[2023 Gib LR 413]

IN THE MATTER OF CASTLE TRUST AND MANAGEMENT SERVICES LIMITED

WILD v. CASTLE TRUST AND MANAGEMENT SERVICES LIMITED

SUPREME COURT (Dudley, C.J.): May 30th, 2023

2023/GSC/023

Companies—administration—dispute as to whether company insolvent—trustee personally liable for loan transactions entered into by trustee, as no express limit on liability—limit not implied into contracts—as no substantial dispute as to debt, trustee insolvent and administration order made

The applicant sought the appointment of an administrator.

The respondent ("CTMS") and companies within the Castle Group were licensed and regulated by the Gibraltar Financial Services Commission to provide corporate and trustee services. In 2021, the applicant had been appointed cell administrator of cells E, F and G of the Inspirato Fund No. 2 PCC Ltd. She was subsequently appointed as cell liquidator over the cells (that judgment is reported at 2022 Gib LR 191). Inspirato was managed by the Castle Group of companies. The applicant said the cells purchased loan notes from the KB Foundation, a Gibraltar trust of which CTMS was the trustee. The loan notes were secured by debentures granted over assets of the KB Foundation. The cells did not receive any return on their investment.

In November 2022, the applicant wrote to CTMS demanding repayment of the sums loaned by the cells which, with interest, amounted to £3,771,327.67. The demand was made on the premise that CTMS was personally liable for the debts of the KB Foundation. The existence of the debt was not disputed but CTMS claimed that there was a substantial dispute as to whether it assumed personal liability to repay the loan notes over and above the assets in the trust fund.

The applicant applied for an administration order pursuant to s.56(1)(c) of the Insolvency Act 2011. Section 57(1) provided:

"57.(1) Subject to section 58, the Court may make an administration order in relation to a company only if—

(a) it is satisfied that the company is insolvent or is likely to become insolvent; and

(b) it considers that there is a reasonable prospect that the administration order will achieve one or more of the objectives specified in 45(1), as added to or varied by any notice issued under 45(3)." (The references to s.45(1) and s.45(3) must be references to s.46(1) and s.46(3).)

Section 46(1) provided:

"46.(1) Subject to subsections (2) and (3), the administrator of a company shall perform his functions with the objective of—

(a) rescuing the company as a going concern;

(b) achieving a better result for the creditors as a whole than would be likely if the company were to enter into liquidation, without first being in administration; or

(c) realising property in order to make a distribution to one or more secured or preferential creditors."

The core issue requiring determination was whether CTMS was insolvent or likely to become insolvent. Underpinning that determination was whether there was a substantial dispute as to whether CTMS was liable for the debt.

The applicant submitted that (a) the application stemmed from a debt which was due and owing by CTMS to the cells; (b) the debts had never been disputed as being owed to the cells; (c) CTMS was the sole trustee of the KB Foundation and it entered into the relevant loan transactions with each of the cells in its capacity as trustee of the KB Foundation; (d) in respect of those transactions the cells were each a third party in relation to CTMS; (e) the fundamental position under Gibraltar law was that (i) the KB Foundation had no separate legal personality; (ii) contracts entered into in respect of the KB Foundation were entered into by its trustees (CTMS) who were personally liable on them; and (iii) CTMS's liability towards the cells was personal, as with any other contracting party that entered into an arm's length transaction with another third party; (f) for CTMS to have excluded personal liability under the loans it would have had to expressly set that out in the contractual documents but there was nothing in the documentation which contractually limited CTMS's personal liability; (g) CTMS was insolvent as it was unable to pay its debts as they fell due in that it had not paid the demand from the cells; and (h) once the debt to the cells was taken into account, CTMS's liabilities exceeded its assets.

CTMS submitted that (a) there was a substantial dispute as to whether CTMS was liable for the debt; (b) the threshold for establishing the division between personal and fiduciary liability was not particularly high; (c) the court needed to be satisfied that on a balance of probabilities the debt was due, bearing in mind the limitations of the jurisdiction in which that determination was to be made; (d) the issues which arose were fact sensitive and inappropriate to deal with in the context of an application for an administration order; (e) the loan notes were not a negotiated contract signed by both parties but offers made by the KB Foundation, acting by CTMS, accepted by the cells; (f) the loan notes did not contain an entire agreement clause and as a matter of legal principle there was nothing which

prevented the parties from reaching an agreement outwith the agreement governed by the loan notes; (g) it had been made clear that any investment in the loan notes would be subject to the agreement that CTMS would not be personally liable, which was known to the cells, and the cells subsequently invested on that basis; (h) for present purposes this established a substantial dispute so as to defeat the application for an administration order; (i) as a matter of construction of the loan notes, the obligation to repay the loan notes was on the KB Foundation; and (j) a term should be implied in the investment agreement that CTMS was contracting as trustee only.

