[2019 Gib LR 165]

RECLAIM LIMITED (in liquidation, acting by its joint liquidators LAVARELLO and VAUGHAN) v. LAW-ABOGADOS PATRIMONIAL SL and FERNANDEZ

IN THE MATTER OF RECLAIM LIMITED

SUPREME COURT (Yeats, J.): October 14th, 2019

Conflict of Laws—forum conveniens—company winding-up—in company action brought by liquidators of Gibraltar company against Spanish respondents, claims to terminate contract between parties, and for disclaimer and relief (Companies Act 1930, ss. 252 and 308)—claims related or analogous to winding-up proceedings—Brussels Recast Regulation disapplied and Insolvency Regulation, art. 4 engaged (law of state in which insolvency proceedings opened to be followed)

The liquidators of Reclaim Ltd. brought proceedings against the respondents.

Following a formal request from the UK Office of Fair Trading in April 2011, the Minister for Finance had sought the winding up of Reclaim Ltd., a Gibraltar registered company. It was contended that two companies related to Reclaim, namely Leisure Group Ltd. and Personal Travel Group Ltd., were involved in a timeshare scam in Spain. As part of the marketing pitch in the sale of the timeshares, purchasers were issued with certificates by Reclaim which, subject to certain conditions being met, entitled them to a refund of a proportion of the purchase price. The purchasers would transfer a small portion of the purchase price to Reclaim. Those funds were not held by Reclaim, but were transferred to a Spanish firm, Law-Abogados Patrimonial ("LAP"). LAP was the first defendant/applicant in the present proceedings. It was the corporate and fiduciary arm of the legal practice of the second defendant/applicant, a Spanish lawyer. In 2014, Reclaim was wound up by order of the Chief Justice (see 2013–14 Gib LR 488). No illegality was attributed to Reclaim but it was considered not to be in the public interest of Gibraltar for it to be allowed to continue operating.

Following their appointment, the liquidators of Reclaim demanded from LAP an account of the moneys held by LAP belonging to Reclaim and the transfer of all such funds. No account was produced.

On March 31st, 2017, the liquidators commenced two sets of proceedings: "the company action" and "the Part 7 claim." In the company action, the relief sought by the liquidators included disclosure by the applicants of

bank statements and documents in respect of any funds held or controlled by them relating to Reclaim certificate holders; a declaration that the funds held or controlled by the applicants were assets of Reclaim; alternatively, a declaration that the funds were held by the applicants as bare trustees for Reclaim; an order pursuant to s.252 of the Companies Act 1930 or otherwise that the applicants transmit the funds to Reclaim/the liquidators; an order that the liquidators be entitled to disclaim any agreement Reclaim had with the applicants pursuant to s.308 of the Companies Act; and damages for breach of trust, breach of contract or otherwise wrongful retention of the trust moneys. In the Part 7 claim, the liquidators sought a declaration that the funds held by the applicants were assets of Reclaim; alternatively, a declaration that the applicants held the funds as bare trustees for Reclaim; that the applicants account to the liquidators; damages against the applicants for breach of trust, breach of contract and wrongful retention of trust moneys; and restitution.

The liquidators were granted permission to serve the claims on the applicants in Spain. Time for service was extended in September 2017 to March 31st, 2018, and it was extended again on March 5th, 2018 to June 30th, 2018. The claims were served on the applicants by the Spanish authorities on April 9th, 2018. Included in the bundles served was a copy of the order extending time until March 31st, 2018 but not a copy of the order extending time to June 30th, 2018. An acknowledgement of service was filed in the Part 7 claim only.

The applicants applied in the company action seeking, *inter alia*, the following relief: (i) an extension of time for filing an acknowledgement of service; and (ii) a declaration that the court had no jurisdiction to determine the action and/or should not exercise any jurisdiction it might have to determine the action and for an order that the action be set aside and dismissed and/or that the action be stayed in favour of Spanish arbitration and/or the Spanish courts. In respect of the Part 7 claim, the applicants sought *inter alia* (i) a declaration that this court had no jurisdiction to determine the action and/or should not exercise any jurisdiction it might have to determine the action; and (ii) an order that the action be set aside and dismissed and/or that the action be stayed in favour of Spanish arbitration and/or the Spanish courts.

The applicants submitted *inter alia* that (a) the Part 7 claim was an ordinary action which raised claims which should properly be brought in Spain and not Gibraltar; (b) the Part 7 claim was caught by the Brussels Recast Regulation (Council Regulation (EU) No. 1215/2012); and (c) the relief sought in the company action should also be sought in Spain.

The liquidators submitted *inter alia* that (a) disclaimer and proceedings brought under s.252 of the 1930 Act would be proceedings "analogous" to winding-up proceedings and the exception in art. 1(2)(b) of the Brussels Recast Regulation applied; (b) any such proceedings could properly be placed within the Insolvency Regulation (Council Regulation (EC) No. 1346/2000); and (c) in any event, the powers contained in ss. 252 and 308 of the Act had extra-territorial effect.

Held, ruling as follows:

(1) The applicants would be granted an extension of time for filing an acknowledgement of service in the company action. They had been served on April 9th, 2018 with documentation which included an order that service on them was to be effected by March 31st, 2018. They did not know that the period for service had been extended to June 30th, 2018 as that last order had not been served on them. Any litigant served in this way would have been entitled to proceed on the basis that service had been effected out of time and therefore improperly. The order extending time to June 30th, 2018 was only brought to the applicants' attention on May 3rd, 2018 and they filed these applications on May 11th, 2018. No prejudice would be caused to the liquidators if the court were to extend time and it would therefore do so. The court also took into account the fact that the applicants filed an acknowledgement of service in the Part 7 claim within time and accepted that there was genuine confusion as to what they had received (paras. 15–16).

(2) The Part 7 claim could proceed no further. The ordinary claims contained in the Part 7 claim could not be brought in Gibraltar. Article 4 of the Brussels Recast Regulation required that the defendants be sued in their country of domicile and it was not in dispute that they were domiciled in Spain. No exception to art. 4 was relied on (para. 42).

(3) In respect of the company action, the liquidators should, if so advised, be allowed to continue with their claim for termination of the contract(s) between Reclaim and the applicants, disclaimer and the relief sought pursuant to s.252 of the 1930 Act. The remaining claims in the company action could not proceed. Declarations as to funds held by the applicants were ordinary claims. It followed that any such proceedings should be brought in Spain as mandated by the Brussels Recast Regulation. The same unquestioningly applied to damages and restitution. The court considered it highly arguable that the liquidators would be able successfully to disclaim the contracts pursuant to s.308 of the Act and there was certainly a plausible evidential basis for saying that the liquidators could then successfully apply for transmission of the funds under s.252. Sections 308 and 252 of the 1930 Act only applied once a winding-up order had been made. They were proceedings related to or analogous to winding-up proceedings. The Brussels Recast Regulation was disapplied and art. 4 of the Insolvency Regulation was engaged, which in effect provided that the law of the state in which insolvency proceedings were opened was to be followed. The court also agreed with the liquidators that ss. 308 and 252 of the Act extended to persons and entities without territorial limitation. The court's jurisdiction was not ousted by the terms of the contracts themselves. In respect of the liquidators' application for permission to terminate or revoke the contract(s) pursuant to s.241 of the Act, terminating a contract would fall within the powers given to a liquidator. Seeking the court's sanction to terminate a contract pursuant to s.241 would be an insolvency related

proceeding. There was no basis for differentiating this application and an application under s.308 in so far as the argument on jurisdiction was concerned (paras. 54–78).

