Neutral Citation Number: [2022] EWCA Civ 493

Case No: CA/2021/000474

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD.)
Chief Insolvency and Companies Court Judge Briggs (sitting as a judge of the High Court)
[2021] EWHC 22 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2022

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEWISON
and
LADY JUSTICE ANDREWS

- -

Between :

RICHARD TERENCE PERCY	**(Former Claimant)**
- and –	
1. MERRIMAN WHITE **2. RAYMOND ST JOHN MURPHY**	**(Defendants) Additional Claimants Respondents to the appeal**
- and –	
DAVID MAYALL	**Additional Defendant Appellant to the appeal**

Patrick Lawrence QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Michael Pooles QC and Henry Bankes-Jones (instructed by **DAC Beachcroft LLP**) for the **Respondents**

Hearing dates : 29 and 30 March 2022

Approved Judgment

Sir Julian Flaux C:

Introduction

1. The appellant David Mayall appeals (with the permission of Newey LJ) against the Order dated 1 February 2021 of Chief Insolvency Judge Briggs (sitting as a Deputy High Court Judge of the Chancery Division). By that Order, the judge gave judgment for the respondent, Merriman White ("MW") on its contribution claim against Mr Mayall under the Civil Liability (Contribution) Act 1978 ("the 1978 Act").

2. The contribution claim was made following the settlement by MW of the claim made against it by its former client Mr Percy. Mr Percy had originally sued both MW and Mr Mayall (who was the barrister instructed by MW on a derivative claim) for negligence. He discontinued his claim against Mr Mayall but continued against MW which settled by payment to Mr Percy of £250,000. The judge held that MW was entitled to 40% contribution from Mr Mayall.

Factual and procedural background

3. In 2007 Mr Percy and his business partner, Mr Trevor, set up a joint venture vehicle, Seven Holdings Limited ("Seven"), to purchase and develop certain properties in Kent. The shares of Seven were held by Langley Ward Limited ("Langley Ward") (owned by Mr Percy) and Madison Jay Limited (owned by Mr Trevor) on a 50/50 basis. As a result, disagreement between the pair would lead to deadlock. No shareholder agreement was ever signed which would have defined their rights and responsibilities.

4. Mr Percy and Mr Trevor fell out badly. There were a number of matters which soured their relationship but principal amongst them was that Mr Percy considered that Mr Trevor had misappropriated large amounts of money from Seven covertly. Seven was responsible for the development of two properties in particular:

   (1) 2 Austin Avenue purchased for £1,025,000 in February 2007. Substantial works were undertaken involving renovation of an existing bungalow and the building of two new residential properties;

   (2) 30 Sundridge Avenue purchased in February 2008 for £840,000. The vendor was a Julian Beale who was also concerned with a third property referred to below.

5. Mr Trevor was also developing for his own account a property at 7 Mavelstone Close which he bought from Mr Beale, who also owned 8 Mavelstone Close. That purchase took place at about the same time as Seven purchased 30 Sundridge Avenue. 7 and 8 Mavelstone Close were extensively developed in 2008 and 2009. Mr Percy was suspicious of these arrangements between Mr Trevor and Mr Beale and considered that Mr Trevor was developing his property using Seven's money and assets. In early 2010, Mr Percy instructed MW, where the sole practitioner was Mr St John Murphy, the second defendant. The matter was handled by an assistant solicitor Mr Jerome O'Sullivan, who had previously been an insurance loss assessor. He commenced an investigation, pursuing disclosure of documents which he described in his evidence as like pulling teeth, since Mr Trevor had arranged matters so that the company's books

and records were under his control. Mr O'Sullivan concluded that Mr Trevor had misappropriated at least £450,000 of Seven's money.

6. MW instructed Mr Mayall to advise. He was a senior junior having been called to the Bar in 1979 and was a tenant at Lamb Chambers in the Temple. At this stage, Seven was more or less at the end of its life with only the two new properties at Austin Avenue remaining to be sold and Mr Mayall had to advise as to what course of action would best resolve the problem of recovering what Mr Trevor had misappropriated. As Mr Patrick Lawrence QC on behalf of Mr Mayall submitted, there were three options: (i) to put the company into liquidation and leave recovery of what had been misappropriated to the liquidator; (ii) a derivative claim under sections 260 to 263 of the Companies Act 2006 by Langley Ward as shareholder on behalf of Seven against Mr Trevor and (iii) an unfair prejudice petition under section 994 of the Companies Act, although no-one recommended this last option. Mr Mayall advised Mr Percy to proceed by way of a derivative claim, which would require the permission of the Court to proceed. The derivative claim was issued on 1 November 2010 and Mr Mayall settled Particulars of Claim setting out allegations of breach of duty by Mr Trevor based on Mr Percy's instructions.

7. On 21 December 2010, there was a mediation before Mr Kallipetis QC. Mr Mayall did not attend and the mediation was conducted on behalf of Mr Percy by Mr O'Sullivan. Mr Trevor offered to settle for £500,000 inclusive of costs and Mr Percy counter-offered £750,000 plus costs. At that time his costs were about £105,000. The counter-offer was rejected. The gap between the parties was not that wide but was not able to be bridged.

8. The following day MW sent instructions to Mr Mayall to advise in a conference to be held on 5 January 2011. The matters on which his advice was sought included: (i) whether there was any merit in Mr Trevor's threat evidently made at the mediation to apply for a just and equitable winding up of Seven and (ii) whether Mr Percy should press on with proceedings with a view to obtaining prompt and comprehensive disclosure.

9. At the conference on 5 January 2011, Mr Mayall began by advising that as the company was effectively deadlocked, winding up the company was one of the options open to the Court. He said that as a liquidator would charge quite substantial fees it was very much the nuclear option as it would prejudice both shareholders equally.

10. There was then a discussion of whether Mr Trevor had made a director's loan to the company, though Mr Percy was adamant he had not. By way of overview Mr Mayall accepted that it was known that there was something fishy in the affairs of the company and there was no doubt Mr Trevor had used the resources of the company for private purposes. However he pointed out that the maximum amount that could be achieved by Mr Percy was limited to the maximum net profit previously discussed, evidently a reference back to the position if Mr Trevor were owed money by the company by way of director's loan.

11. In relation to the prospects of success at trial, Mr Mayall said that it very much depended on the quality of Mr Percy's evidence. There was then a discussion about what would be a reasonable settlement. Mr O'Sullivan pointed out that while counsel was pointing out the risks and costs of going to trial, Mr O'Sullivan recommended

continuing with the proceedings until Mr Trevor came up with an improved offer. It was agreed by Mr Mayall, Mr O'Sullivan and Mr Percy that a reasonable settlement figure would be somewhere between £400,000 and £750,000 plus costs but no final decision would be made until there had been further negotiations. Mr Percy indicated that he was prepared to accept £670,000 plus costs. Mr Mayall reminded Mr Percy that if he went to trial and lost or got less than whatever was the last protective offer Mr Trevor made before trial, he would end up paying both sides' costs. Mr Mayall agreed though that they should press on with proceedings with a view to obtaining comprehensive disclosure. There was a discussion at the conference about making a Part 36 offer and it was agreed to reiterate the last offer at the mediation, £750,000 plus costs, by way of a Part 36 offer.

12. On 13 January 2011 a few days after the conference there was a telephone discussion between Mr O'Sullivan and Mr Mayall in which the latter expressed a concern that Mr Percy would not be as good a witness as he thought. Mr O'Sullivan pointed out that Mr Mayall should be more positive in the future as Mr Percy was concerned that he would be too pessimistic. While the concerns Mr Mayall had were real, they were still a long way from trial.

13. A Part 36 offer was made to Mr Trevor's solicitors but, in the event, at the behest of Mr Percy, it was for £950,000 plus costs, a much higher amount than agreed at the conference. On 28 January 2011, there was a telephone call between Mr O'Sullivan and Mr Percy in which Mr O'Sullivan explained the discussion he had had with Mr Mayall after the conference. Mr Percy expressed the view that he could be as tough as Mr Trevor and if necessary was prepared to go all the way. Mr O'Sullivan cautioned him against the expense of such an approach but he was adamant that he would not be the one to blink first.

14. The hearing of the application for permission under section 261 of the Companies Act 2006 was fixed for 25 May 2011. It was strenuously opposed by Mr Trevor who sought instead a winding up of the company. In an email the week before the hearing, Mr O'Sullivan told Mr Mayall that Mr Percy had a theory that Mr Trevor had made such an effort to get the claim thrown out at an early stage because he had a lot to hide that they had not identified to date. Mr O'Sullivan continued: "If we win next week, Richard reckons that they will come up with a much better offer."

15. The permission application was heard by David Donaldson QC sitting as a Deputy High Court Judge of the Chancery Division. He reserved judgment. The judgment was handed down on 30 June 2011. It dismissed the application for permission to bring a derivative claim. As had been clear at the hearing, the Deputy Judge was attracted to a just and equitable winding up of the company as suggested by Mr Trevor and did not consider that a derivative claim was appropriate given that alternative remedy. The Deputy Judge also analysed the claims made by Mr Percy which he divided into two groups. In relation to the first group he found that the claims did not reach the threshold set by section 263(3) of the Companies Act and that no director acting in accordance with the statutory duties under section 172 of that Act would seek to prosecute those claims. Of the second group, the Deputy Judge said that although presented as one claim for some £461,000, it was more accurately a very large number of individual claims for alleged misappropriation of materials and labour. The Deputy Judge said that at the core of the allegation was "unallocated amounts" and that Mr Percy was taking an "extreme" position. The Deputy Judge noted that Mr Trevor accepted he had used

Seven's resources and it was just a question of amount and that the accounting exercise would have to take account of the substantial amount Mr Trevor was owed by the company on his director's loan account. The Deputy Judge said that in any event he would have decided that these disputes would be better resolved in the context of a winding up.

16. Mr O'Sullivan had seen the judgment in draft and sent Mr Mayall a long email on 29 June 2011 setting out a detailed and highly critical analysis of the judgment. This included noting that the Deputy Judge had failed to take into account the covert nature of the misappropriation by Mr Trevor and that none of what was now known had been volunteered by Mr Trevor but had come to light as a result of their extensive investigations. Mr O'Sullivan also sent an email to Mr Percy saying that he and Mr Mayall thought that the judgment was an "outrageous decision" and Mr Mayall was considering the merits of an appeal.

17. Mr Mayall applied for permission to appeal at the hand down of the judgment, but the Deputy Judge refused permission. When Mr O'Sullivan eventually spoke to Mr Percy about the result later on 30 June 2011, the latter was furious. Mr O'Sullivan explained to him various options as regards a liquidator and reminded him that they had resisted the appointment of a liquidator throughout, because Mr Percy would not be able to control the situation as well as through his own proceedings and a liquidator would be unlikely to investigate matters as thoroughly or as aggressively as Mr Percy.

