Assessing Loss Across Group Companies

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> *"… we are concerned not with economics but with law. The distinction between the two is, in law, fundamental …"* Lord Goff L.J. in *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45 at 64.

1. A common feature of modern litigation is the (increasingly) complex way in which commercial entities manage their affairs. Whether motivated by risk aversion, tax efficiency or just a desire for secrecy, litigators acting for corporate clients often find themselves struggling to identify where a loss has been suffered and on what basis it is recoverable. The problem is particularly acute in the case of group companies where the business of the 'parent' – whether a limited company or an individual – is often indistinguishable from (or at least closely connected to) that of its subsidiaries.

2. Against the backdrop of increasingly complex economic relationships, the courts seem to be moving in the opposite direction, adopting (or at least reasserting) a more formalistic approach. As will be discussed below, the court is not afraid to allow what, on a common-sense analysis, may seem like an uncovenanted windfall, if to do otherwise would result in the blurring of different legal personalities. This obviously gives rise to a tension that litigators, stuck with the effect of advice given by their corporate counterparts, are expected to resolve.

3. The question of which company or companies within a group are owed a duty of care will usually (or at least hopefully) be straightforward. The assessment of damages, much less so due to issues of reflective loss, and the way in which losses felt by one part of a group are transmitted to others.

4. This note aims to explore the court's approach to assessing loss across group companies (i.e. those with common ownership and control) in three different scenarios:

   (i) Where the subsidiary (B) is owed the contractual or tortious duty, but the loss is suffered by the 'parent' (A);

   (ii) Where A is owed the duty, but the loss falls on B; and

   (iii) The peculiar case of real property.

5. Before we turn to the individual scenarios though, it is first necessary to say a few words about the correct legal approach to assessing losses either side of the corporate veil.

Company Losses

6. The leading case remains the decision of the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, which considered the earlier decision of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, which established the proposition that a shareholder cannot sue to recover damages for themselves in relation to wrongs done to the company. The primary policy justification for the rule is the need to avoid double recovery.

7. Mr Johnson was a businessman who conducted his affairs through several limited companies, including Westway Homes Limited ("Westway"), which was described at trial as being his *"corporate embodiment"*.

8. In 1987, Mr Johnson instructed Gore Wood to act on behalf of him and his companies in relation to the purchase of the plot of land that he, through Westway, planned to develop. There was a dispute about the validity of an option to purchase served by Gore Wood leading to litigation, which in turn led to a claim by Westway against Gore Wood to recover the costs of that litigation. Before Westway's claim had been concluded, Mr Johnson intimated a personal claim against Gore Wood. The personal claim was then issued *after* Westway's claim had been settled. Gore Wood applied to have Mr Johnson's claim struck out on the basis that the personal claim was an abuse of process. Gore Wood also sought preliminary determinations on as to whether: (i) it owed Mr Johnson a duty of care; and (ii) the damages pleaded by him were recoverable – it being Gore Wood's case that they were losses that had fallen on Westway and could only (but for the compromise) have been recovered by it.

9. Dealing with this second proposition, Lord Bingham at p.35f summarized the law as follows:

"… (1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. …

(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding.

(3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other."

10. These propositions are often referred to as the principle of reflective loss; that a shareholder's loss is reflective of that of the company. A shareholder can only sue for his own loss where either the company has no claim (in which case the shareholder's claim is for the loss to the company, reflected as the diminution in the value of the shareholding) or where they have suffered a discrete head of damage (i.e. one that they would still suffered even if the company's losses are made good). So the rule identified in *Prudential* was recognized, and only limited exceptions permitted to it which did not involve a risk of double recovery.

11. In the writers' experience, it is all too easy, especially in the case of group companies, or companies that are under the sole ownership and control of a single person/family, to jump into questions of evidence without first asking whose loss, and on what basis, is the court looking to assess.

Duty to B, Loss falls on A

12. It goes without saying that where A is not owed a duty of care they cannot bring their own claim and can only recover through B. The realities of commercial life though often mean that a breach suffered by B will result in a loss falling on A, as A is forced to reorder its affairs to support its struggling subsidiary. In such circumstances, the only way in which A can seek to claim for its losses is by depicting them as B's. This can be done either by adding to B's losses (for example by ensuring that all inter-company support is recorded as loans) or by inviting the court to ignore A's acts of assistance.

13. Historically the court has been slow to regard A's actions as reducing or diminishing B's losses. The recent decision in of the Supreme Court in *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32; [2017] 2 WLR 1161, though arguably marks a change of approach.

14. *Swynson* was a negligence claim by a lender against a firm of accountants arising out of financial due diligence provided by the accountants before a loan was provided to enable an MBO to take place.

15. The lender, Swynson, was owned indirectly by a Mr Hunt. Swynson lent £15m to an SPV company, EMSL, the borrower, to facilitate an MBO of a US company called Evo ("the 2006

Loan”). The 2006 Loan was made in reliance upon a (negligent) due diligence by the defendant firm of accountants, then known as HMT.

