In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)
2023 No: 156

BETWEEN:

AON INSURANCE MANAGERS (BERMUDA) LTD

Plaintiff

And

(1) ASSET HOLDING GROUP, LTD
(2) KENWOOD HOLDINGS, LTD
(3) SCOTT A. CRABTREE
(4) JOSEPH WILKINS, JR
(5) TIMOTHY POHANKA
(6) CHRISTOPHER C. POHANKA
(as trustee of the Pohanka Grandchildren's IRR Trust)
(7) STEVE PARKER
(as trustee of the Geoffrey P. Pohanka 2004 Family Trust)

Defendants

RULING

Dates of Hearing: Friday 10 April 2026

Date of Ruling: Monday 17 August 2026

Plaintiff:	Mr. Ben Adamson and Mr. Conor Doyle (Conyers Dill & Pearman Limited)
1^{st}-2^{nd} Defendants:	Mr. Ryan Hawthorne (Trott & Duncan Limited)
3^{rd}-7^{th} Defendants:	Mr. Alex Potts KC of Counsel (4 Pump Court) and Ms. Sophie Clarke (MJM Limited)

Application for leave to amend Defence and Counterclaim – Proper Plaintiff Rule - Application to issue a Third Party Notice- Negligence – Whether a Duty of Care existed - Assumption of Responsibility

RULING of Shade Subair Williams J

INTRODUCTION

1. There are three applications which have been filed with the Court.

2. One application is for summary judgment (the "summary judgment application") sought on a summons filed by the Plaintiff, Aon Insurance Managers (Bermuda) Ltd (the "Plaintiff" / "Aon"), dated 3 October 2025 insofar as it relates to its pleaded claim for a final anti-suit injunction.

3. The other two applications are brought on behalf of the Third to Seventh Defendants. One of those applications is made on a summons filed on 21 October 2025 by which the Third to Seventh Defendants seek to amend their Defences in the form of a draft Amended and Consolidated Defence and Counterclaim (the "proposed Counterclaim") annexed to the same summons, dated 16 February 2026 (the "amendment application"/ the "amendment summons"). The other application, which is brought on the same amendment summons, seeks leave to issue, file and serve a third-party notice (the "third party notice application") against the First and Second Defendants, Asset Holding Group Ltd ("AHG") and Kenwood Holdings Limited ("KHL") (collectively the "Holding Companies").

4. Presently, I am only concerned with the amendment application and the third party notice application. The summary judgment application was adjourned to be heard on a later date.

5. Having heard the parties on the amendment and third party notice applications, I reserved my decision which I now deliver based on the reasons provided in this Ruling.

FACTUAL BACKGROUND

The Parties

6. Aon is an exempted company incorporated and operating out of Bermuda only. It is a leading supplier of captive and insurance management services, managing a couple of hundred Bermuda-domiciled insurance and reinsurance entities under the Insurance Act 1978 (the "Insurance Act"). Its offerings are said to include corporate administration, cash management, and compliances services for captive insurers.

7. The Holding Companies were incorporated as Bermuda exempted companies. They wholly own Asset Insurance Company Ltd and Kenwood Insurance Ltd (collectively the "Captive Insurance Companies").The Captive Insurance Companies are also exempted companies registered in Bermuda and are registered as class 2 insurers under the Insurance Act.

8. The Third to Seventh Defendants are US residents and individuals who are each associated, by way of employment or other affiliation, with a group of US car dealerships known as the Pohanka Automotive Group ("Pohanka"). Pohanka is insured under a programme issued by the Captive Insurance Companies and the Third to Seventh Defendants, either in their own right or on trust for others, hold and own minority stock in at least one of the Holding Companies.

The contractual relationship and terms as between Aon and the Companies

9. Ms. Kirwan's evidence is that Aon's relationship with the Holding Companies and the Captive Insurance Companies (collectively the "Companies") dates back several decades and that Aon had been servicing the Companies prior to the formation of the formal contracts outlined below.

Formation of the Agreements

10. In the Statement of Claim ("SOC") the Plaintiff states that AHG and KHL appointed it, Aon, as their respective captive managers under separate but materially identical agreements termed a Statement of Work dated 1 January 2015.

11. Both the Statements of Work are said to have incorporated by reference the same Aon Master Service Agreement (the "MSA") containing Aon's standard terms and conditions. The relevant Statement of Work together with the MSA comprise the "Agreement" between each (i) Aon and AHG and (ii) Aon and KHL. In the evidence of Ms. Kirwan it is explained that the Agreements were amended, by way of addendums dated 19 December 2018, to add the Captives as second parties, such that both the Holding Companies and the Captive Insurance Companies were privy to the Agreements with Aon.

<u>Clause providing for Aon's exclusive provision of services</u>

12. The Plaintiff pointed out that one of the expressed terms of the MSA was that the services provided by Aon under any statement of work were for the benefit of Aon's customer-base only and that there is no contractual opening for a third party to rely on or enjoy the benefit of the services. Ms. Kirwan, in her evidence, quoted the following contractual clause(s) regarding Aon's exclusive provision of services:

"*We will provide the services set out in your SOW(s) (the "Services"). You acknowledge that we have not undertaken a duty or obligation to provide any additional services to you or to any other person that are not specified in this MSA or an incorporated SOW. In the event you request us to provide any additional services, we will work together to consider and, if appropriate, agree any changes (including any related change to our remuneration). Any such change will be agreed between us in writing. Until a change is agreed in writing, both of us will continue to act in accordance with the latest agreed version of the Agreement. If you have any queries about the Services we offer please contact your Aon representative.*

You acknowledge and agree that the Services are provided for your benefit only and no third party may rely in any way on, or enjoy the benefit of, any part of the Services unless otherwise expressly stated in this Agreement."

<u>Clause providing for Aon's facilitation of dividend payments</u>

13. Ms. Kirwan in her evidence at paragraph [24] stated:

"*Among the "Services" agreed to provide to the Companies under the Agreements were to prepare "relevant payment documentation and supporting papers prior to authorization" and to "arrange for authorization of payments in accordance with the relevant bank mandates" (pages 3 and 18). These contractual Services included facilitating the payment of dividends declared by the Companies from time to time*."

14. The Plaintiff states at paragraph [11] of the SOC that part of its services "*rendered by Aon to the Companies under the Agreements*" was "*to facilitate the payment of dividends declared from time to time by the Companies*". At paragraph [12] the Plaintiff says:

"*In accordance with its standard business practice, Aon employees routinely contacted shareholders of the Holding Companies, inter alia, to inform them of dividend declarations and to arrange logistics for the payment of dividends on their shares*."

Clauses limiting Aon's liability

15. Ms. Kirwan, in her evidence, pointed to an exculpation clause which she described as a clause excluding Aon's liability for, *inter alia*, the provision of "incorrect or incomplete information" by the Companies or others. She quoted the clause as follows:

We will provide the Services with reasonable care and skill. All representations (whether express or implied) and all other implied conditions, warranties and terms as to the provision of the Services are otherwise excluded to the extent permitted by law.

To the extent permitted by law, we and our Aon Group Members will not be responsible or liable to you or any other party for:

• any indirect, incidental, special, consequential, exemplary, punitive or reliance damages (including, without limitation, lost or anticipated revenues, lost business opportunities or lost sales or profits);

• the supply, by you or others, of incorrect or incomplete information or the failure by you or others to supply appropriate, relevant or timely information;

• any loss arising by reason of or arising out of an error or omission by you or one of your Related Companies;

• the failure by you or others to act on our advice or to respond promptly to any communications from us; or

• the provision or failure to provide or advise on any service not specified in this MSA or an incorporated SOW.

