[2020 Gib LR 367]

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

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): December 1st, 2020

Conflict of Laws—forum conveniens—company winding-up—in company action brought by liquidators of Gibraltar company against Spanish respondents, appeal against Supreme Court's refusal to dismiss claims to terminate or disclaim contract between parties (Companies Act 1930, ss. 241 and 308) dismissed—although civil and commercial claims to be brought in Spain (Brussels Recast Regulation), claims to terminate or disclaim contract 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, i.e. Gibraltar)

The liquidators of Reclaim Ltd. brought proceedings against the defendants/appellants.

The claimant/respondent, Reclaim Ltd. ("Reclaim"), was a company incorporated and registered in Gibraltar. 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. It was contended that Reclaim and two related companies, namely Leisure Group Ltd. and Personal Travel Group Ltd., were involved in dubious timeshare schemes relating to properties 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 (quite onerous) conditions being met, entitled them to a refund of a proportion of the purchase price. On the purchase of a timeshare product, 12.5% of the purchase price was transferred to Reclaim; 2.5% was taken by Reclaim as its fee and 10% was invested for the Reclaim certificate holders. Reclaim claimed it had no title to the refund money which was held by a Spanish firm, Law-Abogados Patrimonial ("LAP"). LAP was

the first defendant/appellant in the present proceedings. It was the corporate and fiduciary arm of the legal practice of the second defendant/appellant, Mr. Fernandez (a Spanish lawyer). Reclaim denied that LAP held the money for Reclaim or to its order.

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. It was wound up by order of Dudley, C.J. in 2014 (see 2013–14 Gib LR 488). It had net liabilities of some £5.5m.

On March 31st, 2017, acting by its joint liquidators, Reclaim issued an originating summons in Gibraltar against the defendants/appellants. The summons sought relief under 15 paragraphs. Its main objective was to achieve (i) the disclosure of documents and an account relating to Reclaim's business; and (ii) the payment to the liquidators of funds said to be assets of Reclaim held by one or both defendants/appellants. Also on March 31st, 2017, Reclaim issued a claim form under Part 7 of the CPR against the same defendants. The main objective of the Part 7 claim was the payment to Reclaim of the same funds.

Reclaim's position in the winding up petition (supported by Mr. Fernandez) was that the legal relationship between Reclaim, LAP and Mr. Fernandez was governed by a written agreement entered into in 2000 ("the 2000 agreement"). Under the 2000 agreement, Mr. Fernandez agreed to provide Reclaim with professional services in respect of the operation of the certificate scheme, including receiving and processing the funds paid to Reclaim; paying the costs incurred in doing so; distributing the money in accordance with the scheme; investing the funds; and performing advisory functions. It appeared to be common ground that Reclaim retained title to the certificate funds: the agreement was for services only and no trustee or fiduciary relationship was created.

In 2018, the defendants/appellants alleged, however, that the 2000 agreement had been superseded by an agreement entered into in 2004 ("the 2004 agreement") under which LAP became Reclaim's Spanish fiduciary and trustee for the benefit of Reclaim's claimant clients, to whom the funds belonged and should be distributed.

Paragraph 1 of the summons sought leave to serve the summons on the defendant in Spain. Paragraph 2 sought disclosure by the defendants of bank statements and documents in respect of funds held by them relating to holders of Reclaim certificates or liabilities relating to them. Paragraphs 3 and 4 sought a declaration or finding that funds held by LAP and/or Mr. Fernandez or otherwise to their order were so held as bare trustee for the benefit of Reclaim. Paragraph 5 sought, following success on para. 3 or 4, an order pursuant to s.252 of the Companies Act 1930, or otherwise, that LAP/Mr. Fernandez transmit the funds to Reclaim/the liquidators. Paragraph 6 sought, pursuant to s.241 of the 1930 Act, the revocation, cancellation or termination of any agreement between Reclaim and the defendants/appellants relating to the certificate funds. Paragraph 7 alternatively sought disclaimer of any such agreement pursuant to s.308 of the 1930 Act. Paragraph 8 sought relief consequential on success under

para. 6 and/or 7 for an order pursuant to s.252 of the Act or otherwise that LAP/Mr. Fernandez transmit the funds to Reclaim. Paragraph 9 sought an order that LAP/Mr. Fernandez account to Reclaim in the sum of the funds. Paragraph 10 sought damages against LAP/Mr. Fernandez for breach of trust and/or breach of contract. Paragraph 11 sought an order for restitution in the sum of the funds. Paragraph 12 sought an order that the joint liquidators had permission to make further inquiries and applications for information and/or documentation, and to do all things incidental to the prosecution of the proceedings and recovery of the funds. Paragraph 13 sought damages; para. 14 sought interest; and para. 15 sought costs.

The summons and the Part 7 claim were served by the Spanish authorities on the defendants/appellants in Spain. The defendants/appellants brought applications in both actions seeking *inter alia* declarations that Gibraltar had no jurisdiction to determine them and seeking their dismissal or, alternatively, a stay.

The Supreme Court (Yeats, J.) (i) dismissed the Part 7 claim with costs; and (ii) dismissed the claims in five paragraphs of the summons, permitting the ten remaining claims to proceed to trial in Gibraltar (that judgment is reported at 2019 Gib LR 165).

The defendants/appellants had submitted in the Supreme Court that the Part 7 claim was caught by Regulation (EU) No. 1215/2012 (Brussels Recast), art. 1(1) of which provided that, subject to exceptions listed in art. 1(2), the Regulation applied to civil and commercial matters. Article 4(1) provided that persons domiciled in a member state should be sued in the courts of that member state. The claims in the present case should therefore properly be brought in Spain, not Gibraltar. The defendants/appellants had submitted that the claims in the summons were ordinary civil or commercial claims which, in accordance with the Regulation, could be pursued only by proceedings in Spain. Reclaim had submitted that the proceedings were analogous to winding-up proceedings within the "bankruptcy, etc" exception in art. 1(2)(b) of Brussels Recast.

Yeats, J. held that the claims raised in the Part 7 claim could, under Brussels Recast, be pursued only in Spain. In addition, Yeats, J. dismissed the claims in paras. 3, 4, 10, 11 and 13 of the summons. He found them to be ordinary claims which, even though brought by a company in liquidation at the suit of its liquidators, had their source in ordinary rules of civil and commercial law. If brought at all, those claims were required by Brussels Recast to be brought in Spain. Yeats, J. held that Gibraltar had jurisdiction to entertain the remaining claims, which fell within the Insolvency Regulation (Council Regulation (EC) No. 1346/2000). The claims in paras. 5, 6, 7 and 8 (and the ancillary claims in paras. 2, 9 and 12) (i) fell within the "proceedings relating to the winding up of insolvent companies" exception in art. 1(2)(b) of Brussels Recast; (ii) were therefore claims to which the Insolvency Regulation applied; (iii) that art. 4 of that Regulation provided that the applicable law was Gibraltar law, where the insolvency proceedings had been opened; and (iv) that Gibraltar therefore had jurisdiction to entertain them.

The defendants/appellants appealed against the refusal to dismiss eight of the ten remaining claims (the other two were for interest and costs, so if the challenge succeeded they would fall too).

The defendants/appellants submitted that the remaining claims should be dismissed because the claims dismissed in the Supreme Court (those in the Part 7 claim and in the summons) were directed at determining Reclaim's claim to the title to, or ownership of, the funds held by the defendants/appellants; the remaining claims were premised on, and assumed the success of, those now dismissed claims; the remaining claims could not determine Reclaim's claim to title to or ownership of the funds, and ownership claims were in any event civil or commercial ones which could only be pursued in Spain; and even if the termination of disclaimer claims in paras. 6 and 7 were to succeed, neither could also achieve a consequential recovery of the funds since, absent a determination of ownership, the court could not order payment. The claim in para. 5 of the summons for an order for a payment under s.252 of the 1930 Act was expressly dependent on the success of the ownership claims in paras. 3 and 4 and as those claims had been dismissed para. 5 was redundant. In respect of the claims in paras. 6 and 7 of the summons, the liquidators' objective was plainly that, having obtained a sanction to revoke, cancel or terminate, alternatively leave to disclaim, the 2000 and 2004 agreements, they would be entitled to recover the certificate funds by an order for payment under s.252, but it could not follow that success under para. 6 or 7 would so entitle the liquidators. In Ground 3, the judge had erred in law and/or fettered his own discretion by failing to properly consider various matters: (a) the genuineness of the 2004 agreement was said to be a Spanish law question; (b) the liquidators' claims should be stayed pending the determination of a Spanish arbitration that had been commenced and/or determination in the Spanish courts; (c) the judge reached too narrow a view of the choice of law and jurisdiction provisions in the 2000 and 2004 agreements; and (d) the judge failed properly to consider the interplay between arts. 4, 5, 6 and 8 of the Insolvency Regulation. In Ground 4, the judge had fettered his discretion by holding that no reliance could be placed on the 2004 agreement in the determination of the jurisdiction issue in circumstances in which there was no sufficient or justifiable basis for so holding.

Held, ordering as follows:

(1) The judge was wrong not to dismiss the para. 5 claim. Whilst it could be characterized as an Insolvency Regulation claim, it was exclusively linked to the civil or commercial claims under paras. 3 and 4 and its invocation was exclusively dependent on Reclaim succeeding on one or other of them. The court would therefore allow the appeal in relation to para. 5 and vary the judge's order accordingly (para. 76).

(2) The court was not satisfied that the judge erred in deciding that Gibraltar had jurisdiction to entertain the claims in paras. 6, 7 and 8. The proposition that the ownership issue was exclusively a civil or commercial

one which could be tried only in Spanish proceedings was incorrect. It was correct that civil or commercial proceedings raising questions as to ownership or title could be pursued only in Spain, but the proposition that like issues arising in Insolvency Regulation proceedings in Gibraltar could not be decided in them was a *non sequitur*. The court rejected the submission that the ownership question anyway could not be resolved in the insolvency proceedings. The trial of the liquidators' claims would inform the court of all it needed to know about the entitlement to the disputed funds. That was because the only barriers in the way of the claims to them were the 2000 and 2004 agreements and the liquidators sought to be rid of both. The judge agreed that, if they could be rid of the agreements, the liquidators had a good arguable case to be entitled to an order for payment. In respect of the para. 7 disclaimer claim, the judge considered it to be highly arguable that the liquidators would be able to disclaim both the 2000 and the 2004 agreements, and that the liquidators would then have a good arguable claim for the return of the funds. In respect of the para. 6 termination claim, the court inferred that the judge's opinion as to Reclaim's entitlement to a return of the funds on a disclaimer would apply equally on a termination of the agreements. The liquidators' claims involved no difficult ownership issues. The judge was correct that the liquidators had a good arguable case under paras. 6, 7 and 8. There was no substance in the defendants/appellants' ownership point (paras. 78–86).

(3) Ground 3 would be dismissed. There was nothing in the submission that the judge had erred in law and/or fettered his own discretion by failing properly to consider various matters. The judge did not exercise a discretion; he made a determination on an issue of jurisdiction. If he had made any of the alleged errors of law, a question might have arisen as to whether that impaired the soundness of his determination of the jurisdiction issue. (a) There was nothing in the submission that the judge had erred in failing properly to consider the genuineness of the 2004 agreement was a Spanish law question. Whilst the liquidators had raised a question about the genuineness of the 2004 agreement before the judge, there was no claim in the summons raising an issue about it; and the judge could not and did not make a decision on it. He dealt with the jurisdiction issue on the assumption that the 2004 agreement was valid. This was therefore not alive before the judge, nor was it before the present court. (b) There was no ground for staying the claims pending any arbitration or judicial proceeding in Spain. While the defendants/appellants had referred for arbitration in Spain questions relating to the legal basis of the fiduciary relationship between Reclaim and LAP and asking for declarations that LAP held legal title in the funds and that it had exclusive responsibility for the administration of payments to entitled certificate holders, the court agreed with the judge that the reference did not impact on the Gibraltar courts' ability to progress the liquidators' claims. The claims were directed at the termination or disclaimer of the 2000 and/or 2004 agreements and were statutory insolvency claims pursued by the liquidators in the winding

up. (c) The court had no argument on point (c) and said nothing about it. (d) In relation to the judge's alleged failure to consider the interplay between arts. 4, 5, 6 and 8 of the Insolvency Regulation, the only point turned on the alleged impact of art. 5 ("Third parties' rights in rem") on the jurisdiction question. The typical right *in rem* case was one in which the law applicable to the debtor's insolvency was that of state A and the debtor was the undisputed owner of an asset in state B which was subject to a charge in favour of X. The policy of the Insolvency Regulation was that X's right *in rem* in that asset, and any claim by the debtor's liquidator to affect that right, was a matter for the law of state B, where any such claim should be brought. The present case was not a typical case. The appellants disputed that Reclaim had any title to the certificate funds; the liquidators disputed that the certificate holders had any interest in the funds such as to give them any rights *in rem*; the liquidators were not seeking to affect or disturb any such rights; and on the material before the court at present there was no plausible case that the certificate holders had any beneficial interests, or therefore any rights *in rem*, in the funds. The court rejected point (d) as being without substance. Article 5 had no impact on the judge's decision as to jurisdiction (paras. 89–100).

(4) There was nothing in Ground 4, that the judge had been wrong to disregard the 2004 agreement. The judge had not ignored the 2004 agreement. When considering the jurisdiction issue, the judge had proceeded on the assumption that it was genuine. When considering the s.308(1) disclaimer argument and the s.241(2)(h) termination argument, he expressly had both the 2000 and the 2004 agreements in mind. He also gave express consideration to the evidence of Spanish law in relation to the 2004 agreement (para. 102).

(5) The court would therefore allow the appeal to the extent of varying Yeats, J.'s order so as to refer also to para. 5 of the summons. Otherwise, the appeal would be dismissed (para. 107).

Cases cited:

(1) *Bols Distilleries B.V.* v. *Superior Yacht Servs. Ltd.*, 2005–06 Gib LR 143, considered.

(2) *Brownlie* v. *Four Seasons Holdings Inc.*, [2018] 1 W.L.R. 192, followed.

(3) *Canada Trust Co.* v. *Stolzenberg (No. 2)*, [1998] 1 W.L.R. 547; [1998] 1 All E.R. 318; [1998] C.L.C. 23; on appeal, [2000] UKHL 51; [2002] 1 A.C. 1; [2000] 3 W.L.R. 1376; [2000] 4 All E.R. 481, considered.

(4) *Gefion Ins. A/S* v. *Pukka Ins. Ltd.*, 2020 Gib LR 315, referred to.

(5) *Goldman Sachs Intl.* v. *Novo Banco SA*, [2018] UKSC 34; [2018] 1 W.L.R. 3683; [2018] 2 BCLC 141, followed.

(6) *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, referred to.

(7) *Medcalf* v. *Weatherill*, [2002] UKHL 27; [2003] 1 A.C. 120; [2002] 3 W.L.R. 172; [2002] 3 All E.R. 721; [2002] 3 Costs L.R. 428, referred to.
(8) *NK* v. *BNP Paribas Fortis NV*, E.C.J., Case C-535/17; [2019] I.L.Pr. 10, considered.
(9) *SCI Senior Home* v. *Gemeinde Wedemark*, Case C-195/15, October 26th, 2016, referred to.
(10) *Schmid* v. *Hertel*, E.C.J., Case C-328/12; [2014] 1 W.L.R. 633, referred to.
(11) *Seagon* v. *Deko Marty Belgium NV*, E.C.J., Case C-229/07; [2009] 1 W.L.R. 2168, referred to.
(12) *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, referred to.
(13) *Wolloff* v. *Calzaturificio Rodolfo Zengarini SRL*, [2020] EWHC 1433 (Ch); [2020] 3 W.L.R. 1077, referred to.

Legislation construed:

Companies Act 1930, s.241(2)(h): The relevant terms of this provision are set out at para. 62.
s.252: The relevant terms of this section are set out at para. 62.
s.308(1): The relevant terms of this sub-section are set out at para. 62.
s.308(2): The relevant terms of this sub-section are set out at para. 79.

Council Regulation (EC) No. 1346/2000 on insolvency proceedings, second recital, art. 4(2)(e): The relevant terms of this provision are set out at para. 45.
art. 5: The relevant terms of this article are set out at para. 94.

Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 1(2)(b): The relevant terms of this provision are set out at para. 36.
art. 4(1): The relevant terms of this provision are set out at para. 36.

K. Azopardi, *Q.C.* and *P. Grant* for the defendants/appellants;
D. Feetham, *Q.C.* and *R. Pennington-Benton* for the claimant/respondent.

1 **RIMER, J.A.:**

Introduction

The claimant/respondent is Reclaim Ltd. ("Reclaim"), a company incorporated in 1999 and registered in Gibraltar. On March 31st, 2014, it was the subject of a compulsory winding up order made by Dudley, C.J. on the grounds that its making was in the public interest. It is insolvent. A statement of affairs as at March 31st, 2019 showed it to have net liabilities of some £5.5m.

2 On March 31st, 2017, acting by its joint liquidators, Edgar Lavarello and Colin Vaughan, Reclaim issued an originating summons ("the summons") in Gibraltar against the two defendants/appellants: (i) Law-Abogados Patrimonial SL ("LAP") and (ii) Luis Garcia Fernandez. Mr. Fernandez is a Spanish lawyer practising in Spain (his firm is Fernandez Navarro Law-Abogados SL). LAP, of which Mr. Fernandez is a director, is a company registered in Fuengirola, Spain and is said to be "the corporate and fiduciary arm" of Mr. Fernandez's practice. The summons, headed "In the Matter of the Companies Act 1930," sought relief under 15 paragraphs. Its main objective was to achieve (i) the disclosure of documents and an account relating to Reclaim's business, and (ii) the payment to the liquidators of funds said to be assets of Reclaim held by one or both of the defendants. Certain paragraphs sought relief under provisions of the 1930 Act relating to the winding up of insolvent companies. That Act was repealed by the Companies Act 2014 but continues to apply to winding up proceedings commenced prior to November 1st, 2014, as the Reclaim proceedings were: see the Insolvency (Transitional Provisions) Regulations 2014.

3 Also on March 31st, 2017, Reclaim issued a claim form under Part 7 of the CPR ("the Part 7 claim") against the same defendants. The accompanying particulars of claim sought relief of which the main objective was the payment to Reclaim of the same funds.

4 Following orders of the Supreme Court made by Jack, J., the summons and Part 7 claim were served by the Spanish authorities on the defendants in Spain on April 9th, 2018. On May 11th, 2018, the defendants made applications in both actions seeking *inter alia* declarations that Gibraltar had no jurisdiction to determine them and asking for their dismissal, alternatively their stay. The applications were heard by Yeats, J., who delivered his reserved judgment on October 14th, 2019 (reported at 2019 Gib LR 165). By separate orders of October 29th, 2019, he (i) dismissed the Part 7 claim with costs, and (ii) dismissed the claims in five paragraphs of the summons, permitted its remaining ten claims to proceed to trial in Gibraltar, reserved costs and permitted the defendants to appeal against the refusal to dismiss those claims.

5 By a notice of appeal dated October 30th, 2019, the defendants appealed against the refusal to dismiss eight of the ten claims (the others are for interest and costs, but if the challenge to the eight succeeds they fall too). Pending the disposal of the appeal, Yeats, J. stayed the prosecution of the permitted claims. The appeal was argued by Mr. Keith Azopardi, Q.C. for the defendants and Mr. Daniel Feetham, Q.C. for Reclaim. The essence of what we have to decide is whether the judge was correct to conclude that Gibraltar has jurisdiction to entertain the claims he refused to dismiss. There is no cross-appeal by Reclaim against the adverse orders the judge made against it.

The winding up of Reclaim

6 On March 31st, 2014, Dudley, C.J. gave judgment in Petition 2012 Comp. No. 44, one presented by the Minister for Finance of Gibraltar for the winding up of Reclaim on the "just and equitable" ground (reported as *In re Reclaim Ltd.*, 2013–14 Gib LR 488). The petition had been triggered by the Minister's consideration of an inspector's report on Reclaim from which he concluded that it was expedient in the public interest for Reclaim to be wound up. The report had been commissioned following a request from the United Kingdom Office of Fair Trading that the relevant Gibraltar Ministry should consider investigating the affairs of Reclaim, Incentive Leisure Group Ltd. ("ILG") and Personal Travel Group Ltd. ("PTG"). All three companies had been mixed up in what were regarded as dubious timeshare schemes relating to properties in Spain. The Inspector's conclusions included that—

> "the companies had been used to entice consumers to invest in various products, with little or no financial reward for the consumer and, in the case of Reclaim Limited, they continue to do so as the company is still active . . ."

7 The Minister did not pursue any action against ILG or PTG, both of which were in creditors' voluntary liquidation, but did seek the compulsory winding up of Reclaim. The criticism of Reclaim related to the refund arrangement it operated in its business of providing an investment product ancillary to the sale by other companies of timeshare products. It issued certificates to purchasers of such products which, in order to incentivize the sale, provided for the repayment by Reclaim to certificate holders of an agreed percentage of the purchase price of the product. Such repayment was, however, subject to the satisfaction of certain, quite testing, qualifying conditions. The certificate scheme is complicated but it is unnecessary to relate its details. Yeats, J., in his October 2019 judgment, adequately described it as follows (2019 Gib LR 165, at paras. 4–5):

> "4 . . . 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.
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> 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 for 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."

8 Dudley, C.J., in para. 12 of his judgment (2013–14 Gib LR 488), noted that the evidence in the petition was that Reclaim had paid 10,842 certificate holders sums totalling more than €17m. and that a further 5,032 certificate holders were potentially entitled to payment. In opposing the petition, one argument advanced by Reclaim (represented by Mr. Azopardi) was that it had no title or claim to the refund money available for making such payments. All the money was said to be held by LAP; and Reclaim denied that LAP held it for Reclaim or to its order. That assertion was advanced in (i) affidavits of Malcolm Willis, a Reclaim director with a 6% stake in it, and of Mr. Fernandez, sworn on September 25th, 2013; and (ii) further affidavits of both deponents sworn on December 19th, 2013. Our bundles included all but the second affidavit of Mr. Willis.

9 Mr. Willis said in his first affidavit that Reclaim had "in effect" stopped trading. All that was left was the running-down of "the Reclaim business," which would:

> "5. . . . occur by 2016 when the last investments and claims mature and the last funds are distributed to Reclaim client claimants. Those funds are not being administered and are not held by Reclaim. They are not held to Reclaim's order.
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> 6. Funds for distribution to Reclaim clients are held by independent fiduciaries in Spain, namely [LAP] in a fiduciary/trustee capacity . . .
>
> 7. Funds were first transferred to these fiduciaries in 2000 and then subsequently invested until the last Reclaim certificates were issued in 2011. No client monies are held by Reclaim or to its order."

10 Whilst Mr. Willis was there asserting that none of the money potentially due to the "Reclaim client claimants" was held by or for Reclaim, he said that in 2007 Reclaim gave Keith Barker (a co-director of Reclaim with a 42% stake in it) a power of attorney "in case anything prevented me from carrying out my duties . . ." He must there have been referring to his duties to Reclaim, although he said that Mr. Barker "would then have worked under the supervision of [LAP]." The power enabled

Mr. Barker to act as Reclaim's attorney in relation *inter alia* to four Moroccan bank accounts. Dudley, C.J. noted (2013–14 Gib LR 488, at para. 4) that the investigating inspector had found that there was "strong evidence to suggest that [Reclaim] operates several bank accounts, both in Spain and Tangiers, Morocco." Dudley, C.J. described the four Moroccan accounts as "Reclaim's bank accounts" (*ibid.*, at para. 17).

11 Mr. Willis said that Mr. Barker and Gary Leigh acquired Reclaim in 2009/2010. He went on to explain how the Reclaim business worked, his evidence conveying that it was *Reclaim* that operated the certificate refund scheme and *Reclaim* that made payments to qualifying certificate holders (see his paras. 23–26). He said that 2011 was the last year in which Reclaim received new business. He said:

> "30. As stated Reclaim is not conducting any new business. The funds that are being administered are historic monies received and invested that are now maturing. They are administered by [LAP] in accordance with the terms of the product and these fiduciaries/ trustees do not follow the instructions of Reclaim and are not under our control. They are not holding the monies to Reclaim's order . . .
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> 42. When [LAP] took over the administration of the scheme in 2000 the funds were held by Reclaim but this is no longer the case and 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. These accounts are held by [LAP] and operated, controlled and administered by them."

12 Dudley, C.J. observed (2013–14 Gib LR 488, at para. 20) that Mr. Willis's evidence in cross-examination was less than candid, which led the Chief Justice to question his credibility and view his evidence with circumspection. Mr. Fernandez, in his first affidavit, confirmed Mr. Willis's evidence that the refund scheme was administered by LAP. He said the certificate funds were "held by independent fiduciaries in Spain namely LAP in a fiduciary/trustee capacity." He said:

> "5. Funds were first transferred to LAP in 2000 and then subsequently invested until the last Reclaim certificates were issued in 2011. No client monies are held by Reclaim or to its order.
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> 6. Reclaim have no say over the way that LAP administer the scheme and I confirm that LAP do not take instructions from Reclaim and are not influenced by its views. The monies held or invested by LAP are administered solely for the benefit of claimant Reclaim clients and belong to these clients.
>
> 7. As such it is not accepted that these funds or investments belong to Reclaim or are assets of Reclaim or that they would be available to a liquidator appointed over Reclaim."

13 In his second affidavit, Mr. Fernandez repeated that "LAP was the Fiduciary for the Beneficiaries of the Reclaim scheme," and described its relationship with Reclaim as exemplified by an agreement of January 18th, 2000 between Mr. Willis (for Reclaim) and himself, of which he exhibited a copy. He explained its nature over several paragraphs, including the nature of Mr. Willis's obligations under it as Reclaim's representative. He explained that LAP was the sole signatory to the accounts holding the Reclaim scheme certificate funds, and his exhibit LF4 included an example of the signatory details, showing the account to be in the name of Reclaim and Mr. Fernandez as the sole signatory. I shall not summarize Mr. Fernandez's account of the relationship between Reclaim and LAP beyond saying that his stance was that once certificate funds were received by LAP:

> "17. . . . LAP acts in complete autonomy of the funds and does not take orders from Reclaim. LAP's mandate is to act in the best interest of Reclaim beneficiaries and not Reclaim itself."

14 In his judgment, Dudley, C.J. said this about the assertion that the certificate money held by LAP did not belong to Reclaim, nor since 2000 had done, but was held in a fiduciary capacity exclusively for the certificate holders (2013–14 Gib LR 488, at para. 13):

> "13 It is Reclaim's position that the funds are neither 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 [LAP]. That is also the position advanced by Mr. Luis Fernandez, 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. Fernandez relies upon an agreement dated January 18th, 2000 between Reclaim and himself. LAP appears to have only come into the equation in 2002, when the Spanish tax authorities required that a specific vehicle hold the funds instead of their being held in Mr. Fernandez'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. Fernandez 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."

15 Whilst indicating his views in the last sentence, Dudley, C.J. there made no determination of the legal relationship existing since 2000 between Reclaim, LAP and the certificate holders. Later, however, in his conclusions for making a winding up order, he returned to the topic in more positive terms (*ibid.*, at para. 28):

> "28 I also cannot ignore that Reclaim is a company holding substantial sums of money which are contingently owed to clients and, crucially, that Mr. Willis neither knows who his fellow directors are, nor has a proper explanation been given as to why palpably inaccurate accounts have been filed with Companies House. Whether the moneys are sufficiently protected because they are held by LAP is a matter capable of debate, but one which I find unnecessary to determine. Irrespective of any protection which LAP may afford, 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."

Reclaim's Part 7 claim and summons

16 Moving now to the two actions that Reclaim, by its liquidators, commenced in 2017, the evidence of Mr. Vaughan (one of the liquidators) in an affidavit of March 30th, 2017 sworn in support of the summons was that Reclaim's indebtedness to certificate holders was upwards of £5.5m. The liquidators commenced the proceedings because LAP and Mr. Fernandez had steadfastly refused to provide an explanation of what certificate funds they held, where they held them, which certificate holders they had paid and when, or what funds they retained. Mr. Vaughan's belief was that the money was located in the four Moroccan bank accounts identified in the 2007 power of attorney that Reclaim gave Mr. Barker. He made the point that it is Reclaim alone that is subject to the contractual liability to make repayments to certificate holders, yet the defendants were denying its right to the money belonging to it that would enable it to make distributions towards the satisfaction of those liabilities. Mr. Fernandez's affidavit of September 25th, 2013, sworn in the petition, had included the information that LAP "holds or administers" approximately €1.5m. and £7.1m. His evidence in these proceedings, in a witness statement of July 27th, 2018, was, however, that since December 2013 something over £5m. and €2m. had been paid out to certificate holders such that then only about £79,000 was still held and there were then only some 247 certificate claimants. Jack, J.'s order of May 9th, 2017 authorizing the service of the summons on the defendants in Spain

had included an order for disclosure but the defendants failed to provide it. The liquidators question on what basis the defendants had assumed the role of the sole administrators of the certificate scheme.

The agreement of January 18th, 2000

17 Reclaim's position in the petition, supported by Mr. Fernandez, was that the legal relationship between Reclaim, LAP and Mr. Fernandez was governed by the written agreement of January 18th, 2000 ("the 2000 agreement") made between Mr. Willis and Mr. Fernandez. Yeats, J. summarized its effect in his October 2019 judgment (2019 Gib LR 165, at paras. 19ff.). It was one under which Mr. Fernandez agreed to provide Reclaim with professional services in respect of the operation of the certificate scheme, including receiving and processing the funds paid to Reclaim, paying the costs incurred in doing so, distributing the money in accordance with the scheme (including the payments due to Reclaim), investing the funds and performing advisory functions. One question before Yeats, J. was who, following the 2000 agreement, retained title to the certificate funds received by Mr. Fernandez. He said (*ibid.*, para. 21) that "it appeared to me to be common ground" that the title remained in Reclaim: the agreement was one for services only and created no trustee or fiduciary relationship between the parties. That analysis accorded with that favoured by Dudley, C.J. in his 2014 judgment. My reading of the agreement leads me to the same view. It presented no bar to Reclaim's assertion of title to the certificate funds. Mr. Vaughan, in his affidavit of March 30th, 2017, summarized the position as follows:

> "37. Clause 1 of the Service Contract deals with its 'objects'. These included 'Opening of accounts for the Principal' into which the Reclaim funds were to be deposited. It is plain therefore that the bank accounts were opened for and on behalf of [Reclaim]. In accordance with the stated operation of the scheme, a percentage of the funds would be sent to [Reclaim] to cover its fees. The rest would be maintained and distributed by Mr. Fernandez/LAP to certificate holders. Mr. Fernandez charged a monthly fee to [Reclaim]. In summary, Mr. Fernandez agreed to act as money agent for [Reclaim] and to provide a service, namely dealing with the claims of certificate holders.
>
> 38. There is no reference to LAP in the Service Contract. Nonetheless Mr. Fernandez is a director of LAP, and has been corresponding on behalf of and on the basis that LAP was engaged to provide the service."

18 To the extent, therefore, that the 2000 agreement was relied upon before Dudley, C.J. as demonstrating Reclaim's lack of title to the certificate funds, the argument was apparently unsound. If the argument

were right, it might be regarded as surprising: how could Reclaim rationally have irrevocably given away the money it needed to satisfy its contractual obligations to the certificate holders?

19 The other matter that arose before Yeats, J. in relation to the 2000 agreement was as to the law that governed it. Mr. Azopardi submitted that it was governed by Spanish law. After referring to cll. 2 and 7, Yeats, J. expressed the view that the most that the contract provided in that regard was that any questions as to its *interpretation* fell to be decided by the Malaga Bar Council or the courts of Fuengirola (2019 Gib LR 165, at para. 23).

20 The 2000 agreement specified no time limit within which it was to operate, nor anything about either party's right to terminate it. On March 30th, 2017 (the eve of the issue of the summons and Part 7 claim), Mr. Vaughan, for the liquidators, wrote separately to LAP and Mr. Fernandez in, *mutatis mutandis*, identical terms saying that that agreement (which he called "the Service Contract") was the only documentary evidence disclosed in support of the defendants' proposition that the certificate funds were held by LAP for the benefit of the certificate holders. He explained that as part of the relief claimed in the proceedings about to be brought:

> "Reclaim/the liquidators are seeking leave/permission/or a declaration that they are entitled to *terminate, cancel or revoke* the or any agreement between [Reclaim] and LAP/Mr. Fernandez relating to the reclaim funds, and in particular the Service Contract." [Emphasis added.]

He said the summons would be seeking an order (as it does, in para. 6) in the following terms:

> "Insofar as is necessary, an order pursuant to section 241 of the Companies Act 1930 that [Reclaim]/the joint liquidators be permitted to revoke, cancel or terminate the or any agreement it had/has in place with LAP or Mr. Fernandez relating to the funds, with the effect [that] neither LAP nor Mr. Fernandez has any authority to hold the funds; and that such revocation or termination take effect upon the making of the order by the Court."

21 Mr. Vaughan concluded his letters by saying:

> "Please accept this notice of termination as formal notification that Reclaim/the liquidators is/are terminating, revoking or cancelling the aforementioned contract(s). Please note that Reclaim/the liquidators have asked, as part of the Summons Proceedings, that the termination, revocation or cancellation take effect immediately upon the order of the Court.

> You will have received, or will shortly receive, a notice of disclaimer with similar effect."

22 Notices of the liquidators' *disclaimer* of the 2000 agreement were given by, *mutatis mutandis*, identical letters sent to LAP and Mr. Fernandez on the same day, March 30th, 2017. These followed the same form as those just described, but now referred to the alternative relief (in para. 7 of the summons) asking for:

> "Alternatively and insofar as necessary, an order pursuant to section 308 of the Companies Act 1930, that the liquidator be entitled to disclaim the or any agreement it had/has in place with LAP or Mr. Fernandez relating to the funds, with the effect that neither LAP nor Mr. Fernandez has any authority to retain the funds; and that such disclaimer take effect upon the making of the order by the Court."

23 Mr. Vaughan followed that quotation with, *mutatis mutandis*, paragraphs in like terms to those quoted in para. 20 above.

24 Those letters said the 2000 agreement was "the only documentary evidence disclosed in support of the Defendants' proposition" that the certificate funds could not be transferred to Reclaim. Some 16 months later, the defendants disclosed some more evidence. I turn to it.

The agreement of May 3rd, 2004

25 On July 27th, 2018, Mr. Fernandez made a witness statement in support of the defendants' application for declarations that Gibraltar had no jurisdiction to entertain Reclaim's two actions. In his December 2013 affidavit in support of Reclaim's opposition to the petition, he had nailed his colours to the mast represented by the 2000 agreement. Dudley, C.J. had, however, poured cold water on his denial that the certificate funds held by LAP under that agreement were held for Reclaim. In his July 2018 witness statement, to adopt another marine metaphor, Mr. Fernandez's position underwent a sea change.

26 He first outlined the defendants' case in para. 7, where he said that—

> ". . . it is the Defendants' position that the funds in respect of the issue of Reclaim Certificates were not held by Reclaim nor did they belong to Reclaim at any time. Rather, these funds were and continue to be held exclusively by LAP as Reclaim's Spanish fiduciary and trustee on trust solely for the benefit of Reclaim's claimant clients to whom these funds belong and should be distributed."

In relation to such time as the Reclaim certificate funds were administered under the 2000 agreement, to which Mr. Fernandez then referred in his para. 21, Dudley, C.J. had disagreed with that assertion, as Yeats, J. was later also going to do.

27 In para. 22, however, Mr. Fernandez explained that the 2000 agreement had been superseded by one between Reclaim and LAP dated May 3rd, 2004, from which he quoted although he did not exhibit a copy. That was the first time he had referred to that agreement and that the liquidators learned of its claimed existence. Despite this, Mr. Fernandez did not think it appropriate to vouchsafe an explanation as to why he had not referred to it in his 2013 evidence in the petition. He had there positively conveyed that the 2000 agreement was the only relevant agreement with Reclaim. He was now saying it had, over nine years earlier, been superseded by one of an apparently different nature. His omission to explain why he was only now relying on the later agreement may be said to reflect a degree of insouciance.

28 Following the emergence of that evidence of the 2004 agreement, the liquidators, on October 4th, 2018, wrote to LAP in terms similar to their letters of March 30th, 2017 relating to the 2000 agreement. Their essence was in these paragraphs:

> "While the Letters [of March 30th, 2017] are wide enough to disclaim or terminate, revoke or cancel the 2004 Trust Service Contract, by this letter we are expressly disclaiming that contract under section 308 of the Act and terminating, revoking or cancelling the same under section 241 of the Act, both with IMMEDIATE EFFECT.
>
> The 2004 Trust Service Contract 'has not come to the knowledge of the liquidator within one month after the commencement of the winding-up' and therefore pursuant to the proviso in section 308 of the Act 'the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the court.'"

29 Mr. Fernandez remedied his omission to exhibit a copy of the 2004 agreement to his July 2018 statement by exhibiting one to his witness statement of October 17th, 2018. It is signed by Mr. Willis, for Reclaim, and by Mr. Fernandez, for himself and LAP. Yeats, J. referred to it at para. 25ff. of his judgment (2019 Gib LR 165). As he noted, it purported to create a different relationship between the parties. He quoted cll. 1 and 2. Their substance was that Reclaim, referred to as "the trustor entity," assigned to "the trustee," LAP, "the actual title" to all the certificate funds, so resulting in LAP becoming "the actual holder" of the accounts that received the funds. Clauses 3, 5 and 7 provided materially:

> "3. The trustee entity [*i.e.* LAP] assumes the obligation to distribute the balances transferred to it in accordance with the conditions agreed upon with the beneficiary holders of the funds, i.e. 20% shall be transferred to the entity Reclaim Limited by way of fee and for

> operating costs, and 80% shall be invested in financial products or capital-guaranteed investments, for their subsequent distribution and payment to the beneficiary holders of the Reclaim Certificate bonus . . .
>
> 5. The trustee shall be entitled to collect at the expense of the trustor fixed monthly fees of 1,264.72€ plus VAT, without prejudice to the fees for specific issued [*sic*] alien to the work of control, investment and settlement of the funds object of this contract, and the fees corresponding to third-party collaborators (notaries public, auditors, etc.) . . .
>
> 7. 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."

30 The defendants submitted to Yeats, J. that the effect of the 2004 agreement was to create "a legal and fiduciary relationship where LAP was the trustee entrusted with the administration of the funds" (2019 Gib LR 488, at para. 26). The arrangement between Reclaim and LAP/Mr. Fernandez was, it was said, no longer one merely for services. It was also said that the 2004 agreement showed Reclaim's claim against Mr. Fernandez to be bad, because it made LAP the sole trustee under the new arrangement. In para. 28 of his July 2018 witness statement, whose essence he repeated in his October 2018 statement, Mr. Fernandez said the effect of the 2004 agreement was that the certificate holders no longer had any claim against Reclaim, but only against LAP. In para. 10 of his October 2018 statement, he said:

> ". . . Clearly, Reclaim was entirely at liberty to divest itself both of the funds and its payment obligations to Reclaim Certificate holders in favour of a third party (this being LAP) through entering into the 2000 and 2004 Trust Service Contracts. These contracts extinguished any right which Reclaim may have had to demand the return of funds from LAP, either for the purposes of making good any purported liability to the certificate holders or any other reason. To reaffirm, the funds were never owned by Reclaim nor indeed ever held to its order by LAP."

31 With respect to Mr. Fernandez, I cannot understand how agreements made solely between Reclaim, LAP and Mr. Fernandez can have extinguished Reclaim's contractual payment obligations to the certificate

holders. If the proposition is tested by reference to Gibraltar law, it is wrong, and there was no expert evidence indicating that, if the agreements were Spanish law contracts, it had any support in Spanish law. The agreements of 2000 and 2004 cannot have dissolved the contractual relationship between Reclaim and the certificate holders, and Reclaim must have remained liable to claims from them. Even if the agreements did achieve this remarkable effect, how could they also have done so in relation to Reclaim's contractual commitments assumed to new certificate holders in the years following the agreements? Upon the court's inquiry of Mr. Azopardi as to whether he supported Mr. Fernandez's proposition, he said he did not. Mr. Fernandez's evidence about this is anyway inconsistent. In para. 20 of his July 2018 witness statement he explained how the beneficiaries of the LAP scheme were those certificate holders who had "complied with their own contract with Reclaim. The contract between those clients and Reclaim is not in doubt or under challenge in these or other proceedings." A contract is a legally enforceable agreement. Further, in paras. 33 and 34 of his affidavit of December 19th, 2013, Mr. Fernandez referred to the bringing by unsatisfied certificate holders of claims against Reclaim and how Reclaim had always successfully defended them. Two of these claims were decided in 2008 and 2009. I do not understand the claims to have failed on the grounds that the certificate holders had sued the wrong defendant.

32 As a matter of Gibraltar law, the notion that the 2000 and/or 2004 agreements could have given the certificate holders any enforceable rights against LAP is also a difficult one. That they did not do so as a matter of Spanish law was the evidence of Kenneth Bonavia, a Spanish abogado. His view was that (i) under the 2000 agreement, the certificate funds managed by LAP or Mr. Fernandez remained in the ownership of Reclaim; and (ii) the 2004 agreement created a fiduciary relationship only between LAP and Reclaim such that upon a valid disclaimer of it by the liquidators (or, I infer, a termination) the certificate funds would belong to Reclaim. I infer from the choice of defendant in the proceedings referred to in para. 31 above that the certificate holders were unaware that, following the 2004 agreement, they could look only to LAP for satisfaction of their rights.

33 The late, unexplained emergence of the 2004 agreement led to the liquidators' stance before Yeats, J. being to question its genuineness. Yeats, J. noted (2019 Gib LR 488, at para. 29) that Mr. Azopardi had omitted to provide a direct answer to his question as to whether the 2004 agreement had been put before Dudley, C.J. Yeats, J. was satisfied it had not. The defendants also relied upon the 2004 agreement as showing that issues as to its validity and as to the liquidators' claim to the certificate funds were ones relating to the performance of the agreement and thus fell within the arbitration provisions of cl. 7. Yeats, J. rejected that, holding that it was

only questions as to the *interpretation* of the agreement that so fell, whereas the differences between the parties did not relate to such questions; the liquidators had put in question the genuineness of the 2004 agreement and, if it was genuine, their bid was to disclaim or terminate it and recover the certificate funds under s.252 of the 1930 Act. Issues of that nature were not covered by cl. 7. Yeats, J. was impressed that there was a "compelling" argument that the 2004 agreement was not genuine (*ibid.*, at para. 32) but he rightly recognized that without hearing evidence he was unable to make a determination on the point. He said this (*ibid.*, at para. 33):

> "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."

Having said that, Yeats, J. did not in fact ignore the 2004 agreement. In analysing the jurisdiction issue before him, he assumed it was a valid one.

34 I turn now to Yeats, J.'s decision on the jurisdiction issue. That was whether he should, as the defendants asserted, dismiss or stay both Reclaim's Part 7 claim and the summons on the grounds that Gibraltar had no jurisdiction to entertain them; or whether he should, as the liquidators asserted, allow them to proceed in Gibraltar. Yeats, J.'s reasoning was full and careful and it is necessary to provide a comprehensive summary of it.

The Part 7 claim

35 I take this shortly, as its dismissal by Yeats, J. is not in issue on the appeal. The Part 7 claim form was accompanied by particulars of claim seeking: (i) a declaration that the funds held by the defendants or to their order were assets of Reclaim; (ii) a declaration that they were held as bare trustees for Reclaim; (iii) an order for an account "in the sum of the funds"; (iv) damages for breach of trust, contract and/or wrongful retention of trust money; (v) an order for restitution "in the sum of the funds"; (vi) interest; and (vii) costs.

36 The defendants' challenge to the pursuit of this claim in Gibraltar rested on the proposition that Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels Recast," which replaced Council Regulation 44/2001) was determinative as to the choice of court in a European Union cross-border dispute involving a civil or commercial matter. It showed that claims of the nature of those in the Part 7 claim could be brought against the defendants only in Spain, the member state

where both defendants were domiciled. The point was straightforward. Article 1(1) of Brussels Recast provides that, subject to exceptions listed in art. 1(2), the Regulation applies to civil and commercial matters. Article 4(1) provides that, subject to the Regulation, "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." The Part 7 claims were, on their face, civil or commercial matters. The only question that might have arisen was whether they fell within the exception to the Regulation in art. 1(2)(b) encompassing "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."

37 Mr. Feetham, for Reclaim, did not, however, rely on that or any other exception to Brussels Recast. He explained that the Part 7 claim had been issued to protect the liquidators against the adverse running of the limitation period and, because of the lack of disclosure by the defendants, the liquidators had been uncertain as to what claims to pursue in the creditors' best interests. The judge concluded that the claims raised by the Part 7 claim could, under Brussels Recast, be pursued only in Spain and he dismissed the claim. I would regard his decision as plainly correct.

The summons

38 The summons is brought by Reclaim, the title explaining that it is in liquidation and acting by its joint liquidators. It claims 15 heads of relief. Paragraph 1 sought leave to serve the summons on the defendants in Spain. Jack, J., by his order of May 9th, 2017, gave leave for that, service was effected there and it led to the jurisdiction challenge. The defendants' application of May 11th, 2018 did not also mount any separate challenge to Jack, J.'s order for service out of the jurisdiction. Yeats, J. did not dismiss para. 1, nor was there any basis for doing so. Its claimed relief has been achieved, it serves no further purpose and raises no continuing issue. I infer from Yeats, J.'s judgment (2019 Gib LR 488, at para. 44) that Mr. Azopardi made no suggestion that he should dismiss para. 1. It is challenged by the notice of appeal, but Mr. Azopardi directed no argument towards it.

39 Paragraph 2 sought disclosure by the defendants of bank statements (including of the Moroccan accounts) and documents in respect of funds held by them relating to holders of Reclaim certificates or liabilities relating to them. Jack, J.'s order of May 9th, 2017 had ordered such disclosure and it was served with the summons. Again, Reclaim has obtained its relief under para. 2, but the defendants have not complied with the order. Again, I infer from para. 44 aforesaid (*ibid.*), that Mr. Azopardi did not advance a separate challenge to para. 2 either. It, too, is challenged in the notice of appeal, but again Mr. Azopardi directed no argument towards it.

