Neutral Citation Number: [2024] EWHC 2710 (Ch)

FL-2020-000051

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (CH D)

25 October 2024

Before:

MR JUSTICE LEECH

- - - - - - - - - - - - - - - - - - - -

B E T W E E N:

ALLIANZ FUNDS MULTI-STRATEGY TRUST (on behalf of ALLIANZGI BEST STYLES GLOBAL EQUITY FUND) AND OTHERS	**Claimants**
- and –	
BARCLAYS PLC	**Defendant**

- - - - - - - - - - - - - - - - - - - -

MS HELEN DAVIES KC, MR MICHAEL WATKINS and **MR TOM FOXTON** (instructed by **Latham & Watkins (London) LLP**) appeared on behalf of the Defendant.

MR JONATHAN NASH KC, MR ALEX BARDEN and **MS CAROLA BINNEY** (instructed by **Signature Litigation LLP**) appeared on behalf of the Claimants.

Hearing dates: 22-23 July 2024

- -

APPROVED JUDGMENT

- -

This judgment was handed down remotely at 10.30am on 25th October 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Leech:

I. The Applications

1. By Application Notice dated 28 March 2024 (the "**Strike Out Application**") the Defendant, Barclays plc (the "**Bank**"), applied to strike out 241 of the Claimants' claims under section 90A ("**S.90A**") and Schedule 10A ("**Schedule 10A**") of the Financial Services and Markets 2000 ("**FSMA**") on the basis that the Claim Form and Particulars of Claim disclosed no reasonable cause of action in relation to those individual claims or, alternatively, for summary judgment under CPR Part 24.2 because those claims have no real prospect of success. The Strike Out Application was supported by the fourth witness statement of Mr Oliver Middleton also dated 28 March 2024 ("**Middleton 4**"). Mr Middleton is a partner in Latham & Watkins LLP ("**Latham & Watkins**"), the Bank's solicitors.

2. The Bank's case was (and is) that the Claimants do not allege and cannot prove that the relevant funds or sub-funds acquired, continued to hold or disposed of the Bank's shares in reliance on published information within the meaning of Schedule 10A, paragraph 3 ("**Paragraph 3**"). It was also the Bank's case (and remains its case) that the Claimants have not alleged and cannot prove that they suffered loss as a result of a delay by the Bank in publishing information within the meaning of Schedule 10A, paragraph 5 ("**Paragraph 5**"). The Bank does not apply to strike out any of the Claimants' claims under section 90 ("**S.90**").

3. On 30 May 2024 the Claimants filed the fifth witness statement of Ms Rebecca Hogan in answer to the Strike Out Application and on 26 June 2024 they filed an amended version of that witness statement ("**Hogan 5**"). Ms Hogan is a partner in Signature Litigation LLP ("**Signature**"), the Claimants' solicitors, and she exhibited the expert's report of Mr Riccardo Curcio dated 17 December 2021 and the expert's report of Dr Andrew Hildreth also dated 17 December 2021 which had been filed or exchanged in the *RSA Litigation*. The Bank pointed out that the Court had not granted permission to the Claimants to rely on expert evidence but did not object to the Court considering it.

4. By Application Notice dated 26 June 2024 the Claimants applied for permission to amend their Particulars of Claim and their Particulars of Quantum (the "**Amendment**

Application"). The Claimants did not apply to amend their case in relation to Paragraph 3 but to amend their case in relation to Paragraph 5 and the parties were agreed that the Court could deal with this application at the hearing of the Strike Out Application. Ms Helen Davies KC, who appeared with Mr Michael Watkins and Mr Tom Foxton on behalf of the Bank, approached the Strike Out Application on the assumption that the Court could consider the proposed amendments in deciding whether to strike out the relevant claims or to grant reverse summary judgment and I do the same. When I refer to the "**Particulars of Claim**" and the "**Particulars of Quantum**" or "**POQ**", therefore, I intend to refer to the draft Amended Particulars of Claim and the draft amended Particulars of Quantum for which the Claimants applied for permission to amend.

II. Background

5. I set out the detailed background to this action and its procedural history in my judgment on the Claimants' applications to amend the names of individual Claimants in the Claim Form and the Particulars of Claim and to substitute a number of additional Claimants: see [2023] EWHC 2015 (Ch) at [1] to [44]. I also set out the procedural developments between that judgment and the first Case Management Conference ("**CMC1**") in my judgment dated 12 January 2024 following that hearing: see [2024] EWHC 235 (Ch) at [1] to [7]. In relation to the issue of reliance I ordered 20 Claimants to complete the Reliance Questionnaire and 80 Claimants to complete the Reliance Questionnaire Lite: see [8] to [18]. I brought the procedural developments up to date in my judgment dated 2 July 2024 following the second case management conference ("**CMC2**"): see [2024] EWHC 2124 (Ch).

6. In this judgment, I adopt the defined terms and abbreviations which I have used in each of the three earlier judgments. It should be obvious from the context what those terms mean without the need to repeat those definitions here. Further, the issues which I have to decide on the two applications before me and my reasoning ought to be intelligible to any reader without the need to repeat the detailed background and procedural history again. However, if there is any doubt about the meaning of the terms which I use or the background to the present applications, I refer the reader to the passages which I have identified above.

7. In considering the case management issues raised by the parties, I will also have to refer

to the terms of the Order dated 11 and 12 January 2024 which I made after CMC1 (the "**CMC1 Order**") and the terms of the Order dated 1 and 2 July 2024 which I made after CMC2 (the "**CMC2 Order**"). But, again, if there is any doubt about the effect of those Orders or the context in which I made them, I refer to the judgments which I gave following each hearing.

III. The Statements of Case

A. The Claimants' Case

(1) The Particulars of Claim

8. In section A of the Particulars of Claim the Claimants set out the factual basis for the claims. On 26 June 2014 the Bank issued an RNS to the London Stock Exchange disclosing that the Attorney General of the State of New York had made the Complaint against the Bank. By close of trading on 1 February 2016 the price of the Bank's ordinary shares had fallen from £1.86 a share to £1.828 a share. On 31 January 2016 the Bank entered into a settlement agreement with the NYAG and submitted to the SEC Order under which the Bank agreed to pay US $35 million to the State of New York and US $35 million to the SEC. In relation to themselves the Claimants allege as follows:

> "3. The Claimants are investors who acquired, continued to hold and/or disposed of ordinary shares issued by Barclays Plc and admitted to trading on the London Stock Exchange during the Relevant Period, and/or interests therein. For the purposes of these Amended Particulars, references to such shares include references to interests therein. The details of the Claimants are set out in Appendix A.
>
> 4. Some of the Claimants acquired shares pursuant to a rights issue carried out in September 2013 by which Barclays Plc raised approximately £5.8 billion by way of additional share capital ("**the Rights Issue**"). The Rights Issue proceeded by way of prospectus dated 16 September 2013 ("**the Prospectus**")."

9. Section B sets out the relevant legal regime. The Claimants allege that the Bank's shares were relevant securities for the purposes of section 90 of FSMA ("**S.90**") and S.90A and that the Prospectus was a prospectus in respect of relevant securities for the purposes of S.90. They also allege that the Bank was under an obligation to disclose inside information on a recognised information service without delay under the Disclosure, Guidance and Transparency Rules (the "**DTR**").

10. In section C the Claimants allege that the Bank operated a "dark pool" trading system known as "Barclays LX" or "LX Liquidity Cross" ("**LX**") which formed part of its Equities Electronic Trading Division ("**EETD**"). They allege that the Bank made false representations to the public, clients and market participants about the extent of the high frequency trading in its dark pool and its safety as a trading environment and that the Bank promoted its "Liquidity Profiling" service as providing protection from predatory trading whereas in fact it did not apply Liquidity Profiling to certain categories of trading or overrode it altogether. They also allege that the Bank made false representations about the algorithms which it used and its smart order router system whereas, in truth, it directed orders into its dark pool where they were executed by high frequency traders or routed to other trading venues which favour the Bank.

11. The Claimants make a number of specific allegations about the operation of the dark pool. They go on to allege that the Bank claimed to have "End to End Client Protection" in place which protected client orders and minimised information leakage whereas in truth it was operating its algorithms, smart order router and dark pool to favour high frequency trading, that it did not subscribe to a direct market data feed in breach of a US financial regulation imposed by the SEC, that it did not monitor credit and capital thresholds, that it failed to restrict access to confidential trading information to the appropriate employees, that it failed to provide required information to the SEC and that this conduct amounted to violations of US state and federal laws. I consider some of the specific allegations in the more detailed analysis below.

12. In section D the Claimants set out the detailed reasons why the Bank was under an obligation to disclose the true facts about the LX trading system pleaded in section C in published information to which Schedule 10A applied. In particular, they allege that those facts gave rise to a principal risk or uncertainty which required a fair review of the Bank's business for the purposes of the DTR, Rules 4.1.8 and 4.2.7: see paragraph 55. They then continue:

> "57. Accordingly, for the reasons set out in this Section D:
>
> a. Barclays was at all material times during the Relevant Period under an obligation to announce to the market via an RIS the matters set out in Section C above.
>
> b. Barclays was under an obligation to include the matters set out in Section C above in the Prospectus.

> c. Barclays was at all material times during the Relevant Period under an obligation to include the matters set out in Section C above in its management reports and interim management reports.
>
> 58. For the avoidance of doubt, Barclays' announcement on 26 June 2014 did not amount to an announcement to the market of the matters set out in Section C above. To the contrary, that announcement did not set out those matters, and did not accept that any of them were true, as it should have done. Barclays subsequently maintained the public position, as recorded in Mr King's speech referred to at paragraph 9 above, that following internal investigation the allegations were not justified."

13. In section E the Claimants set out particulars of the false and misleading statements which they allege that the Bank made in its 2011, 2012, 2013 and 2014 annual reports, its 2011, 2012, 2013 and 2014 interim results announcements and in the Prospectus. They then continue as follows (and in the passage below they propose to amend to add the word "dishonestly" in paragraph 69):

> "67. The matters set out in Section E1 amounted to the inclusion of untrue and/or misleading statements in Barclays Plc's published information within the meaning of paragraph 3(1)(b)(i) of Schedule 10A.
>
> 68. Further or alternatively, the omission to include within Barclays Plc's published information during the Relevant Period the matters set out in Section C above amounted to an omission from that published information of any matter required to be included in it, within the meaning of paragraph 3(1)(b)(ii) of Schedule 10A.
>
> 69. Further or alternatively, Barclays Plc dishonestly delayed throughout the relevant period the inclusion in its published information of the matters set out in Section C above, within the meaning of paragraph 5(1)(b) of Schedule 10A."

14. The Claimants allege that Mr William White, who was the head of the EETD, the Managing Director and Global Head of Product Development and Platforms for Markets and also a member of the Bank's Markets Executive Committee, was a person discharging managerial responsibility (a "**PDMR**"), that he acted dishonestly in causing or permitting the Bank not to disclose the true facts about LX in its published information during the relevant period and that this also amounted to dishonest concealment of material facts. The Claimants also propose to amend to allege that this "amounted to dishonest delay in the publication of such information". Finally, they also allege that he made the untrue and misleading statements set out in section E. They make very similar allegations against Mr Thomas King from 8 September 2014 (at the latest) and allege that it is likely that other PDMRs were guilty of the same misconduct.

15. Section F is headed "Loss and Damage" and in this section the Claimants allege that they relied upon the Bank's published information:

> "82. The Claimants purchased and/or continued to hold shares in reliance on Barclays Plc's published information. In support of this averment the Claimants are entitled to rely on a presumption of reliance, namely that it is to be inferred that they were induced or influenced in their investment decisions by Barclays Plc's misstatements and omissions, in circumstances where those misstatements and omissions were, for the reasons set out above, matters which were likely to play a part in the decision-making of a reasonable investor. Further and in any event, it was reasonable for them to rely on that published information in circumstances where Barclays Plc did not issue any correction or disclose the matters set out in Section C above.
>
> 83. Had Barclays Plc not delayed and/or omitted to publish to the market the matters set out in Section C above, and/or had Barclays not made the misstatements set out in Section E1 above:
>
> a. The Claimants would not have purchased Barclays Plc ordinary shares in the Relevant Period. Further or alternatively, any Barclays Plc ordinary shares they did acquire would have been acquired at a lower price.
>
> b. The Claimants would have disposed of their Barclays Plc shares at a higher price. In particular, had prompt disclosure been made of the position at the earliest possible opportunity, although it is likely that there would have been some fall in the share price, that fall would not have been as great as it was following the NYAG's 25 June 2014 announcement or its 1 February 2016 announcement."

16. Finally, the Claimants allege that they suffered loss and damage as a result of the untrue or misleading statements made by the Bank in its published information. In particular, they allege that from (at least) 2011 the market price for the Bank's ordinary shares was artificially inflated and in excess of their true value and rely on the falls in the market value of those shares following the publication or disclosure of the Complaint and the SEC Order.

(2) The Particulars of Reliance

17. On 24 November 2023 the Claimants served a document headed "Claimants' Particulars of Reliance Categories" (the "**POR**") and in paragraph 1 they stated that the purpose of these particulars was to set out three categories into which the respective cases on reliance of the different Claimants and sub-funds could be divided together with a brief description of the nature of the reliance falling within each sub-category. In paragraph 3 they set out a number of reservations including the statement that the categories were

without prejudice to the Claimants' case that it was unnecessary to show reliance in relation to claims under Paragraph 5 and S.90. They also defined "**Published Information**" for the purpose of their pleaded case as "all of Barclays Plc's published information referred to in the Particulars of Claim, including the Prospectus where relevant". Under the heading "The Claimants' Reliance – General" the Claimants then pleaded as follows:

> "4. As set out at paragraph 82 of the Particulars of Claim:
>
> a. Each of the Claimants purchased and/or continued to hold ordinary shares in Barclays Plc in reliance on Barclays Plc's Published Information.
>
> b. The Claimants are entitled to rely on a presumption of reliance, namely that where Barclays Plc's misstatements in, and omissions from, its Published Information were such as likely to induce or influence the making and/or holding of investments by a reasonable investor in Barclays shares, it is to be inferred that any such investor was in fact induced or influenced by such matters. In this respect:
>
> i. The Published Information in this case was (both generally and in relation to the specific matters of complaint), and/or the relevant statements in, omissions from, and/or delays in the production of, the Published Information were, of a nature which was likely to play a part in the making and/or holding of investments by a reasonable investor, given the seriousness and potential consequences of the relevant matters.
>
> ii. In light of the presumption, service of these Particulars of Reliance Categories is without prejudice to the question of what facts, if any, a Claimant is required to prove in relation to reliance.
>
> c. It was in any event reasonable for each of the Claimants to rely on the Published Information during the whole of the Relevant Period, in circumstances where Barclays Plc did not disclose the relevant matters, and did not issue any relevant correction or clarification."

18. The Claimants allege that they were all professionally managed institutional investors with different investment processes and that a particular Claimant or sub-fund might fall into more than one category. They also allege that as a matter of statutory construction S.90 and S.90A were intended to grant a remedy to investors whose investment processes are wholly or partially "passive", "index-linked or "tracking" in nature for a number of reasons including the fact that at all relevant times a substantial proportion of investors fell within those categories.

(i) Category A

19. The POR then go on to identify three categories of Claimants. The first category

(“**Category A**”) consists of those Claimants who read and relied on the relevant Published Information directly “in that they read and considered Barclays Plc’s relevant Published Information”.

(ii) Category B

20. The second category (“**Category B**”) consists of those Claimants who relied on the relevant Published Information indirectly through other sources which acted as a conduit for the substantive contents of the Published Information. The Claimants provide the following, non-exhaustive particulars of the sources which provided the conduit through which they relied on the Published Information and the activities which they allege amounted to reliance:

> “a. Reviewing transcripts of investor relations calls between Barclays Plc (or its agents or advisers) and financial professionals such as investment analysts, in which the contents of Published Information were the subject of discussion and questions.
>
> b. Meetings and/or discussions with Barclays Plc (or its agents or advisers) which covered matters contained in the Published Information and in which Barclays Plc itself relied on or referred to the Published Information.
>
> c. Reviewing the reports of brokers or financial analysts in relation to Barclays Plc (including “buy”, “hold” and “sell” recommendations) which themselves relied upon or referred to the Published Information.
>
> d. Meetings with brokers or financial analysts to discuss Barclays Plc where such brokers or analysts relied upon or referred to the Published Information.
>
> e. Reviewing news reports and/or financial data and/or analysis from news or investment information outlets which themselves relied on or referred to the Published Information.”

(iii) Category C

21. The third category (“**Category C**”), which is the most important for present purposes, consists of Claimants who are alleged to have suffered losses as a consequence of movements in the share price of the Bank. The POR describe Category C as exhibiting “**Price/Market Reliance**” and they plead that Category C Claimants relied on the Published Information in the following sense:

> “12. Claimants or Sub-Funds in Category C relied on the relevant Published Information in that:

a. Their investment processes proceeded on the basis that:

i. Barclays Plc was a FTSE listed entity required to produce Published Information compliant with the relevant requirements. As set out in paragraph 5 above, such Published Information would therefore include all relevant negative information and would be correct, complete, timely, true and fair; and/or

ii. Barclays Plc's share price (and/or the movement therein) on the London Stock Exchange would reflect the contents of the Published Information, and would thus take account of all information included in the Published Information, including any negative information.

b. In their investment processes, they took account of Barclays Plc's share price (and/or any movements therein) and/or its status as a listed issuer with relevant obligations as set out in paragraph 5 above, including:

i. By making judgments and/or including Barclays Plc within its investment processes on the basis that Barclays Plc was a listed issuer with relevant obligations as set out at paragraph 5 above; and/or

ii. By making judgments taking into account the price and any relevant movements; and/or

iii. By including and/or by taking account of such matters within an algorithm or other numerically-driven system or decision-making process; and/or

iv. By taking account of such matters and/or their effect on Barclays Plc's market capitalisation as the constituent of an index or benchmark (such as the FTSE 100 or FTSE 250) – for example by adjusting its holding in Barclays Plc shares to "track" the value of Barclays Plc shares as a proportion of the total value of the FTSE 100 or FTSE 250.

13. In this regard, and so far as necessary, it will be the Claimants' case that:

a. The LSE is (alternatively, that the Claimants proceeded on the basis that it is) an efficient market in which the price of Barclays Plc's shares was determined and/or influenced by the contents of its Published Information including the omission of relevant matters from Published Information).

b. By behaving in the manner set out above, they relied indirectly on Barclays Plc's Published Information.

c. It was reasonable for an investor to rely on the share price of Barclays Plc in the manner set out above, as reflecting the contents of Barclays Plc's Published Information."

22. In their Skeleton Argument dated 17 July 2024 Ms Davies, Mr Watkins and Mr Foxton stated that on the face of the pleadings 241 of the funds or sub-funds whom the Claimants represent or constitute fall within Category C and that their claims were alleged to be worth £330 million. In their Skeleton Argument dated 18 July 2024 Mr Nash, Mr Barden and Ms Binney accepted these figures and also stated that there are 219 funds or sub-

funds which fall within Categories A and B and that their claims are worth £210 million. Hogan 5 (below) provides further information about the claims.

(3) The Particulars of Quantum

23. The Claimants allege that the fraud measure of loss is applicable to their claims under S.90A and that they are entitled to be put in the position in which they would have been had they not purchased or continued to hold shares in the Bank in reliance on the Published Information during the "**Relevant Period**" (defined as 1 January 2011 to 1 February 2016) or if the Bank had not delayed in publishing information regarding the relevant misconduct. They plead that damages should be assessed by two alternative measures:

> "5. The Claimants therefore claim (in summary) the difference between (i) the price paid for the Barclays Plc shares or (depending on when acquired) the value of the shares when the relevant Claimant continued to hold such shares in reliance on the Published Information (as the case may be); and (ii) the price of the Barclays Plc shares when sold or (depending on when sold) the value of the shares following the disclosure of at least part of the misconduct identified in the Amended Particulars of Claim to the market ("**Measure 1**") (Section D below).
>
> 6. With respect to the dates on which at least part of the misconduct became known to the market, the Claimants rely on the following dates ("**the Relevant Dates**"):
>
> a. 26 June 2014 (the date the filing of the NYAG Complaint was announced by RNS) ("**Relevant Date 1**"); and
>
> b. 1 February 2016 (the date the NYAG Settlement Agreement was announced by RNS) ("**Relevant Date 2**").
>
> 7. Each Claimant also relies on an alternative measure of loss, calculated by reference to the amount of the inflation in the market price of Barclays Plc shares associated with the misrepresentations and omissions alleged in the Amended Particulars of Claim (the "**Misleading Information**") and/or with Barclays Plc's delay in disclosing the true position. On this alternative measure, the Claimants' loss is calculated as the product of the amount of the inflation in the share price arising from the matters revealed on 25 June 2014 and/or 1 February 2016 and the number of Barclays Plc shares held on the associated Relevant Date (Section E below)."

24. It is unnecessary to set out the detailed way in which both measures are developed in the POQ and, for present purposes, it is sufficient to note that the Claimants accept that the assessment and calculation of their losses requires them to persuade the Court to accept a particular methodology and to make a number of assumptions in their favour:

> "8. In order to compare sale and purchase prices for Barclays Plc shares, it is necessary to match sale and purchase pairs. Because Barclays Plc shares are fungible, this requires the application of a matching methodology. Each Claimant relies on a 'last in, first out' ("**LIFO**") method for matching share sales with prior purchases so as to identify 'purchase-sale pairs' ("**PSPs**"). The case for each Claimant is also set out by reference to two further, alternative matching methodologies: (i) weighted average ("**WA**") and (ii) 'first in, first out' ("**FIFO**").
>
> 9. In summary, these methodologies operate as follows:
>
> a. <u>LIFO matching</u> – sales of Barclays Plc shares are matched to the most recent shares purchased prior to the sale in question. The LIFO matching process is repeated until the sold shares are fully allocated to a previous purchase or purchases. Once purchased shares are matched to sold shares, they are removed from the holding inventory when matching to subsequent share sales.
>
> b. <u>WA matching</u> – it is assumed that Barclays Plc shares sold are sold in proportion to the relative percentages of shares in a Claimant's portfolio up until the date of the sale in question. By way of an example:
>
> i. On a given date, a Claimant holds 500 shares in total: (i) 200 shares purchased on a given date ("**Day One**"); (ii) 100 shares purchased on a day following Day One ("**Day Two**"); and (iii) a further 200 shares purchased on a date following Day Two ("**Day Three**").
>
> ii. On the given date after Day Three, the Claimant sells 50 shares.
>
> iii. Applying WA matching: (i) 20 of the 50 shares sold are assumed to be shares that were purchased on Day One; and (ii) 10 and 20, respectively, of the remaining 30 shares sold are assumed to be shares that were purchased on Day Two and Day Three.
>
> c. <u>FIFO matching</u> – sales of Barclays Plc shares are matched to the oldest shares purchased prior to the date in question. The FIFO matching process is repeated until the sold shares are fully allocated to a previous purchase or purchases. Once purchased shares are matched to sold shares, they are removed from the holding inventory when matching to subsequent share sales."

