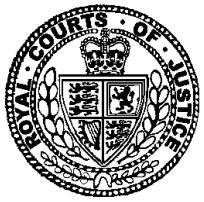

Neutral Citation Number: [2021] EWCA Civ 57

Case No: A4/2020/0105A, 0341A and 0410A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
SIR MICHAEL BURTON GBE (sitting as a Judge of the High Court)
CL-2017-000542

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

LORD JUSTICE FLAUX

- -

Between:

NECTRUS LTD	**Applicant**
- and -	
UCP PLC	**Respondent**

- -
- -

Mr Andrew Butler QC, Mr Andrew Legg and Mr Edward Blakeney (instructed by **Hugh Cartwright & Amin**) for the **Applicant**
Mr Huw Davies QC and Mr Felix Wardle (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Respondent**

Hearing date: Wednesday 13 January 2021

- -

Approved Judgment

Lord Justice Flaux:

Introduction

1. The applicant Nectrus makes an application dated 28 September 2020 for reconsideration under CPR 52.30 of my Order dated 24 July 2020 refusing it permission to appeal. Such applications are normally dealt with on paper, but at the request of the applicant, I fixed the application for a full hearing on 13 January 2021, at which both parties were represented. To put the application in context it is necessary to examine the facts and the procedural history in a little detail.

Factual and procedural background

2. UCP and its then 100% subsidiary, Candor, engaged Nectrus to provide investment management advice under a tripartite Investment Management Agreement ("IMA") dated 14 December 2006. UCP made substantial investments in India through Candor which held shares in a number of Indian SPVs. Nectrus caused or permitted the Indian SPVs to place substantial amounts of cash with SREI and a number of entities associated with the Aten Group. The cash invested with the Aten Group was then invested onwards in a number of manifestly inappropriate companies which were referred to before the judge, Sir Michael Burton, as the Sham Entities. That money was ultimately not recovered. The sums invested with SREI and the Aten Group are referred to as "the Stranded Deposits".

3. In 2013, a company in the Brookfield Group expressed an interest in purchasing UCP's 100% shareholding in Candor. During the due diligence exercise, the existence of the Stranded Deposits became apparent to UCP and Brookfield. Brookfield did not wish to purchase the right to seek to recover the Stranded Deposits, so it was agreed that the sale price of Candor would be reduced to reflect the value of the Stranded Deposits if they were not returned by the completion date. Completion was on 4 November 2014 and the Stranded Deposits had not been recovered, so the sale price paid by Brookfield to UCP for Candor was adjusted downwards by about £15.8 million to reflect the value of the Stranded Deposits.

4. In its claim before the Commercial Court issued on 31 August 2017, UCP claimed damages from Nectrus for breach of the IMA, in the amount of the discount from the purchase price. In his Liability Judgment dated 5 July 2019, the judge held that, in causing or permitting the investment with the Aten Group, Nectrus had breached the IMA. UCP's complaints about the SREI investments were dismissed by the judge and, although the Court of Appeal gave permission to appeal, the appeal was not pursued by UCP.

5. The trial had been a split one because, at the outset of the liability hearing, Nectrus raised for the first time a defence which relied upon the rule against reflective loss, asserting that the losses claimed were irrecoverable because they were reflective of losses suffered by Candor. It was said that, after Brookfield purchased Candor at the discount price, Candor could nonetheless have sued

Nectrus under the IMA for the same amount as UCP was seeking to recover from Nectrus, so UCP's claim was barred by the "no reflective loss" rule.

6. The judge rejected that argument in his Quantum Judgment dated 29 November 2019, upholding the argument of Mr Huw Davies QC on behalf of UCP that the no reflective loss rule did not apply to a claim made by a party who was an ex-shareholder in the company at the time of the claim, distinguishing my judgment in the Court of Appeal in *Marex v Sevilleja* [2019] QB 173. As the judge noted, the Supreme Court had heard the appeal in *Marex*, but judgment was awaited. The judge also held at [27] that UCP's claim as ex-shareholder was a separate and distinct claim from that of the company, Candor. The judge awarded damages corresponding to the shortfall in the sale price attributable to the Aten investments, some £5.8 million.

7. Nectrus applied for permission to appeal on various grounds. By my Order dated 29 May 2020 I refused permission on all but one of those grounds, which was Ground 2, that the judge had been wrong not to apply the rule against reflective loss to this claim, on the basis that UCP should not be entitled to escape the rule by having sold its shareholding at what it knew to be an undervalue prior to bringing a claim. At the time that I was considering the application for permission to appeal, the judgment of the Supreme Court was still awaited. Accordingly, I granted contingent permission to appeal in these terms:

> "On the basis of the law as it stands set out in my judgment in *Marex v Sevilleja* [2019] QB 173, it is arguable that the judge erred in not concluding that UCP was precluded from recovery by the reflective loss principle. Whether my judgment does correctly state the law will depend upon the outcome of the appeal to the Supreme Court from that decision. Unfortunately the judgment(s) of the Supreme Court have not yet been handed down, so it seems appropriate to grant permission to appeal on Ground 2 on the contingent basis that the matter is referred back to me for further consideration when the judgment(s) of the Supreme Court have been handed down."

The Supreme Court judgments in *Marex*

8. The judgments of the Supreme Court were handed down on 15 July 2020. Lord Reed (with whom Lady Black and Lord Lloyd-Jones agreed) held that the rule against reflective loss was limited to cases of shareholders within the original rule as formulated by this Court in *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204. Two citations from his judgment will suffice to demonstrate this point.