40 Paragraph 3 sought "A declaration/finding by the Court that the funds held by LAP and/or Mr. Fernandez or otherwise to their order, are so held as bare trustee for the benefit of [Reclaim]." Paragraph 4 sought "Alternatively, a declaration/finding by the Court that the funds held by LAP and/or Mr. Fernandez or otherwise to their order, are so held as bare trustee for the benefit of [Reclaim]." Paragraph 5 sought:

> "Following (3) and/or (4) above, an order pursuant to s.252 of the Companies Act 1930, or otherwise, that LAP/Mr. Fernandez forthwith transmit the funds to [Reclaim]/the joint liquidators, to a bank account nominated by them."

41 Paragraph 6 sought the *revocation, cancellation or termination* of "any agreement" between Reclaim and the defendants relating to the certificate funds pursuant to s.241 of the 1930 Act. The reference to "any agreement" was capable of encompassing both the 2000 and 2004 agreements, although when the summons was issued the liquidators were unaware of the latter. Paragraph 7 sought, in the alternative, the *disclaimer* of the agreements pursuant to s.308 of the 1930 Act. Paragraph 8 sought relief consequential on success under paras. 6 and/or 7 for "an order pursuant to section 252 of the 1930 Act, or otherwise, that LAP/Mr. Fernandez forthwith transmit the funds to the Claimant, to a bank account nominated by them." Paragraph 9 sought an order that "LAP and/or Mr. Fernandez account to the Claimant (as trustee(s) or otherwise) in the sum of the funds."

42 Paragraph 10 sought "Damages against LAP and/or Mr. Fernandez for breach of trust and/or breach of contract and/or otherwise for wrongful retention of trust monies." Paragraph 11 sought an order for "restitution in the sum of the funds."

43 Paragraph 12 sought an order as follows:

> "That the joint liquidators have permission to make all/any further inquiries and applications within and without this jurisdiction for information and/or documentation as the joint liquidators consider, or are so advised, are appropriate and necessary in the discharge of their duties as joint liquidators and, without limiting the generality of the foregoing, to do all things incidental to the prosecution of these legal proceedings and recovery of the funds, to include the retaining of lawyers (both within Gibraltar and within Europe and/or Morocco) and/or forensic accountants if required and to retain such other persons and services as be required to enforce any order of [*sic*: should be "or"] judgment of the Court within and out of the jurisdiction."

44 Paragraph 13 sought damages, para. 14 interest and para. 15 costs.

45 Mr. Azopardi's submission to Yeats, J. was that the substance of the claims in the summons was that they were ordinary civil or commercial claims which, like those in the Part 7 claim, and as mandated by Brussels Recast, could be pursued against the defendants only by proceedings in Spain. Mr. Feetham's responsive submission was that most, if not all, of the claims were sought under, or were ancillary and consequential to, specific *insolvency* provisions in the 1930 Act (ss. 241, 308 and 252) and so were within the "bankruptcy, etc" exception in art. 1(2)(b) of Brussels Recast and thus fell within Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("the Insolvency Regulation"). If so, art. 4 of the Insolvency Regulation applied, and provided that, as the insolvency proceedings had been opened in Gibraltar, it was the law of Gibraltar that applied to such proceedings, with art. 4(2)(b) providing it was that law that should determine the assets belonging to Reclaim and art. 4(2)(e) that it should also determine "the effects of insolvency proceedings on current contracts to which the debtor was a party."

46 More specifically, Mr. Feetham said the liquidators were asking for an order under s.241 permitting them to *revoke, cancel or terminate* any agreement in place between Reclaim and the defendants relating to the certificate funds, which would apply to both the 2000 and 2004 agreements; alternatively, an order under s.308 permitting them to *disclaim* them and, further to orders under either section, an order under s.252 requiring the defendants to *pay* such funds to Reclaim. The claims for disclosure (in para. 2), an account (in para. 8) and for the general relief sought in para. 12 were ancillary to those claims.

47 As to whether the, or any, claims in the summons were (i) ordinary civil or commercial matters to which Brussels Recast applied, or (ii) within the "bankruptcy, etc" exception, to which the Insolvency Regulation applied, Yeats, J. directed himself by reference to three authorities. One was the decision of the Court of Justice of the European Union in *NK* v. *BNP Paribas Fortis NV* (8), from which Yeats, J. cited these paragraphs (2019 Gib LR 488, at para. 49):

> "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 [and the court cited three authorities supporting that approach].
>
> 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 [and the court cited two supporting authorities].
>
> 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 [and the court cited a supporting authority]."

48 Yeats, J. held that the application of that guidance did not require a conclusion that the claims in the summons must all stand or fall together. They must be considered individually in order to identify upon which side of the Brussels Recast/Insolvency Regulation dividing line they respectively fell. He first put on one side the claims brought under the insolvency provisions of the 1930 Act and what he referred to as the procedural claims (including for disclosure and an account) and focused his attention on the remaining claims.

49 His conclusion was that, of those claims, those in paras. 3 and 4 (for declarations that the certificate funds held by the defendants were assets of Reclaim), in para. 10 (for damages for breach of trust, contract or wrongful retention), in para. 11 (for restitution "in the sum of the funds") and in para. 13 (for "damages") were all "ordinary claims." Even though brought by a company in liquidation at the suit of its liquidators, they had their "source in the ordinary rules of civil and commercial law" rather than in "derogating rules specific to insolvency proceedings" (see para. 28 of *NK* (8), quoted above). He dismissed all five claims: if brought at all, they were required by Brussels Recast to be brought in Spain. I respectfully agree.

50 Yeats, J. then considered the para. 7 *disclaimer* claim (under s.308(1) of the 1930 Act). He cited that sub-section and para. 42 of Chadwick, L.J.'s judgment in *Squires* v. *AIG Europe (UK) Ltd.* (12) ([2006] EWCA Civ 7), an authority on the sense of an "unprofitable contract" for the purposes of statutory disclaimer provisions equivalent to those in s.308, and said (2019 Gib LR 488, at para. 57):

> "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 bepaid. 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."

51 Yeats, J. then considered the relief consequential to a disclaimer sought in para. 8, under s.252 of the 1930 Act. That empowers the court at any time after making a winding-up order to require any of various identified people, including "any trustee, . . . agent . . . of the company to pay . . . to the liquidator any money . . . in his hands to which the company is prima facie entitled." The liquidators' case was that, once a disclaimer had been achieved, they could rely on that section for an order for payment.

52 Yeats, J. then proceeded (*ibid.*, at para. 60ff.) to consider further the arguments in favour of Gibraltar having jurisdiction to decide the s.308 and s.252 claims. Before summarizing what he said, I must first pick up his view on the liquidators' para. 6 claim for the revocation, cancellation or termination of the contracts pursuant to s.241. He dealt with that towards the end of his judgment, where he said (*ibid.*, at para. 76):

> "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."

53 I return to para. 60, where Yeats, J. addressed the considerations he must apply in deciding whether or not to accept the liquidators' case that Gibraltar had jurisdiction to decide the claims under ss. 308 and 252 in paras. 7 and 8 and (following what he said in para. 76) under ss. 241 and 252 in paras. 6 and 8.

54 He referred first to the decision of the Supreme Court of the United Kingdom in *Goldman Sachs Intl.* v. *Novo Banco SA* (5), in which Lord Sumption, J.S.C. explained that the traditional test for determining a jurisdictional gateway issue had been reformulated by the Supreme Court in *Brownlie* v. *Four Seasons Holdings Inc.* (2) ([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."

55 Yeats, J. then said (i) that there was "certainly a plausible evidential view for saying that the liquidators could make successful applications for leave to disclaim and subsequent transmission of funds" (2019 Gib LR 488, at para. 60), and (ii) that the claims under ss. 308 and 252 were either related to the winding-up proceedings or were analogous to them so that Brussels Recast was disapplied, art. 4 of the Insolvency Regulation engaged with its consequence that the law applicable to the claims was that of Gibraltar, where the insolvency proceedings had been opened. If he was right so far, it must, I consider, follow that those sections would have extra-territorial effect, but Yeats, J. also cited from Lord Sumption's judgment in *Jetivia SA* v. *Bilta (UK) Ltd.* (6) ([2015] 2 W.L.R. 1168, at paras. 108–110), for authority at the level of the Supreme Court of the United Kingdom as to the extra-territoriality of statutory provisions in the English Insolvency Act 1986 relating to the powers of liquidators in an insolvent winding up. Yeats, J. (2019 Gib LR 488, at para. 64), said he had no doubt that the powers conferred by ss. 252 and 308 were similarly exercisable extra-territorially; and (*ibid.*, at para. 76), he indicated a like view with regard to the s.241 claim. He explained (*ibid.*, at paras. 71–73) that the decisions of the CJEU in *Seagon* v. *Deko Marty Belgium NV* (11) and *Schmid* v. *Hertel* (10) provided further support for that view, as they do.

56 As for the merits of the claims, Yeats, J. (2019 Gib LR 488, at para. 65) recorded the liquidators' argument that if the 2000 agreement remained the applicable one, its effect was that the certificate money continued to belong to Reclaim. It required Mr. Fernandez to put the funds into accounts for the principal. If he had not done that, but had instead put them into accounts in the name of LAP "then [Mr. Fernandez] is acting as an agent and s.252 would also apply in such circumstances." That is perhaps expressed a little succinctly but I understand its essence to be that, on the disclaimer or termination of the agreement, Mr. Fernandez must be personally answerable as Reclaim's agent to repay its funds to it; and if, as agent, he had engaged LAP to hold the funds, LAP must also be answerable to Reclaim as an agent. Yeats, J. had earlier (*ibid.*, at para. 21), expressed a clear view that the 2000 agreement was one for services only,

and I interpret him in para. 65 as silently accepting the correctness of the liquidators' submissions.

57 Yeats, J. turned to the 2004 agreement and, after reminding himself of what he had said in his para. 33 (see my para. 33 above), proceeded on the assumption it was genuine. He referred to the Spanish law evidence of Mr. Bonavia, his conclusion as to the nature of the 2004 agreement and as to Reclaim's right to the certificate funds following its disclaimer. He noted Mr. Fernandez's evidence as to the different effect of the agreement. He could not decide on the witness statements alone whose views were correct but concluded that (*ibid.*, at para. 68) "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. Fernandez] and/or LAP."

58 In para. 75, Yeats, J. turned to the claims in para. 2 of the summons (for disclosure: already ordered by Jack, J.), para. 9 (for an account) and para. 12 (for permission for the liquidators to make further inquiries). He held these were all procedural and followed, or related to, the substantive relief. As the liquidators were entitled to pursue in Gibraltar their substantive claims under ss. 308 and 252 and—anticipating what he was to say in para. 76—also under s.241, they were also entitled to pursue this procedural relief. He said that "disclosure is necessary. There is no reason for disturbing Jack, J.'s order."

59 The result was that he dismissed the five "civil or commercial" claims, but held that Gibraltar had jurisdiction to entertain the ten remaining claims, which fell within the Insolvency Regulation.

The defendants' appeal

60 There are five paragraphs of grounds. Before coming to them, I shall first (i) make some general points about the summons; and (ii) identify the nature of the exercise the judge had to perform in deciding the jurisdiction issue.

The summons—general points

61 The claims comprised a mixed bag. The sole claimant is Reclaim and it included certain heads of relief that only Reclaim could ask for: in particular, those in paras. 3 and 4 seeking declarations that the certificate funds held by the defendants were assets of, or held as trustees for, Reclaim; and the claims in paras. 10 and 11 for damages and restitution.

62 The summons also, however, includes claims that only the *joint liquidators* could ask for, in particular those under ss. 241 and 308 of the 1930 Act. Section 241, "Powers of liquidator," is one by which a liquidator in a winding up by the court has the power, with the sanction of

the court or the committee of inspection, to perform one or more of a list of activities which will or may be required to be carried out in the winding up, including the power in s.241(2)(h) "to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets." It is that sweeping-up power that the liquidators invoke in para. 6 of the summons for sanction to "revoke, cancel or terminate" the 2000 and/or 2004 agreements. Section 308 is headed "Disclaimer of onerous property in case of company wound up" and, by s.308(1), a *liquidator* may, with the leave of the court, disclaim *inter alia* "unprofitable contracts." Section 252 provides that the court "may, at any time after making a winding-up order, require . . . any trustee . . . agent . . . of the company to pay . . . to the *liquidator* any money . . . in his hands to which the company is prima facie entitled." [Emphasis added.]

63 As the three statutory claims provide relief only available to a *liquidator*, claims under such and like statutory provisions are conventionally brought by the liquidator personally rather than by the company: this was, for example, done in the claim the subject of the recent decision of Sir Geoffrey Vos, Chancellor, in *Wolloff* v. *Calzaturificio Rodolfo Zengarini SRL* (13), to which Mr. Feetham referred us. In this case, however, the liquidators have brought their statutory claims in a summons in which the *company* is the sole claimant, although the summons makes clear which claims are the liquidators'. On inquiry by the court as to whether he was taking any point on the liquidators' chosen procedure, Mr. Azopardi confirmed he was not.

64 As already summarized, the judge held the claims in paras. 3, 4, 10, 11 and 13 to be of a civil or commercial nature to which Brussels Recast applied and dismissed them. By contrast, he held that the statutory claims in paras. 5, 6, 7 and 8 (and the ancillary claims for accounts in paras. 2 and 9, and for further inquiries in para. 12): (i) fell within the "proceedings relating to the winding up of insolvent companies" exception in art. 1(2)(b) of Brussels Recast; (ii) were therefore claims to which the Insolvency Regulation applied; (iii) that art. 4 of that Regulation provided that the law applicable to them was that of Gibraltar, where the insolvency proceedings had been opened; and (iv) that Gibraltar therefore had jurisdiction to entertain them.

"*Good arguable case*"

65 The judge's task in reaching the decision just summarized was to decide the gateway issue of whether Gibraltar has *jurisdiction* to entertain the claims. That required him to decide whether, in their bid for that jurisdiction, the liquidators had what has traditionally been described as a "good arguable case." That test was explained by Waller, L.J. in his judgment in the Court of Appeal in *Canada Trust Co.* v. *Stolzenberg (No. 2)* (3), where he said it reflects ([1998] 1 W.L.R. at 555)—

> ". . . that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e., of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

That case went to the House of Lords, where Lord Steyn ([2002] 1 A.C. at 13), endorsed Waller, L.J.'s statement as the applicable test on a jurisdictional gateway issue. It was later also endorsed by the Judicial Committee of the Privy Council in *Bols Distilleries B.V.* v. *Superior Yacht Servs. Ltd.* (1), in which Lord Walker of Gestingthorpe, delivering the advice of the Board, said (2005–06 Gib LR 143, at para. 28), that "the claimants must show that they have a much better argument than the defendants" that Gibraltar had jurisdiction. Lord Walker said that "In practice, what amounts to a 'good arguable case' depends on what requires to be shown in any particular situation in order to establish jurisdiction."

66 Waller, L.J.'s "good arguable case" test was reformulated by the Supreme Court of the United Kingdom in *Brownlie* v. *Four Seasons Holdings Inc.* (2). In his judgment, and after referring *inter alia* to Waller, L.J.'s statement of the test in *Canada Trust*, its endorsement by Lord Steyn in the House of Lords and its approval by the Privy Council in *Bols Distilleries B.V.*, Lord Sumption, J.S.C. continued as follows (for convenience, I include in the quotation the passage I have already quoted earlier at para. 54 above) ([2018] 1 W.L.R. 192, at para. 7):

> "In my opinion it [Waller, L.J.'s test] is a serviceable test, provided that it is correctly understood. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice* [*Vitkovice Horni a Hutni Tezirstvo* v. *Korner*, [1951] A.C. 869]. What is meant is (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. I do not believe that anything is gained by the word 'much,' which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

67 In *Goldman Sachs Intl.* v. *Nova Banco SA* (5), Lord Sumption, J.S.C. said ([2018] 1 W.L.R. 3683, at para. 9) that "For the purpose of

determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction." He then explained how in *Brownlie* the Supreme Court had reformulated the effect of that test.

69 The Supreme Court of the United Kingdom has therefore clearly identified the test that courts must apply when determining an issue about jurisdiction. Mr. Azopardi submitted, however, that the test as recently reformulated by the Supreme Court is not binding in Gibraltar and that Yeats, J., as a puisne judge of its Supreme Court, was instead bound by the guidance of the Privy Council in *Bols Distilleries B.V.* (1). He said it followed that Yeats, J. had to be satisfied that "one side had a much better argument on the material available." Mr. Azopardi wanted to maintain the "much" and with it the superior standard of conviction of which Lord Sumption spoke a little disparagingly. The same question was considered by Restano, J. in *Gefion Ins. A/S* v. *Pukka Ins. Ltd.* (4), a case decided after we had reserved judgment to which counsel referred us. The judge held (2020 Gib LR 315, at para. 55) that he did not need to decide the point but that, had it been necessary to do so, he would have held that para. (iii) of the *Brownlie* reformulation, which had jettisoned Waller, L.J.'s "much," formed part of the common law of Gibraltar. In my view it is also unnecessary for this court to decide or opine upon the point. That is because it is one that anyway goes nowhere. The grounds of appeal make no complaint that Yeats, J. applied the wrong test, nor did Mr. Azopardi suggest that his adoption of the *Brownlie* reformulation rather than the *Bols Distilleries B.V.* formulation led him into error.

69 As to the application of the test in practice, it is well-established that it requires the judge to decide the jurisdictional issue on the basis of the written evidence. To the extent that this discloses factual differences, there is no question of their being explored in cross-examination. The judge has to do the best he can on the material he has; and judges are expected to decide such issues with despatch. The "good arguable case" test, as reformulated as explained, is to be compared with the more stringent "balance of probabilities" test, one potentially involving cross-examination, additional expense and delay. Further, it is important to note that the test is one that relates exclusively to the assessment of the material before the court relevant to the issue of *jurisdiction*: consider, for example, Waller, L.J.'s quoted statement in *Canada Trust* (3), Lord Walker's quoted statement in *Bols Distilleries B.V.*, para. (i) in the *Brownlie* reformulation and Lord Sumption's quoted statement in *Goldman Sachs*.

70 I make these last observations because in para. 44 of his skeleton argument Mr. Feetham, after referring to Lord Sumption's statement in *Goldman Sachs* (5) and saying that the question for the judge was whether there existed "a good arguable case for the application of the jurisdictional gateway," then asserted that it was trite law that this test required the

liquidators to show (a) a good arguable case that Gibraltar had jurisdiction under the Insolvency Regulation to entertain the claims, and (b) a good arguable case on the merits. That does appear to be how the judge approached the case. He made clear findings that the ss. 241, 308 and 252 claims were insolvency related proceedings within the Insolvency Regulation, that art. 4 was engaged and pointed to the law of Gibraltar as governing the claims and that the statutory provisions had extra-territorial application. Those were conclusions he was able to reach simply by considering the nature of the claims in the summons and the law touching on the jurisdiction issue. Thus it was that he was satisfied under limb (a) of Mr. Feetham's summary of the test. But he also made findings indicating his views that the liquidators had a good arguable case on the merits of those claims so as to satisfy limb (b): (i) he held, in para. 57, that it was "highly arguable" that the liquidators will be able to disclaim the 2000 and 2004 agreements; (ii) he said, in para. 68, after considering the Spanish law evidence, that on the disclaimer of the 2004 agreement, it was "highly arguable" that Reclaim was entitled to a return of the funds; (iii) he said, in para. 76, in relation to the s.241 claim, that it "certainly" appeared to him that terminating a contract was something a liquidator can do with the court's sanction under that section.

71 I am unaware of any source for the proposition, said to be trite law, that in addition to negotiating the *jurisdictional* gateway, the claimant must show he has a good arguable case on the substantive merits of the claim. We were shown no authority supporting that. The only authorities we were referred to do not identify any such requirement. They focus only on the need to show a good arguable case as to jurisdiction. If there were an accompanying requirement on a jurisdictional gateway issue for the claimant also to show a good arguable case on the merits of his substantive claim, it is inconceivable that those authorities would not have said so. I would not, therefore, accept that, once satisfied as to the existence of the jurisdictional gateway enabling the insolvency claims to be pursued in Gibraltar, the judge needed also to consider the merits of the liquidators' claims.

72 That being so, I consider that there is a difficulty in the way of the defendants' appeal, namely that the grounds do not directly challenge the judge's careful assessment that the relevant claims are insolvency proceedings that fall outside the grasp of Brussels Recast and within those of the Insolvency Regulation such that Gibraltar has jurisdiction to entertain them. Save for (i) a special challenge directed at para. 5 of the summons, and (ii) a point under art. 5 of the Regulation (one not developed before the judge) which is said to go to jurisdiction, the grounds developed before us were in large part directed at advancing reasons why the liquidators' claims in Gibraltar will or may not succeed. That is no basis

on which to challenge a decision on jurisdiction. That said, I turn to the grounds of appeal.

Grounds 1 and 2

73 A major part of the appellants' criticism of the judge's decision turned on an ownership issue. It is advanced in paras. 1 and 2 of the grounds. The thrust of it is this: (i) the dismissed claims (both those in the Part 7 claim and in the summons) were directed at determining Reclaim's claim to the title to, or ownership of, the funds held by the defendants; (ii) the remaining claims were premised on, and assumed the success of, those now dismissed claims; (iii) the remaining claims cannot determine Reclaim's claim to title to or ownership of the funds, and ownership claims are anyway civil or commercial ones that can only be pursued in Spanish proceedings; (iv) even if the termination, alternatively disclaimer, claims in paras. 6 and 7 were to succeed, neither can also achieve a consequential recovery of the funds since, absent a determination of ownership, the court cannot order payment; and so (v) the remaining claims should not be allowed to survive.

74 This head of challenge is directed at the claims in paras. 5, 6, 7 and 8 of the summons. The dismissed ownership claims in it were those in paras. 3 and 4, which sought declarations that (in short) the certificate funds were assets of Reclaim. It may be convenient first to set paras. 5 to 8 out again:

> "5. Following (3) and/or (4) above, an order pursuant to section 252 of the Companies Act 1930, or otherwise, that LAP/Mr. Fernandez forthwith transmit the funds to [Reclaim]/the joint liquidators, to a bank account nominated by them.
>
> 6. Insofar as is necessary, an order pursuant to section 241 of the Companies Act 1930 that [Reclaim]/the joint liquidators be permitted to revoke, cancel or terminate the or any agreement it had/has in place with LAP or Mr. Fernandez relating to the funds, with the effect [that] neither LAP nor Mr. Fernandez has any authority to hold the funds; and that such revocation or termination take effect upon the making of the order by the Court.
>
> 7. Alternatively, and insofar as necessary, an order pursuant to section 308 of the Companies Act 1930, that the liquidator be entitled to disclaim the or any agreement it had/has in place with LAP or Mr. Fernandez relating to the funds, with the effect that neither LAP nor Mr. Fernandez has any authority to retain the funds; and that such disclaimer take effect upon the making of the order by the Court.

8. Following (6) and/or (7) above, an order pursuant to section 252 of the Companies Act 1930, or otherwise, that LAP/Mr. Fernandez forthwith transmit the funds to the Claimant, to a bank account nominated by them."

75 I take first the challenge to para. 5, to which a special consideration applies. Mr. Azopardi pointed out that it seeks an order for payment under s.252 that is expressly dependent upon the success of the ownership claims in paras. 3 and/or 4. The para. 3 and 4 claims have, however, been dismissed and so the bid to establish ownership under them has failed. There is therefore no surviving role for para. 5 to play. The sole remaining bid to recover the funds depends upon success in the para. 6 or 7 claims; and, if the liquidators succeed in either, para. 8 makes a consequential claim for payment under s.252. Paragraph 5 is therefore redundant.

76 I do not know why the judge did not dismiss the para. 5 claim; and we had no argument from Mr. Feetham directed at upholding it. It may be that the judge regarded it as an Insolvency Regulation claim that should be left undisturbed with the other such claims, even though it could in practice play no role in the disposal of the summons. I consider, with respect, that the judge was wrong not to dismiss the claim. Whilst it can be characterized as an Insolvency Regulation claim, it was exclusively linked to the "civil or commercial claims" in paras. 3 and 4 and its invocation was exclusively dependent upon Reclaim succeeding on one or other of them. The judge consigned both those claims to the ocean floor, but left the para. 5 claim still visible above the waves as part of the wreck. It was and is incapable of salvage and ought also to have been cleared off. I would do so by allowing the appeal in relation to para. 5 and varying para. 1 of the judge's order of October 29th, 2019 so as also to include a reference to para. 5. That is no more than a cosmetic tidying up. It gives neither help to the appellants nor hindrance to the liquidators.

77 I move to the challenges to the claims in paras. 6 and 7 of the summons. The appellants assert that the liquidators' objective is plain: namely, that having obtained a sanction to revoke, cancel or terminate, alternatively leave to disclaim, the 2000 and 2004 agreements, they will be entitled to recover the certificate funds by an order for payment under s.252 (para. 8). The submission is that it cannot follow that success under either of paras. 6 or 7 will so entitle the liquidators. I preface what follows by noting first that, whilst we had no argument on it, the liquidators' invocation of s.241(2)(h) in the hope of achieving a sanction for the *revocation* or *cancellation* of the agreements, both words perhaps connoting their retrospective undoing, appears to me to be on the ambitious side. On the other hand, the judge noted in para. 76 that it was apparently not in dispute that the liquidators could invoke s.241 for a sanction to *terminate* the agreements and his own view was that they could. I shall refer to the para. 6 claim as simply a "termination" one.

78 In developing his argument, Mr. Azopardi submitted first that the words "with the effect . . . the funds" in paras. 6 and 7 were directed at an attempt to affect the ownership issue, or somehow to assert the basis on which the funds are held by the appellants. He said they were ineffective to do this. I agree. The offending words are in my view writ in water and, like all so writ, signify nothing. Accepting, as the judge did, that the liquidators have an arguable case for asking for the court's sanction to terminate the agreements, alternatively its leave to disclaim them, they cannot dictate the effect of any such sanction or leave they may obtain. That must depend upon an objective analysis of the legal consequence of such relief in relation to the particular agreement to which it applies. I would not, however, agree with Mr. Azopardi that the inclusion of the offending words in paras. 6 and 7 so affects their substance as to require the liquidators to amend the claims. I do not consider any amendment to be required. The nature of the claims is clear enough, namely the sanction for a termination of the agreements, alternatively leave to disclaim them.

79 The appellants dispute, however, that an order under para. 6 or 7, however it may be analysed, could entitle the liquidators to a payment order. They say that to make that good the liquidators must prove Reclaim's title to, or ownership of, the funds, whereas there are now no title or ownership claims still extant: the only such claims were in paras. 3 and 4, which have been dismissed, as have the ownership claims in the Part 7 claim. They say that ownership claims are civil or commercial claims that can only be pursued by proceedings in Spain. They say, therefore, that even if the liquidators were able to obtain a sanction for the termination of the agreements under s.241, they cannot prove their right to an order for payment under para. 8. They say likewise as to any disclaimer the liquidators might achieve under para. 7. Reliance was also placed on the limitations on any disclaimer imposed by s.308(2), which provides:

> "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person."

80 Mr. Azopardi stressed the protection that s.308(2) affords to third party rights in respect of property disclaimed. He said that if, as the appellants claim, the effect of the 2000 and/or 2004 agreements is that the certificate holders have beneficial interests in the funds held by LAP, those interests cannot be disturbed by a disclaimer and proof of their existence will negative Reclaim's claim for payment; nor, he said, could any disclaimer affect the liabilities of LAP to pay such beneficiaries. The evidence supporting the existence in Spanish law of any such rights or liabilities is based on Mr. Fernandez's assertions to that effect, with which

Mr. Bonavia disagrees, but this court is in no position, any more than was the judge, to determine the Spanish law position.

81 Mr. Azopardi advanced his submissions on the ownership issue persuasively but they did not satisfy me of any error by the judge in his decision that Gibraltar has jurisdiction to entertain the para. 6, 7 and 8 claims. As earlier indicated, they go at best to whether or not the claims will succeed. The proposition that the ownership issue is exclusively a civil or commercial one that can be tried only in Spanish proceedings is in my view anyway wrong. It is correct that "civil or commercial" proceedings raising issues of ownership or title can be pursued only in Spain. The proposition that like issues arising in Insolvency Regulation proceedings in Gibraltar cannot be decided in them is, however, a *non sequitur*. As for Mr. Azopardi's proposition that the ownership question anyway cannot be resolved in the insolvency proceedings, I would disagree. The trial of the liquidators' claims will inform the court of all it needs to know about the entitlement to the disputed funds. That is because the only barriers in the way of the claims to them are the 2000 and 2004 agreements (I here assume, like the judge, the 2004 agreement to be genuine). The liquidators' claims in paras. 6 and 7 are to be rid of both. They say that, if they can be, they also have a good arguable case to be entitled to an order for payment; and the judge agreed.

82 I take the para. 7 "disclaimer" claim first (the judge noted in 2019 Gib LR 448, at para. 76 that it was the liquidators' preferred one) and the judge discussed it more fully than the para. 6 "termination" claim. The judge (*ibid.*, at para. 57), held it to be "highly arguable" that the liquidators will be able to disclaim both the 2000 and 2004 agreements. Whilst I do not think the judge anywhere says so expressly, I infer that, were the 2000 agreement the only one in play, he had no doubt that, upon its disclaimer, the liquidators would have a good claim for the return of the funds. They started off as Reclaim's money. The judge's para. 21 shows him to have been in no doubt that they remained so under the 2000 agreement; and (*ibid.*, at para. 65) he summarized the easy argument by which the liquidators, upon a disclaimer, could recover them from the defendants as agents of Reclaim under s.252. I do not overlook that Mr. Fernandez asserts that even the 2000 agreement operated as an irrevocable disposition by Reclaim of its certificate funds, but the judge appears to have preferred the different sense to be derived from its unambiguous language. Mr. Bonavia's evidence was also that upon a valid disclaimer of the 2000 agreement the funds "would belong to" Reclaim.

83 Of course, the 2000 agreement was not the only one in play and the judge had also to deal with the 2004 agreement. At paras. 66 to 68, he reviewed the different Spanish law evidence of Mr. Bonavia and Mr. Fernandez as to its substantive effect and, whilst he could not resolve the difference between them, held that, having regard to Mr. Bonavia's

evidence (which asserted that the only fiduciary relationship it created was one between LAP and Reclaim and that upon its disclaimer the funds would belong to Reclaim), it was "highly arguable" that on its disclaimer the liquidators would be entitled to the return of the funds. There is no ground of appeal challenging that conclusion and the appellants are fixed with it. The judge did not expressly say under which head of s.252 the claim for payment could be based, but it would appear to me that it would be on the basis that LAP was either a trustee or agent for Reclaim.

84 The judge dealt only briefly with the para. 6 "termination" claim, at para. 76. Whilst Mr. Bonavia does not in terms say so, I infer that his opinion as to Reclaim's entitlement to a return of the funds upon a "disclaimer" would apply equally upon a "termination" of them. Equally, whilst the judge opined (*ibid.*, at para. 76) that the liquidators could, with the court's sanction, terminate the contracts under s.241, he did not also say that they would then have a good arguable case for the return of the funds under s.252. In my view, however, it is implicit that he was also of that view.

85 All this is in principle very straightforward. The liquidators' claims involve no difficult ownership issues. Of course Mr. Fernandez asserts that, as a matter of Spanish law, the effect of both the 2000 and 2004 agreements was to dispose of the certificate funds irrevocably, first to Mr. Fernandez and then LAP, who respectively held them on the basis of some sort of fiduciary relationship exclusively for the certificate holders. The proposition that that was the effect of the 2000 agreement appears to me to be an extremely difficult one. It may be just a little less so in relation to the 2004 agreement, but Mr. Bonavia disagrees with it. He and Mr. Fernandez are agreed that Spanish law does not recognize what in other jurisdictions is known as a trust but are disagreed as to the nature of a fiduciary obligation in Spanish law. The battle in these proceedings is likely, therefore, to involve the deployment of the rival views as to Spanish law on this topic. I return to this when dealing with the art. 5 ground of appeal in paras. 93–100 below.

86 The judge was of course not saying that the liquidators will be sure of success at the trial. The court might prefer Mr. Fernandez's case as to the Spanish law position. It might be persuaded that ever since 2000 all the certificate holders either never acquired, or suddenly lost, any contractual rights against Reclaim under the certificate scheme but (probably unbeknown to them) instead only ever had, or suddenly acquired, defeasible, contingent beneficial interests in the funds protected by, and enforceable against, Mr. Fernandez and/or LAP in some as yet unexplained way under a system of law that does not recognize the concept of a trust. It might further follow that proof of such interests would bar the liquidators' recovery of the funds upon any disclaimer or termination of the agreements that they might obtain, and that the most they might then achieve

would be Reclaim's release from further liabilities under the agreements. The possibility of such failure does not, however, undermine the correctness of the judge's evaluation that the liquidators have a good arguable case under paras. 6, 7 and 8. In any event, none of this goes to the question of jurisdiction. There is in my judgment no substance in the appellants' ownership point.

87 I add finally in relation to these two grounds of appeal that neither is directed at paras. 1, 2, 9 and 12, nor is any other ground. If, however, paras. 6 to 8 raise claims triable in Gibraltar, paras. 2, 9 and 12 are in my view, as the judge held, ancillary to them; and there can be no basis for giving a quietus to para. 1.

Ground 3

88 This asserts that the judge erred in law "and/or fettered his own discretion" by failing properly to consider various matters. The judge was not exercising a discretion and so in part this ground misfires. He was making a determination on an issue of jurisdiction. If he did make any of the alleged errors of law, a question might arise as to whether that impaired the soundness of his determination of the jurisdiction issue. Four points are advanced: (a) the genuineness of the 2004 agreement is said to be a Spanish law question, or one for the Spanish courts or for arbitration; (b) the liquidators' claims should be stayed pending the determination of a Spanish arbitration the defendants commenced and/or their determination in the Spanish courts; (c) the judge reached too narrow a view of the choice of law and jurisdiction provisions in the 2000 and 2004 agreements; and (d) failed properly to consider the interplay between arts. 4, 5, 6 and 8 of the Insolvency Regulation.

89 There is nothing in point (a). Whilst the liquidators raised a question about the genuineness of the 2004 agreement before the judge, there is no claim in the summons raising an issue about it; and, whilst the judge was impressed that there is a question about its genuineness, he could not and did not make a decision on it. He dealt with the jurisdiction issue on the assumption that the agreement was valid. Point (a) was therefore not alive before the judge, nor is it before us.

90 As for point (b), I did not understand Mr. Azopardi to develop this in his written or oral argument and there is in my view anyway no ground for staying the claims pending any arbitration or judicial proceeding in Spain. The judge recounted (2019 Gib LR 288, at para. 34) how on December 13th, 2018 LAP and Mr. Fernandez referred for arbitration by the Malaga Bar Association questions relating to "the legal basis of the fiduciary relationship between Reclaim and LAP" and asking for "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." The reference was pursuant to the arbitration clause in the 2004 agreement, one limited to disputes "in relation to the accurate construction of this contract." The judge's view was that the reference did not impact on the Gibraltar court's ability to progress the liquidators' claims. I agree. Their claims are directed at the termination or disclaimer of the 2000 and/or 2004 agreements and are statutory insolvency claims that the liquidators are pursuing in the winding up. In any event, the arbitration reference came to a halt in February 2020 because the liquidators declined to nominate an arbitrator. In September 2020, the defendants commenced proceedings in the Andalucia High Court asking for the appointment of arbitrators.

91 Moreover, whilst this point was not argued before, there is an additional reason why the arbitration clause in 2004 has no impact upon the liquidators' claims, namely that only *Reclaim* was a party to that clause, not its liquidators. The liquidators are therefore not bound by it. It would be surprising if they were. It would mean that Reclaim had thereby contracted its liquidators out of the right to pursue claims that are exercisable only (i) by virtue of special statutory rights conferred on them for the purpose of winding Reclaim up, and (ii) with the sanction or leave of the court. The arbitration clause cannot sensibly be interpreted as having that effect.

92 Ground 3, point (c) is apparently related to the arbitration issue, but we had no argument on it and I say nothing about it.

93 I come to point (d), the judge's alleged failure to consider the interplay between arts. 4, 5, 6 and 8 of the Insolvency Regulation. The grounds omitted to identify how he is said to have gone wrong and the reference to arts. 6 and 8 suggests that at the time of its drafting this ground of complaint may not have been fully worked out. Article 6 is about "Set-off" and art. 8 is about "Contracts relating to immoveable property." Both are apparently irrelevant and the judge did not waste time on them. Nor did Mr. Azopardi. It emerged from his written and oral argument that the only point in this ground of appeal turns on the claimed impact of art. 5 on the jurisdiction question, which Mr. Feetham says was not developed below. If it had been, the judge would have referred to it. His reasoning for the conclusion that Gibraltar has jurisdiction to entertain the liquidators' statutory insolvency claims for the recovery of assets held by defendants domiciled in Spain is, in my view, unimpeachable. But it did not deal with the possible impact of art. 5.

94 Article 5, "Third parties' rights in rem," provides materially:

> "1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets . . . belonging to the debtor which

are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

. . .

(d) a right in rem to the beneficial use of assets."

95 Article 5(2)(a) shows the typical right *in rem* to be a charge over property owned by the debtor, but rights *in rem* are not limited to such rights. Mr. Azopardi's submission was that the appellants say they hold the certificate funds exclusively for the benefit of the certificate holders, who it is said therefore have rights *in rem* in them in the sense of art. 5(2)(d). Article 5(1) provides that the opening of the insolvency proceedings shall not affect such rights. It is said that if the liquidators wish to affect them by claiming the funds, they should open secondary insolvency proceedings in Spain, where they can and should litigate their claims. This is on the basis that the funds are said to be situated there and the question of whether the certificate holders have such rights is one of Spanish law: see *SCI Senior Home* v. *Gemeinde Wedemark* (9) (Case C-195/15, at para. 18 of the judgment of the Fifth Chamber of the CJEU).

96 The typical right *in rem* case is one in which the law applicable to the debtor's insolvency is that of state A and the debtor is the undisputed owner of an asset in state B which is subject to a charge in favour of X. The policy of the Insolvency Regulation is that X's right *in rem* in that asset, and any claim by the debtor's liquidator to affect that right, is a matter for the law of state B, where any such claim should be brought. That is the essence of what art. 5 is about. It provides an exception to the choice of law provisions of art. 4.

97 The present is not a typical such case. First, the appellants dispute that Reclaim has any title to the certificate funds. Secondly, the liquidators dispute that the certificate holders have any interest in the funds such as to give them any rights *in rem.* Thirdly, the liquidators are not seeking to affect or disturb any such rights. Their case is that no such rights exist and that upon the termination or disclaimer of the 2000 and 2004 agreements, they will be entitled to the return of the funds unencumbered by any third party rights. Fourthly, and for the following reasons, on the material at present before the court, I would assess the defendants as not having even a plausible case that the certificate holders have the claimed interests in the funds.

98 First, as to the 2000 agreement, whilst I recognize that Mr. Fernandez continues to assert that it operated to dispose of the funds to the certificate holders beneficially, the proposition appears to me to be an impossible one. The judge appears to have been in no doubt that it did not have the claimed effect.

99 As to the 2004 agreement, I have referred to what the judge said about its genuineness (see para. 33 above). I shall, however, for present purposes, assume it to be genuine. The case that it had the effect of disposing of the beneficial interest in the funds to the certificate holders is, however, also difficult. First, for reasons given in para. 31 above, I would reject Mr. Fernandez's assertion that it operated to release Reclaim from its contractual obligations to the holders. Secondly, I referred in para. 31 also to Mr. Fernandez's evidence of the certificate holders' claims brought against Reclaim in the years following the 2004 agreement. Those claimants obviously did not understand Reclaim to have been so released and Reclaim's defence of them on the merits is consistent only with the inference that Reclaim did not regard itself as so released either. Thirdly, if Reclaim was not so released, it made no sense for it to enter into an agreement by which it disposed irrevocably of the funds it needed in order to meet its own contractual obligations. For a board to commit its company to such an agreement would be commercially absurd and would amount to a serious breach of duty. Fourthly, in the light of all this, the agreement's more natural interpretation is that it was directed at achieving no more than for LAP to administer the Reclaim scheme in accordance with its terms and on behalf of Reclaim, to whom it owed the fiduciary duties explained by Mr. Bonavia. Fifthly, if so, the suggestion that it created an unspoken fiduciary obligation by LAP to the certificate holders is wrong. There is, moreover, nothing in its language to suggest it was doing that: in particular, by its cl. 3, LAP was there apparently doing no more than assuming an obligation to Reclaim. Sixthly, the Spanish law evidence that the certificate holders have the claimed beneficial interests could hardly be thinner. It consists of little more than an undeveloped assertion by Mr. Fernandez (in para. 16ff of his witness statement of March 8th, 2019), with which Mr. Bonavia disagrees. Both agree that Spanish law does not recognize the concept of a trust but are disagreed as to the nature of a fiduciary relationship under Spanish law. Mr. Fernandez needed to do a good deal more than he has in order to make good his assertions as to the claimed beneficial interests of the certificate holders.

100 There is therefore in my view currently no plausible case that the certificate holders have any beneficial interests, or therefore any rights *in rem*, in the funds. The suggestion that in these circumstances the liquidators should open secondary proceedings in Spain rather than proceed in Gibraltar is groundless. The proposition that the defendants' implausible case undermines the judge's conclusion that Gibraltar has jurisdiction to

entertain the liquidators' claims is equally groundless. This is not to say it will not be open to the appellants to seek to make a better case as to the claimed rights *in rem*, supported by evidence of Spanish law, at the substantive hearing of the liquidators' claims; and were the court to accept such case, it would recognize the protection that art. 5 gives such rights *in rem*. But I would reject point (d) in ground 3 as one without substance. Article 5 has no impact on the judge's decision as to jurisdiction.

Ground 4

101 This asserts that the judge "fettered his discretion" by holding that no reliance could be placed on the 2004 agreement in the determination of the jurisdiction issue "in circumstances where there was no sufficient or justifiable basis for so holding." Again, the judge was not exercising a discretion but the ground can charitably be read as asserting that he wrongly closed his mind to the claimed existence of the 2004 agreement when there was no basis for doing so.

102 In his written argument, Mr. Azopardi asserted that the judge had been wrong to disregard the 2004 agreement, and advanced a number of supporting reasons. In fact, the judge did no such thing. True, he said what he did in his para. 33 (see my para. 33 above), and if he *had* then ignored the 2004 agreement, there might perhaps have been legitimate ground of criticism. But he did not. When he came to consider the jurisdiction issue, he proceeded on the assumption it was genuine. When considering the s.308(1) disclaimer argument, he expressly had both the 2000 and 2004 agreements in mind (see 2019 Gib LR 488, at paras. 57 and 58). So did he when considering the s.241(2)(h) termination argument (see *ibid.*, at para. 76). He also gave express consideration to the evidence of Spanish law in relation to the 2004 agreement (see *ibid.*, at paras. 66–68). It cannot be said that, when dealing with the issues he had to decide, the judge ignored the 2004 agreement. There is nothing in this ground of appeal.

103 Both in his written and oral argument, Mr. Azopardi also advanced something of a *miserere* for the appellants. He submitted that, in the absence of any evidence founding a basis for it, there had been no justification for the criticism of them at the hearing below. He said that at no point prior to the hearing had the liquidators asserted that the 2004 agreement was not genuine, whether by assertions in correspondence, witness statements or pleadings (there were no pleadings in the summons but there were particulars of claim in the Part 7 claim). I understand that the first utterance of a question as to the genuineness of the 2004 agreement was in Mr. Feetham's skeleton argument for the hearing below. We do not have a copy of that, but I understand that the points raised in it were developed by Mr. Feetham before Yeats, J. and the outcome was that judge said (*ibid.*, at para. 32) that "the argument favouring a conclusion that the 2004 agreement is not genuine is compelling." Mr. Azopardi is

right that it is improper for counsel to advance challenges to the authenticity of a document, or to those purportedly party to it, without there being sufficient evidence or other material justifying the criticism, and he referred to *Medcalf* v. *Weatherill* (7) ([2003] 1 A.C. 120, at para. 22). I would not, however, accept that this was a case in which counsel's conduct fell on the wrong side of that principle. True, there was no witness statement from, or for, the liquidators making out a case as to the 2004 agreement's lack of genuineness. Nor, however, could there be: the circumstances of its creation were outside their knowledge.

104 There was, however, sufficient evidence before the judge to justify the genuineness question: namely, the evidence of Mr. Willis and Mr. Fernandez themselves. As the judge did not explain the points that concerned him, I consider it inappropriate to speculate as to what they might have been. But at their heart must be the striking consideration that in their evidence in the petition heard by Dudley, C.J. in 2014, they advanced a positive case that the only agreement that had governed the Reclaim/Fernandez/LAP relationship since 2000 was the 2000 agreement. That provided manifestly weak support for their case that Reclaim had no interest in or title to the certificate funds. The 2004 agreement apparently superseded the 2000 agreement and, on its face, can be read as providing better support for that case. Why, then, did Mr. Fernandez not deploy it in his evidence in the petition? Why, when he made his July 2018 witness statement, did he not explain why he had not done so? The circumstances cried out for an explanation but none was provided. It is no surprise that Mr. Fernandez's deafening silence provoked concern and questions by the liquidators. There is no substance in Mr. Azopardi's criticism of their or their counsel's stance in the hearing below.

Ground 5

105 This ground suffers from some mistyping which obscures part of its sense but it appears to make two points: the judge (i) failed properly to consider the provisions for obtaining leave to make a disclaimer application within a defined period; and (ii) failed to consider that a disclaimer cannot affect the rights of third parties, the existence of which could only be determined by ownership claims brought in Spain or by way of a Spanish arbitration.

106 The judge dealt with the leave point (2019 Gib LR 488, at paras. 46 and 47), explaining that, under s.308(1) of the 1930 Act, the liquidators would need to obtain the court's leave for an extension of time to make the application. I understand him to have meant that such leave could be sought on the substantive hearing of the summons. Mr. Azopardi pursued no argument on this in either his written or oral argument, I do not know in what respect the judge is said to have erred and so say no more about this point. I have dealt with the disclaimer point when dealing with

grounds 1 and 2. I would add to it only that, as I said in dealing with the art. 5 point (see *ibid.*, at para. 100), the existence or not of the alleged (and disputed) interests of the certificate holders in the funds is a matter that can be determined at the Gibraltar trial. In my judgment, there is nothing in this ground.

Disposition

107 I would allow the appeal to the extent of varying para. 1 of the judge's order of October 29th, 2019 so as to refer also to para. 5 of the summons. Otherwise I would dismiss the appeal.

108 **ELIAS, J.A.:** I agree.

109 **KAY, P.:** I also agree.

Order accordingly.