(4) Reliance Questionnaires

25. In the CMC1 Order, I ordered the Claimants to answer 20 Full Reliance Questionnaires and 80 Reliance Lite Questionnaires to be selected equally by the parties. Five of the Claimants who completed Full Reliance Questionnaires advanced a case based on Price/ Market Reliance only. C68, the DBX ETF Trust, answered the following questions in the questionnaire with the following answers (and the answers given are set out in bold):

> "1. Does the Claimant or Sub-Fund advance a case that, in acquiring, holding or disposing of shares in Barclays plc ("Barclays Shares"), it relied

on specific statements in Published Information alleged to be untrue or misleading, or on the impression created by specific statements read together? **No.**

2. Does the Claimant or Sub-Fund advance a case that, in acquiring, holding or disposing of Barclays Shares, it relied on documents comprising Published Information as a whole? **No.**"

"4. Does the Claimant or Sub-Fund advance a case that it relied indirectly by means of other sources of information that acted as a conduit for the substantive contents of the Published Information? **No. Not applicable.**"

"5. Does the Claimant or Sub-Fund advance a case that: (i) it knew of and relied on the price of Barclays Shares in acquiring, holding or disposing of Barclays Shares; and (ii) it believed that the prevailing market price of Barclays Shares reflected the value of those shares based on the information disclosed by Barclays being true and complete? **Yes.**

If yes, when and by which individual did the Claimant so rely, and in respect of which of its decisions to acquire, hold or dispose of Barclays Shares?

Yes. The fund tracked an index in the period 1 January 2011 – 1 February 2016 -XTRKR MSCI ALL COUNTRY WORLD US Dollar Hedged Index. XTRKR MSCI ALL COUNTRY WORLD US Dollar Hedged Index hedges to USD the current exposures of its parent index, the ALL COUNTRY WORLD. The ALL COUNTRY WORLD Index is weighted by market capitalization. Tracking was carried out by an adviser DBX Advisers LLC. The fund's portfolio was re-balanced quarterly during the Relevant Period.

6. Does the Claimant or Sub-Fund advance a case that it relied on Barclays' status as a listed issuer with relevant obligations as pleaded in paragraph 5 of the PORC? **Yes.**

If yes, when and by which individual did the Claimant so rely, and in respect of which of its decisions to acquire, hold or dispose of Barclays Shares?

Which Individual: an adviser DBX Advisers LLC.

When: Reliance occurred each time an investment decision was taken in respect of Barclays Shares, including decisions to initiate the transactions identified in the Trading Data."

"7. Does the Claimant or Sub-Fund advance a case of reliance based on a general or invariable practice of reviewing information of a similar nature to the Published Information before making an investment decision? **No.**

If yes, when and by which individual did the Claimant so rely? **Not applicable.**

8. Does the Claimant or Sub-Fund advance a case based only on reliance on alleged material omissions from the Published Information? **No.**

If yes, when and by which individual did the Claimant so rely?

The Claimant does not advance a case based only on reliance on

> **alleged material omissions from the Published Information (an "Omissions Case"). The Claimant advances an Omissions Case in addition to the other reliance cases identified in these. As to the Claimant's Omissions Case, the information provided in the Answers to Questions 5 to 6 is repeated.**
>
> 9. Does the Claimant or Sub-Fund rely on specific communications with the Defendant (including in meetings)?
>
> **No.**
>
> If yes, when and between whom (and where in the case of meetings) did the communications and meetings take place? **N/A.**
>
> 10. On the basis of what (if any) facts and matters which do not necessarily apply to all Claimants does the Claimant or Sub-Fund say that its reliance was reasonable? **None.**
>
> 11. If the Claimant or Sub-Fund has answered yes to any of Questions 1 to 9 above, will it be able to give disclosure in relation to the case it advances?
>
> **No. It is unlikely that this Claimant would have any relevant documents**."

26. C95, the Folksam Ömsesidig Livförsäkring Livak, also completed a Full Reliance Questionnaire. It answered Questions 1, 2 and 4 in the same way as C68 and answered Questions 7 to 10 either "No" or "Not applicable". It answered Questions 5, 6 and 11 in the following way (and, again, the answers are in bold):

> "5. Does the Claimant or Sub-Fund advance a case that: (i) it knew of and relied on the price of Barclays Shares in acquiring, holding or disposing of Barclays Shares; and (ii) it believed that the prevailing market price of Barclays Shares reflected the value of those shares based on the information disclosed by Barclays being true and complete? **Yes.**
>
> If yes, when and by which individual did the Claimant so rely, and in respect of which of its decisions to acquire, hold or dispose of Barclays Shares?
>
> **Folksam ömsesidig livförsäkring LIVAK was a tracker fund during the Relevant Period (1 January 2011 – 1 February 2016). It tracked the MSCI World Ex Sweden Index. However, the index has been slightly customized for Folksam ömsesidig livförsäkring due to its ESG criteria. The index was weighted by market capitalization. Tracking was carried out by fund managers employed by a third-party asset manager (Swedbank Robur). Tracking was carried out quarterly. Re-balancing of the fund's portfolio would have depended on factors related to risk and return in relation to the above index. By factors related to risk and return in relation to the above index this means changes in risk and return character in the index composition, the portfolio composition or company specific risk and return factors. Inflows and outflows from the portfolio and changes in ESG-data are**

> **also factors that can cause a sell or buy decision. For example, the fund uses a "best in class" ESG approach, changes in ESG scores may cause a buy or sell in the portfolio. The fund permitted a 0.5% deviation from the index for equities and fixed income.**
>
> 6. Does the Claimant or Sub-Fund advance a case that it relied on Barclays' status as a listed issuer with relevant obligations as pleaded in paragraph 5 of the PORC? **Yes**.
>
> If yes, when and by which individual did the Claimant so rely, and in respect of which of its decisions to acquire, hold or dispose of Barclays Shares?
>
> Which Individual: **the fund manager, third party agent**.
>
> When: **Reliance occurred each time an investment decision was taken in respect of Barclays Shares, including decisions to initiate the transactions identified in the Trading Data.**"
>
> "11. If the Claimant or Sub-Fund has answered yes to any of Questions 1 to 9 above, will it be able to give disclosure in relation to the case it advances?
>
> **No. The portfolio management is conducted based on a quantitative portfolio analysis where the share's market cap, risk and return characteristics are taken into account (rather than in a fundamental analysis, where analyst's reports or interim reports can be used to a greater extent).**"

27. C132, the Verdipapirfondet KLP AksjeGlobal Indeks I, also answered Questions 1, 2 and 4 in the same way as C68. In answer to Questions 5, 6 and 11 it did not allege that it relied on the price of the Bank's shares in making investment decisions but on the prices of the constituent companies in the Index. It answered Questions 5, 6 and 11 in the following way (and, again, the answers are in bold):

> "5. Does the Claimant or Sub-Fund advance a case that: (i) it knew of and relied on the price of Barclays Shares in acquiring, holding or disposing of Barclays Shares; and (ii) it believed that the prevailing market price of Barclays Shares reflected the value of those shares based on the information disclosed by Barclays being true and complete? **Yes.**
>
> If yes, when and by which individual did the Claimant so rely, and in respect of which of its decisions to acquire, hold or dispose of Barclays Shares?
>
> **The Verdipapirfondet KLP AksjeGlobal Indeks I Claimant relies on holding the relevant knowledge and belief with respect to the prices of shares of the constituent companies of the Index (as opposed to the specific price of Barclays Shares on a given date). In addition, Verdipapirfondet KLP AksjeGlobal Indeks I Claimant intends to demonstrate that the tracker fund industry, and the creation of tracker funds by market participants (including the Verdipapirfondet**

KLP AksjeGlobal Indeks I Claimant and the Manager), operates among other things on the basis that issuers (such as the issuers who were constituents of the Index) disclose true and accurate information to the market at all relevant times. The Verdipapirfondet KLP AksjeGlobal Indeks I Claimant was set up to operate, and did operate, on this basis.

Which Individual: **On the basis of the above, the Verdipapirfondet KLP AksjeGlobal Indeks I Claimant contends that it is not necessary for it to identify specific individuals who held the relevant knowledge and belief (and therefore who relied in the manner described).**

When: **Reliance occurred each time an investment decision was taken in respect of Barclays Shares, including decisions to initiate the transactions identified in the Trading Data.**

6. Does the Claimant or Sub-Fund advance a case that it relied on Barclays' status as a listed issuer with relevant obligations as pleaded in paragraph 5 of the PORC? **Yes.**

If yes, when and by which individual did the Claimant so rely, and in respect of which of its decisions to acquire, hold or dispose of Barclays Shares? **Yes. Please refer to Answer 5.**"

"11. If the Claimant or Sub-Fund has answered yes to any of Questions 1 to 9 above, will it be able to give disclosure in relation to the case it advances?

The Verdipapirfondet KLP Verdipapirfondet KLP AksjeGlobal Indeks I Claimant does not operate a document deletion or destruction process. The Verdipapirfondet KLP Verdipapirfondet KLP AksjeGlobal Indeks I Claimant has not conducted a search for disclosure in relation to the case it advances, so it does not know if it will be able to identify and disclose relevant documents."

B. The Bank's Case

28. The Bank denies liability. Again, it is unnecessary to set out the detailed defence which it advances in relation to the Claimants' allegations about the operation of LX. For present purposes it is enough to note that although the Bank admits that the Complaint was made (and subsequently amended) but denies its contents. It also admits the SEC Order and the settlement agreement, it denies that the limited admissions which it made in answer gave rise to any liability under S.90A. I set out below the summary of the Bank's defence (footnotes omitted):

> "7. For the reasons pleaded in more detail below, Barclays Plc denies that the Claimants are entitled to the relief claimed or to any relief. The claim is fundamentally flawed on a number of levels:
>
> 7.1 As noted, the foundation of the Claimants' claim is a repetition of the

allegations contained in the NYAG Amended Complaint as set out in Section C of the Particulars of Claim.

7.2 Barclays Plc denies the allegations in Section C save insofar as Barclays has admitted certain limited facts and matters, including relating to a small number of the allegations that were made in the NYAG Amended Complaint, as set out in a settlement agreement dated 31 January 2016 entered into between Barclays and the New York Attorney General (the "**NYAG Settlement Agreement**") and a settlement between Barclays Capital Inc. and the SEC contained in an order of the SEC (the "**SEC Order**") of the same date, and save insofar as expressly admitted or not admitted below. The admitted facts and matters as set out in the NYAG Settlement Agreement and the SEC Order are referred to herein as the "**Admitted Conduct**". To the extent that Section C of the Particulars of Claim is consistent with the Admitted Conduct, it is admitted.

7.3 The balance of the Claimants' allegations in Section C which adopt allegations of wrongdoing in the NYAG Amended Complaint are referred to herein as the "**Alleged Conduct**", and are denied.

7.4 Further and in any event, it is denied (insofar as it is alleged) that the Admitted Conduct or the Alleged Conduct (which is in any event denied) would have caused any prejudice to users of the dark pool.

7.5 It is denied that the Prospectus and/or any of the published information referred to in the Particulars of Claim contained any material omissions as alleged or otherwise.

7.6 Further, it is denied that the Prospectus and/or the other relevant published information contained any statements which were false or misleading (at all, or alternatively to a material extent) as alleged or otherwise.

7.7 Further and in any event:

7.7.1 As to the claim under s.90 FSMA, (a) the Claimants have failed to identify and allege that any individual employees or officers of Barclays Plc who were involved in or responsible for the preparation of the Prospectus had any knowledge of either the Admitted Conduct or the Alleged Conduct (which is in any event denied); (b) in any event, Barclays Plc is not liable because it reasonably believed at the time the Prospectus was submitted for approval that the statements in the Prospectus referred to by the Claimants were true and were not misleading and/or did not contain any material omissions.

7.7.2 As to the claim under s.90A FSMA, of the two individuals identified by the Claimants as persons discharging managerial responsibility on behalf of Barclays Plc, one was not a relevant person discharging managerial responsibility, but in any event neither knew or were reckless as to whether any statements made were untrue or misleading and/or knew any omissions to be a dishonest concealment of a material fact.

7.8 In the premises and in any event, it is denied that the conditions for liability under s.90 and/or s.90A FSMA are satisfied.

7.9 Further and in any event, no admissions are made as to whether any of

> the Claimants reasonably relied on any alleged misstatements and/or omissions (and it is specifically denied that the Claimants are entitled to rely on any presumption of reliance). The Claimants are required to plead and prove these allegations on a Claimant-by-Claimant basis. At present, the Particulars of Claim do not contain a properly particularised case in these respects and Barclays Plc reserves the right to strike out and/or seek summary dismissal of the Claim.
>
> 7.10 In any event, it is denied that the Claimants suffered any loss and damage."

29. The Bank accepts in these proceedings that it admitted a number of limited facts and matters and a small number of the allegations set out in the Complaint but denies that it had any duty to disclose the Alleged Misconduct (as it defines the misconduct which it denies) in its published information or that any statements which it made in its published information were misleading or untrue. In relation to reliance and loss, the Bank made its position clear (original emphasis):

> "54. As to paragraph 81, no admissions are made. Each of the Claimants is put to strict proof as to the nature and extent of its alleged dealings in Barclays Plc's ordinary shares during the Relevant Period. Paragraphs 3 and 4 above are repeated.
>
> 55. As to paragraph 82:
>
> 55.1 No admissions are made as to whether, or the extent to which, any of the Claimants purchased and/or continued to hold shares in Barclays Plc during the Relevant Period. Paragraph 4 above is repeated.
>
> 55.2 Save as aforesaid, paragraph 81 is denied. Without prejudice to the generality of the foregoing denial:
>
> 55.2.1 It is denied that the Claimants are entitled to rely upon a presumption of reliance as alleged in the second sentence: on the contrary, it is averred that each of the Claimants is required to plead and prove actual reliance in support of its claim under sections 90 and 90A FSMA. In particular, each of the Claimants is required to identify the specific allegedly untrue or misleading statements and/or omissions in Barclays Plc's published information upon which it claims to have relied, to particularise the nature of its alleged reliance on each such statement or omission, and to plead the basis on which it alleges that its reliance was reasonable. The Particulars of Claim do not contain a properly particularised case in these respects and, unless this fundamental deficiency is rectified, Barclays Plc reserves the right to apply to strike out and/or seek summary dismissal of the Claimants' claims under section 90 and/or 90A FSMA.
>
> 55.2.2 In any event, if and insofar as the Claimants are held to be entitled to rely upon a presumption as to reliance in support of their claims under section 90 and/or 90A FSMA, Barclays Plc will contend that the

> presumption is at most a rebuttable evidential presumption and, accordingly, Barclays Plc will reserve the right to plead, following disclosure from each of the Claimants, that the presumption falls to be rebutted in respect of all or some of them.
>
> 56. As to paragraphs 83-84:
>
> 56.1 The share price movements (and other figures) pleaded in paragraphs 84(c)(i) and (ii) are admitted. (For the avoidance of doubt, the reference to 26 June 2013 in paragraph 84(c)(ii) is understood to be intended as a reference to 26 June 2014.)
>
> 56.2 Save as aforesaid, paragraphs 83-84 are so vague and inadequately particularised that it is not possible to plead a full response. For the avoidance of doubt, the Claimants are required to plead and prove their allegations as to causation and loss on an individual Claimant-by-Claimant basis. The Particulars of Claim do not contain a properly particularised case in these respects and, unless this fundamental deficiency is rectified, Barclays Plc reserves the right to apply to strike out and/or seek summary dismissal of the Claimants' claims under section 90 and/or 90A FSMA. Without prejudice to the generality of the aforesaid, Barclays Plc will say (without limitation) as follows:
>
> 56.2.1 Certain of the pleaded causal chains are mutually exclusive, for example, the allegation that in the counterfactual the Claimants would not have purchased Barclays Plc shares and the allegation that they would have acquired the shares at a lower price. It is denied that any individual Claimant can simultaneously advance both cases.
>
> 56.2.2 In any event, as regards all of the Claimants the pleaded case on loss is internally inconsistent. In particular, paragraph 83(b) (which alleges that if earlier disclosure had been made, there would have been some fall in the share price but such fall "*would not have been as great as it was following the NYAG's 25 June 2014 announcement or its 1 February 2016 announcement*") is inconsistent with paragraph 84(c)(iii) (which alleges that the combined fall following the NYAG's 25 June 2014 or 1 February 2016 announcements is likely to reflect the "*difference between the price the Claimants in fact paid and the price they would have paid had the true position been known*").
>
> 56.2.3 Further and in any event, if and insofar as there was any inflation in the share price of Barclays Plc during the Relevant Period as alleged (which is denied), each of the Claimants must give credit for any gains received as against the loss which it is claiming."

30. The Bank also denies that the Claimants are entitled to rely on the fraud measure of damage or that any fall in the share price of the shares which the Claimants held were the result of any statements which were alleged to be untrue or misleading. Given the Claimants' allegation that the London Stock Exchange was an efficient market in which the price of the Bank's shares was determined or influenced by the contents of the Published Information (upon which they rely), it is also important to set out the Bank's

case in relation to the perception of the market:

> "(a) It is specifically denied that the share price fall which occurred on 26 June 2014 (pleaded at paragraph 84(c)(i)) represents a loss incurred by any of the Claimants as a result of any of the allegedly untrue or misleading statements and/or alleged omissions pleaded in the Particulars of Claim; on the contrary, it is averred that the share price fall was caused (or, alternatively, was predominantly or at least in part caused) by other factors, including prevailing market conditions on that date, and the manner in which the New York Attorney General presented the allegations that were made against Barclays in the NYAG Complaint at his press conference on 25 June 2014, and in particular a perception amongst market commentators that, given the tone and content of the Attorney General's presentation, the allegations might ultimately lead to Barclays Plc's licence to carry out banking business in the US being suspended or withdrawn if the allegations in the NYAG Complaint were proved. Accordingly, it is specifically denied that the share price fall which occurred on 26 June 2014 is a reliable proxy for the impact which prior disclosure by Barclays Plc of the Admitted Conduct and/or the Alleged Conduct (which is in any event denied) would have had on the price of Barclays Plc's shares. This will be a matter for evidence in due course.
>
> (b) Save as aforesaid, no admissions are made as to whether prior disclosure by Barclays Plc of the Admitted Conduct would have caused any or any significant impact on the price of Barclays Plc's shares. Without prejudice to the generality of the foregoing denial, it is specifically denied that the share price fall which occurred on 1 February 2016 (pleaded at paragraph 83(c)(ii)) represents a loss incurred by any of the Claimants as a result of any of the allegedly untrue or misleading statements and/or alleged omissions pleaded in the Particulars of Claim or is a reliable proxy for the impact which prior disclosure by Barclays Plc of the Admitted Conduct would have had on the price of Barclays Plc's shares. This will be a matter for evidence in due course."

31. Finally, the Bank pleads that the Claimants are required to prove on a Claimant by Claimant basis that they would not have bought its shares or would have acquired them at a lower price or sold them at a higher price as a result of the Bank's conduct. It also pleads that they must give credit for any gains which they received as a result of purchasing or holding or disposing of its shares.

C. The Evidence

(1) Middleton 4

32. Mr Middleton gave evidence in support of the Strike Out Application. He summarised the Claimants' case as the Bank and its team understood it and set out the relevant

procedural history. As might have been expected, Ms Hogan did not accept the accuracy of Middleton 4 in her evidence but in my judgment nothing turns on this disagreement. Mr Middleton did not, however, have any relevant evidence to give on the substantive issues in support of the reverse summary judgment element of the Strike Out Application and I need not consider Middleton 4 further.

(2) Hogan 5

33. Ms Hogan provided helpful evidence which put the Claimants' case on reliance in context. She began by dealing with the number and value of the claims (which the Bank did not dispute). There are currently 135 Claimants who represent or constitute 465 individual funds or sub-funds. All but one of these Claimants advance claims under S.90A with a total claim value of £560 million. 98 funds also advance claims under S.90 with a total claim value of £12 million. 38% of the claims fall within Category A amounting to £194 million, 10% of the claims fall within Category B with a total claim value of £18.5 million and 52% of the claims fall within Category C with a total claim value of £332 million. However, there are 241 funds making claims within Category C and 229 or 95% of those funds are also making claims under S.90 and all of them make claims for dishonest delay.

34. Ms Hogan did not suggest that any of the 241 funds within Category C claims to have read or considered any of the Published Information pleaded in the Particulars of Claim when deciding to acquire, hold or sell the Bank's shares which are the subject matter of the claim. In a letter dated 18 April 2024 Latham & Watkins contended that it was necessary for an investor to apply their mind to a statement in the pleaded Published Information (or the absence of such a statement) and that the relevant statement (or omission) must have induced the investor to transact on the terms which they did. Ms Hogan's response to this contention was as follows:

> "The Claimants disagree. In very short summary, the Claimants' case at trial will be that, on a proper construction of the legislation, having regard to its wider purposes and the operation of the securities markets, it is sufficient for an investor to have "relied" on Published Information containing misstatements and/or omissions by relying on the fact that the Issuer is a listed company with relevant disclosure obligations, including to disclose full and accurate information, and/or on the price of the shares which is affected by the information published by an issuer."

35. Ms Hogan also gave evidence about index or tracker funds which do not make an "active" judgment to invest in securities transaction by transaction but invest in a basket of shares based on tracking an index such as the FTSE 100 or the FTSE 250. She described these funds as "passive" but used the term "**Tracker Funds**" to refer to such funds collectively (as do I). Her evidence about those funds was as follows (footnotes omitted):

> "38. Tracker Funds were well established when s.90A was introduced in 2006: it is estimated by the Investment Management Association that in 2006 between 20% and 25% of total assets in the UK were managed according to indexing strategies. By 2010, "Tracker funds under management [had] reached £29.5 billion, the highest on record and 59% up on the 1st Quarter last year." By the end of 2020, such funds accounted for 34% of the total UK investment market (or around £3 trillion) and that percentage appears to be growing year on year.
>
> 39. A finding that Tracker Funds are not entitled to rely on the protections against the fraudulent preparation of published information contained in s.90A FSMA would render that section entirely ineffective in respect of around a third of the investment market, by reason of characteristics of the potential claimants themselves (rather than the degree of wrongdoing on the part of the defendant issuer). Nothing in the wording of FSMA indicates that Parliament intended that s.90A would be so severely fettered in its operation."

36. Ms Hogan also stated that it was very likely that the Claimants would wish to rely on expert evidence in support of their case in relation to Category C claims at trial and she exhibited the reports of Mr Curcio and Dr Hildreth as examples of the kind of evidence which they would wish to call. It is not necessary for me to set out or analyse those reports in detail and sufficient to set out the relevant parts of Hogan 5 and the points which Ms Hogan invited the Court to draw from them (again footnotes omitted):

> "41. Mr Curcio's evidence relates to the fund management market and the role of Tracker Funds. He also covers the general process of rebalancing of those funds and how the funds track indices that are typically weighted by reference to the market capitalisation of its constituent issuers. The market capitalisation is a product of the share price of an issuer and the number of outstanding shares at any given time. As Mr Curcio sets out, Tracker Funds are not homogenous in their approach. He explains, for example, that: "*…although index-tracking funds are generally believed to be operated in a mechanistic way (with the funds replicating exactly what the index does), in practice, fund managers employ some discretion in the day-to-day management of index-tracking funds. Some of this discretion can result in a management of the fund that is akin to being selective, such as with enhanced indexing strategies*." (paragraph 2.3.8)
>
> 42. As Mr Curcio further explains: "*There isn't a clear demarcation*

> *between index-tracking funds and selected portfolio funds, with many funds adopting strategies that combine aspects of both index-tracking and selective portfolio management*" (paragraph 2.5.2).
>
> 43. Dr Hildreth's evidence covers (i) whether the market in RSA shares was efficient during the relevant period and, (ii) whether the published information and/or the alleged untrue or misleading statements and omissions affected the price of RSA's shares. As is clear from Dr Hildreth's evidence, market efficiency is a question of degree: a market can be strongly or weakly efficient. The Claimants anticipate that they will likely wish to adduce similar evidence with respect to the market for Barclays shares in advance of the trial at which reliance will be considered, to the extent that this remains a disputed issue. In this context, it is likely that the Claimants will seek to establish at trial that the price of Barclays shares reflected an aggregation of lots of pieces of information including the Published Information, such that the Claimants can be presumed to have relied on the Published Information as reflected in the share price.
>
> 44. It is clear from the reports of Mr Curcio and Dr Hildreth that reliance is a factually complex issue, occurring across a spectrum. At this early stage and prior to the provision of witness evidence by individual Claimants, that spectrum has been divided into 3 broad categories, of which Price/Market Reliance is one. That division is necessarily broad-brush, and the Claimants' position is that the Court will be in a far better position to determine where the reliance threshold lies for the purposes of s.90A once it has factual evidence (documentary and/or witness evidence) before it from the individual sample Claimants as to how the relevant sub-funds operated, in addition (as necessary) to expert evidence."

