Neutral Citation Number: [2022] EWHC 942 (QB)

Case No: QB-2016-004564

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:25th April 2022

Before:

Master Stevens

- -

Between:

Andrew Breeze and Dominic Wilson	**Claimants**
- and -	
The Chief Constable of Norfolk Constabulary	**Defendant**

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- -

Jason Beer QC and Charlotte Ventham (instructed by **Weightmans LLP)** for the **Defendant**
Thomas Munby (instructed by **Hatch Brenner LLP**) for the **Claimants**

Hearing dates: 9th November 2021 & 25th April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39 A 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.

Master Stevens:

1. INTRODUCTION

This judgment relates to a strike-out application in respect of pleadings now said to be inconsistent with a recent Supreme Court decision, and a cross-application for permission to amend Particulars of Claim 6.5 years after issue of the Claim Form. In reaching a determination, it has been necessary to examine the recently evolving boundaries within substantive company law on the application of the principle of reflective loss. In particular, it has been necessary to reflect upon the question of when a shareholder is not prevented from mounting claims relating to losses arising from their original shareholdings. The matters specifically before me were:

(i) The defendant's application of 27th October 2020 to strike out the claimants' claims for diminution in share value pursuant to CPR 3.4 (2) (a) on the basis that the decision of the Supreme Court in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31;[2021] AC 39 precludes any such claims in law. The draft order sought in the application contained permissions for consequential amendments to both parties' existing Statements of Case, as well as the striking out of both a Response to a Part 18 Request, and an Amended Reply to Defence. It was applied for with a time estimate of 2 hours. The agreed bundle contained 614 pages and was supplemented by a separate Defendant's bundle of 7 case authorities.

(ii) The claimants' application of 8th October 2021 to re-re amend Particulars of Claim so as to reformulate what is claimed in respect of financial losses, based upon the claimants' understanding of the *Marex* decision and various other authorities (together with some other amendments). It was applied for with a 1-hour time estimate. In addition to the agreed bundle referred to above, a separate full lever arch file containing

15 authorities was filed. Needless to say, both time estimates were inadequate, even after a full day's listing and judgment was reserved.

FACTUAL BACKGROUND

2. The claim arises from a discontinued prosecution of the two claimants on a charge of conspiracy to defraud. The claimants were majority shareholders, and directors, in a company (latterly known as Cawston Park Holdings Ltd) whose business, inter alia, was to provide private sector mental health care to the National Health Service. Operations were managed through two wholly owned subsidiaries. The criminal charges laid against the claimants related to the running of the mental health business. The claimants were acquitted at trial on 19th June 2009 but by that time all three companies in the group were insolvent, which the claimants say was directly due to the police investigation and subsequent prosecution.

3. The claimants seek damages for malicious prosecution and misfeasance in public office arising out of their prosecution. Those damages, it was submitted orally, absent business losses, appear unlikely on case law to reach £100,000 each although they may be straining towards that figure. Additionally, the claimants seek damages for their financial business losses, said to be in excess of £15,000,000 each, in respect of their interests in the businesses which they say were destroyed by the defendant's conduct.

4. The claim was stayed pending the outcome of a hearing in the Supreme Court in the case of *Marex Financial Ltd v Sevilleja* [2020] UKSC 31;[2021]AC 39 which was handed down on 15th July 2020. This was because the most substantial part of the damages claimed (relating to the former shareholdings) relies on the correct interpretation of the company law principle of reflective loss which was extensively considered in the *Marex* case by the Supreme Court. The defendant seeks to strike out

those parts of the pleading which they say are inconsistent with the *Marex* decision, whilst the claimants seek to amend parts of the claim following *Marex* and subsequent authorities.

PROCEDURAL BACKGROUND

5. The action has become procedurally complicated and protracted. There have been several prior attempts to amend statements of case by the claimants, in addition to those resulting from the evolving case law referred to. The defendant also criticises the claimants for delay. The police actions complained of, which give rise to the claims made, occurred in 2006 but the claim form was not issued until March 2015. The first costs and case management conference was in November 2017 but a number of issues were adjourned, and matters have still not progressed beyond the statements of case phase. There have also been listing difficulties in getting the defendant's application heard.

6. The amendments now sought by the claimants can be separated out into three categories. The first group is inconsequential and by way of clarification or correction only which the defendant would not oppose, subject to adequate explanation. The second group is the most controversial, with claims for losses which the defendant says have been "refashioned" following changes in the case law and are said to arise from the demise of the company. For example, they re-categorise the statuses of the claimants as an employee, ex-shareholder or indirect shareholder. Finally, the third group contains some new factual averments said to underpin the "refashioned" claims.

7. In addressing the issues this judgment is divided into the following parts:

- **Procedural chronology** (paragraph 8)

- **Striking the balance and conclusions on amendments relating to remuneration** (paragraphs 119-122)

- **Amendments regarding loss of reputation (**paragraphs 123-130)

- **Striking the balance and conclusions on amendments relating to loss of reputation** (paragraph 131)

- **Overall determination of the claimants' draft re-re amended Particulars of Claim** (paragraphs 132-137)

PROCEDURAL CHRONOLOGY

8.

DATE	EVENT
19.06.09	Prosecution of Claimants concluded in their favour following the Defendant's Operation Meridian which had commenced in 2006.
05.03.15	Claim Form issued seeking "unlimited damages" and "basic damages for the Claimants' profitable commercial business which was destroyed by the tortious actions of the Defendant's officers" as well as aggravated and exemplary damages.
01.07.15	Service of Particulars of Claim. Paragraph 210 (13) averred "The value of the First Claimant's interest in the company was

	£15,151.874. Paragraph 210(14) was pleaded in identical terms for the second claimant.
05.10.15	Defence filed/served.
05.11.15	Claimants' Reply to Defence
11.03.16	Claimants' Response to Defendant's Part 18 request (regarding the way in which the misfeasance claim was put).
10.05.16	Claimants' Response to Defendant's Second Part 18 request (stating the linkage between the sum referred to in paragraph 210 of the Particulars of £15,151,874 for each claimant and their own diminution in share value claim).
02.06.16	Defendant issues application for (i) permission to rely on Amended Defence (arising out of Claimants' response to Defendant's Second Part 18 request re the share value claim); (ii) strike out/summary judgment on the share value claim.
04.10.16	Hearing of Defendant's application before Master McCloud.
31.10.16	Judgment of Master McCloud in Defendant's application: Master McCloud ruled that the share value claim in paras 210(13)

	& (14) of the Particulars of Claim was a "reflective loss" and therefore irrecoverable, subject to the Claimants being able to re-plead their claim so as to bring themselves within the exception in *Giles v Rhind*.[1] "Unless order" made requiring Claimants to make any application to amend their Particulars of Claim within 14 days, failing which paras 210(13) and (14) would be struck out.
14.11.16	Claimants' application to amend the Particulars of Claim pursuant to the Order made on 31.10.16.
01.12.16	Defendant informs Claimants and the Court that the proposed amendments are not agreed.
13.06.17	Hearing of Claimants' application to amend before Master McCloud. Permission to Claimants to rely on Amended Particulars of Claim dated 11.11.16. Permission to Defendant to amend Defence. Permission to Claimants to serve an Amended Reply.
27.06.17	Service of Amended Defence.

[1] Giles v Rhind [2003] Ch 618

10.07.17	Service of Amended Reply to Defence.
06.11.17	Claimants' Response to Defendant's Third Part 18 request (regarding Claimants' pleaded reliance on the *Giles v Rhind* exception).
23.11.17	Claimants' application to re-amend Particulars of Claim. Defendant consents to Claimants relying on Re-Amended Particulars of Claim and Re-Amended Reply, dated 23.11.17.
30.11.17	CCMC before Master McCloud. Claimants' application for trial by judge and jury refused. Remaining costs and case management issues adjourned.
26.06.18	Court of Appeal judgment in *Marex*.
Dec 18 – July 20	Multiple agreed adjournments of the adjourned CCMC to await Supreme Court judgment in *Marex*.
15.07.20	Supreme Court judgment in *Marex*.
13.08.20	Claimants send copy of *Marex* judgment to the Court and invite

	the Court to re-list the CCMC.
04.09.20	Defendant invites Claimants to discontinue their claims for diminution in share value, failing which a strike out application would be made.
17.09.20	Claimants decline to discontinue on the basis that they do not agree with Defendant's interpretation.
28.10.20	Defendant issues application to strike out claims for diminution in share value.
26.05.21	Notice of hearing of Defendant's strike out application on 09.11.21.
22.09.21	Claimants provide Defendant with draft Re-Re-Amended Particulars of Claim, inviting Defendant's consent thereto.
14.10.21	Service of Claimants' application to re-re-amend the Particulars of Claim.

APPROVED RE-AMENDED PARTICULARS OF CLAIM PRE-MAREX DECISION

9. It is plain from the chronology that the claimants' Statement of Case has latterly placed reliance upon what has been termed the "Giles v Rhind" exception to the principle espoused in *Prudential Assurance Co Ltd v Newman Industries Ltd (No2)* [1982] Ch 204 which said that a shareholder cannot recover losses for which the company in which the shares are held, has an identical claim, regardless of whether or not the company chooses to pursue that claim.

10. The original Particulars of Claim dating from July 2015 did not refer to *Giles v Rhind* even though the case had been decided in 2002. The pleading was only amended to incorporate the reference following a strike out /summary judgment hearing in 2016 and in response to the defendant's criticism that the Particulars merely stated the lost value of the claimants' interest in the company without citing the mechanism by which that loss was said to have been sustained. During the hearing both sides had markedly different interpretations of the existing case law regarding recovery by a shareholder for diminution in value of shares.

11. The Master reviewed the case law and held that some claims, as pleaded, were not actionable as they were claims for reflective loss. The Master remarked at p 32 that "the possibility of a *Giles v Rhind* argument was mooted in a supplemental skeleton at the last minute." Then at p 36 "I am in no doubt that the present pleading does not fully lay the groundwork for a *Giles v Rhind* argument." She continued by quoting from *Kim v Park* [2011] EWHC 1781 (QB), *"*However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect…". At p 39 in allowing a final opportunity to amend she noted that "There are clear gaps in the pleading but the material which is pleaded, combined with the potential injustice of

halting claims valued at over £30M without providing a final opportunity to amend, together with counsel's oral request for an opportunity to amend, has persuaded me… that I should make an unless order".

12. Following the amendments, and some further supplemental ones which I do not need to discuss, the case was ready to proceed with case management, when it became known that the Supreme Court was to review the whole area of law pertaining to the reflective loss principle, so the claim was stayed to await that determination.

THE PRINCIPLE OF "REFLECTIVE LOSS", THE MAREX DECISION AND THE "GILES v RHIND" EXCEPTION

13. In order to reach a determination on the strike out application it is plainly important to review what the Supreme Court in *Marex* actually decided, and how that has been interpreted in subsequent authorities. The parties are diametrically opposed in their current interpretation, and it is submitted for the claimants that I should not strike out proposed amendments in what is "an evolving area of law". That presents a warning light to me as to the clarity of the law as it currently stands, and whether the defendant's application even meets the threshold for a strike out to be considered. I have therefore needed to study the authorities in some depth in order to satisfy myself on the point. My summary of those authorities is rather more fulsome than usual, as a consequence. I was not assisted in my deliberations by the claimants' late production of a skeleton and authorities, on the eve of the hearing, which also meant counsel for the defendant was unable to address a number of points made until orally during the hearing.

