[2022 Gib LR 298]

RENNES FOUNDATION, NORTHERN ASSET INVESTMENTS and CLAESSENS v. DOMAIN VENTURE PARTNERS PCC LIMITED (in cell administration), ROACHE, JUNO NOMINEES LIMITED (formerly GT NOMINEES LIMITED) and JUNO FUND SERVICES LIMITED (formerly GRANT THORNTON FUND ADMINISTRATION LIMITED)

MATTIN v. DOMAIN VENTURE PARTNERS PCC LIMITED (in cell administration), JUNO FUND SERVICES LIMITED, DOMAIN MANAGEMENT LIMITED and ROACHE

BRAGANZA II AB (formerly known as BRAGANZA AB), BOND HOUSE SYSTEMS LIMITED and BARTLESS v. DOMAIN VENTURE PARTNERS PCC LIMITED (in cell administration) and ROACHE

COURT OF APPEAL (Kay, P., Rimer and Davis, JJ.A.): December 9th, 2022

2022/GCA/011

Documents—interpretation—business common sense—as incentive for investment, founder of investor fund stated that he would hold "£42,000,000 worth of direct equity" in subsidiary companies on trust for benefit of investors—not interpreted to mean shares actually worth £42m. because founder's shares worth far less than that—to be interpreted as £42m. by reference to valuations (which were very optimistic) used in private placement memorandum

The appellants brought claims in respect of certain investments.

The appellants (claimants in three sets of claims) were investors in a Gibraltar protected cell company, Domain Venture Partners PCC Ltd. ("DVP"). They had invested in the shares of DVP's Cell A, the only cell in which shares were issued, which was now in administration. DVP was a defendant in each claim. DVP had been incorporated by Iain Roache, who was also a defendant in each claim, to act as an experienced investor fund.

Cell A's initial commercial purpose was to fund the making of applications by each of its 60 special purpose subsidiary companies (also called "the bid vehicles") to the domain name registry, the International Corporation for Assigned Names and Numbers ("ICANN"). Each bid vehicle had a share capital comprising 100 ordinary shares carrying no economic rights but affording control of the company, and 100,000 redeemable preference shares (referred to as "investment shares" in the documentation) carrying all the economic rights. The ordinary shares in each bid vehicle were issued or transferred to Cell A, which gave it control over each company. A private placement memorandum ("PPM") was issued for each bid vehicle. Mr. Roache was entitled to and subscribed for a large majority of the authorized investment share capital in the bid vehicles and the remaining shares were offered to and subscribed for by Cell A. In order to subscribe for the bid vehicles' investment shares under each such PPM and to fund each bid vehicle's application to ICANN, Cell A required capital from outside investors, including the appellants, whose interest would not be represented by direct holdings of shares in any bid vehicle but only indirectly via shares held by them in Cell A. To raise the required capital from outside investors, Cell A issued its own private placement memorandum ("the Cell A PPM") to sell Cell A redeemable preference shares to subscribing investors. The Cell A PPM provided *inter alia* that the bid vehicles had been independently valued by a firm of accountants on a discounted cash flow basis and that a valuation report ("the valuation book") had been produced, estimating the potential revenues of each bid vehicle.

Investors were offered two additional incentives, one of which derived from a trust letter dated March 5th, 2012 from Mr. Roache to prospective investors. The trust letter stated:

> "I hereby confirm that £42,000,000 worth of direct equity . . . in the Bid Vehicles . . . which is held in my name shall be held on trust in the name of T&T Nominees Limited . . . for the benefit of investors in [DVP] until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has [been] repaid to them ('the Repayment event'). Upon the Repayment Event the legal and beneficial title of such equity shall revert to [Mr. Roache]. Should the Repayment Event not take place within 54 calendar months from the Closing Date . . . the Direct Equity shall be transferred to the Participating Shareholders in [DVP] pari passu based on the size of their Capital Commitments . . .
>
> For the sake of clarity terms defined in or whose interpretation is provided for in any Private Placement Memorandum of the Fund shall have the same meaning when used in this Agreement unless separately defined or interpreted in this Agreement."

The investors in Cell A included the appellants. Cell A subsequently became insolvent and went into administration. The appellants claimed that they had not received amounts equal to their paid-up investments in Cell A, or the 15% hurdle rate. They claimed and Mr. Roache admitted that the repayment event had not happened, with the result that their entitlement to

the trust fund had vested. No shares in the bid vehicles held directly by Mr. Roache had been transferred to any of the investors.

In January 2019, on an application for summary judgment in the Braganza claims, the Chief Justice made a declaration that—

> "Pursuant to the Trust letter, £42 million worth of shares owned beneficially or legally by [Mr. Roache] in the 16 Bid Vehicles listed in Schedule 1 to this Order are held on Trust for [the claimant, Braganza II AB] and subject to paragraph 2 below the Original and/or Step In Investors in [DVP] listed in Schedule 2 to this Order to be shared among them in such manner as the Court should determine."

At later hearings, the other investors contended that the trust created by the trust letter covered shares held by Mr. Roache in all 60 bid vehicles, not just the 16 referred to in the Braganza order. The Chief Justice ordered that the three sets of claims be heard together. He directed the trial of two preliminary issues, the first of which was whether the reference in the trust letter to "£42,000,000 worth of direct equity . . ." was a reference to shares with an actual real current value of £42,000,000. The appellants invited the answer "Yes" but they also agreed that the actual real current value of Mr. Roache's direct holdings in the bid vehicles at April 5th, 2012 (the closing date) was less than £42m. and that he could not transfer shares actually worth £42m. to T&T.

The Chief Justice applied the principles applicable to the interpretation of commercial documents. In respect of the value issue, the Chief Justice identified three options: (i) the "net all" approach (that £42m. worth of direct equity was synonymous with all Mr. Roache's bid vehicle shares); (ii) a trust of part of a fungible mass; and (iii) £42m. based on the valuation book valuations. The Chief Justice concluded that the determinative factor was that the trust letter incorporated terms which were defined in the PPMs and terms whose interpretation was provided for. The reference to "direct equity" in the Cell A PPM was specifically linked to valuations using the methodology in the valuation book and consequently £42m. worth of direct equity was to be interpreted as meaning £42m. by reference to the valuations in the valuation book.

The appellants appealed on the value issue, submitting that the trust letter was a performance guarantee trust and that "£42,000,000 worth of direct equity" in the trust letter meant £42m. worth of shares actually worth £42m.

Mr. Roache submitted that the only coherent interpretation of the trust letter was that "£42,000,000 worth of direct equity" meant £42m. worth of shares valued by reference to the values in the valuation book.

Held, dismissing the appeals:

The trust letter was to be regarded as in the nature of a unilateral contract, the intended trust only being subsequently constituted on April 5th/6th, 2012. The question for the court was one of contractual interpretation and the applicable principles were well settled. Although the reference to a stated amount "worth" of something commonly could connote actual, real

worth, in the present case the wording of the trust letter, when set in context, displaced such an interpretation. The trust letter's "£42,000,000 worth of direct equity . . . in the Bid Vehicles" held by Mr. Roache could not have meant shares actually worth that amount, because everyone knew at the time that the entirety of the shares in the bid vehicles were worth but a fraction of that amount, and the trust letter was anyway proposing that only a tranche of Mr. Roache's total holdings would be settled in the trust. The reasonable man, aware of all this and also of the contrary argument advanced by Mr. Roache, would have no doubt that the trust letter was not referring to a proposed settling of shares actually worth £42m. It could not have done so. He would regard the suggestion as lacking business common sense and as obviously wrong. He would also reject the "net all" interpretation as similarly wrong: he would not understand how the language of the trust letter could be so interpreted. The reasonable man would have concluded that the trust letter's "£42,000,000 worth of direct equity . . . in the Bid Vehicles" was obviously intended to be identified on the basis of the valuations in the valuations book. There was no other rational interpretation. He would also regard the interpretation as amounting to a business common sense one. He would understand that the trust letter's "£42,000,000 worth" of bid shares was simply an offered incentive. He would also understand that the trust letter was not directed at creating anything in the nature of a "performance guarantee trust." He would probably regard it as in the nature of a "performance related bonus share trust" or similar. Therefore, the Chief Justice arrived at the correct conclusion when he declared that the key phrase in the trust letter was to be interpreted as £42m. by reference to the valuations in the valuation book and that the precise number of shares subject to the terms of the trust letter was to be distributed *pari passu* across all bid vehicles on the basis of the valuations in the valuation book (paras. 101–114).

Cases cited:

(1) *Al-Subaihi* v. *Al-Sanea*, [2022] EWCA Civ 1349, considered.
(2) *Hunter* v. *Moss*, [1994] 1 W.L.R. 452; [1994] 3 All E.R. 215, referred to.
(3) *Investors Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy*., [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98, referred to.
(4) *Lukoil Asia Pacific Pte Ltd.* v. *Ocean Tankers (Pte) Ltd*., [2018] 1 CLC 94, referred to.
(5) *McIlquham* v. *Taylor*, [1895] 1 Ch. 53; (1895), 64 L.J. Ch. 296; 71 L.T. 679; 43 W.R. 297, considered.
(6) *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264; 45 E.R. 1185; 7 L.T. 178, referred to.
(7) *Wood* v. *Capita Ins. Servs. Ltd.*, [2017] UKSC 24; [2017] 1 A.C. 1173; [2017] 2 W.L.R. 1095; [2017] 4 All E.R. 615, referred to.

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D. Feetham, *K.C.* and *D. Martinez* (instructed by Hassans) for the claimant/appellant, Braganza II AB, in the Braganza II AB claims;
E. Bennion-Pedley and *J. Daswani* (instructed by Daswani & Co.) for the defendant/respondent Iain Simon Roache in all three claims;
N. Cruz (instructed by Cruzlaw) for the defendant/respondent, Domain Venture Partners PCC Ltd. (in cell administration) in all three claims.

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

Introduction

Before the court are three appeals in three separate claims. All claims arise out of the same facts. The question for us is one of documentary interpretation. The appeals are against the reserved decision of Dudley, C.J. His judgment and order are both dated June 17th, 2022.

2 I must of course first set out the background facts and context in which the relevant document was created. Their unfolding may make more sense to any reader unfamiliar with the claims if I say now that the critical question is the meaning of "£42,000,000 worth of direct equity (the 'Direct Equity') in the Bid Vehicles . . . which is held in my name" in a declaration of trust in respect of such equity made by Iain Roache in a letter signed by him and dated March 5th, 2012 ("the trust letter").

3 In this judgment I shall refer to the claims brought by Rennes Foundation and others as "the Rennes claims"; to that brought by Christina Mattin as "the Mattin claim"; and to those brought by Braganza II AB and others as "the Braganza claims."

