[2026] UKSC 33
On appeal from: [2024] CSIH 38

JUDGMENT

Forthwell Limited (Appellant) *v* Pontegadea UK Limited (Respondent)

before

Lord Reed, President
Lord Stephens
Lady Simler
Lord Doherty
Lord Hodge

JUDGMENT GIVEN ON
17 September 2026

Heard on 20 May 2026

Appellant
David Thomson KC
David Ford
(Instructed by Brodies LLP, Glasgow)

Respondent
Roddy Dunlop KC
Giles Reid
(Instructed by Burness Paull LLP, Aberdeen)

LORD DOHERTY (with whom Lord Reed, Lord Stephens, Lady Simler and Lord Hodge agree):

1. Introduction

1. In this appeal the court requires to consider the circumstances in which a party to a contract may recover damages for breach of contract in respect of losses that were sustained by a third party. The First Division of the Inner House held that the transferred loss claims which the appellant ("Forthwell") advanced in respect of losses suffered by its wholly-owned subsidiary Lynnet Leisure (Rogano) Ltd ("Lynnet") were ill-founded in law. They dismissed them. A further contention by the respondent ("Pontegadea") that losses claimed by Forthwell were the subject of mutual insurance and were irrecoverable was rejected by the commercial judge and by the First Division. There is no appeal against that part of the First Division's decision.

2. On the morning when the appeal hearing was to commence the court was informed that the parties had settled the dispute between them and that Forthwell would move to withdraw the appeal. At the outset of the hearing senior counsel intimated the apologies of all concerned for the lateness of the settlement. The court clarified that the settlement was not dependent upon the court allowing the withdrawal of the appeal. Senior counsel advised the court that a commercial action raising a very similar issue had been sisted (stayed) to await the outcome of this appeal, and that they were fully prepared to proceed with the hearing should the court refuse to allow the appeal to be withdrawn.

3. The court refused the application to withdraw the appeal. We did so because the settlement was not dependent upon the court allowing its withdrawal, and because the appeal raises a point of law of general public importance where authoritative guidance is desirable, in particular because at least one other case is awaiting the decision in this appeal. Senior counsel for each of the parties agreed that the only order required if the appeal succeeds would be to allow the appeal; and that if it is unsuccessful the appeal should be dismissed.

2. The facts

4. The Rogano was one of the oldest and most celebrated restaurants in Glasgow. It first traded in 1874. Successive entities operated the restaurant continuously at 11 Exchange Place from 1935 until it closed in 2020 at the height of the Covid-19 restrictions. It seems particularly fitting that the court was able to hear this appeal while sitting in Glasgow.

5. Forthwell and Pontegadea are the tenant and landlord of the premises at 11 Exchange Place in terms of a lease ("the Lease") dated 18 and 29 March 1996. Neither was party to the Lease at its inception. The tenant's interest in the Lease was assigned to Forthwell in August 2013. Forthwell granted Lynnet a licence to occupy the premises ("the Licence") and Lynnet traded from them as the Rogano Restaurant and Bar. Forthwell does not aver that Pontegadea was aware of the Licence.

6. Clause 8 of the Licence provides that Lynnet cannot oblige Forthwell to carry out any repairs or other works to the premises and that Forthwell will at no time become liable to Lynnet for any loss, injury or damage which Lynnet might sustain from any deficiency in any part of the premises.

7. On 9 and 14 December 2020 and on 10 January 2021 the premises were damaged by flooding and water ingress. A fire broke out after the first flood, rendering the electrical installations unsafe. The premises were left without heating. There is ongoing water ingress.

8. In terms of clause 5.2.2 of the Lease the tenant undertook not to use the premises for any other purpose than as licensed and restaurant premises, and purposes ancillary thereto; or with the consent of the landlord, which consent shall not be unreasonably withheld or delayed, any use falling within Class 3 or Class 5 of the Schedule to the Town and Country Planning (Use Classes) (Scotland) Order 1989 (SI 1989/147). The Lease prohibits sub-letting and the parting with or sharing of possession of the whole or part of the premises (cl 5.3.2, cl 5.3.3.1). It makes provision for assignation of the whole of the tenant's interest, subject to certain conditions (cl 5.3.3.1). It requires the landlord to rebuild any part of the premises which has been destroyed or damaged by any insured risk (including flooding) (cl 1, cl 13.2). In addition, Forthwell avers that it is an implied term of the Lease that Pontegadea will repair the common parts of the building in which the premises are located. The parties are in dispute as to the nature and scope of the repairs required and as to liability for certain aspects of the repairs. Repairs have not been carried out. As a result, it has not been possible to reopen the restaurant for trading.

