Neutral Citation Number: [2019] EWHC 3274 (Comm)

Case No: CL-2017-000542

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
7 Rolls Buildings, Fetter Lane,
London, EC4A 1NL

Date: 29 November 2019

Before :

Sir Michael Burton GBE
(sitting as a Judge of the High Court)

- -

Between :

UCP PLC	**Claimant**
- and -	
NECTRUS LIMITED	**Defendant**

- -
- -

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

Hearing dates: 12, 13, 14 November 2019

- -

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.

....

SIR MICHAEL BURTON GBE

Sir Michael Burton GBE:

1. This has been the second hearing, pursuant to my Order of 31 May 2019, of the claim by UCP against Nectrus, after my Judgment in UCP's favour dated 5 July 2019 [2019] EWHC 1732 (Comm). I refer to and adopt both the facts and abbreviations there set out, and in particular my findings in paragraph 1-5, 8-18 and 30-37 in that Judgment. I concluded that Nectrus owed duties to UCP pursuant to the IMA, of which they were in breach, and I directed this hearing to assess the quantum of loss and consider the relief to be granted. There has been the same representation for both parties, save that Mr Blakeney was added to Mr Legg as one of Mr Butler QC's juniors, and I have been grateful for their assistance, as before by leading counsel, but additionally by junior counsel, who both provided helpful notes at my request.

2. The loss claimed falls into two categories. The first was described by the Claimant as the "Lost Deposits", and the second consisted of Recovery Costs.

The Lost Deposits

3. The claim before me allowed for the fact that I had in the event found no breach in respect of the INR 150 crore invested by Nectrus in SREI (paragraphs 38-41 of the Judgment). Subject to that, the facts appear in paragraph 3 and 4 of my Judgment: the sale of the shares in Candor by UCP to Brookfield involved the deduction from the agreed purchase price of the equivalent of 60% (UCP's share) of INR 243 crore (the Lost Deposits). The relevant provisions, by which the parties agreed that Brookfield would leave UCP to investigate and seek to recover and retain the Lost Deposits invested by Nectrus, at its own cost, and subject to accounting for 40 % (" the recovery rights"), were contained in sub-paragraphs 10.11 and 10.12 of the 10 June 2014 Agreement for the Sale and Purchase of Candor ("the SPA") - the *Seller* is of course UCP, and the *Purchaser* is Brookfield:

> "10.11 *Subject to the Seller indemnifying the Purchaser or other member of the Purchaser's Group concerned against all costs and expenses (including legal and professional costs and expenses) that may be incurred as a result of undertaking the actions contemplated in this Clause 10.11, at the Seller's sole discretion, the Purchaser undertakes.....to procure, to the extent it or the relevant member of the Purchaser's Group is legally able without breaching any regulation, that all rights of the Indian Subsidiaries and any other Group Company to receive any disbursement, or to otherwise recover, sixty (60) per cent, of the Inter-Corporate Deposits and/or the Additional Inter-Corporate Deposits outstanding at Completion shall either (i) be assigned to the Seller or to any person designated by the Seller, on an unconditional basis, or (ii) if the assignment cannot be effected, the Parties shall, at the Seller's written request, take such other action as may be necessary to transfer to the Seller or to any person designated by the Seller the entitlement to require Aten Group and SREI Infrastructure Finance Limited to*

repay such deposits and to receive any repayment due under such deposits, in each case, as soon as possible on or after Completion (the Assignment").

10.12 Subject to the Seller indemnifying the Purchaser or other member of the Purchaser's Group concerned against all costs and expenses (including legal and professional costs and expenses) that may be incurred as a result of undertaking the actions contemplated in this Clause 10.12, at the Seller's sole discretion, the Purchaser further agrees to, and shall procure that any member of the Purchaser's Group shall, to the extent that it is legally able to, with effect from Completion:

(a) execute any assignment agreement or other equivalent or ancillary instrument and take any other action that may be necessary to effect the Assignment, including requesting the approval of, and providing any information requested in connection with such approval by, the Reserve Bank of India;

(b) provide the Seller or any person designated by the Seller, with any information and assistance (including defending and commencing any legal proceedings) that they can reasonably require for the purposes of recovering any Inter-Corporate Deposits and/or the Additional Inter-Corporate Deposits that remain outstanding at the relevant time post Completion; and

(c) pay to the Seller, or to any person designated by the Seller, an amount equivalent to sixty (60) per cent of any amounts recovered by a member of the Purchaser's Group (post Completion) from or on behalf of SREI Infrastructure Finance Limited or any member of the Aten Group (including via Unitech Limited (or any of its Affiliates)) with respect to any outstanding Inter-Corporate Deposits (in excess of the Repaid Inter-Corporate Deposits) or Additional Inter-Corporate Deposits (it being agreed that the reference to amounts recovered above shall include any amount which has been set-off against (or waived in exchange of) any amount due by any member of the Purchaser Group to any of the entities listed above), less (i) any Tax due or payable in respect of such amount or required to be withheld by the Purchaser or member of the Purchaser's Group; and (ii) any costs incurred by the Purchaser or member of the Purchaser's Group in recovering such amount or making the payment

to the Seller or such person designated by the Seller (the 'Deferred Payment')."

4. Mr Lake, to whom I refer in paragraphs 12 and 13 of the Judgment, said as follows in his third witness statement for the purposes of this hearing, on which he was not in the end cross examined because he was prevented by an emergency from attending the hearing, but his evidence was not in the event challenged before me:

> *"12. As I described in my First Witness Statement, it was during the due diligence process that scrutiny of the monies placed with SREI and Aten increased and indications began to be made that the monies may not be returned at face value ahead of the completion of the sale. However, at this stage, the situation remained unclear to UCP: we were receiving conflicting (and, as it turned out, misleading) messages from Nectrus/Unitech as to whether the deposits could be broken and returned ahead of their apparent maturity dates (we were still under the impression that the monies were as good as cash). For example, by a 21 May 2014 email Graham Smith reported to me that he had been told that breaking the deposits "is possible", while on 23 May 2014 Ajay Chandra indicated to me by email that "it may be tough" for the deposits to be broken and returned before they matured.*
>
> *….*
>
> *14. The minutes of the 5 June 2014 meeting of Independent Directors, which was the last meeting before the signing of the SPA (and the first meeting to discuss the unfolding situation with the SREI and Aten monies), record our understanding of the situation as at the time of the finalisation of the wording of the soon-to-be-signed SPA:*
>
> *Based on the information we had from Nectrus, it appeared that INR 243 crore (then c. £25m, of which UCP's 60% share was c. £15m) was due to be repaid before completion: the maturity date for the SREI monies was understood to be in July 2014 and for Aten Capital to have been in March or May 2014 (we did not yet properly understand that substantially all of the monies placed with Aten Capital had apparently been transferred to Aten PM and the onward transfer to the 'Sham Entities' was not yet known to us).*
>
> *……*
>
> > *d) In light of the uncertainty regarding the status of the SREI and Aten monies, the SPA would provide that the consideration be reduced by any deposit monies not received back before completion, with the right to recover any such monies to be left with UCP.*

e) If the monies were not returned (and the consideration paid by Brookfield was therefore correspondingly reduced on completion), UCP would have to seek the loss from Nectrus, for example by set-off against any outstanding IMA fee or amounts payable to Nectrus as shareholder on distribution. Pursuit of Nectrus was the preferred route given its obligations to UCP under the IMA, and on the same day as the meeting, UCP sent to Nectrus (on its and Candor's behalf) a letter seeking confirmation as to whether any breaches of the IMA/Treasury Policy had occurred.

