IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 227 of 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Ms Katie Pearson and Ms Alexia Adda of Claritas Legal for the Plaintiff

Mr Ben Tonner KC and Ms Sally Bowler of McGrath Tonner for the Defendant[1]

Heard: 13 December 2023

Further submissions: 5 January 2024

Draft Ruling Circulated 24 January 2024

[1] By the time the present Ruling was delivered, the Defendant was represented by Nelsons Legal.

Ruling delivered: 31 January 2024

HEADNOTE

Hearing on quantum-breach of contract-temporary deprivation of property- basis for assessing measure of damages for failing to return plaintiff's shares-relevance of market price-need for adjustment to take into account illiquidity of market

RULING ON MEASURE OF DAMAGES

Introductory

1. On 13 December 2023, I delivered an Ex Tempore Judgment on quantum issues following a split trial on liability in June of last year. Having heard oral argument on various quantum issues, I was not satisfied that the relevant principles on the assessment of contractual damages in the context of the factual matrix of the present case were sufficiently clear. Accordingly, the Order drawn up to give effect to that Judgment provided (in addition to giving directions for the filing of supplementary submissions):

> "*7. Judgment is reserved in respect of the amount of damages the Defendant is to pay to the Plaintiff in respect of its breach of contract claim…*"

2. In this Court's Judgment dated 17 August 2023 (the "Liability Judgment"), I allowed the Plaintiff's breach of contract claim. The claim arose in relation to two contracts. First, the Brokerage Contract dated 9 May 2018 pursuant to which the Plaintiff transferred 6 million YRIV shares to the Defendant in early August 2018 to be held in an account for trading purposes. Second, the SPA between the Plaintiff and PFS negotiated by the Defendant pursuant to which PFS purchased 1,144,584 YRIV Shares subject to a Put Option enabling PFS to require the Plaintiff to buy back the shares at a prescribed price. Whether the Put Option was waived by PFS or not is being litigated before the Nevada Court; this question involves a third contract, the Collateral Agreement pursuant to which the Plaintiff was required to secure its obligations under the Put Option through leaving YRIV shares with the Defendant. The Plaintiff's breach of contract claim had two limbs to it:

FSD0227/2018 Page 2 of 24 2024-01-31

(a) the complaint that the Defendant wrongfully refused its request to return all of its YRIV shares in October 2018; and

(b) the complaint that the Defendant wrongfully sold its YRIV shares without its consent in response to the publication of the Hindenburg Report in early December 2018.

The relevant factual matrix

3. The key findings in relation to the October 2018 demands are recorded as follows in the Liability Judgment:

> "*69. Assuming the Put Option had not been waived, FDL was only entitled to demand the return of such shares as were not subject to the relevant security obligations. Mourant's 26 October 2018 letter then dealt with the Collateral Agreement by characterising it as a unilateral instruction which FDL had validly withdrawn. It concluded by stating:*
>
> > *'… Accordingly, in light of your ongoing unlawful conduct, and the clear conflicts of interest you appear to be operating under, our client terminates, with immediate effect, the Brokerage Contract. Your client therefore has no lawful basis upon which to continue holding the Shares, such shares being beneficially owned by our client…"*
>
> *70. Assuming that FDL was still bound by the security obligations under the Put Option, on the hypothesis that it had not been waived, CSL was contractually obliged under the Brokerage Contract to return that portion of the Shares (if any) which was not subject to any security obligations…*
>
> *76. For these reasons I find that FDL's claim for breach of contract in respect of CSL's refusal to return FDL's shares in September-October 2018 succeeds on the hypothesis that the Put Option had not been waived by PFS, to the following extent. I find that CSL was (at that stage in time) entitled to retain on a most generous view in the region of 55% of the shares as security for the Put Option and as security for its rights of indemnity under*

FSD0227/2018 Page 3 of 24 2024-01-31

the Brokerage Contract. FDL's claim would succeed to this extent. These claims together would not have justified retaining more than between 7,500 to 15,000 more of FDL's shares in addition to the 1.3-2.6 million shares needed to secure the Put Option."

4. The Plaintiff had contended that it was entitled to the return of all of its YRIV Shares; the Defendant had contended it was entitled to retain all of the Plaintiff's YRIV shares as security for the Plaintiff's contingent indemnity obligations to PFS under the Collateral Agreement and to the Defendant under the Brokerage Contract. At the time when the demands for the return of the shares were made it was not possible for either party to know how the dispute about waiver of the Put Option would be resolved. It was possible to ascertain the Plaintiff's potential liability under the Put Option and security obligations.

5. The Plaintiff's quantification of its claim was set out in its Submissions in the following uncontroversial terms:

> "*93. On 26 October 2018, when at least 45% of the Retained Shares should have been, but were not, returned they were worth US$57,501,346.32 (being the share price of US$11.77 multiplied by the number of Retained Shares, 4,885,416…*
>
> *94. 45% of that sum is US$25,875,605.84…*"

6. The Plaintiff accordingly sought damages for breach of contract based on the market value of 45% of its YRIV shares which the Court found ought to have been returned on 26 October 2018. At this point the market value had risen since the SPA was consummated. The shares were at trial worthless. The Defendant accepted that in temporary deprivation of property cases damages could potentially be measured based on the market value at the date when the tort or breach of contract occurred, but contended that this was not an inflexible rule. It was inappropriate in relation to the YRIV shares owned by the Plaintiff because (a) the Plaintiff would not have sold the shares had they been returned in late October 2018, (b) the Plaintiff did not consider the shares were worth more than $3 million, and (c) the size of the Plaintiff's stake (taking account of shares owned by related parties) meant that any sale would have been subject to restrictions under US regulatory laws.