16. Ms. Kirwan also flagged (i) a limitation liability clause by which Aon claims its financial liability was capped at a calculated amount; (ii) a contestable period clause containing limitation periods said to apply to all claims connected to the Agreements and (iii) a jurisdiction clause setting out that the parties agreed to be governed by Bermuda law and to submit to the exclusive personal jurisdiction of the Bermuda Courts in respect of any dispute arising out of their respective contractual relationships.

Aon's Facilitating of Dividend Payments

17. Ms. Kirwan explained in her evidence that the Holding Companies seldomly declared dividends prior to 2017 on account of concerns relating to potential adverse US tax consequences. She said it was for that reason that Holding Companies, instead of paying regular dividends, made distributions to shareholders upon the cancellation of their policies with the Captive Insurance Companies. Ms. Kirwan's evidence was that it was not until the enactment of the Tax Cuts and Jobs Act of 2017 that it became tax expedient for the Companies to declare annual dividends and that they did so at the start of the year of 2017.

18. On Ms. Kirwan's evidence, once the Companies started declaring annual dividends, the payments went from the Captive Insurance Companies to the Holding Companies and then from the Holding Companies to the relevant shareholders. She said that all dividend payments came out of the Holding Companies' respective Bermuda bank accounts. At paragraphs [28]-[30] of her first affidavit Ms. Kirwan said:

"*28. Aon's function was to issue instructions to the Companies' bankers, on behalf of the Companies, directing where the funds should go. At no time did Aon itself have custody of any funds. No money relating to dividends went through Aon's own accounts.*

29. It was Aon's practice to request current banking details from the recipient shareholders before each dividend payment from the Holding Companies. Aon, acting as agent for AHG or KHL, would then arrange payment of the dividends by the Holding Companies to the bank accounts provided by the shareholders.

30. Several of the Holding Companies' shareholders were employees or otherwise affiliated with Pohanka. Some of these shareholders, including the Third through Fifth Defendants, used their official Pohanka email accounts to communicate with Aon regarding their dividend payments."

Hacking of the Pohanka email system

19. On or around 17 February 2020, the Pohanka email system was hacked by one or more persons (the "Hacker" / the "Hackers") who gained complete control over the Pohanka email system. The Hackers then caused sham emails to be sent to Aon. Under a guise of legitimacy, the Hackers feigned the identity of the Third to Seventh Defendants and sent false wiring instructions to Aon for dividend payments to be wrongly diverted for the benefit persons other than the Third to Seventh Defendants. At paragraphs [16] and [17] of the SOC the Plaintiff says:

"*16. The Hacker used their position of control to send emails from certain of the Shareholders' Pohanka email accounts. These sham emails originated from the actual mailbox of the affected user and were therefore apt to appear legitimate to the recipient(s).*

17. On multiple occasions in February and December 2020, the Hackers, posing as certain Pohanka employees and sending emails from the legitimate Pohanka accounts of those employees, provided Aon with false wiring instructions for the distribution of dividends declared by the Holding Companies."

20. In answer to this portion of the SOC, the Third to Seventh Defendants say they do not admit that the messages appeared legitimate. They say that all communications sent by the Hacker to the Plaintiff's servants and agents, namely Ms. Katherine Visaya and Mr. Victor Achei, "*provided objectively questionable information*".[1] The crux of the Third to Seventh Defendants' case is summarised at paragraph [13] of the Defence: "*but for the negligence of the servants and agents of the Plaintiff, on account of their failure to seek verification of the identities of the individuals who purportedly sent the false wiring the instructions, the Third through Seventh Defendants would have received their dividend payments*."

21. Aon made six dividend payments (the "dividend payments") in accordance with the false wiring instructions provided by the Hackers. One of the dividend payments was made on or around 24 February 2020 and the five remaining payments were made on or around 14 and 18 December 2020. The Plaintiff says that subsequently, in or around late December 2020, Pohanka alerted Aon to the possibility that the dividend payments had been misdirected[2].

PROCEDURAL BACKGROUND

<u>Threat of claims by the Companies against Aon</u>

22. The Plaintiff says that the Companies are contractually time-barred from bringing any proceedings against it, notwithstanding a pre-action letter of 8 April 2021 by which the Holding Companies threatened to bring proceedings in Bermuda by reference to a draft writ claiming damages and declaratory relief. Ms. Kirwan stated in her evidence that Aon, in reply to the Holding Companies' letter before action, denied the allegations of negligence and misconduct. Ms. Kirwan also stated that the Holding Companies, having received Aon's reply, never issued proceedings against Aon in any jurisdiction.

[1] Paragraph [12] (including its sub-paragraphs) of the Defence provide examples of what the the Third to Seventh Defendants aver to be the "*...objectively questionable information*".
[2] Paragraphs [68]-[78] of Ms. Kirwan's First Affidavit

23. Ms. Kirwan's evidence is that by letters dated 18 March 2022 Aon terminated its contractual relationship with the Companies on 18 June 2022.

<u>The US Proceedings</u>

24. Two years later, on 14 April 2023, the Shareholders, in their personal capacity[3], brought an action for negligence, conversion, bailment and breach of statutory and fiduciary duty against Aon and others in the US District Court for the Eastern District of Virginia (the "US proceedings").

25. In Ms. Kirwan's Second Affidavit, she said that on 15 August 2023 the District Court dismissed the action for want of personal jurisdiction, and on 28 March 2025 the United States Court of Appeals for the Fourth Circuit affirmed the District Court's lack of jurisdiction. Ms. Kirwan stated that no application for certiorari was since which filed with the United States Supreme Court within the time permitted and that she considered the US litigation to be at an end.

<u>The Pleadings in these Proceedings</u>

26. The Plaintiff commenced these proceedings by way of a Specially Endorsed Writ filed on 16 May 2023 before the US proceedings were dismissed at first instance level. In addition to a prayer for a final anti-suit injunction, the Plaintiff seeks a declaration that Aon, as a matter of Bermuda law, is neither liable to the Holding Companies nor to the Third to Seventh Defendants for the misallocation of the dividend payments and that any such claims which might be brought by the Companies against Aon are time-barred in any event. Furthermore, the Plaintiff asks the Court to declare that Aon is entitled to be indemnified by the Holding Companies for any and all liabilities, costs, damages and expenses incurred by Aon in connection with any claims or demands by Pohanka employees in connection with the dividend payments, insofar as those claims or demands exceed the liability limitations in the Agreements.

27. On 15 June 2023 Trott & Duncan Limited ("T&D") entered an appearance for the Holding Companies and on 30 June 2023 their Defence and Counterclaim was filed. In that pleading, the Holding Companies allege that the misallocation of the dividend payments was made as a result of the intentional misconduct of Aon and that such intentional misconduct was the sole and direct cause of the damage to Mr. Potts KC's clients. As an alternative to its primary case asserting a limitation point, the case advanced for the Holding Companies is that the agreements with Aon contained express and implied terms that Aon would carry out its contractual duties with reasonable care and skill but that they failed to exercise any such

[3] Paragraph 4 Defence of the Third Defendant

reasonable care and skill. On that alternative case, the relief prayed by the Holding Companies is for Aon to indemnify the Holding Companies against any liability the Holding Companies have to the Third to Seventh Defendants for payment of the outstanding dividends declared in favour of the Third to Seventh Defendants.

28. Subsequently, on 25 July 2023 the Third Defendant entered a conditional appearance with leave of this Court pursuant to my *ex parte* Order of 25 July 2023. That was followed several months later by the filing of a Defence for the Third Defendant on 17 April 2024.