Held, granting the administration order:

(1) An application for an administration order should not be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of such an order (or in the exercise of the powers afforded to the court by s.59 of the Insolvency Act, the appointing of a liquidator) was materially different in nature from the consequences of a Part 7 ordinary action. However, injustice could arise when a debtor who wished to avoid such an order cynically raised issues claiming that a dispute existed which could not be determined without detailed consideration of the evidence and cross-examination of witnesses. In determining whether there was a substantial dispute the court must consider the evidence and submissions in much the same way as it would when hearing an application for summary judgment. To make an administration order, the court must be satisfied that the company was insolvent or likely to become insolvent. In the present case actual insolvency was predicated entirely upon whether CTMS was personally liable to the cells in respect of the sums due under the loan notes. The primary issue was therefore whether there was a substantial dispute as to whether or not CTMS was so liable. A dispute would not be substantial if it had no real prospect of succeeding (paras. 45–46).

(2) There was no evidence of a separate agreement between CTMS *qua* trustee of the KB Foundation and Inspirato/the cells that in respect of the investment by the cells in the loan notes, CTMS's liability was limited to the trust assets. If this were a summary judgment application, CTMS would have no real prospect of defending the claim on this ground (paras. 47–50).

(3) The construction argument afforded CTMS no real prospect of challenging the debt. A contract fell to be interpreted when the language was ambiguous. In the present case there was no ambiguity. There were no words in the loan notes negativing the personal liability which was an ordinary incident of trusteeship. However, if the court were wrong and there was a residual ambiguity in the loan notes, the following considerations would lead the court to the same conclusion: (i) the letter relied on by CTMS was at most a document evidencing pre-contractual negotiations. It was trite that pre-contractual negotiations were to be excluded as inadmissible in construing a contract; (ii) where an instrument, as the loan notes were, was expressly negotiable, as a matter of principle of construction

the court should be slow to permit some collateral arrangement to influence the construction of the document; and (iii) although the debentures might not be enforceable in Gibraltar, that did not detract from the assistance they might provide in interpreting the loan notes. The debentures defined the borrower as CTMS as the trustee of the KB Foundation. They did not place any limit on CTMS's liability or state that they were limited to assets beneficially owned by the KB Foundation. In all the circumstances the background circumstances relied upon, which included investments by others made in the KB Foundation other than through the cells, would not impact upon the construction of the loan notes. It might very well be that it was intended that CTMS would limit its liability but construction of the loan notes could not cure the problem (paras. 51–56).

(4) A term could only be implied into a contract if the contract would otherwise lack commercial or practical coherence. CTMS failed to make out any arguable case that the loan notes lacked commercial or practical coherence without the implication of the exclusion of personal liability in that the loan notes simply proceeded on the fundamental proposition of Gibraltar trust law that a trustee was personally liable without limit on contracts he or it entered into on behalf of the trust. As an experienced professional trustee, it would have been open to CTMS to have expressly limited its liability (paras. 57–59).

(5) As CTMS failed to establish that there was a substantial dispute as to the debt, the court was satisfied that CTMS was insolvent. Given the sums due by CTMS pursuant to the loan notes, there was no prospect that the objective of rescuing the company as a going concern could be met. The remaining issue was whether there was a reasonable prospect that an administration order would achieve a better result for the creditors as a whole than would be likely if the company were to enter into liquidation, without first being in administration. There was a reasonable prospect that administration would achieve a better result for creditors. CTMS was an entity regulated by the GFSC and it was the holding company of two subsidiaries which were also actively engaged in regulated financial activities. The three companies would presumably each have a substantial portfolio of clients and the business conducted by the three entities might have significant value. An order for administration would, in the first instance, allow the administrators an opportunity to understand the value of the business being undertaken by CTMS and its subsidiaries, evaluate what assets these companies had, and if appropriate sell CTMS's portfolio to another company operating in the sector. The court therefore granted the administration order sought and appointed joint administrators (paras. 63–71).