Cases cited:

(1) *Brownlie* v. *Four Seasons Holdings Inc.*, [2018] 1 W.L.R. 192, referred to.
(2) *German Graphics Graphische Maschinen GmbH* v. *van der Schee*, E.C.J., Case C-292/08; [2010] I.L.Pr1. 15, considered.
(3) *Gibraltar Residential Properties Ltd.* v. *Gibralcon 2004 SA*, [2010] EWHC 2595 (TCC); [2011] BLR 126, considered.
(4) *Goldman Sachs Intl.* v. *Novo Banco SA*, [2018] UKSC 34; [2018] 1 W.L.R. 3683; [2018] 2 BCLC 141, considered.
(5) *Jetivia SA* v. *Bilta (UK) Ltd.*, [2015] UKSC 23; [2016] A.C. 1; [2015] 2 W.L.R. 1168; [2015] 2 All E.R. 1083; [2015] 1 BCLC 443; [2015] BCC 343, considered.
(6) *NK* v. *BNP Paribas Fortis NV*, E.C.J., Case C-535/17; [2019] I.L.Pr. 10, considered.
(7) *Schmid* v. *Hertel*, E.C.J., Case C-328/12; [2014] 1 W.L.R. 633, considered.
(8) *Seagon* v. *Deko Marty Belgium NV*, E.C.J., Case C-229/07; [2009] 1 W.L.R. 2168, considered.
(9) *Squires* v. *AIG Europe (UK) Ltd.*, [2006] EWCA Civ 7; [2006] Ch. 610; [2006] 2 W.L.R. 1369; [2006] BCC 233; [2006] BPRI 457; [2006] WTLR 705; [2007] 1 BCLC 29, considered.

Legislation construed:

Companies Act 1930, s.241:

> "The liquidator in a winding up by the court shall have power with the sanction . . . of the court . . ."

s.252: The relevant terms of this section are set out at para. 58.
s.308(1): The relevant terms of this sub-section are set out at para. 55.

Contracts (Applicable Law) Act 1993, s.3(1):

> "Subject to . . . the Conventions shall have the force of law in Gibraltar."

s.4(1): "Any question of the meaning or effect of any provision of the Conventions shall, if not referred to the European Court in accordance with the Brussels Protocol, be determined in accordance with the principles laid down by, and any relevant decision of, the European Court."

Council Regulation (EC) No. 1346/2000 on insolvency proceedings, second recital: The relevant terms of this recital are set out at para. 64.
art. 3: The relevant terms of this article are set out at para. 38.
art. 4: The relevant terms of this article are set out at para. 38.
art. 27: The relevant terms of this article are set out at para. 38.

Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 1: The relevant terms of this article are set out at para. 37.
art. 4: The relevant terms of this article are set out at para. 37.
art. 5: The relevant terms of this article are set out at para. 37.
art. 7: The relevant terms of this article are set out at para. 37.

K. Azopardi, *Q.C.* and *P. Grant* for the defendants/applicants;
D. Feetham, *Q.C.* and *D. Martinez* for the claimant/respondent.

1 **YEATS, J.:** There are two actions presently before the court involving the same parties. The first is an action brought by originating summons by the liquidators of Reclaim Ltd. ("Reclaim") against Law-Abogados Patrimonial SL ("LAP") and Luis Garcia Fernandez. The second is a Part 7 claim also issued by the Reclaim liquidators against the same defendants. Both were commenced on March 31st, 2017. Applications have now been made by LAP and Mr. Garcia in the two actions—principally concerning the issue of jurisdiction. The applications were heard together and it is undoubtedly convenient to deal with them in the same judgment.

Background

2 The background to the actions is the following. In December 2012, following a report received from the UK Office of Fair Trading, the Minister of Finance filed a petition in this court seeking the winding up of Reclaim, a Gibraltar registered company. The contention was that two companies related to Reclaim, namely Leisure Group Ltd. and Personal Travel Ltd., were involved in a timeshare scam in Spain. As part of the marketing pitch in the sale of the timeshares, purchasers were issued with certificates by Reclaim which, subject to certain conditions being met, entitled them to a refund of a proportion of the purchase price.

3 On March 31st, 2014, Reclaim was wound up by order of Dudley, C.J. (see *In re Reclaim Ltd.*, 2013–14 Gib LR 488). Although the learned Chief Justice found that no illegality could be attributed to Reclaim itself, it was not in the public interest of Gibraltar for it to be allowed to continue operating and he therefore concluded that it was just and equitable for Reclaim to be wound up. By various orders of this court, Edgar Lavarello and Colin Vaughan were appointed joint liquidators of the company.

The certificate scheme

4 It is necessary background to explain how the Reclaim certificate scheme worked. On the purchase of a timeshare product, the seller would transfer 12.5% of the purchase price to Reclaim. 10% of that amount would be invested for the Reclaim certificate holders with the remaining 2.5% being taken by Reclaim as its fee. Purchasers were then issued with

a certificate by Reclaim entitling them to a minimum refund of 10% of the purchase price.

5 The process for claiming was described by the Chief Justice in 2014 as (2013–14 Gib LR 488, at para. 10) "aimed at avoiding or defeating possible claims by the unwary." On any view it was no doubt designed to cause a proportion of certificate holders to fail in claiming the refund. The process was the following. Within 14 days of the date of issue of the certificate, holders had to return a completed registration form to Reclaim by certified post. Then, within a 28-day window immediately before the expiry of a 51-month period from the date of issue of the certificate, holders were required to send to Reclaim at its Marbella offices by certified post the original certificate together with copies of certain documents. Those certificate holders who successfully navigated the process were then entitled to receive the 10% refund of the purchase price they paid together with a proportion of the funds held for other certificate holders who failed to make a proper claim for a refund. The last of the certificates was issued in 2011.

LAP and Mr. Garcia

6 Mr. Garcia is a Spanish lawyer. LAP is domiciled in Spain and is the corporate and fiduciary arm of Mr. Garcia's legal practice. LAP is said to hold funds relating to the Reclaim share certificate scheme.

Events post the winding-up order

7 In July 2014, following their appointment, the liquidators entered into correspondence with LAP demanding an account of the moneys held by LAP belonging to Reclaim and the transfer of all funds held by LAP relating to the Reclaim certificate scheme. LAP refused all requests made by the liquidators and, having stated that it was LAP's obligation as trustee to manage the funds, limited itself to paying to the liquidators a sum purporting to be the fee payable to Reclaim relating to distributed funds. A second such payment was made in 2015 but, according to the liquidators, no account has ever been produced to them.

8 I pause to observe that although no real disclosure of what funds continue to be held by LAP has been made, the last of the certificates appears to have been issued in 2011. The time for claiming and payment has long passed. If funds continue to be held, I am unclear as to the basis for this. The assertion made by Mr. Garcia at para. 35 of his witness statement dated July 27th, 2018, to the effect that the process for repayment has been unavoidably complicated, does not provide any meaningful explanation.

9 Reclaim is hopelessly insolvent. That much is clear from the statement of assets and liabilities as at March 31st, 2019 produced by the liquidators

which shows net liabilities to the order of approximately £5.5m. Mr. Daniel Feetham, Q.C., who appeared for the liquidators, submits that the liquidator is being held at the mercy of a third party who, in effect, says that he is doing the liquidators' job for them—with no risk because there is no privity of contract between the creditors who in the main are Reclaim certificate holders and Mr. Garcia or LAP. To press home the point that this was an unacceptable state of affairs, Mr. Feetham referred me to the words of the learned Chief Justice at para. 28 of his judgment:

> ". . . the contractual obligation to repay certificate holders is Reclaim's and it must be in the interest of those potential creditors that the affairs of Reclaim be wound up and managed by a court-appointed liquidator rather than by those who have allowed the company to be used in a timeshare scam."