Domain Venture Partners PCC Ltd.

4 The appellants (claimants in the three sets of claims) are investors in a Gibraltar protected cell company, Domain Venture Partners PCC Ltd. ("DVP"). Their investments were in the shares of DVP's Cell A, that being the only cell in which shares were issued. Cell A is now in administration, pursuant to a Supreme Court order of April 23rd, 2018 made on the application of Ms. Mattin, the sole claimant in the Mattin claim. Its administrator is Edgar Lavarello of PricewaterhouseCoopers Ltd. DVP is a defendant in each claim.

5 The prime mover behind the formation of DVP was Iain Roache, also a defendant in each claim and the signatory of the trust letter. The declaration he made in it was in respect of shares held by him in Cell A's subsidiary companies, what the letter calls "the bid vehicles." By an order dated January 8th, 2019 made in the Braganza claims (which all parties in all claims accept binds them), the Chief Justice declared that the trust letter did create a trust and there has been no appeal against that. At least one

important matter still, however, remained in dispute, namely what the trust property was: that is, what was meant by the words I quoted in para. 2. That was the subject of the Chief Justice's decision of June 2022 under appeal.

6 Mr. Roache incorporated DVP on June 27th, 2011. Its purpose was to act as an "experienced investor fund" in accordance with Gibraltar's Financial Services (Experienced Investor Fund) Regulations 2005. On September 13th, 2011, Mr. Roache incorporated Domain Management Ltd. ("DML"), also a Gibraltar company, which he controlled and through which he in turn controlled DVP and its Cell A, which was launched as a sub-fund on October 14th, 2011. Juno Fund Services Ltd. (formerly known as Grant Thornton Fund Administration Ltd.) was DVP's fund administrator.

7 Cell A's initial commercial purpose was to fund the making of applications by each of its 60 special purpose subsidiary companies to the domain name registry, the International Corporation for Assigned Names and Numbers ("ICANN"). The window in which each application could be made was from January 12th to April 20th, 2012. The objective of each application was the award to the applicant by ICANN of an exclusive licence—a "gTLD" (generic top level internet domain name) licence—to operate a registry that would then offer for sale domains to all those seeking the awarded word to the right of the dot and who would then locate their email accounts, addresses and websites on the domains they respectively acquired. The 60 applicant companies were described in the documentation as bid vehicles, with each being named after the domain name for which it would bid (for example, Dot Cricket Ltd.). Each bid vehicle had a share capital comprising, so far as material, (a) 100 ordinary shares, carrying control of the company but no economic rights; and (b) 100,000 redeemable preference shares, each with a nominal value of £0.01 (or "investment shares," as the documentation calls them), carrying all the economic rights. All the ordinary shares in each bid vehicle were issued or transferred to Cell A, which gave it control over each company.

8 DML, owned and controlled by Mr. Roache, was the sole director of each bid vehicle. It was to be entitled to an annual fee of £5,000 from each, increasing to £75,000 from each that obtained an ICANN gTLD registry licence. Famous Four Media Ltd. (in which Mr. Roache was also a shareholder) was the registry administration service provider for each bid vehicle and was entitled to a maximum annual fee from each of £30,000. Juno Fund Services Ltd. was the administrator of each bid vehicle.

The Bid Vehicles PPMs

9 The destination of the 100,000, potentially valuable, investment shares in each bid vehicle (or "fund") was dealt with by a private placement memorandum ("bid vehicle PPM") that each bid vehicle issued. The sample such PPM in evidence was that for Dot Accountant Ltd. ("DAL"),

which would be bidding for the acquisition from ICANN of the gTLD .accountant registry licence. The objective of the DAL PPM was, as happened, to enable Mr. Roache to subscribe for 66.75% of DAL's investment shares and for Cell A to subscribe for the remaining 33.25%.

10 More particularly, the DAL PPM was drafted on October 15th, 2011, amended on February 20th, 2012 and re-amended on March 28th, 2012. By para. 7.1, and during the offer period (which closed on April 5th, 2012), it offered DAL's investment shares as follows: (a) 66,750 such shares (66.75%) to Mr. Roache "at a nominal value of £0.01 with a premium consisting of certain intellectual property and contractual rights that he has brought to the Fund"; and (b) 33,250 such shares (33.25%) "at an aggregate price of £1,000,000 which represents a nominal value of £0.01 per share and the remaining amount being share premium." The DAL PPM did not identify the offeree of the 33,250 shares, but I presume that, in accordance with its para. 3.3, it was delivered only to Mr. Roache and DVP; and Cell A was the sole subscriber for these shares. Mr. Roache's 66.75% holding of DAL's investment shares amounted to a total of 66,750 such shares.

11 DAL's investment shares were redeemable on a net asset value ("NAV") basis in circumstances explained in paras. 7.4 and 7.5 of its PPM but I do not understand any such circumstance to have arisen. Part 9 of the PPM explained the method of arriving at the NAV, by reference to DAL's articles of association. Part 8 of the PPM warned prospective investors that:

> "the NAV is in no way guaranteed and any investments made by the Fund may go down as well as up. The future value of any Investment Shares may be substantially lower than the Subscription Price and could even be zero."

12 Part 10 of DAL's PPM is headed "Risk Factors." I quote the following:

> "**10.15 Valuations**
>
> Net Present Value calculations have been used to establish the current valuations of the Fund based on estimated net revenue of the Fund. Net Present Value calculations are highly dependent of [sic] the discount rate used. Whilst it is not believed that once the Fund holds the gTLD .accountant licence there is a significant risk of such license [*sic*] being revoked or any other material adverse change to significantly alter the projected cash flows of such the fund [*sic*] such risks may remain and the discount rate used may be incorrect.
>
> **There can be no certainty that the Fund will acquire the gTLD .accountant licence**
>
> The Fund has been independently valued using the methodology as set out in the Valuation Report. Due to the aforementioned, if the assumptions and/or calculations of the Valuation Report are incorrect there is a risk that the Fund's investment could be adversely affected."

13 Save for the statement in para. 10.17 that DML "believes that the Valuation Report has been produced on a conservative basis," there appears to be no other reference in the DAL PPM to, let alone a definition of, "the Valuation Report." I presume, however, that it is a reference to what I later refer to as the valuation book. Paragraph 10.23 pointed out that there was "no active secondary market for the Investment Shares and it is not expected that such a market will develop." Paragraph 10.25 explained that "The NAV per Investment Share is expected to fluctuate over time with the performance of the Fund's investments." Paragraph 11.7, headed "Valuation Reports," states that "Valuation Reports shall be prepared and issued to the Investment Shareholders by the Secretary. The frequency of the preparation of the valuation reports, unless [DML] determines otherwise, shall be annually."

14 Apart from one feature, I presume that each PPM of the other 59 bid vehicles was in like form. The exception related to the proportions of their investment shares respectively offered to Mr. Roache and Cell A. In the case of certain of those bid vehicles with lower valuations in the valuation book, Cell A was offered, and subscribed for, a majority holding of their investment shares, and Mr. Roache a minority holding. Even so, taking the 60 bid vehicles as a whole, Mr. Roache was entitled to, and subscribed for, a large majority of their six million offered shares, amounting to some 65% to 70% of them.

The DVP Cell A PPM

15 In order to subscribe for the bid vehicles' investment shares under each such PPM and to fund each bid vehicle's application to ICANN, Cell A needed capital from outside investors. It is central to the appellants' arguments that whilst Mr. Roache (i) was the man whose acute commercial vision identified the potentially valuable idea behind the business scheme he hoped the 60 bid vehicles could successfully exploit, and (ii) his intention was to have his own large holdings of bid vehicle investment shares, nevertheless, at the outset, he proposed to put up virtually none of the capital required for the venture. Instead, almost all of it was to come from outside investors (including the appellants), whose interest (subject to the two incentives offered to them, to which I shall come) would not be represented by direct holdings of shares in any bid vehicle, but only by indirect such holdings via shares held by them in Cell A, which would itself have only a minority holding in most of the bid vehicles.

16 With a view to raising the required capital from outside investors, Cell A issued its own private placement memorandum ("the Cell A PPM"), its purpose being to raise capital by selling Cell A redeemable preference A shares to subscribing investors. Only those qualifying as "experienced investors" within the meaning of the Financial Services (Experienced Investor Funds) Regulations 2005 were entitled to subscribe, although the

Regulations do not so define "experienced investors" as to limit them to those who in fact have investment experience: see reg. 3(1).

17 The Cell A PPM was drafted on October 14th, 2011 and amended on November 15th, 2011, with the version dated February 29th, 2012 being the final one in place on April 5th, 2012, the closing date for subscription for the Cell A shares. It was a private offering of up to 100,000 redeemable preference shares at £1,000 each, with each such share having a nominal value of £0.01 and a premium of £999.99: thus it was inviting subscriptions totalling £100m. It was not, however, asking for the immediate payment of such total. Paragraph 9.4 explained that the first 42% of the subscription price for each share was to be paid in four tranches, or by four capital commitments, as follows: (i) 12% on subscription (which I presume means by no later than the closing date, April 5th, 2012); (ii) 12% on April 12th, 2012; (iii) 8% on April 12th, 2013; and (iv) 10% on April 12th, 2014. This represented a total commitment from all investors by April 12th, 2014 of £42m., the figure also featuring in the key element of the trust letter I quoted in para. 2.

18 Section 2.1 gave proposing investors an express warning of the risks of an investment in Cell A:

> "Investments in EIFs may involve special risks that could lead to a loss of all or a substantial portion of such investments. A subscriber for A shares is wholly responsible for ensuring that all aspects of the Company and this Sub-Fund are acceptable to them. Unless a subscriber for A shares fully understands and accepts the nature and the potential risks inherent in this Company and Cell A, an investment should not be made in the Company or Cell A."

19 Paragraph 10.2.2 explained that Cell A had been established to invest in a series of bid vehicles established for the sole purpose of making applications to ICANN for gTLD registry licences. It proceeded to explain that:

> "Cell A has been provided with options to invest up to £1,500,000 in the Bid Vehicles listed in Appendix G by way of equity investment. Each of the Bid Vehicles have [*sic*] been independently valued using the methodology as set out in the Valuation Book. Each of the Bid Vehicles differ [*sic*] in valuation. As such the equity allocation to Cell A varies. A number of premium Bid Vehicles have substantially higher valuations than others. A direct equity investment of £1,500,000 into such Bid Vehicles by Cell A would equate to a small minority interest . . ."