16. Unbeknown to Swynson, Evo was worthless and there was never any hope of EMSL repaying the money it had been lent. Swynson made further loans to EMSL of £1.7 m in 2007 and £3m in 2008 (“the 2007 Loan” and “the 2008 Loan” respectively) in the hope of turning it around, but to no avail.

17. As part of the 2008 Loan, Mr Hunt acquired majority control of EMSL leading to EMSL and Swynson being treated as connected entities for tax purposes. This meant that Swynson was taxed on the loan repayments owed to it by EMSL even though those loan repayments were not being made. Mr Hunt therefore needed to act to stem the losses (the tax charges on the notional loan repayments) being suffered by Swynson.

18. On 31 December 2008, there was a refinancing of the 2006 and 2007 Loans. EMSL and Mr Hunt entered a loan agreement, whereby Mr Hunt made funds available to EMSL ("the Hunt Loan") for the purpose of enabling the 2006 and 2007 Loans to be repaid by EMSL to Swynson, leaving only the 2008 Loan outstanding (“the 2008 Partial Refinance”). The Hunt Loan was on un-commercial terms: a non-interest-bearing loan to a Hunt "family" company, EMSL, to enable it to repay (and on terms that it could only be used for that purpose) another Hunt group company, Swynson. It was an internal "Hunt group" transaction for accounting and tax purposes only, made without reference to true market value.

19. Perhaps inevitably, the Hunt Loan was not repaid by EMSL leaving Mr Hunt with the entirety of the losses suffered on the 2006 and 2007 Loans. Mr Hunt was not a contracting party though (the transmission letter formalising HMT’s retainer was between Swynson and HMT alone) and despite all concerned knowing that Mr Hunt was the ultimate financier and backer of the 2006 and 2007 Loans, Rose J at first instance found that he was not owed a duty of care.

20. At first instance and before the Court of Appeal, the court overcame the difficulties caused by the corporate structures by invoking the doctrine of *res inter alios acta* (i.e. “a thing done between others does not harm or benefit others”), now also referred to under the more modern phrase of the “collateral benefits principle”. Rose J and Longmore & Sales LJJ (Davies LJ dissenting) held that as the 2008 Partial Refinance was not an act of mitigation, and was instead more akin to a gratuitous payment, it was irrelevant so far as HMT was concerned and did not go to reduce Swynson’s losses. In short it could be properly considered to be a collateral benefit and not taken into account when assessing losses. This was a common-sense approach. The 2008 Partial Refinance could only be made, and was only made, because of Mr Hunt’s interest behind the scenes. ‘But for’ Mr Hunt, the 2006 and 2007 Loans would not have been repaid and so it was found by the majority in the Court of Appeal to be contrary to *“justice, reasonableness and public*

policy" (per Lord Reid in *Parry v Cleaver*, quoted by Sales LJ in the Court of Appeal) for the loss to sit with Mr Hunt. For further consideration of the collateral benefits principle, and the circumstances in which it may be said to arise, see Appendix 1 to this Note.

21. The Supreme Court took a different view. Delivering the leading judgment, Lord Sumption (with whom Lords Neuberger, Clarke and Hodge agreed), began at [11] by summarizing the collateral benefits principle as follows:

"The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (res inter alios acta), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose."

22. Applying this causation based analysis, Lord Sumption went on to find that the refinancing could not be regarded as *res inter alios acta* on the basis that the fact that Mr Hunt was the ultimate source of the funds was entirely irrelevant. Mr Hunt's role did not therefore take the case outside the scope of the general rule, notwithstanding that Mr Hunt's majority ownership of Swynson took place in 2008 and was the only reason why additional tax charges were levied and the only reason why the 2006 and 2007 Loans came to be repaid. At [13] he explained his view on the basis that:

"In the first place, the transaction discharged the very liability whose existence represented Swynson's loss. Secondly, the money which Mr Hunt lent to EMSL in December 2008 was not an indirect payment to Swynson, even though it ultimately reached them, as the terms of the loan required. Mr Hunt's agreement to make that loan and the earlier agreements of Swynson to lend money to EMSL were distinct transactions between different parties, each of which was made for valuable consideration in the form of the respective covenants to repay. Thirdly, as the Court of Appeal correctly held, the consequences of the refinancing could not be recoverable as the cost of mitigation, because the loan to EMSL was not an act of Swynson and was not attributable to HMT's breach of duty."

23. Accordingly, the losses suffered by Swynson on the 2006 and 2007 Loans were regarded as having been 'made good' and the fact they now fell on Mr Hunt was irrelevant (on the basis that

he personally was not owed a duty of care). Many of those factors could be said to apply to cases where the court has historically accepted the application of the collateral benefits principle, including cases falling within the category of benevolence, and so it may be said this reasoning does not provide a satisfactory basis for explaining why the principle should be rejected. In this respect, commonwealth jurisprudence may be said to provide a better formulation; for further discussion as to the same see Appendix 2.

24. It is important to bear in mind, though, that the decision in *Swynson* was very much based on and justified on its own facts, including in particular the injection of cash by Mr Hunt being organized so as to repay the 2006 and 2007 Loans (albeit it had to be organized in this way to remove the adverse tax treatment). The case is not therefore authority for the proposition that an injection of funds by the parent, thus shifting the loss (or part of it) to the parent, must always be disregarded.

25. The writers would argue though that unless the injection of funds by the parent can be properly characterized as a loan, or a selfless gift or as entirely unconnected (in a causative sense) to the loss in question, then the payment will be taken into account and the parent will be left with a loss for which they cannot recover. It is submitted that this strict approach has the potential to cause significant injustice, especially in group cases where there is often little thought given at the time to the precise characterization of the transfer.

26. An example of the problems caused by the decision in *Swynson* are neatly illustrated by the earlier decision of the House of Lords in *GUS Property Management Limited v Littlewoods Mail Order Stores Limited*, 1982 SC (HL) 157.

27. There, a property belonging to a subsidiary of The Great Universal Stores Limited was damaged by Littlewoods. Shortly afterwards, the property in its damaged state was transferred to another company in the GUS group at a notional sale price that did not reflect the damage. This transfer was though disregarded when it came to assessing damages on the basis that it was purely an internal accounting exercise and not an arm's length disposal (n.b. if it had been then no loss would have been suffered).

28. Following the logic of Lord Sumption in *Swynson*, the fact that the property was being moved between members of the same group of companies should have been irrelevant (just as Mr Hunt's ownership of Swynson was). The owner had suffered damage in the diminution of the value of the property, but that loss had then been made good when the property was transferred at a value that was not discounted to reflect the damage. Aside from the fact that the loss in question was physical damage to a building rather than an impaired loan, it is difficult to see any significant distinctions between two internal restructures that took place for reasons unconnected with the tortfeasor.

29. Herein lies the problem. Groups of companies are subject to pressures (be they economic, political or otherwise) that may require them to restructure their property and assets. Following the decision in *Swynson*, there is a risk that in carrying out such restructuring, a group company that has suffered a loss will be deemed to have had that loss wiped out, when it economic terms it has merely been transferred upwards or elsewhere within the group.

30. It should be noted that the decision in *Swynson* offers no direct guidance to the situation where the lender restructures its own loan. That issue fell for consideration by the Court of Appeal in *Tiuta v De Villiers* [2016] EWCA Civ 661, and is due to be heard in the Supreme Court in November 2017.

<u>Alternative Basis of Claim</u>

31. In *Swynson*, Mr Hunt also brought a personal claim arguing that, notwithstanding the lack of duty owed to him, he was able to claim against HMT, HMT having been unjustly enriched by the 2008 Partial Refinance as it had reduced their liability to *Swynson* by removing the losses on the 2006 and 2007 Loans. This was accepted by one judge in the Court of Appeal (Sales LJ), but before the decision of the Supreme Court in *Investment Trust Companies v Her Majesty's Commissioners for Revenue and Customs* [2017] UKSC 29; [2017] 2 WLR 1200, which was handed down at the same time as the decision of *Swynson* in the Supreme Court.

32. Readers of these notes will no doubt be familiar with the four-stage test of unjust enrichment: i.e. (i) the enrichment of A, (ii) at the expense of B, (iii) for an unjust reason, and (iv) in the absence of any defence. Mr Hunt argued that he satisfied this test as: (i) HMT had been enriched by the reduction of its liability to Swynson; (ii) that enrichment was at his expense as he had funded the 2008 Partial Refinance; (iii) the enrichment was unjust as the 2008 Partial Refinance had only take place due to Mr Hunt's mistaken belief that it would not affect HMT's liability; and (iv) there were no defences open to HMT as it had (unless the enrichment was reversed) simply received an uncovenanted windfall.

33. As with the arguments based on *res inter alios acta* though, Mr Hunt's personal claim was rejected on a very formalistic basis, with the Supreme Court concluding that the 2008 Partial Refinance had carried out in a very deliberate and structured way (as part of which Mr Hunt had obtained exactly what he had intended to – a loan obligation for EMSL) he did not have a remedy. Per Lord Sumption at [88]:

"In so far as Mr Hunt thought that he might, as owner of Swynson, himself have a claim for breach of contract and/or duty against HMT, he was not mistaken in any way which concerned the relationship between Swynson and HMT or which could give him any arguable claim to be subrogated to a claim by Swynson against HMT. In law, however, the only person with a claim

against HMT was Swynson, as Rose J held. Again, the arrangements he made for EMSL to pay off Swynson did not address or concern the relationship between Swynson and HMT, or the consequences of such arrangements for any claim which Swynson might have against HMT. Again, Mr Hunt never envisaged obtaining any sort of direct interest in any such claim. Further (although I should not be taken as suggesting this is critical to the outcome of the issue of unjust enrichment), the arrangements which Mr Hunt made were not by way of gift, but by way of a loan to EMSL, which in December 2008 had at least some prospect, however remote, of being repaid. What matters is that any transfer of value by Mr Hunt to HMT was not just unintended, it was incidental and indirect and arose from the consequences of Mr Hunt's deliberately structured arrangements on a relationship quite separate from that which the arrangements addressed in exactly their intended way.

In these circumstances, I do not consider that Mr Hunt can establish a basis for being subrogated to any claim which Swynson would have had against HMT, had its loss in respect of the 2006 and 2007 loans not been reduced to nil. In a very general sense, I can understand it being said that it is an injustice to Swynson or Mr Hunt and a pure windfall for HMT, if HMT benefits by avoiding paying damages. This is particularly so, when (as I believe to be the case) Mr Hunt made a mistake which was causative in the "but for" sense, that, apart from the mistake, he would not have structured the arrangements in the way he did. But mere "but for" causation is not sufficient: see ITC, para 52. Any benefit which HMT has from Mr Hunt's mistake is no more than an indirect and incidental consequence of those arrangements on Swynson's separate and pre-existing relationship with HMT. This is too remote to be the basis for a claim that HMT has been unjustly enriched at Mr Page 35 Hunt's expense, or for reversal of the consequences of Mr Hunt's arrangements by treating him as having a (fictionalised) interest which he never expected, in respect of a claim by Swynson to recover from HMT a loss otherwise reduced to nil by the arrangements he made. This conclusion can be explained under the scheme indicated in Banque Financière either on the basis that there was no sufficiently direct transfer of value from Mr Hunt to HMT, or on the basis that there is no relevant unjust factor, or both. More generally, this conclusion underlines the fact that it is not the role of the law of unjust enrichment to provide persons finding to their cost that they have made a mistake with recourse by way of subrogation against those who may indirectly have benefitted by such a mistake under separate relationships which those making the mistake were not addressing

34. The writers would note that notwithstanding the cool reception that Mr Hunt's unjust enrichment claim received from the Supreme Court, there is no reason why, on different facts, an unjust enrichment claim could not succeed where losses have been transferred from one part of a group to another. The key in any case would be to establish that the release in the tortfeasor's liability was not simply an indirect effect of a deliberately structured (successful) transaction, but a direct and deliberately unintended result of the transfer or refinancing.

Duty to A, Loss falls on B

35. Far more common that the situation in *Swynson* is where a duty is owed to A, but where because A chooses to do business via B, the direct loss falls on B. The most obvious example of this is where A seeks professional advice but then (as was the case in *Swynson*) decides to act via B. Litigators tends to approach such cases with extreme caution due to the difficulty in assessing how the loss to B is reflected in a diminution in value for which A can recover. With the appropriate expert evidence though, such cases can be more straightforward than one might expect.

36. A good example of this is the case of *George Fischer (Great Britain) Ltd v Multi Construction Ltd,* [1995] 1 BCLC 260. There, George Fischer entered a contract with Multi Construction for the installation of equipment at one of its subsidiaries. The equipment was defective and George Fischer sued for the loss of sales and increased operating costs of the subsidiary. Multi Construction resisted the claim on the basis that either: (i) George Fischer could not sue for the loss of value of its shareholder or (ii) there was no basis for finding that – as was being alleged by George Fischer – a £1 loss to the subsidiary translated into a £1 loss to George Fischer.

37. The first of these two arguments obviously fell away, but the second gave rise to an interesting question of expert evidence. The evidence given by the expert on behalf of George Fischer was that due to the structure of the group companies, every £1 lost to the subsidiary resulted in £1 less by way of distributable profits (whether paid as dividends or kept in the company) and thus £1 less to George Fischer itself. Given that there was no prospect of George Fischer being sold, this, rather than that marketable value of the shareholding was the appropriate measure of loss.

38. Although unconventional, this evidence was accepted at first instance, and that decision was then affirmed on appeal. The accounting evidence therefore allowed the court to effectively see through the corporate veil.

39. The decision in *George Fischer* is very much one on its own facts and it is unlikely that a similar result would be reached in the case of a publicly listed company or where it could be argued that the value of the subsidiary was as a capital rather than profit making asset. At the same time though, the case is an important reminder that with closely linked group companies, ‘normal' considerations of value might not apply and the court can, and in appropriate will, view the losses collectively.

Real Property

40. Above it was suggested that the case of *GUS v Littlewoods* illustrated the problems posed by the decision in *Swynson*. There is, though, another rationalization; that the court simply adopts a different approach in the case of real property and is willing to allow claims for loss notwithstanding transfers of the asset in question.[1]

41. The first example of the special status afforded to real property is the case of *Jones v Stroud District Council* [1986] 1 WLR 1141. There, Mr Jones brought a claim in negligence following the failure of Stroud District Council's building inspectors to identify deficiencies in the foundations of his property whilst it was under construction. Rather than paying for the repairs to the house himself though, Mr Jones arranged for the house to be repaired by a company that he owned. Then, despite not having paid anything himself by way of repair costs, and not alleging that he was liable to reimburse the company, Mr Jones brought a claim for the costs of repair. The claim was allowed, with May LJ stating at p.1140 that:

"It is true that as a general principle a plaintiff who seeks to recover damages must prove that he has suffered a loss, but if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired I do not consider that the court is further concerned with the question whether the owner has had to pay for the repairs out of his own pocket or whether the funds have come from some other source."

42. The second example is that of *Alfred McAlpine Construction Limited v Panatown Ltd* [2001] 1 AC 518, a case which those practising in the field of construction law will be familiar. There, McAlpine was engaged to construct an office building and car park on land owned by one group company, UIPL. The employer under the building contract though was another group company, Panatown. This arrangement was deliberately adopted in order to avoid VAT on the build.