9. At [9] he identified that case as establishing a "highly specific exception to the general rule" in these terms:

> "9. The fact that a claim lies at the instance of a company rather than a natural person, or some other kind of legal

> entity, does not in itself affect the claimant's entitlement to be compensated for wrongs done to it. Nor does it usually affect the rights of other persons, legal or natural, with concurrent claims. There is, however, one highly specific exception to that general rule. It was decided in the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 that a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company. As appears from that summary, the decision in *Prudential* established a rule of company law, applying specifically to companies and their shareholders in the particular circumstances described, and having no wider ambit." (my emphasis)

10. Having then analysed all the authorities from *Prudential* onwards, he concluded at [89]:

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

11. Lord Hodge delivered a concurring judgment limiting the rule to the position of shareholders covered by the principle in *Prudential* saying at [99]-[100]:

> "99. The Court's reasoning [in *Prudential*] on p 223, which Lord Reed has quoted at paras 27 and 29 above, has been criticised because the stark assertion, that the shareholder "does not suffer any personal loss" by the diminution in the value of its shares or of the distributions which it received, cannot be taken at face value - clearly the shareholder suffers economic loss - and because the example of a non-trading company whose only asset was a cash box containing £100,000 is an oversimplification. But the reasoning is nonetheless clear where the Court asserts (a) that the deceit on the shareholder causes the shareholder "no loss which is separate and distinct from the loss to the

> company" (p 223), (b) that "when the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting" (p 224), and (c) that "[a] personal action would subvert the rule in *Foss v Harbottle*", a rule which "operates fairly by preserving the rights of the majority" (p 224). I agree with Lord Reed (para 28 above) that what the Court was saying is that where a company suffers a loss as a result of wrongdoing and that loss is reflected to some extent in a fall in the value of its shares or in its distributions, the fall in the share value or in the distributions is not a loss which the law recognises as being separate and distinct from the loss sustained by the company.
>
> 100. That is the full extent of the "principle" of reflective loss which the *Prudential* case established. It was not articulated as a general principle to be applied in other contexts; it is a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as shareholder." (my emphasis)

12. The minority judgment of Lord Sales (with whom Lady Hale and Lord Kitchin agreed) concurred in the result of the appeal but would have effectively abolished the reflective loss principle in so far as it applied to shareholder claimants, as is clear from [211]:

> "211. In my judgment, the foundation in the reasoning of Lord Bingham and Lord Millett regarding the reflective loss principle in respect of shareholder claimants is not sustainable. I would not follow Johnson in so far as it endorsed the reflective loss principle identified in *Prudential* in relation to claims by shareholder claimants. But even if the principle is to be preserved in relation to such claimants, the questionable nature of the justification for it means that it is appropriate for this court to stand back and ask afresh whether it can be justified as a principle to exclude otherwise valid claims made by a person who is a creditor of the company. We are not trapped by *Prudential* and the speeches of Lord Bingham and Lord Millett in *Johnson* in the way in which the Court of Appeal in *Gardner v Parker* felt that it was bound by their reasoning. For the reasons given above, I would hold that the reflective loss principle, if it exists, does not apply in the present case."

The refusal of permission to appeal and events leading up to this application

13. Following the hand down of the Supreme Court judgments, the solicitors for Nectrus, Hugh Cartwright & Amin, wrote a letter to the Civil Appeals Office on 17 July 2020, in which it was asserted that the majority of the Supreme Court had reaffirmed the reflective loss principle, but had not decided whether that principle applies to a shareholder which suffers loss in that capacity, but which then goes on to sell its shareholding. That issue was said to be ripe for resolution by the Court of Appeal. It was submitted that the reasoning of the Supreme Court supports Nectrus' argument that UCP's claim is barred by the reflective loss principle, on the basis that it claims for loss suffered in the capacity of shareholder i.e. for diminution in the value of its shareholding in Candor.

14. Mr Butler QC for Nectrus placed some emphasis in this application on the last paragraph on the first page of the letter (to which I will return):

> "Nectrus recognises that certain of its arguments advanced in its skeleton in support of its application for permission to appeal …can no longer proceed in the same form following the decision of the Supreme Court in *Marex*, for example at paragraphs 50 (second half), 51, 52-53 (in part). However, the core of Nectrus' argument on reflective loss remains, see e.g. paragraphs 46, 49, 50 (first half), 52-53 (in part), 54, 55. Further argument will be needed to address the decision of the Supreme Court in *Marex* directly. Nectrus' appeal skeleton argument will identify points that can no longer be advanced and focus the argument on the law as it applies following the Supreme Court's decision in *Marex.*"

15. The letter goes on to argue that the decision of the Supreme Court does not authoritatively deal with the situation that is 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. Reliance is placed on what Lord Sales said at [158] of his judgment: "It should not make any difference to the position whether the claimant has sold his shares or has decided to retain them". The Court of Appeal is asked to make clear for the first time that it makes no difference.

16. The next paragraph of the letter is important. It says:

> "In Nectrus' submission, it therefore remains strongly arguable that the judge erred in not concluding that UCP was precluded from recovery by the reflective loss principle. However, if the court would like to receive further submissions on this topic from the Appellant (or both parties), the Appellant remains at the Court's disposal and would be pleased to provide a replacement skeleton argument in support of its application for permission to appeal".