15. Thus, although we were optimistic about the prospect of recovery of the monies from SREI and Aten prior to completion, we had discussed and agreed with Brookfield the manner in which recovery would take place, if necessary, post-completion, which was reflected in the terms of the SPA.

a) Brookfield made clear to UCP that it wanted no part in the process of recovery of the Stranded Deposits and was not prepared to attribute any value to, or pay for any rights of recovery that Candor or the Indian SPVs may have had. UCP therefore agreed that Brookfield would receive a discount on the sale price of Candor reflecting the value of the monies, but on the understanding that UCP would solely be entitled to recover in respect of those amounts, whether from SREI, Aten or Nectrus. In exchange for the discount, Brookfield also agreed to provide UCP with such assistance as we might require to recover the monies (provided such assistance is not unduly onerous or materially prejudicial to Brookfield).

b) For UCP's part, we did intend to seek to be made whole if a discount was applied to the sale price. Brookfield recognised this and agreed that UCP need not be liquidated as part of the sale; and that all rights to undertake and direct such recovery, what form that recovery would take (e.g. whether by pursuit of Nectrus and/or by proceedings in India), and the costs liability for such recovery would be at UCP's sole risk and expense. Brookfield's only role in any recovery efforts would be procuring members of its group (i.e. including Candor and the Indian SPVs post-sale) to assist UCP, as necessary. That assistance was expressly subject to UCP indemnifying Brookfield against all costs and expenses that it incurred as a result.

………

18. ... I can confirm that in my capacity as a director of Candor, I similarly understood that it would be UCP that would pursue recovery of the Stranded Deposits (at its sole risk and expense) if they remained outstanding on completion and that there was no discussion at Candor-level of an intention by it to pursue the

> *monies for its own/new shareholder's benefit post-sale. It would have been absurd for Candor to retain any right to sue Nectrus and to recover in its own right (or to pursue the monies in India on its own account) after Brookfield had purchased Candor at a discount in the knowledge that UCP intended to pursue and recover the shortfall it had suffered. It was simply never the intention that Candor would be left in a position to double recover the loss UCP suffered on the sale. That would have made no commercial sense and was not part of the deal.*
>
> *…….*
>
> *20. The Independent Directors' overview reflects the commercial rationale of the sale: Brookfield would get a discount on the purchase price for Candor and UCP would seek to make up this loss by pursuing recovery of the monies, whether from SREI and Aten, or from Nectrus as a result of breach of the IMA.*
>
> *……….*
>
> *32. … It would be contrary to the rationale underlying the sale for Candor itself/alone to be able to sue Nectrus post-sale in order to recover the amount of the discount. Brookfield was not interested in acquiring the hassle of pursuing the Stranded Deposits and explicitly left their recovery to UCP, which explains the discount to the purchase price (as I discuss above); UCP would not have sold Candor to Brookfield at a discount reflecting the value of the Stranded Deposits only for Candor to then separately sue Nectrus itself in respect of the very same value that Brookfield had already extracted from the sale. Indeed I would have regarded it a breach of our agreement if Brookfield (or Candor) had sought to usurp UCP's right to recover, or obtain a windfall, by pursuing recovery itself in circumstances where UCP had borne the loss and intended to recover that loss, including by suing Nectrus."*

5. Candor, now 100% owned by Brookfield, has provided an undertaking to the Court dated 13 August 2019, which reads as follows, signed by a director:

> *"Candor confirms that, subsequent to the sale of Candor to BSREP India Office Holdings PTE pursuant to an agreement dated 10 June 2014 (the "SPA"), Candor does not regard itself as having any claim against Nectrus Limited under the Investment Management Agreement between them dated 14 December 2006 in respect of the Inter-Corporate Deposits (as defined in the SPA), and on that basis Candor undertakes to UCP and to the High Court of Justice Business and Property Courts of England and Wales that Candor shall not allege or pursue any such claim against Nectrus Limited".*

6. As I concluded in the Judgment, Nectrus gave no or inadequate information to UCP in relation to the Lost Deposits, and the *optimism* referred to by Mr Lake was misplaced. As a result of the steps taken by UCP, pursuant to the recovery rights, as briefly described in paragraph 4 of the Judgment, and ignoring SREI, for the reasons set out above, UCP has recovered only (60% of) INR 3 crore out of the INR 93 crore originally invested with Aten Capital, amounting to an agreed net figure of £270,118.82. Nothing was recovered from Aten PM. The agreed figure for the Lost Deposits, being 60% of 90/243 (after leaving aside the INR 150 crore), is, after giving credit for the INR 3 crore recovery, £5,837,920.37.

Recovery costs

7. As verified by a report by Ms Natalie Swales, a partner of Masters Legal Costs Services LLP ("Masters"), which was made the subject of a Civil Evidence Act notice, these are claimed at £2,662,115.10. The Masters breakdown extracts the costs incurred in the litigation, referred to in paragraph 4 of the Judgment, in respect of the SREI deposits ("SREI litigation"). As to the balance, the first category is described as Scoping Costs, summarised as including but not being limited to "*undertaking initial investigation into stranded deposits; sourcing relevant documentation and discussing with client and legal team; preparing initial correspondence and formal letters of demand… considering appropriate strategy going forward …finalising letters of demand….; further discussions with legal team and client regarding strategy as to pursuing litigation in respect of recovering stranded deposits*". The total amount is £459,635.45. The second category is then costs in relation to the Indian litigation, other than the SREI litigation: the arbitrations against Aten Capital and Aten PM and the defence of the injunction application, unaccountably brought by Nectrus in India, referred to in paragraphs 4 and 42 of the Judgment. They total £2,202,479.65.

Aten Capital

8. I did not see it as necessary in giving my judgment on liability to address the issue of whether Nectrus was in breach of duty in respect of Aten Capital, because of the fact that the only monies left with Aten Capital, the INR3 crore, were recovered; but with a view to the second hearing relating to legal costs Mr Davies QC immediately, at the consequentials hearing on 5 July 2019, raised the need for such findings to be made, and without objection from Mr Butler it was ordered that, provided that no further evidence was adduced, I should make findings in that regard at this hearing, which I now record. Having adopted and repeated paragraphs 30-37 of the Judgment, I can say that I am satisfied that, as recorded in paragraph 37, Nectrus "*failed in every respect in the obligations expected of the Investment Manager*". In particular in relation to Aten Capital:

    i) The investment in Aten Capital was not reported to the UCP Board prior to January 2013, and was then and thereafter misdescribed and inadequately reported.

    ii) The extension of the terms of the Aten Capital ICDs in March 2013 was not reported.

    iii) By October 2013 there was, to the knowledge of Nectrus, a liquidity crisis being suffered by the Indian SPVs, and negotiations for the sale to Brookfield were

beginning, both of which factors would have required consideration by UCP of repayment of the Aten Capital ICDs; but Nectrus did not report that they were (apparently) recallable on demand, and inaccurate information was given as to the maturity dates.

iv) No information was given that the INR 90 crore was in fact being transferred over to Aten PM in March to May 2014, or that the INR 3 crore was being retained by Aten Capital on unexplained terms, all inconsistently with the Treasury Policy adopted by July 2013.

v) No reports as to Aten Capital were given, consistently with the Treasury Policy, after July 2013.

9. In the circumstances, it was necessary for UCP to investigate, discover and in due course take action, in respect of what had happened with regard to Aten Capital and Aten PM, to find out where the monies were. The INR 3 crore was identified and recovered. The INR 90 crore was irrecoverable.

Defences to the claim for the Lost Deposits

10. It is now common ground that the date for identifying the loss is the date of completion of the SPA, 4 November 2014. Nectrus put forward two defences:

i) That UCP suffered no loss.

ii) That the loss is irrecoverable, being "reflective loss", that is as described by Millett LJ in **Stein v Blake** [1998] BCC 316 CA at 318F, by reference to the principle first enunciated in **Prudential Assurance Co Ltd v Newman Industries Limited (No.2) [**1982] Ch 204, as loss suffered by a claimant which "*consists of the diminution in the value of his shareholding by reason of the misappropriation of the assets of the companies in which those shares subsist*". The application of the reflective loss principle was, prior to the hearing, ascribed by Nectrus by reference to Candor and to the Indian SPVs, but before me was limited to Candor. Reliance was also put by Nectrus upon the terms of a subsequent agreement, to which UCP was not party, between Nectrus and Candor dated 30 March 2015 (the "Deed of Termination"), but no such reliance is now placed by Nectrus.

11. I deal first and briefly with the "no loss" defence. Mr Butler submitted that the natural consequence of his concession that the loss date was 4 November 2014 was that the "recovery rights" within the SPA should be valued as at that date, and offset against the £5,837,920.37. He submits that value must be placed upon those recovery rights, particularly by reference to Mr Lake's "*optimism*", referred to in his statement set out in paragraph 4 above. His original proposition was that the recovery rights be valued at 100% of the sum deducted from the purchase price, leading to no loss, but in argument he contended that the value of the recovery right should be assessed, and accepted that such assessment would be a "*difficult exercise*". Mr Davies points out that Mr Lake's *optimism*, such as it was, was based upon the inadequate information supplied by Nectrus, and that it is plain that Brookfield put no value on the recovery rights.

12. But the answer is, in my judgment, entirely clear. As Mr Davies submitted, the recovery rights consisted of the opportunity, indeed the obligation, to mitigate. The fact that a date has now, by virtue of Nectrus's withdrawal of its earlier arguments, been agreed as 4 November 2014 does not mean that the 'mitigation opportunity' falls to be valued at that date, and Mr Butler provided no authority to support that contention. The position is clear, namely that there is no cause to value the mitigation opportunity, whether as at the date of loss or otherwise, but that the law is simply that the innocent party would have the duty to mitigate and give credit for any recovery made. As is best summarised in **Chitty on Contracts (33rd Ed) at 36-087**: "*the claimant cannot recover damages for any part of his loss consequent upon the defendant's breach of contract that the claimant could have avoided by taking reasonable steps…[*W]*here the claimant incurs loss or expense in the course of taking reasonable steps to mitigate the loss resulting from the defendant's breach, the claimant may recover this further loss or expense from the defendant.*" UCP took that opportunity, and must give credit for monies received, as it has. I shall consider the Recovery Costs claim later.

Reflective Loss

13. I turn to the reflective loss issue, which took up most time before me, in respect of which it is contended that UCP's claim in respect of the Lost Deposits is barred. As Peter Gibson LJ said in **Shaker v Al-Bedrawi and Others** [2003] Ch 350 at paragraph 83, in relation to what was then called the **Prudential** principle (it seems it was only rechristened 'reflective loss' by Lord Bingham in **Johnson v Gore Wood** [2002] 2 AC 1):

> *"As the **Prudential** principle is an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability".*

14. The reflective loss principle has been authoritatively described in a number of places, of which the most frequently cited are **Johnson,** and **Giles v Rhind** [2003] Ch 618. I refer first to **Johnson** (approving the decision of the Court of Appeal in **Stein v Blake** referred to in paragraph 10(ii) above):

    i) per Lord Bingham at 35E-36A:

    > *"(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. ……..*
    >
    > *(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so),*

even though the loss is a diminution in the value of the shareholding….

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

ii) per Lord Millett at 61C-62F:

"A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this is a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see ***Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2)*** *[1982] Ch 204,210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.*

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none ………. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of

> *action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.*
>
> *The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant, or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."*

15. In **Giles v Rhind**, Blackburne J, in the passage approved by the Court of Appeal at 640-1:

> *"(1) a loss claimed by a shareholder which is merely reflective of a loss suffered by the company – i.e. a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer – is not recoverable by the shareholder;*
>
> *(2) where there is no reasonable doubt that that is the case, the court can properly act, in advance of trial, to strike out the offending heads of claim;*
>
> *(3) the irrecoverable loss (being merely reflective of the company's loss) is not confined to the individual claimant's loss of dividends on his shares or diminution in value of his shareholding in the company but extends (in the words of Lord Millett) to "all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds" and also (again in the words of Lord Millett) "to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder";*
>
> *(4) the principle is not rooted simply in the avoidance of double recovery in fact; it extends to heads of loss which the company could have claimed but has chosen not to and therefore includes the case where the company has settled for less than it might (or, as it was explained by Arden LJ in* Day v Cook *[2001] EWCA, CIV 592: "(38) …. It is not simply the case that double recovery will not be allowed so that, for instance, if the company's claim*

is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim if it exists, will always trump that of the shareholder, (39) Accordingly the court has no discretion. The claim cannot be entertained ...)";

(5) provided the loss claimed by the shareholder is merely reflective of the company's loss and provided the defendant wrongdoer owed duties both to the company and to the shareholder, it is irrelevant that the duties so owed may be different in content".

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

17. Mr Davies based his case upon three propositions, on the basis that if any one of them were not satisfied then the reflective loss defence was not established:

(1) UCP must be (and was not) a shareholder of Candor at the time the claim was made.

(2) At the time the claim was made by UCP, Candor must have had (and did not have) a valid claim against Nectrus in respect of the loss claimed with a realistic prospect of success.

(3) The claim by UCP must not be (but was) for a *separate and distinct loss* from that suffered by the company (referring to the words of Lord Hutton in **Johnson** at 51C-G).

Proposition 2 (though not the denial of it) and Proposition 3 (though not the affirmation of the contrary) were accepted by Mr Butler as being requirements, but he did not accept Proposition 1. I shall address Proposition 2 first.

18. The context of Proposition 2 is as follows. On the one hand, it is asserted by Mr Butler, and not contested by Mr Davies, that if UCP had a good claim against Nectrus, as found by me, so did Candor, so as to fulfil, prior to the SPA, the requirement of the reflective loss principle that the company had an *available claim* (**Shaker** paragraph 83), a claim *with at least some prospect of success* (**Perry v Day** [2005] 2 BCLC 405 at 412h) or a claim *with a real prospect of success* (**Primeo Fund** per Jones J at first instance 23 August 2017 at 294). On the other hand, there is no doubt that it is an established element of the principle that if the company had had a claim which it had compromised (as in **Christensen v Scott** [1996] 1 NZLR 273), that did not oust the reflective loss principle: see Lord Millett in **Johnson,** disapproving **Christensen** as not applicable to English Courts at 66C, and Blackburne J cited as (4) in paragraph 15 above (subject to the exception spelt out in **Giles** (at paragraphs 66 – 7, 80) if the company's conduct could be ascribed to the wrongdoer). This applies also to where the company's claim

would be met and defeated by a defence available against it which would or might not be available against the shareholder: see Arden LJ in **Day v Cook** [2001] PNLR 32 CA at paragraph 38, followed by Evans-Lombe J in **Barings Plc v Coopers and Lybrand** [2002] PNLR 16 at paragraphs 113-137. This pushes the reflective loss principle much further than one which is justified by avoiding double recovery on the one-hand or double jeopardy of the company on the other. However, subject to any reconsideration of the reflective loss principle when the decision in **Marex Financial Limited v Sevilleja**, 2019 QB 173 CA, presently awaited from the Supreme Court, is published, it is the law at present.

19. Mr Davies addresses this Proposition as follows:

    i) As is clear from the evidence of Mr Lake and the provisions in clauses 10.11 and 10.12 of the SPA, and the undertaking to the Court by Candor, set out in paragraphs 3 to 5 above, the effect of the SPA was that thereby and thereafter Candor had no claim against Nectrus, and only UCP did. This was either constituted by an implied collateral contract, as pleaded in paragraph 26C(a)(ii) of the Amended Reply or, as I suggested to him, by an implied agreement to assign, i.e. an implied equitable assignment. By virtue of the collateral contract (as reflected in the Undertaking) Brookfield as 100% owner of Candor would be prevented from causing or allowing Candor to sue, or could be obliged to procure it not to do so.

    ii) As to what I called the "anti-**Christensen** principle" (referred to in paragraph 18 above), this is not a case in which the company has compromised or abandoned its claim, or where there is a defence to the company's claim, so that the third party would be protected against a claim by the company, but a case in which the company has divested itself of its claim and <u>transferred</u> it to the shareholder contemporaneously.

20. Mr Butler has a firm answer to this:

    i) There was no equitable assignment. In any event any assignment of a claim against Nectrus by Candor would be prohibited by clause 13.6 of the IMA without Nectrus's prior approval. He also referred to correspondence after June 2014, in which the claim was still being put as by UCP and Candor.

    ii) There was no implied collateral contract. Candor was not a party to the SPA, though Mr Lake was also a director of Candor, and no agreement by Brookfield such as is said to amount to a collateral contract was implied or is capable of being spelt out. If it had been, it would have been in breach of the Entire Agreement clause in clause 22 of the SPA. In any event the fact that UCP might seek to injunct Brookfield to procure Candor not to bring a claim did not mean that Candor did not have a claim.

    iii) Even as put by Mr Davies, on the basis of contemporaneous divestment and transfer of the claim, it offended against the anti-**Christensen** aspects of the reflective loss principle, at least as presently articulated at law.

21. I am persuaded by Mr Butler that Proposition 2 is not available to Mr Davies per se to oust the reflective loss principle. He is left with the simple fact that in practice Candor

has not since 4 November 2014 had, and would not have brought, a claim against Nectrus. Although Mr Davies refers to the words of Lord Bingham in **Johnson** at 36C that "*the Court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation*", the fact is that the Courts have made clear that the reflective loss rule is a strict one and that there is no discretion involved (per Lord Millett in **Johnson** at 62F), irrespective of the unfairness caused (such as Mr Lake describes at paragraph 18 and 32, set out in paragraph 4 above). Such *astuteness* may however be available to restrict or prevent any unnecessary or unjustified extensions or interpretations of the reflective loss principle, rather than to disapply it.

22. I turn to Proposition 1. This is a straightforward case made by Mr Davies that the reflective loss principle extends only to bar a claim by a party who is at the time the claim was made a shareholder**.** In this case that date is 31 August 2017, when the proceedings were commenced. UCP was not a shareholder in Candor then, or indeed at any time after November 2014. He submits that the reflective loss principle is only justified by the fact that a shareholder's loss <u>can be made good,</u> upon the company being reimbursed or recompensed by the third party and thus restoring the value of the claimant's shareholding. However, when the claimant is not any longer a shareholder, if the company's loss is made good, that has no effect upon the claimant who no longer has the shareholding, and does not make good his loss. Mr Davies submits that this is clear from all the existing judgments upon which the reflective loss principle relies:

    i) Millett LJ in **Stein v Blake** at 318 F-H,

    "*The plaintiff's skeleton argument devoted much space to the submission that on what were said to be the very unusual circumstances of the present case, the first defendant did owe a fiduciary duty to the plaintiff personally. But that is not the problem. The problem is that the only conduct relied upon as constituting a breach of that duty, however it is described and in whatever detail it is set out, is nevertheless the misappropriation of assets belonging to the old companies, so that the only loss suffered by the plaintiff consists of the diminution in the value of his shareholding by reason of the misappropriation of the assets of the companies in which those shares subsist. Such loss would be fully remedied by the restitution of the value of the misappropriated assets to the companies. It is not alleged that the plaintiff has been induced or compelled to dispose of his shares in the companies at an undervalue by reason of the diminution in value of their assets; he still has them. If the plaintiff were allowed to recover for the diminution in the value of his shares, and the old companies for the misappropriation of their assets, the plaintiff would have double recovery.*

    All the cases relied upon by the plaintiff in his skeleton argument are cases where the alleged loss was suffered directly by the shareholder. In all those cases he was induced or compelled to dispose of his shares at an undervalue. In such a case the shareholder suffers a loss which is distinct from, and independent of, the loss suffered by the company. Even if the company recovers in respect of the wrong done to it, this will not

benefit the shareholder who has disposed of his shares, but rather the purchaser who acquired them, who may or may not be the wrongdoer or an associate of his."

and at 320 E – F

"The distinction is between (i) loss sustained by a shareholder by diminution in the value of his shares by reason of the misappropriation of the company's assets, and (ii) loss caused directly to a shareholder who has been induced to part with the shares at an undervalue. The shareholder has a personal cause of action to recover in respect of the second type of loss, but not the first.

To compare that to the present case, the situation is clear. The first defendant is alleged to have misappropriated the assets of the old companies. That was a wrong to the old companies which caused loss to them. It may have reduced the value of the plaintiff's shares, but the old companies have a claim to recover the loss, and if they succeed the value of the plaintiff's shares will be fully restored.

ii) In **Johnson** per Lord Bingham at 36C:

"*The problem can be resolved only by close scrutiny of…all the proven facts…: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible.*"

And per Lord Millett, reprising his conclusions in **Stein v Blake** both in the passage at 62 E – F quoted in paragraph 14(ii) above and at 64D:

"*….the only loss suffered by the Plaintiff consisted of the diminution in the value of his shareholding which reflected the depletion of the assets of the old companies. The old companies had their own cause of action to recover their loss and the Plaintiff's own loss would be fully remedied by the restitution to the companies of the value of the misappropriated assets. It was not alleged that the Plaintiff had been induced or compelled to dispose of his shares in the companies; he still had them*"

And see further at 66 – 67.

iii) Mr Davies refers to **Minority Shareholders: Law, Practice and Procedure (6th Ed)** by Victor Joffe QC and others, at footnote 227 on page 164, where the authors rely on **Primeo Fund** at first instance (paragraph 289) by reference to the fact that "*the claimant's status (or lack of it) as shareholder at the time the cause of action arose is irrelevant; whether or not a loss is reflective has to be determined on the basis of the factual circumstances existing at the time the claim is made."* They derive from Jones J at paragraph 289 that the reflective

loss principle is dependent upon the claimant being a shareholder, and that the time for testing this was not the time that the cause of action arose but when the claim was made (in **Primeo Fund** the claimant became a shareholder later). This was approved by the Court of Appeal at paragraph 408 (*"the operation of the bar* [depends] *... on whether the plaintiff's loss would be made good if the company were successfully to pursue its claims"* and, after citing Lord Millett in **Johnson** at 415, they continue:

> *"415. These statements all focus on "the loss claimed" and whether the plaintiff would have been "made whole" and its loss "made good" if the company had not been deprived of its funds by the wrongdoer or had enforced its rights against the wrongdoer. If, as Lord Bingham stated at 36D, ... the object is to ascertain whether the loss claimed is one which "would be made good" if the company had enforced its rights this has to be tested at the time the plaintiff's claim is made. We therefore agree with the judge (at [289], summarised at [317] above) that what is relevant are the factual circumstances that obtain at the time the claim is made. The argument that for the principle to apply it is necessary for a person to be a (material) shareholder at the time that person's cause of action accrues is inconsistent with according centrality to the type of loss because the application of the principle would be determined by examining how and when the plaintiff's cause of action arose rather than by the type of loss suffered and whether it would be made good."*

23. Mr Davies submits that to apply, or in fact to extend, the reflective loss principle to an ex-shareholder would give rise to manifest unfairness, as persuasively set out in paragraphs 91(c) of his Skeleton:

> *"(i) Nectrus' case is that an ex-shareholder is barred from recovering its losses if a company in which it was formerly a shareholder compromises a claim <u>after</u> it sold its shareholding. But: (i) an ex-shareholder does not take the benefit of the company's action through a shareholding (e.g. if the company receives a settlement payment, it would not benefit ex-shareholders); (ii) an ex-shareholder cannot take steps, such as applying to the Companies Court, if it considers that a company in which he is not a shareholder settled its claim for less than it should have done; (iii) an ex-shareholder cannot bring an unfair prejudice petition; and (iv) an ex-shareholder cannot be deemed to have 'agreed' to the compromise in its capacity as a shareholder.*
>
> *(ii) Nectrus' case is also that an ex-shareholder is bound by a company's decision not to commence proceedings against a wrongdoer. Again, whilst this may be explicable in the case of shareholders, it would not be right for an ex-shareholder to be bound in the same way. Not only does an ex-shareholder not benefit from the company's decision via a shareholding (if it is a good decision the share price increases) it would be unable to*

> *take action, e.g. by bringing a derivative claim, if it disagrees with the company's inaction."*

24. Mr Butler was unable to show me any authority to the contrary of Mr Davies's Proposition 2, except that he referred to the words of Flaux LJ in **Marex** at paragraphs 33 where, in applying the reflective loss principle to a creditor, he said as follows:

> *"It follows that the justification for the rule is not limited to company autonomy, in the sense of the unity of economic interest between a company and its shareholders as **Prudential** might be thought to suggest. Once it is recognised that the justification for the rule is wider, it is difficult to draw a principled distinction between a claim by a shareholder qua creditor (in relation to which, as Mr Choo Choy accepted**, Johnson** and **Gardner v Parker** [2004] 2 BCLC 554 CA are binding authority that the claim is barred by the rule) and a claim by any other creditor who is not a shareholder. As a matter of logic and principle, it is difficult to see why a claim by a creditor who has one share in a company should be barred by the rule against reflective loss whereas a claim by a creditor who is not a shareholder is not. That point is well illustrated by the example of a creditor who owns shares in the company, whose claim is initially barred by the rule, but, on this hypothesis, if he sells the shares, the rule no longer bars his claim. That makes no logical or legal sense at all."*

These are only obiter dicta, but in any event Mr Davies submitted, and I agree with him that what Flaux LJ appears to be saying is that a creditor may be barred by the reflective loss principle whether or not he is a shareholder, and that it was illogical that the status of creditor for such purposes should depend upon whether he was also a shareholder, in that, whereas a shareholder would no longer be barred if he sold his shares, a creditor ought to be barred even if not, or no longer, a shareholder. If that interpretation of the learned judge's words be right, then they do not provide support for Mr Butler.

25. Mr Butler's response to Mr Davies's case was as follows:

    i) The Proposition might lead to a deliberate circumvention or side-stepping of the reflective loss principle by a party selling his shares. His postulation in his skeleton, of a shareholder putting the shares in another company under his control, successfully pursuing his claim and then re-taking ownership of the shareholding seems to me unrealistic, and not a ground for extending the principle.

    ii) While he accepted that double recovery would thus be avoided, double jeopardy of the company, leading to a suit by the company and by an ex-shareholder, might still arise. That might be the case in some circumstances, but plainly not in this case (see paragraph 21 above).

26. I consider that Lord Bingham's *astuteness* to avoid arbitrary denial of fair compensation would apply to restrain an extension of what is a strict and inflexible rule. I would not extend it to cover an ex-shareholder. In my judgment, a claimant who is no longer a

shareholder at the time of his claim is not bound by the reflective loss principle, and, in the words of the Court of Appeal in **Primeo,** applying the test as at the time of the making of the claim whether the "*plaintiff's loss would be made good if the company were successfully to pursue its claims*" (paragraph 408), UCP's loss would and could not be made good.

27. I do not need to consider Mr Davies's Proposition 3, which does not seem to me to add anything. The ex-shareholder's claim is a *separate and distinct* claim from that of the company.

Governing law

28. If the claim had offended against the English law principle of reflective loss, I would have needed to address Mr Davies's invitation to consider if the question of whether UCP's claim was barred by the principle of reflective loss is governed by English law. Candor is a company incorporated in Mauritius, and Mr Davies submits that it is the law of incorporation by which the existence of a reflective loss principle, barring recovery by a shareholder of a loss also suffered by the company, falls to be tested. While Nectrus were also pursuing a case of reflective loss by reference to the SPVs (see paragraph 10 (ii) above), there also needed to be consideration by reference to Indian law, as the law of incorporation of the SPVs, but that has not in the event proved necessary, though the Indian law experts have both opined.

29. Both sides accept that there is no previous authority as to which law governs the question of whether the reflective loss principle applies. In **Konamaneni v Rolls Royce Industrial Power (India) Ltd** [2002] 1 WLR 1269, Lawrence Collins J, at paragraphs 48-50, concluded that the law applicable to the question whether a shareholder has a right to claim in respect of wrongs to a company is the law of the place of incorporation of the company. Mr Davies submits that the law of the place of incorporation of the company, thus applicable to whether a shareholder can bring a derivative action, should apply also to whether the reflective loss principle bars such a shareholder from bringing an action. It is not only the effective flip-side of the question resolved by Lawrence Collins J, and therefore suitable for similar treatment, but one of the explicit reasons for applying the reflective loss principle has been explained in the authorities as the fact that a shareholder would have an alternative remedy by way of a derivative action. If a derivative action were not permitted by the law of the company's incorporation, then that would render unjust and inapt the barring of the claimant's own claim, so that the same law ought to be applied to both. The application of such test would bring, Mr Davies submits, certainty and consistency, because the place of a company's incorporation is fixed, and this would rule out the uncertainty caused by claims being brought in the same set of proceedings based upon different causes of action, one or more of which might be subject to a different governing law, some of which might or might not allow the recovery of reflective loss. This is particularly so as, in accordance with the authority upon which Mr Butler relies, **KMG International NV v Chen** [2019] EWHC 2389 (Comm), it is the lex causae and not the lex fori which would (if it were not to be the law of the place of incorporation) apply.

30. The **KMG** decision, of Christopher Hancock QC sitting as a deputy judge, was relied upon by Mr Butler as coming the closest to supporting his case. In that case, where the application of the Rome II Regulation was in issue, Mr Hancock concluded that the reflective loss principle was a matter of substantive, and not procedural, law and was

governed by the lex causae and not the lex fori (those being the choices before him). Several analogies were put before him in support of the choice of the lex causae, including (at paragraph 40(5)) that "*a more appropriate analogy would be with the rule in relation to derivative actions, which are governed by the law of the place of incorporation, not the lex fori*". He did not find any of the various analogies put before him of any great assistance, and chose, obiter because of his conclusion in relation to Rome II, that the reflective loss principle would at common law be regarded as a substantive rule governed by the lex causae. Mr Butler also points to the words of the authors of Joffe, namely:

> *"the no reflective loss principle applies to all companies... It does not apply solely to companies incorporated in England and Wales; the principle applies with equal vigour to claims brought by shareholders in foreign companies."*

There is a footnote with three examples of such cases, including **Barings** and **Shaker**, and Mr Legg has produced a list of seven cases, including those three, in which the principle was applied to foreign companies. *Equal vigour* may be apt, but in none of those cases was the point argued.

31. Mr Butler submitted that it was not insignificant that the point had not previously been argued, because he submitted it was obvious. He submitted that there was no similarity to the test for derivative actions, the latter being a question of company law affecting the rights of shareholders, and the former being a principle of law barring a claim by a shareholder against a third party against whom the company had the same claim. The strictness of the English law against recovery of reflective loss avoided uncertainty.

32. Notwithstanding that the point had not previously been raised, I would have been tempted to follow Mr Davies's route, had I not found that the claim was not barred at English law by the reflective loss principle. I find the analogy of derivative actions persuasive, even if Mr Hancock QC did not. But I do not need to decide the question.

33. Had I found that the law of Mauritius, as the law of the place of incorporation, governed, I would have had no difficulty in concluding, in favour of UCP, that Mauritian law does not incorporate the English common law principle of reflective loss. In their Joint Statement, the two Mauritian law experts, Mrs Ah Foon Chui Yew Cheong, a retired Judge of the Supreme Court of Mauritius, for the Claimant and Mr Sivakumaren Mardemootoo, a practising commercial lawyer in Mauritius, for the Defendant, agreed that the only case in which reflective loss has been referred to in the Mauritian courts, **Saturn Investments SARL v Mr Edmond Wah Bon Ching** [2016] SCJ 5 "*is not a precedent on reflective loss in Mauritius*". Mrs Cheong, in evidence which I accept, explained that Article 1151 of the Mauritius Civil Code, to which Mr Mardemootoo refers, is simply a general provision as to causation, and that the English common law principle against the recovery of reflective loss has not been adopted in, nor forms part of, Mauritian jurisprudence. The burden of proof is upon UCP to establish the position in foreign law if it is said to be different from English law, and I am satisfied that UCP has done so. If the position is that at present the principle is not part of Mauritius law, it is not for me, even if sitting in the position of a Mauritian judge, to introduce it or to conclude that a Mauritian court would introduce it, particularly when, as Mrs Cheong makes clear, in Mauritius the Courts can rely, not only upon the Mauritian Civil Code and Mauritian jurisprudence, but also on English and French case law and jurisprudence

and the jurisprudence of other Commonwealth jurisdictions such as New Zealand (from which its company law has been drawn) and Singapore, both of which have a different and more flexible approach to the recovery of reflective loss, not least, as discussed in paragraph 18 above, by reference to the applicability of **Christensen.**

34. The defence by reference to reflective loss therefore fails and the agreed sum of £5,837,920.37 is therefore due.

Recovery of legal costs

35. There are objections *in limine* which Mr Butler puts forward:

   i) No loss. I have already rejected this argument, as set out in paragraphs 11-12 above. The impossibility of predicting what legal costs would be required to implement the *recovery rights* would be another reason for rejecting any suggestion of valuing them as at the date of November 2014.

   ii) To permit recovery of the legal costs would offend against the principle of reflective loss. As set out in paragraph 10(i) above, Nectrus does not now rely upon the position of the SPVs, but asserts by reference to Candor that recovery of the legal costs expended by UCP would offend against the reflective loss principle. I have already rejected above the applicability of the principle, but in any event, Mr Butler had considerable difficulty, as do I, in applying it to the legal costs incurred by the Claimant (not by Candor in any event). It is plainly, for this purpose, a *separate and distinct* claim from that in respect of the deduction from the purchase price made by Brookfield.

   iii) Expenditure by UCP is said to have been voluntary. Plainly it was not, being money expended to seek to recover the deposits lost by virtue of Nectrus's breach of its obligation to UCP. This argument blended in with a case on causation put by Mr Butler by reference to **Esso Petroleum & Co Limited v Hall Russell & Co** [1989] 1 AC 643, in which the claimant sought recovery in respect of monies paid out to third parties by way of a Voluntary Agreement entitled TOVALOP, (the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution). Plainly the situation here is wholly different, and the need to lay out legal expenses to recover the Lost Deposits flowed directly, indeed inevitably, from Nectrus's breach of duty.

   iv) Mr Butler contends that the expenditure of the legal costs was not foreseeable, and reference is made to **Brown v KMR Services Limited** [1995] 4 AER 598. This too is in my judgment inapt, both for the reason set out in (iii) above and by virtue of the fact that the costs were incurred in mitigation of the Claimant's loss. In the light of my rejection of the reflective loss defence in relation to the first head, this is plain and obvious. Even if I had found that the reflective loss point barred the recovery of the reduction in the sale price, the legal costs would still have been recoverable: first because the effect of the reflective loss principle is not to bar the cause of action but only the recovery of certain types of loss (per Neuberger LJ in **Gardner v Parker** [2005] BCC 46 CA at paragraph 49), but also because in any event the expenditure by UCP is a separate and distinct and foreseeable claim.

36. I turn to address the claims made, and first record some guidelines in respect of my consideration of them:

    i) Steps taken by UCP were, in my judgment, steps taken in mitigation, and I refer to the passage in **Chitty**, set out in paragraph 12 above. The steps taken must be reasonable, but the standard is not a high one, since the defendant is a wrongdoer: see **Banco de Portugal v Waterlow** [1932] AC 452 at 506. Mr Butler placed reliance in his skeleton, though he did not develop the matter orally, upon a without prejudice letter sent on 13 January 2015 on behalf of Nectrus, which requires consideration by reference to **Payzu v Saunders** [1919] 2 KB 581 CA, but I am entirely satisfied that the very broad-brush *proposal* which Nectrus was *willing to consider*, was not one in respect of which UCP can be held to have been unreasonable in failing to follow it up. In any event the test of the steps taken in mitigation will be whether they were reasonable, bearing in mind the position in which UCP were put and left, including having to face the injunction application to which I have referred in paragraph 7 above.

    ii) In considering the reasonableness and recoverability of the legal costs incurred, Mr Butler did not contest that the appropriate analogy in this case of breach of contract and mitigation of loss was with an indemnity costs assessment (see per Colman J in **National Westminster Bank PLC v Rabobank Nederland (No 3)** [2008] 1 Lloyd's Rep 16 and per Newey J in **Herrmann v Withers LLP** [2012] PNLR 28 at 603-4).

    iii) The expenditure of costs increased and was exacerbated by UCP's having to deal with the injunction application. It is plain that Nectrus's injunction application had the intention and effect of delaying, and, if possible, preventing, UCP's recovery of the Lost Deposits, and much time and costs were expended in relation to resisting it. I note that in Mr Butler's post-hearing note of submissions he produced the New Delhi Court Order of 23 August 2019, by which, pursuant to my Judgment, the injunction was withdrawn by Nectrus, and he draws attention to the provision for payment of INR 5,000 by Nectrus. Credit must be given in respect of its share of this by UCP, in a sum which I understand to be £11.

    iv) Both sides accepted that, while taking full account of submissions made by both sides in the helpful schedules which each counsel has prepared, I am entitled to and should approach the costs, subject to the principles I have above set out, with a broad brush, a light touch as Mr Davies would have it, or an axe, as would be preferred by Mr Butler. I take note of **McGregor on Damages (20th ed)** at 10-002. I am satisfied that the costs were incurred, and are recoverable, and I must do my best to assess them. I bear in mind the words of Vaughan Williams LJ in **Chaplin v Hicks** [1911] 2 KB 786 CA that "*the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages*".

37. Before analysing the costs, I should briefly address the question of Masters. I am clear that what they did enables me to navigate my way through this claim for costs as damages. I am satisfied that they did their best to verify the time spent, the bills rendered and the split between categories of work done which are recoverable in this litigation and those which have nothing to do with it. It is clearly sensible and pragmatic that they

should have analysed the disbursements and verified the bills rendered and paid. Nevertheless, the fact is that in relation to the various points which Nectrus properly and understandably make, it has not been possible for them to inspect the underlying documents, and I shall inevitably, when considering all such points, make due allowance for that.

38. I turn to the Scoping Costs, which include the matters set out in paragraph 7 above. The total hours spent by Skadden's personnel is 625.5, and by Khaitan and Co, the Indian lawyers, is 248.5. The fees billed by Skadden amount to £406,697.54 (inclusive of VAT) and £52,937.91 (no VAT being relevant) by Khaitan.

39. There are the following issues between the parties with regard to these Scoping Costs:

i) The Defendant submits that they include time spent in respect of the claims eventually made against SREI, with regard to which UCP's claim did not succeed. Mr Butler asserts that there should be the same 90/243 split as there was in respect of the Lost Deposits claim, though it would need to be 93/243 to allow for the INR 3 crore recovered from Aten Capital. I agree that there should be some allowance. But the early investigations would have been at a time when, due to the lack of information from Nectrus, precisely where the claims were to be aimed would not have been known or understood, and, once it became clear, I am satisfied that, as Mr Davies submitted, it would have been the far less straightforward investigation and, subsequently, claim, in respect of Aten Capital and Aten PM, which would have taken the bulk of the time and care. Doing the best I can, I would discount one quarter of the Scoping Costs in that regard.

ii) Nectrus submits that credit should be given for the fact that 40 per cent of the sums recovered were to be passed on to Brookfield. The fact remains that Brookfield made no contribution to the costs, and UCP was responsible for their entirety.

iii) Nectrus submit that the instruction of Skadden, at any rate to the extent they were instructed, was unnecessary and/or duplicative. Mr Lake in paragraph 10 of his second witness statement, refers to Skadden's role as "*coordinating global counsel*". Mr Davies points out that (i) UCP had (as Nectrus knew) no staff or personnel of its own, and certainly no in-house counsel (ii) that the job in hand was not possibly capable of being achieved simply by instructing Indian counsel, because of the eventually multinational strategy which Nectrus adopted, with the proceedings in the Isle of Man and Cyprus, as well as the involvement of more than one court in India. Mr Butler submits that it would have been more economical for UCP to have employed in-house counsel; but I do not consider that it was unreasonable of them to employ an international firm of solicitors to investigate and coordinate and to give instructions to the Indian lawyers. The fact that, at the stage of scoping, Skadden were spending a great deal of time to investigate and isolate the claims is only to be expected. I shall however make some allowance from the £406k (now to be reduced by a quarter as a result of (i) above) to allow for this. The instruction of Skadden at the scoping stage is more necessary than at later stages of the Indian arbitrations and litigation.

iv) Finally, Mr Butler complains in regard to the Scoping Costs, and the ongoing costs thereafter, that (even on an indemnity basis) the rates charged and time spent by Skadden and, to an extent Khaitan, are excessive by reference to comparison with other similar firms and the work being done. I propose to make a 20 per cent reduction in respect of Skadden's costs and 10 per cent in respect of the Khaitan charges to allow for this.

40. Accordingly, Skadden's fees of £406k, reduced to £300k by reference to (i) above, and then to £250k to allow for (iii) above, are then discounted by reference to (iv) to £200k. Khaitan's £52k are reduced to £39k to allow for (i), and then to £35k in respect of (iv) above. I accordingly award in respect of Scoping Costs the total of £235k, as against the £459k claimed.

41. I turn to "*other Indian litigation*". I have already concluded that the recoverable costs extend to claims and proceedings in relation to both Aten Capital and Aten PM and (subject to credit for £11) to the injunction application. The bills rendered by Skadden are £1,094,278.24 (inclusive of VAT) in respect of 1,400 hours and by Khaitan £1,108,201.41 in respect of 2,500 hours. Included in the total of Khaitan's costs are two separate calculations of disbursements of £357,498.07 and £137,058.87, totalling £494,556.94, so that the net fees are £613,644.47. As to Nectrus's points, (iii) and (iv) above are again relevant, and I reconsider them.

42. Nectrus make the same points in relation to the lack of necessity for the role of Skadden, although in my judgment with greater force. With Khaitan in charge of the Indian arbitrations and litigation it was not so necessary for Skadden to play such a large role. I note in particular that in the following fee periods Skadden charged (inclusive of VAT) considerably more fees than Khaitan: 3.2 (26.5.15 to 30.11.15) £117k to £42k, 3.3 (1.12.15 to 31.3.16) £121k (plus travel expenses) to £60k, 3.4 (31.3.16 to 11.11.16) £291k (plus travel expenses) to £222k, 3.6 (18.3.17 to 12.5.17) £105k (plus travel expenses) to £41k, 3.8 (14.6.17 to 31.7.17) £100k (plus travel expenses) to £51k, 3.9 (1.8.17 to 31.8.17) £45k (plus travel expenses) to £22k, 3.14 (1.1.18 to 31.1.18) £19k (plus travel expenses) to £5k, 3.16 (1.3.18 to 31.3.18) £19k (plus travel expenses) to £4k.

43. Again, doing the best I can, I conclude that, once the Indian lawyers were in the saddle, it was not reasonable for the international solicitors to incur the costs they did, and I make the following deductions from the Skadden costs in respect of the periods which I have identified in the paragraph above: £30k (period 3.2), £40k (3.3), £80k (3.4), £40k (3.6), £50k (3.8), £15k (3.9), £10k (3.14) and £5k (3.16). This is a total of £270k.

44. Nectrus made a number of points about disbursements, but I see no reason to doubt any of the disbursements claimed for by Khaitan. As for the flight/travel expenses billed by Skadden, I do see force in the case that the total in the various bills of approximately £45k (after allowance for separate costs not charged for in respect of SREI) may be excessive in the light of the activity of the Indian lawyers on the spot, and the availability of Skype or other methods of international communication, and I reduce that sum by £15k.

45. Accordingly, the Skadden bills totalling £1,094,278.24 fall to be reduced by the sum of £270k to £824k, and, net of the travel expenses of £44k, the fees themselves amount to some £780k. I then apply the same 20 per cent discount as I have set out above, leaving

a sum payable in respect of Skadden's bills of £620k, plus the reduced figure for travel expenses of £30k, namely in total £650k.

46. As for the Khaitan fees, net of disbursements of approximately £495k they are approximately £615k, to which I would apply the approximate 10 per cent discount again referred to above, making a total of £555k, so that the total sum payable in respect of Khaitan is £555k, plus £495k, namely £1,050k.

47. The total sum recoverable in respect of "*other Indian proceedings*" is accordingly £650k plus £1,050k, namely £1,700,000.

48. I award therefore the total sum in respect of legal costs of £1,935,000, less the £11 referred to in paragraph 36(iii) above.

49. I accordingly award under this head the sum of £1,934,989, as against the sum of £2,662,115.10 claimed.

Set-Off

50. On the basis that I have now given judgment for UCP, there is a judgment debt owing by Nectrus, and UCP seeks to offset against that judgment the payment of distributions referred to in paragraph 5 of my earlier Judgment, and the sum of £150,000 costs payable by way of an interim order for costs in the Manx Court. There is no dispute as to the interim costs, payable by Nectrus to UCP, that there is a legal set-off in that regard against the judgment debt. However, there is now challenge in respect of the distributions because, contrary to the description I gave in paragraph 5 of my earlier Judgment, it now appears that the shares, in respect of which the distributions are payable, are in fact held in the name of nominees for Nectrus, Luna Nominees Limited and Lynchwood Nominees Limited. The reliance by Nectrus on the existence of the nominees is quite inconsistent with the fact that Nectrus claimed both in the Manx Court and in proceedings in Cyprus on the basis that it was entitled to the distributions being retained by UCP.

51. The distributions arose because of the provisions of clause 1.4 of the Deed of Amendment (of the IMA) dated 25 August 2009, whereby Nectrus as Investment Manager was obliged to purchase UCP shares, in accordance with the terms of the IMA using its fee, i.e to take the shares in lieu of the fee. It seems that such shares so purchased were placed by Nectrus into the name of nominees. Technically a legal set-off requires mutuality, in the strict sense that there must be identity between the two parties owing, and according to **Derham On Set-Off (4th ed)** at 11.01, mutuality for the purposes of legal set-off is strictly determined by reference to legal title.

52. Though UCP would if necessary seek to argue estoppel by virtue of the position taken by Nectrus in the Cyprus and Isle of Man, and indeed in these proceedings, Mr Davies is content to rely on the concept of equitable set-off, in respect of which the requirement of mutuality, though it exists, is less strict. A third party is entitled to set up as a defence to a claim by a trustee an equitable set-off that a beneficiary is indebted to it (**Bankes v Jarvis** [1903] 1 KB 549), and in any event in the recent Court of Appeal decision of **Geldof Metaalconstructie NV v Simon Carves Limited** [2010] EWCA Civ 667 there was consideration of the modern law of equitable set-off, and, although not a requirement, but because of the broad view taken by the Courts, two matters would

certainly be sufficient, namely that (i) there be a close relationship between the dealings and transactions which gave rise to the respective claims and (ii) it would be manifestly unjust for the claim to be enforced without regard to the crossclaim.

53. In this case it is quite clear that there is a close relationship between the two claims. The claim in respect of which I have given judgment relates to the breach of duty by Nectrus as Investment Manager under the IMA. The distributions were payable on shares acquired by Nectrus as Investment Manager in lieu of fees, in respect of the duties which they misperformed. As to whether it would be manifestly unjust, I am satisfied both for that reason and also because I am persuaded that without the setoff it is indeed unlikely that UCP will receive payment either of the Manx costs (which remain unpaid) or in particular of this judgment debt, not least given the freezing of Nectrus's assets by the Manx Court. I am in any event satisfied that, in accordance with the approach taken by Nectrus itself, the distributions should be treated as owing to Nectrus, and thus appropriate to set-off against the judgment debt and the present and any future costs orders in the Manx Courts.

54. I will hear argument on the question of interest.