Whilst it is difficult to disagree with this sentiment, this court is presently concerned with whether it has jurisdiction to entertain the liquidators' claims or whether proceedings should be instituted in Spain.

The proceedings in summary

10 On March 31st, 2017, the liquidators commenced both sets of proceedings. They are not applications brought within the original winding-up action. They are distinct originating proceedings. It is necessary to set out the relief sought by the liquidators in the two actions (which I will do in summary form):

Company Action 9 of 2017—brought by originating summons ("the company action")

(i) That service of the proceedings on LAP and Mr. Garcia be effected out of the jurisdiction in Spain;

(ii) That LAP and Mr. Garcia disclose bank statements and all documents in respect of any funds held or controlled by them relating to Reclaim certificate holders;

(iii) A declaration/finding that the funds held (or controlled) by LAP and/or Mr. Garcia are assets of Reclaim;

(iv) Alternatively, a declaration/finding that the funds held (or controlled) by LAP and/or Mr. Garcia are so held as bare trustees for the benefit of Reclaim;

(v) Following (iii) and (iv), an order pursuant to s.252 of the Companies Act 1930, or otherwise, that LAP/Mr. Garcia transmit the funds to Reclaim/the liquidators;

(vi) An order pursuant to s.241 of the Companies Act 1930 that Reclaim/the liquidators be permitted to revoke, cancel or terminate any agreement made between Reclaim and LAP and/or Mr. Garcia;

(vii) Alternatively an order that the liquidators be entitled to disclaim any agreement Reclaim has in place with LAP and/or Mr. Garcia pursuant to s.308 of the Companies Act 1930;

(viii) Following (vi) and/or (vii) an order pursuant to s.252 of the Companies Act 1930 or otherwise that LAP and/or Mr. Garcia transmit the funds to the liquidators;

(ix) An order that LAP/Mr. Garcia account to the liquidators in the sum of the funds;

(x) Damages as against LAP and/or Mr. Garcia for breach of trust and/or breach of contract and/or otherwise for wrongful retention of trust moneys;

(xi) Restitution in the sum of the funds;

(xii) That the liquidators be permitted to make inquiries and applications within and without this jurisdiction for information and/or documentation;

(xiii) Damages;

(xiv) Interest and costs.

Ordinary action 033 of 2017—brought by Part 7 claim form ("the Part 7 claim")

(i) A declaration/finding that the funds held by LAP and/or Mr. Garcia are assets of Reclaim;

(ii) Alternatively, a declaration/finding that the funds held by LAP and/or Mr. Garcia are so held as bare trustees for the benefit of Reclaim;

(iii) That LAP and/or Mr. Garcia account to the liquidators in the sum of the funds;

(iv) Damages as against LAP and/or Mr. Garcia for breach of trust and/or breach of contract and/or wrongful retention of trust moneys;

(v) Restitution in the sum of the funds;

(vi) Interest and costs.

The Jack, J. orders (and orders extending time for service)

11 By orders of May 9th, 2017, in both the company action and the Part 7 claim, Jack, J. granted the liquidators permission to serve the respective

claims in Spain on LAP and Mr. Garcia. In addition the following was ordered:

(i) That LAP and Mr. Garcia disclose, within 28 days of service, copies of bank statements and all other documentation in their possession in respect of any funds held or controlled by them relating to Reclaim certificate holders; and

(ii) That the liquidators be permitted to make inquiries and applications within and without this jurisdiction for information and/or documentation.

12 On March 5th, 2018, whilst service under the EU Service Regulation was in progress, Dudley, C.J. extended the period of service to June 30th, 2018. (An order of September 14th, 2017 had previously extended time for service to March 31st, 2018.) After some delay, the claims were served by the Spanish authorities on LAP and Mr. Garcia in Spain on April 9th, 2018.

The applications made by Mr. Garcia and LAP

13 On May 11th, 2018, Mr. Garcia and LAP made related applications in both claims. It is these applications that are now being considered. In the company action the applicants seek the following relief:

(i) an extension of time for the filing of an acknowledgment of service;

(ii) a declaration that this court has no jurisdiction to determine the action and/or should not exercise any jurisdiction it may have to determine the action *and* for an order that the action be set aside and dismissed *and/or* that the action be stayed in favour of Spanish arbitration and/or the Spanish courts;

(iii) an extension of time for the filing of evidence; and

(iv) costs.

In so far as the Part 7 claim is concerned, the applicants apply for the following:

(i) a declaration that this court has no jurisdiction to determine the action and/or should not exercise any jurisdiction it may have to determine the action; or

(ii) an order that the action be set aside and dismissed *and/or* that the action be stayed in favour of Spanish arbitration and/or the Spanish courts;

(iii) an extension of time for the filing of evidence; and

(iv) costs.

Extension of time for filing an acknowledgment of service in the company action

14 The applications for extensions of time for the filing of evidence do not fall to be determined. The parties agreed extensions and filed their evidence. An acknowledgment of service in the Part 7 claim, in which LAP and Mr. Garcia contest jurisdiction, was filed on time. No acknowledgment was however filed in the company action.

15 It is agreed that LAP and Mr. Garcia were served with both claims on April 9th, 2018. Included in the bundles was a copy of the order extending time for service to March 31st, 2018. According to Mr. Garcia, in light of the fact that service had been effected out of time, he did not pay sufficient attention to what he had received and had not appreciated that there were two distinct claims. He instructed his solicitors that he had received the Part 7 claim alone and that is why the acknowledgment in that action had been filed. On May 3rd, 2018, it was first brought to his attention that time for service had been extended and that the separate company action had also been served on him. The applications were then filed on May 11th, 2018.

16 Mr. Feetham observed that the defendant applicants had been disengaged and obstructing the liquidators' every move. That they only "raised their heads above the parapet" because they thought that service had been effected out of time. It does not seem to me that presently I have to assess such claims. The fact is that the applicants were on April 9th, 2018 served with documentation which included an order saying that service on them was to be effected by March 31st, 2018. Unbeknown to them the period for serving the documents had in fact been extended to June 30th, 2018 but that last order had not been served on them. Any litigant served in this way would have been perfectly entitled to proceed on the basis that service had been effected out of time and therefore improperly. The order of March 5th, 2018 (extending time to June 30th, 2018) was only brought to the applicants' attention on May 3rd, 2018. These applications were filed on May 11th, 2018. It seems to me that no prejudice is caused to the respondent liquidators were I to extend time and I shall therefore do so. (I have also taken account of the fact that an acknowledgment of service in the Part 7 claim was filed by the applicants within time. I therefore accept that there was genuine confusion as to what had been received by them.)

The outcome that the parties seek in practice

17 The liquidators propose that the matters proceed in a staged manner and that until the liquidators receive further information and disclosure and are able to assess the viability of any claim, that this court deals only with jurisdiction in relation to the applications for disclaimer and for the transfer of Reclaim's assets pursuant to the provisions of the Companies

Act 1930 ("the Act"). (The Act has been repealed but, by virtue of the Insolvency (Transitional Provisions) Regulations 2014, continues to apply to winding up proceedings commenced prior to November 1st, 2014.) As Mr. Feetham sets out in para. 27 of his skeleton argument, the liquidators propose that the court confirms Jack, J.'s order for disclosure, directions on service and further information and costs. Thereafter the liquidators will be able to assess their position including whether applications for a transfer of funds should indeed proceed. In the meantime the Part 7 claim is also to be stayed, with liberty to apply.

18 For their part Mr. Garcia and LAP apply for more substantial orders. The Part 7 claim is an ordinary action which raises claims which, as to both matters of law and fact, should properly be brought in Spain and not in Gibraltar. Similarly the claims in the company action should also be brought in Spain as they are not pure insolvency claims but hybrid insolvency and ordinary claims. Mr. Keith Azopardi, Q.C., who appeared for the applicants, submitted that the Part 7 claim application was simple and does not require in-depth analysis. The claim is caught by Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (known as "Brussels Recast") and therefore can only proceed in Spain. On the company action, he submitted first that what he described as the "main" claims within the hybrid action had been "procedurally parked" in the company action but this does not clear the jurisdictional flaw; secondly, they are not proper insolvency claims; thirdly, that in any event there is no good arguable claim; and, fourthly, that the relevant contracts between the parties required them to submit to the exclusive jurisdiction of the Spanish courts. The upshot is that, again, the company action relief should be sought and contested in Spain and not before this court.

The 2000 contract

19 The relationship between Reclaim on the one part and LAP and Mr. Garcia on the other is said by the latter to arise by virtue of two agreements. The first entered into on January 18th, 2000 and the second, which superseded the first, entered into on May 3rd, 2004. (I shall refer to them as the "2000 contract" and the "2004 contract" respectively.)

20 The 2000 contract was made between Malcolm Willis (a Reclaim director at the time) and Mr. Garcia. They agreed that Mr. Garcia would provide Reclaim with professional services in respect of the Reclaim certificate scheme. Mr. Garcia was to open bank accounts for the purposes of receiving the moneys from the certificate scheme; receive and process the funds paid to Reclaim; pay the costs arising from the management of the accounts; distribute the moneys in accordance with the scheme (including the payments due to Reclaim); invest the funds; and perform other advisory functions. For the purposes of the applications presently

being made, two particular features of the 2000 contract require consideration. The first is the question of who retained title to the funds received by Mr. Garcia. The second is whether or not the agreement conferred exclusive jurisdiction on the courts of Spain.

21 As to the first of these, it appeared to me to be common ground that title in the funds remained with Reclaim. This was a contract for services only. It did not create any fiduciary or trustee relationship between the parties. The issue is however complicated by the fact that in the proceedings before the learned Chief Justice in 2014 only the 2000 contract appears to have been referred to by Mr. Garcia and Reclaim. However, it was argued by both that a fiduciary/trustee relationship existed between them. I quote from the judgment (2013–14 Gib LR 488, at para. 13):

> "It is Reclaim's position that the funds are not held by nor belong to it, that Reclaim has no control and is not a signatory to the bank accounts or any of the administrative or investment arrangements in respect of those funds, rather, that the funds are held by its Spanish fiduciary Law-Abogados Patrimonial SL ('LAP'). That is also the position advanced by [Mr. Garcia], a Spanish lawyer and director of LAP, according to whom the funds are held upon trust 'solely for the benefit of claimant Reclaim clients, and belong to these clients,' and he does not accept that these funds would be available to a liquidator appointed over Reclaim. In support of that proposition, [Mr. Garcia] relies upon an agreement dated January 18th, 2000 between Reclaim and himself. LAP appears to have only came into the equation in 2002 when that the Spanish tax authorities required that a specific vehicle hold the funds instead of their being held in [Mr. Garcia's] client account. There is no documentary evidence of a novation agreement whereby LAP acquired the obligations under the January 18th, 2000 agreement. The matter does not fall to be determined, but I am of the view that the relationship which exists between Reclaim and qualifying certificate holders is a contractual one in which Reclaim has a contingent liability which arises upon strict compliance with the refund process and consequently I am unclear as to the basis upon which [Mr. Garcia] makes the assertion that there is a trustee/beneficiary relationship between LAP and the certificate holders, or how that entitles LAP to withhold transferring the moneys to a liquidator appointed over Reclaim."

I shall return to this.

22 As to how the agreement was to be regulated, cl. 2 provided as follows:

> "This contract is understood to be subject to the regulations of service provision in accordance with what is agreed here and with the provisions of articles 1 544 and 1 583 et seq. of the current Civil

> Code, with article 436 of the Judiciary Act and with the ethical standards cited in the Code of Ethics of the Malaga Bar Council."

At cl. 7 it provided that:

> "Any disputes which may arise about the correct interpretation of this contract shall be subject to the decision of the ethical standards and fees committees of the Malaga Bar Council or, if an issue lies beyond the Council's remit, they shall expressly defer to the ruling of the courts of Fuengirola, thereby waiving any jurisdiction to which they may be entitled for any reason whatsoever."

23 Mr. Azopardi submitted that the parties therefore agreed that the 2000 contract was subject to the laws of Spain. If it was not expressly understood from cl. 2 it was then a necessary implication. It seems to me that this is not correct. The 2000 contract was subject to the Spanish legal provisions set out in cl. 2. Following on from that, any question as to the interpretation of any provision was to be referred to the Malaga Bar Council or the courts of Fuengirola as appropriate. Exclusive jurisdiction was therefore confined to any interpretative question.

24 In any case, as I have already stated, this agreement was, according to Mr. Garcia, superseded by the 2004 contract which was made between Reclaim and by LAP on May 3rd, 2004.

The 2004 contract

25 The 2004 contract purports to create a different relationship between the parties. It now provided that the funds received by Reclaim would be administered by LAP for the benefit of Reclaim certificate holders. Clauses 1 and 2 of the 2004 contract state as follows:

> "1. The trustor entity Reclaim Limited assigns to the trustee Law Abogados Patrimonial S.L. the actual title to all the funds raised by the former from their clients holders and beneficiaries of the so-called Reclaim Certificate.
>
> 2. To this end, the trustee entity shall become the actual holder of the accounts where the funds are received that have been transferred by the distributors and collaborators of Reclaim Limited in relation to the so-called Reclaim Certificate.
>
> In those cases where there are accounts held by Reclaim Limited or its Spanish Affiliate Reclaim Capital S.A., the appropriate instructions shall be given to the depository banking entities, in order for the said balances to be transferred in full to the accounts held by Law Abogados Patrimonial S.L.
>
> In the cases of investments already consolidated in the name of the trustee or its affiliate, whose advance cancellation would prove

impossible as it would cause serious financial damage to the beneficiaries, the holder entity shall be notified that the administration and disposal of the said funds shall only be possible in accordance with the instructions of Law Abogados Patrimonial S.L."

26 It is said for the applicants that these provisions created a legal and fiduciary relationship where LAP was the trustee entrusted with the administration of the funds. The dynamic of the relationship changed. It was no longer an agreement for services but a trust agreement and followed the recommendation by the Spanish stock exchange commission. In addition, any claim now being brought by the liquidators against Mr. Garcia personally is bad because he was replaced as a contracting party by the 2004 contract.

27 As to jurisdiction, cl. 7 of the 2004 contract provided as follows:

"With regards to all controversies that may arise in relation to the accurate construction of this contract, the parties, expressly waiving the jurisdiction that may correspond to them for any reason whatsoever, agree to submit to the arbitration of the Malaga Bar Association, with the designation of a lawyer by each of the parties, and, in case of divergence, to the final award of the Dean of the said Association or a substitute arbitration mechanism established by the said institution. Alternatively, to the decision of the Tribunals of Fuengirola."

28 Mr. Azopardi submits that the question of whether contracts are valid or whether the liquidators are entitled to the funds are questions related to the proper performance of the contract and are therefore matters for the courts in Spain. Again it seems to me that it is only interpretative questions which are caught by this clause and are therefore arguably subject to the exclusive jurisdiction of the courts of Spain. Nevertheless, Mr. Feetham in reply focuses on the following: first, that the genuineness of the 2004 contract is questionable; and secondly, that its provisions as to interpretation or construction are immaterial. What the liquidators seek is to disclaim or terminate the contract and obtain a return of the funds as statutory rights under the Act.

29 Nowhere in the judgment of the learned Chief Justice is there mention of the 2004 contract. As can be seen from para. 13 of his judgment which I have quoted above, Mr. Garcia was relying on the fact that title to the funds vested in LAP and that Reclaim were no longer entitled to them. Yet clearly the 2000 contract referred to by the Chief Justice did no such thing. During the course of the hearing, I asked Mr. Azopardi whether the applicants accepted that the 2004 contract was not before the Chief Justice. Not directly answering the point, he replied that it was not relevant to the winding-up proceedings and that the judge's comments were *obiter*—no submissions having been made on the matter.

The evidence of Mr. Garcia he submitted has been consistent throughout the whole process.

30 Mr. Feetham highlighted that there had been no disclosure of the 2004 contract to the liquidators until after the present proceedings were issued in 2018. Even then, it was not referred to in the first witness statement of Mr. Garcia of July 27th, 2018 but it was exhibited to a later statement dated October 17th, 2018. No effort has been made to explain why the existence of the 2004 contract was omitted from the proceedings before the Chief Justice. Mr. Feetham further pointed out that Mr. Garcia's case is that he/LAP receive the modest sum of 1,200 euros per month, but yet Mr. Garcia fights "tooth and nail" refusing to transfer funds to the liquidators or provide disclosure. That this needs to be looked at together with the fact that he never properly explained his relationship with the other participants, namely Reclaim's former directors. This adds further doubt as to the genuineness of the 2004 agreement, he said.

31 Whilst Mr. Azopardi accepted that the liquidators could have been surprised by the existence of the 2004 agreement they knew that the applicants' case was that there was a fiduciary/trustee relationship and that had been made clear in the proceedings before the Chief Justice. Further, it was submitted that the liquidators cannot simply assert in argument that the 2004 contract is not genuine without alleging the fraud in the pleadings—or seeking to amend the pleadings to reflect that position. The summons had of course been issued on the basis of the existence of the 2000 contract alone. As I have stated, the liquidators were unaware of the existence of the 2004 contract until the second witness statement of Mr. Garcia was served.

32 Whilst the argument favouring a conclusion that the 2004 contract is not genuine is compelling, I am unable to make such a determination unless I hear evidence on the matter. However, for the purposes of deciding the issues in these applications I must proceed on the basis that the 2004 contract was not before the learned Chief Justice. It is inconceivable that the judge would not have referred to it had it been brought to his attention. Furthermore, there is certainly no evidence that it was known to the liquidators prior to July 2018. The assertion that it was first disclosed in the witness statement of October 17th, 2018 is unchallenged.

33 In my judgment, in the circumstances, it would be an affront to common sense and the fairness of these proceedings if I were to allow the applicants to rely on the 2004 contract to oust the jurisdiction of this court, or to otherwise argue that the liquidators' claims are bad, without further examination of the genuineness of the contract. It may of course be that this will have to be explored further as matters progress.

Arbitration

34 On December 13th, 2018, LAP and Mr. Garcia filed a notice with the Tribunal Arbitral de Malaga (Malaga Arbitral Tribunal) requesting submission to arbitration before the Malaga Bar Association. The referral to arbitration relates to the liquidators questioning the legal basis of the fiduciary relationship between Reclaim and LAP and seeks a declaration that LAP holds legal title in the funds as well as a declaration that LAP holds exclusive responsibility for the administration of payments to entitled certificate holders. There is an apparent dispute between the parties as to whether service has been properly effected on the liquidators. That is not a matter which I need to analyse or resolve. In any event, I do not consider that the reference to the Malaga Arbitral Tribunal, of itself, impacts on this court's ability to progress these claims.

Rome Convention

35 One of the mainstays of the applicants' submissions is that the 1980 Rome Convention on the law applicable to contractual obligations ("the Rome Convention"), the Brussels Recast Regulation and Council Regulation (EC) No. 1346/2000 on insolvency proceedings ("the Insolvency Regulation") are determinative and will require this court to decline jurisdiction in favour of the courts of Spain.

36 The Rome Convention applies to Gibraltar by virtue of the Contracts (Applicable Law) Act 1993. Mr. Azopardi relies on ss. 3 and 4. The former provides that parties can choose the law which is to govern the contract. The latter provides that in the event that no choice has been expressed it shall be governed by the law of the place most closely connected with the contract. Whilst I note these provisions they are concerned with choice of law not venue.

Brussels Recast

37 The Brussels Recast Regulation must be referred to when any question as to choice of court arises in any European Union cross-border dispute involving a civil or commercial matter. (The Brussels Recast Regulation replaced Council Regulation (EC) 44/2001. It is well established that any decision of the European Court relating to that 2001 Regulation will continue to apply to the equivalent provision in the Brussels Recast Regulation.) The provisions concerning us in the Brussels Recast Regulation are the following:

"*Article 1*

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the

liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration;

(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;

(f) wills and succession, including maintenance obligations arising by reason of death.

. . .

Article 4

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

. . .

Article 5

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter. [Apart from art. 7, none are relevant.]

Article 7

A person domiciled in a Member State may be sued in another Member State:

(1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies . . ."

The Insolvency Regulation

38 The Insolvency Regulation applies to insolvencies commenced prior to June 26th, 2017. (Regulation (EU) 2015/848 applies to later insolvencies.) Articles 3, 4 and 27 are relevant:

"*Article 3*

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

. . .

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of law-suits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

. . .

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State."

The Part 7 claim

39 As I have already set out, the applicants contend that the Part 7 claim should be stayed and/or a declaration made that this court has no jurisdiction. The basis for this is that the nature of the claim and the

domicile of the applicant defendants is such that any claim against them should be brought in Spain. The defendants, the assets and the trust said to exist are all in Spain. Indeed, the creditors are not connected to Gibraltar either. Reclaim operated in Spain.

40 Paragraph 15 of the particulars of claim was described by Mr. Azopardi as providing a "snapshot" of what the Part 7 claim is about. Breach of trust, breach of contract, damages, unjust enrichment—all of which are ordinary claims. Further, para. 39 seeks a declaration that any funds held by the defendants belong to Reclaim. That, it is said, is the dominant purpose of the actions. The other relief sought, termination of contract, damages, restitution are also ordinary claims. There are no circumstances, as provided for by art. 5 of the Brussels Recast Regulation, that would allow LAP or Mr. Garcia to be sued in Gibraltar. Indeed, if exclusive jurisdiction were to be relevant, then exclusive jurisdiction in this case would be Spain.

41 For his part Mr. Feetham limited himself to explaining that the Part 7 claim had been issued to protect the liquidators against limitation. The lack of disclosure has meant that the liquidators are uncertain as to what claims should be pursued in the creditors' best interests. It was submitted that a stay should be granted until such time as the applicants comply with any order for disclosure.

42 In my judgment regardless of what claims the liquidators may in due course be advised to pursue, the ordinary claims contained in the Part 7 claim cannot be brought in Gibraltar. Article 4 of the Brussels Recast Regulation requires that the defendants be sued in their country of domicile. It is not in dispute that they are domiciled in Spain. No exception to art. 4 is relied on. As such, the Part 7 claim should proceed no further.

The company action

43 As regards the company action, Mr. Azopardi was keen to stress that this, as was the Part 7 claim, is a new action. They are not applications brought within the original winding-up proceedings. Importantly, it was said for the applicants, the court must look at the substance of the claims being brought by the liquidators and not at how these have been "dressed up" in the summons.

44 Mr. Azopardi entreats me to look carefully at the relief and remedies sought by the liquidators. In short these are as follows. Paragraph 1 deals with service of the proceedings, and para. 2 with disclosure. Leaving those to one side, Mr. Azopardi submits that it is in fact the declaration sought by the liquidators as to the funds held by LAP and/or Mr. Garcia being assets of Reclaim, as set out in para. 3 of the summons, which has to be seen as the principal claim. Paragraph 4, a declaration that LAP and/or Mr.

Garcia hold any such funds as bare trustees for the benefit of Reclaim, is an alternative principal claim. On any view, these declarations are what the liquidators are really seeking and can only be classified as ordinary claims. Paragraph 5 seeking the transmission of funds follows from the declarations, and therefore that too should be regarded as part of an ordinary claim. Paragraph 6, which seeks an order that any agreement between the parties be revoked or terminated pursuant to s.241 of the Act is framed on the basis of "insofar as is necessary." That, Mr. Azopardi submits, cannot therefore be seen as a main claim in the company action. It is not an essential application which is being brought. The same applies to para. 7 which is drafted in similar terms but relates to disclaimer of any agreement pursuant to s.308 of the Act. Paragraph 8, seeking the transmission of funds pursuant to s.252 of the Act following orders made under 6 or 7 is procedural in many respects. Paragraph 9 seeking an account is part of the ordinary claim. Paragraphs 10 and 11 seeking damages for breach of contract/trust and restitution would constitute equitable relief and therefore come within the ordinary jurisdiction. Paragraph 12 allowing the liquidators to make further enquiries is procedural. Damages claimed by para. 13 are also an ordinary claim.

45 Whilst the applicants accept, as well they might, that the s.252 and s.308 applications are insolvency related claims, they submit that they are simply "makeweight" applications. Furthermore, to the extent that any aspect of the company action is salvageable, that this must form part of secondary insolvency proceedings brought in Spain pursuant to art. 27 of the Insolvency Regulation.

46 As regards disclaimer under s.308 of the Act, Mr. Azopardi referred me to the section itself which requires the leave of the court and that disclaimer be sought within 12 months (or such further period as may be allowed by the court) of the winding up. In respect of the 2000 contract therefore, the liquidators are said to be hopelessly out of time. They have not sought leave either.

47 It seems to me that I can deal with the arguments as to leave and any application being out of time swiftly. Section 308 operates so as to allow a liquidator to disclaim, amongst other things, any unprofitable contract. It can only do so if it has sought the leave of the court. The seeking of leave is not a two-stage court process in the sense known, for example, in judicial review cases. It is simply a requirement for leave to be sought so that the liquidator can then continue his course of action outside of any court proceeding. Although the word "leave" is not contained in para. 7 of the summons, that is in effect what the liquidators are seeking. There is nothing else that they could be doing pursuant to s.308 other than seeking leave—howsoever it is framed in the summons. It does not therefore seem to me that there is any merit in the argument that disclaimer fails because no "leave" has been sought. As to the delay, there is undoubtedly a lengthy

delay. However, it is open to the court to extend any period and this therefore does not constitute an absolute bar.

48 Returning to the argument on whether the claims are mainly ordinary claims and if so whether they are justiciable within the company action, it is necessary to consider a number of authorities referred to me by the applicants.

49 *NK* v. *BNP Paribas Fortis NV* (6) concerned a referral by the court of appeal of the Netherlands to the European Court of Justice on whether a claim for damages brought by a liquidator within insolvency proceedings for the benefit of the general body of creditors fell within the scope of art. 1(1) and (2)(b) of Regulation 44/2001 (now superseded by the Brussels Recast Regulation). In answering the question in the affirmative, the court stated (at paras. 28–30):

> "28. The decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis of the action. According to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings . . .
>
> 29. First, the fact that, after the opening of insolvency proceedings, a claim is brought by the liquidator appointed in those proceedings and that he acts in the interests of the creditors does not substantially amend the nature of the claim, which is independent from the insolvency proceedings and remains subject, in terms of the substance of the matter, to the rules of ordinary law . . .
>
> 30. Secondly, according to the case-law of the Court, it is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable . . ."

50 In *Gibraltar Residential Properties Ltd.* v. *Gibralcon 2004 SA* (3), Edwards-Stuart, J. held that the English courts could properly deal with a contractual dispute notwithstanding that insolvency proceedings were underway in Spain. He further observed that the fact that a claim could, by agreement, potentially be litigated within insolvency proceedings does not alter the nature of the claim. I quote from paras. 15, 24 and 27 ([2010] EWHC 2595 (TCC)):

> "15. Accordingly, there is no question whatever that this court would take any step to prejudice or interfere with the Spanish insolvency proceedings. This court will do no more than determine the rights of the parties under this contract, disputes which are

subject to the exclusive jurisdiction of the courts of England and Wales, and make declarations accordingly, and, in particular, determine so far as it can which party is owed money by the other and how much."

"24. Thus, unless one of the exceptions under Article 2 applies, this court clearly has jurisdiction in respect of the disputes raised in these two actions. Each is an action that falls within the definition of a civil and commercial matter: the disputes between the parties are contractual disputes about the performance and termination of a contract."

"27. . . . Second, the fact that a particular dispute could be resolved within insolvency proceedings, if the parties chose to confer jurisdiction on the liquidator or a court dealing with the insolvency, again does not alter the nature of the dispute."

51 I was also referred to *German Graphics Graphische Maschinen GmbH* v. *van der Schee* (2) where the European Court held that the fact that a liquidator brings proceedings is immaterial. You have to look at the proceedings themselves to see whether they fall under the Brussels Recast Regulation (the case related to Regulation 44/2001) or the Insolvency Regulation. At paras. 31 to 33 the court stated:

"31 It appears from the order for reference that German Graphics, the applicant in the proceedings before the Landgericht Braunschweig, has requested the recovery of assets owned by it and that the only question before the court relates to the ownership of certain machines situated on the premises of Holland Binding in the Netherlands. The answer to that question of law is independent of the opening of insolvency proceedings. The action brought by German Graphics sought only to ensure the application of the reservation of title clause in its own favour.

32 In other words, the action concerning that reservation of title clause constitutes an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator.

33 In those circumstances, the mere fact that the liquidator is a party to the proceedings is not sufficient to classify the proceedings brought before the Landgericht Braunschweig as proceedings deriving directly from the insolvency and being closely linked to proceedings for realising assets."

(I pause to observe that our case does indeed contain claims based on the law of the insolvency proceedings.)

52 In reply, it was submitted on behalf of the liquidators that the order in which relief is sought in the summons is immaterial. The relief sought,

with the exception of damages, is all ancillary and consequential to the court's powers under the insolvency provisions of the Act. The reality is that Mr. Feetham concentrated his arguments on the liquidators' ability to seek disclaimer and also, in the event that the relevant contract(s) between the parties is disclaimed, to require transmission of funds pursuant to s.252. With respect, it appeared to me sensible to do so. I shall first deal with the remaining relief before returning to disclaimer and the transmission of funds.

53 Leaving aside disclosure relating to the funds, an account and the application for permission to make further inquiries which are all procedural in nature, the remaining claims are effectively the following. A declaration that assets belong to Reclaim; in the alternative a declaration that these are held by the defendants as bare trustees for Reclaim; an order for transmission of funds following any such declaration; an order for permission to revoke or terminate any agreement between the parties; damages; and restitution. I agree with Mr. Azopardi that I must look at the claims and, in a sense, ignore the fact that the relief is sought by liquidators or that particular relief is sought alongside, or consequential to, insolvency claims. The principles in the *German Graphics* (2), *Paribas* (6) and *Gibralcon* (3) cases clearly establish this. That said, it does not seem to me that there is any basis for saying that all claims within the company action must stand or fall together. Claims can be carved out and others can be allowed to proceed. They must be considered individually.