17. The letter then raises various arguments as to why Nectrus' appeal should be dealt with before that of UCP, before concluding in the last two paragraphs:

> "In view of the foregoing matters, Nectrus invites the Court of Appeal to remove the contingent basis of its grant of permission to appeal and direct that UCP's appeal be stayed pending determination of Nectrus' appeal on reflective loss.
>
> In the alternative, if the Court of Appeal would like further submissions from Nectrus or both parties on the issue of Reflective Loss before revisiting its decision to grant contingent permission to appeal, Nectrus asks the Court to make directions accordingly".

18. On 21 July 2020, the solicitors for UCP, Skadden Arps, wrote to the Civil Appeals Office saying that UCP requested the converse to the request in the letter of 17 July for the Court to lift the contingent basis of its grant of permission to appeal, in other words it asked the Court to refuse permission to appeal on the basis that my judgment in *Marex* no longer represented the law. That letter continued:

> "The scope of the rule against recovery of reflective loss has been significantly narrowed and does not apply to, and cannot be extended to cover, the circumstances of the present case. UCP's claim for breach of contract is 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 is no scope for the application of the limited rule as accepted by the majority in *Marex*."

19. The letter went on to invite the Court to refuse Nectrus' application for permission to appeal or if not minded to adopt that course, to make directions for the filing of further argument by the parties in the light of *Marex*. I note that that letter was sent by email to Nectrus' solicitors.

20. That correspondence was put before me and, having considered it and read the judgments of the Supreme Court in *Marex*, I made an Order on 24 July dismissing the application for permission to appeal in these terms:

> "Decision: This application has been referred back to me at my direction to consider whether permission to appeal on Ground 2 should still be granted in the light of the judgments of the Supreme Court in *Sevilleja v Marex* [2020] UKSC 31. I consider that permission to appeal on Ground 2 should now be refused.
>
> Reasons
>
> 1. In view of the limitation placed by the majority of the Supreme Court who considered that the rule against

> "reflective loss" should be maintained but only to the extent recognised by the Court of Appeal in *Prudential Assurance v Newman Industries (No 2)* [1982] Ch 204 where the claim in question was by a shareholder, I consider that the judge in the present case was right to conclude that the rule did not preclude the claim by UCP in the present case.
>
> 2. Given the reasoning and conclusion of the Supreme Court, Ground 2 is not arguable."

21. On 28 July 2020 Nectrus' solicitors wrote to the Civil Appeals Office referring to this Order and saying that they considered it to be an Order made under the Court's own initiative and without Nectrus having had the opportunity to make representations. It was asserted that I had misread the effect of the decision of the Supreme Court, so my decision was wrong. It was therefore intended to make an application under CPR 3.3(5) to have the Order set aside or varied. In the light of what is now said on behalf of Nectrus, the letter continued, in a revealing paragraph:

> "Nectrus recognises that there may be an argument that the jurisdiction under CPR 3.3(5) is not engaged in the present circumstances, and therefore intends to make application in the alternative for permission to reopen the appeal under CPR Part 52.30."

22. In view of the forthcoming vacation, that letter sought over six weeks to make any such application, until 11 September 2020. In response to that letter, Skadden Arps wrote the same day, 28 July 2020, saying that to delay matters would prejudice UCP and undermine the principle of finality of litigation, continuing that the proposed application(s) had no prospect of success, since (i) CPR 3.3(5) did not apply as the Order was not made of the Court's own initiative, but in response to Nectrus' representations in the letter of 17 July where the primary position was that an Order should be made without the need for further representation; (ii) the very high threshold imposed by CPR 52.30 was not met. The letter said that if Nectrus wished to pursue any application it should do so in time by 31 July 2020. That was evidently a reference to CPR 3.3(6) which provides that, unless the court specifies a period in which an application under CPR 3.3(5) is to be made, it should be made within no more than 7 days after service of the order on the party making the application. Also, although CPR 52.30 does not specify a time limit for making an application to reopen a decision to refuse permission to appeal, such applications must be made promptly and delay in making an application is a relevant factor pointing towards refusal of an application: see per Hickinbottom LJ in *R (Akram) v SSHD* [2020] EWCA Civ 1072 at [37].

23. On 30 July 2020, the parties were informed that I directed that any application should be served by 4pm on 31 July 2020 and I would then, if necessary, deal

with the application before going on vacation. On 31 July 2020, Nectrus then sought to issue an application under CPR 3.3(5), but not in the alternative under CPR 52.30. That application was supported by the first witness statement of Mr Atul Amin of Nectrus' solicitors, at [33.1] to [33.9] of which he set out in detail Nectrus' case as to why the Supreme Court in *Marex* supported its case that the rule against reflective loss applied to the present case.

24. On 3 August 2020, the Civil Appeals Office sent a detailed email to Nectrus' solicitors explaining that I had directed that my Order of 24 July had not been made of my own initiative but in response to their letter of 17 July 2020 and that if Nectrus wished to challenge my Order an application to reopen under CPR 52.30 must be made. The email went on to explain the limited and exceptional nature of that jurisdiction. Although Mr Butler QC is critical of the approach of the Civil Appeals Office, that criticism is unwarranted. As Skadden Arps had pointed out correctly, my Order of 24 July 2020 was not made of my own initiative, but in response to Nectrus' solicitors' representations in their letter of 17 July 2020 and Skadden Arps' letter in response of 21 July 2020. The revealing paragraph in the further letter from Nectrus' solicitors of 28 July to which I have referred at [21] above was effectively recognising that they might well be wrong that an application under CPR 3.3(5) was the appropriate application, for that very reason. At all events, upon receipt of the Civil Appeals Office email of 3 August 2020, Nectrus and its legal advisers were well aware that, so far as the Court was concerned, any challenge to my Order should be brought under CPR 52.30 not 3.3(5). They were also aware from my direction that any application (whether under CPR 3.3(5) or 52.30) should be made by 4pm on 31 July that I had rejected their application for an extension of time until 11 September to make any application.