20 Paragraph 10.2.4 is important. It explains what was known as "Strategic Investor Direct Equity in Bid Vehicles" and I come to it in the next section of this judgment. Paragraph 10.3 is equally important. It is

about the "Valuation of the Bid Vehicles" and I come to that in the next but one section. Paragraph 10.4 explained that Cell A's investment in the bid vehicles would provide all the venture capital necessary to enable the bid vehicles to pay the costs associated with the filing by each of its application for a gTLD licence, "to include but not being limited to the legal, outreach, consulting and ICANN application fee costs and to provide a financial commitment necessary to exceed the year 1 to year 3 ICANN capital adequacy operating requirements . . ." It explained that those bid vehicle investment shares not held by Cell A may be issued at their nominal value of £0.01 and held by Mr. Roache and/or others. It explained that "It is not intended that any Bid Vehicle Investment Shareholder other than Cell A shall contribute to the costs associated with the filing of the applications to ICANN for the gTLD registry licences."

Strategic investor direct equity

21 Investors minded to make an investment in Cell A—and thereby an indirect investment in the bid vehicle shares—were offered two additional incentives. One was known as strategic investor direct equity ("SIDE"). The provisions relating to SIDE were in para. 10.2.4 of the DVP PPM. To any "strategic investor" (namely, one making a minimum capital commitment of £5m. or more), Mr. Roache offered an upfront grant of "direct equity" in the bid vehicles from his own direct holdings of bid vehicle investment shares: such investors would thus hold these shares in the bid vehicles directly, in addition to their indirect holdings in the bid vehicles via their holdings in Cell A. I should set out the whole of para. 10.2.4, which provided as follows:

> "Strategic investors providing a minimum Capital Commitment to the Cell A of £5,000,000 will be given by Iain Roache (by way of a private transaction) direct equity in the underlying Bid Vehicles *in addition to* their holdings in Cell A (the 'Direct Allocation'), The direct equity allocations shall be:
>
> > Where an investor has made a Capital Commitment of £5,000,000–£19,999,999 the investor shall receive an additional allocation of Bid Vehicles Investment Shares to the value of 100% of the total Capital Commitment of that investor.
> >
> > Where an investor has made a Capital Commitment of £20,000,000 or more the investor shall receive an additional allocation of Bid Vehicles Investment Shares to the value of 140% of the total Capital Commitment of that investor.
>
> The Direct Allocation shall in no way effect [*sic*] Cell A's level of ownership of Bid Vehicle Investment Shares as such transfers shall be made by Iain Roache from his own holding of Bid Vehicle Investment Shares. Subject to sufficient Bid Vehicle Investment

> Shares being held by Iain Roache such Direct Allocation shall be distributed pari passu across all Bid Vehicles on the basis of the valuations in the Valuation Book.
>
> It should be noted that in relation to Bid Vehicles that have lower valuations Cell A will hold the majority of the Bid Vehicle Investment Shares and Iain Roache only a minority interest [in] them. Should Iain Roache not hold enough equity in each Bid Vehicle to make such payment [*sic*] an additional allocation shall be made from the next most valuable Bid Vehicle in which he holds Bid Vehicle Investment Shares. For example in relation to dot BIM Limited Cell A will own more than 57% of the Bid Vehicles Investment Shares and therefore in relation to any amount of the Direct Allocation than [*sic*] has been unable to be made the value of such amount shall be made up in the next most valuable Bid Vehicle in which Iain Roache holds sufficient Bid Vehicle Investment Shares to make such allocation."

22 The valuation book there referred to is central to the issue before us and I come to it in the next section. It is, however, worth noting here, since it is directly relevant, that para. 10.2.4 shows that the way the SIDE scheme worked was that an investor who committed to investing, say, £5m. in Cell A shares would also be entitled to £5m. worth of bid vehicle shares, valued by reference to the valuation book valuations.

23 I add that allocations under the SIDE scheme were not the only potential inroads into the bid vehicle investment shares held by Mr. Roache. The "executive summary" in section 4 of the Cell A PPM explained that he would also be making share allocations to, for example, "employees of Cell A, Domain Management Limited and Famous Four Media Limited as employee incentive plans," adding that "a proportion estimated to be in the region of 35% across the portfolio [will] be retained by him."

The valuation book

24 Paragraph 10.3 of the Cell A PPM, headed "Valuation of the Bid Vehicles," provided materially as follows:

> "The Bid Vehicles have been independently valued by Sochalls [a firm of accountants] on a discounted cash flow basis. A valuation report (the 'Valuation Book') has been produced and shall be approved by Cell A setting out the estimated Net Present Value of each Bid Vehicle during years 1–5 of the registry licences of the Bid Vehicles being operational; the Net Present Value for years 6 onwards and the Multistage Net Present Value. The Valuation Book may be reviewed by prospective investors upon request in hard copy held in data rooms at the offices of Triay & Triay in Gibraltar; Sochalls in London; and Hogan Lovells in New York.

> The Valuation Book has been produced by estimating the potential revenues of each Bid Vehicle based on each being operational for a 5 year period on the following basis: . . .
>
> For specific details relating to the estimated revenues of the Bid Vehicles and their projected NPVs please see the Valuation Book."

25 The Chief Justice, at para. 23 of his judgment, described the valuation book—

> "as a valuation based on exceptionally unlikely assumptions and with highly improbable projected values which would have required all the bids for gTLDs to have been successful. To some extent that is evident from para 10.3 of the DVP PPM itself and it is apparent from the 'Assumptions' at page 10 of the Valuation Book . . ."

from which he quoted. Those assumptions included that:

> "a. Cell A is fully funded and has applied for all 60 proposed registry licences;
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> b. Cell A is successful in all 60 registry licence applications;
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> c. All 60 registries become operational at the same time;
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> d. All 60 registries remain in the portfolio for a five year period; and
>
> e. There are no material adverse changes affecting the value of Bid Vehicles to distribute 90% of their distributable profits (following reserves of 10% being held)."

26 Having so explained the valuation book, the Chief Justice also explained, at para. 24, that the Cell A PPM, the bid vehicles PPMs. and DVP's articles of association also included provisions for the valuation of the Cell A shares ("Cell A net asset value," or "CANAV") to be undertaken in accordance with international financial reporting standards, which the "Definitions" section linked to principles and standards established by the International Accounting Standards Board. He also drew attention to para. 10.1 of the Cell A PPM which (in bold) warned any prospective investors that they—

> ". . . should be aware that the CANAV is in no way guaranteed and any investments made by Cell A may go down as well as up. The future value of any A shares may be substantially lower that [*sic*] the Subscription Price and could even be zero."

The trust letter

27 The other incentive offered to investors in Cell A, at the heart of the appeals, derives from the trust letter of March 5th, 2012 (a month before the closing of the PPMs) from Mr. Roache to prospective investors. The appellants chose to refer to it as a "Performance Guarantee Trust," or "PGT." So did the Chief Justice, whilst cautiously also observing that the

trust letter had come to be so known "accurately or otherwise." I shall continue to refer to it simply as the "trust letter." It reads:

> "To whom it may concern
>
> I hereby confirm that £42,000,000 worth of direct equity (the 'Direct Equity') in the Bid Vehicles of [*sic*] which is held in my name shall be held on trust in the name of T&T Nominees Limited (a fiduciary company regulated by FSC and controlled by partners of Triay and Triay) for benefit of investors in [DVP] until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has be [*sic*] repaid to them ('the Repayment Event'). Upon the Repayment Event the legal and beneficial title of such equity shall revert to [Mr. Roache]. Should the Repayment Event not take place within 54 calendar months from the Closing Date of [DVP] [sic] the Direct Equity shall be transferred to the Participating Shareholders in [DVP] pari passu based on the size of their Capital Commitments in [DVP].
>
> For the sake of clarity terms defined in or whose interpretation is provided for in any Private Placement Memorandum of the Fund shall have the same meaning when used in this Agreement unless separately defined or interpreted in this Agreement."

28 It is the sense of that declaration of trust, or "Agreement" (as it is called in the second paragraph), that was in issue before the Chief Justice and now before us. Mr. Roache, in para. 48 of his witness statement of October 30th, 2020, explained that it was prepared by "the DVP and FFM [Famous Four Media Ltd.] legal team, with input from Mr Hogg [of Grant Thornton Fund Administration Ltd.]." The team does not appear to have included a proofreader and, for all the professional skill said to have been devoted to its creation, the end product is a poorly drawn document. I here make seven points about it.

29 First, in my view the trust so declared was what, in trust lawyers' jargon, was an "incompletely constituted" one. That is, it would not be completely constituted, and so take effect as a trust, until the shares intended to be subject to the trust referred to were vested in T&T Nominees Ltd. ("T&T"): see *Milroy* v. *Lord* (6) (4 De G.F. & G. at 274–275, *per* Turner, L.J.). The significance of that is that, until the trust was so constituted, it would not have been enforceable by any beneficiary who was a mere volunteer; and it never has been. Whatever shares were intended to be subject to the trust remained registered in Mr. Roache's own name (apart apparently from a short period when they were held by someone else) and he alone received the financial returns they yielded.

30 Second, for reasons given later, I consider that the beneficiaries did give valuable consideration for Mr. Roache's trust promise and so were in a position to enforce it even though the trust was never completely constituted.

31 Third, these considerations have anyway been overtaken by the fact that, by its order of January 8th, 2019, the court made a declaration that the trust shares referred to "are held on trust" for the beneficiaries, which must mean they were and are so held by Mr. Roache on an enforceable trust.

32 Fourth, although the trust derives from a letter of March 5th, 2012, I regard it as clear that it was intended to take effect (or be completely constituted) only on, or promptly after, April 5th, 2012, the Cell A subscription closing date. Only then would it be known what capital commitments the outside investors had agreed to make; and, as I shall explain, the creation of the trust was implicitly contingent upon their making a capital commitment of £42m. over the first four payment calls.

33 Fifth, the scheme of the trust was that the trust fund originally represented by the "£42,000,000 worth" of shares was to be transferred to the investors if "the Repayment Event" had not happened by October 5th, 2016 (54 months from the closing date): the investors' right to such a transfer was thus contingent upon that event not happening by then. Upon such right arising, it is clear that the entire trust fund (whatever it might then be worth) would then vest in the investors: the trust letter makes no provision limiting their entitlement to such part of its then value sufficient to meet any shortfall in the repayment event. If, however, the repayment event did happen before or by October 5th, 2016, the entire fund would revert to Mr. Roache.

34 Sixth, although some payments have been made to the investors, the appellants' case is that they have not received amounts equal to their paid-up investments in Cell A, or the 15% "hurdle rate," either by October 5th, 2016 or at all. They say, and Mr. Roache admits, that the repayment event has therefore not happened, with the consequence that the contingency upon which they were to become entitled to the settled shares has happened and their entitlement to the trust fund has vested. No shares in the bid vehicles held directly by Mr. Roache have, however, been transferred to any of the investors in satisfaction of their entitlements under the trust letter.