3. The commercial action

9. In this commercial action Forthwell seeks specific implement of Pontegadea's obligations to repair the premises (the first conclusion of the summons), or, in the event of Pontegadea not repairing the premises, damages to enable the repairs to be carried out (the second conclusion). Forthwell also claims damages in respect of Pontegadea's breach of its obligation to maintain the common parts (the third conclusion). As a result of Pontegadea's failures to discharge its obligations to repair the premises and maintain the common parts, Lynnet has been unable to trade from the premises. In addition, Forthwell seeks recovery of professional fees and costs it has incurred as a result of Pontegadea's

failure to implement its obligations in terms of clause 13.2 (the sixth conclusion). Pontegadea does not admit that it is in breach of its obligations under the Lease, but it is common ground that a proof before answer will be required to determine whether or not Forthwell is entitled to the remedies which it seeks in the first to third and sixth conclusions. However, Forthwell also sues for past and anticipated future loss of profits said to have been suffered by Lynnet (the fourth and fifth conclusions), which claims Pontegadea maintains are irrelevant (ie ill-founded in law).

10. Forthwell avers in articles 1.1 and 6.6 of the condescendence in the summons:

> "1.1 … In the present action, the Pursuer sues: (a) in its own right, in respect of order to enforce obligations owed by the Defender under and in terms of the lease, aftermentioned, in respect of which the Pursuer is vested in the tenant's part and the Defender is vested in the landlord's part; and (b) on behalf of a third party, which has suffered loss, injury and damage as a result of the Defender's breaches of the said lease, in order to recover such losses on behalf of that third party, all as hereinafter more fully condescended upon…
>
> 6.6…[A]s a result of the Defender's ongoing refusal, in breach of its obligations under the Lease, to carry out the necessary works of repair, … Lynnet has … suffered loss, injury and damage, apart from the cost of the necessary repairs. In particular, Lynnet has suffered a loss of profit, in the period between 10th December 2022 (at which time Lynnet's loss of profit ceased to be covered by a business interruption insurance policy) and 31st March 2023, in the amount of £178,696.94, which is the sum fourth concluded for. Lynnet will continue to suffer a loss of profit until the necessary works are undertaken. On the hypothesis that the necessary works will take sixteen months, Lynnet will suffer a further loss of profit estimated in the amount of £934,056.13 in the period to 31 July 2024, which is the sum fifth concluded for …The Pursuer sues for all the losses that have been sustained as a result of the Defender's breach of clause 13.2 of the Lease. The Pursuer is as a matter of law bound to account to Lynnett as the party suffering the loss for any of Lynett's losses that are recovered for its benefit in this action. Lynnet is not a party to the Lease. It cannot sue the Defender for its breaches of clause 13.2. In all the circumstances, the Pursuer is entitled to recover Lynnet's losses on its behalf. The Licence is *res inter alios acta* in any question between the Pursuer and the Defender and in respect of

assessing the losses caused by the Defender's breaches of the Lease…"

11. Forthwell's fourth and fifth pleas-in-law state:

> "4. Lynnet having suffered loss, injury and damage as a result of the breaches of the Lease on the part of the Defender, and the Pursuer being entitled to recover those losses on behalf of Lynnet, the Pursuer is entitled to reparation therefor.
>
> 5. The sums fourth and fifth concluded for being a reasonable estimate of Lynnet's loss, injury and damage, decree should be pronounced therefor."

12. It is clear that the sums sought in the fourth and fifth conclusions are for Lynnet's losses and that those claims are brought on behalf of Lynnet. They are not claims for losses which Forthwell has suffered by reason of breach by Pontegadea of Forthwell's performance interests under the Lease: they are for the consequential losses suffered by Lynnet. Pontegadea disputes Forthwell's entitlement to recover damages in respect of any losses suffered by Lynnet. It challenges the relevancy of those claims and seeks dismissal of that part of the action.