43. Following completion, flaws in the design and build became apparent, leading to a claim for damages from Panatown. McAlpine defended this claim on the basis that Panatown did not have a proprietary interest in the building and thus no loss in respect of which it could claim.

44. McAlpine's defence to the claim was ultimately successful, but only on the basis that UIPL had its own claim against McAlpine under the terms of a duty of care deed entered at the outset. Had there not been this direct claim though, the House of Lords held that Panatown would have been able to recover damages either on behalf of UIPL or on the basis of so-called 'expectation loss'.[2]

[1] The law here is not unique to the context of joint companies, but it is hoped that it will be useful in identifying where the transfer of real property between group companies will not affect their legal rights, and interesting in illustrating the (in the writers' view, unjustifiable) divergence of approach.
[2] Their lordships differed in their reasoning and analysis and the decision in *Panatown* is a talk – or several – in and of itself.

The fact that the owner and contracting party were separate legal entities did not defeat the claim with the court looking at the economic reality rather than issues of form.[3]

45. The third and final (for our purposes) example is that of *Offer-Hoare v Larkstore Limited* [2006] EWCA Civ 1079. There, a landowner engaged a surveyor to report on the suitability of his land for development. The surveyor having provided a positive report, the landowner sold his land to Larkstore. During the construction, there was landslip leading to claims against Larkstore (Mr Offer-Hoare being an affected resident who sued Larkstore). Larkstore then took an assignment of the landowner's rights against the surveyor and brought proceedings against the surveyor in his own name. The proceedings were defended by the surveyor who argued that as the landowner did not have any claim against it – the landowner having sold the land before the landslip – there was no right or claim that Larkstore could seek the benefit of.

46. The expert's argument was rejected by the Court of Appeal, with Mummery LJ holding at [40] onwards that:

"The contention is based on the propositions that Starglade (the assignor) had only suffered nominal damages at the date of the assignment, because it no longer owned the Site, and that Larkstore (the assignee) could not acquire by assignment from Starglade any greater right than Starglade had against Technotrade.

As I see it, that is not the true legal position. What was assigned by Starglade to Larkstore was a cause of action for breach of contract against Technotrade and the legal remedies for it. It was not an assignment of "a loss", as Mr Friedman described it in his attempt to persuade the court that the amount of the loss recoverable by Larkstore was limited by what loss had been suffered by Starglade, in this case nil. The assignment included the remedy in damages for the cause of action. The remedy in damages for breach of contract is not, in principle, limited to the loss suffered as at the date of the accrual of the cause of action or as at any particular point of time thereafter.

The principle invoked by Technotrade that the assignee cannot recover more than the assignor does not assist it on the facts of this case. The purpose of the principle is to protect the contract-breaker/debtor from being prejudiced by the assignment in having, for example, to pay damages to the assignee which he would not have had to pay to the assignor, had the assignment never taken place. The principle is not intended to enable the contract-breaker/debtor to rely on the fact of the assignment in order to escape all legal liability for breach of contract."

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[3] N.B. there is no reason why a claim arising under the doctrine in *Panatown* could not be assigned between group companies. See *Darlington Borough Council v Wiltshier Northern Limited* [1995] 1 WLR 68

47. Based on this analysis, once Larkstore owned both the relevant land and the remedy in damages for breach of contract, it had all it needed to bring a substantial claim against the expert. Both the loss (the cause of action having accrued when the negligent survey was conducted) and the cause of action rested in the same set of hands.

48. Although it arises on unusual facts, the decision in *Offer-Hoare* provides a potential 'rescue' in cases where an impaired asset (whether in the form of real property or otherwise) has been transferred within a group of companies. Even if the transfer prevents the original contracting party from suffering a loss, there is no reason why the right to claim cannot be assigned to the new owner of the asset. In that way, a group company (whether parent or subsidiary) who was not originally owed a duty, may be able to bring a claim.

49. The approach in *Offer-Hoare* has also gained some currency in cases involving securitization of loans (see for example the decision of HHJ Keyser QC at first instance in *Paratus AMS v Countrywide Surveyors Ltd* [2011] EWHC 3307 (Ch), and the Court of Appeal in *Titan Europe 2006–3 plc v Colliers International UK plc (in liquidation)* [2016] 1 All ER (Comm) 999, and (at least until such time as the Supreme Court revisits this issue) may be said to provide a more claimant friendly approach to that adopted in *Swynson.*

Conclusion

50. Are there any lessons to be learned aside from the fact that the court, following the decision in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, is taking an increasingly hard line on the separation of legal personalities, and the need for each to establish that they were owed a duty of care? The decision in *Swynson* would certainly suggest that the law is adopting a more "purist" traditional legal approach, and, as such, is likely to cause further problems in cases with complicated corporate structures, unless the issues are properly considered and addressed in advance.

51. At the same time though, where the claim is being brought by a shareholder or head of a group of companies, there remains scope through the use of careful evidence, including as appropriate expert evidence, to effectively transmit losses up the chain. In that way, the otherwise strict approach set out by the House of Lords in *Johnson v Gore Wood* can be avoided.