35 Seventh, as the trust shares were never vested in T&T, the investor beneficiaries have never been able to identify a separately held trust fund comprising them. More fundamentally, the issue the subject of this appeal is as to the identity of the shares intended by the trust letter to be subject to the trust: what did it mean by "£42 million worth of direct equity . . . in the Bid Vehicles . . . held in my [Mr. Roache's] name"?

A communication subsequent to the trust letter

36 I should mention a communication that followed the trust letter of March 5th, 2012, since Mr. Azopardi, K.C., for Ms. Mattin, sought to rely upon it in aid of the interpretation of the trust letter he advanced. On March 7th, 2012, Mr. Roache sent an email to Ms. Mattin attaching a version of the Cell A PPM and saying: "I have also attached the letter confirming my pledge of GBP42 million of my own equity holding as security against the investor funds."

The outcome of the PPMs and the bid vehicles applications to ICANN

37 There were ten original investors in Cell A, including the claimants in the three claims. They made capital commitments totalling £48.33m. and actual payments of over £21m. to Cell A. Ms. Mattin, the largest investor, paid nearly £6m.

38 Of the 60 bids made by the bid vehicles, 16 were successful: each such bidder obtained an ICANN licence to operate a registry offering for sale the right to use its awarded domain name. 43 bids were unsuccessful. The bid of the 60th bid vehicle, .GiftLimited, was partially successful but it withdrew its application in exchange for a 50% share of the profits of a registry operated by another bid vehicle.

39 One might think the unsuccessful bid vehicles played no part in the success of the venture. One would be wrong. Such bid vehicles were able to achieve valuable compensation as a result of the competitive bid process, including in some cases the negotiation of preferred bid status by other entities. After achieving this, most went into liquidation. The Chief Justice explained this at his para. 27 (his references to "the PGT" in this and the other quotations I later make from his judgment are to the trust letter):

> "Although somewhat counterintuitive, the other [unsuccessful] Bid Vehicles remain relevant because they received financial compensation when their bids were withdrawn or failed. That compensation was paid out to shareholders including [Mr. Roache]. Although the sums involved are evidently of no consequence when it comes to interpreting the PGT, the significance of whether and the extent to which the PGT encompasses the unsuccessful Bid Vehicles is apparent from [Ms. Mattin's] case. It is said on her behalf that the present value of the Active Registries business as a whole is of [the order of] US$2–3 million and that consequently the Active Registry preference shares registered in [Mr. Roache's] name combined with his interest in DVP cannot logically exceed that value. It is further said that in total the unsuccessful Bid Vehicles distributed in excess of US$46m to their shareholders, of which US$32m was paid to [Mr. Roache]."

40 I have, in para. 17, hinted at how the trust letter's £42m. figure was arrived at, but should explain it expressly. The Cell A PPM offered 100,000 redeemable Class A preference shares for subscription. They were offered at a price of £1,000 per share, thus potentially at a total capital commitment of £100m. However, the original arrangements proposed to investors envisaged that they would pay the subscription price over a number of calls, with only 42%, or £42m., required by the fourth call. In the event, this arrangement was modified, but the evidence is that, at about the time when the trust letter was being devised, it was expected, or hoped, that the investors would be making capital commitments of £42m. In fact, the capital commitments by April 5th, 2012 were £48.33m. and a total of five calls were made. It is, however, common ground between all parties that the £42m. figure in the trust letter was directly related to the £42m. capital commitment the investors assumed in response to the first four calls.

The Braganza order

41 Cell A became insolvent and went into administration. The various claimants in the three claims brought claims against, among others, Mr. Roache and DVP. There is no need to detail their nature or progress. One key outcome for present purposes is, however, that on January 8th, 2019, upon an application for summary judgment in the Braganza claims, the Chief Justice made a declaration (as slightly amended on April 9th, 2019) as follows:

> "Pursuant to the Trust letter, £42 million worth of shares owned beneficially or legally by [Mr. Roache] in the 16 Bid Vehicles listed in Schedule 1 to this Order are held on Trust for [the claimant, Braganza II AB] and subject to paragraph 2 below the Original and/or Step In Investors in [DVP] listed in Schedule 2 to this Order to be shared among them in such manner as the Court should determine."

42 By that order, the court also ordered that "the precise number of shares in the Bid Vehicles to which the [Braganza] Claimant, the Original and/or Step-In Investors are entitled" and the basis of the entitlement should be determined on a subsequent occasion. The order provided for notice to be given to other investors. At later hearings, Ms. Mattin and other investors contended that the trust created by the trust letter covered shares held by Mr. Roache in all 60 bid vehicles, not just the 16 referred to in the Braganza order.

The preliminary issues

43 On April 9th, 2019, the Chief Justice ordered that the three sets of claims be heard together on terms he directed. He also directed the trial of two preliminary issues. His judgment now under appeal is his judgment on them. In para. 28, he said this:

"It is not in dispute that (whether or not it was correctly decided) the effect of the 8 January 2019 Order in the Braganza Action is that the PGT created a trust. That declaration has not been appealed by [Mr. Roache] or any other party. What now falls for determination are the two preliminary issues identified in the Order of 9 April 2019."

44 Those two issues were as follows:

"13.1 Whether on the proper interpretation of the provisions of the trust to which the order relates (the 'Performance Guarantee Trust') and in relation to Preference Shares in the Special Purpose Vehicles (hereafter 'Shares'), the reference in the letter dated [March 5th,] 2012 to '£42M worth' of Shares held by [Mr. Roache] is a reference to Shares with an actual real current value of £42,000,000'. . .

13.3 Whether the Order should be amended to include all of the Special Purpose Vehicles (in addition to the sixteen to which the Order currently relates) in which [Mr. Roache] holds or has held Shares."

45 The first issue ("the value issue") asks a clear question, to which the appellants invite the answer "yes." There is, however, a problem with their case, namely that all are agreed that "the actual real current value" of Mr. Roache's direct holdings in the bid vehicles at April 5th, 2012 (the closing date) was nothing like £42m. in real money. It was at most a mere fraction of that and there was no way in which he could transfer shares actually worth £42m. to T&T. As at April 5th, 2012, the venture was speculative and untried and its future success uncertain. The bid vehicles may well collectively then have had some real value, but it was nowhere near £42m. They had not yet been funded, none had yet made any application to ICANN and they had at most some hope or expectation value of a modest amount. Sir Peter Caruana, K.C., for the appellants in the Rennes claims, thought it necessary to underline this point in his skeleton argument in which, at para. 14.2(i), he wrote that "all [Mr. Roache's bid vehicle] shares *were necessarily worth less than £42,000,000* by any measure of real value (a fact that is not in dispute)."

46 All that might suggest that it is improbable that Mr. Roache was referring in the trust letter to a bundle of shares actually worth £42m., with the consequence that the answer to the para. 13.1 value issue might be in the negative. The innocent reader of the story so far might ask himself what the consequence would be if that were to be the answer: what, in that event, would the trust property comprise? His inquiry would be justified. It would, if I may say so, have been helpful if the value issue had also identified the competing argument that was to be advanced by Mr. Roache, namely that the trust letter's reference to "£42 million worth of direct equity . . . in the Bid Vehicles" was not to bid vehicle shares with an "actual real current" such value (no such bundle of shares existing), but to a bundle of shares

with a "worth" or "value" of that amount calculated by reference to the net present values of the bid vehicles in the valuation book.

47 If that argument were to be correct, the valuation book figures enabled a valuation of each of any bid vehicle's 100,000 investment shares as at April 2012 to be arrived at by the exercise of dividing the then net present value of such vehicle by 100,000. Of course, the valuation book's values were arrived at on the most optimistic basis possible, including the making of the improbable assumptions I have described; and they bore no relation to real world values as at April 2012. But if that was the right interpretation, Mr. Roache could have transferred shares of the declared worth to T&T. In this context it is worth noting again that the net present values in the valuation book provided the basis for the calculation of the quantity of bonus SIDE shares allocated to those investors who committed themselves to an investment in Cell A of at least £5m.: their £5m. of real money entitled them to £5m. worth of SIDE bid vehicle shares calculated by reference to the net present values in the valuation book. Mr. Roache's case was the straightforward one that the bid vehicle shares comprising the "£42 million worth of direct equity" referred to in the trust letter fell to be identified in like manner.

48 The second preliminary issue ("the scope issue") is clear and I say no more about it here.

The Chief Justice's decision

49 The main question before the Chief Justice, the value issue, was therefore as to what "£42,000,000 worth of direct equity . . . in the Bid Vehicles" meant. To that end he directed himself to the principles applicable to the interpretation of commercial documents by drawing on the comprehensive summary provided by Popplewell, J. in *Lukoil Asia Pacific Pte Ltd.* v. *Ocean Tankers (Pte) Ltd*. (4) ([2018] 1 CLC 94, at para. 104). He then, however, added this gloss (*ibid.*, at para. 33):

> "33. There is in this case the additional dimension that, it not being in issue that there is a trust, that the interpretation of the PGT must be one which is consistent with trust law. Put another way, the PGT cannot be interpreted in a way which would make the trust a nullity. Therefore, for the interpretation of the PGT to be legally viable the three 'certainties' must be met (i) the intention to create a trust; (ii) the subject matter of the trust must be certain; and (iii) the declaration of trust must make sufficiently clear who the beneficiaries are. For present purposes no issues arise as regards the intention to create the trust or the identity of the beneficiaries. However, certainty of subject matter is inexorably intertwined with both preliminary issues, because what these seek to resolve is precisely what assets are caught by the PGT."

50 The four counsel—Mr. Azopardi, K.C., Sir Peter Caruana, K.C., Mr. Feetham, K.C. and Mr. Bennion-Pedley—who appeared before the Chief Justice and this court were not unanimous as to the correctness of the approach there stated: there was one dissenter, namely Mr. Feetham. The "certainty of subject matter" issue was, however, fully argued before the Chief Justice, who referred to the line of authorities touching upon it commencing with the decision of the English Court of Appeal in *Hunter* v. *Moss* (2). In the event, though, in light of the narrower way in which the interpretation issue was ultimately argued before this court, the "certainty of subject matter" question ceased to be an issue and was not the subject of argument.

51 At para. 37, the Chief Justice recorded that all the claimants were agreed as to their contentions on the two issues, namely that (i) the words "£42,000,000 worth of direct equity" in the trust letter meant "actual real current value of £42million"; and (ii) in addition to the 16 bid vehicles referred to in the Braganza order, *all* the bid vehicles in which Mr. Roache holds, or has held, shares were also caught by it.

