Neutral Citation Number: [2020] EWHC 2719 (Ch)

Case No: BL-2018-000734

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 14 October 2020

Before :

MRS JUSTICE BACON

Between :

(1) NAIBU GLOBAL INTERNATIONAL COMPANY PLC
(2) NAIBU (HK) INTERNATIONAL INVESTMENT LIMITED — **Claimants**

- and -

(1) DANIEL STEWART & COMPANY PLC
(2) PINSENT MASONS LLP — **Defendants**

Nicholas Davidson QC and Daniel Lewis (instructed by **PGB Gitlin Baker**) for the **Claimants**
Christopher Smith QC and Bibek Mukherjee (instructed by **Clyde & Co LLP**) for the **Second Defendant**

Hearing dates: 20–21 May 2019, 21 September 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE BACON

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Introduction

1. The claim in these proceedings arises from the dissipation of the assets of a Chinese sportswear company, Naibu (China) Co Ltd ("Naibu China"). The Second Claimant ("Naibu HK"), a Hong Kong company, is the parent company of Naibu China, and the First Claimant ("Naibu Jersey") is a Jersey company and the holding company for the Second Claimant. Naibu Jersey had been floated on the Alternative Investment Market ("AIM") in London, but the subsequent disposal of the assets of Naibu China rendered the Claimants' shares in that company valueless, and Naibu Jersey was accordingly de-listed.

2. The claim was issued on 28 March 2018, alleging breaches of duty and/or negligence on the part of the Defendants in conducting due diligence and preparing Naibu Jersey for its IPO on AIM, and claiming damages in an amount equivalent to almost £185 million.

3. On 4 July 2018 the Second Defendant, Pinsent Masons, applied to stay the claim brought by Naibu HK pursuant to section 9 of the Arbitration Act 1996. As against Naibu Jersey, Pinsent Masons applied for the claim to be struck out or summarily dismissed. In the alternative it applied for Naibu Jersey's claim also to be stayed pursuant to section 9 of the Arbitration Act.

4. The Claimants accept that Pinsent Masons is entitled to a stay of the claim brought by Naibu HK, but dispute the applications against Naibu Jersey. On 19 December 2018 the Claimants applied to amend their Particulars of Claim to address, among other things, the position of Naibu Jersey. The hearing on 20–21 May 2019 was therefore the hearing of Pinsent Masons' alternative applications against Naibu Jersey, along with the Claimants' application to amend, which raised essentially the same issues as the applications for strike out or summary judgment.

5. One of the submissions made by Pinsent Masons in support of its applications against Naibu Jersey was that Naibu Jersey's loss was not recoverable, on the basis that it was purely reflective of the loss claimed by Naibu HK. At the time of the May 2019 hearing, however, the question of the scope of the rule against recovery of reflective losses was pending before the Supreme Court in the case of *Sevilleja v Marex Financial*. I therefore adjourned judgment on the respective applications to await the judgment of the Supreme Court in that case, which was handed down on 15 July 2020: [2020] UKSC 31. Thereafter the parties made submissions on the implications of the *Marex* judgment, in writing and at a further hearing on 21 September 2020. In the course of those submissions the Claimants made a further application to amend their Particulars of Claim (replacing the previous draft amended Particulars of Claim; I will refer to the new draft as the "revised amended Particulars of Claim"), and Pinsent Masons formally applied to amend its original application notice to include the reflective loss point.

6. Pinsent Masons applications are supported by two witness statements from Ms Sarah Clover, the partner at Clyde & Co who is acting for Pinsent Masons in these proceedings. The Claimants rely on three witness statements from Mr Giles Elliott, who is a director and the Chairman of Naibu Jersey, and is also a director of Naibu HK. Between them, the witness statements set out the chronology of events described further below, and exhibit the contemporaneous documentation that forms the basis of the opposing

applications. In addition, in relation to the revised amended Particulars of Claim, the Claimants rely on a witness statement from Mr Ian Baker, a partner in the firm of PGB Gitlin Baker, solicitors for the Claimants.

Factual background

7. Naibu China was established in 2002 by Mr Huoyan Lin and his family. In around 2005 Naibu HK was incorporated as its parent company. In turn, Naibu Jersey was incorporated in December 2011 to hold 100% of the share capital of Naibu HK, for the purpose of enabling the business carried on by Naibu China to be floated on AIM.

8. The Claimants retained the First Defendant ("Daniel Stewart") to act as their Nominated Adviser ("NOMAD") in relation to the AIM flotation. The original retainer was agreed by Naibu HK in August 2011; that was replaced in March 2012 by a written agreement between Daniel Stewart and Naibu Jersey, which provided for the original retainer to be terminated and replaced with the new agreement. The status of that retainer is not in issue in the present applications.