25. However, Nectrus did not issue this application promptly after the email of 3 August 2020. The application was not issued until 28 September 2020, nearly two months later and 17 days after the date to which they had sought an extension which had been refused by the Court. Nectrus did not even seek a further extension of time from the Court after 3 August but simply took its own course. In the meantime, Nectrus' solicitors in the Isle of Man (where related proceedings are taking place) informed UCP that Nectrus considered the current proceedings "currently stood concluded". UCP sought clarity as to whether that meant that the proposed CPR 52.30 application had been abandoned, but Nectrus declined to confirm either way. Over a month later, on 11 September 2020, Nectrus' English solicitors informed UCP that they had instructions to file an application under CPR 52.30 in the next few weeks and sought an undertaking from UCP not to make a distribution to its shareholders in the interim. On 16 September 2020, Nectrus' Isle of Man solicitors wrote to UCP saying that if that undertaking were not given, they would be required to seek an injunction. On 22 September 2020, UCP responded, refusing to give the undertaking. Nectrus has not made any application for an injunction as threatened.

26. The present application was issued on 28 September 2020, over two months after the Order of 24 July 2020 which it seeks to reopen. Nectrus has not put forward any legitimate excuse for this leisurely approach. In his second witness statement in support, Mr Amin of Nectrus' solicitors simply asserted that the application

had been made "promptly", which it clearly had not. In his third statement, Mr Amin sought to suggest that because the Court had declined to grant an extension of time for making an application under CPR 3.3(5), there was no deadline for making an application under CPR 52.30. That is not correct: the Court had directed that any application, i.e. whether under CPR 3.3(5) or 52.30, should be made by 4 pm on 31 July 2020, a deadline which Nectrus simply disregarded in relation to its application under CPR 52.30, without seeking a further extension from the Court. Mr Amin went on to suggest that the application could not be made until it was because of the "summer holiday season", the need to involve both counsel, the lay client and members of his firm who were away on holiday and their entitlement to prepare the application properly. None of those matters could begin to justify the delay of nearly two months. Furthermore although in his oral submissions, Mr Butler QC sought to excuse the delay on the basis that this was a complex matter and that, because the application under CPR 52.30 was "the last chance saloon", Nectrus needed to make sure the application was made properly, it is striking that the vast majority of the points made about Nectrus' position on *Marex* at [25.1] to [25.12] of Mr Amin's second witness statement simply repeat what he had said at [33.1] to [33.9] of his first witness statement dated 31 July 2020.

CPR 52.30 and the law on it

27. The relevant provisions of CPR 52.30 are as follows:

> "Reopening of final appeals
>
> 52.30—
>
> (1)
>
> The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal."

28. The jurisdiction is a very limited one only exercised in truly exceptional circumstances. The applicable principles were summarised by this Court at [9] to [15] of the judgment of the Court (Sir Terence Etherton MR, McCombe and Lindblom LJJ) in *Goring-on-Thames Parish Council v South Oxfordshire DC* [2018] EWCA Civ 860; [2018] 1 WLR 5161:

"9. This rule enshrines the residual jurisdiction, confirmed by a five-judge constitution of the Court of Appeal in *Taylor v Lawrence*, to re-open an appeal so as to avoid real injustice in circumstances that are exceptional. In confirming the existence of this jurisdiction, the court emphasized (in paragraph 55) "… the greatest importance … that it should be clearly established that a significant injustice has probably occurred and that there is no alternative remedy".

10. The note in the White Book Service 2018 describing the scope of the rule states, at paragraph 52.30.2:

> "… Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings … has been critically undermined. … ."

11. We would endorse those observations, which are justified by ample authority in this court. The relevant jurisprudence is familiar, but the salient principles bear repeating here.

12. Giving the judgment of the court in *In re Uddin (A Child)* [2005] 1 WLR 2398, Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the *Taylor v Lawrence* jurisdiction "can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined". And she added this (in paragraph 22):

> "22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result has in fact been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1). It is to be remembered that apart from the requirement of no

> alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations": *Taylor v Lawrence* [2003] QB 528, para 55. Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

13. In *Barclays Bank plc v Guy (No.2)* [2011] 1 WLR 681 Lord Neuberger M.R. said (in paragraph 36 of his judgment):

> "36. … If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). … ."

14. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):

> "65. … The following principles relevant to [the] application [of CPR 52.17, as the relevant rule then was] to this appeal appear from *Re Uddin (A Child)* … and *Guy v Barclays Bank plc* … . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in *Taylor v Lawrence* … . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud

> or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."

Sir Terence Etherton C went on to say (in paragraph 69):

> "69. … [The] appellants' reasons for re-opening the application for permission to appeal Judge May's possession order amount, on one view, to no more than a criticism that Arden LJ's decision to refuse permission to appeal was wrong. That is not enough to invoke the *Taylor v Lawrence* jurisdiction."