52 At paras. 38–42, the Chief Justice explained the general basis on which the claimants advanced their case on the issues. Their case on the value issue was that the investment made by the outside investors in Cell A was a speculative one. Mr. Roache was retaining a majority stake in the venture, with the outside investors providing all the funding to enable it to happen. The manifest purpose of the trust letter was the provision by Mr. Roache of a guarantee, or security, to the investors against the risk that the business failed to deliver on the very substantial promised return. That security, "£42,000,000 worth of direct equity" in the bid vehicles was, therefore, obviously intended to be security actually worth £42m. To interpret the trust letter as referring to £42m. worth of shares by reference to the hypothetical valuations in the valuation book would defeat that object. The Chief Justice recorded how the £42m. figure in the trust letter was arrived at (see para. 40 above).

53 At para. 43, the Chief Justice observed, however, that such submissions did not take account of the fact that the final paragraph of the trust letter "not only incorporates definitions of terms in the PPMs but also terms found in the PGT 'whose interpretation is provided for' in the PPMs." He pointed out that, whilst "Direct Equity" as used in the trust letter was not a defined term, para. 10.2.2 of the Cell A PPM, under the heading "Introduction to Investment in Private Funds to own and manage gTLDs," provided as follows (and he emphasized the words "direct equity" in the quotation):

> "Cell A has been provided with options to invest up to £1,500,000 in the Bid Vehicles listed in Appendix G by way of equity investment. Each of the Bid Vehicles have been independently valued using the

> methodology as set out in the Valuation Book. Each of the Bid Vehicles differ in valuation. As such the equity available to Cell A varies. A number of the premium Bid Vehicles have substantially higher values than others. A *direct equity* investment of £1,500,000 into such Bid Vehicles by Cell A would equate to a small minority interest. However, the above referenced option have been provided on the basis that in such situations the minimum amount of equity available to Cell A is 15%. By way of example if a Bid Vehicle has been valued at £60,000,000 on a direct investment basis £1,500,000 would equate to 2.5% but upon exercising of the option available to Cell A in relation to such Bid Vehicle Cell A would hold a 15% interest in that Bid Vehicle at a value of £9,000,000. This shall provide an immediate potential capital gain to Cell A."

54 The Chief Justice further noted that the words "direct equity" were also to be found in para. 10.2.4 of the Cell A PPM dealing with the SIDE scheme. I referred to that in para. 21 above. His point in making these references was to identify the basis on which Mr. Bennion-Pedley, for Mr. Roache, sought to link the trust letter's "£42 million worth of direct equity" with the valuations in the valuation book.

55 The Chief Justice turned to the "certainty of subject matter" question. His approach was, as I have noted, that the subject matter of the declared trust had to satisfy the requirement of certainty: if it did not, I infer that his view was that the unchallenged declaration of the creation of a trust he had earlier made by the Braganza order would spontaneously dissolve, with the consequence that no trust would ever have been created. He observed that each of the claimants before him adopted different approaches in their respective attempts to reconcile their interpretation of the trust letter with subject matter certainty.

56 With respect to the Chief Justice, I shall not summarize what he said about the "certainty" question in recording the submissions made to him, because that question was not alive before us. The Chief Justice explained an apparently complicated "certainty" submission advanced by Mr. Azopardi, for Ms. Mattin, but I understand the starting point of that submission to have been that (i) at the time of the trust letter, the bid vehicle shares were at most of only speculative value; (ii) that the original trust property therefore comprised *all* Mr. Roache's directly held shares in the bid vehicles, apart perhaps only from those subject to pre-existing contractual claims by others (for example, SIDE obligations), what Mr. Azopardi called a "fungible mass"; and (iii) as the Chief Justice put it:

> "49. That therefore the real value of the shares in the Bid Vehicles fell to be ascribed on the Repayment Date [October 5th, 2016], because it was only at that point that it would be possible to calculate how the identifiable part of the £42m of the 'fungible mass' would be produced

> and how many of [Mr. Roache's] shares would be necessary to produce that value that had been placed in trust. Mr Azopardi also puts it this way, that if a trust is established in respect of 10% of a business, the value to the beneficiaries will evidently change over time. That in the present case the value remains static at £42m but that the part of the fungible mass needed to generate those £42m will change over time even if the effect of that is that it captured all the shares held by [Mr. Roache]."

57 Reduced to its essence, I infer Mr. Azopardi's submission to have been that it was impossible as at March or April 2012 to identify what proportion of the entire fungible mass of Roache bid vehicle shares were subject to the trust. That could only be done in October 2016, when it would or might be possible to identify a bundle of shares in such mass actually worth £42m. For reasons given in para. 33 above, I respectfully regard that submission as reflecting a misunderstanding of the nature of the trust created by the trust letter. At an early stage in his argument to this court, Mr. Azopardi abandoned a like submission.

58 The essence of Mr. Feetham's submission, for Braganza II AB, was that it mattered not if Mr. Roache did not hold £42m. worth of bid vehicle shares at March 2012. His obligation was to hold such number of shares as was necessary to meet the £42m. commitment to the investors. If their value never reached £42m., his entire shareholding was subject to the commitment. I understand the sense of that submission to have been that the entirety of Mr. Roache's bid vehicle shares became subject to the trust.

59 Sir Peter Caruana, for the Rennes claimants, also approached the case on the basis that at March/April 2012 there was no question of the shares in the bid vehicles being worth £42m. of real money. His case was that the trust was created either on March 5th, 2012, or else that the sense of the trust letter was that it declared Mr. Roache's intention to create the trust on the subscription closure date, April 5th, 2012. Whichever was correct, the trust property had to be certain when the trust was created; and, whatever the correct date, "£42,000,000 worth of direct equity" was synonymous with *all* Mr. Roache's bid vehicle shares, less those he had committed to allocate to particular investors either under SIDE agreements or otherwise. Sir Peter's submission was described as the "net all" approach.

60 Mr. Bennion-Pedley, for Mr. Roache, submitted that the trust letter adopted the terms in the PPMs, the Cell A PPM defined the values of the bid vehicles premised on the values in the valuation book, and that valuation was therefore carried through into the trust letter. He placed particular reliance on paras. 10.2.4 and 10.3 of the Cell A PPM. The Chief Justice explained this submission more fully in his para. 58.

61 In coming to his conclusion, the Chief Justice reminded himself of the opening words of the Braganza order, which were "Pursuant to the Trust

Letter, £42 million worth of shares . . . are held on trust . . .," and held that the first five words precluded him from holding that the trust was created later than March 5th, 2012. He held further that it was then made subject to two conditions precedent: (i) prospective investors becoming actual investors, and (ii) the repayment event not taking place. Having regard to the requirement for the trust property to be "certain," he identified the three choices before him in answering the value issue as being (i) the "net all" approach; (ii) a trust of part of a fungible mass; and (iii) £42m. based on the valuation book valuations.

62 In para. 69, the Chief Justice rejected the "net all" approach. His reasoning was that, (i) whilst at the time the trust was created the "£42,000,000 worth of direct equity" was "synonymous with all of [Mr. Roache's] direct equity," (ii) that would emerge as an impossible position if, as the fund began to prosper, the "net all" shares grew to a value in excess of £42m. I shall later return to para. 69, but here observe, with respect, that the point made in (ii) also appears to me to reflect a misunderstanding of the nature of the trust intended to be created by the trust letter.

63 The Chief Justice was apparently attracted to the £42m. worth of shares being a "real money" part of a fungible mass, as advanced by Mr. Azopardi, which he regarded as a construction consistent with business common sense. He was also attracted by Mr. Bennion-Pedley's valuation book argument, which he regarded as equally so consistent. In para. 71, in support of the latter view, he noted that "both the investments in [Cell A] and the allocation of shares by virtue of SIDE were calculated on the basis of the Valuation Book, and although strictly the PGT sits outside that agreement it is an aspect of the overall commercial arrangement." The Chief Justice's conclusion was that:

> "72. In my judgment the determinative factor in the present interpretative exercise is the second paragraph of the PGT which not only incorporates terms which are defined in the PPMs but also crucially 'terms . . . whose interpretation is provided for'. The reference to 'direct equity' at [10.2.2] and [10.2.4] of the [Cell A PPM] when calculating investments in [Cell A] and the allocation of SIDE shares respectively, is specifically linked to valuations using the methodology in the Valuation Book and in my judgment 'direct equity' is a term which whilst not defined, is one 'whose interpretation is provided for' in the PPMs. Consequently, in my judgment '£42,000,000 worth of direct equity' is to be interpreted as meaning £42m by reference to the valuations in the Valuation Book."

64 That disposed of the value issue. As for the scope issue, the Chief Justice held that the trust declared by the trust letter extended over Mr. Roache's investment shares in all 60 bid vehicles, not just the 16 successful bidders. His reasoning was as follows:

> "73. As regards the scope of the PGT, in my judgment the language evidently does not seek to identify [Mr. Roache's] equity by reference to individual Bid Vehicles. In those circumstances it is only capable of being construed as extending to all the Bid Vehicles pari passu. I am fortified in that view in that it must have been envisaged to have been a workable formula given the fact that at [10.2.4] of the [Cell A PPM] the allocation of SIDE shares is 'distributed pari passu across all Bid Vehicles on the basis of the valuations in the Valuation Book'. It also has to be interpreted as attaching to shares which [Mr. Roache] was then in equity free to alienate on trust. Put another way, shares that were not subject to a contractual obligation on [Mr. Roache's] part to transfer to an investor. Otherwise, [Mr. Roache] would not have been in a position to transfer any of his shares under the SIDE provisions and this would have run counter to an important aspect of the [Cell A PPM]."

The appeals to this court

65 The appeals go only to the value issue, not to the scope issue. In what follows, I shall (i) make some further observations about the nature of the trust letter, which I understood to be common ground between counsel; (ii) briefly say something about the "certainty of subject matter" point; (iii) identify the principles of documentary interpretation applicable to the determination of the value issue; (iv) summarize the submissions; and (v) explain my conclusion.

Simply a trust; or also a unilateral contract?

66 The Chief Justice, in his para. 66, said the wording of the Braganza order, namely that "Pursuant to the Trust Letter, £42 million worth of shares . . . are held on Trust . . ." prevented him from holding that the trust was created any later than the date of the letter, namely March 5th, 2012. I respectfully disagree. First, the words "pursuant to" did not compel such an interpretation. If the sense of the letter was that the trust was to be created at a date later than March 5th, 2012, they presented no bar to so interpreting it.