FSD0227/2018 Page 4 of 24 2024-01-31

7. The Defendant was unable to file any evidence for the purposes of the Quantum Hearing because of a Debarring Order dated 7 September 2023 which, perhaps overly leniently, penalised the Defendant for non-compliance with an Unless Order by precluding it from filing further evidence but not from further participating in the proceedings.

Governing legal principles

The competing submissions

8. The Plaintiff's counsel relied on the assessment principles described in '*McGregor on Damages'*, 21st edition as being applicable to claims for non-delivery of purchased shares, which claims I was initially inclined to accept are analogous to a claim for failing to return another's shares. According to *McGregor* (at paragraph 29-03):

> "*The normal measure of damages is the market price of the shares at the contractual time for delivery less the contract price. This represents the amount required to put the buyer in the position they would have been in had the contract been carried out, since to do so they must buy equivalent shares in the market. This measure was established as far back as Shaw-v-Holland*[2] ."

9. In a footnote to that paragraph, *McGregor* cites a more modern case as confirming the same principle where the purchased shares were not simply not delivered but also sold: *Sentinel International Ltd-v-Cortes* [2008] UKPC 60, a Bahamian appeal to the Privy Council. I am unable to identify any or any clear statements of principle to this effect in that case and the Plaintiff's counsel unsurprisingly did not rely upon it.

10. Again, as a matter of initial impression, wrongfully selling another person's shares, or indeed other property, appears in a general sense to be analogous to wrongfully retaining another's property. Ms Pearson further relied on the following passage from *McGregor* at paragraph 34-096 which dealt with the parallel context of selling shares which should have been delivered to the purchaser:

[2] (1846) 15 M. & W. 136.

FSD0227/2018 Page 5 of 24 2024-01-31

"*Where the broker sells shares which have been deposited with them as margin by the principal, this will constitute at the moment of such sale both a breach of contract and a conversion. Commonly a fair interval of time will elapse before the principal comes to hear of the broker's default and therefore before they can bring an action. In such circumstances, where the market had fallen in the interval, it was held in Solloway v McLaughlin, that the principal was still entitled in conversion to the market value at the time of conversion, and there is no reason why in an action for breach of contract he should not equally be entitled to the market value at the time of breach. This award may represent more than the claimant has lost as he had clearly not intended to sell the shares during the interval; but any other rule would allow the broker to profit from his default…*"

11. She submitted that later references in the same text to cases where that rule was not applied reflected circumstances where the claimant was seeking to recover damages by reference to a valuation date other than the date of breach of contract or duty. Mr Tonner KC in his oral submissions did not appear to me to dispute the propositions that (1) the approach to assessing damages for a breach of contract in the present factual matrix was essentially the same as that for the tort of conversion or (2) that the usual measure of damages should be based on the market price of the shares at the date when the breach of contract occurred. Rather he submitted that the general rule was not inflexible and should be displaced in the circumstances of the present case because it was clear that the Plaintiff would not or could not have sold all the shares if they had been duly returned.

12. In the Defendant's Written Submissions filed after the hearing, however, it was submitted:

"*3…with regard to FDL's Submissions that the 'normal measure of damages' applies in this case and the measure of damages is therefore the market price of the shares at the contractual time for delivery less the contract price, it is submitted that the commentary and supporting case law are not analogous to this case because they concern a scenario where the plaintiff had contracted to purchase shares from the defendant which the defendant did not deliver when agreed, or at all, and after the contract price had been paid. Whereas in this case FDL had not contracted to purchase any shares from CSL. Here, the breach of contract arises from CSL's failure to deliver up the Shares (being shares which FDL already owned) following the demand for them to be delivered up, and which CSL still holds, i.e. FDL has been temporarily deprived of its own shares…*

FSD0227/2018 Page 6 of 24 2024-01-31

9. Reference is also made in FDL's Submissions to commentary made in McGregor on Damages specifically dealing with breaches of contracts by stockbrokers. FDL submits that this commentary shows that damages for breach of contract will be the same as damages for conversion. The cases referred to in the commentary in support of the principle are Solloway v McLaughlin (a conversion case) and Simmons v London and Mansell v British Linen Co. (breach of contract). However, this commentary and cases are again distinguishable because they relate to professional service contracts where the stockbroker holds shares owned by the plaintiff and proceeds to sell them without instruction, which is not the case here…

10. CSL agrees with FDL's submission that damages for breach of contract are the same as damages for conversion to the extent that it relates to the assessment of damages involving temporary rather than permanent deprivation. The commentary in Clerk and Lindsell on Torts says that where there has only been a temporary conversion it is likely to merely give rise to damages for actual loss (as per Brandeis Goldschmidt & Co Ltd v. Western Transport Ltd and Williams v. Peel River Land and Mineral Co. Ltd.) unless the goods converted had been held for resale on the spot market, in which case the plaintiff is likely entitled to the value of the shares as at the time of refusal to return to mark the fact that it has lost the chance of an advantageous sale (as per Solloway).