4. The basis of the transferred loss claims

13. It is important to be clear as to the basis upon which Forthwell's transferred loss claims are made.

14. The claims are not advanced upon the narrow ground of *The Albazero* exception (*Albacruz v Albazero ("The Albazero")* [1977] AC 774), as developed and applied in Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85 ("*St Martins*") and subsequent cases. Under the narrow ground, a contracting party may recover a third party's loss caused by breach of a contract relating to property where the contracting parties contemplated that the proprietary interest would be transferred to the third party, or where it was otherwise contemplated that loss in respect of the property might be suffered by the third party, as long as the contractual arrangements did not provide for the third party having a direct remedy against the party in breach. Forthwell recognises that its averments do not satisfy that ground's requirements. Despite suggestions to the contrary (by Lord Clyde in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*"), at p 530; by Lord Drummond Young in *McLaren Murdoch & Hamilton Ltd v The Abercromby Motor Group Ltd* 2003 SCLR 323, at para 35; and by Lady Smith in *Marquess of Aberdeen and*

Temair v Messrs Turcan Connell [2008] CSOH 183; 2009 SCLR 336, at para 45), the narrow ground exception is a rule of implication based upon the intention of the parties rather than a rule of law (*Swynson Ltd v Lowick Rose LLP (formerly Hurst Morrison Thomson LLP*) [2017] UKSC 32; [2018] AC 313, Lord Sumption, para 14; Lord Neuberger, paras 103–105).

15. Nor are Forthwell's claims advanced on the broader ground posited by Lord Griffiths in *St Martins* and favoured by Lord Goff and Lord Millett in *Panatown*. The essence of that suggested ground is that where a person with no proprietary interest in a property contracts for work or services to be performed in relation to it (for example, a husband instructing work on his wife's house or a benefactor contracting to restore a village hall) that person has a "performance" or "expectation" interest in the contract being performed. In the event of breach, he suffers loss because he has not got what he contracted for, and because in order to put the property into the state it ought to be in, he would have to incur further expense.

5. The judgments of the commercial judge and of the First Division

16. At a debate before the commercial judge (Lord Braid) Pontegadea submitted that Forthwell is not entitled to recover Lynnet's losses and that the transferred loss claims should be dismissed. The commercial judge did not agree ([2024] CSOH 59; 2024 SLT 657). He acknowledged (para 24), correctly, that in treating *The Albazero* exception as arising as a matter of law, rather than something which was in the contemplation of the parties at the time of contracting, Lord Clyde was in a minority of one in *Panatown*. The commercial judge noted (para 25), again correctly, that *Swynson* and *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596; [2020] QB 551 "appear at first sight to have hammered the nail into the coffin of Lord Clyde's approach, coming down squarely in favour of the 'contemplation of the parties' test." Nevertheless, so far as the law of Scotland was concerned, he thought that the adoption by Lord Drummond Young in *McLaren Murdoch & Hamilton* of Lord Clyde's approach offered a principled and reasoned Scots law solution (para 35). In the commercial judge's opinion Scots law in relation to transferred loss differs from the law in England and Wales. He considered that in Scots law the position is as stated by Lord Drummond Young in *McLaren Murdoch & Hamilton* at para 42. In two further Outer House decisions a Lord Ordinary and a commercial judge had agreed with Lord Drummond Young's approach (*Marquess of Aberdeen and Temair,* Lady Smith at para 45 and *Axon Well Intervention Products Holdings AS v Craig* [2015] CSOH 4, Lord Doherty at para 29). Nothing in *Swynson* or *BV Nederlandse Industrie* provided any reason for concluding that Lord Drummond Young's summary of the principles of Scots law is wrong. The transferred loss exception to the general rule that a contracting party can only recover its own loss existed as a matter of policy in circumstances where it would be perceived to be unjust to allow a loss to go uncompensated. It had nothing to do with the contracting parties' intentions or what was in the contemplation of both of them at the time of contracting. If Forthwell recovered damages for the losses claimed it would be obliged to

account to Lynnet for them. The transferred loss claims ought not to be dismissed but should proceed to a proof before answer.