54 Declarations as to funds held by Mr. Garcia and/or LAP are ordinary claims. It therefore follows that any such proceedings should be brought in Spain as mandated by the Brussels Recast Regulation. The same unquestionably applies to damages and restitution.

55 I return now to disclaimer and to the order for transmission of funds pursuant to s.252. One follows the other in the sense that should leave to disclaim be granted and the contracts are disclaimed, then an application pursuant to s.252 could be made. The provisions on disclaimer are contained in s.308(1) of the Act. This provides as follows:

> "308. (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the

commencement of the winding up or such extended period as may be allowed by the court, disclaim the property . . ."

56 It is said that the contracts (be it the 2000 contract or the 2004 contract) are unprofitable and that their continued performance is preventing the liquidators from bringing the liquidation to an end. *Squires* v. *AIG Europe (UK) Ltd.* (9) is the leading authority in which the term "unprofitable contract" was explained. There, Chadwick, L.J. reviewed a number of authorities, including Australian authorities, and had this to say ([2006] EWCA Civ 7, at para. 42):

". . . it is a necessary feature of an 'unprofitable contract' (in the context of disclaimer) that the contract imposes future obligations—that is to say, obligations yet to be performed—the performance of which may be detrimental to creditors. That is the thrust of Mr Justice Chesterman's first two principles, summarised in the *Transmetro* case. But Mr Justice Hodgson does not suggest that that feature is sufficient in itself. A contract is not an 'unprofitable contract' in this context merely because it is financially disadvantageous or merely because the company could have made or could make a better bargain. That is made clear by Mr Justice Chesterman in the fourth and fifth of his principles; and is emphasised by Mr Justice Santow in the *Global Television* case. The critical feature, summarised by Mr Justice Chesterman in his third principle and accepted by Mr Justice Santow, is that performance of the future obligations will prejudice the liquidator's obligation to realise the company's property and pay a dividend to creditors within a reasonable time—or, as Mr Justice Santow would put it, 'at the earliest possible time'."

57 It seems to me that it is highly arguable that the liquidators will be able to successfully disclaim the contracts. A monthly fee continues to be paid. Although the last of the Reclaim certificates was issued in 2011, payments have not been settled. No meaningful explanation has been provided by the defendants. This ongoing situation is prejudicing the liquidators' efforts to finalize the liquidation. On the evidence presently before the court, the argument that the contracts are unprofitable (in the context of disclaimer) is compelling.

58 In so far as s.252 of the Act is concerned, this provides as follows:

"252. The court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to the liquidator any money, property, or books and papers in his hands to which the company is prima facie entitled."

59 It is the liquidators' case that once any contracts in place with LAP and/or Mr. Garcia are disclaimed, s.252 can be relied on to obtain any funds which remain.

60 In considering any application relating to jurisdiction, the liquidators say that I should be considering the factors highlighted by the UK Supreme Court in *Goldman Sachs Intl.* v. *Novo Banco SA* (4). Lord Sumption, delivering the judgment of the court, reaffirmed the test formulated by the Supreme Court in *Brownlie* v. *Four Seasons Holdings Inc.* (1) ([2018] 1 W.L.R. 192, at para. 7), as follows ([2018] UKSC 34, at para. 9),

> ". . . (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

There is certainly a plausible evidential basis for saying that the liquidators could make successful applications for leave to disclaim and subsequent transmission of funds.

61 It is submitted that disclaimer and proceedings brought pursuant to s.252 would be proceedings "analogous" to winding-up proceedings and the exception contained in art. 1(2)(b) of the Brussels Recast Regulation applies. Consequently, any such proceedings can properly be placed within the Insolvency Regulation. In my judgment this argument must be right. Sections 252 and 308 of the Act only apply once a winding-up order has been made. After making the winding-up order, the court can proceed to grant leave for a contract to be disclaimed and can also make the orders identified in s.252. They are either proceedings related to winding-up proceedings or are analogous proceedings. Either way, the Brussels Recast Regulation is disapplied. As a result, art. 4 of the Insolvency Regulation is engaged. This in effect provides that the law of the state in which proceedings are opened is the law that shall apply. Article 4(2) sets out particular aspects of the proceedings in which the law of the state where insolvency proceedings are opened are to be followed. These include art. 4(2)(b) as to determining the assets belonging to the company and art. 4(2)(e) on the effects of insolvency proceedings on contracts to which the company is a party.

62 In any event, it is said for the liquidators that the powers contained in ss. 252 and 308 of the Act have extra-territorial effect. Mr. Feetham relies on *Jetivia SA* v. *Bilta (UK) Ltd.* (5). That case concerned the power under

the English Insolvency Act 1986 for a court to order that any person found to have been carrying on business with a fraudulent purpose is liable to make a contribution towards the company's assets in a liquidation. Two of the defendants in that case were abroad and they defended the claim on the basis that the provision did not have extra-territorial effect. Lord Sumption stated at follows ([2015] UKSC 23, at paras. 108–110):

> "108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.
>
> 109. The English court, when winding up an English company, claims world-wide jurisdiction over its assets and their proper distribution. That jurisdiction is not universally recognised, but it is recognised within the European Union by articles 3 and 16 of Council Regulation (EC) No 1346/2000. In *Schmid v Hertel* [2014] 1 WLR 633, the Court of Justice of the European Union considered these articles in the context of the jurisdiction of the German courts to make orders setting aside transactions with a bankrupt. It held not only that articles 3 and 16 applied to such orders, but that member states must be treated as having power to make them notwithstanding any limitations under its domestic law on the territorial application of its courts' orders.
>
> 110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets. None of them have any express limits on their territorial application. Another such provision, section 238 which deals in similar terms with preferences and transactions at an undervalue, was held by the Court of Appeal to apply without territorial limitations in *In re Paramount Airways Ltd* [1993] Ch 223. Delivering the leading judgment in that case, Sir Donald Nicholls V-C observed (i) that current patterns of cross-border business weaken the presumption against extra-territorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the

absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice. These considerations appear to me, as they did to the Chancellor and the Court of Appeal, to be unanswerable and equally applicable to section 213."

63 The reasoning was echoed by Lords Toulson and Hodge who at para. 213 of the judgment said:

". . . It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business."

64 I agree with Mr. Feetham that, for the same reasons as set out by the learned judges in *Bilta* (5), ss. 252 and 308 of the Act extend to persons and entities without territorial limitation. In further support of this proposition, I was also referred to the second recital in the Insolvency Regulation which states that:

"(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective . . ."

65 Central to the liquidators' claims is the issue of whether any assets held by Mr. Garcia or LAP belong to Reclaim. The 2000 contract says that funds continue to belong to Reclaim. In the circumstances it is submitted that s.252 of the Act applies and this court has jurisdiction. Indeed, the 2000 contract requires that Mr. Garcia open an account and place the funds in the name of the company. If he has not done that and funds are placed in the name of LAP then Mr. Garcia is acting as an agent and s.252 would also apply in such circumstances.