11. In the Court of Appeal case of Brandeis, the plaintiff imported copper to be refined and was found liable for wrongful detention. On the question of damages, the plaintiff argued that it should be entitled to an amount equivalent to the fall in the price of copper during the period of its detention plus interest. The court found on appeal that the plaintiff was only entitled to nominal damages for the infringement to its right to possession of the goods. The court confirmed that there was no universal rule for assessing damages for wrongful detention of goods and the plaintiff could only recover damages which were proved to have resulted from the detention of the copper and that where the detention caused adverse interference with the course of the plaintiff's business operations, they had to prove that they had suffered a quantifiable loss by reason of it. As the copper was acquired for use as a raw material in their business, the plaintiff had neither been deprived

FSD0227/2018 Page 7 of 24 2024-01-31

> *of the opportunity to sell it on the open market on the date when the detention began nor been compelled to sell it on the date when it was delivered up and therefore failed to establish their entitlement to damages based on the fall in the market price of copper during the period of detention.*
>
> *12. In the case of Glenbrook Capital LP v Mark Hamilton trading as Hamiltons, although the damages were assessed by the court as the value of the silver bullions at the time the defendant refused to return them because the bullions were purchased for investment and re-sale, the court did comment that this 'general rule' (set down in Solloway) is not always applicable:*
>
> > *'55. However, these rules are not inflexible. In a case where the owner had no intention of selling the goods, because they were for instance a family heirloom, it would be inappropriate to award damages based on a difference of value.'*'

13. These submissions invite the Court to either find that the 'ordinary' measure of damages relied upon by the Plaintiff does not apply at all to cases of temporary deprivation or, alternatively, is inapplicable to the factual matrix of the present case. My initial response to these arguments was that the suggestion that sale cases were entirely different to the temporary deprivation context seemed more artificial than real. The only obvious distinction between the measure for damages in temporary and permanent deprivation cases was that the claimant who was ultimately able to recover their property must give credit for the value of the property when it is returned. If the value had diminished, the measure of damages would arguably be the difference between the value when the deprivation occurred and when the property was returned. If the value was unchanged or had increased, there would be no loss and any other special damage would have to be proved. If the returned property was worthless (as in the present case), the measure of damages would appear to be the same as in the permanent deprivation cases.

14. I was initially inclined to accept the contention that the ordinary rule was not an inflexible one, but found it difficult to identify the principles governing when the ordinary rule should not apply.

FSD0227/2018 Page 8 of 24 2024-01-31

The 'ordinary' measure of damages for breach of contract involving a temporary deprivation of property

15. The critical legal dispute accordingly is both (1) what is the ordinary measure of damages in a temporary deprivation case, and (2) if the rule contended for by the Plaintiff does apply, in what circumstances should the Court apply a different measure because the general rule does not fit the facts of a particular case?

16. Firstly, it is clear that as a matter of legal principle the measure of damages in temporary and permanent deprivation cases is different. I reject Ms Pearson's submission that the following Privy Council decision supports the application of the Solloway principle in the temporary deprivation context. In fact it supports the contrary proposition. In *BBMB Finance (Hong Kong) Ltd.-v- Eda Holdings Ltd.*[1990] 1 W.L.R. 409 at 412, Lord Templeman opined as follows:

> "*Both the Brandeis case [1981] Q.B. 864 and the Peel River case (1886) 55 L.T. 689 were concerned with damages caused by temporary deprivation of possession and use of property. A different consideration will apply when the property is irreversibly converted and the plaintiff loses that property. The plaintiff loses the value of the property at the date of conversion and the general rule is that the measure of damages is the value thus lost. To depart from that rule in the present case would be inconsistent with Solloway v. McLaughlin [1938] A.C. 247 […] Their Lordships do not consider that the decision in Solloway v. McLaughlin can be affected by the Brandeis case or by the Act of 1977 which only came into force after the Brandeis case had been decided.*" [Emphasis added]

17. *BBMB Finance* was a permanent, not a temporary, deprivation case. This decision is illuminating because of what the Privy Council held (*obiter*) the temporary deprivation measure of damages was and its affirmation of the decision in *Solloway*. Before making the quoted remarks, Lord Templeman set out with explicit approval counsel's submissions on the distinction between the two categories of cases. As to temporary deprivation:

> "*…And where …the plaintiff has only suffered temporary deprivation of his property, the appropriate measure of damages may be assessed by reference to the value at the date when the plaintiff demanded the return of the property …or the date when the plaintiff was prevented from reselling the property…*" [Emphasis added]

18. The phrase "*by reference to*" signifies that in a permanent deprivation case the measure of damages is the market value when the breach occurs. In contrast, in a temporary deprivation case that value is merely a reference point. *Solloway v. McLaughlin* [1938] A.C. 247, which was the main case upon which the Plaintiff's counsel relied, was a case involving a fraudulent conversion whereby the plaintiff unwittingly recovered some of his converted shares but was permanently deprived of the rest. In addition to addressing permanent deprivation, the Privy Council was required to directly address the measure of damages for temporary deprivation as well. Lord Atkin held as follows (at pages 257-258):

> "*Their disposal of the deposited shares amounted to nothing short of conversion, and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion. How, then, is his position affected by the fact that, not knowing of the conversion, he received from the wrongdoer, and has retained, the very goods converted or their equivalent? It appears to their Lordships that the only effect is that he must give credit for the value he has received at the time he received it, and that the damages must be reduced by this amount…*
>
> *It does not require argument to show that the amount by which the damages are reduced must be the value of the goods when returned.*"

19. This is high authority for the proposition that the ordinary rule in temporary deprivation cases is that damages are assessed by reference to the difference (if any) between the market value of the wrongly retained or disposed of property, at the date of the relevant breach of contract or duty, and the value of the property when it is recovered. It remains to consider whether there are any other subsequent decisions which undermine the two Privy Council decisions just considered.

20. One of the more modern temporary deprivation cases upon which Mr Tonner KC relied, *Brandeis Goldschmidt & Co. Limited-v- Western Transport Limited* [1981] QB 864, was regarded by the Privy Council in *BBMB Finance (Hong Kong) Ltd.-v- Eda Holdings Ltd.* as not affecting the *Solloway* decision. This may be in part because the Solloway decision was not considered by the

Court of Appeal in *Brandeis*. The implicit rejection of the damages rule applied in *Solloway* by Brandon LJ (as he then was, at pages 869-873), is accordingly not as persuasive as it might be:

> "*For the defendants, on the other hand, it was argued that there was no general rule of law that damages for detention should be assessed by reference to the difference between the market value of the goods at the time when they should have been delivered up and their market value at the time when they were in fact delivered up. It was conceded that, if the plaintiffs had been copper merchants who had acquired the copper for the purpose of trading it on the market, then the measure of damages referred to might well be the correct one. On the facts of this case, however, that was not the purpose for which the plaintiffs had acquired the copper and the measure of damages referred to was wholly inappropriate. The plaintiffs had acquired the copper as a raw material for use in their business, and it was for them to show how their business had actually been affected adversely, if at all, by the detention of the copper. In fact they had made no attempt to prove any such adverse effect, either in the form of lost profits or otherwise, and in the absence of such proof they were entitled either to no damages at all, or to nominal damages at most.*
>
> *The judge, after being referred to a number of authorities, accepted the contentions put forward for the plaintiffs, and rejected those put forward for the defendants. In accordance with those conclusions he gave judgment for the plaintiffs in the amounts which I set out earlier.*
>
> *Looking at the matter from the point of view of principle first, I cannot see why there should be any universally applicable rule for assessing damages for wrongful detention of goods, whether it be the rule contended for by the plaintiffs or any other rule. Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case.*
>
> *It is for plaintiffs to prove what loss, if any, they have suffered by reason of a tort, and when, as here, the effect of the tort is potentially adverse interference with the course of their business operations, it is for them to establish by evidence that there was in fact such adverse interference, and that they suffered a properly quantifiable loss by reason of it. If*

that is indeed what the plaintiffs are in law required to do, it is manifest that they have wholly failed to do so in this case…

On that approach, so far as the first head of claim is concerned, it seems to me clear that the plaintiffs did not prove their case at all. They had not acquired the copper for sale on the market at a profit, but to use it as a raw material in their business. In these circumstances the detention of the copper did not deprive them of the opportunity of selling the copper on the market at the price ruling on the date when the detention first began; nor oblige them to sell it on the market at the much lower price ruling on the date the copper was delivered up. It is no doubt possible that, by reason of the detention of this relatively small amount of the raw material used in the plaintiffs' business, they suffered a loss of profit on the sale of their finished products which they would otherwise have made."

21. *Brandeis* clearly stands for the proposition that there is no general rule that the measure of damages for the temporary deprivation of shares or other property is the difference between the market value of the property when the deprivation occurs and the market value when it is recovered. It decides that in every case the plaintiff must prove that a loss of opportunity to sell at the market price occurred at the time the wrongful deprivation or retention occurred. *Brandeis* was distinguished by Jonathan Hirst J in *Glenbrook Capital LP-v-Mark Hamilton* [2014] EWHC 2297 (Comm):

"*55. However, these rules are not inflexible. In a case where the owner had no intention of selling the goods, because they were for instance a family heirloom, it would be inappropriate to award damages based on a difference of value. In Brandeis Goldschmidt & Co Ltd v. Western Transport Ltd [1981] QB 64, Brandon LJ refused to award value based damages where the converted copper was intended for use in a manufacturing process and the plaintiffs were unable to establish special loss. At pp. 872–3, he distinguished between goods acquired 'for sale on the market at a profit' and goods acquired for use 'as a raw material in their business'. In that case the copper had been acquired as raw material for use in manufacturing and '[i]n these circumstances the detention of the copper did not deprive [the plaintiffs] of the opportunity of selling the copper on the market on the date when the detention first began'. So the plaintiffs recovered nominal damages only.*

FSD0227/2018 Page 12 of 24 2024-01-31

56. Here the Glenbrook silver was purchased for investment and resale…"

22. *Oxus Resources –v-Templeton Insurance Limited* [2007] EWHC 770 (Comm) was helpfully placed before the Court by the Defendant's counsel although positive reliance was not placed upon it. Langley J expressed doubts about the logic of the damages rule applicable to the delayed delivery of shares, but concluded (based on a review of cases dealing with the sale of goods which were considered to be relevant by analogy-but not the share conversion cases such as *Solloway*):

> "*83. The law is, in my judgment, clear and settled at the highest level. The measure of damages is the market value of the shares in Oxus on the date they should have been delivered to Templeton and that value is the purchase price of the shares at that date. It matters not whether Templeton, as on my findings it would have done, would have sold the shares had they been delivered to it.*"

23. *Bear Stearns Bank Plc. V Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) (Andrew Smith J) was referred to in support of the proposition that a claimant has a duty to mitigate their loss when there is an available market, rather than seeking to enforce their existing contract. This ground for departing from a market price-based assessment of damages was rejected on the grounds that it was incumbent on the defendant to show that the plaintiff had acted unreasonably in relying on their contractual rights. This was, in any event a case, involving a 'permanent' refusal to complete the sale of notes rather than a temporary deprivation case concerning shares.

24. In brief, none of the authorities relied upon by the Defendant provide a clear or persuasive basis for rejecting the general rule articulated in the *Solloway* case. This case, carefully read, clearly supports the Plaintiff's broad position.

25. In summary, I reach the following conclusions on the 'ordinary' rule for assessing damages for the temporary deprivation of property in breach of a contract under Cayman Islands law:

    (a) damages will generally be assessed or measured by reference to the difference (if any) between the market value of the shares or other property, when the breach of contract or duty occurs, and the market value when the property is recovered;

FSD0227/2018 Page 13 of 24 2024-01-31

(b) I regard as binding or highly persuasive the Privy Council decision in *Solloway v. McLaughlin* [1938] A.C. 247. This was approved (albeit by way of *obiter dicta* as opposed to by way of direct decision) by the Privy Council in *BBMB Finance (Hong Kong) Ltd.-v- Eda Holdings Ltd.*[1990] 1 W.L.R. 409 at 412. This is primarily because the present case concerns (1) shares in a listed company which was actively (however thinly) trading and (2) which were placed with an agent for investment purposes;

(c) I decline to follow the English Court of Appeal decision in *Brandeis Goldschmidt & Co. Limited-v- Western Transport Limited* [1981] QB 864. The *Solloway* decision was not referred to in argument in that case and the decision is in any event distinguishable on its facts. *Brandeis* does not in any event support the proposition that (1) even in the case of temporary deprivations of shares in listed companies placed with an agent for investment purposes and (2) irrespective of whether intention to sell has been an issue at trial, a plaintiff has to adduce positive evidence of an intention to sell the shares.

Circumstances in which the 'ordinary' measure of damages will be displaced

26. I have accepted that the 'ordinary' measure of damages in a temporary deprivation of property case involving property (such as the shares in a listed company which is trading on a major stock exchange) is any loss flowing from a diminution in the market value between the improper retention date and the recovery date. I have also found that it is not for the Plaintiff to prove (as a matter of course) that it would have sold the shares on the market promptly or at all if they had been duly returned when the law required their return. However, I also accept, for the reasons articulated by Brandon LJ in *Brandeis*, and advanced by Mr Tonner KC, that the ordinary rule cannot be a "universal" one which applies even where it is established that in reality the successful plaintiff has suffered no loss at all.

27. In my judgment the circumstances where the ordinary rule will be displaced may broadly be described as circumstances in which the logic underpinning the general rule is not engaged. The general rule assumes that marketable property has been wrongfully withheld from its owner. It also assumes that the owner has been deprived of at least the opportunity to exploit whatever commercial opportunities may arise from the ability to exercise ownership rights over the tradeable asset. It crucially assumes that the owner could if they wished, have liquidated the property upon

FSD0227/2018 Page 14 of 24 2024-01-31

its return at the prevailing market price. The market price at the date of wrongful retention and the date of return, in temporary deprivation cases, are rational reference points for ascertaining the quantum of any loss. It is easy for courts to apply and commercial actors and litigants can easily work out where they stand. It encourages compliance with contractual and other obligations.

28. Where the requisite commercial relationship exists and the 'ordinary' measure of damages rule for temporary (or indeed permanent) deprivation of property potentially applies, the onus must be on the defendant to put the plaintiff to strict proof of its loss. Even if issue is not formally joined on the measure of damages at trial, it may be clear from the evidential findings made on related issues that the 'ordinary' measure of damages cannot sensibly be applied. Where this occurs, the plaintiff may not be entitled to recover the usual measure of damages (where the market has fallen) if the Court finds that the plaintiff has not established that it has suffered in 'real world' terms commensurate financial loss. Depending on the circumstances of the particular case, the options available to the Court in such circumstances will include:

(a) finding that the plaintiff need not prove that any sale or other transaction would necessarily have taken place;

(b) finding that no loss has been suffered at all, awarding merely nominal damages; and/or

(c) reducing the award which would otherwise have been made on a 'pure' market price basis where this is necessary to more accurately reflect the true market value.

Findings: the appropriate measure of damages

<u>The Plaintiff's pleaded case on damages for wrongful detention</u>

29. The Plaintiff's Amended Statement of Claim alleged, *inter alia*, breach of contract by reason of failure to comply with its instructions to transfer its shares given finally on 26 October 2018 (paragraph 39). It was then alleged without particularity that the "*said breaches have caused FDL loss and damage*" (paragraph 43). The Defendant responded to paragraph 43 in its Third Amended Defence by alleging that if it had complied with the transfer requests:

(a) the Plaintiff's shares would have had to be held as security for the Put Option; and

(b) as regards shares not subject to the security obligations, "*the sale price would have been the same and/or less than the Sale Price obtained by Canterbury*" (paragraph 48 (i)).

30. It was further pleaded: "*No admissions are made as to the alleged or any loss or damage claimed. Canterbury reserves its rights to amend when further particularisation is given*" (paragraph 48 (b)). On 18 April 2023, the Plaintiff's Additional Particulars of Loss and Damage averred as follows:

> "*4.1 The failure to return the Shares, of which at the material time there were 4,885,416 held by Canterbury, being the Shares minus the Purchased Shares (the 'Remaining YRIV Shares'), when instructed to do so on 19 September 2018, 24 October 2018 and/or 26 October 2018, which amounted to a breach of Canterbury's fiduciary and/or contractual duties and further or alternatively amounted to a conversion of FDL's property…*
>
> *5.1. As a result of failing to return the Shares, FDL has suffered loss and damage in the sum of $56,133,429.84, alternatively $56,084,575.68, in the further alternative $57,501,346.32 being, respectively, the value of the Shares which belonged to FDL as at the date that Canterbury failed to return them. The aforesaid sums are calculated by taking the adjusted close price of YRIV Shares, being $11.49, $11.48, and $11.77, and multiplying it by 4,885,416, being the number of FDL's shares held by Canterbury, which Canterbury failed to return. FDL is entitled to be compensated in one of these amounts in damages, alternatively by way of equitable compensation. FDL is entitled to, and does, elect to take the highest price for the Shares, being $57,501,346.32.*
>
> *5.2. In the further alternative, if the Shares may now be returned to FDL, FDL is entitled to receive: (a) the Shares, and (b) the sum of US$57,501,346.32 (alternatively $56,133,429.84, alternatively $56,084,575.68) less the value of the Shares at the date of delivery to FDL.*"

31. Accordingly, the Plaintiff expressly pleaded approximately two months before the trial their case for damages for temporary retention of their YRIV shares based on the difference between (1) the value of the shares when the Defendant failed to return them, and (2) the value when they were

FSD0227/2018 Page 16 of 24 2024-01-31

returned. While this is not necessarily dispositive, the Defendant did not (as it reserved the right to do) amend its pleadings to advance a positive case in answer to the Plaintiff's Additional Particulars of Loss and Damage.

32. Based on the pleadings, it was not apparent at trial that the Defendant was contending that this head of damages could not be claimed because (a) the Plaintiff had no intention of selling the shares in any event and/or (b) the Plaintiff due to US securities law restrictions could not have sold the shares in any event.

<u>The evidential case advanced by the Defendant at trial</u>

33. The Defendant did not through its own evidence, nor through cross-examination of the Plaintiff's Mr Dominic Sin, advance the case it advanced through argument during the Quantum Hearing. The 'new' case was that the Plaintiff would or could not have sold the shares, had they been returned, in any event. The Plaintiff accordingly had no need to address this issue through positive evidence of its own.

34. Even in advancing the Defence case on market manipulation, no positive assertion was made to Mr Sin in cross-examination that he and the Plaintiff were seeking to inflate the share price through limiting the number of shares on the open market. Mr Sin effectively admitted that the Plaintiff was concerned about preventing the shares being "shorted" and that the YRIV Founders wished to "dry-up" the market by way of response. This prompted the following findings in the Liability Judgment:

> "*122. In the course of the trial, Mr Sin described attempts to "dry up" the market in YRIV shares during a battle with a short-seller. Was this market manipulation? CSL could have pleaded a case based on this alternative form of market manipulation before Mr Sin's oral admission of what had occurred in another litigious commercial relationship. CSL was aware of FDL's completely transparent concerns to limit the size of the public float based on a concern about short-selling due to a somewhat hysterical reaction to the discovery that the Purchased Shares were being sold. In evaluating the risks of buying the shares FDL sought to sell to raise money to invest in YRIV, Ms Winczura described in her Witness Statement (at paragraph 30 (b)) one of the following concerns:*

> *'The volatility of YRIV's share price also made it an unattractive deal for a potential buyer of a large block of YRIV shares, in light of the relatively low trading volume. This was because it is generally difficult to sell a large block of thinly-traded shares at one time without having a negative effect on the share price as a result. A purchaser of a large block of such thinly-traded shares would therefore normally expect to have to sell the shares in small increments over an extended period in order to avoid depressing the price and suffering a loss as a result'…*

> *124. It is impossible to make sense of FDL obliging PFS to keep the Purchased Shares with CSL unless FDL (a) wished to limit the number of shares entering the public market in an unrestricted way, and (b) expected CSL as an apparently neutral broker to ensure that PFS honoured its commitment not to allow the Shares to be used 'in any manner to either short YRIV or facilitate shorting of YRIV.' Neither CSL nor PFS raised any objections at the time to the principle of a purchaser of shares agreeing to restrict their use during a six-month long period, or such shorter period as the Put Option might be in force.*"

35. This evidence is potentially relevant to the measure of contractual damages in two respects. Firstly, I found Ms Winczura's evidence on the effect of selling a large block of thinly-traded shares to be credible and it was ultimately supported by the consensus of the experts that the volume of the YRIV share sale in early December 2018 contributed to a decline in the share price. This is potentially highly relevant evidence which potentially undermines the assumption underpinning the 'ordinary' rule that the shares could have been sold *in toto* for market value on the date when the breach of duty occurred. Secondly, the finding that the Plaintiff wished to limit the volume of shares on the open market provides further potential support for the Defendant's counsel's submission that it is unlikely that the shares would have been sold at all.