29. On 22 May 2024 the Fourth to Seventh Defendants filed a Memorandum of Appearance and their Defence was filed on 6 June 2024. The Third Defendant's Defence was adopted *mutatis mutandis* by the Fourth to Seventh Defendants (the "Defence").

30. On 21 October 2025 the Third to Seventh Defendants filed a Third Party Notice against the Holding Companies seeking to be indemnified against the Plaintiff's claim and the costs of these proceedings. On the Third Party Notice, the Third to Seventh Defendants also seek immediate payment by the Holding Companies of the outstanding dividends, with interest, or for damages in a like amount, plus interest. As a primary position, Mr. Potts KC submitted that formal leave is not required of this Court to permit his clients to serve the Third Party Notice as the Holding Companies are indeed party to these proceedings. All that is sought from the Third to Seventh Defendants are directions providing for the Holding Companies to file a Defence to the Third Party Notice.

THE AMENDMENT APPLICATION AND THE THIRD PARTY NOTICE

31. The Third to Seventh Defendants' third party claim against the Holding Companies are debt claims, notwithstanding that they are shareholders of the Holding Companies. As a result of the non-payment of the debt claims, the Third to Seventh Defendants say that they have suffered loss and damage. Mr. Potts KC submitted that the Third to Seventh Defendants' creditor's debt claim is to be distinguished from a claim qua shareholder for the diminution of the share value in the Holding Companies. He emphasised that his clients claims are instead a claim qua creditor for non-receipt of a declared dividend.

32. Mr. Potts KC stated that the purpose of the amendment application is to introduce a counterclaim against Aon as an alternative claim to the third party claim against the Holding Companies. The Third to Seventh Defendants ask this Court to find that a proper adjudication of these proceedings requires an assessment of their alternative claim against Aon. Otherwise, Mr. Potts KC argued, a risk of a lacuna arises, particularly in circumstances where the Holding Companies prove to be successful in defending their pleaded case that Aon was the sole and

direct cause of the damage suffered by any number or all of the Third to Seventh Defendants. Additionally, a collective evaluation of the proposed Counterclaim and third party notice would enable the Court to properly assess any arising issues of contributory negligence as between any number or all of the Third to Seventh Defendants, the Holding Companies and or Aon. On that basis, Mr. Potts KC urged this Court to grant his clients leave to prosecute the proposed Counterclaim against Aon.

33. Mr. Potts KC's bottom line position was that it is arguable that Aon is liable to the Third to Seventh Defendants because Aon was the party which actually made the payments to the Hackers. Mr. Potts KC referred to the English High Court decision in *Sell Your Car With Us Limited v Anil Sareen* [2019] EWHC 2332 as an example of a case in which the Court found the paying party to be liable in circumstances where the Court found that the company had good reason not to believe in the legitimacy of fraudulent emails.

34. Opposing the amendment application, Mr. Adamson argued that Aon was contractually obligated to the Holding Companies, as opposed to the Third to Seventh Defendants. He sought to distinguish the *Sell Your Car With Us Limited v Anil Sareen* case on the basis that the company, acting as an agent of Mr. Sareen, owed him a contractual duty.

35. However, the Third to Seventh Defendants' proposed counterclaim against Aon is grounded on allegations that Aon owed each of them a duty of care at common law and that Aon negligently breached that duty by failing to detect and act on various 'red flags' which ought to have prevented Aon from misallocating the dividend payments.

36. Mr. Potts KC, on his oral submissions, sought to ground and promote his clients' case on the principle of assumption of responsibility. A duty of care by an assumption of responsibility is created by a special relationship which might give rise to a duty of care, notwithstanding the absence of a relationship shouldered by contract or fiduciary duty. They include relationships which would otherwise be contractual but for the absence of consideration. Moreso, it is a volunteered responsibility in relation to a particular transaction. As Lord Devlin famously put it in *Hedley Byrne v Heller* [1964] AC 465 at page [529]:

"*I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction*."

37. Mr. Potts KC submitted that Aon, by its direct dealings with his clients, assumed a personal duty to his clients under the common law principles of assumption of responsibility, citing *Caparo Industries plc v Dickman* [1990] 2 AC 605, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, *White v Jones* [1995] 2 AC 207, *Robinson v Chief Constable of West Yorkshire Police* [2018], and *Manchester Building Society v Grant Thornton UK LLP* [2021] 3 WLR 81.

38. At paragraphs [42]-[43] of his skeleton argument, Mr. Potts KC argued:

"*These cases all recognise that a duty of care may arise, or be imposed, where it is fair, just and reasonable to do so, having regard to the reasonable foreseeability of loss, and the relationship of proximity between Plaintiff and Defendant: and that the Court's analysis on any given set of facts may take into account historic cases (and historic classes of relationship), and also whether a duty of care should be imposed (or extended incrementally) on the particular facts of the case before the Court.*

The mere fact that a professional service provider or a corporate service provider such as Aon…may owe contractual or fiduciary duties to a company does not, in and of itself, preclude the imposition of a direct duty of care at common law to some or all of the company's shareholders, if there is a 'special relationship' or an 'assumption of responsibility' that justifies one…"

39. During his oral submissions, Mr. Potts KC outlined the detail of the email correspondence between the Aon representatives and the Hackers, highlighting various 'red flags' which his clients say ought to have been detected by Aon, thereby pre-empting any misallocation of the dividend payments. Relying on the frequency of exchanges and number of payment transactions, Mr. Potts KC described Aon's interactive relationship with his clients as having been systemic and sustained over an extended period of time. He highlighted that Aon's interactions with his clients related to six dividend payments involving two different account handlers engaging with five different shareholders. That, Mr. Potts KC said, makes it highly arguable that a duty of care arose between Aon and his clients.

40. Mr. Potts KC also turned to the judgment of the United Kingdom's Supreme Court in *Philipp v Barclays Bank* [2023] UKSC 25 for a review of the *Quincecare* line of cases. At paragraphs [90] and [97] Lord Leggatt stated:

"*90. When these principles of agency law are applied to the factual circumstances of the Quincecare line of cases, the justification for the legal conclusion reached in those cases becomes clear. The authority conferred on an agent by a customer of a bank to sign cheques or give other payment instructions on behalf of the customer does not include authority to act dishonestly in pursuit of the agent's own interests and in fraud of the customer. An agent acting* *in this way will therefore lack actual authority to give the instruction on behalf of the customer. The agent will still in general have apparent authority to do so by virtue of the customer's representation to the bank that the agent is authorised to give payment instructions on its behalf. But not if there are circumstances suggestive of dishonesty apparent to the bank which would cause a reasonable banker before executing an instruction to make inquiries to verify the agent's authority. In such circumstances the bank's duty to exercise reasonable skill and care in and about executing the customer's instructions requires the bank to make inquiries to ascertain whether the instruction given is one actually authorised by the customer. If the bank executes the payment instruction without making such inquiries, the bank will therefore be acting in breach of duty. Furthermore, the instruction will not bind the customer, as the dishonest agent will lack apparent as well as actual authority to give it on behalf of the customer.*

…

97. In summary, the duty of a bank which has come to be referred to as the "Quincecare duty" is not, as that epithet might suggest, some special or idiosyncratic rule of law. Properly understood, it is simply an application of the general duty of care owed by a bank to interpret, ascertain and act in accordance with its customer's instructions. Where a bank is "put on inquiry" in the sense of having reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer, this duty requires the bank to refrain from executing the instruction without first making inquiries to verify that the instruction has actually been authorised by the customer. If the bank executes the instruction without making such inquiries and the instruction proves to have been given without the customer's authority, the bank will be in breach of duty. It will also in making the payment be acting outside the scope of its own authority from the customer and will therefore not be entitled to debit the payment to the customer's account."