67 Second, it is clear that no trust was created on March 5th, 2012. The letter said that the relevant shares "shall be held on trust in the name of [T&T]." The "shall" bore a sense of futurity; the vesting of the shares in T&T had not yet happened (nor did it ever happen), and the inference is that Mr. Roache's intention was to create the trust upon the declared future such vesting, when (and not before) the trust would be completely constituted. The closing date for the Cell A subscriptions was not until April 5th, 2012, the trust letter was issued to all proposing investors in March (see para. 48 of Mr. Roache's witness statement October 30th, 2020) and it was common ground that it was so issued by way of a further

incentive to encourage them to invest in Cell A by April 5th, 2012. All this points to an intention to create the trust on or shortly after April 5th, 2012. Consistently with this, the fixing of the 54-month period identified in the trust letter ran from the closing date, or April 5th, 2012. In my view, the sense of the trust letter (which its second paragraph also calls an "Agreement"), read in the context in which it was issued to investors, is that Mr. Roache was thereby proposing the making of a unilateral contract with such investors, namely that if by April 5th, 2012 enough of them committed to £42m. of investment in Cell A shares over the first four calls, he would settle "£42 million worth of [his] direct equity . . . in the Bid Vehicles" on the trusts of the letter. In the event, sufficient investors did so commit themselves, as a result of which (i) Mr. Roache became contractually bound to honour his £42m. share commitment (whatever it may mean); and (ii) the investors were entitled to enforce it if he did not. I understood all counsel to agree with this "unilateral contract" analysis.

Certainty of subject matter

68 I have referred to what the Chief Justice said in his para. 33, namely that as the Braganza order had declared the creation of a trust pursuant to the trust letter, it was essential that the trust property should satisfy the "subject matter certainty" requirement for a valid trust. If it did not, I understand his view to have been that the declaration would become a nullity.

69 Before this court, all counsel agreed with the Chief Justice's view expressed in his para. 33, save for Mr. Feetham, for Braganza II AB. His position, as explained in his skeleton argument, was that once the court had declared that the trust letter created a trust, that marked the end of any scope for inquiry as to whether the property purportedly subject to the trust satisfied the "subject matter certainty" requirement. All that remained was to identify what the trust property comprised, an exercise simply involving the interpretation of the language of the trust letter.

70 In the event, no "subject matter certainty" point was in issue before us. Mr. Bennion-Pedley conceded that, in light of the way the appellants finally argued their appeals, no such point arose that might undermine their arguments; and no such point was raised in relation to Mr. Roache's case as to the sense of the critical words. We, therefore, had no oral argument on either (i) whether the Chief Justice, in his para. 33, was correct to hold that, even though the Braganza order had declared that the trust letter created a trust, he still had to be satisfied that the trust property met the requirements of "subject matter certainty"; or (ii) any substantive such "certainty" point. The former issue might be said to raise a novel point, and my provisional view is that it is not as straightforward as the Chief Justice and the majority of counsel apparently regarded it. Had it been a live issue, I would have wanted the assistance of argument. As it is, I shall say no more about it.

Principles of documentary interpretation

71 This is now a road well travelled and we were referred to the familiar line of modern authority in the English House of Lords and the United Kingdom's Supreme Court relating to the interpretation of contractual documents: namely, the cases from *Investors Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.* (3) to *Wood* v. *Capita Ins. Servs. Ltd.* (7). I regard the principles there explained as equally applicable to the interpretation of the trust letter, which I consider resulted in the creation of a unilateral contract, and even though its creation was exclusively the work of Mr. Roache and his advisers.

72 A summary of the applicable principles was recently provided by Carr, L.J. in the English Court of Appeal in *Al-Subaih* v. *Al-Sanea* (1), in a judgment (with which Snowden and Phillips, L.JJ. agreed) delivered on October 20th, 2022). That decision of course post-dated the hearing before us, but there was no dispute before us as to the applicable principles and this authority provides a succinct and convenient summary of them. After referring, in para. 31, to the familiar series of cases, her Ladyship said this ([2022] EWCA Civ 1349, at paras. 32–33):

> "32. In summary only, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with business common sense and to reject the other (see *Rainy Sky* at [21] and [23]).
>
> 33. In *Wood v Capita* (at [9] to [11]) Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a 'parsing of the

> wording of the particular clause'; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

73 Whilst the submissions advanced by the appellants came close to espousing the proposition that the relevant words were capable of bearing only the meaning that they sought to attach to them (in fact, Sir Peter did so submit), that is to misstate the nature of the interpretative exercise. To the question, what does "£42,000,000 worth of direct equity (the 'Direct Equity') in the Bid Vehicles of [*sic*] which is held in my name" mean, there are at least two possible answers: (i) a bundle of shares held by Mr. Roache in the bid vehicles actually worth £42m.; or (ii) a bundle of shares held by him in the bid vehicles worth that much by reference to the net present valuations of the bid vehicles in the valuation book. The question has to be answered as at April 5th, 2012: it is then that the identity of the trust shares fell to be determined.

The submissions

74 We had very able arguments from Mr. Azopardi, Sir Peter Caruana and Mr. Feetham in support of the appeals and from Mr. Bennion-Pedley in response. I would express my gratitude to all counsel for the assistance they gave to the court.

75 Mr. Azopardi, for Ms. Mattin, had three grounds of appeal: (i) that the Chief Justice was wrong to exclude from his consideration Mr. Roache's email of March 7th, 2012 (see para. 36 above); (ii) that he was wrong to reject the submission that the phrase "£42,000,000 worth of direct equity . . ." in the trust letter meant shares actually worth that at March/April 2012; and (iii) alternatively, that Mr. Roache's bid vehicle shares intended to be settled into the trust fell to be calculated by reference to the net asset value formula in the PPM for each bid vehicle.

76 As to the first ground, Mr. Azopardi's argument was that Mr. Roache's attachment to the email of the trust letter, and his reference to it in the email, highlighted his alleged knowledge that his pledged shares were to be of a real value of £42m. The relevant words read "I have also attached the letter confirming my pledge of GBP42 million of my own equity holding as security against the investor funds."

77 The Chief Justice held (paras. 61–64) that the email was in the nature of conduct postdating the trust letter and so inadmissible for the purposes of the letter's interpretation. As the commitment to create the trust was contained in the earlier trust letter of March 5th, 2012, one sent to all

proposing investors and purporting to govern the terms of the trust if sufficient investors committed to a £42m. investment, I consider that the email did amount to subsequent conduct and is thus inadmissible on any issue as to the interpretation of the trust letter. Further, to the extent that it is said to clarify Mr. Roache's subjective intentions in the trust letter, it is inadmissible on that ground too. I would therefore respectfully agree with the Chief Justice.

78 If I am wrong on that, I anyway fail to understand how the email lends any help to the interpretation of the trust letter. The two competing interpretations of the letter both recognize that, upon the failure of "the Repayment Event," the investors were to become entitled to a bundle of bid vehicle shares, although they disagree as to what that bundle was; and Mr. Roache's description of such bundle as a "security against the investor funds" can be regarded as a fair one whatever the answer. The email adds nothing to the interpretation issue before us and I shall say no more about it.

79 As to his second, and main ground, Mr. Azopardi confined himself to a simpler argument than that he advanced to the Chief Justice. He abandoned any suggestion that the identification of the trust fund could only be made as at October 5th, 2016. The essence of his argument became that, as at March/April 2012, the whole Cell A venture was speculative and uncertain. Mr. Roache was the entrepreneur behind it, who was proposing to have a large majority interest in it, whilst putting up virtually none of the required capital. The capital was to be raised from outside investors, who would have only a minority interest. The uncertainty of the project's future success meant that their investment would be at risk: the venture might be a massive success; or it might not. To attract the required investment, Mr. Roache offered two incentives. One was the offer of SIDE shares, which gave strategic investors (those investing at least £5m.) a bonus slice of bid vehicle shares bearing a value commensurate with the amount of their investment, but being one derived from the artificial net present values for each bid vehicle in the valuation book.

80 The other incentive was that offered by the trust letter. That was the *quid pro quo* for the commitment by investors to invest £42m. in Cell A over the first four calls. The incentive was the settling on trust for the investors of "£42,000,000 worth of direct equity . . . in the Bid Vehicles . . . held in my name . . ." The terms of the trust were that, if and when the investors had received returns equalling the amount of their paid up capital, plus the 15% "hurdle rate," the trust fund would revert to Mr. Roache; but if that event (the repayment event) had not happened by October 5th, 2016, the investors would between them become absolutely entitled to the fund then represented by the original settled shares.

81 The submission was that the sense of the trust letter can only have been that Mr. Roache was offering security for the investors' investments

in the nature of bid vehicle shares *actually worth* £42m. The security was in the nature of a guarantee against the investors' investments failing. There is no reference in the trust letter to the trust shares being identified by reference to valuation book valuations, which would anyway have amounted to paltry security. No-one suggests, however, that at the outset of the venture the bid vehicles shares were collectively actually worth anything like £42m.

82 Despite this last consideration, Mr. Azopardi urged that the language of the trust letter—"£42,000,000 worth"—of shares must bear its ordinary meaning; the language is referring to shares actually worth that amount. He drew support from the decision of the Court of Appeal in *McIlquham* v. *Taylor* (5). There the defendant had covenanted within 12 months to pay the plaintiff £1,000 or else transfer to him "[£1,000] worth of fully paid-up shares in a company to be formed by [the defendant]." The court held that "worth" meant "worth in the sense of the real value to be ascertained in some manner." See the judgment of Rigby, L.J. ([1895] 1 Ch. at 64).

83 I have no difficulty with the proposition that in many circumstances that will usually be the ordinary meaning of "worth." But, as ever, context is all, and the question is whether, in the circumstances known by everyone in this case, Mr. Roache can be interpreted as having used the word "worth" in that ordinary sense. That is because (i) by the trust letter, he was, I consider, apparently identifying only a tranche of his overall holdings in the bid vehicles as having the disputed value; and (ii) he would have known, as would all the investors, that at the date of the letter (and also at April 5th, 2012) no such tranche was worth anything remotely approaching £42m. in real money; nor was his entire holding of bid vehicle shares.