<u>Has the 'ordinary' rule been displaced by the particular circumstances of the present case?</u>

36. In my judgment it is impossible to identify any principled basis upon which the Court could fail to take these findings into account when assessing the measure of damages. They are relevant to the question of whether or not, and if so to what extent, the general rule that damages should be measured by reference to market value at the date of breach less the value on the date of return (here nil) should be displaced. In my judgment the evidence which I accepted at trial falls far short

of displacing the general rule altogether. The relevant findings do not support the further finding that the Plaintiff would not have sold at all. The Plaintiff was never required to explain what it would have done with the shares had they been returned in late October 2018. By this date attempts to secure the port project had foundered. A decision might have been made to cash in, probably not by way of complete capitulation, but perhaps with a view to raising funds to cover losses or to launch some fresh investment adventure. The YRIV shares are not akin to a "family heirloom" or raw materials explicitly intended to be used in some manufacturing process where the notion of market sale is entirely artificial.

37. On the other hand, the peculiar character of the shares in the relevant market at the time when the shares were wrongfully retained makes the assumption of a full market sale highly unrealistic. Nonetheless, because issue was never formally or directly joined at or before the trial on the Plaintiff's pleaded case on the measure of damages, it would be fundamentally unjust to penalize the Plaintiff for failing to prove that the shares would have been sold. The market value measure is, however, both appropriate to some extent and to some extent inappropriate. It requires modification to take into account the particular circumstances of the present case.

The appropriate award for the Plaintiff's breach of contract claim

38. The Plaintiff's counsel correctly submitted that my finding in the Liability Judgment that 45% of the shares should have been retained allocated 5% to the Defendant's indemnity claim, which was dismissed on 13 December 2023. The appropriate award is therefore to be made in relation to 50% of the shares. In the Plaintiff's Written Submissions on Damages, Ms Pearson submitted:

> "*45. On 26 October 2018 the Retained Shares were worth US$57,501,346.32 (i.e. 4,855,416 shares at US$11.77 each). Half of that figure is US$28,750,673.16.*
>
> *46. FDL also seeks pre-judgment interest at 2⅜ %. For simplicity, given the claim was issued on 11 December 2018 (five years and one day prior to the quantum hearing) FDL respectfully suggests an appropriate interest calculation would be: 2⅜ % (rate) x 5 (years) x US$28,750,673.16 = US$3,414,142.44. FDL understands that CSL does not oppose this (paragraph 111 of CSL's written submissions dated 12 December 2023.)*

FSD0227/2018 Page 19 of 24 2024-01-31

47. In total FDL seeks damages plus interest of US$32,164,815.6. As is already provided for in the order made on 13 December 2023, FDL accepts it must give credit for the value of any Proceeds of Sale or Remaining Shares it recovers. However further damages may be payable following the judgment in the Nevada Proceedings."

39. The purpose of contractual damages is to place the injured party in the position they would have been in had the breach not occurred. This objective is almost indistinguishable from the corresponding position in tort. As Lord Neuberger and Lady Hale put it in *Knauer (Widower and Administrator of the Estate of Sally Ann Knauer) v Ministry of Justice* [2014] EWHC 2553 (QB) (at paragraph 1): "*It is the aim of an award of damages in the law of tort, so far as possible, to place the person who has been harmed by the wrongful acts of another in the position in which he or she would have been had the harm not been done…*" Both contractual and tortious damages aim to compensate a party for loss or damage suffered in real-world terms. As Brandon LJ stated in *Brandeis Goldschmidt & Co. Limited-v- Western Transport Limited* [1981] QB 864 at 870:

"*Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case….*"

40. Although counsel did not address an issue which is fundamental to any trial on damages, I have reminded myself of the correct approach to the assessment task. In my judgment it is self-evident that the approach in contract is, in general terms, the same as it is in tort. In *Smithurst-v-Sealant Construction Services Ltd* [2011] EWCA Civ 1277, Moore-Bick LJ stated:

"*10. Before turning to the authorities it is necessary to remind oneself of the important distinction in cases of this kind between proof of damage and assessment of damages. Damage is an essential element of the cause of action in negligence and therefore, as part of establishing liability on the part of the defendant, the claimant must prove on the balance of probabilities that the defendant's act or omission caused the harm in respect of which he claims. If he fails to do so, his claim will fail: see, for example, Hotson East Berkshire Area Health Authority [1987] AC 750. It is to be contrasted with the assessment of damages, which involves determining the extent of the loss suffered by the claimant, a distinction which Lord Hoffmann was at pains to emphasise in paragraphs 67-69 of his speech in Gregg v Scott. That may involve an enquiry into what would have happened,*

either in the past or in the future, if the defendant had not caused harm to the claimant and may require the court to assess the chances that one or more particular events would or would not have occurred. In one sense the issue can be characterised as one of causation, but not causation in the sense of proving that the respondent's breach of duty was the cause of the injury. It is usually, and I think preferably, treated as an aspect of the assessment of damages. It calls for a different approach because the nature of the enquiry is different.

11. In the present case it was not in dispute that Mr. Smithurst had suffered injury as a result of a breach of duty on the part of the respondent; the only remaining question was how great a loss had he suffered as a result. In Mallett v McMonagle Lord Diplock described the approach of the court when assessing damages. He said at page 176:

'The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.'" [Emphasis added]

41. These principles would justify the Court making a proportionate deduction to the award it would otherwise have made to take into account the likelihood that the Plaintiff would not have sold the shares at all had they been returned on 26 October 2018. However, in my judgment, the Court should make no discrete adjustment to the award to take this into account. The issue of what the Plaintiff would have done if the shares had been returned was not directly addressed at trial at all. And the Defendant failed to put the Plaintiff to strict proof of the Additional Loss and Damage plea which positively set out its market price contractual damages claim. In the absence of any challenge to this case (by way of pleadings or through cross-examination at trial) it would be inherently unjust to assume that the Plaintiff could not have proved that the shares would have been sold if required to do so. Had the Defendant not been subject to the post-Liability Judgment Forbearance Order,

FSD0227/2018 Page 21 of 24 2024-01-31

the Defendant could have supported its case through evidence, to which the Plaintiff could have replied, at the Quantum Hearing. This would have been the most logical stage for the issue to have been evidentially explored, even if further oral evidence might have been required.