Cases cited:

(1) *Arnold* v. *Britton*, [2015] UKSC 36; [2015] A.C. 1619; [2015] 2 W.L.R. 1593; [2016] 1 All E.R. 1; [2015] HLR 31, considered.

(2) *BNY Mellon Corp. Trustee Servs. Ltd.* v. *LGB Capital No. 1 plc*, [2016] UKSC 29; [2017] 1 All E.R. 497; [2016] 2 BCLC 163; [2016] Bus. L.R. 725, referred to.
(3) *Browne* v. *Dunn* (1893), 6 R. 67, referred to.
(4) *Chartbrook Ltd*. v. *Persimmon Homes Ltd*., [2009] UKHL 38; [2009] 1 A.C. 1101; [2009] 3 W.L.R. 267; [2009] 4 All E.R. 677; [2010] 1 All E.R. (Comm) 365; [2009] Bus. L.R. 1200; [2009] B.L.R. 551; [2010] 1 P. & C.R. 9; [2009] 3 E.G.L.R. 119, referred to.
(5) *Cherry Tree Invs. Ltd.* v. *Landmain Ltd.*, [2012] EWCA Civ 736; [2013] Ch. 305; [2013] 2 W.L.R. 481; [2013] 1 BCLC 484, considered.
(6) *Geys* v. *Société Générale, London Branch*, [2012] UKSC 63; [2013] 1 A.C. 523; [2013] 2 W.L.R. 50; [2013] 1 All E.R. 1061; [2013] IRLR 122; [2013] ICR 117, considered.
(7) *Gordon* v. *Campbell* (1842), 1 Bell's App 428, referred to.
(8) *Grundt* v. *Great Boulder Pty. Gold Mines Ltd*. (1937), 59 C.L.R. 641, referred to.
(9) *Highberry Ltd.* v. *Colt Telecom Group plc*, [2002] EWHC 2503 (Ch), considered.
(10) *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.*, [2018] UKPC 7; [2019] A.C. 271; [2018] 2 W.L.R. 1465; 2018 GLR 97, followed.
(11) *King*, *In re*, 2023 Gib LR 1, considered.
(12) *Long* v. *Farrer & Co.*, [2004] EWHC 1774 (Ch); [2004] BPIR 1218, followed.
(13) *Marks & Spencer plc* v. *BNP Paribas Secs. Servs. Trust Co. (Jersey) Ltd*., [2015] UKSC 72; [2016] A.C. 742; [2015] 3 W.L.R. 1843; [2016] 4 All E.R. 441, considered.
(14) *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337; 6 R. (H.L.) 21, considered.
(15) *Rennes Foundation* v. *Domain Venture Partners PCC Ltd.*, 2022 Gib LR 298, considered.

Legislation construed:
Insolvency Act 2011, s.45: The relevant terms of this section are set out at para. 9.
s.46: The relevant terms of this section are set out at para. 6.
s.48(2): The relevant terms of this subsection are set out at para. 9.
s.57(1): The relevant terms of this subsection are set out at para. 6.
s.58: The relevant terms of this section are set out at para. 7.

Insolvency Rules 2015, r.33(3): The relevant terms of this rule are set out at para. 10.

P. Shaw, *K.C.* with *C. Grech* (instructed by Signature Litigation) for the applicant;
D. Feetham, *K.C.* with *D. Martinez* and *R. Pennington-Benton* (instructed by Hassans) for the respondent.

1 **DUDLEY, C.J.:** This is an application by Ms. Joanne Wild ("JW") by which she seeks the appointment of an administrator over Castle Trust & Management Services Ltd. ("CTMS"). CTMS and companies within the Castle Group are licensed and regulated by the Gibraltar Financial Services Commission to provide corporate and trustee services.