18. Later on 30 June 2011, Mr Mayall and Mr O'Sullivan discussed the prospects of appeal. The former put the prospects of a successful appeal at only 25% even if permission to appeal were granted by the Court of Appeal. As Mr Mayall explained in his evidence at the present trial, the reason for this figure being so low was that any appeal would be against a decision which involved the exercise of judicial discretion and any such appeal in respect of judicial discretion faces obstacles. Nonetheless Mr Mayall, as instructed by MW, did commence drafting a notice of appeal and application for permission to appeal, but since MW did not put him in funds and the firm was on the Bar Council list of defaulting solicitors, he was unable to finish the work.

19. The Order made by the Deputy Judge following the judgment provided for Mr Percy to be joined as third defendant to the derivative proceedings for the purposes of costs only. It otherwise provided that Langley Ward should pay Mr Trevor's costs on the standard basis, to be assessed if not agreed and ordered a payment on account of £25,000. The costs were never in fact assessed but in the Particulars of Claim in the negligence action, Mr Percy said that in correspondence the costs were estimated at £221,000.

20. In the meantime, Mr Percy changed solicitors and sought to negotiate a settlement with Mr Trevor. He said in the Particulars of Claim in the negligence action that his negotiating position was very weak by reason of his exposure to adverse costs. He contended that subsequently, on the advice of the new solicitors, he accepted the sum of £65,000 in full and final settlement. The implication is that this figure was low because it took account of the unpaid costs.

21. Mr Percy subsequently commenced the negligence action against MW, Mr St John Murphy and Mr Mayall and Particulars of Claim were served on 1 July 2015. The claim against MW is brought in contract and in tort. The core allegations of negligence and/or breach of contract are: (i) failing to advise that a derivative action stood no reasonable

chance of success and that Seven was a natural candidate for winding up on a just and equitable basis; (ii) failing to consider the advice and draft pleadings of Mr Mayall critically when had they done so they would have appreciated that the advice was glaringly wrong; (iii) failing to conduct the mediation in a sensible and appropriate manner; (iv) failing to note obvious flaws in the proceedings as drafted by Mr Mayall.

22. The particulars of negligence against Mr Mayall were in similar form but also included additional allegations upon which there was some focus at the hearing of this appeal. First, at [49(7)]:

> "Failing to advise on 5 January 2011 that the offer of £500,000 was an attractive settlement offer and should be accepted given the defects in the Proceedings, the risk that they would not be permitted to proceed, the litigation risks generally and the fact that £500,000 represented an excellent commercial settlement."

23. Second at [39] and [49(9)] an allegation that Mr Mayall failed to advise sufficiently or at all that the sum of £500,000 offered was within the bracket he deemed sufficient compensation, that given the costs risks of pursuing the proceedings it would be prudent to accept the figure of £500,000 and that the proceedings were misconceived and contained allegations which ought not to be advanced.

24. In his Defence to Mr Percy's claim, Mr Mayall denied that his advice had been negligent or that his draft pleadings had been defective. In relation to the allegation set out in the previous paragraph he said that he had not been instructed to advise at the conference as to whether the £500,000 made at the mediation should have been accepted or should, if still capable of acceptance, be accepted or whether to make a fresh offer. His advice to press on with the proceedings to obtain disclosure was reasonable.

25. In [42.9] of the Defence, he denied that any of the alleged negligence (other than that alleged at [49(7)] and [49(9)] was capable of causing the loss of which Mr Percy complained. In relation to [49(7) and [49(9)] there was a non-admission that the negligence alleged could have caused the loss. There were further particulars including making the point that Mr Mayall did not attend the mediation nor was he instructed to advise on an appropriate level of settlement prior to the mediation, so that he could not be held responsible for Mr Percy's failure to accept the £500,000 offer at the mediation.

26. At [42.9.5] it was said:

> "The only alleged negligence on the Defendant's part capable of leading to a loss of the opportunity to accept the reported £500,000 offer would have been negligence in failing to advise on 5 January 2011 that the Claimant should offer to settle with [Mr Trevor] at that level. Even if (which is denied) the Claimant would have taken such advice, whether [Mr Trevor] would have been willing to accept such an offer is a matter as to which the Claimant is put to strict proof."

27. The claim by Mr Percy against Mr Mayall was discontinued thereafter. A consent order was made on 18 May 2017 granting judgment in Mr Mayall's favour and ordering that

the claim against him be dismissed. On 26 May 2017 his solicitors wrote to MW's solicitors explaining why that course had been taken, saying that it was arguable thar Mr Mayall's negligence was not causative of Mr Percy's losses, because he did not attend the mediation and was not responsible for events on that day. There was little independent benefit in pursuing him as well as MW and there was a risk he would escape liability on the basis of causation arguments, exposing Mr Percy to an order in relation to Mr Mayall's costs.

28. Thereafter, on 5 February 2018 MW issued a Contribution Notice against Mr Mayall. The allegations of negligence made in the contribution proceedings reflected what had been alleged by Mr Percy against Mr Mayall. In relation to the 5 January 2011 conference it was said that (i) the advice to Mr Percy to press on with proceedings that the Deputy Judge found to be flawed and dismissed was demonstrably the cause of Mr Percy's subsequent losses; and (ii) given those flaws and the evident risk that the proceedings would be dismissed, Mr Mayall should have advised Mr Percy to settle the proceedings as swiftly as possible and his failure to do so was causative of Mr Percy's losses.

29. On 8 January 2019 a Tomlin Order was made in respect of the settlement of the proceedings against MW and Mr St John Murphy on the basis that MW paid Mr Percy £250,000.

30. The trial of the contribution proceedings took place remotely before Judge Briggs on 8 to 10 December 2020. Mr O'Sullivan gave evidence for MW and Mr Mayall gave evidence himself. Mr Percy was not called by either party.

Section 1 of the Civil Liability (Contribution) Act 1978

31. Before summarising the judge's judgment it is convenient to set out section 1 of the 1978 Act which the judge had to consider. This provides:

> "**1.— Entitlement to contribution.**
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by

virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."

The judgment below

32. In the first part of his judgment, the judge dealt with the background to the derivative claim. It is not necessary to refer to the detail of that since I have set out much of it already. However, I should set out the judge's findings on one issue, since it has assumed significance in this appeal. This is the issue whether Mr Mayall ever advised that there was a risk that Mr Percy would not get permission from the Court to proceed with the derivative claim. The judge dealt with this at [31]-[32], concluding that it was more likely than not that Mr Mayall did not give such advice:

> "There is no record of Mr Mayall advising that permission to continue was not a rubber stamp, or the evidence required to meet the test that had to be met. Mr O'Sullivan says: "Mr Mayall never advised that there was any risk of Mr Percy failing to get permission to proceed." Mr Mayall's evidence in cross examination on this point is as follows:

> "As to that, I cannot now remember whether I specifically advised as to that risk. I accept that there is nothing in the documents expressly indicating that I did advise that there was that risk. However, there are documents indicating that it is at least likely that I did give advice as to that risk"
>
> 32. I find that this is an honest response to events that took place many years ago where there is an absence of a record that any such advice was provided. Later in his evidence Mr Mayall agreed that he believed that the first part of the application to bring a derivative claim was "a formality". He was pressed as to whether he warned of the risks when it became known that the permission hearing would be contested. Mr Mayall provided almost the exact same response as I have set out above. As the point is before me, I find it more likely than not that Mr Mayall did not provide such advice."

33. Having set out the background to the claim and the history of the proceedings, the judge then turned to the contribution claim at [69] of his judgment. He summarised the allegations on each side and set out the terms of the 1978 Act. He then referred to the decision of the Court of Appeal in *WH Newson Holding Limited v IMI Plc & Delta Limited* [2016] EWCA Civ 773; [2017] Ch 27 (*"Newson"*). He set out the circumstances of that case at [73] and [74], noting that both IMI and Delta had been addressees of a European Commission decision that they had participated in an illegal price-fixing cartel. The claimants had brought a follow-on claim for damages only against IMI, which raised a defence of limitation, in answer to which the claimants relied on fraudulent concealment under section 32 of the Limitation Act 1980. IMI brought a contribution claim against Delta which, in its defence, denied that it or IMI had caused loss to the claimants and also pleaded a limitation defence.

34. IMI then made a settlement with the claimants. The judge at [74] said that the question then was whether under section 1(4) of the 1978 Act, Delta was precluded from advancing its limitation defence. The judge noted that Delta accepted that section 1(3) meant that it could not argue that a claim by the claimants against Delta would have been time-barred, because expiry of the limitation period would not have extinguished the claimants' right of action, only barred the remedy. However Delta submitted that it could argue that the claim by the claimants against IMI was time-barred, so that IMI would never have been liable to the claimants.

35. The judge then quoted extensively from the lead judgment in *Newson* of Sir Colin Rimer (with whom Gross and Hamblen LJJ agreed). For present purposes, it is only necessary to cite [57] to [61] of that judgment:

> "57. If I may be forgiven for stating the trite, legal proceedings can range from the relatively simple to the very complicated. In some cases, C's claim may be based on straightforward facts and D1's Defence may do no more than deny them. In others, D1's Defence may question whether, even if proved, C's factual case would entitle C to relief; it may also deny the facts or material parts of them; it may raise a limitation or other collateral defence; and the outcome on the pleadings may be that the burden of proof

on matters raised by the Defence will rest on D1 or that a burden of disproof will shift to C.

58. Whether, however, the case is simple or complicated, in arriving at a bona fide settlement C and D1 will respectively have assessed the relative strength or weakness of their respective cases in the litigation and have brought into account the commercial considerations bearing upon it. If the settlement involves a payment by D1 to C, then a claim by D1 for contribution to it by D2 will be one to which section 1(4) applies. The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C. In so providing, section 1(4) gave clear effect to the Law Commission's recommendation.

59. The proviso of course shows that D1 must still prove at least something in order to succeed against D2. That is that 'he would have been liable [to C] assuming that the factual basis of the claim against him could be established.' In my judgment the sense of that is that all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2. There may of course remain issues as to quantum, as to which section 1(4) makes no assumptions.

60. Chadwick J's view expressed in *Hashim* was that there was more to the proviso than that since its stated assumption as to the establishment of factual matters did not extend to an assumption in favour of C of any factual matters forming the basis of a collateral defence raised by D1 in respect of which the burden of proof was on D1. His view was, therefore, that the proviso permitted an investigation by D2 of whether any such collateral defence might have succeeded; and, if it would have done, D1 would not have been liable to C.

61. In my respectful view, that construction of the proviso is one that section 1(4) does not permit. It has provided expressly that there is to be no inquiry as to whether D1 was or was not actually liable to C and the proviso cannot therefore fairly be read as impliedly qualifying that prohibition so as to let in an inquiry directed at showing that D1 was not actually liable. Such an interpretation is repugnant to the express intention of the primary provision of section 1(4). In my judgment, the only permissible interpretation of the proviso, read in the context of section 1(4) as a whole, is that the limit of the inquiry it permits is as I have summarised it in [59] above."