17. Pontegadea reclaimed (appealed). The First Division of the Inner House, by a majority (the Lord President (Lord Carloway) and Lord Pentland, Lord Malcolm dissenting), allowed the reclaiming motion and dismissed the transferred loss claims ([2024] CSIH 38; 2025 SC 127). In the Lord President's opinion, the claims failed because Forthwell had not sustained the claimed losses (para 37). Even if the narrow or broader ground exceptions to the compensatory principle applied in Scotland, the claims did not meet the criteria for either exception. The Lord President observed (para 38) that Lord Clyde's solution in *Panatown* was an obiter dictum, was unvouched by authority, and had not been adopted by the other members of the House. In *McLaren Murdoch & Hamilton* Lord Drummond Young had accepted Lord Clyde's solution and, in a further obiter dictum which otherwise appeared to have "emerged from the ether", he had purported to formulate a rule which applied in Scots law (para 46). The Lord President observed that in an appropriate case there may require to be a deeper analysis of where the transferred loss concept comes from in Scots law (para 47).

18. Lord Pentland agreed with the Lord President's opinion (para 93). However, for his part he did not understand Lord Drummond Young to have been of the view that Scots law on transferred loss differs from the law of England and Wales. Rather, Lord Drummond Young purported to be following the approach of the majority in *Panatown* (para 98). Forthwell's pleaded case did not fall within the parameters of any of the tests for applying the principle of transferred loss in Scots law or in the law of England and Wales (para 100). At the time the Lease was entered into there was no common contractual intention to benefit Lynnet or indeed any third party (para 102). The terms of the Licence precluded Forthwell being liable to account to Lynnet for damages recovered in respect of Lynnet's loss of profits (para 103).

19. In a dissenting opinion Lord Malcolm highlighted reasons why there might be different outcomes in relation to transferred loss under Scots law and English law (paras 55–56). Scots law has no doctrine of consideration; it has long recognised that third parties can have rights arising from promises in a contract between other persons; and there may be a greater emphasis on privity of contract in England and Wales. Lord Clyde's "realistic and practical solution" recognised the contracting party's entitlement to performance of the promise made to them and avoided a windfall benefit to an undeserving promisor (para 59). Lord Malcolm agreed (para 91) with the commercial judge's view in para 35 of his opinion that Lord Drummond Young "offered a reasoned Scots law solution to the problem, recognising, as had Lord Clyde, that the right of the contracting party to sue was conferred as a matter of general legal policy to ensure that if loss results from a breach of contract it can be recovered from the party responsible for the breach". Like the commercial judge, Lord Malcolm was not persuaded that Scots law should be aligned with what was said in *Swynson* and *BV Netherlandse Industrie.*

6. Forthwell's submissions in this appeal

20. It bears repetition that Forthwell's transferred loss claims are not founded on the narrow ground or the broader ground. They are based squarely on Lord Clyde's suggested solution in *Panatown*, which Lord Drummond Young in *McLaren Murdoch & Hamilton* considered was part of Scots law. Forthwell submitted that the court should endorse that approach. It had been followed in *Marquess of Aberdeen and Temair* and *Axon Well*. It was a just solution and it was in accordance with the fundamental principles of Scots law, as Lord Drummond Young, Lord Braid and Lord Malcolm had recognised. Such a claim should only be available where the contracting party had "a material interest" in the loss suffered by a third party (eg in cases involving family or corporate groups). That would be a robust delimiting factor, and the usual rules relating to remoteness and reasonableness would also apply. Forthwell had a material interest in the losses suffered by Lynnet. Lynnet had a close connection with the Lease. Pontegadea must have contemplated that "the restaurant trader" would suffer a loss of profits if Pontegadea breached its repairing obligations.

7. *Panatown*

21. In *Panatown* the employers under a building contract sued the contractors for breach of their contractual obligations. The site and the building were owned by another company ("UIPL") in the same group. In terms of the building contract, the contractors were obliged to grant a duty of care deed ("DCD") in favour of UIPL which they duly did. Panatown advanced a transferred loss claim to recover damages for defective work and delay. They relied on both the narrow ground and the broader ground. The court, by a majority of three to two, held that Panatown were not entitled to recover the damages claimed. However, the reasoning of each of the judges making up the majority differed in significant respects. Lord Goff of Chieveley and Lord Millett dissented. Both would have upheld the claim on the broader ground.

22. The critical consideration for each of the judges making up the majority was the fact that UIPL had a direct contractual remedy (the DCD) against the contractors. In their view the provision of that remedy to UIPL meant Panatown could not succeed under either the narrow ground (Lord Clyde at p 531A–D; Lord Jauncey of Tullichettle at p 568C–G; Lord Browne-Wilkinson at pp 576H–577B (on which point Lord Goff agreed, at p 558C–F)) or the broader ground.

23. Lord Clyde observed that the solution "may carry with it some element of artificiality and may not be supportable on any clear or single principle" (p 535D). At p 535E–F he proffered his proposed solution, which he preferred to the broader ground:

> "It seems to me that a more realistic and practical solution is to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is to be seen as his own loss."

Lord Clyde reasoned (pp 535F–536E) that in order to avoid a legal black hole the law should deem the innocent party to be claiming on behalf of himself and any others who have suffered loss. While the third party might not be able to compel the innocent party to sue, that was unlikely to be a problem in domestic or familial situations or where the parties were companies in the same group. How members of families or groups of companies chose to arrange their affairs should not be a matter of "necessary concern" to a contracting party who had undertaken to one of their number to perform services in which they all had some interest. However, where, as in *Panatown*, the contracting parties had agreed what the third party's remedy should be, there was no scope for a transferred loss claim being admitted.

24. None of the other members of the court expressed concurrence with Lord Clyde's solution. It is inconsistent with the reasoning of the other judges forming the majority.

8. *Swynson*

25. In *Swynson* the Supreme Court had a further opportunity to consider the question of transferred loss. During 2006 and 2007 the claimant (Swynson), a lending company, made three loans to a borrower ("EMSL") relying on a due diligence report prepared by the defendant firm of accountants ("HMT"). Swynson was owned and controlled by Michael Hunt. In July 2008 Mr Hunt also acquired control of EMSL. Swynson claimed damages for the defendant's breach of contract in negligently preparing the report. However, EMSL repaid the first two loans using money lent to it by Mr Hunt. Had those loans by Swynson not been repaid Swynson would have been assessable to tax on the interest payments due from EMSL notwithstanding that they were not being made (because Swynson and EMSL were close companies). Moreover, Mr Hunt took the view that it was disadvantageous for Swynson to have a large non-performing loan on its books. One argument raised by Swynson was that it was entitled to recover Mr Hunt's loss on the principle of transferred loss.

26. Lord Sumption delivered the leading judgment with which the other members of the court agreed. Lord Mance delivered a concurring judgment, dealing with transferred loss at paras 52–54. Lord Neuberger also gave a concurring judgment, with which Lord Clarke agreed. He discussed transferred loss at paras 101–108.

27. Lord Sumption began by observing (para 1):

> "The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves. Mr Michael Hunt is not the first businessman to make that mistake, and doubtless he will not be the last."

At para 14 he explained:

> "The principle of transferred loss is a limited exception to the general rule that a claimant can recover only loss which he has himself suffered. It applies where the known object of a transaction is to benefit a third party or a class of persons to which a third party belongs, and the anticipated effect of a breach of duty will be to cause loss to that third party. It has hitherto been recognised only in cases where the third party suffers loss as the intended transferee of the property affected by the breach…"

28. His Lordship noted that the paradigm case was *The Albazero* exception. At p 847 of that case, Lord Diplock had made clear that the exception was based upon the common intention of the contracting parties. Lord Sumption observed (para 15) that in *St Martins* this rationale was extended to contracts generally, and Lord Griffiths had proposed the broader ground exception. He continued:

> "16. It is, however, important to remember that the principle of transferred loss, whether in its broader or narrower form, is an exception to a fundamental principle of the law of obligations and not an alternative to that principle. All of the modern case law on the subject emphasises that it is driven by legal necessity. It is therefore an essential feature of the principle that the recognition of a right in the contracting party to recover the third party's loss should be necessary to give effect to the object of the transaction and to avoid a 'legal black hole', in which *in the anticipated course of events the only party entitled to recover would be different from the only party which could be treated as suffering loss*: see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 547–548 (Lord Goff of Chieveley), p 568 (Lord Jauncey of Tullichettle), pp 577–578 (Lord Browne-Wilkinson), and pp 582–583 (Lord Millett).

> That is why, as the House of Lords held in this last case, it is not available if the third party has a direct right of action for the same loss, on whatever basis." (Emphasis added.)

29. The court considered that there was much to be said for the broader ground but that it was not necessary to decide the point: neither the broader nor the narrow ground could apply on the facts because it was no part of the object of the engagement of HMT or indeed of any other aspect of the transaction to benefit Mr Hunt (Lord Sumption, para 17; Lord Neuberger, para 106).

9. *BV Nederlandse Industrie*

30. In *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* Coulson LJ (with whom the other members of the court agreed) recognised (para 62) that in *Panatown* Lord Clyde had suggested a different solution to the narrow or broader grounds favoured by his colleagues. The claim in *BV Nederlandse Industrie* was based on the broader ground. Coulson LJ considered that "[f]ollowing the clear guidance in *Swynson*" the broader ground was "good law" (para 70). In fact, as already noted, what this court said in *Swynson* was that it considered there was much to be said for the broader ground but that it was not necessary to decide the point. Nonetheless, the Court of Appeal correctly recognised that, for either ground to be satisfied, at the time of contracting the parties should have intended that there would be a third party benefit.

10. Does Lord Clyde's solution represent the law of England and Wales?

31. Lord Clyde's solution was not endorsed by any of the other members of the Appellate Committee in *Panatown*. None of the judgments in *Swynson* provides any support for it. Neither does Coulson LJ's judgment in *BV Nederlandse Industrie*, with which the other members of the Court of Appeal agreed. The solution is inconsistent with the requirement that it should have been in the contemplation of the parties at the time of contracting that the contract was intended to benefit the third party or at least persons in the same position as the third party. It is very clear that Lord Clyde's solution does not represent the law of England and Wales.

11. The Scottish cases

32. In *McLaren Murdoch & Hamilton* the pursuers, an architects' practice, sued the defenders to recover outstanding fees. The defenders counterclaimed for loss said to have been caused by breach of contract and negligence on the part of the pursuers. The pursuers submitted that some of the loss claimed had not been incurred by the defenders but by another company ("Carden") in the same group to which a showroom and workshop ("the

Fiat showroom") had been transferred by the defenders pursuant to a lending agreement in May 2000. The Fiat showroom had been completed by 1996. Defects in the heating system soon became apparent. Lord Drummond Young held (para 34) that the defenders sustained loss as soon as the building was completed, at which time they owned it. The subsequent involvement of Carden was collateral and res inter alios acta. It followed that the defenders were seeking to recover their own loss, not a loss which had been sustained by Carden, and the issue of transferred loss did not arise. However, in case those conclusions were wrong he opined (obiter) that the defenders would have been entitled to recover the loss on behalf of Carden.

33. Lord Drummond Young's discussion of the circumstances in which a transferred loss claim may be possible begins at para 33 of his opinion:

> "[I]n in a well-regulated legal universe blackholes should not exist. Nevertheless, the basis in principle on which recovery can be achieved in such cases has been the subject of some disagreement. The matter has been considered at length by the House of Lords in a number of English cases, notably *The Albazero; Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine Ltd;* and *Alfred McAlpine Construction Ltd v Panatown Ltd.* While those cases turned to some extent on specialties of English law, they provide some guidance as to the manner in which Scots law might approach the problem of the black hole. That is particularly true of the speech of Lord Clyde in the most recent case, *Alfred McAlpine Construction Ltd v Panatown Ltd,* which considers the underlying principles in detail and indeed makes reference to Scots law."

34. At para 35, Lord Drummond Young outlined the circumstances in which *The Albazero* exception applied in England and Wales. At para 36 he referred to its extension to other contracts in the *St Martins* case. At para 38 he noted Lord Clyde's acknowledgement (at pp 534–535) that in jurisdictions where the law included the jus quaesitum tertio (a right acquired by a third party), such as Germany and Scotland, the availability of that remedy might provide a solution to the problem of the legal black hole; but that it was not available in England where the jus quaesitum tertio was not recognised at common law. He continued (para 38):

> "In the absence of any remedy using the jus quaesitum tertio, Lord Clyde concluded, *in a passage that sums up the views of the majority* of the House of Lords, that the best solution was:

> ‘to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss....The solution is required for the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it. In such a case, to avoid the legal black hole, the law will deem the innocent party to be claiming on behalf of himself and any others who have suffered loss. It does not matter that he is not the owner of the property affected, nor that he has not himself suffered any economic loss. He sues for all the loss which has been sustained and is accountable to the others to the extent of their particular losses.... If there is an anxiety lest the exception would permit an employer to receive excessive damages, that should be set at rest by the recognition of the basic requirement for reasonableness which underlies the quantification of an award of damages’ ([2001] 1 AC 535).” (Emphasis added.)

35. Lord Drummond Young explained at paras 40 and 41 why he considered the broader ground not to be in accordance with the underlying principles of the Scots law of contract (principally because in his view in transferred loss cases a performance interest is not sufficient to entitle a contracting party to substantial damages in the event of failure in performance, the person who suffers the substantial loss being the third party). Although the approach of the majority in *Panatown* was mainly based on English authorities, in his opinion the result was wholly consistent with the principles of Scots law (para 42). He added:

> “I am accordingly of opinion that Scots law should adopt the same general rule as that applied by the majority of the House of Lords in that case, as described by Lord Clyde in the passage quoted above at paragraph [38]. In effect the rule comes to this: if a breach of contract occurs, causing loss that can be measured in financial terms, the party who is not in breach may recover substantial damages even if that loss has been sustained by another person; if a loss has been sustained by a person other than the contracting party, however, the contracting party must sue on behalf of that other, and must accordingly account to that other for the damages recovered. The right to raise an action in this way is deemed by law to exist in any case where the loss resulting from the breach of contract occurs to a person other than the contracting party. It should not in my view be based on the intention of the parties; the right is rather conferred as a

matter of general legal policy, to ensure that if a loss results from a breach of contract damages can be recovered from the party responsible for the breach; that was Lord Clyde's conclusion at [2001] 1 AC 530-531. Nevertheless, if the third party who suffers loss has a direct right of action against the party in breach of contract, for example under a duty of care warranty, there is no need for the contracting party to have a right of action on the third party's behalf, and the law will not deem such a right to exist. That was critical to the decision of the majority in *Alfred McAlpine Construction Ltd v Panatown Ltd*. While the contracting party is obliged to account for the damages recovered, he will in my opinion be entitled to the expenses that he has incurred in conducting the litigation, so far as he has been unable to recover those from the person in breach of contract. Such an approach has a number of advantages. In the first place, it provides a solution to the problem of the legal black hole that is capable of almost universal application. In the second place, it permits recovery even in the case of contracts that are incapable of assignation, since it is the original party to the contract who is responsible for raising any action. That is particularly important in relation to the standard forms of building contract, as it was held in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martin's Property Corporation Ltd v Sir Robert McAlpine Ltd*, supra, that the employer's rights under the JCT standard form could not be assigned to a third party. In the third place, it maintains the fundamental principle that the remedy of substantial damages can only be available if there exists a loss capable of being measured in financial terms. That means that the usual rules on remoteness of damage will continue to apply."

36. Plainly, Lord Drummond Young was not correct to describe Lord Clyde's solution as the view of the majority in *Panatown*. None of the other judges agreed with it. The solution does not represent the law in England and Wales. The basis upon which Lord Drummond Young adopted Lord Clyde's solution was therefore erroneous.

37. Moreover, Lord Clyde's and Lord Drummond Young's view that the basis for any exception to the general rule in transferred loss cases is a rule of law rather than a rule of implication based upon the intention of the parties was not the majority view in *Panatown*. It is contrary to the guidance given by this court in *Swynson*.

38. It is possible to deal very briefly with the Scottish cases decided after *McLaren Murdoch & Hamilton*. In neither *Marquess of Aberdeen and Temair* nor *Axon Well* did the defenders challenge the correctness of Lord Clyde's approach in *Panatown* or Lord

Drummond Young's adoption of it in *McLaren Murdoch & Hamilton*. In both cases the contentious issue was whether the transferred loss claim was excluded because of the existence of other suggested remedies (*Marquess of Aberdeen and Temair,* para 31; *Axon Well*, para 15).

12. Conclusions

39. The errors I have highlighted in Lord Clyde's solution in *Panatown* and in Lord Drummond Young's reliance upon it in *McLaren Murdoch & Hamilton* are reason enough to reject Lord Drummond Young's suggested Scots law solution. However, there are also further compelling reasons. The proposed solution would constitute too wide and too indefinite an exception to the general rule that a party can only recover damages in respect of their own loss. In that regard I recall Lord Neuberger's cautionary observation in *Swynson* about the principle of transferred loss (at para 102), with which I agree:

> "Self-evidently, it is an anomalous principle bearing in mind the well-established conventional rules relating to recovery of damages for breach of contract, namely that, subject to the terms of the contract, scope of duty, foreseeability and mitigation, A can only recover damages in respect of loss which A suffers as a result of B's breach of contract. For that reason, the principle should only apply in defined and limited circumstances."

40. The solution suggested by Lord Clyde and Lord Drummond Young would be too wide because it would allow recovery in circumstances where the involvement of a person such as the third party was not within the contemplation of the parties at the time of contracting. That would be likely to produce unforeseen consequences for the party in breach. They are unlikely to have arranged their affairs (eg in relation to insurance) on the basis that such a liability might arise.

41. The proposed exception is too indefinite because the limits of its applicability are vague. Lord Clyde did not define limits, merely observing that the problem was most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies (pp 535H–536A). Lord Drummond Young envisaged the exception being "capable of almost universal application" (para 42). Conscious of the need for clear limits, Forthwell suggests that the third party would require to have a material interest in the performance of the relevant contractual obligation. I am not convinced that that would provide a clear, robust and workable solution.

42. I am also mindful that in some cases third parties to contracts may be able to rely upon the provisions of the Contracts (Third Party Rights) (Scotland) Act 2017 (and, in

England and Wales, the Contracts (Rights of Third Parties) Act 1999). Legal black holes occur in a relatively small number of cases (see eg Scottish Law Commission Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses, para 18.57 (Scot Law Com No 252)). In some such cases the narrow ground will be available; and, for aught yet seen, it is possible that in some the broader ground may be available. In the whole circumstances I am not satisfied that there is a cogent case for the creation of the exception to the general rule which Forthwell proposes.

43. Nor am I persuaded that the outcome here is unjust. Forthwell and Lynnet chose to organise their affairs in the way in which they did. They had no reason to believe that the ordinary legal consequences associated with their separate corporate personalities would not apply. Moreover, the Lease prohibited sub-letting and the parting with or sharing of possession of the whole or part of the premises (cl 5.3.2, cl 5.3.3.1). Prima facie, the grant of the Licence appears to have been in breach of the Lease.

44. For these reasons the First Division was correct to allow the reclaiming motion. I would dismiss the appeal.

45. The Lord President left open the questions whether the narrow ground and the broader ground are part of Scots law.

46. There can be no real doubt that *The Albazero* exception is as much a part of the law of Scotland as it is of the law of England and Wales. The origin of the exception was the Scottish House of Lords decision of *Dunlop v Lambert* (1839) 6 Cl & Fin 600. While in that case Lord Cottenham LC misunderstood the true effect of the proceedings in Scotland (see *Panatown*, Lord Clyde pp 523C–527D, Lord Goff p 539B-D, Lord Jauncey at pp 563D–565F, Lord Millett p 582D–E; *McLaren Murdoch & Hamilton*, Lord Drummond Young at para 35), the exception is now far too long-established to be questioned.

47. Like the court in *Swynson*, I think there is much to be said for the broader ground, but that it is not necessary or appropriate to decide the point in this appeal. It is not a suitable case in which to decide whether the broader ground is (i) part of the law of England and Wales; or (ii) part of the law of Scotland. Any guidance given by us on those questions would be obiter. Further, since both parties have proceeded throughout the action on the basis that Forthwell's transferred loss claims do not satisfy the requirements of the broader ground, neither this court nor the courts below have had the benefit of developed submissions on either question, nor do we have the advantage of judgments from the courts below which consider them. The courts below could only have formed tentative views as to what the law of England and Wales appeared to be, but their consideration of question (ii) (including Lord Drummond Young's view that the broader ground is inconsistent with the underlying principles of the Scots law of contract

(*McLaren Murdoch & Hamilton*, paras 40–41) and the significance or otherwise of the differences between Scots law and English law which Lord Malcolm suggested might make separate outcomes on either side of the border less than surprising ([2024] CSIH 38, paras 55–56)) is likely to have been valuable.