> 15. For completeness, there should be added to that summary of the principles in *Lawal* the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

29. In the specific context of refusal on paper of permission to appeal, I agree with Mr Davies QC that what was said by this Court at [29] and [31] is also of importance and should guide the Court on the present application:

> "29 In our view, Mr Streeten was right to concede as much as he did. The court's jurisdiction under CPR 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". It is "exceptional" in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered "Yes", the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong.

> 31 In the context of an application for permission to appeal whose consideration is said to have been critically undermined or corrupted, the first question will be whether the judge whose decision is the subject of the application to re-open has sufficiently confronted and dealt with the grounds of appeal. Secondly, if the conclusion is reached that the process has been critically undermined it will still be necessary for the court to consider whether, had that not been so, that it is highly likely, in the sense of there being a powerful probability, that the decision on the application for permission to appeal would have been different and that permission to appeal would have been granted."

Submissions of the parties and discussion

30. The principal submission advanced by Mr Butler QC on behalf of Nectrus was that the integrity of the appeal process was fatally undermined because my Order of 24 July 2020 was in breach of the principles of natural justice, in that I had made the Order without permitting Nectrus to make submissions as to the consequences of the decision of the Supreme Court in *Marex* on the relevant ground of appeal. When I pointed out, during the course of argument, that nowhere in the letter of 17 July had Nectrus asked the Court, if it were minded to dismiss the application for permission to appeal, not to do so until Nectrus had had an opportunity to put in further, more detailed written submissions, Mr Butler QC accepted that but submitted that it had been fair and logical for Nectrus to take the view that the decision of the Supreme Court was in its favour. In those circumstances, he submitted that it was perfectly proper for it not to have said, in effect, we are in trouble on the reasoning of the Supreme Court, please give us 14 days to put in further submissions. Mr Butler QC submitted that, on receipt of the letter, the Court had had two options: either to make permission to appeal unconditional or to give directions for the filing of further submissions. The Court should not have determined the application for permission to appeal against Nectrus without affording it an "effective opportunity to make representations" and in doing so, the Court had breached the principles of natural justice; [14] of Dyson LJ in *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418.

31. Mr Butler QC relied upon two passages in the judgment of Lord Woolf MR in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 itself. First, [26]:

> "…it is desirable to note that, while, if a fraud has taken place a remedy can be obtained, even if the Court of Appeal has no "jurisdiction", it does not necessarily follow that there are not other situations where serious injustice may occur if there is no power to reopen an appeal. We stress this point because this court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and

> setting precedents. (See the White Book Service 2001 paragraph 52.0.3.)"

32. That passage was relied upon by Mr Butler QC to support the submission that a pillar of the jurisdiction to re-open appeals or refusals of permission to appeal under what is now CPR 52.30 was where a decision could be said cogently to be wrong. He submitted that this was the position in relation to my refusal of permission to appeal, given that the Supreme Court in *Marex* had not dealt with the position of an ex-shareholder and this was a point which cried out for determination by this Court.

33. The second passage on which he relied was at [44] where Lord Woolf MR cited what Lord Browne-Wilkinson said in *Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132: "…it should be made clear that [the Court] will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure." Mr Butler QC submitted that that is what had happened here. Through no fault of its own, Nectrus had been subjected to an unfair procedure by this Court having determined the application for permission to appeal against it, without affording it an opportunity to put in fuller and more detailed submissions on *Marex*. He stressed that it was important that the procedure by which permission to appeal was withdrawn was unimpeachable.

34. I agree with Mr Davies QC for UCP that the contention that there was a breach of the principles of natural justice or that I adopted an unfair procedure or that the litigation process was fatally undermined is misconceived. Nectrus set out in its letter of 17 July 2020 submissions as to why the Court should confirm that Nectrus should have permission to appeal following the Supreme Court judgments in *Marex*. The letter was not, as Nectrus now seeks to characterise it in its application "a brief letter sent to progress the appeal", but it was clearly a letter arguing Nectrus' case as to why it should have permission to appeal. Nowhere in that letter did Nectrus say that, if the Court did not accept the point made in the letter that Nectrus should have permission to appeal, the Court should not proceed to deal with the application for permission to appeal unless and until Nectrus had had an opportunity to put in yet further written submissions. On the contrary, in the paragraphs on the second page which I quoted at [16] and [17] above, Nectrus merely indicated that, if the Court considered that further submissions would be helpful before reaching its determination, Nectrus would be pleased to provide them. It was not saying that the Court should not make that determination until Nectrus had expanded on the points set out in its letter. In writing those paragraphs, Nectrus was plainly envisaging a situation where, as I determined after considering the letter of 17 July and the reply of 21 July, the Court did not require further submissions on the topic.

35. As I have indicated, Mr Butler QC placed some reliance on the paragraph on the first page of the letter which I have quoted at [14] above. However, in the context of the letter as a whole, that paragraph was doing no more than acknowledging that, in the event that the Court did give permission to appeal, it would be necessary for Nectrus to file a further skeleton argument. It was not saying that in any event the Court should allow Nectrus to file a further skeleton before determining the application for permission to appeal.