41. Mr. Potts KC likened the bank's duty to exercise reasonable skill and care when carrying out payment instructions with the duty he says Aon owed to his clients in transacting the dividend payments. That said, Mr. Potts was also at pains to distinguish the Quincecare cases from the present case. This is addressed further below.

42. The case put by the Third to Seventh Defendants is that the Hacker's instructions to Aon did not bind the Third to Seventh Defendants any more than the dishonest agent's payment instructions bound the banking customer where a breach of the Quincecare duty is established. Mr. Potts KC further pointed out that in *Philipp v Barclays Bank* the Supreme Court found that the question as to whether the bank was in breach of duty was not a matter to be resolved on an application for summary judgment.

43. The origin of what is notoriously referred to as the Quincecare duty is Steyn J's first instance decision in *Barclays Bank plc v Quincecare Ltd* [1992] 4 ALL ER 363. In the judgment of

Lord Hamblen and Lord Burrows, sitting in the Privy Council *JP SPC 4 v Royal Bank of Scotland International Ltd (PC)* [2023] AC, passages from Steyn J's judgment are extensively quoted in the lead up to their Lordships' observation of three main points highlighting the Quincecare duty of care at page [488], paragraph [39]:

"*39 …*

(1) The Quincecare duty of care is an aspect of the bank's duty of reasonable skill and care in and about executing the customer's orders and arises by reason of an implied term of the contract and under a co-extensive duty of care in the tort of negligence.

(2) Steyn J recognised that this particular duty of care has to be carefully calibrated to reflect the fact that the duty of care is counteracting the receipt by the bank of what appears to be a valid and proper order which it is prima facie bound to execute. In other words, the duty of care runs counter to the bank's standard contractual duty to comply with a valid order of the customer. In line with this, Steyn J was at pains to make clear that the standard of care imposed should not place too onerous a burden on banks.

(3) Steyn J's statement that "the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties" (emphasis added) must be read in context. There was no question on the facts of the case of any duty of care being owed by the bank to innocent third parties. That was not in issue. The relevant parties were the bank and the customer. They were in a contractual relationship and the question was how far an implied term or a duty of care in the tort of negligence should be imposed to protect the customer. It is therefore clear that the reference to protecting innocent third parties was merely to the effect that combating fraud committed against a bank's customer, by recognising a duty owed to the customer,
protects not only the customer but also other innocent victims of a fraud."

44. Also, during his oral submissions, Mr. Potts KC pointed out that the Plaintiff never sought summary judgment on its claim against the Holding Companies. Inferentially, argued Mr. Potts KC, this is because the Holding Companies, having filed a Defence and Counterclaim alleging intentional misconduct, are actively defending themselves against the Plaintiff's claims on the merits. On that basis, the Third to Seventh Defendants should also be permitted to fully prosecute their counterclaim and the third party notice to establish that Aon and/or the Holding Companies are liable to them, whether in damages in tort or in contract for the unpaid debt arising out of unpaid declared dividends.

45. On the Plaintiff's underlying claim, it seeks a declaration from the Court as to whether it is liable to any of the Defendants for the misallocation of the dividend payments. To that end,

Mr. Potts KC said that the Plaintiff makes a positive claim of non-liability. However, Mr. Adamson, on a point of correction, described the Plaintiff's claim as a pursuit of negative declarations to found the anti-suit injunction.

46. Mr. Adamson turned up paragraph 48 of the Defence and Counterclaim for the Holding Companies where it states that a preliminary application under Order 1A and Order 33 rule 3 and 4(2) of the RSC for the dismissal of the Plaintiff's action will be made on the grounds that the claims are now time-barred pursuant to the Agreement which requires any action to be brought within a one-year period. Mr. Adamson emphasised that the primary position taken by the Holding Companies is that this litigation against them ought to be brought to an immediate end, not tried. In flagging this point, Mr. Adamson recognised an odd circularity between the Holding Companies' position and that of his client's plea for a declaration that the Holding Companies are equally time-barred from bringing any action against Aon in relation to the dividend payments. That said, Mr. Adamson highlighted that neither the Plaintiff nor the Holding Companies, on their pleaded cases, wish for the matter to proceed to trial on issues of liability because, as both parties agree, they are contractually time-barred.

47. Mr. Adamson agreed, as a matter of law, that the debt of unpaid dividends remains a debt owed to the Third to Seventh Defendants, as shareholders and now creditors of the Holding Companies. For that reason, he says, the Third to Seventh Defendants have suffered no loss.

48. As for the case proposed by the Third to Seventh Defendants against Aon, Mr. Adamson submitted that an actionable loss in tort and negligence has not been shown. He pointed to the commentary in the 1999 White Book where it provides at paragraph [20/8/4]:

"***Application for leave to amend***

…

In practice, leave to amend is given only when and to the extent that the proposed amendments have been properly and exactly formulated…In such case the order giving leave to amend binds the party making the application and he cannot amend generally. Sometimes, though rarely, leave may be given to amend a pleading generally, but in such case the party is not entitled to introduce in his pleading amendments which would not have been allowed if he had formulated and stated in writing the exact amendment that he was seeking to make: to do so would be an abuse of process and accordingly the Court has power in a proper case to strike out such amendments (Busch v. Stevens [1963] 1 Q.B. 1; [1962] 1 ALL E.R. 412)."

49. Looking at the allegations of loss in the proposed Counterclaim, paragraph [27] sets out what is said to be the loss of unpaid dividends. It reads:

"*The Plaintiff's breaches of duty caused, or materially contributed to, the wrongful diversion of the dividend payments intended to be made by the First and Second Defendants to the Third to Seventh Defendants, and thereby caused or materially contributed to the First and Second Defendants', and/or the Third to Seventh Defendants' respective losses and damages in this respect, to the value of the missing dividend payments (plus interest)*."

50. Mr. Adamson says that this claim and any claim for loss of chance is not, however, a viable claim because the debt remains due and owing on the agreed basis that the Third to Seventh Defendants are now creditors of the Holding Companies.

51. Having pointed out that assumption of responsibility is not pleaded by the Third to Seventh Defendants, Mr. Adamson robustly argued against the Third to Seventh Defendants' proposition that Aon owed them a duty of care at common law to exercise reasonable skill and care in performing the task of making dividend payments, Mr. Adamson flagged that the Courts have never imposed a duty of care on captive managers for the handling of dividend payments, making the claim of the Third to Seventh Defendants an entirely novel one. Mr. Adamson added, with great emphasis, that the Court's role in cases such as the present, is to determine whether the common law recognises a duty of care between the relevant parties- not whether it is arguable that there is a duty of care. Mr. Adamson submitted that this approach was settled by the Privy Council in the *JP SPC 4* case where it provides at paragraphs [29]-[32]:

"*29 It was submitted on behalf of the Fund that, where the strike out/summary judgment application turns on a complex and developing area of the law, it is best left to be determined after a trial on the basis of actual rather than hypothetical facts - see, for example, Hughes v Richards (trading as Colin Richards & Co) [2004] PNLR 35, para 30 per Peter Gibson LJ.*

30 This must depend on the extent to which the issue of law is fact dependent. Where all the relevant facts can be identified there is no reason why the issue of law cannot be determined and, indeed, it will often be consistent with the overriding objective of the Civil Procedure Rules (CPR Part 1) for that to be done, in the interest, in particular, of saving time and costs.