37. For the purposes of the Strike Out Application I assume that the Claimants will be able to demonstrate these facts at trial. Dr Hildreth also gave evidence in the *RSA Litigation* that economists distinguished between three levels of market efficiency according to the information available. A market is "weak form" efficient if prices fully reflect all historical prices. A market is "semi-strong form" efficient where market prices reflect all information publicly available and a market is "strong form" efficient where all information (both public and private) is known to all. His evidence was that RSA's shares were traded in a strong or semi-strong form efficient market on the LSE between 2009 and 2013 as one of the largest listed stocks and included in the FTSE 100. He also gave evidence that the published information upon which the claims group relied was material to RSA's share price. For the purposes of the Strike Out Application I assume that Dr Hildreth (or another expert) would give the same evidence in relation to the Bank's shares.

IV. The Law

D. The Statutory Regime

(1) S.90

38. Liability for untrue or misleading statements in a company prospectus has a long history. Although S.90 was introduced by FSMA, it is the statutory successor to section 3 of the Directors Liability Act 1890 which imposed liability to pay compensation for untrue statements in a prospectus to all persons subscribing for securities "on the faith of such prospectus". In its current form S.90(1) to (7) provide as follows:

> "(1) Any person responsible for listing particulars is liable to pay compensation to a person who has— (a) acquired securities to which the particulars apply; and (b) suffered loss in respect of them as a result of— (i) any untrue or misleading statement in the particulars; or (ii) the omission from the particulars of any matter required to be included by section 80 or 81.
>
> (2) Subsection (1) is subject to exemptions provided by Schedule 10.
>
> (3) If listing particulars are required to include information about the absence of a particular matter, the omission from the particulars of that information is to be treated as a statement in the listing particulars that there is no such matter.
>
> (4) Any person who fails to comply with section 81 is liable to pay compensation to any person who has— (a) acquired securities of the kind in question; and (b) suffered loss in respect of them as a result of the failure.
>
> (5) Subsection (4) is subject to exemptions provided by Schedule 10.
>
> (6) This section does not affect any liability which may be incurred apart from this section.
>
> (7) References in this section to the acquisition by a person of securities include references to his contracting to acquire them or any interest in them."

(2) The Transparency Directive

39. On 15 December 2004 the European Parliament and the Council of the European Union issued Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "**Transparency Directive**" or "**TD**"). The recitals to the directive included the following:

> "(1) Efficient, transparent and integrated securities markets contribute to a

> genuine single market in the Community and foster growth and job creation by better allocation of capital and by reducing costs. The disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency.
>
> (2) To that end, security issuers should ensure appropriate transparency for investors through a regular flow of information. To the same end, shareholders, or natural persons or legal entities holding voting rights or financial instruments that result in an entitlement to acquire existing shares with voting rights, should also inform issuers of the acquisition of or other changes in major holdings in companies so that the latter are in a position to keep the public informed."
>
> "(7) A high level of investor protection throughout the Community would enable barriers to the admission of securities to regulated markets situated or operating within a Member State to be removed. Member States other than the home Member State should no longer be allowed to restrict admission of securities to their regulated markets by imposing more stringent requirements on periodic and ongoing information about issuers whose securities are admitted to trading on a regulated market."
>
> "(17) Appropriate liability rules, as laid down by each Member State under its national law or regulations, should be applicable to the issuer, its administrative, management or supervisory bodies, or persons responsible within the issuer. Member States should remain free to determine the extent of the liability."

40. Chapter II was headed "Periodic Information" and Articles 4 to 8 provided for an issuer to make public its annual reports, half-yearly annual reports and interim management statements and the chapter specified in general terms the contents of those documents (subject to certain exemptions). Article 7 provided as follows:

> "**Responsibility and liability**
>
> Member States shall ensure that responsibility for the information to be drawn up and made public in accordance with Articles 4, 5, 6 and 16 lies at least with the issuer or its administrative, management or supervisory bodies and shall ensure that their laws, regulations and administrative provisions on liability apply to the issuers, the bodies referred to in this Article or the persons responsible within the issuers."

41. Chapter III contained a number of provisions dealing with the provision of ongoing information and Chapters IV and V dealt with general obligations and also competent authorities and their powers. Chapter VI was headed "Implementing Measures" and it included Article 28 which provided as follows:

"**Penalties**

1. Without prejudice to the right of Member States to impose criminal penalties, Member States shall ensure, in conformity with their national law, that at least the appropriate administrative measures may be taken or civil and/or administrative penalties imposed in respect of the persons responsible, where the provisions adopted in accordance with this Directive have not been complied with. Member States shall ensure that those measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authority may disclose to the public every measure taken or penalty imposed for infringement of the provisions adopted in accordance with this Directive, save where such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved."

(3) S.90A

42. Section 1270 of the Companies Act 2006 introduced S.90A to give effect to these provisions and it took effect on 8 November 2006. The Explanatory Note to the section explained that it established a regime for civil liability to third parties by issuers admitted to trading on a regulated market in respect of disclosures made public in response to provisions implementing obligations imposed by the Transparency Directive. In its original form it provided as follows (so far as relevant):

"**90A Compensation for statements in certain publications**

(1) The publications to which this section applies are– (a) any reports and statements published in response to a requirement imposed by a provision implementing Article 4, 5 or 6 of the transparency obligations directive, and (b) any preliminary statement made in advance of a report or statement to be published in response to a requirement imposed by a provision implementing Article 4 of that directive, to the extent that it contains information that it is intended– (i) will appear in the report or statement, and (ii) will be presented in the report or statement in substantially the same form as that in which it is presented in the preliminary statement.

(2) The securities to which this section applies are– (a) securities that are traded on a regulated market situated or operating in the United Kingdom, and (b) securities that– (i) are traded on a regulated market situated or operating outside the United Kingdom, and (ii) are issued by an issuer for which the United Kingdom is the home Member State within the meaning of Article 2.1(i) of the transparency obligations directive.

(3) The issuer of securities to which this section applies is liable to pay compensation to a person who has– (a) acquired such securities issued by it, and (b) suffered loss in respect of them as a result of– (i) any untrue or misleading statement in a publication to which this section applies, or (ii) the omission from any such publication of any matter required to be

> included in it.
>
> (4) The issuer is so liable only if a person discharging managerial responsibilities within the issuer in relation to the publication– (a)knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or (b) knew the omission to be dishonest concealment of a material fact.
>
> (5) A loss is not regarded as suffered as a result of the statement or omission in the publication unless the person suffering it acquired the relevant securities– (a) in reliance on the information in the publication, and (b) at a time when, and in circumstances in which, it was reasonable for him to rely on that information.
>
> (6) Except as mentioned in subsection (8)– (a) the issuer is not subject to any other liability than that provided for by this section in respect of loss suffered as a result of reliance by any person on– (i) an untrue or misleading statement in a publication to which this section applies, or (ii) the omission from any such publication of any matter required to be included in it, and (b) a person other than the issuer is not subject to any liability, other than to the issuer, in respect of any such loss.
>
> (7) Any reference in subsection (6) to a person being subject to a liability includes a reference to another person being entitled as against him to be granted any civil remedy or to rescind or repudiate an agreement."

(4) The Davies Review

43. Section 1270 of the Companies Act 2006 also inserted a new section 90B into FSMA which gave HM Treasury power to make further provision about liability for published information and to do so by amending any primary or subordinate legislation. In October 2006 the Economic Secretary to the Treasury invited Professor Paul Davies QC, who was then the Cassel Professor of Commercial Law at the London School of Economics, to carry out a review of issuer liability (the "**Davies Review**"). In March 2007 Professor Davies circulated a discussion paper for comment to a wide range of recipients ("**Davies 1**"). He sought views on the following key questions:

> "i. Should the trigger for liability be fraud (ie. recklessness or intention) or negligence? Should there be liability for misstatements even if those making the statements honestly (but carelessly) believed them to be true? What is the right standard of liability to incentivise disclosure of timely, accurate and meaningful disclosures without imposing undue cost burdens on issuers? (paras 71-78).
>
> ii. Should the statutory liability regime currently in place under section 90A be extended to ad hoc disclosures? What is the current position in relation to Market Abuse Directive disclosures? Should there be liability for fraudulent misstatements in ad hoc reports? (paras 79-83).

> iii. Should there be liability for statements that are accurate but late? Or are the FSA's rules sufficient, given that much of their enforcement action has focused on delayed disclosure? What about deliberate delays in withholding information in order to mislead the market? (paras 84-88)
>
> iv. What counts as an ad hoc statement? Just disclosures of inside information required under MAD? Or also ad hoc disclosures required under the DTR? Other announcements or statements? (paras 89-94)
>
> v. Should section 90A apply also to non-regulated markets? How would it affect the regimes operated by AIM and Plus markets'? How might the courts apply the principles of the common law to non-regulated market liability anyway? Should there be a level playing field between regulated and non-regulated markets? (paras 95-99)"

44. In Davies 1, Professor Davies summarised the existing law. He pointed out that the reports and accounts provisions were of long standing and pre-dated EU law. He also pointed out that the Transparency Directive did not apply to securities traded on AIM or PLUS. He then set out the following background which applied to issuers on regulated markets (footnotes omitted):

> "15. For issuers on regulated markets, notably the main market of the London Stock Exchange, the TD requires annual financial reports (Article 4), half-yearly reports (Article 5) and interim management statements (Article 6). The annual report is in essence that required by the companies legislation, though now termed an 'annual financial report'. The half-yearly report (which is not required to be audited) must contain a condensed set of financial statements and an interim management report. The interim management report must indicate the important events that have occurred during the first six months of the financial year and their impact on the financial statements and the principal risks and uncertainties for the remaining six months. Article 6 requires the publication of quarterly interim management statements by issuers of shares (but not quarterly financial statements). The issuer is required by Article 21 to disseminate the required information 'in a manner ensuring fast access to such information on a non-discriminatory basis' and to do so 'throughout the Community'. In fact, this requirement is applied not only to information required to be disclosed by the TD, but also to any additional information requirements imposed on issuers by Member States beyond the TD (see para 17 below) and to information required by Article 6 of MAD (see para 19 below). Such information is referred to collectively as 'regulated information'.
>
> 16. The TD requires transposition into UK law and this has been done via amendments to FSMA 2000. These amendments confer new rule-making powers on the FSA, which the FSA has exercised so as to produce 'Disclosure and Transparency Rules' (DTR) in place of the previous 'Disclosure Rules' (DR). The TD's periodic reporting requirements are transposed in DTR 4 and (for dissemination) DTR 6. In particular, where

> the UK is the home state of the issuer, the periodic reports are to be distributed through a Regulated Information Service (RIS) and are to be made available on a website. Again, the RIS is an established feature of the markets and is also the required dissemination channel for the information required to be reported periodically by AIM companies.
>
> 17. Because, unlike the PD, the TD is a 'minimum harmonisation' directive, it is open to the Member States to add to its disclosure requirements. The FSA has done so, through what it calls 'super-equivalent requirements'. These are set out in the Listing Rules. LR 9.8 requires certain information relating to the company's financial position to be included in the annual financial report beyond that required by the DTR; certain non-financial items, such as the requirement to comply, or explain non-compliance, with the Combined Code on Corporate Governance; and the provision of a directors' remuneration report. However, the Listing Rules no longer require the publication of a preliminary statement of annual results, though they do regulate how such a preliminary statement is to be made if the issuer chooses to make one; and a public statement of a board's dividend or other distribution decisions is still required as soon as possible after it has been made. For companies listed on the main market of the LSE, therefore, the periodic disclosure requirements are now mainly in the DTR but still in part in the LR."

45. Professor Davies then dealt with ad hoc disclosure requirements and, in particular, Article 6 of Directive 2003/6/EC (which he described as the "**Market Abuse Directive**" or "**MAD**"). He then turned to civil sanctions for breaches of disclosure obligations and began with the tort of deceit:

> "26. The tort of deceit required proof of various other elements, beyond the lack of a belief in the truth of the statement made. First, there must actually be a statement. There was no liability at common law for non-disclosure, though the law was sufficiently robust to impose liability for half-truths (ie statements which were true as far as they went but implied something false as a result of what was omitted). However, there could be no liability if the defendant said nothing and merely stood by and let the claimant deceive him or herself, even if such conduct on the part of the defendant were intentional. Second, the defendant must intend the claimant to rely on the untrue statement, or at least intend a class of persons, of whom the claimant was a member, to rely on it. Hence, a company could be said to intend a subscriber for shares to rely on the prospectus, even if it did not know the identity of the subscriber when it issued the prospectus. Third, the claimant must in fact rely on the statement, as part of which requirement the claimant would have to be aware of the statement. This requirement is taken to rule out the theory of 'fraud on the market,' whereby a misstatement which has an effect on the market price can be said to cause an investor loss, even though that particular investor was not aware of the misstatement. And, of course, the claimant must suffer loss. Provided these and the other elements of the tort

> of deceit are satisfied, the common law regards the defendant as having acted fraudulently. There is no need to show that the defendant had any particular dishonest intention: even a 'white lie' intended to be and in fact acted on which causes the claimant loss constitutes the tort of deceit. Normally, of course, the maker of a fraudulent statement is also dishonest.
>
> 27. Parliament did not think the result in *Derry v Peek* an acceptable one in relation to prospectuses, and so it passed the Directors' Liability Act the following year. That imposed liability for negligent misstatements in prospectuses, ie the defendant would be liable even if belief in the truth of the statement were honestly held, if that belief had been arrived at carelessly (negligently). The present version of the liability imposed by the 1890 Act is to be found in section 90 of FSMA 2000. It is now a very wide-ranging provision. Any person may sue who 'acquires' securities to which the prospectus applies and suffers loss as a result of any untrue or misleading statement in the prospectus or of any omission from the prospectus of a matter which ought to have been included. The use of the verb 'acquires' indicates that the possible range of claimants includes those who buy shares in the after-market as well as those who subscribe for shares from the company. The absence of a requirement that the claimant should have 'relied' on the misstatement (the section requires simply that the claimant should have suffered loss as a result of it) indicates that, provided the misstatement affects the market price of the security, it does not matter that the claimant was unaware of it. And the section covers omissions."

46. Professor Davies then turned to discuss S.90A in its original form. He stated that the section had two objectives: one relating to the common law of negligence and the other relating to the tort of deceit. He stated that as far as negligence was concerned, it confirmed the existing law that there was no liability and so far as deceit was concerned, the approach was "essentially confirmatory" but made some adjustments for periodic disclosures: see Davies 1, §47. He discussed the way in which the section was modelled on the common law in the following passage and summary upon which Ms Davies and her team placed considerable reliance:

> "54. The liability on the part of the issuer is to anyone (so, to any investor, whether already a shareholder or not) who acquires securities and suffers loss as a result of the misstatement or omission, where that person relied on the information at a time when it was reasonable for him to do so. This statutory liability is clearly modelled on the common law tort of deceit. In two ways it goes beyond the common law, however. First, although the claimant will recover only if he in fact relied on the publication and that reliance must be reasonable, it is not required that the issuer should have intended the claimant to rely on the publication. The requirement of intention on the part of the issuer as to the reliance by the claimant on the publication made the common law tort of deceit of only marginal relevance

to misstatements in periodic reports, as contrasted with prospectuses, where such intention was easy to show. Second, the liability of the issuer is applied to pure omissions from the publication, whereas the common law applied only to omissions which rendered what was said misleading. However, it is to be noted that in the case of omissions, it is not enough that the omission was intentional or reckless, it must amount to a 'dishonest concealment.' Without these two changes from the common law of deceit, it is arguable that the liability for intentional misstatements created by the section would have been meaningless in practice. For that reason, it can be argued that, without these changes, the United Kingdom would have been in breach of its obligation under Article 7 of the Directive and under the general requirements of Community law to have an effective civil liability regime in place for Transparency Directive disclosures. Although Article 7 merely requires Member States to extend their civil liability regimes to the disclosures required by the Directive, it is strongly arguable that this does require the Member State to have some liability regime to be extended. On this basis, it would not constitute compliance with Community law for a Member State to say that it had no liability regime or a liability regime which in practice was wholly ineffective.

55. On the other hand, the statutory regime retains two features of the common law of deceit which restrict its impact. First, and most important, the claimant can succeed only if it relied on the publication. As we have seen above in para 27, the statutory prospectus liability regime does not require reliance. It adopts a 'fraud on the market' theory. If the misstatement in the prospectus affected the market price of the securities, that is enough, even though the claimant may not have known of the misstatement. Section 90A by contrast, by requiring reliance, seems to require a claimant to have been aware of the statement which subsequently turned out to be misleading and for that knowledge to have played a part in inducing the action which was later taken. Second, the defendant's reliance on the publication is required to have been reasonable. Thus, a claimant might not succeed under the section if it had some available way of checking the publication but chose not to use it.

56. Finally, it should be noted that the regime based on intentional or reckless misstatements operates only in respect of those who acquire securities, and not in favour of those who sell or hold securities. This restriction was criticised by many to whom I talked.

57. <u>Summary</u>: Within its scope of operation, the statutory regime introduced by section 90A of FSMA adopted the prior common law by excluding liability in negligence to investors at large. It also adopted the prior common law on deceit and applied it to issuers (but only them) and in favour of acquirers of securities (but only them). The deceit rules are adopted under the statutory regime with two extensions: to bring in pure omissions and to remove the need to prove the issuer intended the claimant to rely on the publication. Overall, the new statutory regime confirms the prior law and, where it does change it, does so in favour of investors (though the changes can be argued to be marginal). What appears clearly to be the case is that section 90A did not deprive investors of rights to sue on grounds of negligence which they previously held at common law."

47. In Davies 1, section II Professor Davies framed the key questions. He addressed first the range of disclosures to be covered and whether they should be extended to either negligent statements or ad hoc statements. He then moved to particular issues which arose in relation to liability for fraudulent ad hoc statements and the first of those was the issue of delay:

> "83. However, respondents, who were in favour of the extension of section 90A, raised a couple of very important issues about the scope of such an extension. One was the question of how section 90A would operate in relation to ad hoc statements which were accurate but late, ie should have been disclosed earlier under the criteria set out in the FSA's DTR rules. This was a significant problem because the FSA's rules were thought to be very demanding about the promptness of the required disclosure and to provide few reasons for non-disclosure. We have also noted that the FSA's public enforcement action has focussed heavily on delayed disclosure. It should be noted, however, that the German reforms do impose liability for delay in parallel terms to those used for inaccuracies. See WpHG section 37b in Annex B.
>
> 84. Where a disclosure was delayed, it was pointed out, to impose liability only on the basis of intention would be no protection for issuers, because the decision to make the announcement at time t_2 rather than earlier time t_1 would often have been a deliberate one. Moreover, it would always be possible for claimants to argue that the disclosure should have been made somewhat earlier and, in the case of a heavily traded stock, the range of potential claimants could be quite large.
>
> 85. Although section 90A goes beyond the common law by imposing liability for omissions, and late disclosure could be analysed as an omission (ie during the period between t_1 and t_2), it seems clear that the section does not cover this type of omission. The section contemplates liability only for omissions from the statement which is made ('omission from any such publication of any matter to be included in it') rather than liability for failure to make any statement at all. Further, it is difficult to see how the section's requirement for reliance 'on the information in the publication' could be satisfied in relation to the period when no statement had been made. There can be such reliance only when the statement is made, but if the statement, when made, is accurate and complete, there can be no liability at that point.
>
> 86. Most of those who raised this issue wanted to maintain the regime of no civil liability for late disclosure. It has to be said, however, that it is unattractive not to impose liability where an issuer deliberately withholds information in order to mislead the market and to create a false market in its securities. It is suggested that an appropriately narrow liability could be crafted in such a case. First, it is already the case under section 90A that, in relation to omissions, a deliberate omission is not enough to lead to liability. There must be 'a dishonest concealment' of a material fact. There must be dishonesty as well as deliberateness, so that this test, applied to

> late disclosures, would not mean an issuer was liable simply because it decided to delay publication for a short period in order to check the accuracy of its proposed statement. Second, however, there is the issue of reliance. It is difficult to see how that requirement could be retained in the case of liability for late publication. An investor can hardly be said to rely on something of which he or she is not aware. However, a substitute for the reliance requirement in the case of late disclosure could perhaps be found by focussing on the purpose of the delay, ie that the purpose of the delay should be to mislead the market. This approach is adopted by section 397 of FSMA 2000 which imposes criminal liability for dishonest concealment of material facts 'whether in connection with a statement… or otherwise' but only where the purpose of the concealment is (under that section) the inducement of, broadly put, an investment decision."

48. In Davies 1, section III Professor Davies dealt with some over-arching issues the first of which was whether "super-optimal levels of fraud-based litigation" could be avoided. He addressed concerns raised about the US experience of private securities class actions and identified a number of differences between the two jurisdictions. He drew particular attention to the absence of any reliance requirement under US law:

> "116. In connection with the formation of the class, it is also important to revert again to the reliance requirement in section 90A (see para 55 above). In the United States a typical class is constituted by those who bought shares after the misleading statement was made and still held the shares at the point the truth emerged. Under the 'fraud on the market' theory, adopted in the US for misleading continuing disclosures as well as for misstatements in prospectuses, it is not necessary for the claimant to show knowledge of and reliance on the misstatement in question. Thus, class formation is easier and classes are larger than where reliance has to be shown."

49. In June 2007 Professor Davies published his final report ("**Davies 2**"). In the first few paragraphs he addressed the argument which had been put to him that there should be no liability to investors even for fraudulent misstatements. He met that argument in the following way:

> "4. I am thus less troubled than these respondents by the principle of requiring the company to compensate investors whom it has misled. Indeed, specifically to enact that there should be no liability on the part of issuers to investors in the case of fraudulent misstatements would be to remove rights which investors have at common law, even if the precise scope of those rights is unclear. However, this does not mean that I think that liability for misstatements to the capital markets should be freely and extensively imposed. There seem to me to be strong reasons for proceeding cautiously (but not good reasons for not proceeding at all). As indicated in

> the DP (Introduction), it is important that any liability regime should not provide incentives for companies to become more cautious in their disclosures to the market. The compensation regime for investors should not be at the expense of a free flow of accurate, timely and helpful information to them from issuers. Rather, if possible, the liability regime should contribute to the incentives for accurate disclosure by issuers. Thus, I share the reservations expressed by a number of respondents about the possible disutility of increased securities litigation. I set out below a set of proposals, which build on the existing but partial statutory regime imposing liability on issuers for fraudulent misstatements and which, I believe, will meet the legitimate interests of investors but not hamper the flow of information to the market."