36. At [76] the judge said that, subject to the proviso [to section 1(4)], MW did not have to prove Mr Percy's case against itself. The court's task: "is to determine if the claim made

by Mr Percy disclosed a reasonable cause of action against MW such as to make MW liable in law". At [77] the judge answered that question in the affirmative. He asked himself what the arguments were to demonstrate that there was no reasonable cause of action. He identified two points, the first that as a matter of law Mr Percy had no claim in respect of the pleaded loss because the relevant loss was sustained by Langley Ward and the second that Mr Mayall was not liable in respect of the "same damage" as that underlying MW's supposed liability. The judge said the two were linked.

37. At [78] he said that it was not open to Mr Mayall to argue the no reflective loss argument. He drew a comparison with the position in *Newson* where the Court of Appeal refused to permit Delta to run an argument that when IMI had made an agreed payment to the claimant the claim was barred by limitation. The judge said: "To admit an argument of reflective loss to undermine MW's liability and claim that the compromise was not in respect of the "same damage", is to adopt the discredited approach taken by Chadwick J in *Arab Monetary Fund v Hashim*."

38. The judge went on to say at [80] that Sir Colin Rimer had been careful not to define the term "collateral defences" since it could take more than one form and. said the judge, could take the form of a defence based on causation or on the reflective loss principle. He continued at [81]:

> "I conclude for the reasons given, and based on the permitted assumed facts, the breach of a duty of care pleaded in the Negligence Claim resulting in loss and damage gives rise to a reasonable cause of action between Mr Percy and MW. It follows, without more, that MW is entitled to a contribution from Mr Mayall: see *Newson* paragraphs 59-61."

39. The judge then said at [82] that if he was wrong about the availability of collateral defences and Mr Mayall were permitted to challenge whether MW was actually liable, on the basis that the rule against reflective loss barred recovery, this defence would not have prevailed. The judge then cited the decision of the Supreme Court in *Marex Financial Ltd v Sevilleja* [2020] UKSA 31; [2021] AC 39. The judge noted that Mr Percy had been a creditor-shareholder on the basis of which the rule against reflective loss does not apply.

40. The judge then set out at [92] his reasons for concluding that Mr Percy on the assumed facts had a reasonable cause of action against MW. The judge then rejected at [93] the argument that Mr Mayall was not liable for the "same damage" as MW because of the rule against reflective loss.

41. The judge then turned to consider specific issues raised by Mr Mayall, namely his arguments that (i) he was not negligent and (ii) even if he was, his negligence did not cause Mr Percy's loss. Since the judge's handling of these issues was subjected to critical examination on the appeal, it is appropriate to set out in full [94] to [100] of his judgment:

> "94 I fully accept that by finding that it is not permissible to deploy collateral defences, Mr Mayall faces a claim for contribution without being able to air the argument that MW had a defence in the shape of the no reflective loss principle (as does

he) or that he did not cause loss or damage to Mr Percy. I have dealt with the former argument. It may seem to him unfair to Mr Mayall as he contends that: (i) he was not negligent (he asks the court to go behind the Permission Judgment so as to determine the issue) and (ii) an agreement to drop hands between Mr Percy and Mr Mayall is evidence that there were causation difficulties for Mr Percy in his claim against Mr Mayall. Accordingly, it is said, MW must prove that Mr Mayall's negligence was causative of loss. These arguments are to look at the proceedings through the eyes of the party against whom a contribution notice is served.

95 As regards the first of these (negligence) Mr Mayall asks the court to find (to use the language of Mayall recorded in his witness statement) that "the Deputy High Court Judge was wrong". If he had taken the right course and permitted the derivative action to proceed, Mr Mayall could not be said to be negligent. I state straight away that no authority has been cited to me in support of the jurisdictional basis to find that "the Deputy High Court Judge was wrong". Mr Lawrence accepts, as he must, that it was Mr Mayall who advised that a derivative action was the best option for Mr Percy (to protect his interests), advised Mr O'Sullivan how to issue the claim, advised on prospects of success and pleaded the claim. I have found that he failed to warn [paragraphs 20, 24 and 25 above] Mr Percy. I decline the invitation to determine whether Mr Donaldson QC was wrong when dismissing the permission application, and making the assessment that the pleaded claims were too weak to continue, that no director would consider it desirable for MEL to prosecute any of the claims and there was "no possible benefit to the company in adopting such a course". To do so would be to undertake a second assessment of the merits of the derivative claim and review findings made of a competent court. In my judgment that would undermine rather than maintain the rule of law and put in danger the reputation of the administration of justice: *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321.

96 The order made following the Permission Judgment was not appealed and stands unless or until it is set aside.

97 The second issue (causation) although raised in the skeleton argument of Mr Lawrence was pressed with little vigour by the end of the trial. There was no doubt good reason for that. It was accepted by Mr Mayall that it was likely that the Derivative Claim could have been settled prior to the permission application. He accepts that he failed to give advice to revisit the offer made at a conference where he was expressly asked to advise. His failure to advise is more likely than not to be causative of loss. The objection taken is that Mr Percy was not

present to give evidence that he would have heeded the advice if it had been given, or not proceeded with the derivative claim if he was properly warned of the risks. Yet this is not a case where the court is "driven to speculate what would have happened": *Goldsmith Williams solicitors v E. Surv Ltd* [2015] EWCA Civ 1147. The court has the benefit of the judgment of the Deputy Judge, the pleadings in the Negligence Claim, the admissions made, and has heard evidence from Mr O'Sullivan and Mr Mayall. Mr O'Sullivan had considerable dealings with Mr Percy and was examined about whether he would take the case to court if he had known of the weaknesses of the case.

98 Mr Mayall had admitted in his defence to the Negligence Claim that damage could be caused by his failure to advise that the offer of £500,000 was attractive given the defects in the proceedings, the risk of failure to obtain permission to proceed and general litigation risk. Mr Percy was not equipped with the right advice to make an informed decision as to whether to proceed or settle the claim after mediation. The failure to warn and properly evaluate the risks involved with the permission application, negated any argument that Mr Percy would have "pressed on" regardless and ignored his advisors on issues of law that would directly affect the commercial outcome.

99 I accept the evidence of Mr O'Sullivan that Mr Percy "was not going to simply go to trial to hear his fate from the lips of a judge". In other words, he would have taken account of the commercial risks if he had been properly advised and settled the claim by accepting the offer. He would not have "pressed on". The evidence of Mr Mayall was that he advised him to "press on". Mr O'Sullivan's evidence, tested in cross examination, was that Mr Percy was "a very commercial man" and "had no intention of going to trial if it could be compromised on the way".

100 The rejection of the invitation to re-assess the permission judgment creates further difficulties for Mr Mayall. The Deputy Judge was required to consider the pleaded case against Mr Trevor. He made findings. He found that the pleaded case was wanting in many respects. He said in relation to one claim: "the propriety of such a pleading appears to me seriously questionable, and it does not appear to disclose a cause of action. It also ignores and is hard to reconcile with the fact that the purchase of Mavelstone Close was agreed and completed months before contracts were exchanged on Sundridge Avenue". Mr Mayall was questioned about the basis of the claim to recover the difference between the purchase and sale price of Mavelstone Close. The Deputy Judge said: "Counsel for Mr Percy was however unable to explain to me how these could give rise to an obligation to account to the company for the whole of his gross

> profit." The combination of admissions made by Mr Mayall, the findings I have made having heard the evidence of Mr O'Sullivan and the findings of the Deputy Judge, lead me to conclude that on the balance of probabilities these failures caused loss. As the issue of causation was advanced with a light-touch I deal with it no further. Although I was not addressed on the test for causation, applying the "but for" test I conclude there is no merit in the argument that Mr Mayall would have succeeded with a defence of causation on the facts of this case."

42. The judge then went on to assess the level of contribution which should be made by Mr Mayall to the settlement sum paid by MW, concluding that it should be 40%. That conclusion was not the subject of a separate challenge on appeal so it is not necessary to consider it further.

The grounds of appeal

43. In summary it is argued on behalf of Mr Mayall that the judge erred in law and/or in fact in four principal respects:

(1) in holding that it was not open to Mr Mayall to invite the Court in the contribution proceedings to review the judgment of the Deputy Judge on the permission application and holding that the judgment was determinative of whether Mr Mayall had been negligent;

(2) in misconstruing section 1(4) of the 1978 Act and accepting MW's submission that it was relevant to the claim for contribution as a whole and to the court's consideration of whether Mr Mayall was liable to Mr Percy;

(3) in his treatment of the issue as to whether any negligence of Mr Mayall caused Mr Percy to suffer damage. In particular (a) the judge failed to define clearly of what negligence Mr Mayall was guilty; (b) his erroneous finding that the judgment of the Deputy Judge was binding informed his decision on causation; (c) in failing to take account of the substantial weight of evidence that Mr Percy was an aggressive litigant unlikely to be deterred by additional cautious advice and (d) in failing to attach any or any sufficient weight to the failure of MW to call Mr Percy to give evidence on the issue of causation;

(4) in rejecting the reflective loss defence both in holding that it was not open to Mr Mayall to take the point by reason of section 1(4) of the 1978 Act and in holding that it was not a good defence because Mr Percy was a "creditor-shareholder".

44. MW served a Respondent's Notice which sought to uphold the judgment for additional reasons:

(1) That Mr Mayall was negligent: (i) in not advising Mr Percy as to the serious risks of losing the application for permission to proceed with a derivative claim where that claim was flawed and settlement was imperative; (ii) in advising Mr Percy that "The company will almost certainly win"; (iii) in advising Mr Percy after the mediation to "press on" with the proceedings without reference to the risks of the permission hearing and (iv) in advancing allegations which were groundless;

(2) That Mr Mayall produced no evidence to rebut the inference that his negligence was causative of loss.

The parties' submissions

45. On behalf of Mr Mayall, Mr Patrick Lawrence QC submitted that four issues arise in contribution proceedings:

(1) Is D1 itself liable in respect of the relevant damage. There are provisions in the 1978 Act designed to give protection to D1, principally section 1(4);

(2) Is D2 liable in respect of the damage suffered by the original claimant which divides into two sub-issues: (i) was D2 negligent and (ii) if so, was that negligence causative of the loss suffered by the original claimant;

(3) If D1 proves all those matters, is the damage for which D2 is liable the "same damage" as that for which D1 is liable; and

(4) If both defendants are liable, how is the liability to be apportioned.

46. Mr Lawrence QC submitted that what had gone wrong in the present case is that the judge had committed two fundamental errors:

(1) He had been persuaded by MW to treat section 1(4) as relevant to the two sub-issues under Issue (2), whereas on a correct analysis it was only relevant to Issue (1) and Mr Mayall was not challenging MW's liability. Contrary to [81] of the judgment section 1(4) did not relieve the Court from determining whether Mr Mayall had been negligent and if so, whether that negligence had been causative of Mr Percy's loss. However, because of the approach which the judge adopted to section 1(4) he failed to grapple with those issues of negligence and causation.

(2) His treatment of the Deputy Judge's judgment on the permission application was erroneous. Initially in the contribution claim MW had argued that the judgment was res judicata but Mr Lawrence QC had pointed out that for that doctrine to apply Mr Mayall would have to be a party to the permission application or the privy of one of the parties which he was not. MW had not pursued res judicata but substituted an argument of collateral abuse which the judge accepted, holding that Mr Mayall could not go behind the judgment.

47. In relation to what he submitted was the judge's first fundamental error, Mr Lawrence QC accepted that, as a matter of law, Mr Mayall cannot dispute MW's liability for damages under the settlement with Mr Percy, but that was a deemed liability which did not affect in any way the second issue set out at [45] above, that D1 still has to prove on the evidence at the contribution trial that D2 was negligent and that that negligence was causative. In concluding that section 1(4) of the 1978 Act was a complete answer, the judge misinterpreted the effect of section 1(4) and of the decision in *Newson*.

48. In that case, both IMI and Delta had been found by the Commission to be parties to an unlawful cartel, a decision which was binding on them. Mr Lawrence QC submitted that both section 1(4) and *Newson* are only concerned with the question of the liability or deemed liability of D1 to the claimant. They are not concerned with the issue of whether D2 was liable to the claimant for the same damage, which still required D1

seeking contribution to establish both that D2 was negligent and that that negligence was causative.

49. Mr Lawrence QC submitted that what Mr Mayall did throughout was well within the range of actions of a reasonably competent barrister. It was no answer that the Deputy Judge had exercised his discretion to dismiss the application for permission to bring a derivative claim, since, as the judge in the present case had recognised during the course of argument, other judges might well have taken a different view and concluded that a derivative action was appropriate and permission should be given. This was borne out by the fact that in two cases decided subsequently to the judgment of the Deputy Judge on not dissimilar facts to the present, the Court had concluded that a derivative action was appropriate.

50. In *Hughes v Weiss* [2012] EWHC 2363 (Ch), His Honour Judge Keyser QC, sitting as a Deputy High Court Judge, recognised at [55] that although the purpose of a derivative claim is to vindicate rights that vest alone in the company, the substance of the dispute is between the only two people entitled to the company's assets, as in the present case. The judge rejected the argument (which had found favour with Mr Donaldson QC) that the availability of alternative remedies of a section 994 petition or winding up should lead to refusal of permission to proceed with a derivative claim, saying at [69]:

> "I do not consider that permission to continue these proceedings should be refused because of the availability of voluntary liquidation as a method of winding up the company's affairs and resolving the issues necessary to that end. It is highly unlikely that a liquidator would fund litigation. The company has only about £15,000 in the bank and no other assets, apart from any value to be attached to these claims. Mr Berragan submitted that the liquidator would properly seek directions from the court in order to enable Ms Hughes and Mr Weiss to resolve the issues directly between themselves. There is no point at all in such a convoluted solution. They can litigate the issues in these proceedings far more conveniently."

51. Mr Lawrence QC submitted that that was manifestly an appropriate response. A derivative claim was much more direct than the nuclear option of liquidation where there could be issues of the costs of the liquidator and of applications to the Court to get the liquidator to do things.

52. The other case was *Saatchi v Gajjar* [2019] EWHC 3472 (Ch) a decision of Chief ICC Judge Briggs himself. The judge dealt with alternative remedies at [76] to [84] of his judgment citing *Hughes v Weiss* and concluding that although the availability of an alternative remedy can be a powerful factor pointing to refusal of permission to proceed with a derivative claim, on the facts of the case that was insufficient to tip the balance. Mr Lawrence QC submitted that it was to be inferred that, since the judge had recognised that different judges might legitimately take a different view from Mr Donaldson QC, he had reached the conclusion he did because of his erroneous view that one could not go behind Mr Donaldson QC's judgment as a matter of law. The judge did refer to these two cases at [108] of his judgment on the issue of apportionment, but, as Mr Lawrence QC submitted, it was cursory treatment of a central issue.

53. Accordingly, Mr Mayall did not need to go as far as showing that the Deputy Judge was wrong. It was enough, to establish that his advice to proceed with a derivative action had not been negligent, that other judges might reasonably have taken a different view from that of the Deputy Judge and concluded that a derivative action was appropriate. However, contrary to the judge's conclusion at [95] of his judgment. Mr Mayall was not precluded from arguing that the Deputy Judge had been wrong in defending himself against the allegation of negligence. There was no question of Mr Mayall not being able to defend himself, if necessary, by arguing that the Deputy Judge's judgment had been wrong. Contrary to what the judge said, this would not bring the administration of justice into disrepute. On the contrary, for Mr Mayall not to be able to defend himself against the allegation of negligence would be an outrageous outcome. There was no question of any argument that the Deputy Judge had been wrong being an abusive collateral attack which the Court would not permit. Mr Lawrence QC relied upon the judgment of Marcus Smith J in the Court of Appeal in *Allsop v Banner Jones* [2021] EWCA Civ 7; [2021] 3 WLR 1317 specifically the synthesis or summary at [44]-[45].

54. Mr Lawrence QC submitted that, because of the fundamental errors he made, the judge did not grapple properly with either of the issues as to whether Mr Mayall was negligent or whether that negligence was causative. So far as negligence was concerned, as [95] demonstrated the judge had proceeded on the erroneous basis that it was not open to Mr Mayall to contend that the Deputy Judge had been wrong. The only aspect of alleged negligence on which the judge had focused in [95] and [97] was the alleged failure to warn of the risk that the Court might not give permission to proceed with the derivative claim. I should interpolate that, although in [95] the judge refers back to [20], [24] and [25] as dealing with failure to warn, those paragraphs do not deal with that issue. The judge must have had in mind [31] and [32] which I have quoted at [32] above.

55. As the Court pointed out during the course of argument, there is a major difficulty with this allegation of failure to warn of the risk that the Court might not give permission to proceed with the derivative claim, which is that it is simply not pleaded against Mr Mayall by Mr Percy and hence by MW in the contribution claim. [49(7)] and [49(9)] of the Particulars of Claim, to which I referred at [22] and [23] above, make allegations about failure to give advice after the mediation, specifically at the conference on 5 January 2011. However, [49(7)] does not allege a failure by Mr Mayall to warn of that risk. On the contrary, it proceeds on the assumption that the existence of the risk was a given: "given…the risk that they would not be permitted to proceed…" [49(9)] refers back to [39] but that is only referring to the costs risks of proceeding to trial of the derivative claim.

56. Mr Lawrence QC referred this Court to some of the evidence given by Mr O'Sullivan in cross-examination at trial. The judge records at [31] his evidence that: "Mr Mayall never advised that there was any risk of Mr Percy failing to get permission to proceed." As Mr Lawrence QC said to him in cross-examination he made that point several times very tenaciously but Mr O'Sullivan accepted that by the time of the permission hearing it was clear that Mr Trevor was throwing a lot of legal resources at the target in the hope of persuading the Court to refuse permission for the derivative action. Mr Lawrence QC then put to him the email he sent Mr Mayall the week before the hearing referred to at [14] above where he said: "If we win next week, Richard reckons that they will come up with a much better offer." Mr Lawrence QC suggested to him that

that reflects that it was known that there was a risk that the Court could refuse permission. Mr O'Sullivan's response was that possibly he should have written: "When we win next week.". At that point the judge challenged that answer and said to him that he must have appreciated that there was a risk at that stage, to which he answered: "I must have appreciated there was a risk, there was a small risk, yes."

57. Mr Lawrence QC then put to him that the email showed that Mr Percy had discussed that risk with Mr O'Sullivan and had instructed him to proceed in the expectation that if Mr Percy won and got permission from the Court, Mr Trevor would then come up with a better offer. Mr O'Sullivan accepted that he and Mr Percy perceived there was a risk of not winning that application and he also accepted that, looking at the case as a whole, the tone of Mr Percy's instructions to him was to the effect that he always wanted Mr O'Sullivan to put forward his case as aggressively as he reasonably could.

58. Mr Lawrence QC also referred this Court to an earlier passage in his cross-examination of Mr O'Sullivan on his note of the mediation, upon which the judge had particularly relied at [99] of his judgment in relation to the issue of causation:

> Q. That shows...that you made it very clear to Mr Percy on this, and I have no doubt other occasions, that it would be very expensive to take the matter all the way to Court, and that doing so would expose Mr Percy to the risks of a substantial costs liability, yes?
>
> A. That is correct, but also Mr Percy was a very commercial man. He had no intention of going to trial if it could be compromised on the way. So his agenda was to pursue it, ideally to disclosure, so that he can get the full measure of Trevor's wrongdoing or failing that Mr Trevor coming up with a better offer. So yes, he was aware of the risks, but he was not going to simply go to trial simply to hear his fate from the lips of a judge.

59. Mr Lawrence QC submitted that this passage was to do with the risks of proceeding to trial, not to do with the risk that the Court might not give permission to proceed and that the judge had been wrong to regard this passage as supportive of the proposition that Mr Percy would have been persuaded to take a different course to the one he did, even prior to the hearing before the Deputy Judge.

60. He submitted that the judge's approach to causation was flawed in a number of additional respects. Contrary to what the judge said at [97] the issue was not "pressed with little vigour by the end of the trial". Mr Lawrence QC had dealt with it fully in closing submissions and indeed Mr Bankes-Jones for MW had described Mr Lawrence QC's submissions on causation as "trenchant". There is also an extremely odd first sentence of [98] where the judge says that Mr Mayall had admitted in his Defence that any negligence in what was alleged in [49(7)] of the Particulars of Claim was causative. This seems to be based on a misunderstanding on the judge's part of what is pleaded at [42.9] of Mr Mayall's Defence as set out at [25]-[26] above.

61. Mr Lawrence QC had submitted to the judge that, where the issue of causation was whether had Mr Mayall advised before the permission hearing, and specifically, at the conference on 5 January 2011, of the risk that the Court might not give permission to

proceed with the derivative claim, Mr Percy would have taken a different course and sought to settle with Mr Trevor for the £500,000 the latter had offered at the mediation if that was still on offer, it was incumbent on MW to call Mr Percy to give evidence to that effect. Mr Percy had not been called to give evidence so that there was a lacuna in the evidence which meant that MW's contribution claim should fail.

62. It was in that context that Mr Lawrence QC relied before the judge, as he did before this Court, on the decision of the Court of Appeal in *E Surv Ltd v Goldsmith Williams Solicitors* [2015] EWCA Civ 1147; [2016] 4 WLR 44, particularly on what was said by Sir Stanley Burnton at [47]-[49] on the burden of proof on the contribution claimant to prove causation against the contribution defendant.

63. MW relied upon the decision of the Court of Appeal in *Levicom International Holdings v Linklaters* [2010] EWCA Civ 494; [2010] P.N.L.R. 29 and specifically what Jacob LJ said at [284], in support of the proposition that there was an inference to be drawn that the negligence of Mr Mayall was causative and the burden was on him to disprove that:

> "When a solicitor gives advice that his client has a strong case to start litigation rather than settle and the client then does just that, the normal inference is that the advice is causative. Of course the inference is rebuttable – it may be possible to show that the client would have gone ahead willy-nilly. But that was certainly not shown on the evidence here. The Judge should have approached the case on the basis that the evidential burden had shifted to Linklaters to prove that its advice was not causative. Such an approach would surely have led him to a different result."

64. Mr Lawrence QC submitted that that principle was not engaged. He accepted that where a solicitor recommends the client to do x and the client does x, there is an inference to be drawn, but the fatal obstacle to applying that reasoning here is that the alleged negligence was in failing to advise as to the risk that the Court might not give permission to proceed with the derivative claim, which was not recommending doing anything. Where the issue on causation, as in this case, is that, if the lawyer had given the right advice, the client would have done something different, the burden is on the client (and here the contribution claimant) to establish that something different would have been done.

65. He submitted that in the present case, the judge had fallen into error in concluding at [97] to [99] that that burden of proof was discharged here. Mr O'Sullivan could not give evidence as to what was in Mr Percy's mind or as to what he would have done if certain advice had been given. Only Mr Percy could give that evidence. Mr Lawrence also relied in this context on evidence given by Mr Mayall that if he had advised Mr Percy of the risk that the Court might not give permission to proceed with the derivative claim, he would have advised that the risk was low. He also relied upon a passage in the cross-examination of Mr Mayall:

> "…your question was, if I had advised him that there was a risk that it might not get over the permission hearing, would he have gone back and accepted the £500,000 offer-then obviously I cannot go into his head and he is not here to say what would have

> happened-but the overwhelming likelihood is, if he had been told that there was a small risk that the derivative action might fail at that hurdle, but, as he thought, it was producing a much higher offer, and it was a much better route than the liquidator provision, then my answer would be no, I think it is unlikely in the extreme that it would have caused him to go back."

66. Mr Lawrence QC also submitted that, to the extent that the judge appears to have thought that the pleadings in the negligence claim were somehow evidence presumably because the Particulars of Claim were supported by a statement of truth by Mr Percy, that was wrong. He relied upon a passage in the judgment of Stewart J in *Kimathi v FCO* [2018] EWHC 2066 (QB) as a correct statement of the law, that the contents of a statement of case are not evidence in a trial, even though verified by a statement of truth. At [35] Stewart J said:

> "Clearly, if a Claimant or witness adopts in his or her oral evidence the whole or any part of a pleading (e.g. Part 18 responses) then they are evidence in the trial. Otherwise, the evidence from a Claimant is only that contained in his or her witness statement verified in oral evidence, together with such oral evidence as the Claimant/witness gave on oath/affirmation. I do not accept the Claimants' submissions. First, they say that refusing to consider as evidence at trial matters verified in a statement of case elevates a general rule into a statute. It does not. It is the clear effect of a procedural rule, made under Statutory Instrument, as to how facts are to be proved. Secondly, they say that in the above authorities, there was nothing from the parties that assisted their case and the issue was whether evidence existed, not how statements were to be classified, adding: "Here the facts exist. D's complaint is that because they are in the wrong place, they should be categorised as something other than facts". This is not the point. Rule 32.6 is clear that "<u>any fact</u>…is to be proved….at trial by their oral evidence given in public" (my underlining). That is why witnesses specifically adopt statements in their oral evidence, thus proving them for purposes of the trial. If facts have been proved as required by Rule 32.6, then there is no need to attempt to rely on Statements of Case; if they have not been so proved, then, at trial, the Statements of Case (unless adopted in oral evidence) do not prove those facts."

67. Overall, Mr Lawrence QC submitted that there was a lacuna in the evidence through MW's failure to call Mr Percy and that, contrary to the judge's conclusion, the evidence including the contemporaneous documents, pointed to a conclusion that, even if Mr Percy had been advised of the relatively low risk that the Court might not give permission to proceed with the derivative claim, he would not have done anything different, but would have proceeded with the application for permission in the hope of getting a better offer from Mr Trevor and of getting fuller disclosure from him. Accordingly, the judge should have concluded that the contribution claim failed.

68. If this Court allowed the appeal, Mr Lawrence QC urged us not to send the case back to the Business List for retrial, but to conclude that the contribution claim failed. He submitted that, in the particular circumstances of this case, it would be oppressive to Mr Mayall as a professional man to be put to a further 3 day hearing 12 years after the events in question. MW had taken the decision to make a submission before the judge to the effect that section 1(4) of the 1978 Act closed down causation, an approach which, if this Court allows the appeal will be shown to have been misconceived. It would be oppressive to allow MW to relitigate the contribution claim on the correct legal basis.

69. Mr Lawrence QC also maintained his case that the judge should have concluded that Mr Mayall had a good defence based on the rule against reflective loss. In support of that case, he submitted that when account was taken of the corporate structure of Seven and Langley Ward, the loss pleaded in [50] of the Particulars of Claim is loss which, in the eyes of the law, was suffered by Langley Ward, since it was that company, not Mr Percy, which was the shareholder in Seven.

70. He referred to the legal analysis by Lord Reed at [79] to [84] of *Marex*. He submitted that each of MW and Mr Mayall owed a duty of care in tort to Langley Ward. They had acted for Langley Ward in the derivative action. Langley Ward as a shareholder in Seven was seeking to put money back into Seven, the joint venture company, which Mr Percy had allegedly misappropriated. As I pointed out during the course of the argument, what Mr Lawrence QC was really arguing was not so much that the claim was barred by the rule against reflective loss as that the wrong claimant was bringing the claim in the negligence action, that the correct claimant was Langley Ward not Mr Percy. Mr Lawrence QC also submitted that, contrary to the judge's analysis, the claim was never advanced as a creditor.

71. On behalf of MW Mr Michael Pooles QC submitted that this case raised concerns in the market generally as to the practicability of bringing contribution proceedings. In relation to Mr Lawrence QC's four issues raised by contribution proceedings, Mr Pooles QC submitted that where the analysis went astray was on issue (2)(b), the suggestion that D1 had to establish that D2's negligence was the cause of the claimant's loss. He submitted that that issue was determined by issue (3), is it the same damage. If it is, then D1 does not have to prove causation by D2's negligence of the claimant's loss. He submitted that that was the effect of the decision of the Court of Appeal in *Newson*.

72. Mr Pooles QC submitted that the relevant negligence of both MW and Mr Mayall was that they failed to advise Mr Percy about the risks. In a case such as the present, the liability of the two defendants was mirrored and the effect of section 1(4) was that Mr Mayall could not say that MW should not have settled and was not liable to Mr Percy. Accordingly, the settlement meant that the hurdle of Mr Mayall's liability to Mr Percy was passed. The whole point of the 1978 Act was to simplify contribution claims and to encourage settlement.

73. Mr Pooles QC accepted that there will be cases where there is no parity of reasoning between the case against D1 and the case against D2. *Goldsmith Williams* was such a case. The surveyors (D1) were alleged to have over-valued the property and the solicitors (D2) were alleged to have failed to draw the attention of the lenders to the fact that the borrowers had paid a lower purchase price for the property than

represented. Although the alleged negligence of each defendant had caused the same loss, different negligence was alleged against each. D1 then settled the lenders' claim and sought contribution from D2. The Court of Appeal upheld the judge's finding that D2 was negligent but reversed his finding that that negligence had caused the lenders' loss. The Court of Appeal held that, because the lenders had already been made aware by the borrowers of a reduced purchase price but not of the extent of the reduction, the burden of proof was on D1 to establish that D2's negligence was the cause of the lenders' loss. It had failed to discharge that burden because it had failed to prove that the lenders would have acted differently if D2 had provided the information about the purchase price which it should have done.

74. In that case, because the case against each defendant was different, there was no question of the issue of causation raised by D2 challenging the impact of the settlement made by D1. However, Mr Pooles QC submitted that the position was different in a case such as the present where the issue of negligence and causation was the same against both defendants. Accordingly, by contesting the issues of negligence and of causation, Mr Mayall was making a collateral challenge to the liability of MW which was established by the settlement. That was not permitted by section 1(4) or by *Newson*. Given that MW had made a bona fide settlement, Mr Pooles QC submitted that Mr Mayall could not go behind it and say that he was not negligent or that his negligence did not cause the loss, because to do so would be equivalent to his saying to MW that it should not have settled.

75. In relation to the suggestion that the alleged failure to warn found by the judge at [31]-[32], [95] and [98] was not a pleaded case against Mr Mayall, Mr Pooles QC relied upon [49(7)] of the Particulars of Claim as set out at [22] above. However, as the Court pointed out during the course of argument, that plea is not one of failure to warn of the risk that the Court might not give permission to proceed with the derivative claim and, as Lewison LJ also pointed out, that plea, which was deleted when the Particulars of Claim were amended after the claim by Mr Percy against Mr Mayall was dismissed, was not incorporated in the Contribution Notice.

76. In relation to the issue as to the weight to be attached to the judgment of Mr Donaldson QC, Mr Pooles QC submitted that, whilst one was confronted by an unusual balance, it was one which fell to be determined in favour of the judge's approach, as set out in [95] of his judgment, in the light of the decision of the Court of Appeal in *Laing v Taylor Walton* [2007] EWCA Civ 1146, [2008] P.N.L.R. 11. He submitted that the principle as to abuse of process was set out in the judgment of Buxton LJ at [12]:

> "The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute. Attempts to draw narrower rules applicable to particular categories of case (in the present instance, negligence claims against solicitors when an original action has been lost) are not likely to be helpful."

77. He also relied upon [22] and [25] of that judgment:

> "22 The second, different, and more significant difficulty is however that everything said to us and to Langley J in criticism of Judge Thornton's judgment could have been said to Judge Thornton (and mainly was so said); and could have been deployed in the appeal from Judge Thornton that was never brought. What is sought to be achieved in the second claim is, therefore, not the addition of matter that, negligently or for whatever reason, was omitted from the first case, but rather a relitigation of the first case on the basis of exactly the same material as was or could have been before Judge Thornton.
>
> 25 I therefore conclude that it would bring the administration of justice into disrepute if Mr Laing were to be permitted in the second claim to advance exactly the same case as was tried and rejected by Judge Thornton. If Judge Thornton's judgment was to be disturbed, the proper course was to appeal, rather than seek to have it in effect reversed by a court not of superior but of concurrent jurisdiction hearing the second claim. That the second claim is in substance an attempt to reverse Judge Thornton is important in the context of wider principles of finality of judgments. In *Hunter*, at p 545D, Lord Diplock said that the proper course to upset the decision of a court of first instance was by way of appeal. Where, wholly exceptionally, a collateral, first instance, action can be brought it has to be based on new evidence, that must be such as entirely changes the aspect of the case: see per Earl Cairns LC in *Phosphate Sewage v Molleson* (1879) 4 App Cas 801 at p 814. The second claim in our case not merely falls short of that standard, but relies on no new evidence at all."

78. Mr Pooles QC submitted that this was exactly what was proposed here. Without any new or additional evidence, the barrister would be saying I was right and the judge was wrong and if this were permitted he would be advancing exactly the same case. Mr Pooles QC accepted that this was not the way the judge had put it, but this was why there was a Respondent's Notice. I note in passing that this way of putting the case does not in fact seem to be referred to in the Respondent's Notice.

79. In relation to the issues of negligence and causation, Mr Pooles QC accepted, in answer to a question from Andrews LJ, that there was no other finding of negligence than in [32] and [95] of the judgment. In answer to the further question as to what had changed since the failed mediation which led to counsel having to advise as to the merits of getting permission, Mr Pooles QC submitted that what had changed is that they were now within striking distance of the permission hearing. Mr Mayall's advice grappled with the risks of trial but not with this additional risk of not getting permission. When the Court put to Mr Pooles QC that this case was not pleaded, he asserted that it was pleaded as part of what he described as a "wrapped up allegation". However, contrary to that assertion, it is not pleaded anywhere.

80. Mr Pooles QC submitted, in relation to causation, that it was not essential in a case such as the present that the claimant was called to give evidence and that causation could be proved by the evidence of the solicitor. As I have already indicated, he also relied upon

Levicom to submit that the burden had been on Mr Mayall to call Mr Percy. He submitted that the question of what evidence supported MW's case on causation was a matter for the trial judge, but as Lewison LJ pointed out, the judge's view was skewed by his erroneous finding at [98] that Mr Mayall had admitted causation.

81. In relation to Mr Mayall's reliance on the rule against reflective loss, Mr Pooles QC submitted that this was the sort of collateral defence which *Newson* did not permit. In any event, the duty of care was owed to Mr Percy and it was his money and his exposure to a costs liability which were being talked about.

Discussion

82. Contrary to Mr Pooles QC's submissions, in my judgment section 1(4) of the 1978 Act is concerned only with the first issue identified by Mr Lawrence QC, namely whether D1 is liable to the claimant. Section 1(4) in effect creates a species of deemed liability of D1 where D1 enters a bona fide settlement with the claimant: D1 does not have to establish that he was or is liable to the claimant provided that he would have been liable if the factual basis of the claim against him could be established.

83. However, nothing in the sub-section touches upon the second twofold issue as to whether D2 was negligent or otherwise in breach of duty and whether that negligence or breach of duty was causative of the claimant's loss.

84. Furthermore, I do not consider that the judgment of Sir Colin Rimer in *Newson* leads to a different conclusion. The passages in the judgment on which particular reliance is placed are concerned with establishing that the effect of section 1(4) is that, where D1 settles the claim, there will be no enquiry in the contribution proceedings as to whether D1 was in fact liable to the claimant, provided that the proviso is satisfied: see the third sentence of [58]:

> "The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C."

85. [59] then addresses the effect of the proviso, but this is still dealing with the position as between D1 and the claimant, not with the issue as to how the liability of D2 to the claimant is to be established. This is really made clear by the paragraphs which follow, [60] to [62], which discuss and disapprove the judgment of Chadwick J in *Hashim* which had suggested that the assumption in section 1(4) did not extend to factual matters forming the basis of a collateral defence raised by D1 in respect of which the burden of proof was on D1. However, that judgment and the discussion of it by Sir Colin Rimer were concerned only with the liability or deemed liability of D1 to the claimant where there is a bona fide settlement. Nothing in that analysis addresses the need to establish that D2 is liable to the claimant.

86. Reliance is placed by MW on the third and fourth sentences of [59] of Sir Colin Rimer's judgment:

> "In my judgment the sense of that [the proviso] is that all that D1 needs to show is that such factual basis would have disclosed a

> reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2."

87. That passage is relied upon to support the proposition that, if the proviso to section 1(4) is satisfied, D1's contribution claim against D2 will succeed without more and without D1 having to establish that D2 was negligent or that any such negligence was causative of the claimant's loss. It is apparent from the last sentence of [81] of his judgment that this is the analysis which found favour with the judge.

88. However, in my judgment, neither section 1(4) nor the decision of this Court in *Newson* dictates such a startling result. It is important to have in mind two aspects of the particular facts of *Newson*. First that both IMI and Delta were bound by the decision of the Commission that they had participated in an unlawful cartel. Second, as recorded in [13] of Sir Colin's judgment, Delta was constrained to accept, by virtue of section 1(3) of the 1978 Act, that it could not argue that it was not liable to make contribution because the claim against it by the claimant was time-barred under the Limitation Act 1980, since the effect of that Act was to bar the remedy not to extinguish the right. That acceptance made Delta's argument on appeal that, notwithstanding the settlement and section 1(4), IMI was not liable to the claimant because of limitation, a peculiarly ambitious one.

89. Once the Court had determined that the proviso in section 1(4) was satisfied, it does follow that, on the facts of that case, D2's liability was established so that the fourth sentence of [59] of Sir Colin's judgment: "If he can do that, he will be entitled to succeed against D2", was clearly explicable. However I do not consider that that sentence can be taken out of context and made to stand for the proposition that, in every case where D1 makes a bona fide settlement with the claimant and the proviso to section 1(4) is satisfied, D2 is liable to make contribution, without the need to establish whether or not D2 was liable to the claimant, which in a case such as the present means establishing that D2 was negligent and that any such negligence was causative of the claimant's loss. In other words, in a case such as the present, that fourth sentence of [59] falls to be qualified by adding words such as: "as regards his own liability to the claimant".

90. The judge's analysis at [95] of his judgment that it was not open to Mr Mayall to argue, in defending himself against an allegation of professional negligence, that the judgment of Mr Donaldson QC was wrong is equally startling. It is accepted by MW that there is no question of res judicata applying, since Mr Mayall was neither a party to nor a privy of a party to the derivative action. If authority were needed for the proposition that counsel or a solicitor for a party is not a party or privy to the litigation in which he or she is representing that party, it is to be found at [32] of *Laing* where Buxton LJ said:

> "It was argued before us, but not I think before Langley J, that TW were the privies in interest of their client Mr Watson. Mr Laing was bound by estoppel not only as against Mr Watson but also against TW in respect of the issues decided in the first case. The second claim should be dismissed on that ground, without therefore needing to evoke abuse of process. This was a novel claim, and almost certainly misconceived. It is difficult to see how a solicitor can have the *same* interest as his client either in

> fact or in law, not least because of his concurrent duty to the court. In any event, this is not the case in which to seek to explore this suggestion further".

91. Since no question of res judicata arises, the basis for the judge's conclusion that it is not open to Mr Mayall to challenge the correctness of Mr Donaldson QC's judgment is that to do so would be a collateral attack on the judgment, which would bring the administration of justice into disrepute and hence be an abuse of process.

92. The relevant legal principles were articulated by Sir Andrew Morritt V-C, giving the lead judgment of the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1 at [38], in a passage which has been approved and followed many times since, most recently in *Allsop*:

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
>
> …
>
> (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge…in the earlier action (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

93. There is no question of a challenge to the judgment of Mr Donaldson QC being unfair to MW, since it was not party to the derivative proceedings any more than Mr Mayall was. As for the suggestion that to permit such a challenge would bring the administration of justice into disrepute, which found favour with the judge, where the parties to the second proceedings are not the same as the parties to the first proceedings, the authorities are clear that it will only be in a very rare or exceptional case that the court will find that the second proceedings are an abuse of process: see [86] of the judgment of Flaux LJ in *PriceWaterhouseCoopers v BTI 2014 LLC* [2021] EWCA Civ 9 and the authorities cited there, together with [44(iv)(c)] of the judgment of Marcus Smith J in *Allsop*. MW was unable to point to any authority to the effect that, for a professional lawyer who had conducted litigation to be able to challenge the judgment in defence of a negligence claim against him, would bring the administration of justice into disrepute.

94. Indeed, it is striking that the only case Mr Pooles QC was able to refer to was *Laing*. However, that case is nothing to the point, since it was a case where the claimant in the second proceedings had been the unsuccessful claimant in the first proceedings, which was not the case here. Far from [22] and [25] of Buxton LJ's judgment supporting

MW's case that for Mr Mayall to challenge Mr Donaldson QC's judgment would be an abuse of process, they highlight the essential difference between that case and this, that there the claimant could have appealed the first judgment but did not do so. Since Mr Mayall was not a party to the derivative proceedings, he could not have appealed Mr Donaldson QC's judgment. In those circumstances it is difficult to see how a challenge to that judgment, even if it is a collateral attack, could be said to bring the administration of justice into disrepute.

95. In fact, as Andrews LJ pointed out during the course of argument, Mr Mayall's defence of the contribution claim did not need to go so far as saying that Mr Donaldson QC's judgment was wrong. It was enough to be able to demonstrate that other judges might well have taken a different view and concluded that a derivative action was appropriate and permission should be given. That was demonstrated by the decisions in *Hughes v Weiss* and *Saatchi v Gajjar* referred to above. In those circumstances, it is clear that Mr Mayall's advice to proceed with a derivative claim and seek permission was within the range of advice which could be given by a reasonably competent barrister and therefore could not be characterised as negligent.

96. However, because the judge fell into error in the two respects Mr Lawrence QC identified, concluding that the application of section 1(4) of the 1978 Act established Mr Mayall's liability in the contribution proceedings without more and concluding that any challenge by him to the correctness of Mr Donaldson QC's judgment would be an abuse of process, the judge did not address sufficiently the critical issues in the case as to whether Mr Mayall was negligent and, if so, whether that negligence was causative of Mr Percy's loss.

97. In relation to the first of those issues, whether Mr Mayall was negligent, the only finding the judge made, as Mr Pooles QC accepted, was that at [32] and [95] that Mr Mayall failed to warn Mr Percy that there was a risk that he would not get permission from the Court to proceed with the derivative claim. It appears from [98] that the judge had in mind a failure to warn after the mediation, specifically at the conference on 5 January 2011. However, the major problem with that alleged negligence is that none of it is pleaded by Mr Percy or by MW. As a consequence, it is not possible to establish precisely what advice it is alleged should have been given or the relevant counter-factual, in other words what it is said would have occurred if that advice had been given. The absence of a properly pleaded case means that a critical issue cannot be fairly and properly determined.

98. As noted above, Mr Mayall's evidence was that he did not recall giving any such advice and the judge found at [32] that it was more likely than not that he had not given such advice. However, Mr Mayall's evidence was also that, if he had given such advice, it would have been that the risk of not getting permission was low. It may be that the correct counter-factual is what would have occurred if that advice had been given, but none of that has been addressed in the judgment.

99. This leads into the issue of causation because, however the counter-factual is defined, it must depend upon how Mr Percy would have acted differently if he had been given a warning, at the conference on 5 January 2011, that there was a low risk of not getting permission to proceed with the derivative claim. The closest the judge gets to grappling with this issue is in [98] and in the sentence in [100] where, having reiterated some of the Deputy Judge's criticisms of the pleaded case in the derivative claim the judge said:

"The combination of admissions made by Mr Mayall, the findings I have made having heard the evidence of Mr O'Sullivan and the findings of the Deputy Judge, lead me to conclude that on the balance of probabilities these failures caused loss." Mr Pooles QC submitted that the question of whether the evidence supported MW's case on causation was a matter for the trial judge. However, there are a number of problems with the judge's approach to causation.

100. First, he proceeded on the mistaken assumptions that Mr Mayall had admitted causation in his Defence (as set out at the beginning of [98]) and that causation had only been dealt with by Mr Lawrence QC with "little vigour" (the beginning of [97]) or a "light touch" (the sentence in [100] after the one quoted in the previous paragraph). These mistaken assumptions clearly make his analysis of the whole issue of causation flawed.

101. Second, once one removes any alleged admissions by Mr Mayall from the equation, the only matters which could even arguably support the judge's conclusions on causation are the evidence of Mr O'Sullivan and the findings of the Deputy Judge. The latter cannot possibly be of any assistance in assessing whether the alleged failure to warn caused Mr Percy's loss. So far as the evidence of Mr O'Sullivan is concerned, the judge seems to have considered that his evidence was sufficient to establish what Mr Percy would have done. Hence the last sentence of [97], where the judge said: "Mr O'Sullivan had considerable dealings with Mr Percy and was examined about whether he would take the case to court if he had known of the weaknesses of the case." The problem with this is that the evidence of Mr O'Sullivan which the judge evidently had in mind was that quoted at [58] above, which, as Mr Lawrence QC pointed out, is to do with Mr Percy's reaction to the risks of proceeding to trial. That evidence does not begin to support a case that, if Mr Mayall had advised at the conference on 5 January 2011 that there was a risk, albeit low, that permission to proceed with the derivative claim might not be granted, Mr Percy would have done something different at that stage long before any trial, let alone establish what that something different would have been.

102. Third, the judge's analysis does not consider at all two important pieces of evidence which militate against the conclusion that the alleged failure to warn was causative of Mr Percy's loss: (i) the evidence of Mr O'Sullivan (referred to at [57] above) that he and Mr Percy did appreciate that there was a risk of losing the permission application and (ii) the evidence of Mr Mayall (quoted at [65] above) that, if he had given the advice that there was a risk, albeit low, that Mr Percy might lose the permission application, the overwhelming likelihood is that Mr Percy would still have proceeded with the application.

103. Those two pieces of evidence demonstrate that, contrary to the view expressed by the judge at [97] and Mr Pooles QC's submissions, however the counter-factual was defined, it depended upon establishing that, if Mr Mayall had given the advice that there was a risk that Mr Percy would not get permission from the Court to proceed with the derivative claim, Mr Percy would have acted differently, for example by seeking an immediate settlement of the claim rather than continuing with it. Only Mr Percy could give evidence of what he would have done. What would have happened in the counter-factual is an issue in the contribution proceedings on which the burden of proof was clearly on MW.

104. Contrary to Mr Pooles QC's submission, *Levicom* does not point to the burden of proof being on Mr Mayall in a case such as the present, for the reason given by Mr Lawrence

QC referred to at [64] above. Where a client acts upon a lawyer's negligent advice to do something, there may well be an inference, if the client does the something, that the negligence was causative of the loss so that if the lawyer wants to establish that the advice is not causative, the burden is on him or her to refute causation. However, where, as here, the complaint is of a failure to advise of something and it is said the client would have acted differently if that advice had been given, the burden of establishing that counter-factual is clearly on the client or in contribution proceedings on D1 which adopts that complaint. This is clear from [47]-[49] of the judgment of Sir Stanley Burnton in *Goldsmith Williams*.

105. Accordingly, the burden would have been on Mr Percy in the negligence claim to establish the counter-factual and thus the burden in the contribution claim was on MW. If it wished to establish the counter-factual that, if Mr Mayall had given the advice that there was a risk that Mr Percy would not get permission from the Court to proceed with the derivative claim, Mr Percy would have acted differently, for example by seeking an immediate settlement of the claim rather than continuing with it, it was incumbent on MW to call Mr Percy to give that evidence. It is no answer to say that, to have to call Mr Percy when MW had settled with him, would have presented MW with practical difficulties. The agreement of Mr Percy, if necessary, to provide a witness statement and to give evidence in the contribution proceedings (which were already on foot) could have been made a term of the settlement agreement. Furthermore, as Lewison LJ pointed out in the course of argument, contribution claims which give rise to this sort of counter-factual do not arise all that often. Most cases where one negligent defendant seeks contribution from another will not necessitate evidence from the original claimant.

106. In my judgment the judge failed to appreciate the significance to the issue of causation of the failure to call Mr Percy. This may have been because the judge erroneously thought that Mr Mayall had somehow admitted that any negligence in relation to the advice he did or did not give at the conference on 5 January 2011 was causative of Mr Percy's loss. However, whatever the reason, I consider that the judge should have concluded, on the basis of the documentary and oral evidence he had, particularly the two pieces of evidence referred to in [102] above, that it was incumbent on MW to call Mr Percy if it wished to establish that, contrary to that evidence, Mr Percy would have acted differently if Mr Mayall had given the advice which it is said he should.

107. Since MW did not call Mr Percy, there was a fatal lacuna in MW's case. It simply failed to call any evidence as to what Mr Percy would have done if Mr Mayall had given the advice at the conference on 5 January 2011 there was a risk that Mr Percy would not get permission from the Court to proceed with the derivative claim. That lacuna cannot be filled by Mr O'Sullivan's evidence, since he did not give evidence as to what Mr Percy would have done if given that advice. Nor can it be filled by reference to the Particulars of Claim supported by a statement of truth from Mr Percy since, as set out at [66] above, a pleading is not evidence at trial unless adopted by a witness in his or her evidence, which by definition did not happen here and, in any event, this case was not pleaded.

108. In the circumstances, the judge should have concluded that the contribution claim failed. In the light of the errors in his approach which I have identified, the appeal must be allowed.

109. I have reached that conclusion without having to consider Mr Mayall's alternative case that the contribution claim is precluded by the rule against reflective loss, so I can deal with that issue briefly. In my judgment, on a proper analysis, Mr Percy's claim was not as a shareholder in Langley Ward or not only as such a shareholder. His claim was essentially that, as a consequence of MW's and Mr Mayall's alleged negligence, Mr Percy made a settlement with Mr Trevor at a much lower level than he would have done, not least because the settlement he made had to take account of his potential personal liability for the costs of the unsuccessful permission application. This claim is a personal one to which the narrow rule against reflective loss does not apply.

110. On the basis that the appeal is allowed, the question still remains whether this Court should remit the matter to the Business List for retrial or simply dismiss the claim. Having given the matter careful consideration, I consider that the appropriate course is to dismiss the claim. I have reached that conclusion for two related reasons: (i) MW chose to pursue the contribution claim on the basis that Mr Mayall was liable without more because of section 1(4) of the 1978 Act and did not call Mr Percy to give evidence. It would seem unfair and oppressive to allow MW a second bite of the cherry on the correct legal basis, when I have concluded, for the reasons set out above, that the judge should have dismissed the claim; and (ii) it would also be unfair and oppressive that a professional man such as Mr Mayall should face a second trial which would probably not take place until some time next year, some 12 years after the events in question, particularly in circumstances where the case on negligence and causation now advanced was not even pleaded against him.

Conclusion

111. In the circumstances I would allow the appeal and dismiss the contribution claim.

Lord Justice Lewison

112. I agree with the Chancellor that the appeal must be allowed for the reasons he has given. But since Mr Pooles QC stressed the importance of this appeal to those who practise in the field of professional negligence, I add a short judgment of my own.

113. Section 1 (4) of the Civil Liability (Contribution) Act 1978 provides:

> "A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established."

114. The leading case on the operation of that sub-section is the decision of this court in *WH Newson Ltd v IMI plc* [2016] EWCA Civ 773, [2017] Ch 27. The facts of that case are

of crucial importance in understanding why it decided what it did. On 20 September 2006 the European Commission decided that there had been an unlawful price-fixing cartel in the market for copper and copper alloy fittings. The decision was addressed to 23 undertakings, including IMI and Delta. Both were found to have participated in the unlawful cartel. The effect of a decision of that kind is that all persons to whom it is addressed are bound by it. WH Newson and others brought "follow-on" proceedings against IMI. IMI in turn served Part 20 claims on fellow cartelists, including Delta. IMI had defended the proceedings on a number of grounds, including an allegation that the claim against it was statute barred by limitation. IMI subsequently settled with the claimants, and sought contribution from Delta. The question was whether Delta could rely on the limitation defence. This Court held that it could not. In the course of his judgment Sir Colin Rimer said:

> "[56] The premise of a contribution claim by D1 based on section 1(4) is that there has been a bona fide settlement or compromise of C's claim against D1. It will no doubt be open to D2 to argue in any contribution proceedings that the settlement or compromise was not a bona fide one, for example that it was a collusive, corrupt or dishonest one (see the Law Commission report, para 56), and if such a case is made good the provisions of section 1(4) will not avail D1. In this case, however, there is no suggestion that D1's settlement with C was other than bona fide and so section 1(4) is in play.
>
> …
>
> [58] Whether, however, the case is simple or complicated, in arriving at a bona fide settlement C and D1 will respectively have assessed the relative strength or weakness of their respective cases in the litigation and have brought into account the commercial considerations bearing upon it. If the settlement involves a payment by D1 to C, then a claim by D1 for contribution to it by D2 will be one to which section 1(4) applies. The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C. In so providing, section 1(4) gave clear effect to the Law Commission's recommendation.
>
> [59] The proviso of course shows that D1 must still prove at least something in order to succeed against D2. That is that "he would have been liable [to C] assuming that the factual basis of the claim against him could be established". In my judgment the sense of that is that all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. *If he can do that, he will be entitled to succeed against D2.* There may of course remain issues as to quantum, as to which section 1(4) makes no assumptions." (Emphasis added)

115. It is the sentence that I have emphasised that has caused the problem. On the facts of that case, where both IMI and Delta had already been found by the Commission to have been joint participants in an unlawful cartel, the sentence is correct. But it cannot be extrapolated into a general rule.

116. Take a simple example. Suppose that three cars are involved in a road traffic accident in which one of the drivers is injured. He brings a claim against the driver of one of the other two cars. In turn that driver settles the claim with the claimant and claims a contribution from the owner of the third car. It is surely open to the contribution defendant to say that he was not in fact the driver; or that the accident was entirely caused by the fact that the contribution claimant was driving on the wrong side of the road. Section 1 (4) relieves the contribution claimant from having to establish *his own* liability, but it does not absolve him from establishing the liability of anyone else from whom he seeks contribution. That is the mischief that the Law Commission identified in the report which led up to the passing of the Act. As that report stated at [45]:

> "In our working paper we suggested that it was unsatisfactory to require the 'settling' defendant to prove *his own liability* as a tortfeasor in order to entitle him to contribution from the other." (Emphasis added)

117. Their recommendation (which was accepted) was that:

> "a person who had compromised a claim made against him so as to benefit some other possible defendant should have the right to claim a contribution from the other defendant *provided that the other could be shown to be liable*; we added that it should not be an answer to such claim that the person who settled the claim would not have been held liable if the action against him had been tried." (Emphasis added)

118. In other words, the contribution claimant must still show that the contribution defendant was liable.

119. There is another reason why that sentence cannot be extrapolated into a general principle. Article 6 of the European Convention on Human Rights and Fundamental Freedoms provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

120. If Mr Mayall's liability were to be conclusively determined against him by a settlement made between two parties who are suing him (without any determination by a court) that would, on the face of it, deprive him of his right to have his liability determined by an independent and impartial tribunal. It is not, of course, incompatible with article 6 for Merriman White's own liability to be determined by an agreement to which it is a party, because it is always open to one party to waive its rights under article 6. But Mr Mayall has not waived his.