31 There are many precedents for decisions being reached as to whether a duty of care can be established on the basis of assumed or pleaded facts rather than following a full trial. Notable examples include Caparo Industries plc v Dickman [1990] 2 AC 605 (a preliminary issue assuming the facts to be as pleaded, see p 615E); Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 (a preliminary issue on the question of law as to whether a duty of care was owed, see p 170A); Customs and Excise Comrs v Barclays Bank plc [2007] 1 AC 181 (a preliminary issue on assumed facts, see p 188H); Michael v Chief Constable of South Wales Police [2015]

AC 1732 ("Michael") (application for summary judgment, see para 3); N v Poole Borough Council [2020] AC780 ("N v Poole") (application to strike out, see para 9).

32 In the present case the relevant facts as to whether in law the Bank owed a duty of care to the Fund can be readily identified, namely, the assumed facts. It follows that the lower courts were correct to "grasp the nettle" and to decide the question of law, as to whether there was the alleged duty of care, one way or the other. This does not involve deciding whether, on the assumed facts, it is arguable that there is a duty of care: but rather deciding whether, on the assumed facts, there is, or is not, a duty of care."

52. Mr. Adamson submitted that the *JP SPC 4* case stands for the proposition that the Court must decide whether a duty of care exists on the basis of the pleaded or assumed facts. Conversely, what the Court ought not to do is to proceed to trial on the basis that the question as to whether a duty of care exists will be decided at trial.

53. The claimants in the *JP SPC 4* case were two investment funds based in the Cayman Islands. They brought a case in the Isle of Man against the Royal Bank of Scotland International Ltd (the "Bank"). The claim was for the recovery of alleged losses said to have resulted from a fraud committed by an Isle of Man company and its owners in relation to monies in the company's account with the Bank which were monies beneficially owned by the claimants. The claimants' primary case was that the Bank owed them a duty of care to exercise reasonable skill and care since the Bank knew that the monies ultimately belonged to the claimants. Similar to the 'red flag' submissions made in the present case, the claimants contended that a reasonable banker would have had grounds for considering that there was a real possibility that the claimants were being defrauded.

54. In the *JP SPC 4* case the Bank applied for summary judgment and/or for the claim to be struck out, on the basis that there was no arguable pleaded claim by which the claimants could establish that the Bank owed the claimants a duty of care. At first instance, the Bank's application for summary judgment was struck out. However, on appeal to the Staff of Government (Appeal Division) the first instance decision of the Deemster was reversed and the claimant's claim was struck out with summary judgment being entered for the Bank. That decision on appeal was upheld by the Privy Council.

55. The appellants in the *JP SPC 4* case argued that the Quincecare duty applied to their claim and, in the alternative, that if it was not so covered, their case was suitable for incremental extension of the law to cover their claim. Attempting to make good this submission, Mr. Stephen Auld QC for the first claimant referred to previous cases in which a duty of care was held to be owed to third parties suffering pure economic loss, one of which was the House of Lords decision in *White v Jones* [1995] 2 AC 207. In that case, the Court was concerned with allegations made

by the intended beneficiaries of will that the instructed solicitors negligently failed to draw up the will prior to the passing of the testator. In such cases, the law may operate to incrementally extend a duty of care where practical justice so demands, so to fill a lacuna, because it was not otherwise possible for the intended beneficiaries of the estate to claim against the estate or the testator. This was explained in the *JP SPC 4* case at paragraph [71]:

"*71 The House of Lords in White v Jones decided, with the leading speech being given by Lord Goff, that a duty of care in the tort of negligence was owed because practical justice demanded that there should be a remedy to fill the lacuna that would otherwise arise given that the estate which had a cause of action had suffered no loss whereas the intended beneficiaries who had suffered the loss had no cause of action. To fill this lacuna, the law should treat the assumption of responsibility owed by a solicitor to its client as extending to the intended beneficiary*."

56. Mr. Doyle distinguished cases like *White v Jones* eligible for an incremental extension from the present case on the basis that the Third to Seventh Defendants do in fact have an actionable debt, qua creditors, which may be brought against the Holding Companies.

57. Mr. Doyle also submitted that proposed Counterclaim wrongly sought to impose a duty on Aon for an omission occasioned by the wrongdoing of a third party, namely the Hacker. He pointed to passages from the Privy Council's judgment in the *JP SPC 4* case setting out the exclusion of acts amounting to omissions to prevent the harm caused by third parties. At paragraphs [81]-84] of the judgment it provides:

"*81 Although it featured more in his oral than his written submissions, Mr Giles Wheeler QC for the Bank urged on the Board that a further reason or caution before considering an incremental extension of the duty of care is that one is here concerned not merely with pure economic loss but also with an omission in the sense that what is alleged is the failure of the Bank to step in to prevent harm being caused to the claimant by the wrong of a third party. Put another way, the duty of care would be one to protect the claimant against the fraud of the Bank's customer.*

82 The Supreme Court has extensively examined the law on the duty of care in the context of such failures in Michael [2015] AC1732 and N v Poole [2020] AC 780. In Michael, the deceased had rung the police to report that her former partner had threatened to return to kill her. The police delayed in responding to that call and, in the interim, the deceased was stabbed to death by her former partner. It was held that there was no duty of care owed by the police to prevent the harm to the deceased. In N v Poole, the claimant children, along with their mother, were placed by the defendant public authority in accommodation where they were subjected to harassment and abuse by a neighbouring family. It was again held that no duty of care was owed by the public authority to prevent the harm to the children. In both cases it was *emphasised that the common law does not generally impose liability for failure to prevent harm caused by others. As Lord Toulson JSC expressed it at para 97 in Michael: "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else."*

83 In those cases, therefore, the Supreme Court recognised that for a duty of care to arise restrictive principles needed to be satisfied. Those principles are, most importantly and relevantly, that the defendant has some special level of control over the source of danger or has assumed a responsibility to protect the claimant from the danger: see Michael at paras 99—100; and N v Poole at para 76. In neither of those two cases were either of those principles made out on the facts.

84 Applying those principles to the present case, it can be seen that the Bank had no special level of control over the source of danger (i e it was not in control of the fraudsters) and, for reasons already set out, it cannot be said to have assumed responsibility to protect the Fund from the fraud. Therefore, viewing this case through the lens of the conduct of the defendant being an omission, in the sense of a failure to protect the Fund from the fraud of the Bank's customer, further supports the decision that the Bank owed no duty of care to the Fund."

58. However, Mr. Potts KC submitted that it is not generally appropriate for a Court to strike out or summarily determine an arguable claim on assumed facts in a developing area of jurisprudence. Mr. Potts KC quoted from Lord Browne-Wilkinson's judgment in *Barrett v Enfield DC* [2001] 2 AC 550 at page [557] at paragraphs [e-g] which provides as follows:

"*Moreover, there have been two developments since the conclusion of the argument in the present case, both of which have been drawn to our attention by the parties. For reasons which I will seek to demonstrate, they both emphasise the extreme care which must be taken in striking out claims in this confused and developing area of the law, and clearly reinforce the conclusion that the case cannot be struck out.*

Striking out
In my speech in the Bedfordshire case [1995] 2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

59. Mr. Potts KC also relied on the decision in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 where Lord Collins at paragraph [84] said:

"*The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e g Lonrho Plc v Fayed [1992] 1 AC 448, 469 (approving Dyson v Attorney General [1911] 1 KB 410, 414: summary procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance . . ."); X (Minors) v Bedfordshire County Council [1995] 2 AC 633, 740—741 ("Where the law is not settled but is in a state of development . . . it is normally inappropriate to decide novel questions on hypothetical facts"); Barrett v Enfield London Borough Council [2001] 2 AC 550, 557 (strikeout cases); Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of American Cyanamid Co v Ethicon Ltd [1975] AC396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration".*"