2 By order dated June 9th, 2021, JW was appointed cell administrator of cells E, F, and G ("the cells") of the Inspirato Fund No. 2 PCC Ltd. ("Inspirato"). By further order dated June 23rd, 2022, she was subsequently appointed as cell liquidator over the cells. The wider background is set out in my judgment of June 23rd, 2022 ordering the cells into liquidation (*In re Inspirato Fund No. 2 PCC Ltd.*, reported at 2022 Gib LR 191), where I said (*ibid.*, at paras. 3–12):

> "3 By order dated June 9th, 2021, JW was appointed cell administrator of cells E, F and G ('the cells') of Inspirato Fund No. 2 PCC Ltd. ('Inspirato') which is a protected cell company incorporated pursuant to the Protected Cell Companies Act ('the Act').
>
> 4 The applicant in the original application to appoint a cell administrator of the cells was XCAP Nominees Ltd. ('XCAP') a company previously owned by Hume Capital Securities plc (which is now in special administration) ('Hume') and which is now part of the Kingswood Group.
>
> 5 In December 2014, XCAP invested £2,735,000 in the cells by acquiring shares in these and is the legal owners of all the shares in the cells. It holds the shares as nominee for the beneficial owner of the shares, Quilter International Isle of Man Ltd. ('Quilter').
>
> 6 Inspirato was incorporated as a protected cell company in 2011 although the cells the subject of these proceedings were formed in December 2014. Inspirato is managed by the Castle Group of companies ('Castle Group'). The fund administrators of Inspirato are CFA and the company secretary is CSL. The board of directors comprise First Management Ltd., a corporate director which is said to be provided by Castle Trust and Management Services Ltd. ('CTMS'), another company which is within the Castle Group, and two professional experienced investment fund directors, namely SK, and the late Mr. Joseph Tavares, who resigned in March 2021. According to JW, SK is the ultimate beneficial owner of the Castle Group. SK, Mr. Tavares and the relevant Castle Group entities were at all material times licensed by the Gibraltar Financial Services Commission ('GFSC') to undertake their respective activities.
>
> 7 It is JW's evidence that SK has held out that a Mr. Keith Bayliss (who was a director of Inspirato from April 7th, 2017 until what is

said to be his purported resignation on July 10th, 2019) was the architect and promoter of the cells.

8 According to JW each cell had a separate private placement memorandum, each with an independent long-term objective which went towards furthering what is referred to as 'the local authority model,' which is partnering with local authorities under joint ventures for private investment into regeneration projects, affordable housing *etc*. The short-term strategy if required, centred around investment in short-term cash equivalents until sufficient capital had been received for the long-term strategy to be implemented.

9 Also according to JW, by reference to client account ledgers of CFA and CTMS, she has established that payments amounting to £2,735,000 were paid into the cells by Hume (for XCAP). In turn the sum of £2,560,000 was used by the cells to purchase fixed rate 6% loan notes ('the loan notes') from the KB Foundation with the balance of £175,000 in the main paid by way of fees to the Castle Group, SK and Mr. Tavares.

10 Relying upon a document which is exhibited to a report produced by Kroll dated January 7th, 2022 ('the Kroll report') and which was commissioned by CTMS as trustee of the KB Foundation, JW expresses the belief that Mr. Bayliss is the settlor of the KB Foundation. Further said by JW, that the KB Foundation is a Gibraltar trust of which CTMS is the sole trustee. She emphasizes that SK is the beneficial owner and director of CTMS.

11 The loan notes were secured by debentures granted over assets of the KB Foundation and each had a repayment date defined as 'the date which is 3 months after the date of issue of a certificate for that Note, unless otherwise agreed between [the KB Foundation] and the relevant Noteholder.' As regards the debentures, it is said by JW that at the time that these were granted, the KB Foundation held KBFR Holdings Ltd., which according to the most recent balance sheet dated December 31st, 2018 has no value. And, that she established that another asset that the KB Foundation claims to own, namely KBF Holdings (Asia) Ltd., was struck off on November 24th, 2021 for failure to file annual returns.

12 It is not in dispute that the cells have failed to receive any return at all on their investment, and that as at the date of JW's appointment, the Castle Group continued to claim and accrue fees and costs for services they claimed to be performing."

3 I adopt the same abbreviations in respect of the *dramatis personae* as I used in that earlier judgment, although I shall also refer to the KB Foundation as "KBF."

4 On November 11th, 2022, JW wrote to CTMS demanding repayment of the sums loaned by the cells which together with accrued interest at 6% as at that date amounted to £3,771,327.67. The demand was made on the premise that CTMS is personally liable for the debts of the KB Foundation. The existence of the debt itself is not disputed, rather for CTMS it is said that there is a substantial dispute as to whether it assumed personal liability to repay the loan notes over and above the assets in the trust fund.