84 Mr. Azopardi recognized that and that it followed that Mr. Roache could not have vested shares actually worth £42m. in T&T, the intended trustees referred to in the trust letter. But, he said, that simply means that Mr. Roache's obligation has to be regarded as one requiring him to put all his bid vehicle shares into the trust, apart only from those he was contractually committed to apply elsewhere, either because of a SIDE obligation or other contractual commitment. This was, in effect, Sir Peter's "net all" argument, which the Chief Justice did not regard as a serious runner. At his para. 69, the Chief Justice had dealt with it as follows:

> "I can deal with the net all analysis briefly. Undoubtedly it satisfies subject certainty given that all the shares held by [Mr. Roache] as at 5 March 2012, which he was then in equity free to alienate, would be subject to the trust. However, the submission is predicated upon '£42,000,000 worth of direct equity' being synonymous with all of [Mr. Roache's] direct equity. At the time the trust was settled that was undoubtedly the position, but had the fund performed as no doubt all hoped when they invested, it need not necessarily have continued to

> remain the case and at that stage there would have been no question that any balance in excess of £42m would not have been subject to the PGT. It follows that '£42,000,000 worth of direct equity' cannot be interpreted as interchangeable with all of [Mr. Roache's] direct equity and therefore that construction of the PGT fails."

85 With respect to the Chief Justice, I have difficulty with that paragraph. First, I fail to understand why he regarded "£42 million worth of direct equity" as "synonymous" with Mr. Roache's "net all" holding. It was not. Second, I do not understand why he was of the view that, once (if it ever did) the trust fund exceeded £42m. in value, the excess would cease to be subject to the trust. The scheme of the trust letter was not one under which the fund would and could never be worth more than £42m. Its self-evident scheme was that, whatever the value of the shares at the time of the repayment event, it was the entirety of that fund that would vest in the investors if the repayment event did not happen. The trust letter says not a word about confining the investors' potential interest in it to an upper limit of £42m. and it is not capable of bearing that interpretation. I come later to my assessment of the "net all" argument but would not here rule it out on the ground that the Chief Justice did.

86 As for Mr. Azopardi's alternative submission that the identification of the shares to be settled into the trust was by reference to a net asset value calculation, I fail to understand how such an exercise could have provided an answer to the value issue. Such a valuation as at April 2012 would not have yielded a value anywhere near a total of £42m.; and, once such a valuation was done, what was supposed to be the point of it? The notion that Mr. Roache might have been intending to engage in any such exercise in identifying the trust shares is one I would reject.

87 Sir Peter, for the appellants in the Rennes claims, made submissions in support of the view that the trust was intended to be created on April 6th, 2012 rather than on March 5th, 2012. He said the trust letter did not itself create the trust, it was a commitment to create one. He also said the relevant words meant shares in the bid vehicles worth £42m. "of real value" and that as the trust was a "security trust," that interpretation was the only rational one as well as being the only that made commercial sense. He criticized the Roache interpretation, namely the calculation of "worth" by reference to the valuation book values, as one flouting business common sense. He disagreed with the Chief Justice that the second paragraph of the trust letter provided a relevant link to the reference in the Cell A PPM to the valuation book. He submitted that this was a case where the sense of the key words of the trust letter was so clear that there was nothing for the court to interpret: the trust letter had used unambiguous language and the court was bound to apply it.

88 If I may respectfully say so, I would regard that last submission as putting the appellants' case too high. On March 5th, 2020, Sir Peter signed a position statement on behalf of his clients in which para. 4.1 expressly rejected the proposition that the relevant words in the trust letter meant shares with "an actual real current value of £42,000,000"; and para. 4.4 asserted that the shares "were only capable of being worth £42 million by reference to" the valuation book. Sir Peter's clients were no doubt entitled to depart from that position, but I would not accept his submission now advanced that there is no arguable interpretation of the relevant words other than that for which he contended.

89 In the event, Sir Peter had necessarily to depart from his submission that the trust letter required Mr. Roache to settle shares actually worth £42m., because his entire bid vehicles holdings are agreed to have been worth nothing remotely approaching that. That, however, was said to present no interpretational difficulty. The consequence was, he said, simply that the correct sense of the trust letter was that Mr. Roache was committing himself to settling *all* his bid vehicle shares into the trust, apart only from those subject to SIDE or other like commitments: the "net all" argument. As Sir Peter put it in para. 15(ii) of his skeleton argument:

> "The [trust letter] therefore constitutes an unrevoked statement of intention to create a trust of *all* (given that in real value terms £42m worth must mean all his shares since they were necessarily worth less than that sum) of the shares in Bid Vehicles remaining to Mr Roache *after he had satisfied his contractual obligations to Investors* . . ."

90 Mr. Feetham's supporting argument, for Braganza II AB, was to the like effect. He too emphasized that the manifest purpose of the trust letter was to provide security, although what it was said to be securing was a little imprecise. At para. 4 of his skeleton argument, he said it was "to secure the £42m actually paid by the investors." At para. 23, he said it was "to provide security when the entry prices in the [Cell A] PPM prove to be unsustainable, i.e. when the venture fails." In between, in paras. 6 and 7, he said this:

> "6. The whole point of the PGT was to provide security in the event the projections in the PPM did not materialise. Calculating the value of the PGT security by reference to the same artificial and aspirational values in the PPM is circular and illogical, as it limits the value of the security to the expectation value of the very fund that has failed and against which failure the security is intended to protect. We submit this is the simple point on which this appeal turns. If the shares in the Bid Vehicles carried the values in the Valuation Book there would be no need for the security, as self-evidently everyone would be paid in full plus 15% (as per the PPM). The entire purpose of the PGT—as a

> security document—was to provide support if things did not work out in this way.
>
> 7. In the premises it is highly unlikely the parties, ([Mr. Roache] in providing it, or the investors accepting it as a form of security) would have intended the value of the trust fund established by the PGT to be limited to the values listed in the Valuation Book. Rather, it is much more likely they intended (as per the plain and ordinary words used in the PGT) for the security to carry a real-world value of £42m (this being, after all, the extent of their actual real world investment)."

91 Mr. Feetham may be right that these paragraphs focus on the key to the determination of the appeals but insofar as it is his case that the "whole point" of the trust letter was to provide security worth £42m. in real money to protect the investors against the loss of their investment, it may perhaps be said that his argument tends to undermine rather than to support that case. Its problem is that it is founded on the assertion that the trust letter was referring to a bundle of bid vehicle shares actually worth £42m., when everyone knows that no such bundle existed. In an attempt to inject non-existent value into the putative security, Mr. Feetham's para. 7 resorted to the assertion of a likelihood that Mr. Roache and the investors "intended . . . the security . . . to carry a real-world value of £42m"? But how could they so intend? And to what end? Mere intentions, however fervently held, lack the power necessary to change base metal into gold. I did, however, nevertheless understand Mr. Feetham to remain firmly wedded to the proposition that the "£42,000,000 worth" commitment in the trust letter was one in respect of bid vehicle shares actually worth £42m., although I understood him also to adopt the more realistic proposition that the commitment in the trust letter was to be interpreted as requiring Mr. Roache to do the best he could and thus settle his "net all" bid vehicle shares.

92 Mr. Bennion-Pedley, for Mr. Roache, advanced a cogent argument in support of the proposition that the only coherent interpretation of the trust letter was that "£42,000,000 worth of direct equity . . . in the Bid Vehicles" meant £42m. worth of shares valued by reference to the values in the valuation book. More particularly, para. 10.3 of the Cell A PPM, headed "Valuation of the Bid Vehicles," explained that each bid vehicle had been valued by Sochalls as shown in the valuation book, which was open to inspection by investors. Paragraph 10.2.4, headed "Strategic Investor Direct Equity in Bid Vehicles," explained that the allocation of SIDE shares in bid vehicles was to be calculated "pari passu across all Bid Vehicles on the basis of the valuations in the Valuation Book." The PPM therefore provided an "interpretation" as to the valuation of bid vehicle shares and it was one that fed into the interpretation of the trust letter by reason of the latter's closing paragraph. In a context in which the reference to "£42,000,000 worth of direct equity . . . in the Bid Vehicles" held by Mr.

Roache could not rationally mean £42m. in real money, those provisions in the PPM provided the explanation of how the £42m. figure could be translated into an identifiable number of shares held by Mr. Roache in the bid vehicles. Mr. Bennion-Pedley submitted that the Chief Justice had been right in his conclusion in para. 71. The "Valuation of the Bid Vehicles" was a statement "whose interpretation is provided for" in the Cell A PPM, and was therefore, by reason of the final sentence of the trust letter, an interpretation that applied also to that letter.

Discussion

93 The appellants' arguments were heavily reliant upon their assertions that the trust letter was a "performance guarantee trust." Quite what "performance" it was said to be guaranteeing was obscure, but the assertion fed conveniently into their related one that the £42m. figure in the trust letter necessarily meant £42m. worth of shares *actually worth* £42m., since otherwise the putative guarantee would be substantially worthless.

94 The latter argument ran into the insuperable difficulty that Mr. Roache and the investors all knew at April 5th, 2012 that his entire shareholding in the bid vehicles, let alone the lesser tranche of it the trust letter indicated he intended to settle, was worth nothing remotely approaching £42m. That might be thought to deal a fatal blow to the case that the relevant words could sensibly be interpreted as referring to a tranche of shares actually worth £42m. But none of the appellants abandoned their case in this respect, although they sought to meet its practical difficulty by asserting that, given that inconvenient fact, the trust letter must be interpreted as at any rate capturing all Mr. Roache's shares in the bid vehicles, apart only from those subject to SIDE or other contractual commitments; that is, as capturing his "net all," or free, shares.

95 I admit to being less than clear as to what the appellants were saying in this last respect. If, as they assert, Mr. Roache's contractual commitment was to settle £42m. worth of shares actually worth that sum, and they are right about that, that commitment cannot also be interpreted as one requiring him simply to settle his free shares. If his obligation was to settle £42m. shares actually worth that, his inability and failure to do so would have amounted to a breach of contract; and the investors would have been entitled to sue him for damages (although their assessment would be likely to present a considerable challenge). He would not have been entitled to say in his defence that, in light of such inability, his £42m. contractual commitment required him merely to settle such (then virtually worthless) shares as he did have and that the damages claim must fail. Were that open to him, it would amount to a contract breaker's dream. If the appellants are right that the £42m. commitment in the trust letter was a commitment to settle £42m. shares actually worth that, that is the end of the interpretation exercise. There is no scope for their alternative "net all" interpretation.

96 That said, let it be assumed that the free shares were settled into the trust. Those shares were of course also worth very little at April 5th, 2012 but they would then have become the assets said to provide the guarantee under what is said to be a "performance guarantee trust." This affords a convenient basis for an examination of the virtue of the appellants' primary point that the trust letter was all, and only, about creating a "performance guarantee." This is a critical element of their suggested interpretation of the key language in the trust letter and so it is worth looking at more closely. For the purpose of the exercise I shall, taking a fairly conservative figure, assume that Mr. Roache's free shares amounted to 45% of the total of the bid vehicles' investment shares. The investors' interest in the bid vehicles (ignoring any SIDE entitlements that any might enjoy) was limited to their respective interests in the (rather smaller) minority interest that Cell A had in the bid vehicles.

97 The most common type of guarantee is a contractual obligation assumed by a guarantor ("G") to answer for the liability of a debtor ("D") to a creditor ("C") if D fails to pay. If D fails to pay any of what is due, G must pay it all. If D pays only part of what is due, G must pay the balance. Applying that by analogy, as best one can, to the present case, Cell A might be said to be in the position of D, the investors in the position of C, and the trust shares in the position of G. The analogy is, however, weak, because Cell A made no *promise* of any performance, or return, to C: its PPM made it plain that the investors invested at their own risk (see paras. 18 and 26 above). The closest one gets to a relevant expectation of return on their investments is that referred to in the trust letter, the achievement of the repayment event. But that too was not *promised* to the investors: it was merely the benchmark whose attainment (or not) determined the entitlement to the trust fund. There is also nothing in the letter suggesting that its intention was to provide the investors with a true guarantee against a failure of their investments to achieve the identified return.

98 The appellants' "performance guarantee" assertion can be tested by considering two scenarios. Assume first that, by October 5th, 2016, the Cell A fund had worked well, its shares and the bid vehicle shares had risen greatly in value and the investors had collectively received a substantial return on their investments—say 90% of their paid up capital. In addition, they still have their, now valuable, Cell A shares. On those figures, good though they might be, the repayment event would not have happened. The consequence would be that the investors would, in addition to the enjoyment of such return and their continued holding of their valuable Cell A shares, also become absolutely entitled to the entirety of Mr. Roache's original holding of free shares, or 45% of the bid vehicle shares; and he would have lost forever his interest in the whole venture, apart only from any such interest he might have via any Cell A shares.

99 That outcome could not be further from what a guarantee is ordinarily directed at achieving. If the trust letter had been intended to be any sort of "performance guarantee," it would have provided that, upon the repayment event not occurring by October 5th, 2016, the investors would only become entitled to that proportion of the settled shares sufficient in value to answer the shortfall between their actual return and that identified in the letter; and for the balance to revert to Mr. Roache. But it did not do so and cannot be read as impliedly so providing. Mr. Roache cannot have foreseen, let alone intended, that an outcome of the sort I have described was a possible effect of the trust letter, if only because he never intended the entirety of his free shares to be settled on the trust: the trust letter made clear that he was only proposing to settle shares comprising a tranche of them.

100 An alternative scenario is that the project is a major disappointment. By October 5th, 2016, the investors have received no return anything like that referred to the trust letter and the Cell A shares and bid vehicle shares remain low in value. On the failure of the happening of the repayment event, the investors again become entitled to the trust shares, but their value goes nowhere towards meeting the shortfall in the return. The potential for such an outcome is reflected in what the Chief Justice said in para. 27 of his judgment, where he recorded that Ms. Mattin's case was that "the present value of the Active Registry business as a whole is of [the order of] US$2–3 million . . ." which necessarily means that Mr. Roache's free shares would have been worth much less. The result is that the "performance guarantee" would again provide no real guarantee of anything. That is because the putative guarantee was dependent upon the fortunes of shares in the same bid vehicles upon whose performance the success of the investment in Cell A depended.

101 These examples illustrate what I respectfully regard as the fundamental difficulties about the appellants' cases. The trust letter's "£42,000,000 worth of direct equity . . . in the Bid Vehicles" held by Mr. Roache cannot have meant shares actually worth that amount, because everyone knew at the time that the entirety of the shares in the bid vehicles were worth but a fraction of that amount; and the trust letter was anyway proposing that only a tranche of Mr. Roache's total holdings would be settled in the trust. The reasonable man, aware of all this, and also of the contrary argument advanced by Mr. Roache, would have no doubt that the trust letter was not referring to a proposed settling of shares actually worth £42m. How could it have done? He would regard the suggestion as lacking business common sense and as obviously wrong. He would reject the "net all" interpretation as similarly wrong: he would not understand how the language of trust letter could be so interpreted.

102 The reasonable man would not, however, come to that conclusion without first assessing Mr. Roache's contrary argument. He would have noted from the second paragraph of the trust letter that "terms defined in or

whose interpretation is provided for" in the Cell A PPM had the same meaning when used in the trust letter. His reading of the PPM would take him to paras. 10.2.4 and 10.3, headed respectively "Strategic Investor Direct Equity in Bid Vehicles" and "Valuation of the Bid Vehicles." Paragraph 10.3 would inform him that the "Bid Vehicles" had all been valued in the valuation book. Paragraph 10.2.4 would inform him that Cell A investors entitled to "Direct Equity" in the "Bid Vehicles" would have that equity allocated "pari passu across all Bid Vehicles on the basis of the valuations in the Valuation Book." Having read all that, he would have no hesitation in concluding that the trust letter's "£42,000,000 worth of direct equity . . . in the Bid Vehicles" was obviously intended to be identified in a like manner, namely "pari passu etc." He would probably mutter a word or two of justified criticism at the quality of the drafting of the trust letter. But he would be satisfied that, as there is no other rational explanation of the meaning of its "£42,000,000 worth of direct equity . . . in the Bid Vehicles," that was their true sense. He would also regard that interpretation as amounting to a business common sense one. He would understand that the trust letter's "£42 million worth" of bid vehicle shares was simply an offered incentive of the like kind as the bonus shares offered under the SIDE scheme, but differing from it only in that its enjoyment was dependent upon a stated contingency. He would, in turn, also understand that the trust letter was not directed at creating anything in the nature of a "performance guarantee trust." He would probably regard it as in the nature of a "performance related bonus share trust," or something similar, which is what it was.

103 Whilst, therefore, I have not agreed with all that the Chief Justice said in his judgment, I am satisfied that he arrived at the correct conclusion. By his order of June 17th, 2022, he (a) declared that the key phrase in the trust letter was "to be interpreted as £42m by reference to the valuations in the Valuation Book produced by Messrs Sochalls Chartered Accountants;" and (b) that "the precise number of shares subject to the terms of the Trust Letter is to be distributed pari passu across all Bid Vehicles on the basis of the valuations in the Valuation Book." If the Chief Justice's decision was destined to be upheld, the appellants advanced no argument against the form of his order. I would dismiss the appeals.

104 **DAVIS, J.A.:** When, in advance of the hearing, I read the written arguments and the judgment of the Chief Justice under appeal I formed the initial view that the competing arguments were quite evenly balanced. However, as the arguments wore on at the hearing I became increasingly doubtful if those advanced on behalf of the appellants, very skilfully and thoroughly presented though they were, could be right; and, having read the judgment of Sir Colin Rimer, J.A. in draft, I am wholly persuaded that they are wrong.

105 It is unfortunate that, in a very complex transaction, potentially so important a part of the arrangements should be left to so tersely and elliptically drafted a document as the trust letter of March 5th, 2012. At all events, a first reading (or a number of readings) of that document wholly disposes of the argument at one stage optimistically advanced before us on behalf of the appellants to the effect that the wording was plainly and unambiguously in favour of the appellants' interpretation; as also evidenced by the fact that various of the appellants had been advancing a different interpretation at an earlier stage of the proceedings from that now advanced by them.

106 I agree that the trust letter is to be regarded as in the nature of a unilateral contract, the intended trust only being subsequently constituted on April 5th/6th, 2012. The applicable principles of contractual interpretation can be taken as reasonably well settled in the authorities. I also agree that, in the circumstances of this case as it has developed, potentially tricky points as to certainty of subject-matter can for the purposes of this appeal be treated as having fallen away.

107 The question thus is purely one of contractual interpretation, in particular of the phrase "£42,000,000 worth of direct equity" set in the context of the trust letter read as a whole and in the context of the known factual matrix, objectively assessed.

108 The appellants were fiercely critical of the valuation book prepared by Sochalls. I do not think that that criticism of itself much advances their argument. It can be accepted that the assumptions there expressly made were highly optimistic, indeed quite possibly unrealistic. But those assumptions were known to the investors at the time and not challenged by them. In any event, I do not readily see how the ultimate issue of interpretation of the trust letter can be affected by considering whether or not the valuation book was wildly optimistic in its assumptions. Altogether more powerful, in my view, was the argument forcefully advanced on behalf of the appellants to the effect that plainly the valuation book had initially been prepared for a purpose quite different from that of what they styled a "performance guarantee."

109 I can accept that the reference to a stated amount "worth" of something commonly can connote actual, real worth. The case of *McIlquham* (5), much relied on by the appellants, is an illustration of that. But, as Sir Colin Rimer, J.A. points out, context is all. And here, in my view, the wording of the trust letter, when set in context, displaces such an interpretation.

110 I cannot go quite so far as the Chief Justice in thinking that the second paragraph of the trust letter on its actual wording explicitly incorporates reference to the valuation book as supplying the basis for assessing "£42,000,000 worth of direct equity." But what it does do—and as is in any event, in my view, inherent in the first paragraph and in accordance with

the factual matrix—is to incorporate reference to the PPM. That then is apt to bring in reference to the valuation book for the purposes of assessing the meaning and quantification of "£42,000,000 worth of direct equity."

111 Once that is accepted, as I think it should be, real difficulties manifest themselves in the appellants' arguments—difficulties which do not arise on the respondent's arguments. In particular, it was known all round as at March 5th, 2012 that the respondent's shares did not begin to have an actual value of £42m. or anything approaching that; nor would they at the closing date. It is in fact conspicuous, to my mind, that the trust letter did not even stipulate that all of the respondent's shares were to be subject to the trust intended to be constituted; but even if it had that would still seem to have rendered the respondent prospectively in breach of contract from day one—a most unlikely commercial intention, objectively assessed. Further, for the reasons given by Sir Colin Rimer, J.A., the "net all" approach does not really advance matters for the appellants either. The short point here thus is that the proffered security never remotely had the actual worth of £42m. and everyone knew that. That, as I see it, is flat against the appellants' suggested interpretation. But that difficulty does not arise if the valuation book is incorporated as supplying the means for assessing, by reference to shares in the bid vehicles, the worth of the direct equity for the purpose of the trust letter. I would accept the very well presented arguments of Mr. Bennion-Pedley for the respondent in this respect.

112 I add that the email of March 7th, 2012 seems to me to be entirely equivocal. In any event, and even more fundamentally, it is, on settled principles of contractual interpretation, inadmissible as an aid to construction since it post-dates the trust letter.

113 I do not propose to say more. I agree with the comprehensive reasoning and with the conclusion of Sir Colin Rimer, J.A. Accordingly, I too would uphold the conclusion of the Chief Justice and would dismiss these appeals.

114 **KAY, P.:** I agree with both judgments.

Appeals dismissed.