Neutral Citation Number: [2019] EWHC 2389 (Comm)

Case No: CL-2017-000753

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 13th September 2019

Before:

Christopher Hancock QC (sitting as a Judge of the High Court)

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Between:

KMG INTERNATIONAL NV	**Claimant**
(a company incorporated under the laws of the Netherlands)	
- and -	
(1) MELANIE ANNE CHEN	**Defendant**
(2) CHIPPER MANAGEMENT LIMITED	
(a company incorporated under the laws of the British Virgin Islands)	

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Alain Choo Choy QC, Anna Dilnot and Sophie Weber (instructed by **PCB Litigation LLP**) for the **Claimant**
Jonathan Crow QC and Jamie Holmes (instructed by **Fox Williams LLP**) for the **Defendants**

Hearing date: 29th July 2019

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Approved Judgment

CHRISTOPHER HANCOCK QC:

Introduction.

1. In this matter the Defendants seek to strike out the claim, or, alternatively, summary judgment on that claim. For its part, the Claimant, by a summary judgment application dated 23 July 2019, sought summary judgment against the Defendants on the three issues which were the subject of the Defendants' strike out application in the event the latter was decided against the Defendants.

The facts.

2. For the purposes of this application, I can deal briefly with the facts.

   (1) On 30 April 2016, the Claimant ("KMG") obtained an arbitration award for US$200m against a company called DP Holding SA ("DPH"). DPH was the holding company of a diverse group of companies.

   (2) The claim in these proceedings is made in tort, and is based on a breach of duties allegedly owed as a matter of Dutch or alternatively English law. The wrongful acts of the Defendants are said to have resulted in a diminution of the assets of DPH, since it is asserted that the Defendants caused the DP Group to part with a valuable asset, namely the shares in a German company, which company was part of the DP Group. It is asserted that the purpose of the transfer was to disable DPH from satisfying the arbitration award.

   (3) KMG contends that, under Article 4(1) of the Rome II Regulation (hereinafter "Rome II"), the claim is governed by Dutch law, and that there is a claim under Article 6.162 of the Dutch Civil Code.

   (4) Alternatively, KMG makes a claim in English law.

3. Accordingly, to quote the Defendants' skeleton, the essential facts for present purposes - in which the parties agree that I must assume the facts are as pleaded by KMG - are simply that:

   (1) KMG is bringing this claim in its capacity as a creditor of DPH by virtue of the Award;

   (2) The wrong that was allegedly done by the Defendants under Dutch law was done to NIBV, which was a sub-sub-subsidiary of DPH.

Adjournment of the application in relation to the English law claim.

4. At the beginning of the hearing, I adjourned consideration of the English law claims. That was because the principal question in issue between the parties, namely whether the Claimant's claims put forward as a matter of English law were untenable on the basis of the law as it now stood by reason of the principle of reflective loss ("the RL rule"), was currently the subject matter of an appeal to the Supreme Court which had been heard in May 2019. My reasons for this decision, which was essentially a question of case management, were set out in my earlier judgment.

5. However, that left the question of whether the claims put forward as a matter of Dutch law were also untenable by reason of the principles of English law dealing with reflective loss. I concluded that it would be useful to determine these matters, and accordingly heard argument on the issues which arose in this regard. This judgment deals with those issues.

The appropriate standard.

6. Although I was not addressed to any degree on the appropriate standard, I take the standard for summary judgment to be that set out by Lewison J (as he then was) in *EasyAir Ltd (trading as Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], a case that has been approved in a number of authorities, including *AC Ward Ltd v. Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at [24]; and *Global Asset Capital Inc v Aabar Block and others* [2017] EWCA Civ 37.

7. As regards the test for a strike out, this requires me to assume that the pleaded facts are correct, and then to ask, if those facts were made out at trial, whether the claim would nevertheless fail.

8. In this case, Mr Choo Choy very fairly accepted that if the points of law which were argued in front of me were correct, so that the RL rule applied even to the Dutch law claims, his client could not succeed on the basis of the current state of English law. Accordingly, since these were points of pure law, I did not understand there to be any dispute that a determination in favour of the Defendants would result in the claim being dismissed.

The issues.

9. I can summarise the Defendants' arguments under this heading very briefly. They argued that the English law rules as to reflective loss barred the Claimant's claims, even under Dutch law, because:

    (1) The RL rule was a rule of procedure and not substance and was accordingly governed by the *lex fori* and not the *lex causae*;

    (2) The RL rule was a mandatory overriding rule of English law within the meaning of Article 16 of Rome II;

    (3) Any derogation from the RL rule would be manifestly incompatible with English public policy within the meaning of Article 26 of Rome II.

10. I deal in this judgment with each argument in turn. However, before doing so, I will set out the leading authorities relating to the RL rule in English law.

The rule against reflective loss.

11. I start with the decision of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2*) [1982] Ch 204. In that case, a personal action was brought by shareholders in a company, on the basis that by reason of wrongful acts on the part of the defendants, the value of their shareholding had been diminished. This claim was said by the Court of Appeal to be misconceived, in the following well known passage, found at pages 222G to 223E:

"In our judgment the personal claim is misconceived. It is of course correct, as the judge found and Mr. Bartlett did not dispute, that he and Mr. Laughton, in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company."

12. The rule was then the subject matter of consideration by the House of Lords in *Johnson v Gore-Wood (No 1)* [2002] 2 AC 1.

13. Lord Bingham set out the following propositions in his speech in that case, at pages 35E to 36A:

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

"(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding ...

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

14. Lord Goff dealt with the matter as follows, at pages 41D to 42A:

"Here the question is whether certain heads of claim advanced by the plaintiff, Mr Johnson, against the defendant firm, should be struck out. The relevant heads of claim are usefully recorded in the opinion of my noble and learned friend, Lord Bingham of Cornhill. I do not propose to repeat them in this opinion. The Court of Appeal held that each of the heads of damage pleaded in paragraphs 23 and 24 of the re-amended statement of claim is recoverable as a matter of law by the plaintiff by way of damages for the breaches of duty pleaded by him, and so should not be struck out. It is against that decision that the defendant firm now cross-appeals to your Lordships' House.

The principal ground on which it is said by the respondent firm that some of these heads of claim should be struck out is derived from the well-known case of Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 . I agree with the analysis of that case, and of the other cases following upon it, set out in the opinion of my noble and learned friend, Lord Millett (which I have had the opportunity of reading in draft). I accordingly agree with his conclusion, post, p 126c-d that:

> *"On the assumption which we are bound to make for the purpose of this appeal, which is that the firm was in breach of a duty of care owed to Mr Johnson personally, he is in principle entitled to recover damages in respect of all heads of non-reflective consequential loss which are not too remote."*

On that basis I, like Lord Millett, agree with my noble and learned friend, Lord Bingham of Cornhill, that the heads of damage specified by him as items 1, 2, 4 and 5 are unobjectionable and should not be struck out. Item 3 relates to the diminution in value of the plaintiff's pension policy set up by the company and accruing to the benefit of the plaintiff as part of his remuneration in his capacity as director of the company. In so far as the claim relates to payments which the company would have made into a pension fund for the plaintiff, I agree that the claim is merely a reflection of the company's loss and should therefore be struck out. But in so far as it relates to enhancement of the value of his pension if the payments had been made, it is unobjectionable and should be allowed to stand."

15. Turning then to the speech of Lord Millett, he said, at pages 61G to 63D, and then at pages 66C to 67C:

"A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this is a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf:

see Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 , 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in Lee v Sheard [1956] 1 QB 192 , George Fischer (Great Britain) Ltd v Multi Construction Ltd [1995] 1 BCLC 260 , and Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443 . Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed. The position was explained in a well known passage in Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 , 222-223:

> *"But what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution of the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of*

> *participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the defendant does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company." ...*

... I cannot accept this reasoning as representing the position in English law. It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders.

Thomas J acknowledged that double recovery could not be permitted, but thought that the problem did not arise where the company had settled its claim. He considered that it would be sufficient to make an allowance for the amount paid to the liquidator. With respect, I cannot accept this either. As Hobhouse LJ observed in Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443 , 471, if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without a remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence.

But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands. The present case is a fortiori; Mr Johnson cannot be permitted to challenge in one capacity the adequacy of the terms he agreed in another.

Reflective loss extends beyond the diminution of the value of the shares; it extends to the loss of dividends (specifically mentioned in Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204) and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds. All transactions or putative transactions between the company and its shareholders must be disregarded. Payment to the one diminishes the assets of the other. In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. On the other hand, he is entitled (subject to the rules on remoteness of damage) to recover in respect of a loss which he has sustained by reason of his inability to have recourse to the company's funds and which the company would not have sustained itself.

The same applies to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder and even if he would have had a legal claim to be paid. His loss is still an indirect and reflective loss which is included in the company's claim. The plaintiff's primary claim lies against the company, and the existence of the liability does not increase the total recoverable by the company, for this already includes the amount necessary to enable the company to meet it."

16. Most recently (in this jurisdiction), the RL rule was considered by the Court of Appeal in *Marex Financial Ltd v Sevilleja* [2019] QB 173. In that case, having considered the authorities, Flaux LJ summarised the reasons for the rule as follows:

"32. On behalf of Mr Sevilleja, Mr David Lewis QC submitted that what emerges from these authorities is that there is a four-fold justification for the rule against reflective loss. I agree with that analysis. The four aspects or considerations justifying the rule which emerge from the authorities, in particular Lord Millett's speech in Johnson v Gore Wood & Co [2002] 2 AC 1 , are: (i) the need to avoid double recovery by the claimant and the company from the defendant: see per Lord Millett at p 62 quoted at para 18 above; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not by the defendant's wrongdoing: see per Lord Millett at p 66 quoted at para 20 above and Chadwick LJ in Giles v Rhind [2003] Ch 618 , para 78; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements: see per Lord Millett at p 66 again quoted at para 20 above; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors. The point about company autonomy is made by Lord Millett at p 66 quoted at para 21 above and the point about protecting minority shareholders and other creditors is made by Arden LJ at para 162 in Johnson v Gore Wood & Co (No 2) [2003] EWCA Civ 1728 quoted at para 24 above."

17. I take this statement as the most recent authoritative comprehensive account of the rule and the reasons for it, pending the decision of the Supreme Court on the point.

Substance or procedure?

The parties' respective contentions.

18. Under this heading, the Defendants submitted that:

    (1) The RL rule was not within the provisions of Article 15 of Rome II;

    (2) The RL rule was a rule of procedure within Article 1(3) of Rome II and thus outside the Regulation;

    (3) Applying common law rules, the RL rule was one of procedure and not substance, and was thus governed by the *lex fori* and not the *lex causae*.

19. Conversely, Mr Choo Choy, for KMG, submitted that:

    (1) The RL rule was within the express provisions of Article 15 of Rome II, and in particular Articles 15(a)(b)(c) or (f);

    (2) The list in Article 15 was not exhaustive and the RL rule fell within Article 15, properly understood;

    (3) The RL rule was not within Article 1(3) of Rome II;

    (4) Even if the RL rule did fall within Article 1(3) so that the Regulation did not apply to it, then the rule was a substantive one as a matter of the application of the English common law.

The relevant provisions of Rome II.

20. I will deal with each of these points in turn, but, before I do, it is convenient to set out the provisions of Rome II, namely Article 1(3) and Article 15, which provide as follows:

"CHAPTER I
SCOPE

Article 1

Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)… .

… 3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

CHAPTER V
COMMON RULES

Article 15

Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation…

Article 21

Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.

Article 22

Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum."

Issue 1: Is the rule within Article 15 of Rome II or is it excluded from Rome II by virtue of Article 1(3)?

21. Although I have set out these two issues as separate issues above, they are in my view interrelated. That is because it seems clear both from the provisions of Rome II itself and from the drafting history I refer to below that it was intended that the proper scope

of Article 15 and the ambit of the exception in Article 1(3) were indeed intertwined. The parties both addressed me on this basis and in my judgment they were right to do so.

22. I turn then to the parties' respective contentions on this first pair of issues.

The Defendants' contentions.

23. The Defendants contended as follows:

(1) The question of whether the rule is one of substance or procedure is a question of EU law.

(2) In applying EU law:

(a) It was not the goal of the English Court simply to reach the same result as a Dutch Court;

(b) A litigant in England could not expect to enjoy an advantage which other litigants could not;

(c) Article 1(3) is itself a choice of law rule;

(d) The *travaux* show that the intended effect of Articles 1(3) and 15 was to resolve any ambiguity about what was substance and what was procedure and to promote uniformity in this regard between countries.

(3) In relation to this last point, I was taken to various of the *travaux*, and, in particular, the Commission's Proposal dated 22 July 2003 ("the Commission's 2003 Proposal") and the European Parliament Report dated 27 June 2005. In this connection, I have also read and reviewed the helpful account of the history of Rome II in *Dickinson on The Rome II Regulation*, Chapter 1. The relevant parts of the drafting history, it was submitted, were as follows:

(a) In the original proposal, the Commission stated, in relation to Article 1 (the exceptions from coverage):

"These being exceptions, the exclusions will have to be interpreted strictly.

The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 that, subject to the exceptions mentioned, these rules are matters for the lex fori. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation."

(b) Article 11 was what became Article 15. I set out below the relevant provisions from the Commission's 2003 Proposal in the context of a consideration of the particular terms of that Article.

(c) The Commission's 2003 Proposal was however amended when the matter came before the European Parliament. It was at this stage that Article 1(3) was introduced. The justification for this Amendment was said to be as follows:

> *"This amendment takes account of the universal principle of lex fori within private international law that the law applicable to procedural questions, including questions of evidence, is not the law governing the substantive legal relationship ("lex causae") but, rather, the procedural law of the forum."*

(4) On the basis of this drafting history, it was submitted that the intention of the draftsman was that Article 1(3) and Article 15 should be read together, and that the purpose of Article 15 was to make clear which aspects of the law which might otherwise be regarded as procedural were nonetheless to be governed by the applicable law, in order to resolve differences that had existed in the manner in which this question had been treated in different countries prior to Rome II.

(5) Overall, it was submitted that the RL rule was one which was concerned with a condition for "*admissibility of actions, rather than rules concerned with the substance or content of parties' rights*" and was thus a rule of procedure. The quotation here was taken from the decision of the Court of Appeal in *Actavis v Eli Lilly* [2015] Bus LR 1068, where the Court said:

> *"130. Article 1(3) of Rome II is a rule about what is sometimes called the "vertical scope" of the Regulation. Evidence and procedure are excluded from the scope of the Regulation. Although it does not automatically follow that these issues will be subject to the lex fori, the private international law principle that such matters are for the law of the forum is well recognised. It is enough to quote Dicey at paragraph 7.002:*
>
> > *"The principle that procedure is governed by the lex fori is universally admitted."*
>
> *131. Article 15 of Rome II is not itself directly concerned with clarifying the distinction between substance on the one hand and evidence and procedure on the other. It simply contains a list of matters which are "in particular" to fall under the designated law. Included in the list are matters, such as limitation periods, which were traditionally the subject of some debate as to whether they were substance or procedure. Article 15 does not answer that question, but merely declares that they will be subject to the law which governs non-contractual obligations under Rome II. I therefore do not regard Article 15 as a safe guide to whether matters which do not fall within its scope are procedural or substantive.*
>
> *132. The distinction between substance and procedure is a fundamental one. The principle underlying it is said to be that a [foreign] litigant resorting to a domestic court cannot expect to occupy a different procedural position from that of a domestic litigant. Thus, that litigant cannot expect to take advantage of some procedural rule of his own country to enjoy greater advantage than other litigants here. Equally he should not be deprived of some procedural advantage enjoyed by domestic litigants merely because such an advantage is not available to him at home. Thus, at common law, every remedy was regarded as procedure: see for example Don v Lippmann (1837) 2 Sh. & MacL. 682 at 724-5.*
>
> *133. Whether a rule is to be classified as one of substance or one of procedure or evidence under Rome II is a matter of EU law: the fact that a rule is classified as*

one or the other under domestic law is of no relevance. There is therefore a need for an autonomous EU criterion for allocating rules into one or the other category.

134. In Wall v Mutelle de Poitiers Assurances [2014] EWCA Civ 138; [2014] 1 WLR 4263 , the claimant motorcyclist was injured in a motor accident in France. He claimed damages against the other driver's insurers in England. Liability, which was governed by French law, was admitted. The question arose as to whether the claimant should be permitted to adduce expert evidence in accordance with English practice, or whether a single joint expert should be instructed, as would be the practice in France. This court held that the issue of which expert evidence the court should order was one of "evidence and procedure" within Article 1(3) and not an issue relating to "the existence, the nature and the assessment of damage" within Article 15(c) of Rome II. It was argued that the objective of the Regulation was to ensure uniformity of outcome, and that the English court should do its best to ensure that uniformity by adopting all the rules of the foreign court which might affect outcome. The court rejected that argument (see Longmore LJ at [11] to [14] and Jackson LJ at [40] to [43]), holding that it was inevitable that the same facts tried in different countries might achieve different outcomes. The words "evidence and procedure" were thus given what Jackson LJ called their "natural meaning".

135. In my judgment, subject to any impact on the question which Rome II may have had, the rules with which we are concerned are conditions of admissibility of actions, rather than rules concerned with the substance or content of parties' rights. They are all concerned with whether the court should hear a dispute about substance. They are not concerned directly with the substance itself. Thus:

i) a rule about the need to seek an acknowledgement from the patentee will avoid the dispute coming to court if the acknowledgment is given;

ii) a rule requiring the giving of particulars will ensure that the proposed act is sufficiently formulated for the court to be able to adjudicate on whether it infringes;

iii) a rule requiring some form of interest, or degree of preparation, will avoid cases coming to court if the party seeking the DNI has not reached a stage where it has sufficiently formulated its plans;

iv) a rule requiring that the party seeking the DNI can show that it would serve a useful purpose avoids the court adjudicating on pointless disputes.

136. Such rules would traditionally, for private international law purposes, be classified as procedural and not substantive. In my judgment, therefore, they should continue to be so treated unless Rome II requires a different outcome.

137. I do not think Mr Mitcheson's argument based on Dr Illmer's illuminating article displaces this view. As Dr Illmer himself recognises, "matters of procedure concerned with the commencement of the proceedings" will continue to be governed by the lex fori. I consider that the rules with which we are concerned fall within that description. They are not so intertwined with matters of substance as to require them to be dealt with under the lex causae. Whilst the passage from Dicey on which Mr

Mitcheson relies suggests a very narrow interpretation of "evidence and procedure", the authors nevertheless say at 7-072:

> *"It is clear that rules on the conduct of the parties prior to the instigation of proceedings, for example on providing notice before action, or on the need for a meeting between parties before starting proceedings, are procedural."*

138. Whilst rules which require an interest, or effective preparations, are different, I can see no reason in principle why they should not be categorised in the same way. As the judge observed, they have the same broad purpose as the more formalistic rules to which Dicey expressly refers, and are quite distinct from the rules which govern the parties' substantive rights."

139. I do not accept that Article 15 should be given a wider effect than its language suggests, treating the listed matters as no more than examples of a class of analogous matters regarded as procedural in private international law, but now to be brought within the designated law. Mr Raphael is right that the legislative history shows that the Regulation was intended to respect the private international law principle that the ' lex fori ' is applicable to procedural questions.

140. Although Article 15 applies the lex causae to a number of matters which at least the English common law would have treated as procedural, none of them, as it seems to me, is apt to encompass the rules for admissibility of a DNI. I take these in turn.

141. Paragraph (a) is concerned with the basic conditions and extent of liability under a non-contractual obligation, and the persons who may potentially be held liable. Whilst Mr Mitcheson's attempt to fit the negative declaration into the wording of the paragraph is ingenious, it does not seem to me that, even if correct, it gets him home. That is because the conditions of admissibility of a positive claim are not caught by the section. If that is so, then I fail to see how the conditions of admissibility of a DNI can be caught either.

142. The problem with reading paragraph (c) as widely as Mr Mitcheson contends is that it covers any remedy, when the legislative history shows it was concerned with financial remedies alone. Moreover, as the judge pointed out, other language versions of paragraph (c) use words which translate as "compensation", "indemnity" or "reparation". Reading it more broadly, the domestic court could find itself having to apply remedies of a nature unknown to its law. This would be in stark contrast to paragraph (d) which covers specific remedies aimed at preventing or terminating injury or damage, but which are limited by the opening words "within the limits of the powers conferred on the court by its procedural law." To my mind, the negative declaration, whilst no doubt a remedy, is not a remedy which falls within (c).

143. The negative declaration is also not within (d), because it is not a measure which the court takes to prevent or terminate injury or damage, or provide compensation. Unlike an injunction to prevent infringement, it cannot be said that a characteristic of a DNI is that it prevents injury or damage. Moreover paragraph

(d) is again concerned with the availability of such remedies, not the conditions which must be satisfied for their admissibility.

144. Finally, the mention of limitation periods in paragraph (h) is not a basis for suggesting that the conditions of applying for a DNI should be brought within the lex causae.

145. It follows that, had we needed to decide the point, I would have agreed with the judge that Rome II does not result in the conclusion that the lex causae applies to the conditions for applying for a DNI. Those conditions are procedural, and subject to the lex fori."

(6) Overall, the RL rule does not extinguish the claim, which remains open to the Claimant in particular circumstances. Instead it operates as a procedural bar to a claim being made.

24. Turning then to Article 15, the Defendants submitted that the RL rule did not come within any of the express heads of Article 15, and that that Article should be regarded as exhaustive. More particularly, in relation to the various heads relied on by KMG, they submitted as follows:

Article 15(a).

25. The Defendants contend that Article 15(a) governs the question of who may be liable and the extent of that party's liability, and that the rule against reflective loss does not go to the extent of a wrongdoer's liability, but to who is entitled to claim in respect of a particular head of loss arising out of that wrongdoing.

Article 15(b).

26. The Defendants submit, again, that these rules relate to the position of the defendant, whilst the rule looks to the position of the claimant. As such, the RL rule is not governed by Rome II because of the provisions of this subparagraph.

Article 15(c).

27. Once again, the nature of the Defendants' argument is similar. They submit that this provision relates to the damages available, but does not relate to the question of who can make a claim, which is the subject matter of the rule.

Article 15(f).

28. The Defendants argue that this is the only provision which might catch the RL rule. However, they argue that I should not construe the sub-Article as going beyond the cases set out in the Commission's 2003 Proposal since that would undermine the central desire for certainty which underlies the whole of Rome II.

29. Overall, therefore, the Defendants submit that:

(1) The RL rule is a rule of procedure within Article 1(3);

(2) The RL rule is not within any of the express provisions of Article 15;

(3) The provisions of Article 15 should be read as exhaustive.

KMG's contentions.

30. KMG's submissions, in outline, were as follows:

(1) In interpreting the Regulation, the courts had to have regard to the need for certainty.

(2) Article 1(3) had to be interpreted in the light of the provisions of Article 15, which provided that a number of matters which might be considered procedural had to be determined in accordance with the lex causae.

(3) Article 1(3), as an exception or restriction on the applicability of the Regulation, had to be interpreted narrowly, a conclusion reinforced by the fact that Article 15 was, according to the Commission, intended to give a wide function to the applicable law. In this regard, they cited the following passage from the Commission's 2003 Proposal:

"Article 11 defines the scope of the law determined under Articles 3 to 10 of the proposed Regulation. It lists the questions to be settled by that law. The approach taken in the Member States is not entirely uniform: while certain questions, such as the conditions for liability, are generally governed by the applicable law, others, such as limitation periods, the burden of proof, the measure of damages etc, may fall to be determined by the lex fori. Like Article 10 of the Rome Convention, Article 11 accordingly lists the questions to be settled by the law that is actually designated.

In line with the general concern for certainty in the law, Article 11 confers a very wide function on the law designated. It broadly takes over Article 10 of the Rome Convention, with a few changes of detail."

(4) The RL rule is not an indispensable feature of the forum's legal framework for resolving disputes which is the test suggested by the leading textbooks on the subject:

(a) In *Dickinson on The Rome II Regulation*, at paragraphs 14.60 and 14.61, the author concludes that a decision by a Court to refuse to apply a law which comes under the provisions of Article 15 on the grounds that the rule is procedural would be exceptional and justified on the basis that the rule has a feature that renders it as an integral and indispensable element of the forum's legal framework for the judicial determination of disputes.

(b) The learned editors of *Dicey, Morris and Collins on The Conflict of Laws* state, at paragraph 34-36:

"Article 1(3) stipulates that the Regulation shall not apply to evidence and procedure without prejudice to Art.21 (concerned with "formal validity") and Art.22 (concerned with "burden of proof"). These provisions, and their relationship with the law applicable under the Regulation, are addressed in further detail below. At this stage it will suffice to draw attention to two

points. First, the exclusion of evidence and procedure seems to mean, that English practice in relation to the pleading and proof of foreign law continues to have effect. Secondly, while characterisation of matters relating to evidence and procedure is at least partially a matter for national law, the role and scope of the concepts of evidence and procedure must also be defined and understood within the framework of the Regulation. In particular, and in addition to Arts 21 and 22, it will be necessary to have regard to the non-exhaustive list of matters which Art.15 requires to be determined in accordance with the law applicable to non-contractual obligations under the Regulation. This list includes issues which, at common law, were characterised as matters of procedure, to be governed by the law of the forum. Foremost among these are "the nature and assessment of damage or the remedy claimed" and "rules of prescription and limitation". Whatever may be the position in cases to which the Regulation does not apply, these issues cannot be considered to fall within the scope of the exclusion of matters of "evidence and procedure" in Art.1(3), and they will henceforth be governed not by the lex fori but by the law to which the Regulation refers. In order to secure the objectives of the Regulation in enhancing the predictability of litigation and the reasonable foreseeability of court decisions, it is suggested that the Art.1(3) exclusion should be interpreted narrowly as covering only matters, such as the constitution and powers of courts and the mode of trial, that are an integral and indispensable feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the lex causae. As a consequence, it would no longer be possible (for example) to classify the provisions of the Fatal Accidents Act 1976 concerning the assessment of damages in dependency cases, or of a foreign statute placing limits upon the damages recoverable in traffic accident cases, as procedural in nature for the purposes of the Regulation."

(5) The rule is not a procedural bar, but serves to prevent recovery of damages in respect of a particular type of loss, and is thus substantive.

(6) The Defendants' reliance on *Actavis* takes them no further, for the following reasons:

(a) That action concerned patents and declarations of non-infringement, available even where there was no cause of action, in contrast to the RL rule, which relates to the recoverability of a head of loss where there is a cause of action;

(b) The finding that the rules were conditions of admissibility was said to be subject to any impact of Rome II;

(c) The Court of Appeal went on to find that none of the subparagraphs of Article 15 were apt to encompass a DNI because such a remedy was not a financial remedy nor a measure to prevent or terminate injury or damage. Here, even if the Court of Appeal was correct, then that reasoning did not apply to the rule against reflective loss;

(d) The Court of Appeal's decision on this point was obiter;

(e) The RL rule is not about admissibility of actions but is about recoverability of a particular head of loss.

31. KMG further submit that the RL rule does indeed come within the express provisions of Article 15, or is sufficiently similar to those cases dealt with in the Article to fall within the scope of that Article, which should not be treated as exhaustive.

Article 15(a).

32. The first head relied on by KMG is Article 15(a), on the basis that it relates to the extent of liability, which includes maximum limits of liability laid down by law. It relies on the analogy of the example given by the Commission of rules preventing claims between spouses, the applicability of which will be governed by the law chosen by Rome II. Thus, it is argued that, just as that rule determines who may be liable, a rule determining who may recover in respect of a particular type of loss should come within the scope of the rule chosen in accordance with Rome II.

Article 15(b).

33. Next, KMG contend that the matter falls within Article 15(b), as being related to an exemption or limitation of liability. They again cite from the Commission's 2003 Proposal, and its citation of a rule exempting claims between spouses, in which the Commission stated that this sub-paragraph included the "*exclusion of the perpetrator's liability in relation to certain categories of persons*".

Article 15(c).

34. Thirdly, KMG rely on the provisions of Article 15(c), which governs the existence, the nature and the assessment of damage or the remedy claimed, including *"the nature of the available remedy, questions of remoteness of damage, the duty, if any, to mitigate damage, the available heads of damage, and matters of assessment (quantification) of damage"*.

Article 15(f).

35. Next, KMG rely on Article 15(f), which indicates that the relevant law should deal with the issue of persons entitled to claim in respect of damage sustained personally. They refer to the example given in the Commission's 2003 Proposal, in which the Commission stated that the provision *"particularly refers to the question whether a person other than the "direct victim" can obtain compensation for damage sustained on a "knock-on" basis, following damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by a bereavement, or financial, as in the loss sustained by the children or spouse of a deceased person."*

My conclusions.

36. I have come to the very clear conclusion that Mr Choo Choy is right in saying that the rule against reflective loss falls within Article 15 of Rome II and not within Article 1(3). My brief reasons for this conclusion are as follows:

(1) I accept that the provisions of Article 1(3) should be construed as a matter of EU law.

(2) I accept the submission that Article 1(3) falls to be construed narrowly, in the light of the authoritative statements of the textbook writers which I have already set out, and the Commission's 2003 Proposal, to which I have also referred.

(3) As both parties have emphasised, Rome II was designed to promote legal certainty in cross border disputes. To this end, as the Commission has said, the provisions of Article 15 should be construed widely, and any derogations from such narrowly.

(4) This is emphasised by the breadth of the list of matters falling within Article 15, which cover the entire gamut of matters which would generally arise in the course of non-contractual claims, including a number of matters which would, under the law as it stood before the Regulation, have been considered to be outside the scope of the applicable law (such as limitation, assessment and remedies).

(5) It is further emphasised by the fact that even this broad list is probably not exhaustive, as the words "*in particular*" in Article 15 suggest: see *Dickinson*, op cit, at 14.04; *Dicey, Morris and Collins*, op. cit, at para 34-052.

(6) I accept the submission that the RL rule is not an indispensable feature of the forum's legal framework for resolving disputes which is the test suggested by the leading textbooks on the subject.

(7) Looking at the specific provisions, the clearest one seems to be Article 15(f). It is common ground between the parties that this provision caters for indirect loss, as is indeed made clear by the explanation given by the Commission to which I have already made reference. I see no reason for confining this provision in the manner suggested by the Defendants, and, indeed, it would be my view that to impose the suggested limit would detract from legal certainty and not promote such certainty.

(8) It is also my view that the RL rule falls within the other headings of Article 15, although, in view of my finding on Article 15(f) I can be brief on this.

   (a) In my view, the rule does relate to the extent of liability. It imposes a limit on the amount recoverable by the claimant from the defendant in respect of a particular head of loss. True it is that this limit is imposed because of the characteristics of the Claimant; but nevertheless it remains a rule which imposes a limit and thus relates to the extent of liability.

   (b) The same logic applies, in my judgment, to Article 15(b).

   (c) As regards Article 15(c), in my judgment the rule relates to the recoverability of a particular head of loss and is thus within the Article.

(9) I do not find the *Actavis* judgment of any real assistance in this regard. It is of course true that I am not bound by the dicta of the Court of Appeal in that case, but they are entitled to great respect. However, in my judgment, the provisions that the Court of Appeal was there considering, which did indeed relate to the formal preconditions for the admissibility of the particular type of action in issue, are to be contrasted with the RL rule in issue here, which is not a precondition to an action, but is a bar to recovery of a particular type of loss. In my judgment, the

RL rule is clearly one which affects the substantive rights and remedies of the Claimant and is not a procedural rule.

Issue 2: Is the RL rule procedural or substantive as a matter of the English common law?

37. On the basis of my findings so far, this further issue does not arise, since it would only arise if Rome II did not apply to the RL rule (as I have held it does).

38. I can therefore deal with my findings very briefly. I will again set out the parties' respective submissions in brief before turning to my conclusions.

The Defendants' contentions.

39. The Defendants submitted as follows:

(1) As a matter of English law, the question of whether the RL rule is substantive or procedural depends on whether the rule is concerned with determining a substantive right or barring or quantifying a remedy. In that regard, I was referred to *Boys v Chaplin* [1971] AC 356, 395, and *Harding v Wealands* [2007] 2 AC 1, at paras 24, 36 and 51.

(2) If the test was what the most appropriate law was, applying a purposive test, English law was the most appropriate since the rule is based on considerations of English policy.

(3) Various analogies were also suggested in this regard, including an analogy with limitation, rules as to actionability of damages, and rules as to priority between creditors, all of which are for the *lex fori*. In this regard, I was referred to *Harding v Wealands*, op cit; *Cox v Ergo Versicherung AG* [2014] AC 1379 at paras 14 and 41; *Iraqi Civilians v Ministry of Defence* (No 2) [2016] 1 WLR 2001, at para 1; and *The Halcyon Isle* [1981] 2 AC 221, 230A-231D.

KMG's contentions.

40. For its part, KMG submitted that:

(1) Only rules for the quantification or assessment of damages are procedural as a matter of common law. *Boys v Chaplin* and *Harding v Wealands* were concerned with such matters, not with the availability of particular remedies.

(2) In *Cox v Ergo Versicherung AG* [2014] AC 1379, at para 14, Lord Sumption, having referred to *Harding v Wealands*, noted that:

14. The leading case is the decision of the House of Lords in Harding v Wealands [2007] 2 AC 1 . The appeal arose out of an action in England for personal injury caused by a road accident in New South Wales. Under New South Wales law, damages were limited by Chapter V of the Motor Accidents Compensation Act 1999 (known as "the MACA"). Section 123 of the MACA provided: "A court cannot

award damages to a person in [a] respect of a motor accident contrary to this Chapter." The Chapter then provided for a fixed limit to the damages and a number of detailed rules for awarding them. These included an exclusion of the first five days of earning capacity, an exclusion of economic loss, a specified discount rate to be used to calculate lump sum awards, and a rule requiring credit to be given for payments received from an insurer. The House rejected the view that in section 14(3)(b) of the 1995 Act, "questions of procedure" referred only to rules governing the manner in which proceedings were to be conducted. They distinguished between questions of recoverability (substantive) and questions of assessment (procedural). At common law the kinds of damage recoverable was a question of substance, whereas their quantification or assessment went to the availability and extent of the remedy and as such were questions of procedure for the law of the forum. The House classified all the relevant provisions of the MACA as rules of procedure. They were accordingly inapplicable to litigation in England. The leading speech was delivered by Lord Hoffmann, with whom the rest of the House agreed. Lord Hoffmann stated the principle at para 24 as follows:

> *"In applying this distinction to actions in tort, the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and, if so, how much) or, for example, restitution in kind, is a question of remedy."*

This reflected the test previously stated by the majority of the House of Lords in Boys v Chaplin [1971] AC 356 .

(3) Here, applying the distinction laid out by Lord Sumption, the RL rule bars recovery of certain types of loss, and is not concerned with assessment or quantification. It is thus a substantive rule.

(4) If limitation is a true analogy, then, under the English law as it now stands, in the Foreign Limitation Periods Act 1984 s.1 then such rules are now governed by the *lex causae* and not the *lex fori*.

(5) Finally, a more appropriate analogy would be with the rule in relation to derivative actions, which are governed by the law of the place of incorporation, not the *lex fori*.

My conclusions.

41. I do not find the various analogies of any great assistance, nor, despite its great value as a description of the rationale for the inquiry into the appropriate proper law, have I derived great assistance from the decision in *Raiffeisen v Five Star* [2001] QB 825 (as cited by the Defendants).

42. In my judgment, KMG are correct to say that the rule against reflective loss is a substantive rule of the common law, based on the comments of Lord Sumption in *Cox v Ergo Versicherung AG*, quoted above. That is because, in my judgment, the rule is one which has to do with the kinds of damage recoverable, just as much as are rules relating to remoteness, mitigation and the like. The rule does not have to do with the assessment of the amount of compensation payable.

Overall conclusions on this first issue.

43. Overall, therefore, for the reasons I have set out:

    (1) I hold that the rule is within the express provisions of Article 15 of Rome II;

    (2) I hold that the rule is not within Article 1(3) of Rome II;

    (3) I hold that, even if the rule had been taken out of the provisions of Rome II by reason of Article 1(3), it would, at common law, be regarded as a substantive rule, governed by the *lex causae*.

44. I turn therefore to the Defendants' second and third grounds for seeking an order striking out the claim.

Overriding mandatory provisions?

45. Article 16 of Rome II provides as follows:

> *Article 16*
>
> ***Overriding mandatory provisions***
>
> *Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.*

The parties' respective contentions.

46. The Defendants submitted that as a matter of EU law the test is whether the rule in question – here the RL rule – is one of compliance with which has been *"deemed to be*

so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State". In that regard, I was referred to the original Commission Proposal, as to what was then Article 12.2, at pp. 25 and 37.

47. The Defendants submitted that the RL rule fell within this definition, because:

    (1) The Court has no discretion to disapply the rule;

    (2) It applies to bar an otherwise good claim, even in fraud, where loss has been suffered by the claimant;

    (3) The policy reasons outlined in the judgment of Flaux LJ in *Marex*, cited above, apply as "*part of the fabric of English company and insolvency law, and in turn the economic order of the forum*".

48. KMG, for its part, submitted as follows:

    (1) It noted that Recital 32 of Rome II makes clear that Article 16 is only to be applied in exceptional circumstances.

    (2) It submitted that the provision was analogous to Article 9(1) of the Rome I Regulation, which uses the same wording, which does indeed state that mandatory provisions are *"provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to the extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."* This statement as to the type of rule covered by Article 16 is similar to that put forward by the Defendants. It further submitted that a rule connected with private interests could not come within this definition.

    (3) It cited the decision of *United Antwerp Maritime Agencies (Unamar) NV v Navigation Bureau Bulgare* [2014] 1 Lloyd's Rep. 161, at para 49 (a case concerned with Rome I), which stated that the court has to take into account not only the exact terms of the provision of (national) law in question, but also its general structure and all of the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned.

    (4) Finally, it noted the provisions of Recital (37) to Rome I, which makes clear that the concept of "*overriding mandatory provisions*" is to be distinguished from the expression "*provisions which cannot be derogated from by agreement*" and should be construed more narrowly.

49. Applying this approach, KMG submitted that the RL rule was clearly not crucial to safeguard the political, social or economic organisation of the UK or England. The most that could be said was that the rule against reflective loss was informed by considerations of public policy, which would be true of many if not all rules of law.

My conclusions.

50. I have concluded that the rule against reflective loss is clearly not an overriding mandatory provision within the meaning of Article 16.

(1) My starting point is that the law which would be applicable to this question is, for the reasons I have given, Dutch law. The question is thus whether, despite this fact, the rule barring a claim for reflective loss should apply to override the rules of Dutch law on the recoverability of such loss, whatever such rules might be. In the latter regard, I note the comment in the Commission's 2003 Proposal on Article 22 that overriding rules apply without regard to the actual content of the foreign law.

(2) I have been shown no authority which is of any assistance in relation to this question. The question for me is thus one of first principle and impression.

(3) It is clear that the fact that the provision cannot be derogated from by agreement is not decisive of the issue, since, as has been pointed out by KMG, Recital (37) to Rome I draws a distinction between provisions which cannot be derogated from by agreement and overriding mandatory provisions.

(4) It is also, in my view, insufficient that the application of the rule is not discretionary and is, in that sense, mandatory. The fact that a provision of English law is mandatory in this sense does not establish that it is overriding so as to disapply what would otherwise be the proper law.

(5) I also note the provisions of Recital (32) to Rome II, which make it clear that this is an Article which is only to be applied in "*exceptional circumstances*". I do not regard this as an exceptional case or circumstance.

(6) Further, the fact that the rule is informed by considerations of policy (as are many rules of law) is insufficient to make it an overriding mandatory rule.

(7) Applying the test set out above, (which I accept is the correct test, since it is the test suggested by the Commission in its Explanatory Memorandum) I have concluded that the rule against reflective loss is clearly not a "*provision the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to the extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."*

(8) Whilst I do not need to go so far as to say that rules regulating private law claims such as this one cannot come within Article 16, as KMG submitted, it is in my view clear that it is the rules which the country (here England) regards as crucial for safeguarding its interests which are the focus of Article 16.

(9) Overall, I have concluded that the reasons put forward by the Defendants for saying that the rule is an overriding mandatory one fall far short of establishing this.

Public policy.

51. Article 26 of the Rome II Regulation provides as follows:

> *"The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum."*

52. The question for me, therefore, is whether, on the assumption that the provisions of English law are not procedural but substantive, Dutch law should not be applied because the application of such law would be *"manifestly incompatible with the public policy (ordre public) of the forum"*.

The parties' respective contentions.

53. As to the Defendants:

    (1) Their starting point was that it was necessary to take account of both English and EU law.

    (2) They then argued that the rule was one of public policy for the same reasons as given in relation to Article 16.

    (3) In addition, they contended that:

        (a) Any such derogation would be arbitrary, in circumstances in which the rule is otherwise mandatory;

        (b) The application of Dutch law so as to avoid the rule would amount to unlawful discrimination on the grounds of nationality and would be contrary to Article 18 of the European Treaty and Article 14 of the ECHR.

    (4) They did not refer me to any authority on the meaning of Article 26.

54. Conversely, KMG did refer me to a number of authorities and indications, which I deal with before I turn to its substantive submissions.

    (1) First, I was referred to Recital (32), which provides that:

> *"Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory, exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum."*

    (2) Secondly, the authorities, it was submitted, support a restrictive approach to Article 26.

        (a) In *Krombach v Bamberski* [2001] QB 709, the CJEU said:

The second question

35 By this question, the national court is essentially asking whether, in relation to the public-policy clause in Article 27, point 1, of the Convention, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in its territory and charged with an intentional offence, take into account the fact that the court of the State of origin refused to allow that defendant to have his defence presented unless he appeared in person.

36 By disallowing any review of a foreign judgment as to its substance, Article 29 and the third paragraph of Article 34 of the Convention prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin.

37 Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

38 With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States.

39 More specifically still, the European Court of Human Rights has on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing (see the following judgments of the European Court of Human Rights: judgment of 23 November 1993 in Poitrimol v France, Series A No 277-A; judgment of 22 September 1994 in Pelladoah v Netherlands, Series A No 297-B; judgment of 21 January 1999 in Van Geyseghem v Belgium, (Application No 26103/95) EHCR 1999-I, 127).

40 It follows from that case-law that a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused

person who is not present at the hearing constitutes a manifest breach of a fundamental right.

41 The national court is, however, unsure as to whether the court of the State in which enforcement is sought can take account, in relation to Article 27, point 1, of the Convention, of a breach of this nature having regard to the wording of Article II of the Protocol. That provision, which involves extending the scope of the Convention to the criminal field because of the consequences which a judgment of a criminal court may entail in civil and commercial matters (Case 157/80 Rinkau [1981] ECR 1391, paragraph 6), recognises the right to be defended without appearing in person before the criminal courts of a Contracting State for persons who are not nationals of that State and who are domiciled in another Contracting State only in so far as they are being prosecuted for an offence committed unintentionally. This restriction has been construed as meaning that the Convention clearly seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this (Rinkau, cited above, paragraph 12).

42 However, it follows from a line of case-law developed by the Court on the basis of the principles referred to in paragraphs 25 and 26 of the present judgment that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, inter alia, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraph 39, and Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).

43 The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing (Case 49/84 Debaecker and Plouvier v Bouwman [1985] ECR 1779, paragraph 10).

44 It follows from the foregoing developments in the case-law that recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing.

45 The answer to the second question must therefore be that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person."

(b) The approach in this case was followed in the later case of *Gambazzi v Daimler* [2010] QB 388, where the CJEU said:

"36. The Court of Justice has imposed limits on reliance on the public-policy proviso in that connection, to the effect that recourse to the proviso can be envisaged only where recognition or enforcement would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle: Krombach , para 37 and Renault , para 30."

(c) In the English domestic context, in the case of *Kuwait Airways Corp v Iraqi Airways Corp* [2002] AC 883, at paragraphs 17 and 18, Lord Nicholls said:

"17. This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal": see Loucks v Standard Oil Co of New York (1918) 120 NE 198, 202.

18. Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: Oppenheimer v Cattermole [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

(3) KMG also contended that the Defendants' position was inconsistent with decided case law, and in particular the cases of *LCIC Telecommunications SARL v VTB Capital PLC* [2018] EWHC 169 (Comm) and *Khazakstan Kagazy PLC v Zhunus* [2013] EWHC 3618 (Comm).

55. KMG then went on, turning to the substance, to argue as follows:

(1) The fact that the rule was mandatory in the sense that it did not involve the exercise of a discretion did not mean that it satisfied the restrictive test for being a rule of public policy within Article 26.

(2) Likewise, the fact that policy considerations informed the existence of the rule did not make it a rule of public policy.

(3) The rule was only established some 20 years ago.

(4) The rule was subject to exceptions.

(5) There was no question of any discrimination. Whether the rule applied depended on the lex causae, so that an English company with a Dutch law claim would be in the same position as a Dutch company.

(6) Overall, the rule was clearly not one of public policy, either as a matter of English law (applying the approach in *Iraqi Airways*) or EU law (applying the test in *Krombach*).

My conclusions.

56. I turn to my conclusions. The test under this Article differs from that under Article 16. Under Article 16 the focus is on the mandatory nature of the English rule. Under this Article, the focus is on the effect of applying the rule of foreign law, and whether the application of that law would be contrary to English public policy in the sense identified in the cases set out above.

57. I have concluded that it is quite clear that the rule against reflective loss is not a rule of English public policy within the meaning of that phrase in Article 26 of Rome II, for the following reasons:

(1) I accept the submission that both EU and English law are relevant to this issue. That is because EU law defines what the characteristics of a rule of public policy must be to come within this Article; and English law then determines, at least within bounds, whether the rule of English law satisfies the relevant criteria and has the relevant characteristics.

(2) Here, therefore, the question is whether recognition of a Dutch law claim for reflective loss would be "*at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle*".

(3) In my judgment, there is no question that allowing a claim of this nature does not offend against English public policy, in the sense identified above. The principle against reflective loss is a recognised rule of English substantive law. However, it does not seem to me to be such a fundamental principle that it is to be equated with a fundamental right, such as a right guaranteed by the ECHR.

(4) Nor, in my judgment, is there any question of discrimination, essentially for the reasons given by KMG. Thus, if pursuing a Dutch law claim, an English company would be in exactly the same position as a Dutch company. It is the fact that the issue is governed by the relevant foreign law that makes the difference, not the nationality of the Claimant.

(5) Finally, I do not accept that there is any "arbitrary derogation". The principled solution follows from the fact that the question of whether a claim for reflective loss is permitted is a matter, under the Regulation, for the lex causae, for the reasons I have already outlined in this judgment.

Overall conclusions.

58. For the reasons I have set out in this judgment:

(1) The rule as to reflective loss is within Rome II and is not procedural;

(2) The rule is not an overriding mandatory provision within Article 16 of Rome II;

(3) The application of Dutch law to the issue is not invalidated by reason of Article 26 of Rome II.

59. In these circumstances, the Defendants' applications to strike out the Dutch law claims and for summary judgment on those claims must fail. Conversely, in my judgment, the Claimant is entitled to succeed on the matters with which I have dealt in this judgment, which were raised by the Defendants in their strike out application.

60. I am very grateful to Counsel for their full and interesting arguments, and I would be grateful if an Order could be drawn up giving effect to this judgment.