50. Although a majority of respondents were against the proposal, Professor Davies recommended the introduction of liability for dishonest delay. He accepted that deliberate delay should not be sufficient to impose liability (because there might be good commercial reasons for delay in publication of financial information) but met this as follows:

> "49. The need to define dishonesty appropriately is indeed a key requirement of this proposal. In my view the solution to this problem is to focus on the purpose of the delay and to impose civil liability only if the purpose (or predominant purpose) for the delay falls within the prohibited category. One could take an analogy from section 397 of FSMA, imposing criminal liability for dishonest concealment of material facts, whether in connection with a statement of not. Under that section, criminal liability is imposed only if the concealment is for the purpose of inducing someone to take or not to take a certain course of action (broadly to take or not take an investment decision). Translated into the context of this Report, there would be liability only if the person deliberately delayed publication for the purpose of inducing investors to acquire (or possibly dispose of) securities. More narrowly, the prohibited purpose could be defined as making a profit on the part of the defendant or inflicting a loss on the person who acquired the securities during the period of delay. In either case, delay in order to obtain the full facts of the situation or even delay in order to permit the company to deal more easily with the situation which had arisen, would not fall within the scope of the civil liability regime, though such delay might constitute a breach of the FSA's rules. On the other hand, delayed disclosure of bad news on the part of the issuer in order to enable the directors of the company to exercise their options and sell the shares at a more attractive price would fall within the civil liability regime, at least on the second of the two approaches to dishonesty."

51. Professor Davies dealt with a wide range of issues and made a number of different recommendations in the Davies Review which go wider than the issues which I have to consider. I therefore set out only the first three questions and first three recommendations

at the end of Davies 2:

> "**Question 1**:
>
> What should be the basis of liability? Should the basis of liability be simple negligence? Would gross negligence be available as a possible basis for liability in the British context? Is fraud an appropriate basis for liability?
>
> *Recommendation*: That fraud should be maintained as the basis of liability for the statutory regime and that the relaxation of the common law's requirements – whereby the claimant need only show that his own reliance on the misstatement was reasonable and not also that the issuer intended that he should rely on it – should continue as part of any extended statutory liability regime.
>
> **Question 2**:
>
> Should the statutory regime should be extended in principle to ad hoc statements?
>
> *Recommendation*: Yes, the statutory regime should be extended to ad hoc statements.
>
> **Question 3**:
>
> Should a liability for dishonest delay be imposed in the narrow circumstances identified above or should delay be sanctioned only through public enforcement via the FSA?
>
> *Recommendation*: That the statutory regime should encompass liability for dishonest delay in making RIS statements."

(5) The Treasury Consultation

52. In July 2008 HM Treasury began an extended consultation in relation to S.90A (the "**Treasury Consultation**"). It began by publishing a consultation paper ("**Treasury 1**") proposing to implement Professor Davies' recommendations and, in particular, to extend S.90A to "multi-lateral trading facilities" such as AIM and PLUS and ad hoc disclosures and also to permit recovery for dishonest delay. The Treasury also published draft regulations under S.90B to introduce a new Schedule 10A which would give effect to these proposals. They framed the policy issue in the introduction to Treasury 1:

> "The question of whether and how far companies (issuers of securities) should be liable in damages for inaccurate statements made to the market upon which investors rely to their detriment is an important one but the answer is not obvious. On the one hand, timely, comprehensive and complete reporting by companies is a crucial element to promote the allocative efficiency of capital markets. Appropriate incentives for such disclosure are thus important. Public enforcement through FSA investigation and sanctions and private litigation by investors have the

> potential to reinforce each other, providing effective incentives for prompt and accurate disclosures. On the other hand, private litigation to enforce investors' rights, particularly if there is uncertainty about the scope of liability, can operate perversely by encouraging speculative litigation and settlements by issuers based on a desire to terminate litigation rather than on the harm done to shareholders."

53. In Treasury 1, section 5 the authors stated that the Government agreed with Professor Davies' recommendation and proposed that the scope of disclosure to which the statutory regime applied should be extended to all information published by an issuer using a recognised information service, and also other information where its availability had been announced using such a service. They also proposed to accept the recommendation that S.90A should be extended to investors who sold securities but not to the holders of shares: see paragraph 7.7. The authors also addressed the question of information acquired from a secondary source:

> "5.16 A question arises as to liability where the information relied on is acquired from a secondary source (e.g., its republication in a news item), rather than directly from a recognised information service (the primary source). Under the statutory regime, liability will arise where the investor has relied on the relevant information, irrespective of its precise source. While the Government proposes to define the relevant information by reference to its primary source, this is simply the most convenient way of defining scope. It would be unfair to deny a remedy simply because the plaintiff could not show that the information was obtained directly from a recognised information service. Indeed it could impose an unnecessary evidential hurdle to valid claims. Accordingly, provided that an investor can prove that the information in question was published on a recognised information service, he will not have to prove that he obtained the information himself from the recognised information service.
>
> 5.17 The Government proposes that the issuer be liable, irrespective of whether the person claiming damages obtains the relevant information from a recognised information service, or other source, provided that the information was published on a recognised information service."

54. The authors of Treasury 1 considered the question whether to introduce liability for dishonest delay to be a finely balanced issue but agreed with Professor Davies' recommendation that the statutory regime should be extended in this way. They accepted that the more restrictive the definition of delay, the greater the certainty for issuers:

> "6.3 The Government recognises the concerns of issuers and their advisers about the risks involved in creating a liability for dishonest delay. Assessing the truth or falsity of a statement is a question of fact. Delay is

qualitatively different to misstatement, in that it requires a greater element of judgement as to what delay may be permissible. Thus it is more difficult to infer honesty or dishonesty from the circumstances of any delay. This uncertainty could increase the vulnerability of issuers to litigation and increase defensive behaviour. The uncertainty is increased by the potentially wider scope and less predictable application of private law remedies, compared to the public law remedies available through the FSA tribunal process.

6.4 Equally, the Government understands investors' concern that dishonest delay in making disclosures can be just as effective as a direct misstatement in creating a false market and harming the interests of buyers and sellers of securities. Indeed, Davies noted that no one identified a principled (as opposed to a practical) reason why dishonest delay should not be the subject of civil litigation.

6.5 This is a finely balanced issue. The Government's view is that it is appropriate to create a liability for dishonest delay to reinforce the incentives for prompt disclosure, provided that the scope of liability can be precisely drawn to ensure that legitimate delay is not penalised and defensive behaviour on the part of issuers is not promoted.

6.6 The more restrictive the definition of delay that attracts liability, the greater the certainty for issuers and the greater the difficulty for investors in securing redress. Davies considered whether requiring that delay should be deliberate would be sufficient but concluded that it would provide too broad a scope for liability. The basis for delay must be more than intention, since most delays will be intentional and often for good reasons (to check the facts before publication, for example). Issuers would face great pressures in approaching any decision to delay release if it could be challenged afterwards on this basis. A requirement for recklessness would also be insufficient. There would be considerable uncertainty as to what delay would be considered to be "reckless" for these purposes, and though this might be a more difficult standard to meet, there would justifiable fear that some forms of negligent delay would be drawn into the net.

6.7 Hence, Davies has recommended that liability should only attach to dishonest delay. He further suggests that the definition of dishonesty should focus on the purpose of the delay, and that civil liability should only be imposed if the purpose, or the predominant purpose, fell within a prohibited category. Drawing on the test for criminal behaviour under section 397 of FSMA, he suggested that such a purpose could be inducing investors to acquire (or possibly dispose of) securities, or, more narrowly in his view, to enable a gain to be made or to inflict a loss on a person who acquired or sold the issuer's securities during the period of delay.

6.8 The Government agrees that such a test is appropriate. This would ensure liability in those cases where directors, for example, deliberately delayed disclosures in order to buy or sell securities on non-public information. It would ensure that some important cases where disclosure was deliberately delayed, for example, to give the board time to consider the implications of disclosure, to conclude contractual negotiations or to check the accuracy of a disclosure before publication, would not incur

liability for dishonest delay."

55. There were a number of differences between the draft Schedule 10A which the Treasury produced for the consultation and Schedule 10A in its final form. However, the principal difference between paragraphs 4 and 5 of the draft and Paragraphs 3 and 5 in their final form was that S.90A was ultimately extended to include liability not only to buyers and sellers of securities but also to holders. (Schedule 10A involved some re-ordering of the provisions in the draft which explains why paragraph 4 of the draft ultimately became Paragraph 3.)

56. On 17 July 2008 Ms Kitty Ussher, the Economic Secretary to the Treasury, also published an impact assessment which accompanied Treasury 1. It stated that approximately 3,500 issuers of securities were affected by the proposals and it contained an analysis of the costs and benefits. Under the heading "Litigation Costs" it anticipated that any increase in costs would be small and for the following reasons:

> "However, clarifying the liability for misstatement, albeit subject to a demanding test of issuer fraud, is likely to increase the incidence of litigation in cases of fraudulent misstatement. The increase is likely to be small. But the potential costs of such cases are significant, even when settled before trial. It is reasonable to envisage perhaps 2–3 cases over the next ten years, with costs in the region of £1-2 million for each side. It is reasonable to expect that a similar number of cases would be settled before trial with costs of £0.25–0.5 million for each side. This gives a ten year cost range of £5–15 million, or an annual average transaction cost range of £0.5-£1.5 million. Note that the costs of damages or settlement are excluded from the IA. These are not a transaction cost, but a sanctioned transfer of wealth between parties, and as such do not represent an economic cost. The statutory regime has deliberately been shaped, principally by selecting a demanding fraud test for liability, to minimise the potential for speculative litigation and the corresponding pressure on issuers to settle in order to terminate litigation, rather than compensate for harm done to shareholders. Accordingly, we do not anticipate incremental costs from speculative litigation."

57. In March 2010 the Treasury published its response to the consultation ("**Treasury 2**"). The authors reported that the Government had made no change to most of the proposals although some of the wording in the draft regulations had been clarified. They stated in terms that they proposed "to make no change to the current basis of liability (i.e. fraud)". For present purposes, the most significant change to the proposals was to extend the statutory regime to holders as well as sellers of securities. The authors of Treasury 2

justified the extension on the basis that all of the relevant investors would have to prove reliance:

> "5.7 The Government, having weighed up all the points of view carefully, has decided to extend the statutory regime to include holders of securities as well as sellers. The potential to have two divergent regimes, one for sellers and purchases but another for holders would not be conducive to investor and issuer certainty. Furthermore, there is very little principled reason for seeking to bring sellers within the regime but to leave holders out.
>
> 5.8 However, as the Regulations make clear, there must be reliance on information published by the issuer in deciding to continue holding securities. There is a clear difference between an active holder and a passive holder – the latter will not be entitled to bring an action as they would not be able to show reliance upon the statement in making their investment decision.
>
> 5.9 To be able to bring an action a claimant would, for example, have to demonstrate that as a result of reliance on a fraudulent misstatement he instructed his broker to cancel a sell order and instead retained the holding of securities. A holder of securities who continued to hold without giving the matter any thought would be considered to have held those securities passively and thus not able to demonstrate the necessary reliance on the information to bring a claim."

58. The authors of Treasury 2 recorded that there had been a debate about "out of hours" disclosures which issuers of securities were required to make under the DTR if a recognised information service was closed but maintained the view that liability should be imposed for information derived from secondary sources:

> "**Source of information**
>
> 6.16 The Government proposed that the issuer be liable, irrespective of whether the person claiming damages obtains the relevant information from a recognised information service, or other source, provided that the information was published on a recognised information service.
>
> **Respondents' views**
>
> 6.17 There was majority support for this proposal – it was seen as a non-contentious issue.
>
> 6.18 Some respondents queried how the liability regime would apply when there was not verbatim reporting of primary material through a secondary source.
>
> **The Government's response**
>
> 6.19 The Government remains of this view and therefore liability will attach to statements put out on a recognised information service, even if a claimant does not obtain the information directly from the recognised

> information service.
>
> 6.20 The rationale for liability arising even where an investor relies on information acquired from a secondary source was it was felt to not do so would impose too high an evidential burden on valid claims. Any statement put out through a recognised information service will be within the scope of the liability regime if that statement contains a fraudulent misstatement."

59. Finally, the authors recorded that there were a range of views in relation to the extension of liability for dishonest delay including a concern that the Court would apply a civil test of dishonesty rather than the criminal test (as it was then understood). They also recorded that the Government's response was as follows:

> "7.11 The Government acknowledges that the argument that liability for dishonest delay should only attach to statements that are required to be made has some merit in terms of reducing the risk of opportunistic litigation. However, in order to be successful a claimant would have to demonstrate that a particular statement should have been made at a previous point in time and in fact wasn't, and the act of so doing, was as a result of dishonest behaviour intended to enable a gain to be made or to cause loss to another or expose another to the risk of loss. This is a very high evidential hurdle that claimants will have to satisfy and thus reduces the possibility of opportunistic litigation."
>
> "7.13 The Government acknowledges that there is a risk that the courts would adopt the civil, as opposed to criminal, test for dishonesty. Therefore to prevent this, the Regulations expressly define dishonesty using the criminal test so that a person will be "dishonest" in respect of a delay where that person's conduct would be regarded as dishonest by those who regularly trade in the markets in question, and, in addition, the person concerned was aware that their conduct would be regarded as dishonest."

60. In October 2009 and between Treasury 1 and Treasury 2, Professor Eilìs Ferran of Cambridge University published an article in the Journal of Corporate Law Studies discussing the Treasury proposals and called "Are US style investor suits coming to the UK?": see (2009) 9 JCLS 315. She pointed out that to establish misrepresentation at common law it is sufficient that a misstatement was an inducement to enter into a transaction and not the sole cause. She also pointed out that an inference of reliance may in certain circumstances be drawn from the facts. She continued as follows:

> "An inference drawn from the facts is to be distinguished from a legal presumption of reliance. The classic "fraud on the market" theory developed in US securities law, which affords investors trading in efficient markets a rebuttable legal presumption of reliance, has not been adopted

> in section 90A/schedule 10A. However, the thinking that underlies the fraud on market theory, which is that in an informationally efficient capital market the price of securities reflects all publicly available information, could potentially be of some relevance so far as the UK remedy is concerned because it is possible that it could influence determinations on the facts as to reliance/materiality. In many cases it should be relatively straightforward for an investor to show on the facts that the pre-trade price of the securities was material to its investment decisions, on the basis that the price served as a reference point for its trading strategy. From there, arguably it is not a large step to seek to use the efficient capital markets hypothesis to form the basis of an argument that (inferred) reliance on market prices was tantamount to (inferred) reliance on the information itself. If that argument were to succeed, the claimant could have done enough to transfer the burden of proof to the defendant.
>
> This would be a novel argument so far as the English courts are concerned and the likely judicial reaction is hard to predict. Looking to jurisprudence elsewhere in the common law world, *Mondor v Fisherman*, a decision of the Ontario Superior Court of Justice, suggests that there may be some life in an argument based on inferred reliance. However, this was merely a preliminary ruling in which the court refused to strike out a class action by secondary market purchasers and it could be unwise therefore to attach too much significance to it. The counterview—that the inferred reliance argument is really fraud on the market by the back door and, as such, it would be inconsistent with the legislative intent to apply it in the context of section 90A/schedule 10A seems likely to carry considerable weight. Furthermore, in view of developments in financial economics that have undermined the once seemingly unassailable position of the efficient capital markets hypothesis as an accurate explanation of how capital markets actually work, any attempt to use that hypothesis in the interpretation of the section 90A/schedule 10A remedy would certainly merit a cautious reception from the judiciary."

(6) Schedule 10A

61. On 1 October 2010 the Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010 substituted a new S.90A for the provision which I have set out above. It provided for Schedule 10A to make provision for the liability of issuers of securities to pay compensation to persons suffering loss as a result of a misleading statement, dishonest omission or a dishonest delay in publishing information. In its current form Schedule 10A provides as follows:

> "1.(1) This Schedule applies to securities that are, with the consent of the issuer, admitted to trading on a securities market, where— (a) the market is situated or operating in the United Kingdom, or (b) the United Kingdom is the issuer's home State.
>
> (2) For the purposes of this Schedule— (a) an issuer of securities is not

taken to have consented to the securities being admitted to trading on a securities market by reason only of having consented to their admission to trading on another market as a result of which they are admitted to trading on the first-mentioned market; (b) an issuer who has accepted responsibility (to any extent) for any document prepared for the purposes of the admission of the securities to trading on a securities market (such as a prospectus or listing particulars) is taken to have consented to their admission to trading on that market.

(3) For the purposes of this Schedule the United Kingdom is the home State of an issuer if— (a) the transparency rules impose requirements on the issuer in relation to the securities, or (b) the issuer has its registered office (or, if it does not have a registered office, its head office) in the United Kingdom.

2.(1) This Schedule applies to information published by the issuer of securities to which this Schedule applies— (a) by recognised means, or (b) by other means where the availability of the information has been announced by the issuer by recognised means.

(2) It is immaterial whether the information is required to be published (by recognised means or otherwise).

(3) The following are "recognised means"— (a) a recognised information service; (b) other means required or authorised to be used to communicate information to the market in question, or to the public, when a recognised information service is unavailable.

(4) A "recognised information service" means— (a) in relation to a securities market situated or operating in the United Kingdom, a service used for the dissemination of information in accordance with transparency rules; (b) in relation to a securities market situated or operating outside the United Kingdom, a service used for the dissemination of information corresponding to that required to be disclosed under transparency rules; or (c) in relation to any securities market, any other service used by issuers of securities for the dissemination of information required to be disclosed by the rules of the market.

3. (1) An issuer of securities to which this Schedule applies is liable to pay compensation to a person who— (a) acquires, continues to hold or disposes of the securities in reliance on published information to which this Schedule applies, and (b) suffers loss in respect of the securities as a result of— (i) any untrue or misleading statement in that published information, or (ii) the omission from that published information of any matter required to be included in it.

(2) The issuer is liable in respect of an untrue or misleading statement only if a person discharging managerial responsibilities within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading.

(3) The issuer is liable in respect of the omission of any matter required to be included in published information only if a person discharging managerial responsibilities within the issuer knew the omission to be a dishonest concealment of a material fact.

(4) A loss is not regarded as suffered as a result of the statement or omission unless the person suffering it acquired, continued to hold or disposed of the relevant securities— (a) in reliance on the information in question, and (b) at a time when, and in circumstances in which, it was reasonable for him to rely on it.

4. An issuer of securities to which this Schedule applies is not liable under paragraph 3 to pay compensation to a person for loss suffered as a result of an untrue or misleading statement in, or omission from, published information to which this Schedule applies if— (a) the published information is contained in listing particulars or a prospectus (or supplementary listing particulars or a supplementary prospectus), and (b) the issuer is liable under section 90 (compensation for statements in listing particulars or prospectus) to pay compensation to the person in respect of the statement or omission.

5.(1) An issuer of securities to which this Schedule applies is liable to pay compensation to a person who— (a) acquires, continues to hold or disposes of the securities, and (b) suffers loss in respect of the securities as a result of delay by the issuer in publishing information to which this Schedule applies. (2) The issuer is liable only if a person discharging managerial responsibilities within the issuer acted dishonestly in delaying the publication of the information.

6. For the purposes of paragraphs 3(3) and 5(2) a person's conduct is regarded as dishonest if (and only if)— (a) it is regarded as dishonest by persons who regularly trade on the securities market in question, and (b) the person was aware (or must be taken to have been aware) that it was so regarded.

7. (1) The issuer is not subject— (a) to any liability other than that provided for by paragraph 3 in respect of loss suffered as a result of reliance by any person on— (i) an untrue or misleading statement in published information to which this Schedule applies, or (ii) the omission from any such published information of any matter required to be included in it; (b) to any liability other than that provided for by paragraph 5 in respect of loss suffered as a result of delay in the publication of information to which this Schedule applies.

(2) A person other than the issuer is not subject to any liability, other than to the issuer, in respect of any such loss.

(3) This paragraph does not affect— (a) civil liability— (i) under section 90 (compensation for statements in listing particulars or prospectus), (ii) under rules made by virtue of section 954 of the Companies Act 2006 (compensation), (iii) for breach of contract, (iv) under the Misrepresentation Act 1967, or (v) arising from a person's having assumed responsibility, to a particular person for a particular purpose, for the accuracy or completeness of the information concerned; (b) liability to a civil penalty; or (c) criminal liability.

(4) This paragraph does not affect the powers conferred by sections 382 and 384 (powers of the court to make a restitution order and of the Authority to require restitution).

> 8.(1) In this Schedule— (a) "securities" means transferable securities as defined in Article 2(1)(24) of the markets in financial instruments regulation, other than money market instruments as defined in Article 2(1)(25A) of that regulation that have a maturity of less than 12 months (and includes instruments outside the United Kingdom); (b) "securities market" means— (i) a regulated market as defined in Article 2(1)(13) of the markets in financial instruments regulation, or (ii) a multilateral trading facility as defined in Article 2(1)(14) of that regulation.
>
> (2) References in this Schedule to the issuer of securities are— (a) in relation to a depositary receipt, derivative instrument or other financial instrument representing securities where the issuer of the securities represented has consented to the admission of the instrument to trading as mentioned in paragraph 1(1), to the issuer of the securities represented; (b) in any other case, to the person who issued the securities.
>
> (3) References in this Schedule to the acquisition or disposal of securities include— (a) acquisition or disposal of any interest in securities, or (b) contracting to acquire or dispose of securities or of any interest in securities, except where what is acquired or disposed of (or contracted to be acquired or disposed of) is a depositary receipt, derivative instrument or other financial instrument representing securities.
>
> (4) References to continuing to hold securities have a corresponding meaning.
>
> (5) For the purposes of this Schedule the following are persons discharging managerial responsibilities" within an issuer— (a) any director of the issuer (or person occupying the position of director, by whatever name called); (b) in the case of an issuer whose affairs are managed by its members, any member of the issuer; (c) in the case of an issuer that has no persons within paragraph (a) or (b), any senior executive of the issuer having responsibilities in relation to the information in question or its publication.
>
> (6) The following definitions (which apply generally for the purposes of Part 6 of this Act) do not apply for the purposes of this Schedule: (a) section 102A(1), (2) and (6) (meaning of "securities" and "issuer")."

62. In *Bennion, Bailey and Norbury on Statutory Interpretation* 8th ed (2020) the editors state that where an Act uses a concept that has an established legal meaning it will generally be interpreted as having the same meaning: see section 25.2 (p.829). They also state as follows at p.830 under the heading "Incorporation by reliance on similar concepts":

> "An Act sometimes uses language which describes a concept in terms that are similar but not identical to an existing legal concept. The question then is whether the legislative intention was to incorporate or attract the common law rules, wholly or in part, or to start afresh. External aids to construction may help to shed light on the legislative intent.
>
> EXAMPLE

> In *Milne v Express Newspapers Ltd* the Court of Appeal held that the words 'had reason to believe' in the Defamation Act 1996, s 4(3), imported the legal concept of recklessness as discussed in earlier case law. In doing so they relied on the fact that this interpretation was consistent with recommendations made in the report of the Supreme Court Procedure Committee on Practice and Procedure in Defamation (the Neil committee, 1991), which the Act implemented.
>
> EXAMPLE
>
> In *Jones v Tower Boot Co Ltd* the question was whether the words 'in the course of his employment' in the Race Relations Act 1976, s 32(1), incorporated the common law rules relating to vicarious liability. The claimant had been subjected to racial abuse by two fellow employees. The employer denied liability on the basis that it was only responsible under s 32 for things done by an employee 'in the course of his employment' and, drawing on the common law doctrine of vicarious liability, this excluded the acts complained of. It was held that, having regard to the purpose of the Act, the words were to be given their natural everyday meaning and not to be construed restrictively by reference to the principles governing vicarious liability at common law.
>
> EXAMPLE
>
> The Suicide Act 1961, s 1, abolishes the crime of suicide. Section 2(1) as originally enacted went on to state that a person who 'aids, abets, counsels or procures' the actual or attempted suicide of another commits an offence. Despite using the normal language of secondary liability, the aided party commits no crime so the defendant must in fact commit the offence as a principal rather than a secondary party. It is unclear whether the wording was intended, impliedly, to bring in the usual ancillary rules governing aiding, abetting etc (for example as to the need for and nature of mens rea)."

63. One of the issues which I have to decide is whether the legislative intention was to incorporate the common law concept of reliance or whether Parliament intended to "start afresh". I also have to decide how much weight to attach to the Davies Review and the Treasury Consultation. Lord Hodge DPSC gave guidance in relation to that issue in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [30]:

> "External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty,

> and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

E. Reliance

(1) A textbook definition

64. I turn next, therefore, to reliance in the law of deceit. Ms Davies relied upon Cartwright Misrepresentation, Mistake and Non-Disclosure 6th ed (2019) for a textbook definition or description of reliance in the law of misrepresentation. Professor Cartwright described what we mean by reliance in this context at 3—54:

> "**"Reliance" as the core requirement** It is often misleading to talk in terms of a statement having caused loss; at least, a statement "causes" loss in a different way from an act. A badly built wall may fall over and injure a passer-by. It is not difficult to see that the defective workmanship caused the injury. But if I advise you that a wall is safe, and you walk past it and it falls over, your injury is "caused" in a different way: you took my words, trusted them and yourself took an action which put you in a position in which you suffered damage. A statement affects the decision-making processes of the person who reads or hears it, and that person then takes his own action in the light of the statement. For many of the remedies, therefore, rather than using the language of "causation", it is more usual to speak of the representee's reliance on the statement; by "reliance" we are focusing on this causal link between the statement and the representee's own actions which then gave rise to the harm of which he complains, whether it is entering into the contract or doing some other act which resulted in his suffering loss."

65. Professor Cartwright distinguished between actual reliance and reasonable reliance (e.g. in the tort of negligence) and also between materiality and reliance. He pointed out that materiality is neither necessary nor sufficient to establish liability. Materiality may establish an inference that the representee relied upon the representation but the strength of that inference will depend on the context and may transfer the burden to the representor of adducing evidence to rebut the inference: see 3—55 and 3—56. But he also stated that the presumption of reliance or inducement cannot "trump" the requirement that the representee was aware of the statement (citing *Leeds City Council v Barclays Bank plc* below): see footnote 267. He then continued at 3—57:

> "**The difficulty of proving reliance; multiple causes** The courts' willingness to infer reliance from the materiality of a statement is a consequence of the difficulty faced by a representee in proving why he entered into a contract. "It is impossible so to analyse the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another." Using as the paradigm case the pre-contractual misrepresentation, the starting-point is clear: look for evidence that the statement caused the representee to enter into the contract—or, at least, was one of the causes. The decision to enter into a contract is generally based on a range of motives and as long as any one of those motives is vitiated by the misinformation given by the other party, it is enough to undermine the whole transaction: the misrepresentation need not be the sole cause of the representee's decision to enter into the contract."

(2) The prospectus cases

66. Ms Davies also relied on three well-known 19th century cases which made a major contribution to the development of the law of deceit. As it happens, all three involved claims by investors that statements in a prospectus were untrue and were decided in the decade immediately preceding *Derry v Peek* (1889) 14 App Cas 337 and the enactment of the Directors Liability Act 1890. In *Arkwright v Newbold* (1881) 17 Ch D 301 the plaintiff alleged that the promoters of a company had falsely represented in the prospectus that they agreed to pay £32,500 and that this was untrue because the true price was £28,500 and the balance had been misappropriated by the directors personally. Fry J held that the claim was made out but the Court of Appeal overruled his decision on the basis that although there had been misconduct by the directors, the prospectus did not contain a false representation. Cotton LJ also considered that there was no evidence that the claimant had been deceived. He stated this at 324-5:

> "I have dealt with that point in order to shew that, in my opinion, there is no ground for reliance on that part of the prospectus as maintaining this action; but I ought to add that in an action of deceit the Plaintiff cannot establish a title to relief simply by shewing that the Defendants have made a fraudulent statement: he must also shew that he was deceived by the statement, and acted upon it to his prejudice. But in this case, although the Plaintiff knew from the defence how the Defendants put their case, and probably knew it from what had taken place previously, he does not in his pleading allege that, even according to the Defendant's own case, the statement of the prospectus as to the remuneration of the directors was false. I should be reluctant to decide the case on the ground of pleading, but the Plaintiff does not carry the case further in his evidence. All he says

> is this: "I saw that there was no promotion money to be paid, and I saw Mr. Grimes' name, whom I knew as a retired paper-maker, and I thought he would know if it was a profitable concern." Therefore he does not allege that he relied on the prospectus as saying, "The directors shall get nothing from anybody except what they get from the shareholders, and that shall be a commission only on the profits." In my opinion it would not be right in an action of deceit to give a plaintiff relief on the ground that a particular statement, according to the construction put on it by the Court, is false, when the plaintiff does not venture to swear that he understood the statement in the sense which the Court puts on it. If he did not, then, even if that construction may have been falsified by the facts, he was not deceived."

67. In *Smith v Chadwick* (1884) 9 App Cas the House of Lords held that a statement in a prospectus was ambiguous and capable of two interpretations and that the plaintiff had failed to prove that he had understood the words in the sense in which they were false. In *Crossley v Volkswagen AG* [2021] EWHC 3444 (QB), [2023] 1 All ER (Comm) 107, a case which I will have to consider in greater detail below, Waksman J provided the following summary of the decision at [51] to [57] (which I gratefully adopt):

> "51. *Smith v Chadwick* (1884) 9 App Cas 187, [1881–5] All ER Rep 242 was a decision of the House of Lords. The claimant alleged that he had been induced to buy shares by a statement contained in the defendant's Prospectus which stated that: '… the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum.'
>
> 52. That statement admitted of two interpretations. It could have meant that the actual turnover for the year exceeded £1m in which case it was plainly false. Or it could have meant that the works were capable of producing that output, in which case it was true.
>
> 53. Prior to trial, the claimant was served with interrogatories asking him to say what his understanding of the words was. Somewhat unhelpfully, he said that he understood the words to mean 'that which they obviously convey' and added that he could not express in any other words what he understood to be their meaning. At trial, the claimant was neither examined nor cross-examined about his understanding. He succeeded at first instance and recovered £5,000 damages for fraudulent misrepresentation. The Court of Appeal reversed that judgment and dismissed the action.
>
> 54. In the House of Lords, Lord Bramwell upheld the decision of the Court of Appeal, even though he thought that the representation could only mean a reference to actual output and was therefore false. However, he was not satisfied that the statement had been made fraudulently.
>
> 55. The lead judgment, with which the Earl of Selborne LC and Lord Watson agreed, was given by Lord Blackburn. He stated ((1884) 9 App Cas 187 at 195, [1881–5] All ER Rep 242 at 246) that whatever the statement meant, the claimant had not sufficiently proved that it did

> influence him. Later, he said that the claimant must prove damage and if he did not act upon the representations he showed no damage. He went on to refer to the fact that it was not always necessary to call the claimant as a witness to prove that he acted upon the inducement. If it could be proved that the defendant, with a view to inducing a person to enter the contract, had made a statement to the representee which was such as would be likely to induce a person to enter into a contract and it was proved that the claimant did enter into the contract, it was a fair inference of fact that he was induced to do so by the statement.
>
> 56. Lord Blackburn thought that the words used here could plausibly have had the sense contended for by the defendant (and indeed Cotton LJ in the Court of Appeal thought they bore that meaning). However, he went on to say that he could not see why the claimant did not give evidence as to whether he understood the words to mean what his case alleged, rather than as the defendant alleged. He thought that the claimant's own counsel did not wish to examine him in case he gave the wrong answer and vice-versa for the defendant's counsel wishing not to cross-examine him. But the burden was on the claimant to show that he had been induced by the representation to buy the shares.
>
> 57. Here, the point was not that the claimant had not seen the words in question. It was rather that they bore two possible meanings and he had put forward no positive evidence to establish the sense in which he understood them, which was critical to the question of reliance. Accordingly, awareness as such was not the key issue but rather it was his understanding. That said, I take the point made by VW here that it is hard to see how the relevant understanding (whatever it was) did not involve awareness of the words in question."

68. Because of the nature of the argument in the present case, it is necessary to analyse *Smith v Chadwick* in a little more detail. At first instance, Fry J held that the prospectus contained a number of false statements and that they led the plaintiff to subscribe for shares. The Court of Appeal allowed the appeal see (1882) 20 Ch D 27. Sir George Jessel MR held that Fry J had made a number of errors in his judgment and that the turnover statement was ambiguous and not untrue: see 63. He described the prospectus at 67 as in some respects careless but a fair, honest and bona fide attempt to state the truth. In the early part of his judgment he articulated the following test at 44:

> "Again, on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may shew that in fact he did not so act in one of two ways, either by shewing that he knew the truth before he entered into the contract, and therefore,

> could not rely on the mis-statements; or else by shewing that he avowedly did not rely upon them, whether he knew the facts or not. He may by contract have bound himself not to rely upon them, that is to take the matter at his own risk whether they were true or false (which was the conclusion to which the House of Lords came in the recent case of *Brownlie v. Campbell*, or he may state that he did not rely upon them in the witness-box, which I think is so in one instance here. But unless it is shewn in one way or the other that he did not rely on the statement the inference follows."

69. Sir George Jessel found that this test was not satisfied and that even if the statement bore the meaning found by Fry J it was not a material inducement: see 66. Cotton LJ disagreed with him on the question whether the statement in the prospectus was untrue but he concurred in the result. He stated (at 68) that it must be shown that: "the Plaintiff was deceived, and induced by the deceit that was practised upon him to do something to his prejudice, in respect of which prejudice he claims damages." He then stated his conclusion at 74-5:

> "Now, under these circumstances, in my opinion, even although the construction may be that which Mr. Justice Fry put upon it; yet how can we come to the conclusion in that state of the evidence that the Plaintiff was induced to act to his prejudice by any false statements made by the Defendants in that respect? Of course it may be that where there is a positive statement in clear terms, it is unnecessary for a man to come forward and say how he understood it; where there is a precise statement of a fact about which statement there can be no mistake, then, if that is shewn to be false, it may be assumed that the Plaintiff understood it in the meaning which alone it can have; but here where there is a statement at least of doubtful interpretation, I adhere to what I said in *Arkwright v. Newbold*, that the Plaintiff, coming as he does here, cannot call upon the Court to grant him relief, even if the statement is shewn to be incorrect, and made by the Defendants under such circumstances as to render them subject to liability in consequence of the misstatement so made. Those I think are all the grounds on which the Plaintiff here relies for relief. In my opinion he has not established that there were statements incorrect in fact made by the Defendants by which he was induced to act to his prejudice; or if there is any statement which is incorrect that it was made by the Defendants knowingly or recklessly so as to render them liable."

70. Lindley LJ also found that the turnover statement in the prospectus was ambiguous. But he also held that the plaintiff had not been induced to acquire shares in reliance on any of the statements in the prospectus. He set out his conclusion at 80:

> "Now I come to the last question, whether the Plaintiff has proved that he took his shares in this company on the faith of any of the statements in the

> prospectus which are alleged to be untrue. I have read his evidence with the greatest possible care, and I cannot come to that conclusion as a matter of fact. The conclusion at which I have arrived, after carefully studying his evidence, is that he knew something about Messrs. Hannay —I think nothing very much—but he knew them to be an old-established firm; he knew something in the same way of Messrs. Chadwick; he had confidence in them that they would not pass off rubbish or be guilty of issuing a fraudulent prospectus; and his knowledge of the two firms induced him to take the shares, but there was no particular expression in the prospectus which he relied on. He relied on the prospectus as a whole; and as a whole I have not the slightest hesitation in saying I think it is an honest prospectus. We have prospectuses varying in point of fraud in every conceivable degree; many of them are tissues of lies from beginning to end. Here is an extreme case in the other direction. I believe it is a thoroughly honest prospectus; and but for one single awkward expression it appears to me the Plaintiff would have no ground of complaint whatever."

71. The House of Lords upheld the decision. Lord Blackburn gave the principal speech and the Earl of Selborne LC and Lord Watson both agreed with him (as Waksman J pointed out in *Crossley*). It is clear from his speech that he considered it necessary for the plaintiff to prove that the relevant representation had influenced him to act and that he had acted upon it. He stated this at 195-196:

> "I have come to the conclusion that whatever be the meaning of that statement the plaintiff has not sufficiently proved that it did influence him. I do not say that there is no evidence on which a verdict for the plaintiff might be found. I certainly think that, if trying this cause with a jury, I should not be justified in withdrawing it from the jury. I do not even say that a verdict for the plaintiff if found by a jury would be so unsatisfactory that there should be a new trial. But I should have accompanied my direction to the jury with the same observations which I shall hereafter submit to your Lordships as justifying the conclusion to which the Court of Appeal have come and to which I myself come, and to which I ask your Lordships to come; and I think that the jury would, on hearing them, have probably found for the defendants.
>
> Before going further I wish to make some observations; for though I very nearly agree in what is said by the late Master of the Rolls, he does not quite state what I conceive to be the law. I do not mean to go through the numerous decisions on the subject of an action of deceit. All those which were decided before the date of the last edition of Smith's Leading Cases are to be found collected in the notes to *Chandelor v Lopus* and *Pasley v Freeman*. In *Pasley v Freeman* (3) Buller J. says: "The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies, per Croke J."

> Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley v Freeman* was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the-plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave v Hurd*[1] the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that if convinced that there was such a material representation they ought to find that the plaintiff was induced by it, unless one of the things which the late Master of the Rolls specified was proved; nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And whenever that is a matter of doubt I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts that the inference was a true one. I do not say it is conclusive."

72. In *Edgington v Fitzmaurice* (1889) 29 Ch D 459 the directors of a company issued a prospectus inviting shareholders to subscribe for debentures. They stated in the prospectus that the purpose of the issue was to enable the company to carry out alterations to their premises, to buy horses and vans and to develop a supply of cheap fish. In

[1] *Redgrave v Hurd* was decided the previous year but is reported in the law reports immediately before the decision of the Court of Appeal in *Smith v Chadwick*: see (1881) 20 Ch D 1. The passage to which Lord Blackburn was referring (above) is on p.21 of the law report in which Sir George Jessel MR stated the presumption of inducement was "an inference of law" which could be rebutted by proof that the claimant knew the truth or clear evidence that he or she did not rely on the representation.

substance, these statements gave the impression that the company was looking to expand rather than being in dire financial trouble. The plaintiff subscribed for £1,500 mistakenly believing that the debentures would be secured by a mortgage over the company's property and that a second charge would be paid off. Denman J held that the statements in the prospectus were false and gave judgment for the plaintiff.

73. The Court of Appeal dismissed the appeal on the basis that the statements of intention were actionable and that the plaintiff had relied on them. On appeal the defendant's counsel, Mr Horace Davey QC (later Lord Davey), squarely argued that the plaintiff had not been misled by the statements of purpose in the prospectus because he gave evidence that he was induced to subscribe for debentures in the belief that he would have a charge on the company's property and now admitted that this was a mistake: see 477. Cotton LJ dealt with this argument at 480-1:

> "But it was urged by the counsel for the Appellants that the Plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property, and that it was this mistaken notion which really induced the Plaintiff to advance his money. In my opinion this argument does not assist the Defendants if the Plaintiff really acted on the statement in the prospectus. It is true that if he had not supposed he would have a charge he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will be still liable. Did he act upon that misstatement? He states distinctly in his evidence that he did rely on the Defendants' statements, and the learned Judge found, as a fact, that he did, and it would be wrong for this Court, without seeing or hearing the witness, to reverse that finding of the Judge. We must therefore come to the conclusion that the statements in the prospectus as to the objects of the issue of the debentures were false in fact, and were relied upon by the Plaintiff."

74. Bowen LJ agreed with Cotton LJ that the statements had been made fraudulently and that the plaintiff had relied upon them. He began his judgment by identifying the ingredients of the tort of deceit at 481-2:

> "This is an action for deceit, in which the Plaintiff complains that he was induced to take certain debentures by the misrepresentations of the Defendants, and that he sustained damage thereby. The loss which the Plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and

> secondly, that it was false to the knowledge of the Defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in Lord Blackburn's judgment in *Smith v. Chadwick*, but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the statement was false, you must further shew that the plaintiff has acted upon it and has sustained damage by so doing: you must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting."

75. After making the famous observation that "the state of a man's mind is as much a fact as the state of his digestion" he dealt with the argument that the plaintiff did not rely on the statement in the prospectus because he only subscribed for the issue in the belief that the debt would be secured on the company's property (at 483-4):

> "Then the question remains - Did this misstatement contribute to induce the Plaintiff to advance his money. Mr Davey's argument has not convinced me that they did not. He contended that the Plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact."

76. Finally, Fry LJ (who had tried both *Arkwright v Newbold* and *Smith v Chadwick* at first instance) upheld the judge's decision that the plaintiff had relied on the false statements in the prospectus. He stated as follows at 484-5:

> "The next inquiry is whether this statement materially affected the conduct of the Plaintiff in advancing his money. He has sworn that it did, and the learned Judge who tried the action has believed him. On such a point I should not like to differ from the Judge who tried the action, even though I were not myself convinced, but in this case the natural inference from the facts is in accordance with the Judge's conclusion. The prospectus was intended to influence the mind of the reader. Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would

> give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendants' case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable. The appeal must therefore be dismissed."

77. These authorities have been consistently applied in a modern context. For example, in *Marme Inversiones 2007 SL v NatWest Markets plc* [2019] EWHC 366 (Comm) Picken J cited the passages in Cartwright (above) and *Arkwright v Newbold* and traced their modern application at [281] to [286]. Indeed, he cited both *Arkwright v Newbold* and *Smith v Chadwick* at [285]:

> "As Mr Howe QC observed, this passage was cited with approval by Asplin J in another express representation case, *Bonham-Carter v SITU* [2012] EWHC 3589 (Ch), at [131], as supporting the proposition that "the representee must establish that he subjectively interpreted the representation in the sense in which the court has found it to be false". It was also, previously, cited by Rix LJ in *The Kriti Palm* [2007] 2 CLC 223 at [253] and, again, at [278] when dealing with the absence of evidence from a Mr Whitaker as to what his understanding was in relation to a particular conversation where the representation was said to have been made (see [274]). It was, indeed, the absence of similar evidence in a claim for misrepresentation where the critical words in a company prospectus ("the present value of the turnover or output of the entire works") were ambiguous which led the House of Lords in *Smith v Chadwick* (1884) 9 App Cas 187 (Lord Bramwell dissenting on this point on the facts) to decide that the claim could not succeed. In that case, the claimant gave evidence merely that he understood the words to mean "that which the words obviously conveyed" without explaining the meaning he understood them to convey."

(3) The implied representation cases

78. In *Edgington v Fitzmaurice* the directors were found to have lied about the purpose for which they needed to raise capital. By contrast, *Marme* was a case in which the defendants were alleged to have made implied representations. Financial institutions may make factual statements about their operations or their systems and controls which are alleged by borrowers or investors to carry a degree of assurance about their integrity or that their officers and employees have conducted themselves honestly. The borrowers or

investors may contend that factual statements were obviously designed or intended to reassure them but may be unable to persuade the Court that the individual decision-maker actively considered this issue or was consciously re-assured by the context in which the express statements were made. Further, the more detailed or complex the implied representations are said to be, the more difficult it is to prove that a decision-maker relied on them and the harder it is to resist the conclusion that they are no more than a lawyer's construct.

79. In *Marme*, for example, a borrower alleged that a number of banks had impliedly represented that they and other banks had not manipulated EURIBOR rates and had acted honestly in relation to setting those rates. Picken J held that the relevant representations had not been made. But he also held that reliance had not been established because the decision-maker did not understand that any of the implied representations had been made to him and that those representations (or something approximating to them) were not and could not be "actively present to his mind": see [288].

80. In *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch) Asplin J (as she then was) held that a term was to be implied into the relevant swaps contracts that the parties would conduct themselves honestly when performing the contract. But she dismissed the claim on the basis that the banks had not made the specific representations alleged and the borrower had not relied on them. The Court of Appeal disagreed with the judge about the scope of the representations but affirmed her decision on reliance: see [2018] EWCA Civ 355, [2018] 1 WLR 3529.

81. A third case in which the Court had to consider reliance on implied representations in the context of interest rate swaps was *Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm), [2021] QB 1027. This important decision was also an application to strike out the claim and Cockerill J conducted an extensive review of the authorities on reliance before concluding that awareness of the implied representation was a requirement of liability: see [144]. She also held that the borrowers had no real prospect of success in establishing liability on the basis of their pleaded cases: see [154] to [162].

82. Cockerill J was asked to revisit her decision in *Leeds* at the trial of the subsequent claim in *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd*: see [2023] EWHC 2759 (Comm). That case did not involve interest rate swaps but a credit

default swap backed by residential mortgage-backed securities. The investors purchased US $100 million of notes through a private placement and alleged that the issuer had made implied representations in relation to both the honesty of its past and future conduct and the credit-rating of the notes (together with certain other representations). These allegations all failed: see [321] to [373].

83. Cockerill J also held that the investors' case on reliance failed: see [374] to [436]. In *Loreley* the question whether it is an ingredient of the tort of deceit that the representation must be actively present to the mind of the claimant was critical because the claimants had adduced no evidence that they had read the relevant term sheets or understood the issuer to be giving the implied assurances which they alleged: see [426] to [435]. Moreover, in reaching her decision Cockerill J also had to consider not only whether her own decision in *Leeds* was correct but also whether it could stand in the light of Waksman J's decision in *Crossley v Volkswagen AG* (above).

84. *Crossley* was also a decision on an application to strike out and for reverse summary judgment (as in *Leeds* and as in the present case). In that case Waksman J refused to strike out claims for deceit brought by a claims group of purchasers of VW cars based on the implied representation that the vehicles which they had purchased complied with all statutory and regulatory requirements including emissions limit. The judge began his analysis of the law with *Smith v Chadwick* and I have set out the relevant passage above when dealing with the prospectus cases. He dealt with *Edgington v Fitzmaurice* at [58]:

> "58. *Edgington v Fitzmaurice* (1885) 29 Ch D 459, [1881–5] All ER Rep 856, was another prospectus case, decided by the Court of Appeal. The key question was whether the claimant could maintain the claim where he was partly influenced by his own mistake but also partly by the defendant's material misstatement of fact. Again, therefore, awareness of the relevant representation was not itself in issue. Cotton LJ stated ((1885) 29 Ch D 459 at 481, [1881–5] All ER Rep 856 at 860) that: 'It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will still be liable.'
>
> 59. Bowen LJ stated ((1885) 29 Ch D 459 at 483, [1881–5] All ER Rep 856 at 861–862) that: '… Such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a statement himself could make no difference.'"