36. Furthermore, it was quite clear from Skadden Arps' letter in response dated 21 July 2020, that UCP was asking the Court to refuse permission to appeal without the need for any further submissions, on the basis that Nectrus' case was unarguable in the light of the Supreme Court judgments in *Marex*. Although Mr Amin asserts in his witness statement that Nectrus has not had an opportunity to respond to the points made in the letter, that is not correct. The letter was sent to Hugh Cartwright and Amin by email. 21 July was a Tuesday and my Order was not made until the following Friday 24 July. Mr Amin does not say that he did not read the letter at the time and, on the basis that he did, he must have appreciated that UCP was asking the Court to dismiss the application for permission to appeal without the need for any further submissions. If, as is now asserted, Nectrus wanted to put in yet further submissions, it had three days in which to do so or, if it needed more time, to write a short letter to the Court requesting the Court not to determine the application until it had had an opportunity to make further written submissions. Had it done so, I would have set a timetable, albeit not a leisurely one, for the serving of further submissions by both parties.

37. In the circumstances, if as is now asserted, Nectrus wanted to put in further submissions before the application was determined, it has only itself to blame for not having done so, or at the least for not having written to the Court asking for the opportunity to put in further submissions, the one request noticeably lacking from its letter of 17 July. There is no question of the principles of natural justice having been breached or of there being any procedural unfairness. It cannot be said that the integrity of the litigation process had been fatally undermined, so that an essential precondition for a successful application under CPR 52.30 cannot be satisfied in this case and, on that ground alone, this application must fail.

38. Furthermore, there is and was nothing in Nectrus' proposed application under CPR 3.3(5). That provision only applies where the Court has made an Order under CPR 3.3(4) of its own initiative without giving the parties the opportunity to make submissions. My Order of 24 July was made after I had been invited in written submissions from both parties to determine the application for permission to appeal. Accordingly CPR 3.3(5) was of no application and, to the extent that Nectrus wished to challenge the refusal of permission to appeal, it could only do so if it could satisfy the stringent conditions of CPR 52.30, which as I have just said, it cannot.

39. However, as Mr Davies QC correctly submitted, even if Nectrus could demonstrate at the first hurdle that the litigation process was fatally undermined, this application could still not succeed unless Mr Butler QC could demonstrate a powerful probability that my Order of 24 July refusing permission to appeal was wrong or, at least that if, as Mr Butler QC contends the Court should have allowed Nectrus to put in more detailed written submissions, there is a powerful probability that the decision I reached would have been different: see [29] of the judgment of the Court in the *Goring-on-Thames Parish Council* case and [61(5)] of the judgment of this Court (Sir Keith Lindblom SPT, Coulson and Andrews LJJ) in the recent case of *R (Wingfield) v Canterbury City Council* [2020] EWCA Civ 1588, reaffirming the applicable principles.

40. Mr Butler QC submitted that my decision of 24 July 2020 refusing permission to appeal misunderstood the judgments of the Supreme Court and involved a manifest error of law. He submitted that when UCP's cause of action accrued by Nectrus breaching the IMA by making the Stranded Deposits, UCP was a shareholder in Candor and its claim would have been barred by the rule against reflective loss. As a matter of principle, UCP should not be entitled to convert a loss which would not have been recoverable by it whilst a shareholder, into one which is recoverable by the voluntary act of selling its shareholding after the relevant wrongdoing occurred. This would have unfortunate consequences such as, if the company entered a compromise of a claim against the wrongdoer which the shareholder did not like, it could sell its shareholding and make a claim itself. This would distort any liquidation and would create an unwarranted distinction between a shareholder and an ex-shareholder. On the correct interpretation of the judgments in the Supreme Court in *Marex*, the rule against reflective loss applied just as much to an ex-shareholder as to a shareholder. The distinction between the two for which UCP contends is illogical which was essentially the point I had made in my judgment in *Marex* in the Court of Appeal at [33]. The underlying logic of the rule applying to ex-shareholders as much as to shareholders was said to support Nectrus' position.

41. Mr Davies QC submitted that there were five overarching points which demonstrated that Mr Butler QC came nowhere near establishing that my decision refusing permission to appeal was even arguably wrong and, on the contrary, demonstrated that my decision was clearly correct. I found each of those points compelling.

42. The first point was that it was important to understand the nature of the claim made in the proceedings. It was in respect of a loss which UCP had suffered on its sale of its 100% shareholding in Candor. Brookfield obtained the shareholding at a discount and it was at that time that the loss crystallised. 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. In my judgment, this analysis is correct. Mr Butler QC sought to contend that the applicability of the rule against reflective loss should be assessed at the date the cause of action for breach of contract arose, but as Mr Davies QC pointed out, it was common ground before the judge that the issue as to whether the loss is precluded by the rule against reflective loss is to be assessed at the time the claim was made. As the judge said at [16] of the Quantum Judgment:

> "It was common ground, as indeed recently spelt out in *Primeo Fund v Bank of Bermuda (Cayman) Ltd***,** in the Court of Appeal of the Cayman Islands 13 June 2019 CICA (Civil) Appeal No 21 of 2017 (Field, Birt, Beatson JJA at 371, 415), approving the first instance decision of Jones J, that "*whether or not any particular loss is reflective of the company's loss has to be determined on the basis of the factual circumstances existing at the time the claim is made.*"'"

43. Even if that point had not been common ground, I consider that it is correct as a matter of principle that the applicability of the rule against reflective loss should be assessed when the claim is made, at a time when the loss claimed has

crystallised, not at some earlier date when, although there may have been a breach of contract, the loss claimed had yet to crystallise. Looking at the loss when the claim was made it can be seen that, as Mr Davies QC correctly put it, it is not a claim made in the capacity of shareholder, but a free-standing claim in breach of contract for loss suffered by UCP through ceasing to be a shareholder. As the judge correctly characterised it at [27] of the Quantum Judgment, the ex-shareholder had a separate and distinct claim from that of the company.

44. Mr Davies QC's second point was that the problem which Nectrus' argument faces is that, from the express terms of the judgments in the Supreme Court, it is clear that the rule does not apply to a claim by an ex-shareholder. Despite Mr Butler QC's valiant attempt to argue the contrary, that is clearly correct. 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. It is quite clear, from all the judgments, that the Supreme Court was intent on limiting the scope of the rule against reflective loss to the narrow principle or rule in *Prudential.* There is simply no warrant for extending the rule in the way for which Nectrus contends.

45. Mr Davies QC's third point was that the inapplicability of the rule against reflective loss to claims by ex-shareholders was demonstrated by the whole premise or rationale of the rule as found by the Supreme Court, which was that because of the shareholder's right of participation in the company, even if the wrongdoer has caused the shareholder loss as well as the company, that loss is not recognised as having an existence distinct from the company's loss because of the rule in *Foss v Harbottle* (1843) 2 Hare 461, a rule of company law.

46. As Mr Davies QC correctly submitted, this rationale was explained by Lord Reed in *Marex* at [10] of his judgment:

> "The rule in *Prudential*, as I shall refer to it, is distinct from the general principle of the law of damages that double recovery should be avoided. In particular, one consequence of the rule is that, where it applies, the shareholder's claim against the wrongdoer is excluded even if the company does not pursue its own right of action, and there is accordingly no risk of double recovery. That aspect of the rule is understandable on the basis of the reasoning in *Prudential*, since its rationale is that, where it applies, the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss. On that basis, a claim by the shareholder is barred by the principle of company law known as the rule in *Foss v Harbottle* (1843) 2 Hare 461: a rule which (put shortly) states that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself."

47. This analysis was expanded by Lord Reed later in his judgment at [33] to [37] in his discussion of the rule in *Prudential,* where the Court had said that to allow the shareholder to pursue a personal action would subvert the rule in *Foss v Harbottle*. At the end of [37], Lord Reed said:

> "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 fortunes 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": *Townsing v Jenton Overseas Investment Pte Ltd* [2007] SGCA 13; [2008] 1 LRC 231, para 77."

48. This was the same point as Lord Bingham made in his first proposition in *Johnson v Gore Wood* [2002] 2 AC 1 at 35-36 as Lord Reed said at [42] having quoted Lord Bingham's statement of principle at [41]:

> "In Lord Bingham's proposition (1), the first sentence is a statement of the rule in *Foss v Harbottle*. The second sentence encapsulates the reasoning in *Prudential*, and explains why, in the circumstances described, a shareholder who is "suing in that capacity and no other" cannot bring a claim consistently with the rule in *Foss v Harbottle*."

49. At [51] of his judgment, Lord Reed emphasised that it was, in effect, this unity of economic interest, not the principle against double recovery, which explained the rule in *Prudential*:

> "As explained at para 33 above, the principle that double recovery should be avoided is not in itself a satisfactory explanation of the rule in *Prudential*. As was explained at paras 34-37 above, the unique position in which a shareholder stands in relation to his company, reflected in the rule in *Foss v Harbottle*, is a critical part of the explanation. In addition, as was explained at para 38 above, there are pragmatic advantages in adopting a clear rule. However, by treating the avoidance of double recovery - a principle of wider application - as sufficient to justify the decision in *Prudential*, Lord Millett paved the way for the expansion of the supposed "reflective loss" principle beyond the narrow ambit of the rule in *Prudential*."

50. Although Mr Butler QC sought to rely upon some of the same passages at [33] to [37] as supporting his case, they clearly do not. As Mr Davies QC correctly submitted, the rule in *Foss v Harbottle* manifestly does not apply to an ex-shareholder, so there is no reason for the rule against reflective loss to apply. Although Mr Butler QC sought to argue that, because UCP had voluntarily given up its rights as a shareholder, so that the rule should still apply, I agree that there is nothing in that point. As Mr Davies QC said, why should UCP be penalised for selling its shares at a discount, *a fortiori* where that crystallised the loss it had

suffered as a consequence of Nectrus' breach of contract. Once UCP had sold its shares, in my judgment there was no unity of economic interest between UCP and Candor and the claim was not made in the capacity of a shareholder.

51. Mr Davies QC's fourth point was that although [158] of Lord Sales' judgment was the high point of Mr Butler QC's case, the sentence relied on was taken out of context. I agree. The minority would have preferred to abolish the rule against reflective loss altogether, as [211] of Lord Sales' judgment makes clear, but at all events considered it should be limited to the circumstances of *Prudential*, in other words to claims by shareholders of the kind to which the majority had held the rule should be limited. That is yet another reason why there is simply no warrant whatsoever for the suggestion that the Supreme Court has somehow left open the argument that the rule against reflective loss should apply to a claim like the present.