42. In any event, the general or 'ordinary' rule must be modified to do justice in the present case. No injustice flows from modifying the general rule to more accurately reflect the real market value of the specific block of shares in light of findings made on closely connected issues at trial based on both expert and factual evidence. A modification of the rule in light of evidence fully canvassed at trial amounts to a judicial finding that the Plaintiff has failed to fully prove its pleaded case that the market value is the appropriate measure of its damage. That is distinguishable from being invited to find, with no sufficient evidential or pleaded foundation, that the Plaintiff would have suffered no damage at all. 'Trial by ambush' has no place in civil litigation.

43. In his pre-hearing Written Submissions, Mr Tonner KC advanced the following cogent fall-back arguments:

> "*47. If the Court does not accept that it is appropriate to award nominal damages for the September / October refusal to return, it is submitted that the market price of the 2.8 million shares that the Court has decided should have been returned in September /October 2018 should at least be discounted by 50%.*
>
> *48. The learned judge has ruled that CSL was entitled to retain up to 55% of the YRIV shares. For the purpose of determining how many shares CSL was entitled to retain (assuming the put has not been waived), the learned judge appears to have valued the YRIV shares at 50% of the September / October market price per share.*
>
> *49. In making that assessment, the learned judge appears to have accepted the proposition that YRIV's low trading volume, and the volatility of share price in the preceding 12 months, meant that it would not have been possible to sell a large block of YRIV shares quickly, at least not without depressing substantially the sale price. This assessment is consistent with the evidence of Keith Palzer…*"

44. It is correct that, in making a rough and ready assessment in the Liability Judgment (at paragraph 72) how many shares should have been retained as security for the Put Option, I considered that a

FSD0227/2018 Page 22 of 24 2024-01-31

50% reduction in the market price of the YRIV shares might, "*at most*", be appropriate to reflect their true value if sold as a block:

> "*(f) Mr Palzer in his Affirmative Report describes these sales as having been made 'in order to preserve value to cover the invoice', citing the evidence of Ms Winczura and the CSL pleading. It is therefore obvious that even in what was almost a fire-sale, all of the 4.8 million YRIV shares CSL was holding could not have been needed to secure FDL's obligations under the Put Option. Even if it was assumed in the autumn of 2018 that a fire-sale would achieve a return of only 50% of what was actually achieved (i.e. selling at $5 rather than $10), it would only have been necessary to retain at most perhaps 2.6 million of the 4.8 million parcel of YRIV shares…*"

45. In my judgment it is on balance appropriate to make a 50% reduction in the YRIV share price as at 26 October 2018 to take into account the 'real world value' of the improperly retained shares. This assumes they would potentially have been sold either as a block or incrementally over the next 4-6 weeks. After that, as we now know, the price began its unerring decline following the publication of the Hindenburg Report on 6 December 2018.

46. I accordingly assess the Plaintiff's damages for breach of contract at 50% of the US$28,750,673.16 (i.e.$14,375,336.58) it claims and award interest in the amount of 50% of the US$3,414,142.44 claimed in respect of interest (i.e.US$1,707,071.22). The total award is accordingly 50% of the total claimed in the sum of US$32,164,815.60 (i.e. US$ 16,082,407.80).

Costs-provisional views

47. My provisional view is that the Plaintiff has achieved substantial success overall in relation to the Quantum Hearing and should have its costs to be taxed if not agreed on the standard basis. In relation to the 12-13 December 2023 hearing, when costs were reserved, the main controversial issues were the Defendant's indemnity claims, which were all dismissed. The conversion issue was resolved in the Defendant's favour, but this had no material impact on the outcome of the damages award. It was ultimately common ground that the same measure of damages applied to the breach of contract claim, which I have just assessed based on supplementary submissions which assisted the Court to resolve a difficult point. The breach of contract claim was reduced by 50% adopting

FSD0227/2018 Page 23 of 24 2024-01-31

the Defendant's fall-back position advanced at the December hearing. To give credit to the Defendant for its partial success on a not insignificant 'big-ticket' issue, I would make a proportionate reduction to the Plaintiff's recoverable costs. I would award the Plaintiff 75% of its costs of the Quantum Hearing, to be taxed if not agreed on the standard basis.

Summary

48. For breach of contract, the Plaintiff's damages are assessed at US$14,375,336.58together with interest in the amount of US$1,707,071.22. The amount recoverable is based on the difference between the market price of the withheld shares at the date of their wrongful retention and their recovery and has been reduced by 50% to reflect their likely real value in a comparatively illiquid market. I award the Plaintiff 75% of its costs of the Quantum Hearing, to be taxed if not agreed on the standard basis, unless either party makes a written request to be heard as to costs within 21 days from the date this Ruling is delivered.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

FSD0227/2018 Page 24 of 24 2024-01-31