52. Finally, real property (and, by extension, building contracts) remain something of an anomaly with the court willing, in order to avoid the creation of a legal black hole, to adopt a far more flexible approach to loss that for many group companies can prove invaluable. Cases involving securitization (involving other corporate entities) also (at least for the time being) appear to fall into a different category.

Appendix 1 - Collateral benefits and *res inter alios acta*

1. The starting point is the general compensatory principle; the objective being to put the innocent party in the position they would have been in if the contract had been performed (contractual), or wrong not occurred (tortious).[4] The general rule is that an injured party is unable to recover more than it has lost.[5] But that is not the end point.

2. There are two well recognised classes of exception to the general rule (i.e. insurance and benevolence), but the principle is not limited to those categories.

3. In applying the general rule, the court does not take into account any payment or benefit received by the injured party where such benefit is considered collateral or *res inter alios acta* (i.e. *"a thing done between others"*). Whilst proceeds of insurance and acts of benevolence are well recognised exceptions to the so-called rule against double recovery, and are thus considered collateral, they do not represent the totality of the law.[6] They are the main examples of collateral payments, but nothing more.[7]

4. Benefits received by a party may also be discounted where they are unusual, independent or disconnected, on a proper application of the rules of legal causation.[8] In contrast with the examples of insurance and benevolence, the invocation of considerations of causation mean that such benefits are not (or at least not necessarily) exceptions to the rule against double recovery; they are simply treated as irrelevant to the calculation of the losses caused by the wrong.

5. Even where a benefit would not have been received by a claimant 'but for' the defendant's breach, it may still be disregarded in the assessment of damages on the grounds of public policy or legal causation, including where the benefit is regarded as collateral and therefore irrelevant[9]. This is demonstrated by the following examples (referring in each case to the nature of the benefit obtained) [10]:

    (a) Insurance: receipts ignored as: (i) bought by the claimant for their own benefit; and (ii) on causation grounds as the accident is merely the indirect cause of the payment being made[11];

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[4] *Robinson v. Harman* (1848) 1 Exch 850 per Parke B at 855, *Livingstone v. The Rawyards Coal Company* (1880) 5 App. Cas. 25 per Lord Blackburn at p.39.
[5] *Parry* per Lord Reid at p.13C-D.
[6] See by way of example the cases cited in *McGregor* §9-152 onwards. See also *The Law of Contract Damages,* 2014, Adam Kramer, at §16.10. See also *Kramer* at §16.1 for the picture he says can be drawn from the cases.
[7] See *Kramer*, at §16.10.
[8] *McGregor* §9-152 and *Kramer* at §15.2A(v), §15.2B, §15.3D and §16.1.
[9] *Kramer* at §15.1A, who considers mitigation as an aspect of collaterality.
[10] There is a helpful review of many of the cases by Staughton LJ in *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* (1992) 30 ConLR at 21, as referred to by Rose J in *Swynson* at first instance.
[11] *Bradburn v. The Great Western Railway Company* (1874) LR 10 Exch 1 at 465. See also *FNCB v. Barnett Devaney (Harrow) Ltd* [1999] 2 All E.R.(Comm) 233, per Morritt LJ at [39] confirming that the position is the same irrespective of whether or not the insurer has rights of subrogation.

(b) Disablement pensions: excluded as a matter of *"justice, reasonableness and public policy"*[12] and as contrary to an *"ordinary man's sense of justice"* that the only gainer should be the wrongdoer[13]. Exclusion depends not on remoteness or source of the benefit, but its *"intrinsic nature"*[14]. A pension is different from wages as, drawing an analogy with insurance, it is the fruit of money put aside in the past rather than a reward for contemporaneous work[15];

(c) Benevolence: discounted on the basis that the payees intend to benefit the injured party and not the tortfeasor so it would be contrary to public policy for the tortfeasor's liability to be reduced[16]. There is *"no reason or logic"* why the rule in respect of benevolent payments should be limited to personal injury cases as such payments are excluded on the basis that they are *res inter alios acta* (i.e. irrelevant) as between claimants and defendants[17];

(d) Public Grants: discounted on the basis that they are collateral.[18] They have also been left out of account: (i) on grounds of public policy as making a deduction would reduce the incentive that the grant is intended to achieve;[19] and (ii) as they are different in character/kind to money paid by way of compensation[20];

(e) Subsequent transactions – re-sale of goods: benefits received under onward contracts discounted on the basis that the re-sale is mere good fortune and *res inter alios acta* as it arises *"from circumstances peculiar to the plaintiff"*[21]. Where there is an available market, the consequences of not immediately re-selling the goods are ignored on causation grounds, as they stem from an independent decision[22];

(f) Inter-group/Company/Family benefits: where the cost of the repair is met by the claimant's company this is viewed as irrelevant – benefits from kindness and/or special relationships do not go to reduce the claimant's loss[23];

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[12] *Parry* per Lord Reid at p.13H; *Smoker v. London Fire and Civil Defence Authority* [1991] 2 A.C.502.
[13] *Parry*, p.14D.
[14] Ibid, p.15E.
[15] Ibid, p.16A-H.
[16] *Redpath* per Andrews LCJ at p.170 and p.175.
[17] *Hamilton-Jones v. David & Snape (a firm)* [2003] EWHC 3147, [2004] 1 W.L.R. 925 per Neuberger J at [74]
[18] *Treml* v. *Ernest W. Gibson & Partners* [1984] 2 EGLR 162, per Popplewell J at p.164.
[19] *Palatine Graphic Arts Co Ltd v. Liverpool City Council* [1986] 1 Q.B.335 (CA), per Glidewell LJ at p.344-345.
[20] Ibid. See also *Design 5 v. Keniston Housing Association Ltd* (1986) 10 Con. L.R. 123, per Judge Smout QC at p.136.
[21] *Slater* v. *Hoyle* [1920] 2 K.B. 11, per Bankes LJ at p.14-15 and Warrington LJ at p.18. It has been said the key factor in this case was the defect was patent and so the claimant was acting with knowledge of it. Thus where the claimant acts freely with knowledge this may break the chain of causation. See *Kramer* §4.2B(v), pp.97-100, so reconciling this case with *Bence Graphics* [1998] Q.B.87, where the defect was latent.
[22] *The Elena D'Amico* [1980]1 Lloyds L.R. 75, per Goff J at p.89.
[23] *Jones v. Stroud District Council* [1988] 1 W.L.R. 1141, per Neill LJ at p.1150. The reasoning in *Jones* was approved and applied in *Burdis v. Livsey* [2003] Q.B.36. Together with *St Martin's Property Corp v. Sir Robert McAlpine Ltd* (reported with *Linden Gardens* at [1994] 1 A.C.85), *Jones v. Stroud* is cited by *Kramer* at §6.10D(i) as examples of payments or assistance by group companies where the payment is disregarded - see also further the discussion on transferred loss in Part 3 below, including Lord Clyde in *Panatown* at p536A-B.

(g) Gratuitous care: care from third parties (ordinarily family members) are not treated as reducing losses (other than if provided by the tortfeasor); the claimant is deemed to be claiming on behalf of the third party care provider, the recovery being held on trust[24];

(h) Benefits conferred by landlord: ignored on two bases: (i) on causation grounds where, due to the passage of time and the occurrence of intervening events, the repairs are not treated as part of a continuous transaction arising from the breach; and (ii) on grounds of relevance where, due to the cause of the repairs being a matter between the claimant and the landlord, they are simply considered *res inter alios acta*[25];

(i) Internal group transfers: where assets are transferred without a view to their true value, and with the values ascribed to them for internal accounting purposes only, the transaction is ignored on the grounds it is *"irrelevant"* to the claim[26];

(j) Income from transaction induced by defendant: benefits are only taken into account where they can be said to have been caused by the negligence (in the direct sense as opposed to the negligence merely giving the opportunity for the profit). The question is whether there was a continuing transaction starting with the negligence; a question of fact[27]. In real property cases, where a claimant is unable to afford the cost of repair, and seeks to develop the land rather than simply selling up, any benefits obtained from this decision can again be ignored on causation grounds[28];

(k) Fruits of settlements & reformulations: ignored on causation grounds where the settlement *"is an entirely independent and collateral matter arising not in the context of mitigation at all"*[29] or where the transaction said to reduce the loss is merely a reformulation of the claimant's relations with a third party[30];

(l) Securitisation & syndication agreements: these can be ignored on causation grounds where the subsequent agreements do not arise *"out of the consequences of the breach and in the ordinary course of business"* and/or more generally where they are independent

[24] See *Hunt v. Severs* [1994] 2 A.C.350 at pp.393-394 per Lord Bridge, adopting the dicta of Denning LJ in *Cunningham v Harrison* [1973] Q.B. 942 at pp. 951-952.
[25] *Gardner v. Marsh & Parsons* [1997] 1 W.L.R 489, per Hirst LJ at p.503H and Pill LJ at p.514E-F.
[26] *GUS Property Management Ltd v. Littlewoods Mail Order Stores Ltd* 1982 SLT 533 (HL), per Lord Keith at p.538.
[27] *Needler Financial Services v. Taber* [2002] 3 All E.R.501, per Sir Andrew Morritt V.C at [23]- [24], applying the observations of the CA in *Galoo Ltd (in liq.) v. Bright Grahame Murray (a firm)* [1994] 1 WLR 1360 at 1375. See also *Primavera v. Allied Dunbar* [2002] EWCA Civ. 1327, [2003] Lloyd's Rep PN14, per Brown LJ at [29] where benefits obtained after a certain point were discounted on the basis that the stemmed from the claimant's speculation rather than the defendant's negligence, and *Kramer* §16.6B.
[28] *Hussey v. Eels* [1990] Q.B.227 (CA), per Mustill LJ at p.241 – see also the observation at p.240 that the assessment of damages is primarily a question of fact.
[29] *Mobil North Sea Ltd v. PJ Pipe & Valve Co Ltd (trading as PJ Valves or PJ Valve Ltd)* [2001] EWCA Civ. 741, [2001] 2 All E.R.(Comm) 289, per Aldous LJ at [30].
[30] Ibid, at [31].

of the relationship between the claimant and the defendant[31], but not where the loss is suffered after syndication [32];

(m) Joint ventures: third party benefits deriving from extraneous contractual or other relationships with a joint venturer are regarded as irrelevant[33]; and

(n) New employment: a benefit deriving from share investments that would not (and due to the terms of the claimant's previous employment, could not) have been made but for the breach, are viewed as being an entirely collateral benefits,[34].

6. There are four notable areas where benefits received are not viewed as collateral:

(a) State benefits: these are ordinarily viewed as matters which fall to be deducted as they are not special or peculiar to the claimant so as to justify exclusion[35];

(b) Legislative changes: which enable an asset to be sold without encumbrance; not peculiar to the claimant and a beneficial change taken into account[36];

(c) Assistance from the tortfeasor: benefits provided by the tortfeasor will ordinarily reduce the damages they would otherwise have to pay - the source of the benefit is not always irrelevant to the enquiry[37]; and

(d) Ordinary course of business/events: if mitigation by the claimant is to be taken into account the action "*must be one arising out of the consequences of the breach and in the ordinary course of business.*"[38]

[31] *Titan Europe* [2015] EWCA Civ. 1083; [2016] 1 All E.R.(Comm) 990, per Longmore LJ at [30]- [38] (obiter).
[32] See Phillips J in *Banque Bruxelles Lambert SA v. Eagle Star* [1992] 2 All E.R.769 at p.802. It is questioned whether the collateral benefits or *res inter alios acta* principles are limited to loss made good and cannot cater for a third party stepping in to prevent a loss, but such a factual scenario did not arise in *BBL.*
[33] *John Harris Partnership (a firm) v. Groveworld Limited* [1999] P.N.L.R. 697, per HHJ Thornton QC at p.720-722.
[34] *Lavarack v. Woods of Colchester Ltd* [1967] 1 QB. 278 per Lord Denning MR at 290F-G, with whom Diplock LJ agreed.
[35] *Kramer* at §16.10C.
[36] See *Kennedy v. Van Emden* [1996] P.N.L.R. 409.
[37] See Lord Bridge in *Hussain v. New Taplow Paper Mills* [1988] 1 A.C. 515 at p.528H.
[38] *British Westinghouse Electric and Manufacturing Company Ltd v. Underground Electric Rlwys Co of London Ltd* [1912] A.C.673 at 689 et seq.

Appendix 2 – Commonwealth authorities

1. The leading Australian case is *The National Insurance Company of New Zealand Limited v Espagne*[39], a personal injury claim concerning the correct treatment of an invalid pension paid by the state. The High Court held that the pension did not need to be taken account when assessing lost earnings, basing its decision not (or not only) on questions of causation, but on the purpose of the statue under which the invalid pension was awarded.

2. The leading judgment of the court was given by Dixon C.J. said that certain benefits should be excluded as:

"… they have this distinguishing characteristic, namely that they are conferred on him [i.e. the claimant] *not only independently of the existence in him of a right of redress against others, but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him."* [40]

3. The same approach was adopted by Windeyer J, who commented that:

"… So far as any rules can be extracted, I think that they may be stated, generally speaking, as follows: In assessing damages for personal injuries, benefits that a plaintiff has received from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of the contract he had made before the loss incurred and by the express or implied terms of that contract they were to be provided not withstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of his damages … In both cases the decisive consideration is not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff has paid for, and in the other by the intent of the person conferring the benefit. The test is purpose rather than by cause." [41]

4. *Espagne* was subsequently followed in *Redding v Lee*[42] where at p. 124 Gibbs C.J. described the approach set out by Dixon C.J. in *Espagne* as being one of broad application. He then summarized the test to be applied by the court at page 125 in the following terms:

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[39] [1960] 105 CLR. *Espagne* was cited extensively in *Parry*. See Lord Reid at p.19, Lord Morris at p.28, Lord Pearce at p.38 and Lord Wilberforce at p.40.
[40] At p.573
[41] At p.599
[42] [1982] 151 CLR 117

"The test suggested is a general one, and it requires the court to consider the nature of the benefit which the defendant seeks to set off against the damages, and to enquire whether the person or body supplying the benefit intended that the plaintiff should enjoy it in addition to whatever damage he might recover from the defendant."

68. This test of intention was recently confirmed by the High Court of Australia in the case of *Zheng v Cai*[43], a personal injury claim following a road traffic accident. There, the claimant had undertaken voluntary work for her church from whom she received fortnightly payments into her bank account. The defendant sought credit for such payments, but its argument was rejected with French C.J. stating at paragraph 23 that:

"The critical question, on the respondent's case was whether the payments by the Assembly where intended by it to operate in the interest of the respondent and to diminish the damages he otherwise would be liable to pay."

5. It is also relevant to note that the "*ordinary course of business*" test has been adopted as a valid demarcation line in Canada; see *Apeco Canada Ltd v. Windmill Place*[44].

[43] [2009] HCA 52
[44] [1978] 2 RCS 385

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