52. It is important to read [158] of Lord Sales' judgment as a whole, which elucidates its true meaning and effect, which is not that contended for by Mr Butler QC. The whole paragraph provides:

> "One could also envisage a situation in which, after the defendant's wrongdoing, a claimant shareholder decided to sell his shares in the company, and in consequence of that wrongdoing received a lesser price than he otherwise would have done. In that case the claimant could recover for the crystallised loss he has suffered by way of the diminution in the shares' value due to the wrong committed by the defendant. Lord Millett appears to have contemplated that this might be so, since in explaining *Stein v Blake* [1998] 1 All ER 724 in *Johnson* he emphasised that the shareholder had not disposed of his shares in the company: [2002] 2 AC 1, 64B. In *Heron International Ltd v Lord Grade* [1983] BCLC 244 the Court of Appeal would have been prepared to distinguish *Prudential* and allow shareholders to sue for damages in a situation where breaches of fiduciary duty by a company's directors caused a diminution in the value of its assets resulting in a reduction in the value of its shares as sold by the shareholders in the market, albeit on the facts this had not occurred and would not occur: see p 262a-h; and see *Lin* [2007] CLJ 537, 554. In this situation, what the claimant has received for his shares by selling them in the market will have reflected the market's view of the value of the company's claims against the defendant (alongside its other assets and its general trading prospects). The company's claims against the defendant will have been brought into account for the credit of the defendant in this way, to the extent that they are material to valuing the claimant's loss, and it would not be unjust to allow the claimant to recover the full amount of his crystallised loss. It should not make any difference to the position whether the claimant has sold his shares or has decided to retain them. (In *Johnson* the House of Lords held

> that the claimant shareholder was entitled to claim in respect of his loss of a 12.5% shareholding in the company, transferred to a lender as security for a loan which, by reason of his lack of funds attributable to the defendant's wrongdoing, he was unable to redeem: [2002] 2 AC 1, 37A: presumably the value of what the claimant had lost would reflect the value which the relevant market would place upon the company as a company having amongst its assets its own cause of action against the defendant.)"

53. It is clear from the first two sentences that the minority considered that the rule against reflective loss would not preclude a claim by an ex-shareholder who received a lesser price for his shares than he would have done otherwise, but for the wrongdoing. The paragraph then explains why the minority considered that, on the existing state of the law, such a claim by an ex-shareholder was not precluded by the rule against reflective loss. Accordingly, the sentence relied upon by Mr Butler QC: "It should not make any difference to the position whether the claimant has sold his shares or has decided to retain them", far from supporting his case that the rule should preclude claims by ex-shareholders in the same way as it precludes claims by shareholders, in fact establishes the precise opposite. What Lord Sales was saying was that both current shareholders and ex-shareholders should be able to recover the diminution in value of the shareholding when this is caused by the wrongdoing of the third party, rather than only the ex-shareholder being able to recover.

54. Mr Davies QC's fifth point was that Mr Butler QC's suggestion that every time a shareholder sells shares it should factor in disputed claims by the company against the wrongdoer which justified the extension of the rule to ex-shareholders was wholly unrealistic and unnecessary. I agree. Furthermore, in so far as Mr Butler QC posited examples of situations where, if the rule did not apply to ex-shareholders, there would be a risk of double recovery, the Court can and always will avoid putting a defendant in double jeopardy. It can do so using the procedural tools it already has, without any need to extend the rule against reflective loss beyond the limited scope of the rule in *Prudential* to which the Supreme Court has clearly held that the rule should be limited.

55. In my judgment, despite the eloquence and ingenuity of Mr Butler QC's submissions, the contention that the Supreme Court has left open the possibility that the rule against reflective loss is applicable to an ex-shareholder in the position of UCP is unarguable.

56. Furthermore, there is nothing in the suggestion that what Lord Woolf MR said at [26] of *Taylor v Lawrence* would justify re-opening the refusal of permission to appeal because of the need to clarify the law and set a precedent, what might be described as Mr Butler QC's "ripe for determination by the Court of Appeal" point. Quite apart from the fact that it is made entirely clear by the Supreme Court that the rule is limited in the way I have described, which is not this case, this interpretation of what Lord Woolf MR said was decisively rejected by this Court in *Wingfield* at [55]-[56]:

> "In the course of her submissions, Ms Dehon alluded to this passage [in [26] of *Taylor v Lawrence*] to support her submission that CPR 52.30 existed to ensure that, as she put it, "the jurisprudence was not to be led astray", and that if a decision was going to be a precedent, and it was wrong, CPR 52.30 existed to correct it.
>
> 56 We are in no doubt that that is not what Lord Woolf C.J. had in mind in the passage to which we have referred. He was simply identifying the objectives that justified an inherent jurisdiction to reopen in exceptional circumstances. He was not suggesting that every decision that was arguably wrong could be reopened simply because of concerns about precedent. That would cut across his subsequent emphasis on the importance of finality and the exceptional case required to reopen an appeal."

57. Even if Nectrus had been able to overcome the high hurdles imposed by CPR 52.30, there remains the delay in the making of this application. Nectrus in effect ignored the direction I gave that any application should be made by 4 pm on 31 July 2020 and, even after the Civil Appeals Office had made it quite clear, in the email of 3 August 2020, that any challenge to my decision could only be by way of an application under CPR 52.30, Nectrus did not issue this application for nearly two months. By no stretch of the imagination could it be said that the application was made "promptly" and no legitimate excuse has been offered for that delay in the evidence put before the Court. In the modern world with the possibility of communication by email and over the internet, the intervention of the Long Vacation is clearly not an excuse for the delay. Furthermore, given that the challenge made is essentially one based upon an analysis of the law as determined by the Supreme Court in *Marex* and Nectrus had already set out its position in some detail in Mr Amin's first witness statement, it could not possibly have taken the best part of two months to prepare the application properly, even making every allowance for holiday arrangements. The delay in making the application is inimical to the public interest in finality. This would be a factor weighing heavily against allowing the application, even if it otherwise had any merit, which it does not.

58. For all these reasons, this application under CPR 52.30 is dismissed.