85. Waksman J reached his decision principally for pragmatic, case management reasons. But it is right to say that he was not prepared to accept that the members of the claims group had no real prospect of succeeding at trial even if they were unable to demonstrate that they had each been aware of the implied representation. He distinguished *Leeds* on the basis that the factual basis for the claims was very different and he set out his detailed conclusions at [94] to [98]:

> "94. The case before me is very different from *Leeds* (and indeed *PAG* and *Marme*). The conduct, and the representations to be implied therefrom, as pleaded at para 63 of the GPOC (albeit at some length) are both in fact relatively simple. They are not to be spelled out from a complex web of communications. And while in *Leeds* it was to be assumed that the implied representations have been made out, it cannot be denied that the whole context was one where the implied representations might have been difficult to establish and indeed were positively rejected in *PAG* and *Marme*.
>
> 95. In my judgment, at the end of the day, and for present purposes, it is the approach to summary judgment taken by Cockerill J that is as important as her analysis of the law. Absent *PAG* and *Marme*, if *Leeds* had to be considered in a vacuum, it seems likely that she would have found that this was an unsuitable case for determining the relevant issue at the summary judgment stage as opposed to at trial. In that sense, this case is being dealt with in a vacuum.
>
> 96. One then has to remember that *Leeds* will be heard by the Court of Appeal on 22 February 2022. Cockerill J must have taken the view that there was a real prospect of a successful appeal on the point of law and/or that there was a compelling reason for an appeal because she granted permission.
>
> 97. In addition, I do think there are real questions arising from what is to be drawn from the fact that an implied representation from conduct is established which means that the reasonable representee would assume or infer the content of the representation from the conduct observed. It was put to me in argument by the Claimants that it would be odd if a reasonable representee was found to have made that assumption or inference, and yet such an assumption or inference was not sufficient on the part of the actual representee. I appreciate that the former question is an objective one whereas the latter is subjective, depending on the state of mind (or direction of thought) of the actual representee. Nonetheless, I think that there are particular issues raised where implied representations by conduct are alleged and which have yet to be fully worked out. Given also the decisions of the Court of Appeal in *Spice Girls* and *Gordon* and the House of Lords in *Ray*, and notwithstanding *Smith v Chadwick* and the other cases referred to above where the question of awareness was not directly for decision, there is in my view a real prospect of success for the Deceit Claim

> here. This is in circumstances where a relevant assumption or CFOT[2] must be taken to exist or at any rate is likely to be established or at least there is a real prospect of it being established. Further, I do not consider that the whole issue of the Awareness Condition could seriously be described as a 'short point of law' which I should grapple with now. Accordingly, I do not determine that issue at this stage.
>
> 98. There are other points, too. First, I understand why VW says that there is an underlying utility in disposing of the Deceit Claim if there were nothing in it, even if there remains a substantial trial. However, the trial here is likely to remain very extensive and involved. It is not as if one would be able by this course to reduce a trial listed for a week or two down to a day or two or at least narrow it substantially. Second, and this is allied to the first point, VW's conduct in relation to the defeat device and its alleged dishonesty (assumed before me for the purpose of these applications) will still be relevant at trial. Apart from anything else, there is a claim here for exemplary damages. Yet further, the whole issue of reasonable consumer expectations will figure prominently in respect of the contractual, CPUT and unfair relationship claims, or at least it is plausible to think that they will. Indeed, on the Claimants' SQ Application (to which I will refer shortly) VW's own position is that this sort of evidence will be highly important. It is indeed why there is a sense in which the two applications before me are both somewhat double-edged. It is impossible in my view, and at this stage of the process, to draw a clear differentiation between the evidence that will be relevant and admissible on the Deceit Claim on the one hand, and on the Satisfactory Quality and further claims on the other. Yet further, in my judgment, the law in this area cannot be said to be complete or fully developed. This is a classic case where I should on any view avoid determining it ahead of trial and in the absence of all relevant findings of fact. For all of those reasons, even if there were no real prospect of success on the Deceit Claim, these are all compelling reasons for a trial.
>
> 99. It therefore follows that the principal part of the Deceit Claim Application must be dismissed."

86. In *Loreley* Cockerill J analysed *Crossley* closely but reached the same conclusion as she had done in *Leeds,* namely, that it was necessary to prove awareness of the statement or statements: see [388]. She also pointed out that *Leeds* had settled just prior to the hearing of the appeal: see [374]. She expressed her overall conclusions in the following passage at [421] to [425]:

> "421. I conclude that the law does require that a representation (however made) is received by the representee and that to satisfy the requirements of reliance the representee must be aware of it/have it actively present to their mind when they act on it.

[2] The counterfactual of truth.

422. Mr Lord endeavoured to persuade me that in this context a test of "present to the mind" would suffice. This I regard as a dangerous step away from where the authorities stand, essentially because such a test too easily elides into assumption. "Actively present to the mind", becomes "present to the mind", from which it is but a short distance to "at the back of my mind" - which was exactly where L30 wanted to go because that was what Dr Bauknecht said. But where something is at the back of the mind is it because of assumption or representation? Very often it will be only because of an assumption unconnected to what has been said or done. Accordingly I consider that this approach merely provides another route to dissolve the distinction between representation and assumption – which is also the division between representation and non-disclosure. This is a problem which is particularly acute when (as here) one is dealing with implied representations as to honesty, because it turns every contract into a contract of utmost good faith.

423. I return finally to the fault line which plainly exists in the cases. The authorities above show that there are cases where on the particular facts in play reliance/inducement is found without any distinct evidence of understanding or awareness being identified. It is fair to say that when placed under the analytical microscope those cases do offer a different flavour to those which I have decided establish the orthodoxy which applies where a question arises as to reliance based on an issue as to the operativeness of a representation. But it can be seen that these cases where no evidence of understanding/awareness is separately discernible are, in type, very different cases to the ones where this issue is really live. There are two hallmarks which appear to drive the distinction. The first is that in the *Gordon v Selico*/*Spice Girls* type case the representation is simple and cannot well be missed by the representee. There is no issue as to whether the representation is discerned so as to be operative. In the *Leeds* and current type case, the representation is being said to be capable of being implied despite complex contractual provisions, usually in complex multifaceted transactions. That pushes to the fore a need to see what has been registered or understood.

424. The second (related) distinction is that in the *Gordon v Selico*/*Spice Girls* type case the representation is one which is at the heart of the transaction. Are you buying a good flat or a money pit? Are you buying the star power of a flourishing or an imploding group? Both of these factors mean that the question of awareness is one to which the answer is obvious (the representee cannot miss it) and where the whole question of reliance is, in the light of that, likely to be susceptible of being decided by the presumption of inducement. As noted above, it would have taken a brave counsel to raise this point in *Gordon v Selico* (when the court had been prepared to find a representation). In *Spice Girls* a similar flavour emerges from the use of the word "inconceivable" in [72] of the Court of Appeal judgment. In the banking cases awareness is far from obvious; so much else is being said more explicitly that there are real questions as to whether a particular implicit message is received and understood. A proffering of a complex transaction such as this is not analogous to the ordering of a meal or the raising of an auction paddle.

> 425. All of this of course feeds back in to the question of making of the representation. In these more complex cases the question will often arise either contingently (as here – arising only if I am wrong about the making of the representations) or (as in *Leeds*) based on an assumption which might never be made out; but the facts that drive the first conclusion impact on the situation where causation arises. In the simpler cases the answer is often either so obvious that there is no dispute, or the court may be prepared (instinctively, but I would suggest technically incorrectly) to elide the question into the presumption of inducement. That is in essence the point being made by Longmore LJ in *BV Nederlandse v Rembrandt Enterprises* [2019] EWCA Civ 596 [2020] QB 551 at [45] to which Mr Lord alluded in reply. None of this however affects the logic of the argument. Because points are not in some cases taken, does not mean that they are not there."

87. The final authority on implied representations to which I was taken was *Farol Holdings Ltd v Clydesdale Bank plc* [2024] EWHC 593 (Ch). That case involved four test claims brought by the borrowers of business loans who had agreed to pay a fixed interest rate calculated by reference to a basic rate plus an additional margin cost. They alleged that the bank had made an express representation about the break costs of those loans: see [20](1). But they also alleged that the bank had made a series of implied representations in relation both to the break costs and the interest rate: see [20](2) and [26]. These included representations that the margin was the only profit which the bank was making from the loans, that it did not include any hidden additional margin or profit and that the interest rate was a market rate fixed by reference to external sources. The borrowers brought claims in both negligence and deceit.

88. Zacaroli J (as he then was) dismissed all of the claims for a number of detailed reasons which it is unnecessary for me to rehearse here. However, he set out the elements of inducement and reliance in the tort of deceit more generally at [216] to [219]:

> "216. Fifth, the representee must in fact have been induced to take action – for example entering into a contract – in reliance on the representation. The misrepresentation need not be the only reason for the representee's decision to enter into the contract, but the representee will have no cause of action if it would have entered into the contract on the same terms even if the representation had not been made. If it is proved that a false statement is made which was material – in the sense that it was likely to induce entry into the contract – then there is an evidential presumption (of fact, not law) that the representee was so induced. The presumption is stronger if the representation was made fraudulently.
>
> 217. The relevant question in this respect is whether the claimant would have entered into the contract if the representation had not been made at

> all, not whether it would have done so if it had been told the true position: see *Raiffeisen* (above) at [180], approved by the Court of Appeal in *SK Shipping Europe Ltd v Capital* VLCC 3 Corp [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521 , per Males LJ at [61].
>
> 218. The identification of the appropriate counterfactual if the statement had not been made, however, is a question of fact, and in some cases this may necessarily involve asking what would have happened if the truth had been told. That might be the case where, if the representation had not been made, the true position would have been revealed as a result of questions asked by the representee: *Raiffeisen* at [182] to [185]; *SK Shipping* at [61]. Even then, however, the "truth" is that which is sufficient to correct the falsity of what was said: *Raiffeisen* at [192] to [193].
>
> 219. It is well established that the representee must have understood, at the time, that the representation – in the sense that the court ascribes to it – was being made: see, e.g. *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* (above), per Hamblen J at §224, citing *Raiffeisen* at §87. As Hamblen J pointed out, this is probably not a separate requirement of a misrepresentation claim but rather is part of what the claimant needs to show in order to prove inducement. That follows from the fact that the essential question is one of causation: was the claimant induced to take action in reliance on the representation made? If the claimant did not appreciate at the time that the representation was made in the sense pleaded by the claimant, then it cannot show that, but for that representation being made, it would have acted differently."

89. He then addressed the question whether there was a separate or distinct requirement that the representation must be "actively present" to the representee's mind and whether they must have given it "contemporaneous conscious thought". He cited *Leeds*, *Loreley* and *Crossley* before stating as follows:

> "221. The issue identified in the relevant passages in those cases was that sometimes the court has found that a misrepresentation was relied on, apparently without a finding that the representee gave conscious or active thought to the representation (see for example the cases conveniently summarised at §380 of *Loreley*). An extreme example (discussed from §105 of *Leeds*) is the representation by a diner at a restaurant, made by the conduct of ordering a meal, that they have an intention to pay for it (see *DPP v Ray* [1974] AC 370, a criminal case but often cited in the cases dealing with misrepresentation in civil law). It is highly unlikely that the waiter who took the order gave any thought to whether such an implied representation was being made.
>
> 222. As Cockerill J noted, at §423 and §424 of *Loreley*, the cases in which inducement has been found without distinct evidence of understanding or awareness are where the representation is simple and cannot be missed by the representee, and where it is at the heart of the transaction. In such cases, it might be said that the fact represented, albeit implied from some other conduct or statement, is so obvious it goes without saying. Unless,

therefore, the representee actively thinks about it and decides not to rely on it, it might be said that it goes without saying that the representee relied on it. That would explain, for example, cases where someone who gives their opinion on a matter – where the facts are not equally known by both sides – may be held to make an implied statement "that he knows facts which justify his opinion": *Smith v Land and House Property Corp* (1884) 28 Ch D 7, at p.15 . It will be rare, if ever, that a representee thinks further than that they trust the person giving the opinion and assume that he knows facts which support it. Yet the court is unlikely to require evidence that the representee actively thought at the time that the representation was being made.

223. I doubt the utility (as did Cockerill J) of breaking down this causation question into distinct elements and seeking to find a single universally applicable test for those elements. It is essential to keep in mind that in every case it is necessary to show, as a matter of fact, that the claimant's decision to take the action (or refrain from taking action) which caused it loss must have been caused by the representation made by the defendant. The evidence required to satisfy that requirement will differ greatly depending on where on the spectrum the case lies (from "it goes without saying", at one end, to a complex representation said to be implied from conduct and statements, at the other).

224. In relation to the Break Costs Representations, whether or not there is such a requirement is academic, since I am satisfied for the reasons set out below that the claimants understood at the time that the simple form of representation (i.e., that the amounts quoted were the break costs to which CB was contractually entitled) was being made.

225. The point is of most relevance to the implied Fixed Rate Representations. As developed in Part C below, these are inherently complex representations. In each case, the pleaded implied representation is far from the obvious or only interpretation of what was expressly said or done. It is well established that where there is any ambiguity in the conduct or statements relied on in support of an implied representation, it will always be necessary to establish that the representee appreciated at the time the representation was made that it was being made in the sense relied on by the claimant: see, for example, the decision of the Court of Appeal in *Spice Girls Ltd v Aprilia* [2002] EWCA Civ 15; [2002] EMLR 27, at §67, distinguishing cases such as *E.A. Grimstead & Sons Ltd v McGarrigan*, unreported, Court of Appeal 27th October 1999, referred to by Waksman J in Crossley at §81. Without such understanding, the essential causal link cannot be established."

(4) Autonomy

90. The only case to which either counsel referred in which the Court had considered the meaning of reliance in Paragraph 3 was *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) (to which I will refer as "***Autonomy***"). The facts of that case were very different to the facts of the present case but in the course of his detailed judgment

Hildyard J considered the meaning of "reliance" in Paragraph 3 and also Davies 1 (above). He stated his conclusions at [501] to [506] under the heading "Reliance on what?":

> "**Reliance on what?**
>
> 501. Sch 10A paragraph (1)(a) refers to the payment of compensation to a person who acquires, continues to hold or disposes of securities "in reliance on published information to which this Schedule applies". (Its predecessor, s. 90A, related only to acquisitions of shares and referred to compensation to a person who acquired shares "in reliance on the information in the publication"). The loss claimed must be caused by reliance on that statement or omission.
>
> 502. The focus is on statements or omissions in published information on which reliance is demonstrated to have been placed. Paragraph 3(2) refers to the issuer being "liable in respect of an untrue or misleading statement". Further, paragraph 3(1) states that compensation is only to be paid where the acquirer "suffers loss in respect of the securities as a result of—(i) any untrue or misleading statement in that published information, or (ii) the omission from that published information of any matter required to be included in it."
>
> 503. As Dr Lynch submitted in his written closing, it would not be enough for Bidco to show that it relied in some generalised sense on a piece of published information (e.g. the annual report for a given year): I accept the Defendants' submission that it cannot have been intended to give an acquirer of shares a cause of action based on a misstatement that he never even looked at, merely because it is contained in (say) an annual report, some other part of which he relied on. The requirement that loss be suffered as a result of the untrue or misleading statement can only be satisfied where the person acquiring securities applied his mind to the statement in question, and where that statement induced the acquisition or (more relevantly for this case) induced the acquirer to transact on the terms he did.
>
> 504. This view gains support from the Davies Review on Issuer Liability. Discussing s. 90A, Professor Davies QC said this: "Section 90A …by requiring reliance, seems to require a claimant to have been aware of the statement which subsequently turned out to be misleading and for that knowledge to have played a part in inducing the action which was later taken." The same reasoning would apply in relation to Sch 10A .
>
> 505. Similarly, the requirement for reliance cannot be satisfied in respect of a piece of published information which the acquirer did not consider at all: again, see *Marme v Natwest Markets Plc* at §§281-288. The statement must "have been present to the claimant's mind at the time when he took the action on which he bases his claim." Unless a document was reviewed, it cannot have been relied on. In this case, the Claimants have referred to alleged misstatements or omissions in a number of documents (for instance transcripts of earnings calls, and Quarterly Reports from long before the acquisition) which were not reviewed by or on behalf of any of the

> Claimants. These cannot found a claim, though they may be relevant evidence of intention.
>
> 506. That said, statements (or omissions) may in combination create an impression which no single one imparts. In my view, if the overall impression thus created is false it may found a claim, if the other conditions of liability are also met."

91. The judge then went on to consider the degree of reliance required to establish liability. He rejected a submission that only a weak causal connection was required between the false statement and the acquisition of shares. He accepted, however, that the presumption of inducement (which he treated as an inference of fact) applies no less in a claim under Schedule 10A than it does in a claim for common law deceit. He stated as follows at [515]:

> "(1) It is enough that a fraudulent representation has had "an impact on the mind" or an "influence on the judgement" of the claimant (see per Lord Goff of Chieveley in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, as quoted by Lord Clarke of Stone-cum-Ebony JSC in *Zurich Insurance Co plc v Hayward*). There is no "but for standard" in that context; and the fact that other considerations may have been predominant does not negate the deception if it did have some impact or influence, for (as Lord Cross of Chelsea said in *Barton v Armstrong* [1976] AC 104, 118-119) "in this field the court does not allow an examination into the relative importance of contributory causes."
>
> (2) I was originally minded to agree with the Defendants that the so-called 'presumption of inducement' should not be read into the FSMA test; and that it would be difficult to integrate with the test of reasonable reliance which is expressly introduced by FSMA. On reflection, I think this would be to treat the "presumption of inducement" as, in effect, one of law: and as Lord Clarke explained in the *Zurich Insurance* case, it is simply an inference of fact. I have ultimately concluded that the presumption applies in the context of a FSMA claim no less than in other cases of deceit. The reason is simple: it aphoristically expresses the reality that once it has been established that a representor fraudulently intended his words to be taken in a certain sense and that the representee understood them in that sense and entered into the contract, it is natural to suppose, unless the presumption is rebutted on the facts, that the representee was induced to make his investment decision on the faith of the representor's statement.
>
> (3) It remains a question of fact to be determined on the balance of probabilities whether having regard to all the circumstances it did in fact have "an impact on the mind" or an "influence on the judgment" (as Lord Goff put it in the *Pan Atlantic* case) of the representee in making that investment decision. But the presumption is difficult to shift.
>
> (4) In *Hayward v Zurich Insurance Co plc*, Lord Clarke noted (at [36]) that the authorities are not entirely consistent as to what is required to rebut the

presumption of inducement: and in particular, "whether what must be proved is that the misrepresentation played "no part at all" or that it did not play a "determinative part", or that it did not play a "real and substantial part". It was not necessary to decide how the test should be worded in that case since it was found that the presumption was not rebutted in that case on any of the formulations; but Lord Clarke did go on to say that "the authorities…support the conclusion that it is very difficult to rebut the presumption", citing Baroness Hale of Richmond DPSC's observation in *Sharland v Sharland* [2015] UKSC 60; [2016] AC 871 that a party who has practiced deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality or that it actually played a causative part in inducement.

(5) It seems to me that, it would be in accordance with the approach in the authorities cited above to avoid semantic debate and leave the issue to be determined according to a value judgment whether in all the circumstances the misrepresentation(s) should be taken as having influenced the decision, without entering into an assessment of its relevant importance amongst any other influences.

(6) Further, the additional requirement of FSMA that the reliance, if established, must also be shown by the claimant to have been reasonable does not remove, but does, in my view, mitigate the effect of the presumption. In my judgment, it introduces an additional test requiring consideration of whether it was reasonable for the representation so to have impacted on the mind and judgment of the representee; put another way, it seems to me that the claimant must show that the representation had a sufficient impact on its mind or influence on its judgment for it to have been reasonable in all the circumstances for the claimant to have relied on it: and see further paragraphs [517 ff] below.

(7) It is also important to keep in mind that the propensity of a statement to influence the mind only gives rise to the presumption (if applicable) if it is shown to have been read or heard and understood by the representee in its deceptive sense and/or the claimant would have entered into the contract even if the misrepresentation had not been made: see *Leni Gas & Oil Investments v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm) (Males J, at §§18, 19 and 171-172): if it did not influence the mind, or if the representee understood it in some different sense and it was by reference to that different meaning that he acted, the presumption does not arise: and see the discussion about ambivalent or ambiguous statements in the recent decision of Cockerill J in *Leeds City Council and others v Barclays Bank plc* and another [2021] 2 WLR 1180.

(8) I agree, therefore, with Mr Miles that the Court should not assume reliance by Bidco on every statement alleged by the Claimants to be potentially false or misleading, drawn from hundreds of pages of financial statements and transcripts going back months or years before the acquisition of Autonomy, merely because the Claimants allege that these statements were deliberately false or misleading."

F. Summary Disposal

(1) Strike Out

92. CPR Part 3.4(2)(a) confers a power on the Court to strike out part of a statement of case if it appears to the Court that it discloses no reasonable grounds for bringing or defending a claim. CPR Part 3.4(3) also provides that when the Court strikes out part of a statement of case it may make any consequential order it considers appropriate. The parties did not cite any authorities giving particular guidance about the way in which the Court should exercise these powers in the present case and both approached the Strike Out Application on the basis that the test under CPR Part 3.4(2) and the test for reverse summary judgment were for present purposes the same.

93. The parties were agreed that even if the Court identified a defect in the pleaded case which would render the claim unarguable, the Court should not strike it out without giving the relevant party an opportunity to amend. Mr Nash also reminded me of the Court's case management jurisdiction not to decide a strike out application where it considered it inappropriate to do so for case management reasons. The parties approached the Strike Out Application (as do I) on the basis that the Court had granted permission to amend the Particulars of Claim and the POQ.

(2) Summary Judgment

94. There was no real dispute between the parties either in relation to the principles which the Court should apply in deciding whether to grant summary judgment. Both parties cited the familiar decision of Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (which has been cited on many occasions both at first instance and in the Court of Appeal):

> "As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillma*n [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

95. Ms Davies and her team accepted that summary judgment may not be appropriate in an area of developing jurisprudence unless the claims are plainly and obviously bad (e.g. because there is no real prospect of the law developing sufficiently to enable the claim to succeed): see *Hudson v HM Treasury* [2003] EWCA Civ 1612 at [59] to [67] (Jonathan Parker LJ). They also drew my attention to *Getty Images (US) Inc v. Stability AI Ltd* [2023] EWHC 3090 (Ch) where Joanna Smith J stated as follows at [38]:

> "On the issue of "compelling reason", it may be inappropriate to grant summary judgment where similar issues would remain to be determined at a full trial and extensive factual and expert evidence would have to be called, meaning that there would be much less in terms of saving costs and court time than is normal (see *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715 at [71]-[73] per Jackson LJ). However, as the Defendant submitted, the mere existence of other arguable claims which must go to trial cannot, of itself, be a compelling reason why an unarguable claim must proceed to trial."

96. Mr Nash and his team placed particular emphasis on paragraphs vi) and vii) from the principles in *Easyair* (above) and cited *Crossley* (above) for the proposition that where an application involves a novel point of law, that may provide a compelling reason for deciding the issue at trial when all of the facts are known regardless of the view which the Court may have taken to the merits. In *Crossley* Waksman J stated as follows at [15]:

> "In this case, and as will be explained below, both sides contend in respect of the applications made against them, that even if the claim or defence has no real prospect of success, there is in any event a compelling reason for a trial of it. In this regard, two important examples of a compelling reason are:
>
> (1) the fact that the application concerns a developing area of the law; here, it may be desirable that the disputed legal questions should be resolved against the background of the facts as already found at the trial, and not hypothetical facts;
>
> (2) where summary judgment will not dispose of the whole case; this will be so where there will be a trial anyway, regardless of the outcome of the summary judgment; it is particularly relevant if, at the trial, there will be or is likely to be evidence concerning the same or similar factual matters as those traversed in the application."

V. Paragraph 3

G. Submissions

(1) The Bank

97. The Bank submitted that on a plain reading of Paragraph 3 there could be no claim unless the investor actually read the specific statement which was said to have been untrue or misleading or the specific piece of published information which was said to have contained an omission. Ms Davies relied on the use of the word reliance in both paragraph 3(1)(a) and paragraph 3(4). She submitted that reliance on the Bank's status as a listed company or its share price was plainly not "reliance on published information" or

"reliance on the information in question".

98. Ms Davies also submitted that the meaning conveyed by the language of the statute was confirmed beyond doubt by the legislative background. She took me through the common law principles of deceit, Davies 1 and 2 and also Treasury 1 and 2 (above). She placed particular reliance on Davies 1 and the passages in which Professor Davies contrasted the statutory prospectus regime (now S.90) and in which he regarded the reliance requirement as a distinguishing feature from US litigation in which the "fraud on the market" theory has been adopted and class formation is much easier. She also relied on the passage in Treasury 2 where HM Treasury stated that the Government had decided to extend S.90A to holders of shares but regarded the reliance requirement as a brake on litigation and gave a directly relevant example: see Treasury 2, §5.8 and §5.9 (at [57] above).

99. Finally, Ms Davies relied on *Autonomy* as the only authority on the meaning of reliance under Paragraph 3. She did not submit that I was bound to follow Hildyard J's decision unless I was satisfied that it was plainly wrong or that I should follow it as a matter of comity but submitted that I should follow it because it demonstrated that Paragraph 3 had a plain and obvious meaning and that I could be satisfied both that it was correct but also that it was appropriate to grant summary judgment.

(2) The Claimants

100. The Claimants submitted that Parliament could not have intended to adopt the common law concept of reliance from the tort of deceit because it extended liability to omissions which are not actionable at common law. Mr Nash also submitted that Parliament could not have intended to require investors to prove that they applied their minds to the absence of a particular statement and that an omission could not be categorised as "the information in question" but rather "an absence of information". He relied on the decision of the Federal Court of Australia in *TPT Patrol Pty Ltd v Myer Holdings Ltd* [2019] FCA 1747 that it is conceptually incoherent to require an investor to prove inducement or reliance in relation to an omission and the absence of information: see [1643]. In their Skeleton Argument Mr Nash and his team submitted as follows:

> "56. By contrast, this issue does not arise under Cs' interpretation. The first question is whether the investor relied on the Published Information.

> The second question is then whether any loss the investor suffered was caused by the misstatement or omission. That reflects the difference in the statutory wording applied to causation and reliance.
>
> 57. If weight is being placed on the Treasury papers, it is also notable that paras 6.16 to 6.19 of the Second Treasury Report clearly contemplate that an issuer can be liable even if a claimant does not obtain information from the RIS (Published Information), but is relying on a "secondary source". That view would suggest that s.90A does indeed contemplate that reliance which occurs via others in some way (contra D's para 21(3)) is capable of giving rise to a claim. The question of where any line is drawn is obviously fact-sensitive.
>
> 58. A similar point is implicit in Professor Ferran's article cited by D at para 44(3). She observes that s.90A does not embody a "fraud on the market" concept, but makes clear that it is an open question whether determinations on "reliance/materiality" should involve a consideration of whether "(inferred) reliance on market prices was tantamount to (inferred) reliance on the information itself".
>
> 59. D is not correct to suggest (at para 22) that Price/Market Reliance would apply to "every claimant in every s.90A claim". The liability regime covers a wide range of securities, from issuers of listed shares in the LSE premium market, to obscure debt on relatively illiquid markets which may not be efficient in the relevant sense. It covers a wide range of investors, from professional investors such as Cs to holders of inherited family interests or strategic holdings by public authorities who may not hold by reference to price at all. It is not the case that any investor in respect of any issuer would be able to demonstrate such reliance. This is a question of fact."

101. Mr Nash also relied on the fact that it remains highly controversial whether claimants must demonstrate that they applied their minds to the statement in question. He relied on *Crossley* and the outstanding debate whether *Leeds* and *Loreley* were correctly decided. He also relied on the earlier cases cited by both Cockerill J in *Loreley* and Zacaroli J in *Farol Holdings* in which the Court of Appeal had made no mention of a separate requirement that the representee must have read or heard the relevant statement or that it must be present to the mind. Finally, he relied on the fact that where it is actionable, non-disclosure does not require reliance: see, e.g., section 8 of the Insurance Act 2015 (below).

H. The Test

(1) Does the common law test apply?

102. Paragraph 3(1) imposes liability upon an issuer to pay compensation upon an issuer to a

person who acquires, continues to hold or disposes of securities "in reliance on published information to which this Schedule applies". The term "reliance" is used in the first instance, therefore, to limit the class of persons to whom an issuer is liable to those persons who have relied on published information. Paragraph 3(1) is to be contrasted with S.90(1)(a) which imposes liability to pay compensation to a person who has acquired securities to which listing particulars apply.

103. Paragraph 3(4) also provides that a loss is not to be regarded as suffered as a result of a statement or omission unless the person suffering it acquired, continued to hold or disposed of securities "in reliance on the information in question". The term "reliance" is used again, therefore, to limit the losses which are recoverable under Schedule 10A to those suffered by persons who have relied on the information which contained the untrue or misleading statement or from which the relevant matters were omitted. Again, paragraph 3(4) is to be contrasted with S.90(1)(b) which imposes liability to pay compensation for losses suffered as a result of any untrue or misleading statement in the relevant listing particulars or any omission from them.

104. I agree with Ms Davies that Parliament must have intended to give the term "reliance" some content and to limit the recovery of compensation to those investors who are able to prove something more than that they suffered loss as a consequence of a misleading statement or omission being made to the market. Otherwise, the framers of Schedule 10A would have adopted very similar language to S.90. Indeed, when Parliament amended S.90A to include liability for delay it adopted exactly that course as a brief comparison between S.90 and Paragraph 5 will demonstrate. It follows that the Court must give effect to the term "reliance" which goes beyond causation of loss and requires investors to prove a separate ingredient of liability.

105. The obvious test for Parliament to adopt in Paragraph 3 was the common law test for inducement or reliance in the tort of deceit. The detailed analysis of the prospectus cases which I have set out above shows that by *Edgington v Fitzmaurice* (by the latest) the requirement for inducement or reliance was a separate ingredient of the tort: see, in particular, the formulation of the test by Bowen LJ at 481-2 (see [74] above). Moreover, the critical ingredients of the test had also been established in the prospectus cases:

(1) It is necessary to show that the investor was deceived by the statement and acted

upon it to their prejudice (see Cotton LJ in *Arkwright v Newbold* and *Smith v Chadwick*).

(2) The Court may draw an inference of fact that the investor has been induced to subscribe for securities from the fact that the statement was material and the fact that the investor made the investment even if the investor does not give evidence. But this is an inference of fact and not a presumption or inference of law (see Lord Blackburn in *Smith v Chadwick*).

(3) It is not necessary to show that the untrue or misleading statement was the sole inducement if it was actively present to the investor's mind and did induce the investor to make the investment (see Bowen LJ in *Edgington v Fitzmaurice*).

106. Moreover, the Courts have consistently applied this test and these principles for almost 150 years and one can almost draw a straight line between the prospectus cases and the test for inducement or reliance applied in modern cases. I have cited two examples. First, in *Marme* Picken J traced the evolution of reliance from the prospectus cases and in *Farol Holdings* Zacaroli J adopted the same test and the same three principles: see [216] and [219]. The test has been refined in the intervening period and may not have completed its evolution at least in relation to implied representations (as I consider further below). But the nature of the test and the core principles have been settled for almost 150 years.

107. In my judgment, therefore, the obvious interpretation of Paragraph 3 is that Parliament did not intend to "start afresh" but recognised that the Courts have developed a settled test of reliance in the tort of deceit where proof of liability requires a claimant to prove both reliance and causation as separate ingredients of the tort and incorporated both tests into Paragraph 3. The Davies Review and the Treasury Consultation confirm that this was the legislative intention and that reliance was intended to be a separate requirement of liability and to limit recovery: see, in particular, Davies 1, §26 and §55 (see [45] and [46] (above)), Davies 2, the recommendation in answer to Q1 (at [51]), the Treasury's impact assessment (at [56]) and Treasury 2, §5.7 to §5.9 (at [57]). The example given in Treasury 2 at §5.9 demonstrates that the authors had the test for fraudulent misstatement in mind.

108. I accept Mr Nash's submission that the Davies Review and the Treasury Consultation (including the impact assessment) can only have a secondary role in the interpretation of

Paragraph 3 and that I should not give them decisive weight: see *R(O) v Secretary of State for the Home Department* at [30] (see [63] above). But in my judgment, those materials do no more than confirm the obvious interpretation of Paragraph 3. They disclose the background to Schedule 10A and identify the purpose of the independent requirement of reliance, namely, to limit recovery to those investors who can prove that they relied on the published information in which the untrue or misleading statement was made or from which any matter which should have been included in that published information was omitted.

(2) What is the common law test?

109. In my judgment, the test for reliance as it applies to express representations (whether made orally or in writing) requires the claimant to prove that they read or heard the representation, that they understood it in the sense which they allege was false and that it caused them to act in a way which caused them loss. I agree with Professor Cartwright at 3—54 (above) that this is because the test is one of causation and a statement can only cause an individual to act or operate on their decision-making process if they hear or read the statement or if the statement (or the gist of it) is communicated to them by a third party. If (as I have found) the common law test applies to misleading and untrue statements in Paragraph 3, then I agree with Hildyard J in *Autonomy* that the requirement for reliance in Paragraph 3 cannot be satisfied in respect of published information which the Claimants did not read or consider at all: see [505] (at [90] above).

110. I turn now to consider whether any of the individual arguments which Mr Nash advanced on behalf of the Claimants displace the obvious interpretation of Paragraph 3 which I have adopted. I also address Mr Nash's argument that the common law test is uncertain and the Court should follow *Crossley* and defer deciding whether the Claimants in Category C can satisfy the test until trial.

(3) Omissions

111. Mr Nash was right, in my judgment, to focus his submissions on liability for omissions. The common law does not impose liability for the failure to speak unless that failure falsifies a positive representation (whether express or implied) and S.90A introduced a liability for omissions which is purely statutory. Indeed, I might well have accepted Mr Nash's argument that Parliament must have intended a wider test for reliance than the

common law test if I had also agreed with him that the effect of adopting that test would require investors to prove that they applied their minds to the absence of a particular statement. But in my judgment, Schedule 10A does not impose such a requirement upon investors for the following reasons:

(1) I agree with Mr Nash that the term "reliance" must mean the same thing whether investors allege that they relied on an untrue or misleading statement or that they relied on an omission. This is no more than a consequence of the way in which both paragraph 3(1)(a) and paragraph 3(4) are drafted. Moreover, it is highly unlikely that Parliament intended to use the same term in different senses in the same paragraph of the schedule.

(2) I also agree with Mr Nash that it would be almost impossible for investors to prove that they consciously considered whether matters had been omitted from published information and that if Schedule 10A imposed such a test, it would be virtually impossible to establish liability to omissions. As Mr Nash put it, liability would be limited to "known unknowns" and even then investors would have very similar problems to those claimants who seek to rely on implied representations (as the authorities above demonstrate).

(3) However, in my judgment the framers of both S.90A and Schedule 10A were alive to this issue. They did not require investors to prove that they had relied on the omission itself (i.e. that they appreciated that the issuer had failed to include facts or matters in its published information). They required investors to prove that they had relied on the published information itself. S.90A(5)(a) excluded liability unless investors proved that they acquired the relevant securities "in reliance on the information in the publication" and Paragraph 3(4)(a) now requires investors to prove that they acquired, held or disposed of securities "in reliance on the information in question".

(4) This makes sense in the context of liability for both misleading statements and omissions. I agree with Mr Nash (and the Federal Court of Australia in *TPT Patrol*) that an investor cannot rely on information which has been omitted from an annual report or a periodic statement if they do not know or cannot guess what has been omitted. But this is not what they have to prove. What they have to prove is that

they relied on the annual report or the periodic statement itself and that their reliance in doing so was reasonable. The materiality of the facts or matters which the issuer has omitted and whether they would have made a difference to the investment decision will go to causation and the quantification of loss.

(5) I accept that Hildyard J appeared to go further than this in *Autonomy* (above) at [503] and [515] where he accepted the submission of Mr Robert Miles QC (as he then was) that the claimants had to prove that they relied on the individual statements in the published information. However, the judge was considering liability for misleading or untrue statements and not for omissions. Moreover, it is unnecessary for me to decide on this application whether he was correct to go this far. For present purposes, it is enough that I agree with him that "the requirement for reliance cannot be satisfied in respect of a piece of published information which the acquirer did not consider at all": see [505].

112. I can illustrate the way in which Paragraph 3 operates by an example taken from the Particulars of Claim. In section C the Claimants make specific allegations that the Bank operated LX to favour high frequency traders and that they did not use a direct data feed from the New York Stock Exchange. They also allege that the Bank omitted this information from its published information during the Relevant Period:

> "C4: Barclays' EETD Systems did not adequately safeguard clients' interests and in fact assisted HFT Firms
>
> 40. Barclays represented to clients and potential clients, that it had implemented special safeguards to protect clients from high-frequency trading in its dark pool. For instance, Barclays represented that it had "End-To-End Client Order Protection" by which its electronic trading products and services (algorithms, smart order router, and dark pool) worked together to "protect client orders and minimize information leakage" to "maximize fill rates" and "minimize market impact" (meaning whether prices move against a client). That is, Barclays represented that it would use its algorithms, router, and dark pool for its clients' best interests, not its own, by seeking to increase the number of its clients' trades that were executed, secure better prices for those trades, and minimize the ability of HFT firms to anticipate the orders and trade ahead of them.
>
> 41. In fact, Barclays operated its algorithms, smart order router, and dark pool to favour HFTs over other clients and actively sought to attract HFTs by providing HFT firms with: a. Favourable prices and/or lower rates; b. Information not provided to institutional investors including the routing logic of Barclays' order router, a breakdown of trades executed in the dark pool by participant type, and a breakdown of trades executed in the dark

> pool by "toxicity" levels; and c. Technological tools to assist HFTs to take advantage of institutional investors in its dark pool including by permitting HFTs to "cross-connect" to its servers and by processing market data slowly to allow latency arbitrage to be employed by HFTs.
>
> <u>C5: Barclays' EETD Systems did not use a direct data feed from the New York Stock Exchange</u>
>
> 42. US Regulation National Market System ("Regulation NMS") requires trading centres to have and enforce policies and procedures reasonably designed to prevent executions at prices that are inferior to prices that are displayed and available at another market centre.
>
> 43. Barclays represented to clients that it used direct data feeds for major exchanges.
>
> 44. In fact, and in contravention of Regulation NMS, LX did not during the relevant period subscribe to a direct market data feed from the New York Stock Exchange."
>
> "68. Further or alternatively, the omission to include within Barclays Plc's published information during the Relevant Period the matters set out in Section C above amounted to an omission from that published information of any matter required to be included in it, within the meaning of paragraph 3(1)(b)(ii) of Schedule 10A."

113. Appendix C contains extracts from the Bank's 2011, 2012, 2013 and 2014 annual reports. The Claimants also rely on the Bank's interim announcements for the years 2011, 2012 and 2013 and the Prospectus itself. The Bank admits that it did not disclose any of the information in section C in any of its published information but denies various of the underlying allegations in paragraphs 41 to 44 (above) and denies that it made any material omissions: see the Defence, paragraph 46.

114. The Claimants may be able to prove the specific facts alleged in paragraphs 41 and 44 (above). They may also be able to satisfy the Court that the DTR imposed a duty on the Bank to publish those facts in its annual reports, interim announcements or the Prospectus and that it omitted those facts from each of these publications. For example, they may be able to prove that the Bank should have published those facts in its 2011 annual report and that Mr White or Mr King deliberately and dishonestly withheld those facts from the market when the 2011 annual report was being prepared and published. If they prove these facts, then the Claimants will succeed in establishing liability under Paragraph 3 subject to questions of reliance and causation.

115. To satisfy the common law test for reliance, however, it will not be necessary for each Claimant to satisfy the Court that a decision-maker or adviser read the 2011 annual

report, considered the paragraphs on risk set out in Appendix C and asked themselves the question whether the Bank might have omitted information about the way in which it operated LX (or its algorithms, smart order router and dark pool) or whether it had complied with Regulation NMS. It will be enough for the Claimants to prove that the decision-makers or advisers reviewed the 2011 annual report in order to decide whether to acquire, hold or dispose of Barclays' shares and, if so, whether it was reasonable for them to do so. If the Claimants are also able to prove that they would not have acquired or continued to hold shares in the Bank or would have acquired or sold them at a different time and at a different price if the Bank had published the facts pleaded in paragraph 41 and 44 (above) in the 2011 annual report, then they will be entitled to compensation.

116. Finally, although I would be very reluctant to decide such an important issue on a pleading point, I do consider it of some significance that the Claimants have pleaded their case in exactly this way. They do not allege that they relied on the omission or absence of any of the information in section C (including paragraphs 41 and 44) from the published information in Appendix C. They plead that they purchased or continued to hold shares in reliance on the Bank's published information: see paragraph 82 (which I have set out in full at [15] above).

(4) The presumption of inducement

117. I agree with both Hildyard J in *Autonomy* and Zacaroli J in *Farol Holdings* that the presumption of inducement is an inference of fact which the Court may properly make if the claimant has established that the defendant made the representation with the intention to mislead the claimant, who understood it in the sense which it was intended to have. I also accept that although it always remains open to the defendant to prove otherwise, the presumption is "difficult to shift": see *Automony* at [515](3). This is because it hardly lies in the mouth of the maker of a fraudulent statement to say that a victim, who understood the statement in the way in which it was intended, could not have placed any reliance upon it.

118. But whether or not it applies to claims under Schedule 10A, the presumption does not assist the Claimants in Category C. They allege that it is to be inferred that they were induced or influenced in their investment decisions by the Bank's statements and omissions: see paragraph 82 (above). But if I am right that the test for reliance requires

them to prove that they read the untrue or misleading statements or that their gist was communicated to them by third parties, then the POR and the Questionnaires are sufficient by themselves to rebut any presumption and to prevent the Court from drawing such an inference. The Claimants in Category C do not allege that they read the statements in Appendices B to D and the three sample claimants (above) all answered Questions 1, 2 and 4 in the Reliance Questionnaire in the negative.

119. Moreover, this is not simply a case in which the Claimants in Category C rely on the plain and obvious meaning of the words which the Bank used in its published information. They also allege that the overall impression which the Bank's published information gave, was false:

> "62. The statements set out in Appendix B were untrue and/or misleading in that: a. Read fairly, they presented the impression that Barclays was committed across its business to (i) integrity and ethics, (ii) putting customers' interests at heart of what they did, (iii) transparency and (iv) undergo cultural change with a view to putting ethics at the centre of what it did."
>
> "63. The statements set out in Appendix C were untrue and/or misleading in that: a. Read fairly, they presented the impression that while general risks were being described, Barclays was not aware of specific material risks other than those identified (being involvement in benchmark rates including LIBOR, ISDAfix, foreign exchange rates and gold prices, interest rate hedging products, and PPI), which were discussed in the relevant documents."
>
> "64. The statements set out in Appendix D were untrue and/or misleading in that: a. Read fairly, they presented the impression that Barclays was applying a strong (alternatively, an adequate) system of risk management and control to provide reasonable assurance that internal controls were effective to minimise risk."

120. The Claimants in Category C do not, however, allege that their decision-makers or advisers read and understood the documents in Appendices B to D or took away the impression set out in these paragraphs from reading them. It follows, therefore, that the Claimants in Category C are in the same position as the plaintiff in *Smith v Chadwick* and the presumption does not arise. But there is a common sense answer too. The presumption of inducement gives rise to a genuine inference of fact and it is not intended to be a legal fiction. I consider it inconceivable that the Claimants in Category C will be able to persuade me at trial that I should draw the inference that they were induced to act by the statements in Appendices B to D when they accept that nobody who had any

responsibility for their investment decisions read the Bank's Prospectus or its annual reports or its interim announcements at all.

121. Finally, I am not satisfied that Professor Ferran's article provides any assistance to the Claimants in Category C either. She made it clear that the "fraud on the market" theory developed in US securities law gives rise to a rebuttable presumption of law and that it would be novel for an English court to adopt it. I agree with the counterview which she set out in the passage from her article which I have quoted. In my judgment, it would be inconsistent with Parliament's legislative intent to apply a legal presumption of reliance to Paragraph 3 and would deprive the concept of "reliance" of the meaning which it was intended to have. I accept Ms Davies submission that if "Price/Market Reliance" falls within reliance in paragraphs 3(1) and 3(4), then it applies to "every claimant in every s.90A claim". When challenged to explain why this was not correct, Mr Nash and his team gave a wholly unconvincing answer and could not provide an example of a case in which reliance would limit recovery in any way: see their Skeleton Argument, ¶59 (above).

(5) Secondary Sources

122. I do not consider that Mr Nash's appeal to Treasury 2 and the decision to permit reliance on secondary sources provides any real assistance to the Claimants either. The decision to extend reliance to secondary sources is reflected in the drafting of Schedule 10A and, in particular, in paragraphs 2(1)(b) and 2(3). Those paragraphs extend the definition of published information to include not only information published or a recognised information services ("**RIS**") but also to information published by alternative methods where the availability of that information has been published on a RIS and other means required or authorised to be used to communicate with the market where a RIS is not available. These extensions will include many secondary sources. But even if the investor cannot prove that they read or received the published information through any of these means, Schedule 10A does not require investors to prove that they relied exclusively on information published on a RIS. They only have to prove that they relied on the published information itself, however communicated (as the authors of Treasury 2 appreciated).

123. Furthermore, the common law test of reliance is flexible enough to accommodate indirect reliance in the sense that the gist of the published information was communicated to the

investor by a third party (and Mr Nash did not attempt to persuade me otherwise). Indeed, there are examples of cases at common law where the Court has recognised that a misrepresentation may be actionable where the information has been filtered through a third party who took the relevant decision. An example which came to my mind when Mr Nash was developing his submissions was *Banque Bruxelles Ltd v Eagle Star Ltd* [1995] All ER 769 at 793h-796d (Phillips J). Finally, the Claimants themselves distinguish between those Claimants who relied on secondary sources and those Claimants who relied on price movements and the market. The Claimants in Category B fall within the first category and the Claimants in Category C fall within the second. The Bank has not applied to strike out any of the claims in Category B.

124. Indeed, Parliament's intention to recognise claims based on published information communicated through secondary sources demonstrates, in my judgment, that it must have intended liability to be limited to those investors who are able to prove that the published information or the gist of that information was communicated to them and that they either read it or read a summary of it or relied on an agent or third party who read and relied upon it. If it was unnecessary for the Claimants to prove that they received the information published by the Bank by recognised means either directly or indirectly, then it would have been unnecessary to extend Schedule 10A to secondary sources at all. It may well be argued that there is no real reason of policy or principle to draw the line between a Claimant who relied on a broker's report or a "buy" recommendation (which were based on published information) and a Claimant who relied solely on a movement in price (which was also influenced by that same information). That may be so but it is clear that this is where Parliament chose to draw the line and that line must be respected.[3]

(6) The Insurance Act 2015

125. Mr Nash and his team also relied on the fact that when Parliament has legislated for non-disclosure, it has not required a claimant to prove common law reliance. The example which they gave was section 8 of the Insurance Act 2015 which imposes liability for the breach of the duty of fair presentation:

[3] I add that there was no argument about the extent to which the Claimants in Category B are entitled to rely on Schedule 10A and the extent to which it enables them to rely on the examples in the text above is a matter to be argued in due course.

> "**8 Remedies for breach**
>
> (1) The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer— (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms.
>
> (2) The remedies are set out in Schedule 1.
>
> (3) A breach for which the insurer has a remedy against the insured is referred to in this Act as a "qualifying breach".
>
> (4) A qualifying breach is either— (a) deliberate or reckless, or (b) neither deliberate nor reckless.
>
> (5) A qualifying breach is deliberate or reckless if the insured — (a) knew that it was in breach of the duty of fair presentation, or (b) did not care whether or not it was in breach of that duty.
>
> (6) It is for the insurer to show that a qualifying breach was deliberate or reckless."

126. Mr Nash was quite right to point out that section 8 does not require the insurer to prove that it relied on the insured's presentation of risk but imposes a "but for" test of causation. In my judgment, section 8 does not assist the Claimants either. It shows how easy it would have been for the framers of Paragraph 3 to adopt a test of causation only (as in S.90 or Paragraph 5) and reinforces my conclusion that full effect must be given to the requirement of reliance in Paragraph 3 by applying the common law test.

(7) Loreley: the "Awareness" test

127. Finally, Mr Nash argued that the common law test was in a state of uncertainty and that this is a compelling reason in itself for deferring consideration of the issue until trial. For the purposes of the Strike Out Application I am prepared to accept that the test for reliance as it applies to implied representations or representations by conduct is not "complete or fully developed": see *Crossley* at [98]. I am also prepared to accept that the Court of Appeal might decide that Cockerill J was wrong to conclude that claimants relying on an implied representation must prove that they were aware of the representation and had it actively present to their minds when they acted on it: see *Loreley* at [421] (above). I did not hear full argument on this issue and it would be wrong for me to express a view about it on this application.

128. But even if it is unclear whether *Loreley* was properly decided, I am not satisfied that the Claimants in Category C have any real prospect of persuading me at trial either that they

do not have to prove that they or their representatives read the published information in section E1 and Appendices B to D and acted on it or, alternatively, that they acted on the advice or at the direction of a third party (or even a chain of third parties) who read that published information. I have reached this conclusion for the following reasons:

(1) Both *Crossley* and *Loreley* are concerned with implied representations or representations by conduct. There is no suggestion in either of those authorities that the debate whether the claimant was aware of the representation extended to express representations (whether made orally or in writing).

(2) Moreover, in *Crossley* Waksman J distinguished both *Leeds* and *Loreley* on the basis that the implied representation or representation by conduct upon which the claimants in that case relied was "relatively simple" and did not arise out of a "complex web of communications": see [96]. As Zacaroli J pointed out in *Farol Holdings*, those cases in which the Court has made no finding that the claimant was aware of the representation or had it actively in mind involved clear and obvious statements where it "goes without saying" that the claimants relied on them. Cotton LJ said much the same thing in the Court of Appeal in *Smith v Chadwick*: see [69] (above).

(3) But even if Waksman J intended to cast doubt on the test for reliance as it applies to express representations (and I do not accept that he did), then I respectfully disagree that there is any doubt about the test. He suggested that the question whether the investor was aware of the representation in the prospectus was not in issue in either *Smith v Chadwick* or *Edgington v Fitzmaurice*: see [57] and [58]. For reasons which I now explain, I do not accept that this conclusion is fully accurate.

(4) I accept that in *Smith v Chadwick* there was no challenge to the plaintiff's answer to interrogatories stating that he had read or looked at the prospectus. I also accept that the question whether he relied on the statement in the prospectus was not determinative of the appeal because both the Court of Appeal and the House of Lords held the prospectus to be honest. But it was the first issue which Lord Blackburn (who gave the majority speech) addressed and he held that the plaintiff had not been induced to purchase shares by the representation. If it was unnecessary

for him to prove that he read the prospectus or acted on the representation, then this conclusion was unnecessary and wrong.

(5) By comparison, the conclusion that the representation was "actively present" to the plaintiff's mind did form part of the ratio in *Edgington v Fitzmaurice*. Counsel argued that the plaintiff did not rely on the prospectus and the Court of Appeal rejected that argument and held that he did because it operated on his mind at the same time as his mistaken belief that the debentures would be secured over the company's assets. If Waksman J intended to suggest that he or Cockerill J were not bound by this conclusion – and, as I say, I do not accept that he was addressing the requirement of reliance as it applies to express representations – then, in my judgment, he was not correct to do so.

(6) Finally, it is clear that Waksman J was influenced by the fact that Cockerill J had given permission to appeal in *Leeds* and that the appeal was to be heard in the near future: see *Crossley* at [96]. However, the parties compromised the case before the appeal was heard: see *Loreley* at [374]. Moreover, Cockerill J has now reconsidered the issue in *Loreley* and Zacaroli J has followed her decision in *Farol Holdings*. As he pointed out, the fundamental question which the Court has to answer is whether the claimant's decision to take the action (or refrain from taking action) which caused it loss was caused by the representation made by the defendant: see [233].

(8) Conclusion

129. In my judgment, Parliament intended the Court to apply the common law test of inducement or reliance from the tort of deceit to Paragraph 3 and both to misleading statements and omissions. That test requires the Court to determine whether the Claimants were induced to rely on the published information set out in the Particulars of Claim, section E1 and Appendices B to D and whether that published information caused the Claimants to acquire, hold or dispose of the Bank's shares. I agree with Hildyard J in *Autonomy* that the Claimants in Category C cannot satisfy this test unless their representatives read and considered that published information or third parties who directed or influenced their investment decisions read and considered that published information.

130. I leave open the question whether it is necessary for the Claimants to prove that their

decision-makers or advisers applied their mind to the relevant misleading or untrue statements and that those statements induced them to acquire, continue to hold or dispose of their shares on the terms which they did: see *Autonomy* at [503]. This is a matter for further argument at trial (as is the scope of Category B). But I am satisfied that this is not a requirement of the test applicable to omissions for the reasons which I have given. Paragraph 3 requires reliance on the relevant published information not on the facts or matters which the Claimants allege to have been omitted.

I. Summary Disposal

131. Even though I have determined the legal argument against the Claimants, it does not automatically follow that the Bank is entitled to strike out the claims in Category C or to reverse summary judgment. Mr Nash submitted that not all of the 241 funds in Category C operated in the same way and that some of them involved the exercise of discretion by human decision-makers. But the Reliance Questionnaires completed by the sample Claimants in Category C (which I have quoted above) do not assert that any of their human decision-makers or their advisers read or considered any of the published information in section E1 or Appendices B to D (or relied on any secondary sources). Indeed, if they had read or considered that information, they would be included in Category A (or Category B).

132. Moreover, Ms Hogan gave no evidence to that effect in Hogan 5. If the methodology of any of the Tracker Funds had involved a human fund manager considering the Bank's published information or, indeed, even an AI or computer assessment of that published information, those funds have had ample opportunity to adduce evidence to this effect. If any Tracker Funds had operated in this way, Ms Hogan would have given evidence to that effect. But she did not do so.

133. Finally, I have considered whether there is any evidence which can reasonably be expected to be available at trial which might lead to a different conclusion. But it is striking that two of the Reliance Questionnaires which I have quoted stated that the Claimants had no relevant documents to disclose and the third stated that the Claimant had not conducted a search for documents. I am not satisfied, therefore, that there are any further contemporaneous documents which the Claimants in Category C could put before the Court. I accept that they may be able to adduce factual and expert evidence about the

way in which they operated. But if they give evidence to the same effect as Dr Hildreth and Mr Curcio, I am not satisfied that the claims of those Claimants in Category C have any real prospect of success.

VI. Paragraph 5

J. Submissions

(1) The Bank

134. Ms Davies and her team submitted that Paragraph 5 only applied where the Bank had actually published information but had done so late. She relied on the dictionary definition of the word "delay" as the "action of deferring or postponing something" and also the wording of paragraph 5(2) which only applies where a PDMR has acted dishonestly in "delaying the publication of the information". It followed, so she argued, that Paragraph 5 only imposes liability upon an issuer where publication has taken place. Ms Davies also submitted that if the Court adopted a different construction, it would render the claims under Paragraph 3 redundant and absolve the Claimants from the need to prove reliance at all. In support of this submission, she relied on the statutory context and, in particular, Davies 1, §85 (see [47] above) and Treasury 1, §6.5 (see [54] above) where the Treasury intended to define liability precisely so that legitimate delay was not penalised. Finally, Ms Davies relied upon paragraph 7(1) as providing that the remedies in Paragraph 3 and Paragraph 5 were exclusive of each other.

(2) The Claimants

135. Mr Nash and his team also appealed to the normal meaning of the word "delay" and relied on the dictionary definition which includes not only "the action of deferring or postponing something" but also "procrastination" or "waiting". He relied on the example of the delivery of a parcel (upon which the Bank had originally relied). He submitted that the recipient would be entitled to complain about the delay in delivery after the due date whether or not it had been delivered (or even lost) and that it was nonsensical to suggest that the customer was not entitled to complain about the delay until the parcel was finally delivered.

136. Mr Nash pointed out that, although the Bank had later published some information in

answer to the Complaint and in the subsequent settlements, it had not published all the information in section C or all the information which the Claimants alleged that it was under a duty to disclose. Mr Nash submitted that it could not be right that the Bank could avoid liability under Paragraph 5 by failing to publish such information <u>at all</u>. If this was correct, so he submitted, the Claimants would not be entitled to bring a claim at all during any period of non-disclosure and permanent silence would prevent liability from ever arising under Paragraph 5. He had a number of answers to the apparent overlap between the two paragraphs:

> "45. The essential argument put forward by D (paras 64 and 67) appears to be that "every single Claimant could bring precisely the same claim under both paragraph 3 and paragraph 5 in every case", allowing them to escape the para 3 reliance requirement. However:
>
> a) It is not clear why potential overlap is a problem. There are many situations where concurrent claims exist (e.g. contract and in tort, and in the context of statutory claims – e.g. unfair prejudice, derivative actions and just and equitable winding up). D's reliance on the "exclusivity provisions" (as it terms them) in para 7 of Sch 10A is misconceived. These exclude other remedies (e.g. deceit). They do not suggest that there cannot be overlapping liability between limbs of Sch 10A. That is obviously not the case – to take a simple example, a statement which omits certain information such that it is misleading will give rise to claims in both misstatement and omission.
>
> b) On any view the overlap would not be complete. The example above demonstrates a period for which there could be no claim based on omission, because there is no Published Information and thus nothing from which to make an omission. The Davies Discussion Paper (para 85) notes this point in relation to omissions (emphasis added):
>
>> "The section <u>contemplates liability only for omissions from the statement which is made</u> ('omission from any such publication of any matter to be included in it') <u>rather than liability for failure to make any statement at all.</u> Further, it is difficult to see how the section's requirement for reliance 'on the information in the publication' could be satisfied in relation to the period when no statement had been made. <u>There can be such reliance only when the statement is made, but if the statement, when made, is accurate and complete, there can be no liability at that point</u>."
>
> c) D cites this passage at para 74 – but then proposes a construction which would give no remedy for dishonest delay in exactly that situation, so that dishonest delay would not plug the very gap which has been identified. The passage also raises interesting questions about the relationship between dishonest delay and omissions, and what is characterised as an omission for these purposes.
>
> d) Liability is not coterminous in other respects. For example, an issuer

> which had dishonestly delayed in making an announcement, but had not been dishonest in the preparation of an announcement that was eventually made, would be liable under para 5 but not para 3. Conversely an issuer which had delayed for legitimate reasons, but had then acted dishonestly in causing omissions from the statement once made, would be liable under para 3 but not para 5.
>
> e) Liability under paras 3 and 5 might arise in respect of different periods of time. An issuer might, for example, be liable for dishonest delay in not announcing anything at all, and then liable for omissions from the point at which a partial, defective statement was made. It might be liable for continued dishonest delay in relation to matters not announced. In such a scenario, each stage of the analysis might proceed on a different factual basis, with the Court required to apply a different test to different information."

137. Finally, Mr Nash submitted that this was not an exhaustive discussion but it highlighted the complexity of addressing the question in the abstract without concrete facts or without analysis of a full set of provisions. He also submitted that if the point fell to be decided on a summary basis, the analysis was heavily against the suggestion that dishonest delay is subject to a blanket requirement of subsequent, accurate publication.

K. The Test

138. Despite Mr Nash's attractive submissions, I am satisfied that Paragraph 5 only imposes liability upon an issuer of securities in relation to information which has been published on a RIS and does not impose liability where no publication has taken place. I have reached this conclusion for the following reasons:

    (1) I agree with Mr Nash's submission that the natural and obvious meaning of the word "delay" is capable of describing both the situation in which a parcel arrives later than was originally promised by the delivery company but also the situation in which it is not delivered at all. I am not satisfied, therefore, that Parliament intended Paragraph 5 to apply only where publication had taken place just by using the word "delay".

    (2) But that is not the end of the story. Paragraph 5 only imposes liability to pay compensation to a person who acquires, continues to hold or disposes of securities as a result of "a delay by the issuer in publishing information to which this Schedule applies": see paragraph 5(1)(b). Moreover, the issuer is only liable to pay compensation if a PDMR "acted dishonestly in delaying the publication of the

information".

(3) Paragraph 2 defines the information to which Schedule 10A applies. The schedule only applies to information "published by the issuer" either "(a) by recognised means" or "(b) by other means where the availability of the information has been announced by the issuer by recognised means". It follows that Paragraph 5 has no application to an issuer unless or until it has published the relevant information by recognised means or it has announced the availability of that information by recognised means. It also follows, in my judgment, that Schedule 10A does not apply – and that there can be no liability for delay in publishing information – unless or until it falls within paragraph 2 and has been published.

(4) In my judgment, this construction of Schedule 10A addresses the mischief which Professor Davies identified in Davies 1, §85. If the PDMRs of an issuer deliberately and dishonestly delay the publication of information, e.g. to take advantage of it personally before the market becomes aware of it, but then later publish it accurately, there can be no liability under Paragraph 3 either for making a misleading statement or for omitting to publish the information. But there will be liability under Paragraph 5. This construction also addresses the need identified in Treasury 2, §6.3 to §6.8 for the liability to be precisely drawn.

(5) I, therefore, reject Mr Nash's submission that Davies 1, §85 supports his own construction rather than that of the Bank. In that paragraph Professor Davies was drawing attention to the fact that S.90A only imposed liability for omissions from information which had been published and did not apply where there was no publication at all. But it is clear from the last sentence that the lacuna which he identified was the late but accurate publication of information rather than the failure to publish the information at all.

(6) For example, the Claimants allege that the Bank was under an obligation to announce the facts set out in section C to the market under the DTR and to publish them in the Prospectus and in its management reports and interim management reports. If they establish this and also that the Bank's PDMRs dishonestly and deliberately failed to publish these facts in the Prospectus or the relevant reports, they will establish liability for omissions under Paragraph 3 (subject to reliance and

causation). But if the DTR (or any other regulations) did not impose a duty on the Bank to publish that information on a RIS promptly or within a specified time period or at all, then there can be no liability for delay in publication either.

139. In my judgment, therefore, Paragraph 5 only imposes liability upon an issuer of securities in relation to published information whether one adopts a literal construction of the words used or a purposive construction of the schedule as a whole. The Bank can be liable for misleading or untruthful statements in its published information and for deliberately omitting to include facts in that published information or for delaying the publication of information which was accurate but doing so late. Schedule 10A does not impose liability on the Bank for misleading statements or omissions or delay unless and until it has published information to which Schedule 10A applies.

140. But I am also satisfied that the Claimants' preferred solution would lead to an absurd result. Mr Nash accepted that there was a considerable overlap between Paragraph 3 and Paragraph 5 if liability under the latter was not dependent upon proof of publication on a RIS. Indeed, the Claimants had to say that the Bank was liable to pay compensation to them under Paragraph 5 even if they failed to prove reliance for the purposes of Paragraph 3 because they have applied for permission to amend the Particulars of Claim to plead no additional facts in support of the dishonest delay claim apart from the allegation the Bank delayed publication dishonestly: see the Particulars of Claim, paragraph 69.

141. I can see no reason why Parliament would have intended to introduce a liability for delay in Paragraph 5 which overlapped to such a degree that it would render Paragraph 3 almost redundant in this way. This degree of overlap makes no sense at all given the significance which both the Davies Review and the Treasury Consultation attached to the requirement of reliance in Paragraph 3. The extent of the overlap between the two paragraphs also makes no sense given the Treasury's view that the issue was finely balanced but liability should be introduced provided that it was precisely defined. I found none of the reasons which Mr Nash and his team advanced to explain the subsequent overlap remotely convincing given the background to the introduction of Schedule 10A.

142. Mr Nash's principal reason for justifying the overlap was that there are many situations in which concurrent liability in tort and contract or under statute may exist. But in those cases, each cause of action requires proof of a number of different elements and exists

independently of the others. Put another way, there will be some cases in which liability will overlap but many cases in which it does not. But if Mr Nash's construction of Paragraph 5 is correct, then the liability for delay under Paragraph 5 will always overlap with liability for omissions under Paragraph 3. He advanced no positive reason why Parliament would have intended such a result and it is plainly inconsistent with both the Davies Review and the Treasury Consultation.

143. Moreover, paragraph 7(1) was clearly intended to prevent concurrent liability of this kind arising. I agree with Mr Nash that this provision was primarily designed to ensure that Schedule 10A excluded other, non-statutory remedies such as damages for deceit. But Parliament did not intend S.90A to give rise to concurrent liability under the section and in contract or tort, I can see no reason why would it have amended S.90A to create concurrent liability between Paragraph 3 and Paragraph 5. In my judgment, the exclusivity provisions are consistent with both the Davies Review and the Treasury Consultation and provide further support for my preferred construction of Paragraph 5.

144. Finally, I found neither of Mr Nash's examples convincing. They both assume that no liability for omissions will arise under Paragraph 3 if the Bank has delayed in publishing the information in section C for a significant period of time. But if the Bank had an obligation to publish that information in the Prospectus or in their interim or annual statements (as the Claimants allege), the deliberate failure to do so will give rise to liability under Paragraph 3 provided that the Claimants can prove reliance and causation. The paradigm example of liability under Paragraph 5 is insider trading and the dishonest delay by a PDMR in making an ad hoc disclosure to the market of price sensitive information or holding it back from information which the issuer was imminently about to publish: see Davies 2, §49 (see [50] above).

L. Summary Disposal

145. The Claimants do not allege that the Bank published any of the information in section C on a RIS or published it by other means where the availability of that information was published on a RIS. Indeed, they expressly plead that the announcement which the Bank made to the market on 26 June 2014 did not amount to an announcement of the matters in section C: see the Particulars of Claim, paragraph 58. Moreover, Mr Nash did not suggest that the Claimants would wish to amend to plead that the Bank had published

any of the specific information in section C but had dishonestly delayed its publication. I am satisfied, therefore, that the Claimants have no real prospect of succeeding on their claims under Paragraph 5 at trial.

VII. Case Management

146. In the CMC1 Order I ordered that Trial 1 should be listed for hearing on the first open date in October 2025 with a time estimate of 8 weeks (later extended to 10 weeks) and it has now been listed to begin on 6 October 2025. In the CMC2 Order I ordered a split trial and that issues of reliance, causation and share price would be tried at Trial 1 in respect of a group of seven sample Claimants. I also made separate orders for disclosure and witness statements in respect of the sample Claimants (and a number of reserve Claimants). I also gave permission to the parties to call expert evidence in three disciplines.

147. Mr Nash advanced a number of case management reasons why the Court should refuse to grant the Strike Out Application. His primary submission was that all of the Claimants in Categories A and B relied on Price/Market Reliance and their claims would be going to trial. He also relied on the fact that only one sample Claimant in Category C had been selected for trial (C68 above). In my judgment this is not a sufficient reason for refusing to strike out the claims in Category C or strike out the claims for dishonest delay. If I strike out all of the claims in Category C, then it will be unnecessary to call any factual evidence or any experts relating to Price/Market Reliance. This will undoubtedly lead to a saving in time and costs and I agree with Joanna Smith J in *Getty Images (US) Inc v. Stability AI Ltd* (above) that the existence of the claims in Categories A and B is not a compelling reason why the claims in Category C should proceed to trial.

148. Mr Nash's second case management reason why the Court should refuse to grant the Strike Out Application was that both issues which I have decided are novel points of law and that it is overwhelmingly likely that the Claimants will appeal. I do not fully accept Mr Nash's characterisation of the issues because *Autonomy* provides authority on the scope of reliance under Paragraph 3. But I accept that the Claimants are likely to appeal and, whether or not I grant permission to appeal myself, I have to take into account the possibility that the Court of Appeal will grant permission to the Claimants.

149. In my judgment, the possibility of an appeal is not a reason either for refusing to strike

out the claims in Category C or to strike out the claims for dishonest delay. It is equally possible that the Bank will appeal given the importance of the issue. Moreover, the directions which I have given in both the CMC1 Order and the CMC2 Order are sufficiently flexible to accommodate a successful appeal (by either party). It will not be difficult to substitute a reserve Claimant for sample Claimant C68 at this stage. The Court can the try the claims in Category A and Category B at Trial 1. If the Claimants in Category C are successful on an appeal, then it ought to be possible to try the question of Price/Market Reliance discretely at Trial 2 (if judgment is handed down after Trial 1).

150. The Claimants do not rely on any additional facts in relation to their dishonest delay claims under Paragraph 5. They rely on the failure to publish the information in section C in relation to both liability for omissions under Paragraph 3 and liability for delay under Paragraph 5 and they allege dishonesty against the same individuals. I accept that there may be a difference between "dishonest concealment of a material fact" for the purposes of paragraph 3(2) and dishonest delay for the purposes of paragraph 5(2) but the overall test for dishonesty is the same: see Schedule 10A, paragraph 6. In my judgment, the findings which the Court makes at Trial 1 in respect of the allegations of dishonest concealment are likely to be determinative of the allegations of dishonest delay even if an appeal is allowed. I am not persuaded that the possibility that the Bank may be required to recall Mr White or Mr King at Trial 2 (or other PDMRs) to deal with the dishonest delay claims is a compelling reason to refuse to strike out claims which have no real prospect of success.

151. Finally, Mr Nash relied on the fact that in other S.90A cases the Court has permitted similar issues to go to trial. However, neither of the two cases upon which Mr Nash relied involved an application to strike out claims based on Price/Market Reliance or the Court delivering a considered judgment. Moreover, in *Various Claimants v Standard Chartered PLC* [2024] EWHC 1108 (Ch) Michael Green J accepted that the question of "common reliance" (which was not identical to Price/Market Reliance) involved "essentially a legal issue" and that it was an important legal point which ought to be decided as soon as possible: see [76]. I note in passing that in *Standard Chartered* Michael Green J heard and determined a strike out application in October 2023 and on 17 June 2024 the Court of Appeal handed down judgment on the appeal: see [2024] EWCA Civ 674.

152. In my judgment, there are no compelling reasons why I should permit the claims in

Category C and the dishonest delay claims to go to trial having determined that they have no real prospect of success. Moreover, there is in my judgment a compelling reason why I should not permit them to go to trial. The Category C claims involve 241 different funds and have a total value of £332 million which is 60% of the total value of the claims. If I dispose of those claims on a summary basis, this ought to reduce the scope of the claims considerably and promote an early settlement. I will, therefore, do so.

VIII. Disposal

153. I am satisfied, therefore, that the Particulars of Claim disclose no reasonable claim for dishonest delay under Paragraph 5. I am also satisfied that the 241 funds or sub-funds who advance claims in Category C have no real prospect of succeeding at trial in proving reliance under Paragraph 3 and that I should grant reverse summary judgment in respect of those claims. I invite the parties to agree a form of order which reflects these findings and I will hear argument on any consequential issues at CMC3 which is listed in a window commencing on 25 November 2024. I will adjourn the final disposal of the Strike Out Application and extend time for any application for permission to appeal until 21 days after CMC3 and I invite the parties to incorporate such a provision in any agreed order.