121. In the present case the judge said at [81]:

> "As Mr Mayall is unable to avail himself of a "collateral defence" because no factual assumptions may be made in respect of them, I conclude for the reasons given, and based on the permitted assumed facts, the breach of a duty of care pleaded in the Negligence Claim resulting in loss and damage gives rise to a reasonable cause of action between Mr Percy and MW. It follows, *without more*, that MW is entitled to a contribution from Mr Mayall: see *Newson* paragraphs 59-61." (Emphasis added)

122. I consider that the words I have highlighted were wrong. In my judgment, the judge was wrong to side-step the question whether Mr Mayall was negligent. The settlement between Merriman White and Mr Percy established only that Merriman White had been negligent. It did not establish that Mr Mayall had been. The facts are, in my judgment, fundamentally different from those in *Newson* where both IMI and Delta had already been found to have been participants in the unlawful cartel. As against each other, neither was entitled to go behind that binding decision. That is not this case. No court has yet found that Mr Mayall was negligent.

123. There is another point to be made here. The judge appears to have decided that because Mr Mayall could not challenge the decision of Mr Donaldson QC his liability was established. There are, in my judgment, two errors here. First, just because a barrister gives advice which turns out to be wrong, it does not follow that the advice was negligent. We have all had experience of a court reaching a decision contrary to the advice we have given to a client. Although the decision itself has been overtaken by later developments, it is still worth recalling the words of Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198:

> "Much if not most of a barrister's work involves exercise of judgment - it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment, which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed."

124. Mr Mayall's Defence is peppered with assertions that even if the application for permission to bring the derivative action was not appropriate, he was "reasonably entitled to consider it" to be so. Paragraph 19.4 pleads in terms that even if his advice was incorrect it does not follow that no reasonably competent barrister would have concluded that the derivative action was inappropriate. This aspect of Mr Mayall's defence does not feature in the judge's decision; and he does not explain why. Mr Mayall was entitled to a judgment, not on whether his advice was right or wrong, but on whether it was *negligent*.

125. The judge was shown two cases in which, on analogous facts, judges had given permission to bring a derivative action in preference to other remedies (e.g. a winding up or an unfair prejudice petition). One was a decision of HHJ Keyser QC (*Hughes v Weiss* [2012] EWHC 2363 (Ch)) and the other was a decision of the judge himself (*Saatchi v Gajjar* [2019] EWHC 3472 (Ch)). The Chancellor has set out the relevant

passages from those decisions. The judge dealt with those cases very shortly at [108] but only in the context of his apportionment of liability, rather than in considering the prior question whether Mr Mayall was negligent at all. What he said was:

> "In my judgment reliance on later authority where the court declined to make a winding up order is misconceived. Each case is dealt with on their own facts."

126. No doubt it is true that each case is dealt with on its own facts; but it was still necessary to deal with the question not simply whether Mr Mayall's advice was wrong, but whether it was negligent. It is notable that the judge does not use the word "negligent" or negligence" in relation to Mr Mayall anywhere in his judgment.

127. Second, I do not consider that the judge was right to say that Mr Mayall was necessarily precluded from challenging Mr Donaldson's decision. It is, of course, the case, that in some circumstances a collateral attack on a first instance decision will amount to an abuse of process. That was the case in *Laing v Taylor Walton* [2007] EWCA Civ 1146, [2008] PNLR 11. The underlying claim concerned the interpretation of a loan agreement. HHJ Thornton QC decided that question adversely to Mr Laing. Mr Laing himself then began a second action against his solicitors, alleging that they had been negligent in the drafting of the agreement. The second action was struck out as an abuse of process, but it is important to understand why. Buxton LJ said:

> "[22] The second, different, and more significant difficulty is however that everything said to us and to Langley J in criticism of HH Judge Thornton's judgment could have been said to HH Judge Thornton (and mainly was so said); and could have been deployed in the appeal from HH Judge Thornton that was never brought. What is sought to be achieved in the second claim is, therefore, not the addition of matter that, negligently or for whatever reason, was omitted from the first case, but rather a relitigation of the first case on the basis of exactly the same material as was or could have been before H.H. Judge Thornton."

128. It was because no new material was adduced in the second action that it was an abuse of process. Buxton LJ went on to say at [27]:

> "The difference is that, as shown in [19] above, in order to succeed in the new claim Mr Laing has to demonstrate not only that the decision of HH Judge Thornton was wrong, but also that it was wrong because it wrongly assessed the very matters that are relied on in support of the new claim. That is an abusive relitigation of HH Judge Thornton's decision not by appeal but in collateral proceedings…"

129. It is, in my judgment, clear that the fact that Mr Laing (who was bound by HHJ Thornton's judgment) did not appeal was a highly significant factor in leading to the conclusion that the collateral challenge was abusive. But this case is different. In the first place, unlike Mr Laing, Mr Mayall is not bound by Mr Donaldson's judgment.

Nor, for that matter, are Merriman White. In *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, 541 Lord Diplock said:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision *against the intending plaintiff* which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

130. Mr Mayall was not a party to Mr Donaldson's decision. No judgment was given against him; and he is therefore outside the key mischief which this species of abuse of process is designed to prevent.

131. Second, in paragraph 8 of his Defence, Mr Mayall pleads that following Mr Donaldson's judgment, Merriman White instructed him to draft an application for permission to appeal "but failed to put [Mr Mayall] in funds to do so." The pleading goes on to assert that because Merriman White was on the Bar Standards Board list of defaulting solicitors, he was unable to accept instructions without a payment on account. This plea therefore concludes by asserting that "any loss suffered by [Mr Percy] as a result of the lack of appeal is wholly caused by [Merriman White's] failure to put [Mr Mayall] in funds." This aspect of Mr Mayall's defence also finds no place in the judge's judgment.

132. It is true that Mr O'Sullivan's attendance note of 30 June 2011 records Mr Mayall having advised that the prospects of success on appeal were "only 25%." Mr Donaldson's decision was an exercise of judicial discretion; and the task of overturning an exercise of discretion on appeal is formidable. But that goes to the merits of this plea. It is not a reason for not considering it at all.

133. At [95] the judge said that he declined to assess the merits of the derivative claim because that would amount to a review of findings made by a competent court. He added:

> "In my judgment that would undermine rather than maintain the rule of law and put in danger the reputation of the administration of justice: *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321."

134. I regret to say that I consider that this bald conclusory statement does not explain *why* the judge thought that the administration of justice would be endangered on these particular facts. In *Bairstow* ([2004] Ch 1) Sir Andrew Morritt V-C said:

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. …
>
> (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to

> challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

135. These two propositions are only consistent with each other if something more than the mere fact of challenging an earlier decision is required in order to make a later challenge abusive. But in this case the judge did not identify what that extra ingredient was. In circumstances in which part of Mr Mayall's defence is that an appeal was precluded by Merriman White, I cannot see that it is abusive for him to argue (if he can) that an appeal would have succeeded.

136. It was also necessary for Merriman White to establish that any negligence on the part of Mr Mayall caused "the same damage". At [32] the judge found as a fact that Mr Mayall did not warn of the risks when it became known that the permission hearing would be contested. The risks to which the judge referred must have been the risk that permission would be refused. The judge returned to the topic later in his judgment. He said:

> "[98] Mr Mayall had admitted in his defence to the Negligence Claim that damage could be caused by his failure to advise that the offer of £500,000 was attractive given the defects in the proceedings, the risk of failure to obtain permission to proceed and general litigation risk. Mr Percy was not equipped with the right advice to make an informed decision as to whether to proceed or settle the claim after mediation. The failure to warn and properly evaluate the risks involved with the permission application, negated any argument that Mr Percy would have "pressed on" regardless and ignored his advisors on issues of law that would directly affect the commercial outcome.
>
> [99] I accept the evidence of Mr O'Sullivan that Mr Percy "was not going to simply go to trial to hear his fate from the lips of a judge". In other words, he would have taken account of the commercial risks if he had been properly advised and settled the claim by accepting the offer. He would not have "pressed on". The evidence of Mr Mayall was that he advised him to "press on". Mr O'Sullivan's evidence, tested in cross examination, was that Mr Percy was "a very commercial man" and "had no intention of going to trial if it could be compromised on the way"."

137. There are a number of problematic aspects in this part of the judgment. First, it has not been possible to identify where in his Defence Mr Mayall made the admission to which the judge referred. Second the failure to warn at the permission stage was not a pleaded allegation against Mr Mayall. Mr Pooles QC was able to identify a paragraph in the original Particulars of Claim which sidled up to such an allegation (paragraph 49 (7)); but did not make it clearly. But that paragraph of the original Particulars of Claim was deleted by amendment and was not included in the allegations made in the contribution notice. So the basis of the judge's decision was an unpleaded allegation. Third, the

judge did not consider what warning Mr Mayall should have given. From the perspective of causation there is an obvious difference between a warning that there is a 10 per cent chance that permission will be refused and a warning that there is a 50 per cent chance that it will be refused. The judge did not, for example, find that Mr Percy would have taken no risk at all. Fourth, the evidence of Mr O'Sullivan that the judge accepted was concerned with the risks of *going to trial* (on the assumption that permission had been granted). A trial would have been a far costlier and riskier enterprise than the permission stage; and Mr Mayall did advise that there were risks in going to trial.

138. Finally, it is necessary to say something about the "reflective loss" argument. That requires looking at how Mr Percy put his case against Merriman White. After the narrative, and his allegations of breach of duty, Mr Percy pleaded in paragraph 45 of his Particulars of Claim that as a result of Mr Donaldson's decision he was exposed to an adverse costs order. On 30 June 2011 he was ordered to pay the costs of the application subject to a detailed assessment. Although the costs never were assessed, they were said to be in the region of £221,000. Mr Percy's exposure to that liability for costs weakened his position in subsequent settlement negotiations, and ultimately he settled for £65,000.

139. The thrust of his claim is that had he been properly advised he would have settled for much more. The weakening of Mr Percy's negotiating position was, he alleged, caused by his personal potential liability for costs. That was nothing to do with any company and is outside any principle that bars the recovery of "reflective loss".

140. Unfortunately, as a result of the course that the trial took, many of the matters which were highly material to Mr Mayall's potential liability were never investigated. I agree with the Chancellor that to permit Merriman White to have a retrial would necessitate a complete recasting of their case and would be unfair to Mr Mayall so long after the relevant events.

141. Accordingly, for the reasons given by the Chancellor, and these reasons, I too would allow the appeal.

Lady Justice Andrews

142. I agree with both judgments.