14. Turning to the case law history, the boundaries of the principle of reflective loss have troubled practitioners and courts alike for a number of years. Such was the importance of the topic that the Supreme Court convened an enlarged panel of seven justices to

consider the issue in 2020 in the *Marex* case. The all-Parliamentary Group on Fair Business Banking was also given permission to intervene. The seriousness of the position was commented upon in colourful language by Professor Tettenborn[2] and I consider it worthwhile to quote those comments to provide some context and perspective; "Twenty-five years ago the principle [against reflective loss] was little more than a curiosity of company law, mainly of importance to disgruntled shareholders suffering a loss of value due to some wrong committed against the company. Since then, however, its tentacles have spread alarmingly, rather like some ghastly legal Japanese knotweed. Today it promises to distort large areas of the ordinary law of obligations unless drastic steps are taken to prune it". Whilst the Supreme Court did indeed "prune" the principle, it seems from my reflections, that it did not provide what I might term "the complete gardener's handbook". The question for me, was whether it provided a clear enough guide on the points actually in issue in the applications before me, such that I could reach a final determination.

The principle of "reflective loss"

15. The origin of the principle at the heart of the issue in *Marex* arose within company law in the case of *Foss v Harbottle* (1843) 2 Hare 461. Lord Reed summarised this principle at p 10, of *Marex* namely "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." As Lord Reed had explained at p 9 "The fact that a claim lies at the instance of a company ….does not in itself affect the claimant's entitlement to be compensated for wrongs done to it…There is, however, one highly specific exception to that general rule. It was

[2] LQR 2019,135(Apr) 182-186

decided in the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No2)* [1982] Ch 204."

16. Lord Reed continued to summarise the ruling in *Prudential* "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".

17. Lord Reed reflecting on that decision said it created a new rule of company law "applying specifically to companies and their shareholders in the particular circumstances described, and having no wider ambit". None of the justices in *Marex* favoured any extension of the rule, even though courts subsequent to *Prudential,* (such as the House of Lords in *Johnson v Gore Wood (No1)* [2002] 2AC1), had started to enlarge upon it. In *Marex* the Supreme Court had to decide the position of a creditor seeking to sue where a company could have had a cause of action also, and they were unanimous that a creditor was not debarred from seeking its own redress.

The Marex decision

18. It is important to note that the Supreme Court in determining *Marex* was divided over whether there was in fact any justification for retaining even a slimmed down principle of reflective loss; some questioned whether claims where the issue arose should instead be managed utilising other well-established principles of causation and assessment of damages to ensure appropriate outcomes and avoid double recovery and other ills. In the end a narrow majority favoured retention of the "bright line legal rule" for shareholders established in the *Prudential* case.

19. In order to understand the majority reasoning in the *Marex* judgment, so as to apply it to this case, it is necessary to consider, at least briefly, two topics. First, the unique position of a shareholder said to justify the restrictions placed upon them from making a claim for diminution in value of their shares and, secondly, the policy considerations said to bolster the court's approach.

20. Position of a shareholder

a) In *Prudential* at p 223 it was held "The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property." Lord Reed expanded further at p 28 of *Marex* "what the court meant, put shortly, …. the fall in share value (or in distributions) is not a loss which the law recognises as being separate and distinct from the loss sustained by the company. It is for that reason that it does not give rise to an independent claim to damages on the part of the shareholders".

b) At p 31 Lord Reed continued, "The starting point is the nature of a share, and the attributes which render it valuable. A share is not a proportionate part of a company's assets….. a share is a right of participation in the company on the terms of the articles of association. The articles normally confer on a shareholder a number of rights, including a right to vote on resolutions at general meetings, a right to participate in the distributions which the company makes out of its profits, and a right to share in its surplus assets in the event of its winding up".

c) Lord Reed expanded further at p 32 "Where a company suffers a loss, that loss may affect its current distributions or the amount retained and invested in order to pay for

future distributions (or, if the company is wound up, the surplus, if any, available for distribution among the shareholders)."

d) Lord Reed went on to consider the varying nature of companies, large and small, public and privately owned and noted at p 49 "The rule in *Prudential* is not premised on any necessary relationship between a company's assets and the value of its shares (or its distributions). Then at p 81 "There may, however, be circumstances where the company's right of action is not sufficient to ensure that the value of the shares is fully replenished. One example is where the market's valuation of the shares is not a simple reflection of the company's net assets. Another, is where the company fails to pursue a right of action which, in the opinion of a shareholder, ought to have been pursued…. But the effect of the rule in *Foss v Harbottle* is that the shareholder has entrusted the management of the company's right of action to its decision-making organs, including, ultimately, the majority of members voting in general meeting. If such a decision is taken otherwise than in the proper exercise of the relevant powers, then the law provides the shareholder with several remedies, including a derivative action, and equitable relief from unfairly prejudicial conduct".

e) At p 82 Lord Reed explained "The company's control over its own cause of action would be compromised, and the rule in *Foss v Harbottle* could be circumvented, if the shareholder could bring a personal action for a fall in share value consequent on the company's loss, where the company had a concurrent right of action in respect of its loss".

f) Finally, at p 83 Lord Reed said "The critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder (and unlike

a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind...". The minority view expressed by Lord Sales at p 132 was that the phrase "separate and distinct" losses of the shareholder from those of the company when considering share value may not strictly be true as "There is no necessary, direct correlation between the two". He also referred to "unhelpfully slippery and imprecise language" in some of the authorities on this point. The importance of recording some of the strongly dissenting views in this judgment is that they have not prevailed against the majority so I should not succumb to argument now which might be seen by some as an attempt to re-litigate the point.

21. Policy considerations

Four policy justifications for the rule of reflective loss were also reviewed by the court in *Marex*. They were disputed by the minority, as being adequate to justify retention of the rule, even on a strict and narrow basis, where bespoke case management interventions for individual situations were considered to be more suitable. The majority however found continuing benefit in the application of some policy considerations in retaining the bright line legal rule. So, it is necessary to refer to those policies now, briefly at least, as many of them are woven into other judgments which have sought to explore the boundaries established by *Marex*; it is important not to give them an inappropriate elevation. Lord Reed said with great clarity in *Marex* that the reflective loss principle was to have "no wider ambit" than that allowed for in the judgment, whatever the policy considerations.

a) Avoidance of double recovery

i) Lord Reed acknowledged that the courts have several procedural routes which they can adopt to ensure that multiple claims by different claimants do not result in double

recovery. It is not necessary for me to describe these, suffice to say the policy consideration alone does not require retention of the reflective loss principle. Indeed, Lord Reed noted at p 10 "one consequence of the rule is that, where it applies, the shareholders 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".

ii) Thus, the majority having noted the possible hardship of retaining the rule, even where there may in fact be no possibility of double recovery in certain situations, still chose neither to jettison the rule, nor to create an exception to it on this policy ground.

b) Causation

i) The majority in *Marex* found no favour with the view that causation arguments were sufficient to explain the continuance of the reflective loss principle as a helpful and binding one. At p 57 Lord Reed, quoting Lord Hutton in *Johnson* stated "causation does not provide a satisfactory explanation. One difficulty is that the failure of the company to sue the wrongdoer, or its decision to settle with him for less than the full value of its claim, may be the result of its impecuniosity, caused by the defendant's wrongdoing. In those circumstances, the company's failure to recover its loss can hardly be regarded as interposing a novus actus interveniens between the defendant's wrongdoing and the shareholders loss. Furthermore, in an economic tort case, where the shareholder's claim is based on an allegation that the wrongdoer committed the wrongdoing with the intention of causing the shareholder to suffer loss, it is bizarre to say that the loss which the defendant intended to cause, and which ensued from his wrongdoing, was nevertheless not caused by what he did".

ii) Lord Reed had already considered at p 38 the practical complexities for a trial judge in trying to establish the extent, if any, to which a fall in the value of a company's shares

was attributable to a loss that it had suffered because of the defendant's wrongdoing, adding "But the existence of a concurrent claim by the company would add another dimension to the difficulties. It would be necessary, for example, to take account of the fact that the wrongdoing had resulted in the company's acquiring an asset, namely its right of action against the defendant, which might have offset any detrimental effect of the wrongdoing on the value of the shares….Those issues might have to be addressed in the context of a proliferation of claims, possibly in different proceedings, at different times, and in different jurisdictions. They would also arise in a context where there might well be conflicts of interest between the shareholder and the company's directors, its liquidator, other shareholders, and creditors".

c) Company autonomy, conflicts of interest and the encouragement and integrity of settlements

i) At paragraphs 37 and 59 Lord Reed considered that the reflective loss principle was required to allow company's management, whether through its directors or a liquidator, to compromise the company's claims. At p 37 Lord Reed discussed the company autonomy point and the fact that "The existence of concurrent claims could also result in the shareholders preventing the company's management from dealing with its claim in the way they considered appropriate in the best interests of the company, thereby undermining the rule in *Foss v Harbottle*. That could occur, for example, where the company's management wanted to compromise the company's claim but were prevented from doing so by the shareholder's refusal to enter into a settlement with the wrongdoer."

ii) He continued, "One can envisage other situations where the existence of concurrent claims could result in the shareholders acting contrary to the company's interests, for

example where the wrongdoer's assets were inadequate to satisfy both claims. But the effect of the rule in *Foss v Harbottle*, as the court said in *Prudential* at p 224, is that "[the shareholder] accepts the fact that the value of his investment follows the fortune of the company". It is for that reason that the rule in *Prudential* has been said to recognise "the unity of economic interests which bind a shareholder and his company".

iii) It was said the policy consideration avoided issues where shareholders could refuse to enter settlement with the wrongdoer, or where the wrongdoer's assets were inadequate to satisfy both claims. Lord Reed held at p 37 that this policy reason was "not merely a theoretical concern" but a very real one which the rule in *Foss v Harbottle* addressed.

d) Avoidance of prejudice to other shareholders and creditors

i) This policy justification for retaining the rule, and therefore excluding claims other than by the company, was focussed on the mischief, aptly described in argument at page 51 H of a "free-for-all in which the distribution of assets depends on the adventitious location of assets and the race to grab them is won by those who are swiftest, or best informed, best resourced or best lawyered".

ii) The majority in *Marex* once again reinforced the unity of economic interest factor binding a shareholder and the company together, with Lord Reed reflecting at p 85 that "Where a company suffers a loss, it is possible that its shareholders may also suffer a consequential loss in respect of the value of their shares….Even where a loss causes the company to become insolvent, or occurs while it is insolvent,....the shareholders will recover only a pro-rata share of the company's surplus assets, if any". The court accepted this position (and therefore the consequent loss to a shareholder) but sought to make an exception for a creditor -who could be a non-shareholding creditor or a

shareholder who in a separate capacity had given a loan or provided a guarantee to the company.

The "Giles v Rhind" exception

22. The Court of Appeal held in 2002, that there were special circumstances where a shareholder could recover for loss, flowing from the company's loss, where the company failed to pursue its cause of action. In *Giles* another company had caused loss through conducting a business in competition with the company in which the claimant held shares, and in breach of contract both to the claimant and to the company. The company had to discontinue its action because it was unable to provide security for costs, its own impecuniosity having been caused by the defendant's wrongdoing.

23. Of central importance, to at least some of the amendments before me, is the continuing applicability, or not, of this exception to the reflective loss principle. In fact, at the time the defendant's application was made (before the claimants' current application to amend) they argued that the claimants' pleaded claim for the diminution in share value was built entirely on the premise that it fell within the *Giles* exception.

24. I can summarise the references to the *Giles v Rhind exception* in *Marex,* fairly briefly. Submissions on the point were diametrically opposed as to correct interpretation. The defendant submitted that there could be no question that any claim brought in reliance upon the exception "must fail". They asserted there is no longer a situation of developing jurisprudence on the point and the Supreme Court's majority decision has conclusively resolved the matter. The claimants submitted that Lord Reed's views of the case were not decisive and were strictly obiter. They further contended that the dissenting minority had used terms strongly suggestive that they considered the

exception should remain, that Lord Hodge did not address the issue and that the issue was not one argued before the Supreme Court.