THE LAW ON AMENDMENT OF PLEADINGS

60. RSC Order 20/5(1) is the relevant governing procedural rule for seeking the Court's leave to amend. These rules provide:

"*20/5 Amendment of writ or pleading with leave*
5 (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

61. The 1999 White Book commentary on the Court's power to amend appears at para 20/0/2:

"*The overriding principle with regard to amendments is that contained in r.8, namely that, generally speaking, all amendments will be allowed at any stage of the proceedings and of any document in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the Court thinks just. This principle is subject to the countervailing rule of practice that an amendment will be refused or disallowed when, if it were made, it would* *result in prejudice or injury which cannot properly be compensated for by costs. Accordingly, as a general rule, either party is allowed to make any amendment in his own pleadings or other proceedings which is reasonably necessary for the due presentation of his case on payment of the costs of and occasioned by the amendment, provided there has been no undue delay on his part, and provided also the amendment will not injure or prejudicially affect any vested rights of his opponent. But if the application is made mala fide, or if the proposed amendment is sought to be made after undue delay, or will in any other way unfairly prejudice or cause detriment to the other party, or is irrelevant or useless or would raise merely a technical point, leave to amend will be refused…*"

62. At para 20/8/6 commentary is provided on the general principles for grant of leave to amend under Rules 5, 7 and 8. Those passages provide:

"*It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" (see, per Jenkins L.J. in G. L. Baker Ltd v Medway Building & Supplies Ltd [1958] 1 W.L.R. 1216 at 1231; [1958] 3 ALL E.R. 540 at 546).*

"It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy…It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right" (per Bowen L.J. in Cropper v Smith (1883) 26 Ch. D. 700 at 710-711, with which observations A.L., expressed "emphatic agreement" in Shoe Machinery Co. v. Cultam [1896] 1 Ch. 108 at 112).

In Tildesley v. Harper (1878) 10 Ch. D. 393 at 396 and 397, Bramwell L. J. said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs"… An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties" and multiplicity of legal proceedings avoided…

On the other hand, it should be remembered that there is a clear difference between allowing amendments to clarify issues in dispute and those that provide a distinct defence or claim to be raised for the first time (see, per Lord Griffiths in Ketteman v Hansel Properties Ltd [1987] 1 A.C. 189 at 220)"

63. Kawaley CJ (now President of the Court of Appeal) in *Fifth Street Finance Corporation v Dobbin* BM 2013 SC 52 said:

"*It is well-settled that any amendment which is not liable to be struck-out on the grounds that, inter alia, it discloses no reasonable cause of action or is an abuse of process because it is bound to fail ought ordinarily to be allowed. It remains to consider whether the proposed amendment discloses a legally arguable alternative defence (i.e. a claim for breach of the plaintiff's alleged general duty to act reasonably in relation to its security). Alternatively, the legal viability of the amendment turns on an analysis of whether the plaintiff validly contracted out of the relevant duty so that the proposed defence is bound to fail*."

WHETHER THE PROPOSED COUNTERCLAIM IS ARGUABLE

Whether there was a Duty of Care

Whether there was an Assumption of Responsibility

64. Mr. Adamson, having cited the *JP SPC 4* decision of the Privy Council, submitted that I must determine whether Aon owed a duty of care to the Third to Seventh Defendants. Mr. Potts KC, however, urged this Court against making any such finding. Terming this the "grasp the nettle point", Mr. Potts KC cautioned that the Court, without the totality of the relevant facts and evidence, is not properly positioned after only a single hearing day, to "grasp the nettle" and dispose of the issue.

65. Mr. Potts KC also reminded this Court that the Privy Council's decision in *JP SPC 4* is binding only for the *ratio decidendi* of the case. Here, I would point out that the *JP SPC 4* case was decided on the question and effect of pure economic loss in negligence cases and on the issue of conduct which constitutes failure by omission to prevent the wrongdoing of a third party causing loss to a claimant. Additionally, it is worth noting that the grounds of appeal against the decision of the Court of Appeal were noted at paragraph [33] as including, *inter alia*:

(1) in failing to allow the case to proceed to trial so that it can be decided in full view of the facts;

(2) in failing to have any or any sufficient regard to key facts;
(3) …
(4) in mischaracterising the scope of the alleged duty of care and/or the circumstances alleged to give rise to it;
(5) …
(6) in holding that a duty of care could only arise on the basis of an assumption of responsibility by the Bank to the Fund and in failing to recognise the possibility of an implied assumption of responsibility;
(7) in failing to recognise that, if the duty of care alleged does not fall within an established category of duties, it would be an incremental development justified by analogy with existing authorities on duties of care to third parties to protect against economic loss and by considerations of policy;
(8) …
(9) in failing to permit amendment to the particular of claim.

66. Notwithstanding, Mr. Potts KC argued that the facts in the present case are readily distinguishable from the facts and circumstances of the *JP SPC 4* case. He pressed on Aon's actual knowledge of and direct interaction with the shareholders in this case and distinguished the *JP SPC 4* case on the grounds of it being a banking case involving allegations made by liquidators of two insolvent funds as to the Bank's actual or constructive knowledge. At paragraph [26] Lord Hamblen and Lord Burrows said:

"*…Despite the departure from the pleaded case which this involves, we are prepared to consider whether a duty of care was owed in this case on the basis that the relevant assumed facts are as follows: (1) the Bank knew or ought to have known that the moneys in the Accounts were not beneficially the property of SIOM, but instead of the Fund and (2) the circumstances were such that a reasonable banker would have had grounds for considering that there was a real possibility that the Fund was being defrauded ("the assumed facts").*"

67. Mr. Potts KC also pointed out that the banking relationship is one of debtor creditor as opposed to one of trust. Although he accepted that his arguments were prayed in aid of the necessary approach for answering to red flags when processing payments, Mr. Potts KC emphasised that his clients do not rely on the Quincecare banking cases as its authority for establishing a duty of care against Aon. Instead, his clients aim to persuade trial judge to incrementally extend the Quincecare duty by analogy to the present facts involving a captive insurance manager making dividend payments.

68. I start with the "grasp the nettle point". In my judgment, the Privy Council's decision in *JP SPC 4* is, at least, highly persuasive authority for the proposition that the Court should determine, at this stage, the question as to whether there was a duty of care in order to determine

whether the proposed Counterclaim contains an arguable claim. The question as to whether Aon owed a duty of care to the shareholders of the Holding Companies is not dependent on any special relevant facts unknown to this Court. In the present circumstances the assumed and pleaded facts are sufficient to determine whether there was a duty of care owed. As I see it, the discovery stage of the proceedings would more so illuminate questions relevant to a breach, if in fact a duty of care was ever owed. In this case, deciding whether a duty of care was owed is consistent with the Court's case management duties. That being the case, I am conscious that I must be satisfied that it is plain and obvious that the proposed Counterclaim should be struck out as being effectively unarguable with no chance of success.

69. Clearly, Aon owed a coincident duty of care to the Companies, as arose from and was implied in the Agreements between those parties. However, no contractual or statutory duty was owed by Aon to the Holding Companies' shareholders, whether individually or as a body or class. The question is, putting aside the absence of any pleaded case on assumption of responsibility (the "pleading point"), whether an assumption of responsibility arises on the pleaded and assumed facts.

70. In Hedley Byrne & Co. Ltd Lord Devlin said at page [529]:

"*I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract*."