66 Of course the defendants say that the 2000 contract has been superseded by the 2004 contract. Notwithstanding my observations contained in para. 33 above regarding the fact that no reliance ought to be placed on the 2004 contract for the purposes of these applications, I should at this stage refer briefly to evidence of Spanish law as it concerns the 2004 contract. There is an argument that it does not create the type of trust and fiduciary relationship which the applicants say it does. The liquidators rely on the evidence of Kenneth Louis Bonavia, a solicitor and Spanish abogado who at paras. 6 and 7 of his witness statement dated January 10th, 2019 (incorrectly referred to as 2018 in the witness statement) states as follows:

> "[6] . . . under Spanish law, the transferee does not become the absolute real owner of the assets transferred (notwithstanding the language which may be used to this effect) and is required to return the asset to the transferor once the relevant conditions (for which the fiduciary relationship has been created), have been satisfied. In his first witness statement, Mr Garcia refers to and attaches as Exhibit LF13 an extract from the judgment of the Spanish Supreme Court dated 26/7/2004, which expressly states inter alia as follows: 'There is abundant legal case law which repeatedly provides that formal and apparent title is transferred under a fiduciary business which is valid and effective as against third parties acting in good faith and for valuable consideration with a limited efficacy which may not be challenged as against the transferor since there is no true transfer of ownership so that, even though the relationship may be valid vis a vis third parties acting in good faith for valuable consideration, a fiduciary relationship expressly recognises that the transferor retains real and absolute ownership of the asset transferred, given that between transferor and transferee, the apparent transfer created by the relationship does not prevail.'
>
> [7] Curiously, Mr Garcia fails to draw attention in his second witness statement to this important aspect/qualification of a fiduciary relationship under Spanish law, namely, the ultimate right of the transferor to recover the asset transferred, since the transferee never becomes the true or real owner of the asset transferred under the relationship."

67 He then concludes at para. 10 as follows:

> ". . . it is my view that the monies continue to be owned by Reclaim not the underlying investors or LAP. Assuming the disclaimer of the 2004 Agreement and 2004 Agreement are valid, Spanish law would not entitle LAP to the monies which would belong to Reclaim."

68 Mr. Azopardi points out that Mr. Bonavia is a lawyer working within Hassans (the firm of solicitors instructed by the liquidators) suggesting therefore that less weight should be attached to his opinion. Be that as it may, the only evidence as to the effect of the 2004 contract in Spanish law relied on by the applicants is the evidence of Mr. Garcia himself. More substantively, Mr. Azopardi points to para. 9 of the 2004 contract which he says clearly creates a fiduciary relationship. It seems to me that having regard to the evidence of Mr. Bonavia, it is highly arguable that, on disclaimer of the 2004 contract, Reclaim is entitled to a return of any moneys held by Mr. Garcia and/or LAP.

69 Of course, regardless of what the position is as to ownership of the funds, the fact remains that Reclaim was and is entitled to a share of these. As has been explained, 20% of the 12.5% payable under the Reclaim

share certificate scheme by the purchasers of the time shares is retained by Reclaim and it is therefore absolutely entitled to it. However, the whole of the 12.5% was paid to Mr. Garcia/LAP who then were obliged to transfer back Reclaim's commission. Mr. Garcia explained how this worked in practice at para. 9 of his witness statement of October 17th, 2018 as follows:

> ". . . Pursuant to the contractual and fiduciary relationship between Reclaim and myself under the terms of the 2000 [contract], the funds relating to the 12.5% were paid into accounts held in the name of Reclaim but exclusively administered by myself as sole signatory. Thereafter, following the signing of the 2004 [contract] between Reclaim and LAP, these funds were transferred to accounts held exclusively by LAP. LAP (and previously myself) then retained 80% of the said 12.5% (i.e. 10% of the value of the figure stated on the Reclaim certificate) in its capacity as trustee/fiduciary of the Reclaim Certificate Scheme and proceeded to invest these funds. The remaining 20% of the said 12.5% (i.e. 2.5% of the total purchase price of the good) was paid to Reclaim as an administration fee in consideration of services provided . . ."

70 Mr. Feetham suggests that because the liquidators were not themselves party to the contracts they are not bound by any jurisdictional limitations contained in the contracts themselves. I would prefer to settle the matter on the following basis. First, the jurisdictional clauses only refer to interpretative provisions and do not confer exclusive jurisdiction in respect of claims arising from the performance or termination of the agreements. Secondly, s.308 of the Act must have extra-territorial effect—as I have already observed. In the circumstances that cannot be defeated by a jurisdiction clause within the contract itself.

71 Mr. Feetham also relies on *Seagon* v. *Deko Marty Belgium NV* (8) and on *Schmid* v. *Hertel* (7), both judgments of the European Court of Justice, in support of his submission that it does not matter that Reclaim's assets are in Spain. In *Seagon*, the court concluded as follows (at para. 28):

> ". . . Article 3(1) of the [Insolvency Regulation] must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State."

72 In *Schmid*, the court was concerned with a reference by German courts which were dealing with proceedings brought by a liquidator in a German liquidation against a third party resident in Switzerland. The court

held that the jurisdiction conferred by art. 3(1) of the Insolvency Regulation included international jurisdiction to hear and determine actions which derived directly or were closely connected with the insolvency proceedings regardless of the domicile of the third person—be it in another member state or in a third country.

73 It also seems to me that these authorities support the argument that it is immaterial that the company action has been brought outside of the original winding up proceedings. It involves insolvency related claims which derive directly or are closely connected with the original proceedings. It is therefore perfectly permissible for the liquidators to bring these.

74 In my judgment therefore this court has jurisdiction to deal with applications for leave to disclaim the contracts and for an order for the transmission of funds pursuant to s.252 of the Act. These provisions of the Act have extra-territorial effect. They are insolvency related claims and therefore fall under the Insolvency Regulation. The jurisdiction of this court is not ousted by the terms of the contracts themselves. The fact that Spanish law may apply to the performance of the contracts does not affect the power of the courts in Gibraltar to disclaim the contract arising from the liquidation of one of the parties here. They are distinct propositions.

75 I return briefly to disclosure, permission to undertake further inquiries and to the application for an account. These are all procedural. They follow, or relate to, the substantive relief. As I have determined that the liquidators can properly pursue their disclaimer and s.252 applications, this procedural relief also stands. The argument deployed for the applicants that they would be in breach of their fiduciary duty towards certificate holders were they to disclose any information to third parties is not a serious one. The request for disclosure is reasonable and proper. Disclosure is necessary. There is no reason for disturbing Jack, J.'s order.

76 The remaining item of relief contained in the summons is an application for permission to terminate or revoke the contract(s) pursuant to s.241 of the Act. This section allows the liquidator to carry out certain tasks or functions with the court's permission. It does not appear to be in dispute that terminating a contract would fall within the powers given to a liquidator. It certainly does appear to me that terminating a contract is something that a liquidator can do with the court's sanction under this section. (That said, it is in any event apparent that the liquidators' preferred course in this case is disclaimer.) Seeking the court's sanction to terminate a contract pursuant to s.241 of the Act would be an insolvency related proceeding. I see no basis for differentiating between this application and an application for disclaimer under s.308—in so far as any argument on jurisdiction is concerned. There may be a distinction in terms of applicable law but that is another matter.

77 Finally, as to Mr. Azopardi's fall-back submission that any aspect of the company action which is salvageable should be brought within secondary insolvency proceedings in Spain, I would observe as follows. Whilst it may be right that some potential claims by the liquidators may have to form part of secondary proceedings, in my judgment, for the reasons already explained, this is not true of the applications intended to be made under ss. 241, 252 and/or 308 of the Act.

Conclusion

78 For the reasons set out in this judgment, the Part 7 claim should proceed no further. As to the company action, the liquidators should, if so advised, be allowed to continue with their claim for termination of the contract(s), disclaimer and the relief sought pursuant to s.252 of the Act. To that end, the order made by Jack, J. as to disclosure should be complied with by the defendants. The remaining substantive claims within the company action should not proceed.

79 I shall hear the parties as to the orders that should follow.

Ruling accordingly.