25. I have studied the *Marex* judgment in detail and note that both the appellant and the respondent did in fact argue the principle in *Giles* when making their submissions. I also found the following references to the authority in *Giles v Rhind* in the majority judgment:

- Headnote at page 2, para-C "Giles v Rhind….overruled"

- Issues in the appeal at p 22 "Whether there is any and if so what scope for the court to permit proceedings claiming for losses which are prima facie within the no reflective loss rule, where there would otherwise be injustice to the claimant through inability to recover, or practical difficulty in recovering, genuine losses intentionally inflicted on the claimant by the defendant in breach of duty both to the claimant and to a company with which the claimant has a connection, and where the losses are felt by the claimant through the claimant's connection with the company".

- Lord Reed at p 70 "One can sympathise with the Court of Appeal's sense of the unattractiveness of the defendant's position, but the fact that a wrongdoer has unmeritoriously avoided his liability in damages to A is not a reason for requiring him to pay damages to B. The basis of the decisions in *Prudential* and *Johnson* is that a shareholder, whose shares have fallen in value as the consequence of loss suffered by the company for the recovery of which it has a cause of action, has not suffered a recoverable loss. That conclusion does not depend on whether the company is financially able to bring proceedings or not". Then at p 71 "The same criticism applies to the later decision… where the court followed Giles v Rhind".

- Lord Reed at p 74 "I would hold that no such exception exists".

- Lord Reed at p 89 "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".

- Lord Reed at p 91 "Three issues arose before the Court of Appeal… The second issue was whether the *Giles v Rhind* exception applied. The Court of Appeal held that it did not" and continuing at p 92 "For the reasons I have explained, the rule in *Prudential* has no application to the present case, since it does not concern a shareholder. That disposes of the first issue. It also disposes of the second, since no question arises of a possible exception. In any event, as I have explained, there is no *Giles v Rhind* exception".

26. None of the cases to which I was referred, and which were decided after *Marex* have sought to discuss a new position in respect of the *Giles v Rhind* exception beyond what was said in *Marex*. Counsel for the claimants referred to a Cambridge Law Journal article written by a legal practitioner, which said that as Lord Hodge did not comment on any of the rule's exceptions, *Giles* remains (arguably) good law. This is at odds with all other legal commentaries that I have located through simple internet searches against the case name, where well-known law firms and chambers have concluded that the *Giles* exception is no longer valid. My determination on the point, as it relates to the defendant's application for strike out, on the basis *Giles* is no longer good law, is dealt with later in this judgment at paragraph 47 and onwards.

CASES DECIDED AFTER MAREX

27. The claimants sought to persuade me that there have been four potentially important decisions, after *Marex*, which I should consider in reaching my determination on their application and the evolving nature of the substantive law as it impacts their request for further amendments (beyond the *Giles v Rhind* exception) to the statement of case. The amendments of most significance were:

a) Claim for loss of a favourable sale of the business in which the claimants held shares

b) Loss of value of the shares now they have ceased to exist post-dissolution/now the company has transferred the loss upon its dissolution

28. The cases referenced touch upon these matters. I will consider each judgment in the chronological order in which it was handed down. I have already explained that as the claimants' skeleton argument was only prepared the day before the hearing, the defendants had to make their submissions on this new case law orally. I have found the need therefore to consider the cases in-depth myself following the hearing.

29. Unsurprisingly there are particular factual matrices to each of the decisions which I consider are relevant to the breadth of applicability of any new authority established. I have set these out. The defendant's own skeleton relied on just one case, *Naibu*, which I shall come to later. The application of my interpretation of the authorities referred to below, to the instant case, is dealt with in the paragraphs below when considering each application.

30. ***Nectrus Ltd v UCP plc*** **[2021] EWCA Civ 57**

Summary

a) This was said by the claimant to be authority for a claim by a *former* shareholder not being caught by the reflective loss principle. Flaux LJ, reconsidered his sole decision to refuse permission to appeal which had been handed down the previous June (i.e., pre-*Marex*). He held that the time for assessing the status of the shareholder was when he submitted his claim, after the loss has crystallised and not any earlier date, when the breach may have occurred.

The factual situation

b) This was rather different to the present case. UCP, and its then 100% subsidiary, Candor, engaged Nectrus to provide investment management advice which resulted in UCP making substantial investments through Candor which held shares in a number of Indian Special Purpose Vehicles (SPVs). Nectrus caused or permitted the SPVs to place substantial cash sums in other entities which were not then recovered.

c) The purchaser of Candor did not wish to acquire the right to recover the lost cash, so the sale price was adjusted downwards accordingly. In the proceedings that followed UCP sought damages from Nectrus for the discount it had to suffer on the sale price. It was said at the trial against Nectrus that even after sale Candor could have pursued Nectrus for the same loss that UCP was seeking against Nectrus. It was held at first instance that UCP as an ex- shareholder was not barred from bringing its own separate and distinct claim in those circumstances.

Argument

d) It was submitted on permission to appeal that the decision of the Supreme Court in *Marex* did not authoritatively deal with the situation that was said to arise in this case where a shareholder crystallises its loss by selling its shares at an undervalue and then

commences proceedings as a former shareholder. UCP's claim for breach of contract was brought in its own right and not in its capacity as a shareholder of Candor; at the time the proceedings were commenced UCP had ceased to be a shareholder in Candor and, as such, there was no scope for the application of the limited rule as accepted by the majority in *Marex*.

Decision

e) On re-opening the appeal Flaux LJ noted at p 28 that "the [reflective loss] jurisdiction is a very limited one only exercised in truly exceptional circumstances". At p 42 Flaux LJ accepted UCP was able to bring a free-standing claim for breach of contract against Nectrus because it had caused UCP that loss. The loss arose as a result of UCP ceasing to be a shareholder.

f) At p 44 he held "The passages in the judgments of Lord Reed at [9] and [89] and Lord Hodge at [100] which I underlined in [9] to [11] above make it clear that the general rule as to recoverability of loss is subject to the highly specific exception of the case which falls within the narrow principle of *Prudential*. As the last sentence of [89] makes clear, all other claims (which must include claims by an ex-shareholder) are to be dealt with in the ordinary way, in other words the rule against reflective loss does not apply to such claims".

Submissions and my conclusions on interpretation

g) The defendant said that the decision did not have the authority of a decision of the Court of Appeal determining an appeal which has been fully argued. It was submitted that it was a "hopeless" proposition that I should consider an irrecoverable loss could be converted into a recoverable one by the process of selling shares. It was considered not

to be a binding authority in the subsequent High Court case of *Allianz,* discussed below. Sir Nigel Teare in *Allianz* also commented upon the different factual matrices which were pertinent to the determination of the applicability of the principle at stake in any event and I too consider that a relevant consideration.

h) Of greatest importance, in my judgment, is the fact that a subsequent Privy Council case, which I will consider at paragraph 33 below determined that *Nectrus* was "wrongly decided" at p 61, on the position of a shareholder being able to convert its loss into one which is recoverable simply by selling its shareholding and acquiring a change of status to "ex-shareholder" and using that to circumvent the reflective loss principle. The five-member Board had all taken part in the *Marex* decision and could not have been more representative of the positions taken in each of the three judgments handed down in *Marex*.

i) The Board disagreed with Flaux LJ at p 63 that the time to test the applicability of the reflective loss principle was when proceedings were brought rather than when the loss was suffered. At p 66 it was said "In the Board's view, the "follow the fortunes" bargain which arises from membership of a company is forward-looking, not backward-looking…and is directed to limiting the ability of a shareholder to acquire a right of action from that time on".

31. ***Allianz Global GmbH v Barclays Bank plc*** **[2021] EWHC 399 (Comm)**

Summary

a) In February 2021 Sir Nigel Teare decided that shareholders who had redeemed or withdrawn their shares (from a going concern) at a price reflecting damage done to the company, and by relevant wrongdoing, had a valid claim outside the reflective loss

principle as the loss had effectively been transferred from the company to the shareholder.

The factual situation

b) The factual circumstances of the claim were markedly different from the situation that I must consider. In brief, many claimants, who were mostly trusts or companies with investment funds, sought damages from the defendant banks for breaches of statutory duty and engaging in illegal and anti-competitive manipulation of foreign exchange markets, such that they suffered a loss caused by reduction in the value of their investments.

c) A main issue before the court was whether those investors who had redeemed or withdrawn their investment still had a cause of action in damages against the bank, as they were now former shareholders.

Decision

d) The judge held at p 100 in the context where the company has "passed on its loss to the shareholder, who has redeemed or withdrawn his investment, the company would not be expected to be dealing with a claim for compensation in respect of that particular loss even though it retained the right to do so for damage caused to the remaining property of the company and the benefit of the existing shareholders".

e) The judge continued "In such context the stated justification for the ruling 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". At p 89 the judge had reasoned "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".

f) Continuing at p 91 the judge held that " ..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" … "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".

g) Finally, at p 101 the judge held "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".

Submissions and my conclusions on interpretation

h) Counsel for the defendant submitted that the context of the *Allianz* decision (which I note the judge had himself said was very important in distinguishing the case from others) is not the context of this case. The company which had the claim originally was still trading and had allowed the shareholders to redeem their shares at a price reflecting the damage done to the company by the relevant wrongdoing. It was therefore held that

the company had avoided suffering the loss. In the case before me the company was unable to carry on trading, did not give effect to any transfer of the relevant shares, and therefore did not pass on a portion of the damage suffered in that way to its shareholders, so its losses remained intact. I agree therefore that the factual matrix is significantly different.

i) I find the later Privy Council case of *Primeo* to which I have already referred, and which I will return to later in this judgment, very helpful. It is clear from that case that all the judges considered at p 62 that "strange and unprincipled results" could undermine the substantive law position in *Marex* if shareholders were able to acquire a cause of action at a future point in time when company fortunes had changed. They believed that the "follow the fortunes" bargain entered when someone became a shareholder in a company (and would therefore be caught by the reflective loss principle) is forward looking from that time onwards. For a shareholder to be able to escape such restriction through the mere process of redeeming shares, which is a relatively common shareholding transaction, would seem totally at odds with the forward-looking nature of their original transaction in acquiring shares. The Board at p 62 expressly stated it was contrary to their understanding and intention if a situation was permitted wherein "it would make the reflective loss rule easy to circumvent and would subvert its intended effect".

32. ***Broadcasting Investment Group Limited (and others) v Smith and Finch [2020] EWHC 2501(Ch) and its subsequent appeal, Broadcasting Investment Group Limited (and others) v Smith and Finch*** **[2021] EWCA Civ 912 T**

Summary

a) In the High Court action Andrew Simmonds QC, sitting as a Deputy High Court judge, held that the reflective loss principle had no application to a claim by an indirect shareholder i.e., a shareholder in a company which is itself a shareholder in the company that suffered the loss. On the appeal, in June 2021, the court was asked to reconsider the application of *Prudential* "if any, to shareholders in corporate shareholders of the company which has a cause of action".

The factual situation

b) The case had a complex factual background. Broadcasting Investment Group Limited which I will refer to as "BIG" was a holding company with majority shareholder, Visual Investment International Limited ("VIIL") owning 51% of the shares. VIIL was under the control of a Mr Burgess. Mr Burgess wanted some software developed for his company, VIIL, and in his search, was introduced to Simplestream Ltd ("SS").

c) One of SS's directors, Mr Smith, advised orally that SS could indeed develop the software, but that SS would need investment to do so. It was pleaded that Mr Burgess and Mr Smith agreed that BIG and another investment vehicle, which I do not need to identify, should be entitled to 39% of the equity in a new joint venture company to be set up called Simplestream Group which would be the holding company for SS and another company (which again I do not need to identify).

d) The dispute arose when SS went into creditors' voluntary liquidation. The claim was brought by BIG, VIIL and Mr Burgess. It was disputed that the claimants had a right of action, as it was said that SS itself had a right to enforce.