71. In general terms, the Court will look for the presence of the following ingredients of duty of care by assumption of responsibility:

(i) Reasonable foreseeability of harm;
(ii) A special relationship demonstrating proximity, meaning a close and direct relationship, and one which is "equivalent to contract" but for the absence of consideration or actual privity of contract but there is a voluntary assumption of responsibility;
(iii) Circumstances which make it fair and reasonable to impose a duty of care;

72. In *Caparo Industries plc v Dickman* [1990] 2 AC 605, the English Court of Appeal was concerned with the question as to whether a company's auditor, who had statutory and contractual obligations to the company, also had a duty of care to the company's shareholders with whom no direct contractual agreement was in place. The above three ingredients were applied by the Court of Appeal in *Caparo Industries plc* where it was held that the auditors owed a duty of care to the company's shareholders. While the Court of Appeal's ultimate

findings were appealed and reversed by the House of Lords, both levels of Court broadly agreed on the statement of the relevant legal principles.

73. The basic facts in the case of *Caparo Industries plc*, was that Caparo Industries plc ("Caparo") purchased shares of Fidelity Plc ("Fidelity") on the London Stock Exchange. Fidelity's accounts were audited by "Dickman" whose report for the year ending on 31 March 1984 had been approved by Fidelity's directors. On 12 June 1984 the auditor's report was issued to Fidelity's shareholders, with notice of the annual general meeting which took place on 4 July 1984 when the auditor's report was read and adopted. Days prior to the auditor's report being issued to the shareholders, Caparo began to purchase Fidelity shares which were not registered until after 12 June 1984. Caparo alleged that those shares and a subsequent bid were all made in reliance upon the auditor's accounts which were misleading and inaccurate. Caparo's case was that it consequently suffered economic loss and that had it known the true facts, it would not have made a bid at the price paid or at all.

74. The Court of Appeal found that it was reasonably foreseeable that harm would be caused to the shareholders if the auditors failed to exercise reasonable care and skill in carrying out their professional duties. The Court of Appeal upheld the finding made at first instance that the publishing of auditor's report made economic loss to Caparo, a shareholder, foreseeable.

75. The issue as to whether there was a special relationship was a contentious one in *Caparo Industries plc*. Caparo argued that auditors were appointed for the specific purpose of reporting to the shareholders and that the statute required the auditors' report to be sent to every shareholder and for the report to be read before the company in a general meeting, making it open to inspection by any member of the meeting. However, Counsel for the auditor argued that the auditor's relationship was also with investors who were not shareholders. As stated in the Court of Appeal judgment:

"*The auditors' fundamental submission was that voluntary assumption of direct responsibility to the plaintiff (and thus, here, to Caparo as shareholder) in circumstances equivalent to contract is the touchstone of proximity in cases such as this. This requires that the auditor should deliberately accept a particular responsibility to the shareholder in addition to the responsibility already existing to the company. This also requires that the statement should be made for the very purpose of a particular transaction of which the auditor knows, that the shareholder should be the person (or a member of a small and determinate class) for whom the statement is made and that there should be some communication or conduct linking the auditor to the shareholder so as to show his acceptance of special responsibility to the shareholder. Judged by these tests the relationship between auditor and shareholder (it was said) lacks the proximity necessary before a duty of care can arise*."

76. To this, Bingham LJ said:

“*Thus "voluntary assumption of responsibility, “although a very useful expression, does not provide a single, simple litmus test of proximity*.”

77. Bingham LJ quoted from Lord Denning M.R. in *Ministry of Housing v Sharp* [1970] 2 Q.B. 223 at p. 268F as follows:

“*"[Mr. Hunter] submitted to us, however, that the correct principle did not go to that length. He said that a duty to use due care (where there was no contract) only arose when there was a voluntary assumption of responsibility. I do not agree. He relied particularly on the words of Lord Reid in Hedley Byrne's case [1964] A.C. 465, at p.487, and of Lord Devlin at p.529. I think they used those words because of the special circumstances of that case (where the bank disclaimed responsibility). But they did not in any way mean to limit the general principle.*

In my opinion the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate. That is enough to bring the duty into being. It is owed, of course, to the person to whom the certificate is issued and whom he knows is going to act on it, see the judgment of Cardozo J. in Glenzer v. Shepard (1922) 233 N.Y. 236. But it is also owed to any person whom he knows, or ought to know, will be injuriously affected by a mistake, such as the incumbrancer here."”

78. Bingham LJ further quoted from the speeches of Salmon LJ and Cross LJ as follows:

“*Salmon L.J. (at p. 279E) said:*
"I do not accept that, in all cases, the obligation to take reasonable care necessarily depends upon a voluntary assumption of responsibility."

Cross L.J. added (at p. 291A):
"...It is true that the phrase 'voluntary assumption of risk' occurs frequently in the speeches in the Hedley Byrne case, but I agree with the judge that that case did not purport to lay down any metes and bounds within which legal liability in tort for false statements, on which the parties to whom they are made rely, has to be confined: see in particular per Lord Devlin, at pp.530–531. I see no sufficient reason why in an appropriate case the liability should not extend to cases in which the defendant is obliged to make the statement which proves to be false."”

79. Having applied the term “voluntarily assumption of responsibility” in the broader context, the Court of Appeal found that a special relationship between the auditors and the shareholders existed on the basis that the auditors assumed the responsibility in accepting their appointment as auditors, knowing that their report would be sent to the shareholders and that the shareholders would rely on their report. The Court found:

“*There is, of course, no contract between the shareholders (either as a class or individually) and the auditor. But certainly as between the shareholders as a class and the auditor the relationship seems to me to be very close indeed to contract The auditor's contract is made with the company, but it is a contract made on the company's behalf by the shareholders; the auditor's fee is paid out of company funds otherwise available (in part) for distribution to the shareholders; and the object of the contract is to obtain a report to shareholders made independently of the company itself. As between the shareholders individually and the auditor the analogy with contract is less compelling, but in my view it remains close. If a company engaged a doctor to examine and advise its senior employees, I would regard the relationship between the doctor and each individual employee as equivalent to contract for all except strictly legal purposes. The relationship between auditor and individual shareholder is less close, but not in my opinion critically so*.”

80. As to the third requirement, whether or not it was fair and reasonable to impose a duty of care, Lord Bingham said:

“*I come, therefore, to the third requirement to be satisfied by Caparo, that it is in all the circumstances just and reasonable to impose a duty of care on a statutory auditor towards individual shareholders. Caparo's case was again simple. The duty contended for obliges an auditor to do nothing which he is not already obliged to do under his contract with the company. The existing obligation is one from which the auditor cannot be excused (see s.310 Companies Act 1985). The duty contended for would simply extend a right of redress, if the auditor failed to perform his duties with reasonable care and skill, from the company, which would rarely have a claim, to shareholders who foreceably* [forcibly] *would. It is just and in principle desirable that those who fail to perform their professional duties in accordance with professional standards should compensate those foreceably* [foreseeably] *injured by their failure*.”

81. Part of the Court of Appeal’s consideration, in deciding whether it was fair and reasonable to impose a duty of care, was whether in doing so, it would procure an oppressive result, citing Cardozo CJ in a US law case *Ultramares Corp. v Touche* 174 N. E. 441 (1932) at page [444]: “*…liability in an indeterminate amount for an indeterminate time to an indeterminate class…*”. At page [430G] Counsel for the auditor relied on the observations of Keith LJ in *Rowling v Takaro Properties Ltd*. [1988] A. C. 473 where he is reported as having said:

"*The third is the danger of overkill. It is to be hoped that, as a general rule, imposition of liability in negligence will lead to a higher standard of care in the performance of the relevant type of act; but sometimes not only may this not be so, but the imposition of liability may even lead to harmful consequences. In other words, the cure may be worse than the disease…*"

82. However, by majority decision, the Court of Appeal erroneously found that the auditor of a public company owed individual shareholders a duty to exercise reasonable care in the carrying out of an audit. They held that an individual shareholder who suffered loss by acting in reliance on negligently prepared accounts, whether by selling or retaining his shares or by purchasing additional shares, was entitled to recover in tort.