9. It is common ground that Pinsent Masons was retained to act as the legal advisor to both Naibu China and Naibu HK, in accordance with letters of engagement dated 16 August 2011. At that time, which predated the incorporation of Naibu Jersey, it was envisaged in the letters of engagement that a parent company (referred to in the letter of engagement as "FloatCo") would be incorporated for the purposes of the AIM flotation, and that Pinsent Masons would advise that company and its board of directors.

10. In particular, the letter of engagement from Pinsent Masons to Naibu HK stated that the services provided by the firm would include:

> "conducting a due diligence exercise and preparing a legal due diligence report on FloatCo; …
>
> commenting on the AIM admission document (the primary responsibility for the preparation of which will lie with the FloatCo and the Nomad); …
>
> commenting on and negotiating the placing/floatation agreement and advising the FloatCo upon it; …
>
> preparation of legal advice to the directors of the FloatCo on the AIM admission process, including advice on the directors' responsibilities and duties, and confirming to the Nomad that we have done so;
>
> drafting/reviewing any existing or proposed new service agreements for executive directors and letters of appointment for non-executive directors, if required, to be entered into by FloatCo; and
>
> preparing secondary legal documents, including minutes of meetings of the board of directors convened in relation to the AIM

> admission, and advising on such other documents, where responsibility for such documents rests with [Naibu HK]."

11. Both letters of engagement set out the fees that would be payable by Naibu China and Naibu HK respectively, and both letters provided for Pinsent Masons' total liability to be limited to US$50 million.

12. In addition to the specific matters set out in the respective letters of engagement, both letters incorporated a set of "standard" terms and conditions which included, in clause 14, the following limitation of any third party rights:

> "**Third party rights**
>
> 14.1 In reference of 'Contracts (Rights of Third Parties) Act 1999' in England and Wales, we hereby confirm that we provide services only for the rights and interests of your company as our customer and our legal service agreement may only be enforced by your company and us, not any third party.
>
> 14.2 Even if the purpose of customer instructions is to authorise rights and interests to any third party, Pinsent Masons LLP shall not bear any obligation or any liability for any matter towards such third party (unless such third party is also a customer of Pinsent Masons LLP on such matters)."

13. The terms and conditions also included a governing law and arbitration clause which stipulated that the contract was to be governed by "laws in the United Kingdom", but which went on to provide at clauses 20.2 and 20.3 as follows:

> "20.2 In the event that your company or Pinsent Masons LLP ('Petitioner') wishes to escalate the resolution of any disputes, conflicts, or claims ('Claims') arising from contracts between your company and Pinsent Masons LLP, the Petitioner shall first send a written notice to the other party and specify the following facts and matters.
>
> 20.3 All Claims shall first be submitted to the Hong Kong International Arbitration Centre ('HKIAC') for mediation according to its mediation rules. In the event that a mediator gives up the mediation or the mediation is ended in other ways without resolving the Claims, such Claims (and all counterclaims raised thereby) shall be submitted to HKIAC for arbitration according to its local arbitration rules."

14. Naibu Jersey was duly incorporated as the FloatCo and its flotation on AIM took place on 30 March 2012; this went on to raise around £6m. The Claimants' allegations as to what subsequently occurred are set out in the Particulars of Claim (in both the original and amended versions). In summary, Naibu China began to experience trading difficulties, and concerns were raised regarding the performance of the group. It appears that at some point in 2014 Mr Lin ceased cooperating with the non-executive directors of the Claimant companies, failed to respond to communications sent to him, and has

since been untraceable. What exactly happened is not known, but the Claimants believe that Mr Lin disposed of all of the assets of Naibu China and closed its factory in Jinjiang. He was able to do so, the Claimants say, because he was in sole possession of Naibu China's "chop", which the Claimants allege is the seal of a Chinese company that allows the company's business to be transacted. As a result of the dissipation of the assets of Naibu China, the shares in that company held by Naibu HK and in turn by Naibu Jersey were rendered valueless, and Naibu Jersey was de-listed on 9 January 2015.

15. In light of this series of events, the Claimants contend that the Defendants acted negligently and in breach of their retainer in conducting due diligence and preparing for the IPO. Among other things it is said that the Defendants failed to advise on Mr Lin's powers as holder of the company chop, failed adequately to investigate on the business history and background of Mr Lin and his associates, and failed to take adequate steps to ensure that Naibu China could be controlled by the Claimants.

16. Pinsent Masons denies all of these allegations, but accepts that for the purposes of the present applications it must be assumed that they are well founded. What is disputed by Pinsent Masons is whether the Claimants can pursue their claims in this jurisdiction or at all.

17. In the case of Naibu HK, the position is now common ground: Naibu HK accepts that on the basis of clause 20 of the terms and conditions attached to Pinsent Masons' letter of engagement, its claim should be stayed pursuant to section 9 of the Arbitration Act 1996. The position of Naibu Jersey is, however, different: although it is undisputed that Pinsent Masons did provide advice to Naibu Jersey and its directors in connection with the AIM flotation, there was no letter of engagement from Pinsent Masons in relation to Naibu Jersey, and Pinsent Masons' conduct cannot therefore be said to have been in breach of any express contractual duties. The question of the basis on which Pinsent Masons advised Naibu Jersey, and the consequences of that for Naibu Jersey's claim, lies at the heart of Pinsent Masons' applications as well as the Claimants' application to amend.

The parties' applications

18. The Claimants' case, as set out in particular in the proposed amendments to their Particulars of Claim, is that Pinsent Masons' conduct gave rise to an implied retainer, or (at the very least) that by acting as they did Pinsent Masons assumed a duty of care in tort to Naibu Jersey. The Claimants say that their case advanced on the basis of these amendments has at the very least a reasonable prospect of succeeding, and should therefore be permitted to proceed.

19. Pinsent Masons' response is that all of the advice given to Naibu Jersey in the context of the flotation was provided on the basis of the letters of engagement under which Pinsent Masons was retained to act for Naibu HK and Naibu China. There is therefore (it is said) no need to imply any retainer; nor could a tortious duty of care to Naibu Jersey arise, since the terms and conditions incorporated in the letters of engagement expressly excluded any liability to third parties other than their clients. Accordingly, Pinsent Masons says that even with the proposed amendments Naibu Jersey's case discloses no reasonable grounds for bringing or defending the claim, and/or has no real prospect of success, and that the claim should accordingly be struck out under CPR r. 3.4(2)(a) or dismissed summarily under CPR r. 24.2.

20. In the alternative, Pinsent Masons argues that the loss claimed by Naibu Jersey, even on the basis of the revised amended Particulars of Claim, is almost entirely reflective of the losses claimed by Naibu HK, and is therefore irrecoverable under the rule against recovery of reflective losses. On that further basis, therefore, Pinsent Masons says that the claim should also be struck out or dismissed summarily, as regards the majority of the losses claimed. It is accepted, however, that certain categories of loss set out in the revised amended Particulars of Claim would not fall to be dismissed on this basis.

21. In the further alternative, if the strike out/summary judgment applications fail, Pinsent Masons says that Naibu Jersey's claim should be stayed pursuant to s. 9 of the Arbitration Act 1996, on the grounds that Naibu Jersey is claiming "under or through" a party to an arbitration agreement (i.e. Naibu HK) within the meaning of s. 82(2) of the Arbitration Act.

22. The tests for strike out and summary judgment are well established. Under CPR r. 3.4(2)(a) a claim may be struck out if it discloses no reasonable grounds for bringing the claim, and CPR r. 24.2 provides that the court may give summary judgment against a claimant if it considers that the claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at a trial. The correct approach to applications of this nature by defendants is set out by Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch) at §15, and is common ground as between the parties. In summary:

    i) the court must consider whether the claimant has a "realistic" prospect of success, which means a claim that is more than merely arguable;

    ii) the court must not conduct a "mini-trial", but it may nevertheless be clear from the evidence before the court that there is no substance in factual assertions made, particularly if contradicted by contemporaneous documents;

    iii) the court must take into account the evidence before it as well as the evidence that can reasonably be expected to be available at trial. If there are reasonable grounds for believing that a fuller investigation into the facts would affect the outcome of the case, the court should hesitate about making a final decision without a trial;

    iv) however if the application turns on a short point of law or construction, and the court is satisfied that it has before it all the evidence necessary for the proper determination of that question and the parties have had an adequate opportunity to address it in argument, the court should decide that point.

23. The stay application, advanced by Pinsent Masons in the alternative to its strike out and summary judgment applications, gives rise to different issues which are discussed further below. At this stage, however, it should be noted that the implications of a stay under s. 9 of the Arbitration Act are more than merely procedural, since, when the application was issued, neither Claimant had commenced an arbitration in Hong Kong, and Pinsent Masons had indicated that if either Claimant sought to do so it would be argued that the claims are time barred. For practical purposes, therefore, if Naibu Jersey's claim is stayed (as it is agreed Naibu HK's claim must be) that may well be the end of the matter as regards the claims against Pinsent Masons.

The implied retainer point

24. The legal principles governing the implication of a retainer are not disputed. It is common ground that where there is no express retainer, a retainer may nevertheless be implied from the conduct of the parties. The leading case is *Dean v Allin & Watts* [2001] EWCA Civ 758, in which the Court of Appeal expressed the test as follows at §22:

> "As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties. In *Searles v Cann and Hallett* [1993] PNLR 494 the question arose whether the solicitors for the borrowers implied agreed to act as solicitors for the lenders. Mr Philip Mott QC (sitting as a Deputy Judge of the Queen's Bench Division) held that there was nothing in the evidence which clearly point to that conclusion. He went on:
>
> > 'No such retainer should be implied for convenience, but only where an objective consideration of all the circumstances make it so clear an implication that [the solicitor himself] ought to have appreciated it.'"

25. In a slightly earlier judgment of the Court of Appeal in *Baird Textile Holdings v Marks & Spencer* [2001] EWCA Civ 274, Mance LJ at §§61–2 emphasised that (1) the party asserting an implied contract must show an intention to create legal relations, and (2) the test of any such implication is necessity.

26. In *Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch), Arnold J reviewed the authorities and at §682 summarised the test as follows: "was there conduct by the parties which was consistent only with Mishcon de Reya being retained as solicitors for the Claimants?" That test was cited with approval by Moore-Bick LJ in *James-Bowen v Commissioner of Police for the Metropolis* [2016] EWCA Civ 1217 (reversed on other grounds [2018] UKSC 40), going on to add at §24:

> "In circumstances where the parties could have entered into an express retainer but have not chosen to do so, I think the court should be slow to find that they have entered into such a contract by conduct. In my view it cannot properly do so unless they have behaved towards each other in a way that can be explained only by the existence of an intention to enter into legal relations of a particular kind."

27. Relying on that latter point, in particular, Mr Smith QC, representing Pinsent Masons, argued that all of the work carried out by Pinsent Masons for Naibu Jersey in relation to the AIM flotation was in fact carried out pursuant to, and in discharge of, Pinsent Masons' retainer with Naibu China and/or Naibu HK. In particular Mr Smith pointed to the various clauses in section 2 of the letter of engagement for Naibu HK (set out above) as showing, in his submission, that Pinsent Masons was engaged to advise and provide services to the FloatCo, which became Naibu Jersey, and to the directors of that company. There was therefore, he said, no necessity whatsoever for Pinsent Masons to enter into a legal

relationship with Naibu Jersey. The test was whether (objectively) Pinsent Masons accepted Naibu Jersey as its client; that is, he said, different from simply agreeing to provide advice to Naibu Jersey or its directors.

28. Mr Smith also referred to clause 14 of the terms and conditions incorporated in the letters of engagement for Naibu China and Naibu HK (also set out above), which expressly excluded liability to third parties. That, Mr Smith submitted, was strong evidence that Pinsent Masons did not intend to create legal relations with Naibu Jersey.

29. In addition, Mr Smith referred to the fact that all of Pinsent Masons' invoices were issued to Naibu China or Naibu HK, and that negotiations as to additional fees, during the course of March 2012, were conducted specifically with Naibu China and Naibu HK by reference to the agreements with those companies. He also submitted that it would be inconceivable that Pinsent Masons would intend to enter into a contractual relationship with Naibu Jersey that did not include, for example, the $50 million cap on liability that was expressly set out in the letters of engagement for Naibu China and Naibu HK.

30. I am not persuaded that these points are in themselves sufficiently decisive to show that Naibu Jersey has no realistic prospect of establishing an implied retainer as pleaded in the Amended Particulars of Claim. The striking feature of this case is that Pinsent Masons repeatedly described itself or permitted itself to be described, in formal documents, as being the solicitors for, or instructed by Naibu Jersey. For example:

    i) The placing proof admission document issued by Naibu Jersey on 28 March 2012 for the purposes of the AIM flotation named Pinsent Masons as "Solicitors to the Company as to English Law", the Company being defined as Naibu Jersey.

    ii) The legal due diligence report prepared by Pinsent Masons for the purposes of the flotation, and dated 30 March 2012, stated that Pinsent Masons had been "instructed by the Company to carry out a legal due diligence review in relation to the Proposed Transaction", the Company again being defined as Naibu Jersey; that the report was "intended solely for the use and benefit of the Company and Daniel Stewart in connection with the Proposed Transaction"; that Pinsent Masons accepted "no responsibility or legal liability to any person other than the Company and Daniel Stewart, whether in relation to the Proposed Transaction or otherwise (including but not limited to, in relation to the contents of this Report) such liability not to exceed US$ 50 million. It is not to be relied upon by, nor is any responsibility accepted to, any third party"; and that the report was prepared "solely on the basis of the information supplied to us by or on behalf of the Company".

    iii) On the same date, Pinsent Masons provided a letter to Daniel Stewart which again defined the Company as Naibu Jersey and stated among other things that "We are acting as the Company's solicitors in connection with the application for admission to trading on AIM"; that "the scope of this letter is limited to matters which are customarily the responsibility of the Company's UK solicitors in the context of a transaction of this type described in the first paragraph of this letter"; that the letter is "provided to you, with the consent of the Company, for information only in relation to your confirmation to the London Stock Exchange plc"; and that Pinsent Masons "acted for the Company and for no one else in connection with the Application. In particular, we have not acted for you and accordingly we do not

> accept or incur any liability to you or any other person in relation to the confirmation set out above."

31. It is, I consider, entirely realistic for Naibu Jersey to contend that these statements are only consistent with Pinsent Masons being retained as solicitors for Naibu Jersey. Even if a distinction might (in an appropriate case) be drawn between providing advice to a company and accepting that company as a client, in this case the formal statements from Pinsent Masons provide ample evidence on which Naibu Jersey can contend that Pinsent Masons' conduct should be characterised as entering into a solicitor-client relationship with Naibu Jersey, rather than merely providing advice to the latter in discharge of the retainer with Naibu China and Naibu HK.

32. In addition, there are internal documents indicating that Pinsent Masons did regard Naibu Jersey (and not merely Naibu China and Naibu HK) as its client. In particular, in internal emails dated 29–30 March 2012, Mr Page, who was the partner leading the Pinsent Masons team working on the flotation, asked a legal PA at Pinsent Masons to do a client opening form for Naibu Jersey, grouping it with Naibu China and Naibu HK. If Pinsent Masons was *not* retained by Naibu Jersey but was simply acting on the instructions of Naibu China and Naibu HK, it would not have been necessary to open a new client matter on the Pinsent Masons system.

33. It is also notable that the due diligence report and the letter to Daniel Stewart on 30 March 2012 both contained express statements limiting Pinsent Masons' liability to parties *other than* Naibu Jersey and (in the case of the due diligence report) Daniel Stewart. Such statements carry the inevitable inference that Pinsent Masons *was* accepting liability to Naibu Jersey. That sits very oddly with the submission that the Naibu China and Naibu HK letters of engagement should be interpreted as excluding liability to Naibu Jersey.

34. In an attempt to avoid that inconsistency Mr Smith was driven to submit that the due diligence report and letter to Daniel Stewart did not mean what they said, and should be read in the context of the other evidence. That is, however, not something that can be resolved in the context of the present strike out/summary judgment application. Pinsent Masons has not put forward any witness evidence (for example a statement from Mr Page) to suggest that the various statements in the formal documents prepared by Pinsent Masons itself should be interpreted contrary to their apparently clear meaning, nor is the other evidence before me (such as the terms of the letters of engagement) so compelling as to allow me to conclude, on a summary basis, that those documents should be given something other than their clear and natural meaning.

35. For all of these reasons I consider that Naibu Jersey's case on the implied retainer has a real prospect of success. As Mr Davidson QC for the Claimants pointed out, that does not mean that Pinsent Masons' liability under such a retainer would necessarily be unlimited. Rather, the question of the extent of liability under any implied retainer would likewise be a matter for debate at trial.

36. I therefore reject the application for strike out or summary judgment in relation to the implied retainer point.

The duty of care point

37. Mr Smith accepted that if the Claimants' case in relation to the implied retainer has a real prospect of success, then it must follow that their case as to the duty of care owed by Pinsent Masons to Naibu Jersey likewise has a real prospect of success. It is therefore not necessary to consider Mr Smith's further arguments on whether, assuming that there was no implied retainer, the Claimants' alternative case as to a duty of care in tort should also be struck out or summarily dismissed.

The reflective loss point

38. That leaves (for the purposes of the strike out/summary judgment applications) the reflective loss issue, which is essentially a point of law based upon the Claimants' pleaded case.

39. Before addressing the substance of this point there is a threshold issue, raised for the first time by the Claimants in their supplemental submissions following the judgment of the Supreme Court in *Marex*, of whether Pinsent Masons is entitled to rely on this point at all. Specifically, Mr Davidson's submission is that Pinsent Masons did not take a point on reflective loss either in its pre-action correspondence or in its original application seeking strike out or summary judgment. Rather, the reflective loss issue was first raised at the end of Ms Clover's second witness statement. Mr Davidson therefore submits that the reflective loss point should not be decided on this application.

40. This is a rather surprising submission given that the reflective loss point, including the question of how to deal with the pending appeal in *Marex*, was fully addressed by the Claimants in their skeleton argument and oral submissions before me in May 2019, supported by Mr Elliott's second and third witness statements, without any suggestion then being made that the point was inadmissible. On the contrary, Mr Davidson positively submitted at that hearing that one case management option would be to adjourn my decision until judgment in *Marex* had been given by the Supreme Court, and then to invite further argument if appropriate in light of that judgment – precisely the course which, as set out above, I decided was indeed appropriate to take in this case. Mr Smith's submissions regarding case management were likewise premised on the assumption that adjournment of my judgment to await the outcome of the *Marex* appeal was one possible appropriate course to take (albeit not his preferred option). If Mr Davidson had, by contrast, submitted then that the reflective loss point could not properly be taken by Pinsent Masons, and if I had accepted that submission, it would not have been necessary to postpone judgment for what turns out to have been more than a year to await the outcome of the *Marex* appeal.

41. In these circumstances I consider that the Claimants are either estopped from raising an admissibility point now, or have waived their rights to do so. Their acceptance of Pinsent Masons' entitlement to raise the point was, in my view, entirely unequivocal from their conduct at the hearing in May 2019 and in particular the express submissions of Mr Davidson at that hearing.

42. In case of any doubt, however, Pinsent Masons has now applied formally for permission to amend its application notice to include the reflective loss point, and I consider that it is appropriate to grant permission to do so. CPR r. 3.1(2)(m) gives the court wide powers to make appropriate case management orders for the purpose of furthering the overriding

objective. Those powers apply "in addition to" any powers given to the court by other rules or practice directions, (r. 3.1(1)) "[e]xcept where these Rules provide otherwise" (r. 3.1(2)). It follows that while CPR Part 17 does not include the power to amend an application notice, permission for such an amendment can be given under r. 3.1(2)(m).

43. That was the conclusion of Master Matthews in *Agents Mutual v Moginnie James* [2016] EWHC 3384 (Ch), §§9–10, permitting an oral application to amend an application for summary judgment. As Master Matthews noted, it will often further the overriding objective if the court allows all issues between the parties about summary judgment to be decided at the same time. That comment applies *a fortiori* in the present case, where as set out above both the parties and the court have hitherto proceeded on the assumption that the reflective loss point would indeed form part of the issues to be decided at this time. In those circumstances it is, in my view, clearly desirable for the reflective loss point to be decided now alongside the other issues raised in Pinsent Masons' original application. If it is a good point, there can be no conceivable purpose in requiring Pinsent Masons to issue a new application, still less to proceed to trial.

44. That brings me, therefore, to the substance of the issue. The starting point is the *Marex* judgment of the Supreme Court. In that case, the Court unanimously allowed the appeal of Marex from the decision of the Court of Appeal, and permitted Marex to proceed with various aspects of its claim against Sevilleja which the Court of Appeal had held were precluded by the rule against recovery of reflective loss, as set out in the case of *Prudential Assurance v Newman Industries (No. 2)* [1982] Ch 204. The majority of the Court nevertheless accepted the rule against reflective loss in the *Prudential* case, confirming it as a rule of law, but limiting it to claims by shareholders based on the diminution of the value of their shares or distributions that they receive as shareholders.

45. There was no dispute between the parties to these proceedings as to the reasoning of the majority. At §28 of the judgment of Lord Reed (with which Lady Black and Lord Lloyd-Jones agreed), Lord Reed summarised the principle to be drawn from *Prudential* as follows:

> "… where a company suffers actionable loss, and that loss results in a fall in the value of its shares (or in its distributions), the fall in share value (or in distributions) is not a loss which the law recognises as being separate and distinct from the loss sustained by the company. It is for that reason that it does not give rise to an independent claim to damages on the part of the shareholders."

46. As Lord Reed went on to find, however, that principle should be confined to claims by shareholders in that capacity. He summarised the distinction at §79 of his judgment as follows:

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

> company has a right of action in respect of substantially the same loss."

47. Lord Hodge at §§99–100 of his separate judgment agreed with Lord Reed that:

> "… where a company suffers a loss as a result of wrongdoing and that loss is reflected to some extent in a fall in the value of its shares or in its distributions, the fall in the share value or in the distributions is not a loss which the law recognises as being separate and distinct from the loss sustained by the company … it is a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as shareholder."

48. The difference between the parties lies in the question of how that rule is applied in the present case. Shortly put, Pinsent Masons' submission is that the loss and damage pleaded by Naibu Jersey turns almost entirely upon the loss suffered by Naibu HK, since the alleged loss consists of a fall in the value of the shares in Naibu HK (to nil) and a consequent diminution (to nil) of the value of Naibu Jersey's investment in Naibu HK. That is, Mr Smith says, a paradigm example of a situation in which the rule against reflective loss will be engaged, as confirmed by the Supreme Court in *Marex*. Mr Smith accepts, however, that this does not encompass the separate losses that are now pleaded in the revised amended Particulars of Claim in respect of the costs of steps taken by Naibu Jersey to assert control over and investigate losses suffered by Naibu HK and Naibu China.

49. Mr Davidson, in response, acknowledges that the claim as originally pleaded did not distinguish between the losses of Naibu HK and Naibu Jersey, pleading a loss to Naibu HK of RMB 1,649,326,000, "being the value of its shares in Naibu China", and a loss to Naibu Jersey of an identical amount, "being the value of its shares in Naibu HK". That original pleaded position, he acknowledges, reflects the overall position on loss: in total, he accepts that Naibu Jersey has suffered precisely the same loss as Naibu HK, although the revised amended Particulars of Claim no longer seeks to put a precise figure on the quantum of that loss.

50. His argument is, however, that it is necessary to look at the losses of the two companies as they evolved over time, as now pleaded in the revised amended Particulars of Claim. On the day of the flotation of Naibu Jersey on AIM, the revised draft pleads that "Naibu Jersey suffered loss in that the value of its shareholding in Naibu HK was substantially less than it would have been if appropriate control mechanisms had been in place". Subsequently, it is said, further losses were suffered by Naibu Jersey, namely (1) the cost of steps taken to assert and regain control of Naibu HK, (2) the cost of steps taken to assert and regain control of Naibu China, (3) the cost of steps taken to investigate the depredations against Naibu China, (4) disbursement of the proceeds of flotation, and (5) further diminution (to nil) of the value of the shareholding in Naibu HK consequent upon the depredations against Naibu China. What is required, Mr Davidson says, is an investigation (through expert evidence) of the loss suffered by each of Naibu Jersey and Naibu HK at each of those different stages. To the extent that, at one or more of those stages, that investigation identifies a loss to Naibu Jersey that is different in nature to and/or more than the loss to Naibu HK, that is a loss that Naibu Jersey can recover. As to why the losses to Naibu Jersey might, at different points in time, be quantified as being

different to the losses to Naibu HK, Mr Davidson suggests that this might be the case since the shares were being traded in different markets.

51. As I have already indicated, Pinsent Masons accepts that the costs of steps taken by Naibu Jersey to assert control over and investigate losses suffered by Naibu HK and Naibu China do not constitute reflective losses. In respect of the remainder of the categories of loss claimed, however, I consider that it is wholly artificial to carve up those losses by time in an attempt to circumvent the application of the reflective loss rule. As Mr Davidson rightly concedes, the total losses of Naibu Jersey are ultimately the same as those of Naibu HK. If the application of the rule against reflective loss could be avoided by the simple device of repleading so as to identify different losses occurring at different times, with the submission that the losses of the two companies might not have been precisely contiguous, that would entirely undermine the purpose of the rule.

52. Nor does Mr Davidson's approach find any support in the majority judgments in *Marex*. As set out in the passages that I have cited above, the majority of the Supreme Court considered that the rule against reflective loss is engaged where the loss claimed by the shareholder takes the form of a diminution in the value of its shareholding or its distributions as shareholder. The decisive question is therefore the *nature* of the loss claimed by the shareholder. There is no further requirement that the *amount* of the loss to the company should be identical to the loss to the shareholder. Indeed Lord Reed expressly acknowledged at §§32–33 of his judgment that a company's loss and any fall in its share value may *not* be closely correlated, particularly in cases where the company's shares are traded on a stock market. That is one of the reasons why Lord Reed rejected the avoidance of double recovery as a justification, in itself, of the reflective loss principle.

53. Leaving aside the costs of steps to assert control over and investigate losses suffered by Naibu HK and Naibu China, the loss that is claimed by Naibu Jersey, whether it is pleaded as a single total figure (as in the original Particulars of Claim), or as a series of separate losses suffered at different times (as in the revised amended Particulars of Claim), is entirely composed of the diminution in the value of Naibu Jersey's shareholding in Naibu HK. Mr Smith is, I consider, right to say that the supposedly separate category of losses suffered through disbursement of the proceeds of flotation is, in reality, part of the same loss, representing the investment made by Naibu Jersey in Naibu China, through Naibu HK, the value of which has now been reduced to nil. The claim is therefore a paradigm claim of reflective loss, which is barred by the principle as confirmed and restated in *Marex.*

54. It follows that the claim by Naibu Jersey should be struck out save in so far as it relates to the three new categories of alleged losses relating to steps taken by Naibu Jersey to assert control over and investigate losses suffered by Naibu HK and Naibu China. In relation to those three categories of losses, permission to amend the Particulars of Claim can be given.

The application for a stay under s. 9 of the Arbitration Act

55. My conclusions on the various applications for strike out/summary judgment mean that it is necessary to consider, finally, Pinsent Masons' application for a stay under s. 9 of the Arbitration Act, albeit that this point now only arises in relation to the three new categories of alleged losses that are not struck out.

56. Section 9 of the Arbitration Act 1996 provides that:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

57. Section 82(2) of the Arbitration Act goes on to specify that references to a party to an arbitration agreement include "any person claiming under or through a party to the agreement".

58. In the present case, as set out above, it is common ground that clause 20 of the terms and conditions attached to the letter of engagement as between Pinsent Masons and Naibu HK sets out an arbitration agreement that engages the terms of s. 9 of the Arbitration Act. The question is whether s. 9 also extends to the claim by Naibu Jersey.

59. Pinsent Masons' case is that if it is ultimately established at trial *either* that Pinsent Masons' acted for Naibu Jersey under an implied retainer, *or* that Pinsent Masons was in any event subject to a duty of care in tort, then Naibu Jersey is a "person claiming under or through" a party to an arbitration agreement within the meaning of s. 82(2), since it is in substance seeking to take the benefit of the Naibu HK letter of engagement.

60. There is no doubt that s. 82(2) would apply in the case of a formal assignment of a claim under a contract that included an arbitration agreement: *Schiffahrts–gesellschaft Detlev von Appen v Voest Alpine Intertrading (The Jay Bola)* [1997] 2 Lloyds Rep 279. In the same way a transferee under the Third Parties (Rights Against Insurers) Act 1930 may be bound by an arbitration clause in the contract between the insured and the insurer: *The Padre Island (No. 1)* [1984] 2 Lloyd's Rep 408. The more difficult question that arises in this case is whether s. 82(2) might also be engaged by something short of an assignment or transfer.

61. That issue came before the court in *Through Transport Mutual Insurance v new India Assurance* [2005] EWHC 455 (Comm), in which the insurers of the shippers of a container of goods (New India) had paid out for the loss of the goods in transit, and sought to pursue the insurers of the carriers (Through Transport, referred to as "the Club") through proceedings in Finland. The Club rules for the relevant period included a requirement to refer any dispute to arbitration in London. On that basis, the Club sought and obtained a declaration in the English courts that the claim should be pursued by way of arbitration in London. It subsequently applied for the appointment of an arbitrator pursuant to s. 18 of the Arbitration Act 1996. Moore-Bick J granted that application on the basis that although New India was not seeking to claim as an assignee or transferee of the chose in action in a conventional sense, the right it enjoyed was nevertheless a

right to enforce a chose in action which was subject to the limitations in the Club rules, which included the arbitration provision (§§23–4). The judge continued:

> "25. For these reasons I am satisfied that, however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London. Section 82(2) of the Arbitration Act 1996 provides that references in Part I of the Act to a party to an arbitration agreement include any person claiming under or through a party to the agreement. An assignee seeking to enforce the contract clearly falls within that provision because he claims under or through the assignor, as the Court of Appeal recognised in *The Jay Bola*. …
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> 28. … I accept that New India's position is not quite the same as that of a simple assignee … However, as soon as a third party in the position of New India makes a demand on the insurer there is the potential for a dispute to arise, as indeed happened in this case, and once a dispute has arisen in relation to the third party's right to recover from the insurer it is one which must be determined by arbitration in accordance with the contract. … In my view it was not necessary for New India to commence proceedings in order to bring itself within the scope of section 82(2); it became a person claiming under or through a party to the arbitration agreement within the meaning of that subsection as soon as it sought an indemnity from the Club in the right of [the carrier]."

62. It is clear from this passage that, while not an assignee of the contract of insurance concluded between the Club and the carrier, New India's claim was entirely based on (and would not have arisen but for) that contract. It was for that reason that New India was a person claiming "under or through" a party to the arbitration agreement. In this case, however, Naibu Jersey is *not* claiming "under or through" Naibu HK in any sense, formal or otherwise. Rather it is advancing a claim on the basis of duties owed directly to it. If the implied retainer point is ultimately successful, then the claim is brought pursuant to a contract (albeit an implied one) between Naibu Jersey and Pinsent Masons; if, alternatively, the claim is brought pursuant to a duty of care in tort, that is likewise a distinct claim based on a duty owed specifically to Naibu Jersey rather than to Naibu HK.

63. It is certainly the case that the Claimants' case is premised on duties owed by Pinsent Masons to Naibu Jersey (whether as a matter of contract or tort) that are similar to the duties owed by Pinsent Masons to Naibu HK. But that is not, in my view, sufficient to engage s. 82(2).

64. Finally, while in the event the application of s. 82(2) only arises in relation to the specific categories of loss that are not based on the diminution of the value of Naibu Jersey's shareholding in Naibu HK, it follows from the reasoning set out above that I would have found the same in relation to the other aspects of the claim if I had reached a different conclusion on the application of the reflective loss principle, such that those parts of the claim were also permitted to proceed.

Conclusion

65. My conclusion is therefore that permission should be given to amend the Particulars of Claim to add the claims relating to the costs of steps taken by Naibu Jersey to assert control over and investigate the losses suffered by Naibu HK and Naibu China; and Pinsent Masons' application for a stay under s. 9 of the Arbitration Act is dismissed. The claim is, however, struck out in so far as it relates to the remaining claimed losses; and the Claimants' application to amend the Particulars of Claim in that regard is dismissed.