Decision

e) At first instance at p 64 the judge reflected that at the heart of the reflective loss principle is "the legal relationship between a shareholder and his company. That relationship gives rise to both advantages and disadvantages for the 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 or third degree shareholder who does not acquire a share in the relevant company and therefore never contracts into the rule so far as it affects recovery of losses by that company."

f) On appeal there were three points of application of the reflective loss principle to deal with. Only the third was material to the points arising in the applications before me. It had been submitted at p 7 that the ruling in Prudential "applies not only to claims brought by the direct shareholders in a company, but also to claims brought by those further up the shareholding chain. This has been referred to as "the Russian doll" argument or effect". Asplin LJ, giving the lead judgment, concluded it was not necessary to consider the Russian doll argument (at p 63) in order to reach a determination on the appeal.

g) Arnold LJ noted at p 66 "I consider it well arguable that the rule in *Prudential* can apply to indirect shareholders in appropriate circumstances". He went on to supply an example "Suppose A owns 100% of the shares in B Ltd which owns 100% of the shares in C Ltd. Suppose that a wrong is done to C Ltd by D which results in a diminution of the value of B Ltd's shares in C Ltd which in turn results in a diminution in value of the value of A's shares in B Ltd. Suppose that A has a <u>concurrent</u> right of action and sues D to recover his loss as result of that diminution. I find it difficult to see why, on those hypotheses, the rule should not apply".

Submissions and my conclusions on interpretation

h) The claimants submitted that I should ignore Arnold LJ's obiter comments. It was further said by their counsel that Arnold LJ "did not engage with the *prima facie* compelling reasoning of the judge at first instance". Whilst that may be true it does appear to me that the situation which Arnold LJ described, of a wholly owned subsidiary, was very far removed from the shareholding structures in Broadcasting Investment Group Limited, itself, and much more akin to that in the instant case before me.

i) The defendant submitted "it was far from clear" that a claim brought by indirect shareholders would serve to disapply the reflective loss principle, and that even if I was convinced that it was permissible as a proposition the pleading was "incoherent and wholly unsatisfactory". I will come to this later in my judgment.

33. ***Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd and Another*** **[2021] UKPC 22**

Summary

a) As a decision of the Privy Council, I was reminded that I was not bound to follow the authority, and especially that I should not normally do so if there was a decision that was inconsistent with it from a superior court in England and Wales. It was submitted for the claimants that the judgment "may be relevant" for my determination. It was accepted that Cayman Islands law, as to the reflective loss rule, was the same as English law.

The factual situation

b) In brief, the relevant facts concerned the operation of a Ponzi scheme or investment fraud. Primeo, a Cayman Islands company, was a mutual investment fund which raised money from investors (who were customers of Bank Austria) in return for shares. The shareholders thereby gained access to international investment funds and exposure to the US equity market. Primeo entered into agreements to appoint a separate custodian and administrator whose purposes were to protect the company's assets. For example, the administrator had a duty to determine the net asset value upon which Primeo and its shareholders could properly rely for the purposes of transacting subscriptions and redemptions. Primeo's investment manager, broker and custodian, initially for some accounts, but later responsible for investing the whole Primeo fund (whether directly or indirectly through two feeder funds) subsequently transpired to be operating a Ponzi scheme.

c) The main issue in the case was whether Primeo could claim against the administrator and custodian for losses it said it suffered through its investments. Primeo had later become a shareholder (in a material timeframe) in one of the feeder funds, Herald, so there was a question as to whether the reflective loss principle was engaged. It was common ground that when Primeo made a direct investment through its broker and custodian the money was immediately misappropriated and not used for investing in securities, treasury bills and cash as it should have been but to fund payments to others through the Ponzi scheme. The true value of the investments managed was at all times far below the value that they were represented to be by the broker and custodian (which in due course became its sub-custodian). Eventually it was realised that Primeo had suffered heavy losses and it was placed into voluntary liquidation.

Decision

d) Initially Primeo's claims for breaches by the administrator and custodian were dismissed on the grounds that they infringed the reflective loss rule. This was because by the time Primeo brought its claims, it was already a shareholder in the two feeder (Herald and Alpha) investment funds. It was common ground that if Herald and Alpha succeeded with their claims it would fully restore the value of the indirect investments placed on behalf of Primeo if the judgment was satisfied. The principal issue was identified at p 17 as to whether the administrator/custodian had a good defence to claims for investment losses by Primeo before the first share transfer to a feeder fund, Herald.

e) At p 52 it was reflected that "In *Marex*, the Supreme Court was concerned to ensure that the reflective loss rule was kept within proper bounds and given limited scope". It was held at p 53 that " on proper application of the reasoning of Lord Reed and Lord Hodge in *Marex,* the reflective loss rule has no application to bar Primeo from claiming in respect of the losses it suffered each time it made a direct investment in BLMIS, [Bernard L Madoff Investment Securities LLC]nor from claiming in respect of the losses it maintains it suffered by loss of the chance to redeem its BLMIS investments down to the time of the Herald Transfer. In the Board's view, those losses were not suffered by Primeo "in its capacity as shareholder" of Herald". The reasoning continued at p 54 "the correct analysis here is that Primeo suffered an immediate loss by giving BLMIS money in return for the contractual right to redeem the investments reported in Primeo's managed accounts with BLMIS …whereas in reality "it only acquired a precarious right (if that is the word) to participate in Mr Madoff's Ponzi scheme so long as it remained on foot and a right to participate in BLMIS's insolvency when the scheme collapsed. Those rights were worth a fraction of the money paid to BLMIS … At the time Primeo acquired its cause of action ….no relevant wrong had been committed …against Herald at all in respect of the loss suffered by Primeo".

Submissions and my conclusions on interpretation

f) The claimants submitted that the case was "a strong warning against extending the reflective loss principle beyond direct shareholdings without proper regard to separate corporate identity". The defendant drew attention to the composition of the Board and its inclusion of the dissenting members of the Supreme Court in *Marex* as a "reset" on the rule on reflective loss and therefore a decision that I should pay attention to, as well as observing how "hopeless" it would be to rely on *Nectrus* in my determination, given that the Board said it had been wrongly decided.

g) I consider that the reasoning within the *Primeo* decision is most helpful given the constitution of the Board. The forward-looking nature of the reflective loss principle when acquiring shares "directed to limiting the ability of a shareholder to acquire a right of action from that time on" is clearly instructive when considering claims sought through the amendments before me by the claimants as former shareholders.

34. ***Naibu Global International Co Plc, Naibu (HK) International Investment Limited v Daniel Stewart & Co Plc*** **[2020] EWHC 2719 (Ch)**

Summary

a) Finally, on authorities, I turn to the only case relied on by the defendant in their skeleton regarding the substantive law. It concerns shareholders' losses claimed where they arose from the dissipation of assets of a company, after a flotation. Bacon J had to decide whether Naibu Jersey's loss was not recoverable on the basis it was reflective of the loss of Naibu Hong Kong, on a strike out application following the production of amended pleadings.

The factual situation

b) "Naibu China" was the company whose assets were dissipated, such that shares in it were said to be worthless following the flotation. The Second Claimant, ("Naibu Hong Kong") was the parent company of Naibu China, and the First Claimant, ("Naibu Jersey") was the holding company for Naibu Hong Kong. Naibu Jersey held 100% of the shares in Naibu Hong Kong.

c) The dispute was said to have arisen due to breaches of duty by the defendants in preparing Naibu Jersey for its IPO on AIM. Originally the pleadings had not distinguished between the losses suffered by each company. A distinction was also sought as to the timing of when the losses were suffered by the respective companies. At p 50 it was recorded that the claimants argued that Naibu Jersey suffered loss on the day of the flotation as the value of its shareholding in Naibu Hong Kong was less than it would have been, and subsequently further losses were suffered by Naibu Jersey for steps taken, which included the disbursement of the proceeds of flotation, and subsequently the further diminution to nil of the value of the shareholding in Naibu Hong Kong. At different points in time, it was said that the losses to Naibu Jersey were different in nature and amount to the losses in Naibu Hong Kong.

Decision

d) At p 51 it was held, "I consider that it is wholly artificial to carve up those losses by time in an attempt to circumvent the application of the reflective loss rule. … If the application of the rule against reflective loss could be avoided by the simple device of repleading so as to identify different losses occurring at different times, with the submission that the losses of the two companies might not have been precisely contiguous, that would entirely undermine the purpose of the rule". At p 52 the judge continued " .. the majority of the Supreme Court considered that the rule against

reflective loss is engaged where the loss claimed by the shareholder takes the form of a diminution in the value of its shareholding or its distributions as shareholder. The decisive question is therefore the *nature* of the loss…. there is no further requirement that the *amount* of the loss to the company should be identical to the loss to the shareholder".

e) At p 53 it was held that it is "right to say that the supposedly separate category of losses suffered through disbursement of the proceeds of flotation is, in reality, part of the same loss, representing the investment made by Naibu Jersey." The judge went on to strike out the claims relating to three new categories of alleged losses.

Submissions and my conclusion

f) It was submitted on behalf of the defendant that this case drew attention to the artificiality of seeking to draw a distinction between losses suffered through a diminution in share value and losses suffered through the disbursement of the proceeds of a sale.

g) The claimants however contended that it was "unclear" what disbursements were being referred to, they did not think the case had anything to do with a sale of Naibu Jersey's subsidiary and believed the case was "totally beside the point" that they were seeking to address in respect of their own losses as claimed.

h) To my mind this authority is clear that the *nature* of the loss is key to determining whether the reflective loss principle applies or not. One cannot attempt to disguise the nature of the loss by refashioning it with a new name and seek to create an exception. Therefore, investment in shares in a company which later transform into proceeds of sale (whether or not there is any correlation in respective values) is one and the same

investment, bound by the same rule. This general interpretation is better aligned with the submissions of the defendant on the point.

THE AMENDMENTS SOUGHT BY THE CLAIMANTS WHICH ARE THE SUBJECT OF THE DEFENDANT'S APPLICATION

35. The table below sets out the paragraphs which the defendant invited the claimants to discontinue on 4th September 2020, when they also advised that they were prepared to agree to the remainder of the amendments. These amendments relate to the *Giles v Rhind exception* as pleaded following the previous hearing before Master McCloud. They therefore pre-date the latest amended Particulars supplied by the claimants on 22nd September 2021, well after the strike out application had been issued. The latest draft amendments seek to extend the *Giles v Rhind* point even further post-*Marex* to apply it to additional/refashioned claims for other financial losses by used of the words "alternatively, if and insofar as necessary, the Claimants rely on the exception to the reflective loss principle in *Giles v Rhind*". The refashioned claims themselves are described more fully and dealt with at paragraph 57 and onwards of this judgment where I consider the claimants' application to amend, as they are not the subject of the strike out claim which is focussed upon the pleading of any *Giles v Rhind* exception.

Paragraph Number	**Revised text from the claimants before amendments contained in claimants' application of October 2021**	**Defendant's submission summarised**
161	On or around 25 September 2007, the Claimants were formally dismissed from their positions by Leslie Denton on behalf	Re-fashioned claim for losses -should revert to earlier

	of LDC because of the pending allegations against them. This was as a direct result of the Defendant's officers telling the company to carry out this action to protect their investment. Having been formally dismissed by the company, lines of communication between the Claimants and the company were further severed and the Claimants were further ostracised by the company as a direct result of this police action.	wording
199-203	199. On or around 20 November 2009, the First Claimant discovered that Cawston Park Holdings was being taken into receivership. The financial difficulties that had been sustained by the company were a direct consequence of the Claimants having been investigated and prosecuted by the Defendant's officers 200. On 23 November 2009, the First Claimant organised and held a meeting for all staff of Cawston Park Holdings to talk	Re-fashioned claim for losses -should revert to earlier wording

	about the situation and the closure of the business. At this stage, the Claimants did not know the full extent of the factual background and the particulars of the torts that they now allege against the Defendant. 201. On 1st December 2009, the Claimants received a letter from Deloitte, the administrators for Cawston Park Holdings asking them to complete details for the closure of the business. At this stage the Claimants still did not know the full extent of the factual background and the particulars of the torts they now allege against the Defendant. The Claimants were therefore unable to communicate to the administrators that the company had a potential cause of action against the Defendant. 202. On 23rd August 2010, Chief Inspector Henwood's investigation was completed. The complaints were ultimately not upheld. It did therefore not appear that it	

	would be admitted by the Defendant that the investigation and/or prosecution of the Claimants was in anyway improper and/or malicious. 203. On 19th February 2011, Cawston Park Holdings was dissolved. The company was dissolved at a time when the Claimants still did not know the full extent of the factual background and the particulars of the torts they now allege against the Defendant. The company ceased to have any legal personality and therefore did not have the capacity to sue. The Claimants therefore no longer had an ongoing relationship with the company, nor did they have ownership of any company.	
207A-207B	On 23rd July 2014, the Claimants' Letter of Claim was sent to the Defendant, alleging malicious prosecution. It was only at this stage, after having sought appropriate legal advice and preliminary investigations having been conducted that the Claimants were in the position to	Re-fashioned claim for losses -should revert to earlier wording

	properly particularise the allegations against the Defendant for the purposes of compliance with the pre-action protocol. The company had already ceased to have legal personality and thus did not have capacity to join the proposed action. On 13th November 2014, the Defendants response to the Claimants' Letter of Claim was sent. The letter denied liability and attached 37 items of pre-action disclosure. It was only at this stage that the Claimants became aware of the Defendant's response on liability and that they were able to further investigation their claims. The company had already ceased to have legal personality and thus did not have capacity to join the proposed action.	
209A-209I	NB these long paragraphs were all prefaced by the words: The Claimants rely on the exception to the reflective loss principle in *Giles v Rhind[2003] Ch 618* So the paragraphs are not repeated herein	Re-fashioned claim for losses -should revert to earlier wording Should all be struck out.
210(13)	The value of the First Claimant's interest in the company was£15,151,874	Should be deleted
210(14)	The value of the Second Claimant's	Should be deleted

	interest in the company was £15,151,874	
210(15)	The claimants will rely at trial on the report of a forensic accountant.	Should be deleted

THE LEGAL TEST ON STRIKE OUT

36. The test is set out at CPR 3.4(2):

"The court may strike out a statement of case if it appears to the court—

a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

c) that there has been a failure to comply with a rule, practice direction or court order."

Incoherent /ill-founded claims

37. The notes to the White Book, at 3.4.1 state that grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim. The notes continue, at page 127, to say that whilst the application to strike out can be made without evidence in support, the applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed and served.

38. Although I was not referred to *Towler v Wills* [2010] EWHC 1209, Teare J's analysis of the purpose of pleadings is uncontroversial and helpful. He held "The purpose of a

pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies; it is not fair and just that the Defendant cannot be sure of the case he has to meet. It may well be that, with appropriate legal advice, the Claimant could have pleaded a concise, clear and particularised case against the Defendant but that has not been done. If the Amended Particulars of Claim are not struck out there is a very real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, that he will be impeded in his defence of allegations which are pursued, and that the Court will not be sure of the case which it must decide".

Unwinnable cases / cases bound to fail / plain and obvious cases

39. The notes to CPR 3.4.2 reference examples of cases suitable for striking out, such as those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste costs on both sides (Harris *v Bolt Burdon* [2000] C.P. Rep.70. Also, where the claim is not valid as a matter of law it should be struck out (*Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E. R. (Comm) 346 Ch).

40. The test for striking out on a point of law was summarised in *Oysterware Limited v Intentor Limited & Ors* [2018] EWHC 611 (Ch) at [40]: "It is clear from the authorities (which are well established and need not be cited in detail) that I can only strike out a statement of case or part of a statement of case under CPR 3.4(2)(a) where I am satisfied that it discloses on its face no reasonable grounds for bringing the claim (hence my detailed analysis of the Particulars of Claim) and that it is only a remedy to which the court should resort in plain and obvious cases where the court can be certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266 per Peter Gibson LJ at [22])".

41. In *Hamblin v World First Ltd* [2020] EWHC 2383 (Comm) at [3]-[4], further guidance was more recently set out:

"To these general principles I would add this - summary judgment / strike out applications are not an appropriate forum for the determination of issues of law that are not short or straightforward, clear or obvious or otherwise where the issues that arise require detailed argument and mature consideration – see *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 per Lord Collins at [84]".

Novel points of law/developing jurisprudence

42. However, it is not appropriate to strike out a claim in an area of developing jurisprudence since, in such areas, decisions as to novel points of law should be based on actual findings of fact. (*Farah v British Airways,* The Times, 26 January 2000, CA).

43. A similar point was made in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 per Lord Browne-Wilkinson at pages 741 and 742: "In cases where the law is developing or complex or its applicability has not been fully worked out in the

authorities, it is much more appropriate for the issues to go to a full trial, where findings of fact can be made, and the application of existing law can then be applied with certainty to the facts as found, including any incremental developments of the law which are accepted as appropriate on the basis of the facts as found".

Defects which can be cured by amendment/multiple amendments and abuse

44. Case law reflects that the court should consider whether any defects can be cured by amendment and, if they might be, the court should refrain from striking claims out without first giving the party concerned an opportunity to amend.

45. The court also must be mindful of allowing a claiming party to put its case in various different ways within one action so as to effectively begin the process all over again. As Coulson J (as he then was) remarked, "The Civil Procedure rules are designed to avoid the litigation equivalent of death by 1000 cuts" in *Seele Austria GMBH Co KG v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC).

Delay and abuse

46. The notes to the White Book at 3.4.16 state that "Rule 3.4.(2)(b) is not strictly relevant where the complaint is one of delay rather than a complaint as to the form or content of a statement of case… However in *Habib Bank Ltd v Jaffer (Gulzar Haider)* [2000] C.P.L.R 438,CA, a claim was struck out where delays were caused by a claimant acting in wholesale disregard of the norms of conducting serious litigation and doing so with full awareness of the consequences… Delay, even a long delay, cannot by itself be categorised as an abuse of process without there being some additional factor which transforms the delay into an abuse".

SUBMISSIONS ON THE STRIKE OUT APPLICATION AND MY CONCLUSIONS UPON THEM

Giles v Rhind exception

47. I have already summarised some of the main submissions on this point at paragraph 24. The claimants maintained such claims remained "well-founded" and that "on a true reading of the [*Marex*] case, the point was not decided". They considered that Lord Hodge did not address the issue. I have already referred to the Cambridge Law Journal article at p 26 which they said demonstrates that *Giles v Rhind* remains "open for argument". They further cited "there are compelling arguments for its retention in the interests of justice". They urged me not to strike out the claims based on the *Giles* exception unless I was certain they were bound to fail. They asked me to consider the lateness in the context of the consensual agreement with the defendants in 2018 to let *Marex* work its way through the Supreme Court before taking further steps. They argued there was none of the usual prejudice as the amendments have been drafted early in the procedural timetable of the case, and before case management directions.

48. The defendant sought to persuade me that all amendments relating to the *Giles v Rhind* exception should be struck out as bad law post-*Marex*. In their skeleton they said, "There can be no question, having regard to the speech of Lord Reed in *Marex*, adopted by the majority, that any claim brought in reliance upon the so-called *Giles v Rhind* exception must fail". They said that this was not an area of developing jurisprudence and referenced the extreme delay in the amendments being drafted. They added that prior to the hearing, "The Claimants have failed to articulate any basis upon which their claim, as currently pleaded, could succeed. They have simply asserted that they "*do not agree with [the Defendant's] interpretation/ understanding*" of the Supreme Court's

judgment in *Marex*". During the hearing, following submissions from the claimants, they sought to emphasise that there was no way I could avoid striking out the *Giles v Rhind* claims, post-*Marex,* and that I should resist all attempts by the claimants to seek to "case manage away the [*Marex*] decision". They considered it was hopeless on a proper reading of *Marex* to suggest, as the claimants did, that Lord Hodge somehow disagreed with Lord Reed on the *Giles* point but kept it to himself. They also pointed to the fact that none of the subsequent cases have sought to suggest that Lord Reed did not mean to put an end to the *Giles* exception.

49. I have set out detailed extracts from the *Marex* judgment in respect of the *Giles v Rhind* exception at paragraph 25 above. On my clear reading of those extracts and the judgment, there was no caveat or suggestion that remarks on *Giles* were obiter or best left for a future appeal. The *Giles* exception was a specific issue raised by the appeal for determination. The remarks made by Lord Reed were intrinsic to the whole structure of the judgment. It was not a situation like that in the *Broadcasting Investment Group* case referred to above at p 32 (f) where one of the points raised on appeal (relating to whether a claim for specific performance by a shareholder fell outside the reflective loss principle) was held at p 62 as "best left to a case in which it is essential to determine the issue". There was no sense of this being a leftover issue from the enlarged panel of justices.

50. In fact, contrary to the claimants' submissions, Lord Hodge did comment on other exceptions at p 98 "When a shareholder pursues a personal claim against a wrongdoer in another capacity, such as guarantor or creditor of the company, the exclusion has no application". He also referred at p 108 to the rule of reflective loss upholding "the default position of equality among shareholders in their participation in the company's

enterprise" which I consider would not be the case if the *Giles v Rhind* exception remained.

51. In my determination *Giles v Rhind* is dead for all intents and purposes on any straightforward interpretation of *Marex*. In this regard I have already referred at paragraph 26 to my own simple internet searches which tend to a similar view, albeit this is contrary to the Cambridge Law Journal article relied upon by the claimants to say the position was still "arguable". I do not consider this is persuasive enough for me to alter my view.

52. Having reached my conclusions on what I believe is the correct interpretation of *Marex* relating to *Giles v Rhind*, when then applying the CPR test on strike-out I consider I am bound to accept the defendant's submissions that the amendments reflecting the old *Giles* position must be struck out. This is on the basis that they are obviously ill-founded and no longer amount to a legally recognisable claim. It would waste time and costs for both sides for this point to be pursued further. Having reached this decision, it is not appropriate to make any allowance for developing jurisprudence.

53. Even putting to one side the question of the certainty of the law on *Giles*, as I see it, I also remind myself that this is not the first opportunity the claimants have had to plead the *Giles* exception. Master McCloud granted an indulgence in 2016, backed by an unless order. As I noted at paragraph 45 the court must be mindful of allowing a claiming party multiple opportunities to amend its case. This is not consistent with the CPR.

54. Delay is not a ground for striking out on its own, but it can be a material factor in reaching a determination. I found the claimants' delayed approach towards the amendments currently sought in respect of *Giles v Rhind,* to be wholly inappropriate.

Having agreed with the defendant to await the outcome of *Marex* they did not produce a revised draft pleading until 14 months after the Supreme Court judgment, and 11 months after the defendant's strike out application had been issued. There was no proper explanation for this, simply a restatement of the fact they had been awaiting the Supreme Court decision, and they cited a lack of prejudice. To my mind this is totally at odds with modern CPR compliant litigation where there is an onus on efficient case progression. I accept the court's listing difficulties have added to the delay, but this does not exonerate the claimants from at least preparing their revised draft pleading more quickly and seeking to engage upon it with the defendant promptly. The *Towler* case cited above at paragraph 38 contains useful references to the need to keep the other party informed as to the nature of the claim they are expected to meet, and the onus on saving time and costs through appropriate conduct.

55. In addition to requesting a strike out of the *Giles v Rhind* exception, the defendant also sought to resist some of the additional refashioned claims which are the subject of the claimants' application by arguing for a strike out. This request was not contained within their application, as they did not have sight of the extra amendments when that was issued. I will consider those particulars within the overall context of the claimants' amendment application at paragraph 57 below.

56. Notwithstanding my conclusions above regarding strike out of claims referencing the *Giles v Rhind* exception within the existing pleadings, and new paragraphs citing the same case within the draft amendments, all amendments also fall to be considered in the claimants' application which I now turn to.

THE AMENDMENTS SOUGHT BY THE CLAIMANTS IN THEIR CROSS-APPLICATION (an overview)

57. As set out at paragraph 6 above the defendant helpfully categorised the types of amendment now sought by the claimants, into three groups:

(a) Those said to be inconsequential and by way of clarification or correction only, such that subject to an explanation from the claimants as to why they were now required, they were not contested. The explanation put forward on behalf of the claimants, as recorded at paragraph 54 above, was simply that they had been awaiting the *Marex* decision which I did not find compelling. I will return to this group of amendments and what should happen to them at the end of my judgment.

(b) Those said to contain refashioned claims for losses which were said to arise from the demise of the company. These also fall into three groups which can loosely be described as:

(i) financial losses stemming from original shareholdings,

(ii) loss of employment benefits and

(iii) financial losses associated with a

loss of reputation.

I will consider each of these further from paragraph 71 onwards

(c) Those said to contain new factual averments, apparently underpinning the amendments for the "refashioned" claims.

THE LEGAL TEST ON AMENDMENT

CPR and case law

58. CPR 17.3.5 sets out the general principles governing the granting of permission to amend by the court. The starting point is having regard to all the matters mentioned in Rule 1.1 [2] under the overriding objective so as to deal with the case justly and at proportionate cost. This includes so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) Ensuring that it is dealt with expeditiously and fairly;

(e) allotting an appropriate share of courts resources, while taking into account the need to allot resources to other cases;

Striking a balance

59. Pursuant to CPR 17.3.5, the power of the court is a discretionary one, with the court being required to seek to strike a balance between injustice to both the applying and opposing parties. The notes at CPR 17.3.8 remind parties that the modern approach in litigation is to require them to be open, above board and co-operative such that once the

necessity to amend has become apparent they should tell their opponents about the amendment they intend to seek, in order that they can consider whether to oppose or consent to it.

A real prospect of success

60. CPR 17.3.6 summarises the case law concerning the need for an applicant to show some prospects of success before permission will be granted. The test is whether or not there is a real prospect of success, as in the test on an application for summary judgment (*SPR North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch)). There is a need to support amendments with evidence rather than "pure speculation or invention". Furthermore, the notes indicate "a claimant should not be granted permission to amend their claim in order to raise a claim which is not maintainable in established law; the possibility that the Supreme Court may develop or change the law was not sufficient to afford the claimant a real prospect of success at trial; the duty of the court is to apply the law as it stands (*Mandrake Holdings Ltd v Countrywide Assured Group Plc* [2005] EWHC 311 (Ch)).

Clarity

61. I have already referred to the *Towler* judgment regarding principles on both strike out and amendment of pleadings at paragraph 38, "it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies". Coulson J, as he then was, in *CIP Properties (AIPT) Ltd v Gulliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) refused amendments where he had ruled at p 35 "The pleading is not therefore of the tightly-drawn and focussed kind which would ordinarily be permitted as a late amendment".

Proportionality refers to both wasted time and costs

62. I find the judgment of Coulson J in *CIP Properties* referred to above very helpful. At p 15 he reviewed the traditional approach of allowing amendments so the real dispute between parties could be adjudicated upon, provided any prejudice to the other party could be compensated in costs, as the wrong starting point. He referred to an earlier Court of Appeal decision in *Worldwide Corporation Limited v GPT Ltd and another [*1998] WL 1120764 where Waller LJ "stressed that a payment in costs was not adequate compensation for the other party being "mucked around" at the last moment". He went on to emphasise the importance today of paying great regard to *all* the circumstances now summed up in the overriding objective, rather than purely focusing on compensation in costs.

63. Coulson J continued at p 18 that "Proportionality is vital… to the vast majority of applications to amend late". He reviewed a number of earlier authorities, noting those where the prejudice caused by the refusal of an amendment was very substantially caused by the amending party being the author of the prejudice (*Archlane Ltd v Johnson Controls Ltd* [2012] EWHC B12 (TCC)).

64. In citing Briggs LJ in *Hague Plant Ltd v Hague and Others* [2014] EWCA Civ 1609 Coulson J found favour with the view that lateness, as measured by the amount of existing work that would be wasted, and substantial further work that would be incurred, should weigh in the judge's mind.

Explanation for delay

65. Coulson J also considered lateness to be a relative concept, quoting further from the Hague judgment at p 18 "a tightly focussed, properly explained and fully particularised

short amendment in August may not be too late, whereas a lengthy, ill-defined, unfocussed and unexplained amendment proffered in the previous March may be too late. It all depends upon a careful review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of its consequences in terms of work wasted and consequential work to be done".

66. Carr J, as she then was in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) added, in the same year as *CIP Properties*, some further very helpful analysis. As in the present case the losses, on which the amended claim hinged, were said to be substantial (in excess of $38 million) and the application for permission to amend was made about 15 months after the claim had been issued and 3 weeks pre-trial. Within 4 months of issue of proceedings the claimant had been aware that obtaining expert evidence was crucial, but nothing was done about it until 2 months pre-trial with a subsequent request to substantially re-plead the claim.

67. At p 36 Carr J held "the applicant has to have a case which is better than merely arguable". And at 38 f) – g) "it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;" g) "a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

68. Finally, at p 95 in dismissing the application to amend Carr J ruled that "The prejudice to Ms Quah in losing the opportunity to raise a difficult new case is not sufficient to overcome the prejudice to GS as set out above in circumstances where there is no good reason properly explained to justify her failure to bring the new case forward in proper time and where that failure is the result of her own decision not to investigate the merits of her case timeously". Continuing at p 96 "This may be seen as a harsh decision given its consequence for Ms Quah. But this is modern day commercial litigation".

GENERAL SUBMISSIONS ON THE AMENDMENTS

69. The claimants submitted in general terms that:

i) Their factual content is formally vouched in evidence.

ii) Insofar as they extend the heads of loss currently pleaded, they have (at the least) a real prospect of success.

iii) They urged particular caution for cases involving law which is developing or complex.

iv) They said the matter will go to a heavy trial in any event so little, if anything, was to be gained from disallowing amendments now and the overriding objective required me to act justly.

v) There is no real prejudice to the defendant from allowing the amendment. They said the further work required of the parties would be minor to take on board the amendments. By contrast, the prejudice to the claimants from refusing them is potentially severe. They said that it would be an obvious and gross misjustice if the claimants were shut out from claiming the >£30m "real world" losses which they have suffered; and it is barely credible that the Supreme Court, when deciding *Marex* intended to bring such a result.

vi) There can be "no question" that they are not within the "very late" category referred to in case law, indeed they have been fashioned pre-CCMC, albeit that the proceedings have been afoot since 2015.

70. The defendant, in contrast, submitted in general terms:

(i) There is no question that any amendments brought in reliance upon *Giles v Rhind* must fail, post-*Marex* and the claimants' assertion that they "do not agree" with the defendant's interpretation is untenable.

(ii) I should have at the forefront of my mind that there have been multiple amendments to the pleadings already when describing the "appalling history of repeated reformulations of the claims", but despite that this attempt to re-plead still lacks particularity as to what the loss is, or its factual basis.

(iii) They reminded me that the last amendments approved by a Master some five years ago were described as a "final" opportunity and backed by an unless order accordingly.

(iv) The lack of any explanation for the delay counts against the claimants.

AMENDMENTS REGARDING FINANCIAL LOSSES ARISING FROM THE ORIGINAL SHAREHOLDINGS

71. In respect of each claimant, the draft pleading in relation to the lost business interests was contained at paragraphs 210 (13) and (14) of the draft Re-re Amended Particulars of Claim as the loss of:

(i) the benefit of a favourable sale which would have been achieved by the claimants and [Lloyds Development Capital] LDC in spring 2007 (alternatively thereafter), but for the

Claimants' arrest and prosecution; or in the alternative, the chance of such a favourable sale.

(ii) His shares in Cawston Park Holdings, which shares have ceased to exist upon its dissolution. Further or alternatively:

(a) the value of those shares, which crystallised at zero at dissolution;

(b) Such portion of the loss suffered [by] the company itself as was effectively transferred to the [First][Second] Claimant upon dissolution; and/ or

(c) the value of his indirect interests in CPL and SHCCL

Prospects

72. Each of these heads of loss represented a wholly new piece of drafting and a new characterisation of loss which had not been contained in any earlier iteration of the pleadings. Because of the reliance on submissions placed upon evolving case law post *Marex* it is necessary, on the question of prospects, to consider each sub-clause separately. I also refer back to paragraphs 27-34 where I considered those new cases and general principles to be derived from them.

Loss of a favourable sale

73. The claimants submitted that this loss is not suffered at company level and carried up into the value of the shares; it can only arise directly at shareholder level, where the claimant is prevented from disposing effectively of his property.

74. The claimants contended that they had a real prospect of success under this head of loss. They said that *Marex* establishes that the form of loss that is caught by the rule on

reflective loss must be the shares value or distributions arising from them (largely in the form of dividends). They went on to submit therefore, that share sale proceeds are out with the rule (both on this basis and because the company did not have a claim for not being able to sell its shares).

75. The claimants also argued that the *Naibu* case relied upon by the defendant does not deal with the point, indeed that it is unclear what the disbursements are, which were being ruled upon in that case. They also said that areas of developing law should go to a full trial.

76. The defendant submitted that re-fashioned claims to try and convert claims caught by the reflective loss principle into ones which are recoverable by the shareholders, by pleading that a sale of the shares transfers the losses from the company to the former shareholder is "hopeless", not least because the claimants rely upon an entirely different factual matrix to the situation before me. The defendant reminded me that Master McCloud had already struck out claims for losses incurred due to the company's demise where the losses equate to diminution in share value. They invited me orally to strike out these amended claims too.

77. Finally, the defendant submitted *Naibu* was good authority for demonstrating the futility of trying to distinguish between the way in which losses materialise (i.e., in terms of sale proceeds rather than share value) when they all originate from the underlying shareholdings. I considered this at paragraph 34 above.

78. In respect of the draft claims for the loss of a favourable sale, I prefer the defendant's general submissions on interpretation and their specific submission that the judgment in *Naibu* is applicable to the present claims. I agree that on interpretation it exposes the artificiality of seeking to reclassify the proceeds of sale of a business as something

different in nature to the underlying values of shareholdings. I consider that they are not separate and distinct as required by the majority decision in *Marex.*

79. To my mind this is also consistent with the Board's findings in *Primeo* where it was held that the rule on reflective loss is forward looking, designed to encompass all claims as at paragraph 33 above. I remind myself that my conclusions on prospects are just part of the balancing exercise I need to conduct. Other factors are considered below. I am also mindful of the authority in *Mandrake* that "the possibility that the Supreme Court may develop or change the law was not sufficient to afford the claimant a real prospect of success at trial; the duty of the court is to apply the law as it stands."

Shares ceasing to exist or crystallising at zero on dissolution or the company's loss transferring to each claimant on dissolution

80. The claimants submitted that claims for the loss caused by shares ceasing to exist were personal losses for the shareholder's own property in the shares themselves. This they argued placed the losses out with the reflective loss rule.

81. In respect of losses crystallising at zero on dissolution, the claimants argued this placed them into the category of "ex-shareholders" who were not caught by the reflective loss principle following *Nectrus* which they said is binding upon me. The claimants accepted that this loss was likely to be reflected in the quantification of the other claims for loss of a favourable sale and /or the shares ceasing to exist.

82. Finally, in respect of losses transferred upon dissolution, and to the extent not quantified by the preceding claims, the claimants submitted the situation was analogous to the share redemption in *Allianz* and therefore recoverable.

83. The defendant's submissions on the applicability of *Nectrus* are recorded at paragraph 30 g) to the effect that it is not binding upon me and was overruled in *Primeo.* As regards the *Allianz* decision, I recorded at paragraph 31 h) that they considered the context was important and different to this one. Similar to the submissions on loss of a favourable sale, the defendant said I should strike out this latest amendment.

84. My considered view on the prospects of an argument succeeding at trial in respect of a recoverable personal loss of property in shares, is that it is fragile. Although no specific case was cited to me it would seem inconsistent with the general propositions in other judgments where shares have ceased to exist, for example following insolvency. The authority in *Mandrake* is also instructive on prospects i.e. amendment applications are not the best forum for seeking to test out novel points of law.

85. In respect of claims relating to losses said to arise by virtue of the claimants now being "former shareholders" I believe the case law is sufficiently settled for me to conclude that there are no reasonable grounds for bringing such claims, certainly in the factual matrix of this case. I refer to paragraphs 30 h), 31 i) and 33 g) above. I am aware of the non-binding nature of the Privy Council's decision in *Primeo* but the constitution of that Board could not be more reflective of the enlarged court in *Marex*. Their reasoning of the forward-looking nature of the reflective loss principle, "directed to limiting the ability of a shareholder to acquire a right of action from that time on", is to my mind, flawless. This view of course takes account of the fact that *Marex* established that the underlying principle of reflective loss is here to stay, in respect of shareholders suffering losses in relation to diminution of their share value. I prefer the defendant's submissions regarding the correct interpretation in respect of both *Nectrus* and *Allianz* when considering likely prospects of success.

Claims as indirect shareholders

86. The defendant submitted that the validity of any claims by indirect shareholders is "far from clear" on the basis of the current case law. The claimants had of course relied upon *Broadcasting Investment Group Ltd which* I explored at paragraph 32 above. They wished me to consider the reasoning of the judge at first instance and ignore obiter remarks by Arnold LJ.

87. I conclude that it is very dubious whether claims made by the claimants as indirect shareholders, in wholly owned subsidiaries would survive post-*Marex*. The wholly owned subsidiary model more closely mirrors the illustrative situation described by Arnold LJ than the case that was before him. I do not find that such a claim meets the threshold test of "bound to fail" which would be applicable for a strike out application, but the claim is very borderline for the "realistic prospects" test required on an amendment. I recall Arnold LJ's obiter comments that the position is "well arguable" that such claims would fail which seems to be a similar position to my own.

Clarity

88. In respect of loss of a favourable sale the claimants submitted in their skeleton argument that because a sale depended in part upon the likely actions of LDC and third-party purchasers it should be analysed on a "loss of a chance" basis. It was not however fully pleaded as such.

89. The defendant submitted that the claimants have not expressly pleaded that they were prevented from selling their shares, it is just an inference; what is currently pleaded lacks particularity, (especially causality of loss).

90. Whichever way I look at it, it is plain to me that the pleading on loss of a sale is lacking, even in this Re-re-amended set of Particulars.

91. Turning to consider shares which have ceased to exist or where losses have been transferred, the defendant submitted that any draft amendments referring to the loss of share values upon dissolution lack particularity as to how, or why, a loss might arise at that point in time, which is distinct from overall diminution in share value as caught by the reflective loss principle.

92. I have to record that contrary to the court requirement for a pleading to be concise and tightly focussed, the nature of these particular paragraphs does resemble more of a bullet point checklist than the finished article. As Coulson J remarked in *CIP*, it "represents the start of a pleading process, rather than the end". That might not of itself be a deciding factor depending upon my view of other factors such as lateness and reasons for delay.

93. Finally, the new pleading regarding indirect shareholder interests is remarkably brief for such a novel point, limited as it is to stating that the claimant has lost "the value of his indirect interests in CPL and SHCCL". The defendant submitted that the pleading on the point is "incoherent and wholly unsatisfactory". I repeat my comments in the preceding paragraph.

Proportionality

94. In considering proportionality, the main submissions focussed on the amount of damages at stake and the complexity of a developing area of law. On the first point, without doubt, an awful lot of money is at stake if the amendments are not allowed, but this only makes it even more mysterious that in a 37-page pleading only a scant few

lines are devoted to explaining, in very brief outline, the factual basis for making those claims, such explanation having been withheld, or certainly not articulated, for around six years during earlier amendments to Particulars and two Replies.

95. When considering the developing area of law around reflective loss, it is plain that claims involving reflective loss, and exploring the exceptions to the rule, have been afoot for a number of years, pre-*Marex*. Indeed, *Marex* was of course one such attempt to test a boundary, so it seems to me that the claimants could have tried to test boundaries themselves in an earlier iteration of the Particulars, had they chosen to do so. They would not necessarily have been successful but there was no need to await the outcome of *Marex*. The judgment in *Mandrake* says on amendment applications the court should not consider the possibility of what the Supreme Court may decide in the future; the duty of the court is to apply the law as it stands. In this respect the CPR test at 1.1 [2] c (iii) has been developed through case law.

96. On proportionality I also take account of *Hague* and consider the amount of work done so far which on the pleadings comprises three previous sets of Particulars, three replies to Part 18 requests and two Replies by the claimants as well as two Defences plus drafting of the Part 18 requests and this being the second strike out application. If the amendments are allowed there will be a revisiting of significant steps involving substantial further cost and effort. This is not true of all the amendments but is correct for the most significant ones relating to financial business losses. I do not accept the claimants' submission that the further work consequential upon allowing the amendments would be minor.

Delay and the reasons for it

97. The defendant referred to the absence of any explanation for the claims being introduced (prior to the skeleton argument) and for the lateness and lack of evidence. They said it was unacceptable that 15 years on the claimants should be permitted to plead that they were going to sell the company, having not mentioned it before and adduced no evidence either. It should not be introduced as "a sudden revelation". Their more general submissions on lateness related to the other financial losses arising from the original shareholding as above.

98. The claimants however responded that they are not "very late", and it was not a new factual case regarding the loss of a sale. This was because they maintained that the defendant's officers had been aware of an impending sale and the likely failure of the business in the event of a prosecution such that a sale would be scuppered. That to my mind does not explain why the case was not pleaded previously.

99. On the subject of delay, I accept the claimants' submission they are not in the "very late" category such that a trial date could be prejudiced, but that is not the end of the matter as the authorities referred to at paragraph 65 make plain. Lateness is a relative concept, and given both the lapse of time since proceedings were issued, the volume of pleadings to date and the Master's very clear "last chance saloon" style order following the hearing on 4th October 2016, lateness is a heavy factor weighing against the claimants. They were granted a considerable indulgence on the last occasion concerning amendments before Master McCloud. I was surprised by the manner in which the claimants' addressed delay, not having any real explanation, to my mind at least for it. The only reasons offered were delays awaiting the *Marex* judgment and subsequently awaiting a court listing, neither of which appeared satisfactory given the other timescales involved post-*Marex* and after the defendant's application being issued.

100. The chronology at paragraph 8 above records the lack of substantive response to the *Marex* judgment until 6 weeks before this hearing i.e., some 15 months after judgment had been handed down, and even then, the response was somewhat woolly, "We do not agree your interpretation". That line was maintained without reasoning until the eve of this hearing, and after the usual time by which skeleton arguments should have been delivered.

101. As the authorities make very clear the thrust of modern commercial litigation is to be progressive, narrowing issues as early as possible and where delay can result in real disruption this can, combined with other factors, trump any potential merits of proposed amendments when the court is considering the grant of permission for them.

102. It is for the claimant to prosecute their action but the procedural history in this matter reveals it has routinely been the defendant that has been setting the pace. They have been seeking to progress matters by requesting clarification of pleadings which have been light on both causality and particularisation of losses. Whilst I recognise that a defendant who constantly chivvies the other party may also not be working totally in the spirit of the CPR, I do not consider the timing or nature of the steps taken by the defendant in this action to fall into that category.

103. The courts would soon become bogged down in very old claims if they all followed the rather slow and winding path this action has taken to date. It is not for me to speculate as to why some of the delays have arisen, in the absence of anything more meaningful being articulated before me.

104. I also have in mind that on the last occasion that amendments were before this court, the claimants, most unusually, had not prepared a draft of what they were seeking in advance and were offered the "last chance saloon" to put things right. It is therefore

incomprehensible to me (as no proper explanation has been provided) how they find themselves once again on the back foot seeking late amendments without having engaged in a proper CPR compliant "cards on the table" exchange with the defendant in advance of the hearing.

105. The claimants could have put together their draft amendments post -*Marex* a year earlier than they did. A number of the current amendments could have been drafted even before *Marex*; as the defendant said in submissions it is not as though the claimants could only just have remembered that they had plans to sell the company in 2007, such fact being said to underpin some of the refashioned claims to include loss of a favourable sale. Similarly, claims made in the capacity of "indirect" or "former" shareholder could have been pleaded at the outset if there was a belief that it was appropriate. Indeed, one of the cases relied upon by the claimants, *Nectrus*, pre-dated *Marex* in terms of original argument on the point about ex-shareholders.

Prejudice

106. The prejudice to the defendant in allowing the amendments can in part be compensated by costs, although as Carr J observed in *Quah at* p 88 "an opposing party is never fully compensated for the costs it incurs (or for the business disruption and loss of management time)". This reflects the modern view that prejudice goes beyond costs which may not be seen as adequate compensation. I do not find this prejudice to the defendant to be overwhelming in my determination, but it is nonetheless a significant factor.

107. The prejudice to the claimants of not allowing them the chance to be heard at trial, on the fresh claims they have particularised in the latest amendments, is significant on the

face of it. However, in many regards, it could also be viewed as illusory, where poor prospects associated with the amendments is such a strong factor.

STRIKING THE BALANCE AND CONCLUSIONS ON AMENDMENTS FOR FINANCIAL LOSSES RELATING TO SHARES

108. I have taken the opportunity to weigh up all the factors which are relevant. In terms of *prospects*, I consider they range from "hopeless" for some of the amendments to "fragile" at best for one of them. In terms of *clarity,* I consider the new pleadings appear rather more of a draft than a finished product, which given the time scales involved is highly unsatisfactory and does not meet the threshold levels set out in *Towler* and *CIP Properties*. *Delay* is a relative concept and where extreme can trump merits. I consider the delay in this case has been excessive. *Proportionality* is a significant factor, and more so in the claimants' favour in financial terms but as the modern application of the test also reflects wasted time that provides some counterbalance. I do not consider the *prejudice* to the defendant in allowing the amendments would be overwhelming (although that does not of itself make it acceptable), but the claimants have contributed significantly to the prejudice against them if the amendments are refused. Overall, the balance is tipped heavily against allowing these amendments by reason of the poor prospects, (and not forgetting the case law in *Mandrake* that amendments are not the appropriate mechanism for testing novel points of law) delay and lack of clarity.

109. In terms of overall justice pursuant to the overriding objective, I call to mind the words of Carr J as she then was in *Quah* at p 38 g) that a much stricter view is taken now of acceptable conduct and the wider public interest in the allocation of court resource, where there has been no good explanation for delay. The claimants have had the benefit of legal representation throughout and had warnings from Master McCloud in 2016

about the critical need to sort out their pleadings earlier, if they wanted to raise claims in a new way. These amendments came before me only after the listing of the defendant's application.

AMENDMENTS REGARDING LOSS OF REMUNERATION (relating to ongoing &future remuneration/benefits as an employee, director & executive officer in the companies)

The new pleading

110. Draft paragraphs 210 (13) (iii) and 210 (14) (iii) simply refer in identical terms to the losses claimed for each claimant for "His ongoing and future remuneration and benefits as an employee, a director and executive officer of the companies".

Prospects

111. The claimant submitted that this form of loss is entirely personal and has nothing to do with their status as shareholders; as such they argued it was "plainly not affected by the "*reflective loss*" principle".

112. The defendant said it was critical to my view of these claims to consider how such remuneration was paid and, "While the Supreme Court in *Marex* unequivocally, and unanimously, held that claims brought in the capacity of creditor were not precluded by the rule in *Prudential*, it did highlight one aspect of the claim in *Johnson* which served to illustrate the potentially blurred line that may exist (on the facts) between benefits recovered as a shareholder and those received as an employee".

113. In *Johnson* part of the claim was for the value of a pension policy, but in that case the contributions were apparently a form of distribution of profits to a shareholder, as an

alternative to payment of dividends or bonuses. Therefore, the House of Lords concluded it was merely reflective of the company's loss and should be struck out. The defendant accepted that they could not make a submission these claims were unarguable as a matter of law. They did not opine on whether they had a realistic prospect of success.

114. To my mind, there is a realistic prospect of success for these claims if disclosure reveals forms of employee remuneration which are separate from payments in respect of shareholdings. This would not be at all uncommon in a corporate structure.

Clarity

115. The defendant submitted "there is a complete absence of particulars as to what sums are said to be involved and as to the basis upon which the Claimants were allegedly remunerated outside any distributions received as shareholders". This seems incontrovertible as the pleading is extremely brief as set out above, but I note that as this is not a personal injury claim CPR 16 PD.4 does not apply.

Delay and the reasons for it

116. The points concerning delay have already been set out above at paragraphs 97-105. There were no further specific matters raised in respect of this head of loss alone.

Proportionality

117. It is difficult to fully assess this factor without any great sense of the magnitude of the sums involved. I do not however consider it should be particularly difficult or complex to ascertain which side of the "blurred line" any relevant payments fall, following a

proper disclosure exercise encompassing payroll and tax records as well as any contractual documentation.

Prejudice

118. There were no specific submissions in relation to this head alone, although the general factors already recorded would be relevant. I have read the earlier pleadings thoroughly and noted the following references which taken together point towards the likelihood of a claim, even if not well-articulated (or at least a realistic risk that sums would be sought relating to the events described), for loss of employee benefits even though they were not expressly identified:

- Para 119 refers to the claimants absenting themselves from the business "so they were in effect suspended".
- Para 161 refers to the claimants being formally dismissed
- Para 162 refers to the First Claimant being suspended from his professional register
- Para 210 (3) states "the prosecution effectively ended the First Claimant's career"
- Para 210 (10) states "The prosecution hampered the Second Claimant's career".

STRIKING THE BALANCE AND CONCLUSIONS ON AMENDMENTS FOR LOSS OF REMUNERATION

119. Unlike the claims for losses arising from their shareholdings, these claims did not arrive in the latest draft pleadings wholly "out of the blue". I have already referenced inferences about earnings losses in the existing Particulars of Claim and I note also the Amended Reply to Defence at 1 A where references to dismissals from the positions of

Chief Executive (First Claimant) and Finance Director (second Claimant) are contained.

120. There is a realistic *prospect* of success. The court in *Marex* was at pains not to expand the ambit of the reflective loss principle wider than to shareholders, suing in that capacity. I quoted Lord Reed's distinction regarding employees at p 20 f) above. The factors weighing most heavily against them are lack of *clarity* and *delay* but they are not sufficient to my mind to displace the potential *prejudice* which may otherwise be caused by a well circumscribed claim which will not be *disproportionate* to pursue through disclosure and lay evidence where necessary.

121. I have therefore concluded it would be unjust in all the circumstances of the case to prohibit the claimants from advancing with their draft, albeit extremely brief, pleading in respect of any remunerative losses connected with their employment but unrelated to their shares. Most employment claims do not require expert evidence but any determination on that point will be for a future case management occasion. At such a juncture better information should be to hand, including budgeting information.

122. I do not believe this decision is unjust to the defendant in my balancing exercise, given that I do not believe the defendant will need to revisit steps already taken, or at least not to any significant level. The claimants' delay and lack of clarity do them no credit but it would be a disproportionate censure to deny them this last opportunity to set matters straight through procedural case management steps which have not yet begun.

AMENDMENTS REGARDING FINANCIAL LOSSES RESULTING FROM LOSS OF REPUTATION

The pleading

123. This loss was characterised at 210 (13) (iv) and 210 (14) (iv) for each claimant in respect of "The standing, reputation and track record which he enjoyed and would have enjoyed as senior executive and partial owner of the successful companies".

Prospects

124. The defendants submitted that these claims appeared to be wholly unparticularised pecuniary loss and whilst general damages for malicious prosecution may, in principle, include compensation for damage to reputation, such damages would be non-pecuniary losses. The defendant therefore objected to the characterisation of these claims as ones more akin to special damages.

125. The claimants on the other hand submitted that these losses were entirely personal to the claimants and unrelated to shareholdings and should be allowed in as they are not barred under any reflective loss principle.

126. Prospects of success therefore appear highly uncertain as characterisation of the claim appears to be "out of the norm" for actions of this type. I was not taken to any case authority which might persuade me otherwise. It is difficult for me then to find that there is a realistic prospect of success for this head of claim when it is so vague.

Clarity

126. The defendant submitted the pleading was "incoherent", and "unsatisfactory".. in terms of clarity and particularity". In their skeleton argument they tried to trace a causal route for the origin of the loss as they said it was unclear on the face of the pleading. They suggested that the claimants might be contending that the root cause was the prosecution which led to the demise of the company and that as a result of its demise the claimants suffered damage to their reputation and standing which was somehow separate from the

damage caused by the mere fact of being prosecuted. The claimants maintained it was a proper head of loss and sufficiently pleaded.

127. I prefer the submissions of the defendant and would have expected this claim to be pleaded in greater detail, especially in the context of this "last chance saloon" if it was considered to be an important and distinct head of loss, separate from other types of damages already contemplated within the main awards and the employment/career losses claimed elsewhere.

Delay and reasons for it

128. As with the employment losses claim considered above, there were no specific submissions in respect of this factor so I have to fall back on the general submissions regarding delay at paragraphs 97-105 above.

Proportionality

129. As with employment losses discussed at paragraph 117 I do not have adequate information on quantum to fully assess this factor.

Prejudice

130. There were no specific submissions in relation to this head of loss alone. As the pleading lacked clarity it is difficult to comprehend what the claimants consider they might be missing out on in addition to the usual general damages claims where there has been a malicious prosecution, and which are already provided for. This is even more so in present circumstances where I am allowing an amendment for financial losses related to employment benefits. The prejudice to the defendant would be the cost and uncertainty of a claim which is so poorly drafted and not understood.

STRIKING THE BALANCE AND CONCLUSIONS ON AMENDMENTS FOR LOSS OF REPUTATION

131. Weighing up all the factors above, there is nothing other than a vague sense of *prejudice* which was unquantified that seems to be material in the claimants' favour for allowing the amendment. Certainly, on *prospects*, *clarity* and *delay* my decision was weighed towards the defendant. There was nothing of substance either way in submissions regarding *proportionality*, beyond the more generic points made in relation to other amendments. Overall, I do not believe that justice would be done under the overriding objective were I to allow the amendment.

OVERALL DETERMINATION OF THE CLAIMANTS' DRAFT RE-RE-AMENDED PARTICULARS OF CLAIM

132. I have already given my judgment on the proposed amendments relating to financial losses relating to shares, remuneration and benefits as an employee, director and executive officer as well as for loss of reputation. I have not referred to the new proposed wording intertwined with these amendments regarding the *Giles v Rhind* exception. I have however concluded that the existing wording relating to that case should be struck out under the defendant's application. I would hope it is plain that the amendment application insofar as it relies on that exception fails too.

133. For the avoidance of doubt I conclude that the proposed amended wording such as at paragraph 210A "Alternatively, if and insofar as necessary.." referencing *Giles v Rhind* should not be permitted. This is because I do not believe that there are realistic *prospects* of the claimants' case succeeding by placing reliance on the *Giles* authority given the judgment in *Marex.* Additionally, the points made previously causing me to reject other amendments such as *delay* and lack of *clarity,* as well as the *overriding objective* lead

me to the same conclusion. Therefore, any part of the draft amended pleading seeking to rely on the *Giles* case needs to be removed from the Particulars going forwards.

134. I referred previously to a category of proposed amendments which were said to be inconsequential by way of clarification or correction only, such that subject to an explanation as to why they are now required, the defendant was not contesting them. The explanation put forward by the claimants was simply that they had been awaiting the *Marex* decision.

135. I have decided in the context of an already lengthy judgment not to list or describe this group of proposed amendments. However, as they are indeed inconsequential, and a revised pleading will be required in any event following my determination on other points, I am prepared to allow them in if they aid clarity. This is despite the lack of a compelling explanation because I consider in terms of overall proportionality justice will be better served if the pleading is as coherent as possible. It also appears that they will not add appreciably to delay or expense. As there was no time to draw my attention to these paragraphs at the hearing counsel may, if they consider it necessary, address me further regarding any such minor amendments upon hand down of this judgment.

136. Finally on the amendments I was made aware of a group which contained new factual averments said to underpin the "refashioned" claims. I would hope that having made determinations on the permissibility of each set of "refashioned" claims, it will be clear which amendments in this group will now fall away as otiose. Similarly, to the inconsequential amendments sought, if counsel needs to address me further on these, because they cannot be agreed between the parties, the opportunity will be available on hand down of this judgment.

137. To conclude, I find in favour of the defendant's application to strike out claims relating to the *Giles v Rhind* exception for all the reasons set out above. On the claimants' application for permission to amend I dismiss the requests made save for those relating to loss of remuneration/benefits as an employee, director and executive officer of the companies. In addition, some minor uncontroversial amendments for the purposes of clarification or correction are allowed. Finally, there may be a small number of factual averments, as referred to at paragraph 136, which it will be sensible to permit now that my overall determination has been made on the substantive issues. The parties can address me separately on these if they cannot be agreed.

EDITORIAL NOTE

A After circulating my Approved Judgment counsel for the claimants brought two cases to my attention which had been decided since the original hearing in this claim. Counsel made it clear he was not inviting me to reopen my judgment, nor to rely upon the authorities. As they touch on some of the issues which I was asked to determine, I simply note them below with the most relevant paragraphs identified by counsel and a cross-reference to my own paragraphs dealing with similar determinations.

B ***Burnford v Automobile Association Developments Ltd*** **[2022] EWHC 368 (Ch)**

Paragraphs highlighted by counsel	Subject matter	Relevant paragraphs in my judgment
77-82	Whether the law of reflective loss is "uncertain and	24, 47-52

	developing" and therefore unsuited to a strike out determination	
89-113	Issue of precedence of a decision on an application for permission to appeal (including precedence of a Privy Council decision and of Court of Appeal decision on an application to appeal). Nectrus considered distinguishable Court had to consider whether the no-reflective loss rule applied where no shares were sold	30 (h), 33, 83, 85

C *Allianz Global Investors GmbH and Barclays Bank Plc* [2022] EWCA Civ 353

Paragraphs highlighted by counsel	Subject matter	Relevant paragraphs in my judgment

17-19	Defendant accepted the effect of *Marex* and *Primeo* that a shareholder who sells shares does not acquire a cause of action for diminution in proceeds but this case concerned a shareholder who redeems them and suffers loss	30 (h), 31, 33 (f) and (g)
41-49	Court rejected contention that redeeming shareholders have a separate claim for losses that escapes the *Prudential* rule	85