83. As earlier noted, the Court of Appeal's finding that a duty of care was owed by the auditors to the individual shareholders was appealed and reversed by the House of Lords in in *Caparo Plc v Dickman (H.L.(E.))* [1990] 2 AC 605. In the leading judgment of the House, Lord Bridge of Harwich recognised, by reference to numerous previous cases, that the Courts should avoid any temptation to state a defining principle for when a duty of care will arise in the law of negligence. This caution equally applied to the concepts of proximity and fairness as components of a duty of care.

84. Having re-examined these concepts of proximity and fairness, the House of Lords in *Caparo Industries plc* overturned the Court of Appeal's decision. Lord Bridge of Harwich at page 620H-621F said:

"*The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to "liability in an indeterminate amount for an indeterminate time to an* *indeterminate class:" see Ultramares Corporation v. Touche (1931) 174 N.E. 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism ... imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence"* [footnote omitted] *rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind.*"

85. Addressing the position of investors, which included existing shareholders seeking to purchase additional shares, Lord Bridge found the auditors of a public company's accounts owe no duty of care to members of the public at large who rely on those accounts in deciding whether to purchase shares of the company. That, the House of Lords found, would be a duty owed too widely. As to the interests of shareholders, qua shareholder, the House found that their interest in the proper management of the company's affairs is indistinguishable from the interest of the company itself. So, any negligent failure on the part of an auditor to report on misappropriation of funds by directors is a claim to be made against the auditors by the company as opposed to any individual shareholder. That invokes the proper plaintiff rule relied on by the Plaintiff in this case.

86. In the conclusory portion of Lord Bridge's judgment, which was unanimously agreed, he said at page [627D-F]:

"*…It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. "The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it:" see Sutherland Shire Council v. Heyman, 60 A.L.R. 1, 48, per Brennan J. Assuming for the purpose of the argument that the relationship between the auditor of a company and individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor's report, he stands in no different position from any other investing member of the public to* *whom the auditor owes no duty*."

87. What is perfectly clear from the judgment of the House of Lords in *Caparo Industries plc* is that reasonable foreseeability of harm is but only one element of the consideration of the question of duty of care. There must, in cases of voluntary assumption of responsibility, be a special relationship between parties which establishes real proximity. Real proximity in this sense means the defendant who is said to have owed a duty of care must have known and anticipated that the plaintiff would rely on that defendant to exercise reasonable care and skill for a particular purpose known to both parties. And the success of the plaintiff's case requires the plaintiff to have actually relied on that defendant's performance of the task for that very purpose.

88. In the present case there was a clear voluntary assumption of responsibility on the part of Aon to perform the task of administering the dividend payments. However, to whom did Aon volunteer that duty? On the pleaded facts before this Court, Aon was contractually obligated to the Holding Companies, albeit that its duties included the dispensing of declared dividend payments to the Third to Seventh Defendants. However, pursuant to its contractual relationship with the Companies, Aon clearly disclaimed its liability to any third party in the Agreements which expressly provided that Aon's services were provided for the benefit of the Companies and not any third party, unless subsequently and otherwise agreed in writing. This is distinguishable from the position in *Henderson v Merrett Syndicates Ltd* where the services provided by the managing agents was purposed for the benefit of Names, the underwriting members at Lloyd's and in circumstances where a duty of care was not excluded in any of the contractual agreements or the byelaws.

89. Aon's communications with the Third to Seventh Defendants were carried out as an agent of the Holding Companies. The fact of the matter is that the Third to Seventh Defendants were ultimately reliant on the Holding Companies, albeit via its agent, to make good those dividend payments. That is because the duty owed to the Third to Seventh Defendants for payment of the declared dividends was a duty owed to them by the Holding Companies, not a duty owed by the agent of the Holding Companies. As Mr. Doyle correctly submitted on behalf of the Plaintiff, agents do not generally owe a duty of care in tort for their principals' performances of contractual obligations (citing *Dean v Allin & Watts* [2001] EWCA Civ 758).

90. Mr. Doyle also submitted that the Third to Seventh Defendants are unable to establish a duty of care on the basis of pure economic loss. The crucial distinction between personal injury or injury to property on the one hand and pure economic loss on the other was addressed by House of Lords in *Caparo Industries plc*. Lord Bridge of Harwich at page [618E] said:

"*One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss. A graphic illustration of the distinction is embodied in the proposition that:*

"*In case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right:" see Elliott Steam Tug Co. Ltd. v. Shipping Controller (1922) 1 K.B. 127, 139 per Scrutton L.J.*"

91. In the present case, any loss claimed by the Third to Seventh Defendants can only be of a purely economic nature, as the claim brought by them is not a proprietary claim. In this regard, I accept the Plaintiff's submission that a declaration of dividend does not create a trust of specific property in favour of the shareholder. That is reinforced by the agreed position that the unpaid dividends remain a debt owing which may be claimed by the Third to Seventh Defendants as creditors of the Holding Companies. That is so whether or not the Holding Companies pursue a claim against Aon for loss.

92. I also accept Mr. Doyle's submission that the proposed Counterclaim fails to establish a duty of care owed by Aon because it errantly imposes a duty on Aon for its omissions to intercept and pre-empt the wrongdoing of a third party. It would be wrong of this Court to impose a duty of care on Aon to prevent harm caused to the Third and Seventh Defendants by a third party. This area of the law was amply set out by the Privy Council in the *JP SPC 4* case and I consider myself bound by the Privy Council's approval of the principles stated in *Michael* [2015] AC 1732 and *N v Poole* [2020] AC 780.

93. Finally, I come to the question of whether, on the presumed and pleaded facts, the Third to Seventh Defendants can establish a claim eligible for incremental extension of the law. On that question, I have no difficulty in finding that there is no basis for any plea to incrementally extend a duty of care to cover the proposed Counterclaim against Aon because, as I earlier noted, the unpaid dividends continue to be an actionable debt claim which is open to the Third to Seventh Defendants to prosecute against the Holding Companies. I do not accept that there is a risk of a lacuna, in the sense of the lacuna recognised in cases like *White v Jones*. The purported lacuna described by Mr. Potts KC during his oral submissions was a mere recognition of a risk that the Third to Seventh Defendants may not obtain the full relief they seek, qua creditor, against the Holding Companies. That risk is not a basis for incrementally extending the Quincecare duty to apply to the claim set out in the proposed Counterclaim.

94. For all these reasons, I am bound to find that the proposed Counterclaim alleging a breach of duty against Aon for negligent misallocation of the dividend payments is unarguable with no chance of success as Aon did not owe a duty of care to the Third to Seventh Defendants.

DECISION

95. I refuse leave for the Third to Seventh Defendants to amend the Defence by way of the proposed Counterclaim against the Plaintiff on the basis that the proposed Counterclaim does not establish an arguable claim against the Plaintiff.

96. To the extent that leave is required, I grant leave to the Third to Seventh Defendants to issue the third party notice against the Holding Companies.

COSTS

97. Unless either party seeks to be heard on the issue of costs, costs shall follow the event in favour of the Plaintiff.

Dated this 17th day of August 2026

THE SEAL OF THE SUPREME COURT OF BERMUDA

SIGNED

HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT