Press Summary

17 November 2026

Enterprise Insurance Company Plc (In Liquidation) (Appellant) v Andrew Flowers (Respondent) (Gibraltar)

Andrew Flowers (Appellant) v Enterprise Insurance Company Plc (In Liquidation) (Respondent) No 2 (Gibraltar)

[2026] UKPC 40

On appeal from the Court of Appeal of Gibraltar

Justices: Lord Reed, Lord Lloyd-Jones, Lord Leggatt, Lady Rose, Lord Doherty

Background to the Appeal

Enterprise Insurance Company Plc ("**EIC**") is an insurance company incorporated in Gibraltar. It went into insolvent liquidation in 2016, with the deficit in the insolvency estimated at around £200 million. EIC, acting by its liquidator, brought a claim against (amongst others) Mr Andrew Flowers, who acted as its managing director from 2003 to 2014. Mr Flowers was also a director of EIC's holding company, Enterprise Holdings Ltd ("**EHL**"), and another subsidiary, EIG Services Ltd ("**EIG**"). Mr Flowers was the major figure behind the Enterprise group. EIC alleged that Mr Flowers had acted in breach of the fiduciary duty, and the common law duty of reasonable care and skill, which he owed towards EIC. Following trial, the Supreme Court of Gibraltar found substantially in favour of EIC and held Mr Flowers liable.

For the purposes of this appeal, two aspects of the claim are relevant. First, EIC paid large sums of money to EIG purportedly for the provision of services. However, no services were in fact provided. Mr Flowers was found to have been dishonestly involved in the making of these payments, which he knew to be gratuitous. EIG used part of the money wrongfully transferred to it to make payments to EHL and its shareholders, one of whom was Mr Flowers. The effect of the gratuitous payments made by EIC to EIG was to leave EIC undercapitalised. EHL, relying in part on the dividends it had received from EIG, injected capital into EIC by

subscribing for £32.3 million of additional shares. This additional capital allowed EIC to underwrite additional insurance business and, in turn, continue to make payments to EIG as part of the dishonest practice described above. The trial judge rejected Mr Flowers' argument that these capital injections should be deducted from EIC's damages.

Second, Mr Flowers had arranged for EIC to enter into bespoke insurance policies in relation to a tax avoidance scheme known as "Icebreaker" without providing for appropriate reserves. The scheme was complex and involved investors becoming members of limited liability partnerships ("**LLPs**") which made investments in the arts sector. The intention was that members of the LLPs would take advantage of the losses made by the LLPs to reduce their own tax liability. The Icebreaker scheme became the subject of legal proceedings with the result that the investors could not claim the anticipated tax relief. Mr Flowers argued that the Icebreaker policies did not give rise to any risk for EIC and therefore did not require the creation of reserves. He relied on clause 11.4 of the policy, which provided that EIC would not be liable if it had reasonable grounds for believing that the LLP and its members had colluded to engineer the failure of the LLP. He also argued that the policies were void as being contrary to public policy on the ground that they formed part of a failed tax avoidance scheme. These arguments were rejected by the trial judge, who found that Mr Flowers had acted negligently by writing the Icebreaker business on behalf of EIC and failing to establish any reserves.

Mr Flowers appealed to the Court of Appeal of Gibraltar. The Court of Appeal dismissed all but one of Mr Flowers' grounds of appeal. The ground it allowed was that the sums paid by EHL to EIC for new shares should be taken into account when assessing the loss EIC had suffered. As regards the Icebreaker policies, the Court held that neither clause 11.4 nor reasons of public policy operated to exclude EIC's potential liability.

Both parties now appeal to the Judicial Committee. EIC appeals in relation to whether the payments it received from EHL should be credited against Mr Flowers' liability. Mr Flowers cross-appeals in relation to the Icebreaker issue.

Judgment

The Judicial Committee unanimously allows EIC's appeal and dismisses Mr Flowers' cross-appeal. No deduction should be made from the damages or equitable compensation payable to EIC in respect of the payments made to it by EHL for the issue of shares. Neither clause 11.4 nor reasons of public policy meant that EIC carried no insurance risk under the Icebreaker policies. Lord Reed gives the Board's unanimous advice.

Reasons for the Judgment

(1) Should a deduction be made from the damages or equitable compensation payable to EIC in respect of the payments made to it by EHL for the issue of shares?

This question raises two distinct issues. First, did EIC benefit from the payments? Second, if it did, should the benefit be taken into account [**58**]?

As regards the question of benefit, the starting point is that the purpose of a damages award is to put the claimant in the position in which it would have been had the defendant performed its obligations [**59**]-[**62**]. This involves comparing the claimant's actual financial position with the

hypothetical position it would have occupied had the wrongdoing not occurred. The receipt of a payment may not have truly been a benefit if, for example, valuable consideration had been given for it or if the result of the payment was that the claimant made greater losses than it would otherwise have done. The evidential burden of proving that the claimant received a benefit which should be deducted rests on the defendant.

The law governing the deductibility of benefits is guided by the objective of ensuring that the claimant is compensated for the net loss for which the defendant can fairly and reasonably be held responsible [**63**]. The deductibility of benefits resulting from the defendant's conduct is not determined solely applying a factual "but for" test. Rather, there must be a sufficiently close connection to the defendant's conduct [**64**]-[**74**]. The question is one of fact and degree. It must be answered by considering all the relevant circumstances and forming an overall judgment as to the sufficiency of the causal connection. The objective is always to arrive at a result which is just and reasonable.

Benefits arising from the claimant taking reasonable steps in response to the wrongdoing must normally be brought into account in the computation of loss [**75**]-[**78**]. Benefits received as a consequence of the claimant's loss should also generally be taken into account. There are a number of established exceptions to this rule, including for insurance payments and charitable donations. The rationale for these exceptions is based not on causation but is a matter of justice, fairness and public policy [**79**]-[**90**].

The Board applies these principles to the facts of the appeal. The fact that EIC gave EHL consideration for the payments in the form of new shares did not prevent a benefit from having been conferred. As EHL already owned the whole of EIC's share capital, the new shares were of little economic value to it. More significantly, the trial judge found that the EHL payments did not leave EIC better off: they enabled EIC to continue trading and thereby incur additional liabilities without adequate provision and make further wrongful payments to EIG. The Board concludes that the defendant has failed to discharge the evidential burden of proving that EIC received a benefit from EHL [**101**]-[**106**].

The Board goes on to consider whether, had a benefit been received, it should have been brought into account [**107**]-[**116**]. EHL's intention in subscribing for additional shares was to increase EIC's working capital to enable it to continue trading. It had no intention to discharge Mr Flowers from his liabilities. It would be unjust and unreasonable if payments made by EHL to financially support EIC manage its financial difficulties had the effect of diminishing Mr Flowers' liability for the wrongdoing which had brought about those very problems. The payments would therefore not fall to be deducted.

The same reasoning applies in respect of EIC's claim for equitable compensation for Mr Flowers' breach of his fiduciary duty [**117**]-[**122**].

(2) Should clause 11.4 of the Icebreaker policy be interpreted as meaning that EIC carried no insurance risk in respect of the Icebreaker scheme?

The Board finds that there are no grounds on which EIC could reasonably believe that there had been any relevant collusion or attempt to engineer the failure of the LLP. Mr Flowers sought to rely on an alleged misrepresentation relating to the operation of the scheme, but the trial judge had found as a fact that there was no misrepresentation. The true nature of the scheme was transparent and well understood. Even if there had been a misrepresentation, it would not have amounted to collusion. Clause 11.4 was therefore not engaged [**123**]-[**127**].

(3) Were the Icebreaker policies void or unenforceable for reasons of public policy?

Tax avoidance schemes are not unlawful. Nor is there a common law doctrine that arrangements designed to avoid tax are void as being contrary to public policy. There have been developments in the law which have made it more difficult for certain kinds of tax avoidance scheme to succeed, namely a purposive approach to interpreting tax legislation and the enactment of anti-avoidance measures. However, these developments do not mean that even the most artificial tax avoidance schemes are unlawful, nor that the relevant contracts are void as being contrary to public policy [**128**]-[**141**].

References in square brackets are to paragraphs in the judgment.

NOTE:
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: Cases - JCPC