5 From that somewhat convoluted background, and before turning to the loan notes; other transactional documentation and related evidence, it is to be noted that, companies within the Castle Group acted both on the lender and borrower side of the transactions; to observe that JW's statement of belief in her first affidavit that SK is the ultimate beneficial owner of CTMS has not been challenged and that but for the alleged indebtedness created by the loan notes, it is not in dispute that CTMS is solvent.

The application

6 The present application is made pursuant to s.56(1)(c) of the Insolvency Act 2011 ("IA 2011") which allows for an application for an administration order to be made by a creditor of a company. In turn s.57(1) provides:

> "57.(1) Subject to section 58, the Court may make an administration order in relation to a company only if—
>
> (a) it is satisfied that the company is insolvent or is likely to become insolvent; and
>
> (b) it considers that there is a reasonable prospect that the administration order will achieve one or more of the objectives specified in 45(1), as added to or varied by any notice issued under 45(3)."

As an aside, the reference to s.45(1) and s.45(3) must necessarily be a drafting typographical error and must in fact be references to s.46(1) and s.46(3), as s.46 is entitled "Objectives of administration." Section 46(3) is not engaged. Section 46(1) provides:

> "46.(1) Subject to subsections (2) and (3), the administrator of a company shall perform his functions with the objective of—
>
> (a) rescuing the company as a going concern;
>
> (b) achieving a better result for the creditors as a whole than would be likely if the company were to enter into liquidation, without first being in administration; or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors."

In turn subsection 46(2) provides:

> "(2) The administrator shall perform his functions with the objective specified in subsection (1)(a) unless he considers either—
>
> (a) that it is not reasonably practicable to achieve that objective; or
>
> (b) that the objective specified in paragraph (b) would achieve a better result for the company's creditors as a whole."

In very short, for the purposes of making an administration order pursuant to s.57 the company the subject of the application must be insolvent or likely to become insolvent. And, there has to be a reasonable prospect that the company can be rescued as a going concern, or that a better result can be achieved for creditors, if the company goes into administration first before entering liquidation, or property is to be realised to pay secured or preferential creditors.

7 Section 58 provides a distinct route through which an administration order may be made which does not require the court to be satisfied that the company is insolvent or is likely to become insolvent. It provides:

> "58.(1) This section applies where an application for an administration order—
>
> (a) is made by the holder of a floating charge who has appointed, or is entitled to appoint, an administrative receiver; and
>
> (b) the application includes a statement that this section applies.
>
> (2) Where this section applies, the Court may make an administration order whether or not it is satisfied that the company is insolvent or is likely to become insolvent."

8 Right to say that the facility provided by the loan notes was secured by debentures entered into between CTMS as trustee of the KB Foundation and each of the cells advancing the moneys, with the debentures also providing a floating charge. The debentures are registered in the Charges Register of CTMS's register at Companies House in accordance with the provisions of s.168 of the Companies Act 2014 as particulars of a charge in respect of CTMS.

9 By her supplemental skeleton argument JW seeks to rely upon s.58 IA 2011. It is cogently submitted by Mr. Feetham that the applicant cannot succeed on an application based on s.58 because s.45 provides that an administrator may be appointed by the court or "by the holder of a floating charge under section 48." Section 48(2) defines a "qualifying floating charge" as one created by an instrument "which states that this section applies to the floating charge." Put another way, the charge documentation must expressly refer to s.48 IA 2011 thereby giving contractual notice that

the charge gives rise to the right to appoint an administrator under the IA 2011. The debentures do not include such a statement and it is therefore submitted that the applicant is not entitled to appoint an administrator out of court under s.48 and consequently cannot rely upon s.58.

10 There is an added layer of complexity in that the debentures are stated to be governed by English law. Again, Mr. Feetham cogently submits that the debentures do not create a right to appoint an administrative receiver in Gibraltar but rather purport to create a right to make such an appointment in England and Wales. That such a conclusion is to be derived from the references to the English Insolvency Act 1986 and the English Law of Property Act 1925. All that said, fortunately it is unnecessary to make a determination in respect of any of those or indeed more intricate related submissions. The more unexacting point, but one which is procedurally fundamental, is that JW's reliance on s.58 is an entirely new point, raised for the first time in her supplemental skeleton argument. Section 58(1)(b) specifically requires the application to include a statement that the section applies and in turn r.33(3) of the Insolvency Rules 2015, provides:

> "Where the application is made by the holder of a qualifying floating charge in accordance with section 58, the affidavit shall set out the basis on which the applicant is entitled to make the application."

No application to forgive the breach or amend the application for an administration order is sought and therefore JW cannot rely upon s.58.

11 The core issue requiring determination is therefore whether the company is insolvent or is likely to become insolvent. Underpinning that determination is whether there is a substantial dispute as to whether CTMS is liable for the debt. Unless established that it is liable, CTMS remains a solvent trading company. In those circumstances during the course of the hearing I indicated that I would not contemplate making an administration order unless I was satisfied that there was no substantial dispute as to the debt.

Substantial dispute as to the debt

Liability of trustees to third parties

12 The legal principles as to the liability of trustees to third parties when acting in connection with the administration of a trust are well established and are of themselves not in issue in this case. They were relatively recently restated by the Privy Council in *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.* (10), which concerned art. 32(1)(a) of the Trusts (Jersey) Law 1984 which limits the liability of Jersey trustees to trust assets where the contracting party has knowledge that they are transacting with trustees. Although there is of course no such statutory provision in Gibraltar limiting a trustee's personal liability, Lord Hodge provided a summary of the position

under the English common law, which by virtue of s.2(1) of the English Law (Application) Act, subject to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, is applicable in Gibraltar.

13 Lord Hodge said ([2019] A.C. 271, at para. 59):

> "For this reason, it is necessary to start by setting out some well-established principles of English trust law which are relevant to the present issue:
>
> (i) A trust is not a legal person. Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently.
>
> (ii) English law does not look further than the legal person (natural or corporate) having the relevant rights and liabilities. As Purchas LJ observed in dealing with the legal personality of a temple under Indian law in *Bumper Development Corpn v Comr of Police of the Metropolis* ([1991] 1 WLR 1362, 1371):
>
> > 'The particular difficulty arises out of English law's restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognising as a party entitled to sue in our courts something which on one view is little more than a pile of stones.'
>
> (iii) The legal personality of a trustee is unitary. Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate. As Lord Penzance put it in *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, 368), where debts are incurred by a trustee for the benefit of the beneficiaries, the trustee—
>
> > 'could not avoid liability on those debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted.'
>
> (iv) This liability may be limited by contract, but the mere fact of contracting expressly as trustee is not enough to limit it. It merely makes explicit the knowledge of the trustee's capacity, which Lord Penzance regarded as insufficient: see *Lumsden v Buchanan* (1865) 3

M (HL) 89. There must be words negativing the personal liability which is an ordinary incident of trusteeship. In *Gordon v Campbell* (1842) 1 Bell App 428 and *Muir v City of Glasgow Bank* itself, it was held that the words 'as trustee only' were enough.

(v) A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate . . .

(vi) A creditor has no direct access to the trust assets to enforce his debt. His action is against the trustee, who is the only person whose liability is engaged and the only one capable of being sued. A judgment against the trustee, even for a liability incurred for the benefit of the trust, cannot be enforced directly against trust assets, which the trustee does not beneficially own. The creditor's recourse against the trust assets is only by way of subrogation to the trustee's right of indemnity . . ."

For his part Lord Mance said (*ibid.*, at paras. 202–203):

"202. . . . There is no question of the trust being a separate entity, or being represented by the trustee as its agent: Virgo, *Principles of Equity & Trusts*, 2nd ed (2016), p 589. As regards the beneficiaries, the trustee is simply bound by the trust obligations. Where these relate to property, the property is protected as against the trustee and, to a considerable extent though not completely, also against third parties. Under the common law, therefore, a trustee undertakes third party transactions and other dealings in his (or its) own capacity as an individual (or body corporate), and is personally liable accordingly, irrespective whether or not the transactions and dealings relate to property the subject of any trust obligations. Because equity will recognize and enforce the beneficiaries' interests, as explained above, the trust assets will only be available to meet such liability to the extent that the trustee can look to them for indemnity against third party liability (in which case the third party will also have a right of subrogation).

203. The trustee can of course vary and limit the scope of his or its personal liability, or of the property by reference to which it may be satisfied, by agreement with the third party. A recognized way of doing this is to ensure that he contracts 'as trustee only'—the word 'only' being on authority critical."

In turn and in similar vein, Lord Briggs stated (*ibid.*, at 240):

"That is why trustees have to contract in very specific terms 'as trustees only' if they wish to limit their liability. The limitation thereby achieved is contractual. It does not arise from their status as trustees, even if that is known to their counterparty. Put another way,

> the question whether the trustees' liability is limited depends on the law of contract, not the law of trusts."

The loan notes

14 Five loan notes were issued during the period December 18th, 2014 to April 30th, 2015 in respect of each of five loans, all of which (and it is not a matter in dispute) are said by JW to have been issued under identical terms and conditions. On the face of the loan notes the repayment date is three months after the date of issue of a certificate for the note, unless otherwise agreed between the KBF and the relevant noteholder. According to JW, although there is correspondence to suggest that the repayment dates were extended to 2020, it is not in dispute that all five loan notes are due and payable. The loan note instruments are made as a deed by the KBF which is described as: "KB Foundation, a Gibraltar trust acting by its trustee [CTMS] whose principal office is at 932 Europort, Gibraltar ('KBF')." Clause 1 which sets out "Definitions and Interpretation" defines "Group" as:

> "KBF, KBF Holdings Limited (a Gibraltar registered company, no. 111032) and any subsidiary or holding company from time to time of KBF Holdings Limited and any subsidiary from time to time of KBF Holdings Limited (and the expression member of the Group shall be construed accordingly)."

Whilst "Trustee" is simply defined as: "the trustee of KBF for the time being (currently [CTMS])." Clause 4 entitled "Status of Notes" provides:

> "The Notes when issued shall rank equally and rateably without discrimination or preference among themselves and as a secured obligation of KBF. As security for the repayment and discharge of the Notes, KBF agrees to enter into a mutually acceptable charge (if requested by the Noteholder) over its shares held in KBF Holdings Limited (a Gibraltar registered company, no. 111032)."

And cl. 5.1 under the entitlement "Repayment of Notes" provides:

> "When a Note becomes payable in accordance with the provisions of this instrument, KBF shall pay to the relevant Noteholder the full principal amount of the Note to be repaid together with any accrued interest on such Note (less any tax which KBF is required by law to deduct or withhold from such payment) up to and including the date of payment."

15 The loan notes themselves are a schedule to the instrument and stated to be "[c]reated and issued pursuant to a resolution of the Trustee of KBF" and is "Executed as a deed by KB Foundation acting by [CTMS] a trustee . . ." Of some significance given the submission advanced, para. 4 of the loan notes provides: "The Notes are transferable in amounts and in integral

multiples of £1 in accordance with the terms of the Conditions and the Instrument." As regards the minutes of the meetings of CTMS as trustee of KBF in relation to the issuing of the notes, these do not reflect any limitation of liability on the part of CTMS, they reflect that the loan notes are issued "as per the terms and conditions prescribed in the Loan Note Instrument."

16 For their part the minutes of a meeting of the board of directors of Inspirato of May 12th, 2015, which was chaired by SK, in relation to the purchase of loan notes by cells E and G in the sums of £30,000 and £20,000, there is simply a ratification of the approval of these investments, and again nothing in these minutes to indicate a limitation of liability on the part of CTMS. I have not been referred to any other minutes of either the KBF or Inspirato which have a bearing on the submissions advanced.

17 Far more recently the minutes of a meeting of CTMS as trustees of the KBF held on September 28th, 2021 states "Cells E, F & G lent the KB Foundation £870,000, £950,000 and £690,000 respectively by way of loan notes which were due for repayment in December 2019. These remain outstanding." It is said for JW (and not challenged by CTMS) that these minutes are the first instance in which any effort is made by CTMS to limit its liability. The minutes continue: "At the time the loans were granted Cells E, F & G agreed that the Trustees of the KB Foundation would only be liable to the extent of the assets available in the Trust and have no personal liability." It is trite that subsequent conduct of parties cannot be relied upon as a means of construing a contract, and no material reliance was placed upon these minutes in the submissions advanced by the parties.

The debentures

18 Although for the reasons given above the debentures cannot be relied upon to ground the present application, they are also relied upon by JW in support of the contention that CTMS did not limit its liability to the KBF trust assets.

19 The three debentures are said to be in identical terms, other than as regards the identification of the cell within Inspirato as lender and the sum borrowed. Each is entered into by CTMS "as Trustee of the KB Foundation" *qua* "Borrower"; "Facility Agreement" is defined by reference to the loan note instrument, whilst "Secured Liabilities" is defined as:

> "all present and future monies, obligations and liabilities of the Borrower to the Lender, whether actual or contingent and whether owed jointly or severally, as principal or surety or *in any other capacity*, howsoever incurred, including but not limited to all present and future monies, obligations and liabilities owed by the Borrower to the Lender under or in connection with the Facility Agreement or

> this deed (including, without limitation, those arising under clause 30.3.2), together with all interest (including, without limitation, default interest) accruing in respect of those monies, obligations or liabilities." [Emphasis added.]

The covenant to pay at cl. 2 provides: "The Borrower shall, on demand, pay to the Lender and discharge the Secured Liabilities when they become due." Clause 3.1 creates a legal mortgage over the shares held by way of declaration of trust in KBF Holdings Ltd. and KBF Holdings (Asia) Ltd. and thereafter cl. 3.4 creates a first floating charge over "all the undertaking, property, assets and rights of the Borrower at any time not effectively mortgaged, charged or assigned" pursuant to the earlier sub-clauses.

20 For the purposes of registration of the debentures in accordance with s.168 of the Companies Act, the company against which it is registered is CTMS, with the description of the instrument creating the charge reflecting that it is made between CTMS "as trustee of the KB Foundation" and the applicable cell in Inspirato.

Evidence advanced on behalf of CTMS

21 It is SK's evidence that it is impossible to conceive that CTMS would have assumed personal liability to repay the loan notes beyond the value of the trust fund. That CTMS is a trust management company which charges fees on average between £2,000 and £4,000 per annum to manage a trust and that it is therefore not credible to suggest that as part of those management obligations it assumed personal liability to repay the loan notes beyond the value of the trust fund. That no trustee in his right mind would ever agree to such a thing. That in any event in this case he expressly emphasized that the liability of CTMS was limited to the trust fund and that it is clear in any event from contemporaneous documents that Inspirato acquired the loan notes on the expressly agreed basis that CTMS had no liability beyond the value of the fund.

22 The core document relied upon by SK is a letter from him to Keith Bayliss dated December 10th, 2014 with the heading "RE INSPIRATO CELLS E, F & G" which is signed off by SK "FOR AND ON BEHALF OF INSPIRATO FUND No2 PCC LIMITED RE CELLS E, F, & G."

23 In that letter the possibly very obvious question of whether a conflict of interests arose for CTMS when acting on both the borrower and lender sides of the transactions was dealt with by SK as follows:

> "CTMS are providing Trustee services to KB Foundation. For the record we have all discussed this and concluded it is in the best interests of the overall plan (and in turn the investors and other stakeholders) in order to maximise the returns and reduce inefficiencies. The Fund Cells could not invest directly in Kingdom

> Bank which is key to the whole strategy. An independent party would probably have charged very much more than CTMS have been able to process the application. CTMS and its connected parties also arranged the initial funding to be able to complete the bank change of control application. We have duly disclosed that potential conflict (which is in fact not a conflict but a huge assist) to you and your team who were also advised of the applicable pre agreed success based arrangement fee."

More pertinent for the purposes of the present application is the paragraph in the letter which states:

> "We have discussed fees and the terms upon which we are appointed. Neil has sent you the draft agreements and we have met and agreed the basis of fee charging. We have not charged any premium for the expedited delivery of the three cells. Regarding our terms, those are all in line with our standard terms and conditions. We have made you aware of both the company standard terms and trust terms. *We have mentioned to you whilst CTMS carries PI up to five million pounds its liability is strictly and contractually limited to the assets held in the Trust to which it provides Trustee services.* That is in line with all the other trusts we act for and follows the procedure for the other cells, which we have also discussed." [Emphasis added.]

The position adopted by SK in his witness statement is that by this correspondence, he confirmed, and it was clearly understood by the cells, that CTMS would not incur any trust liability beyond the value of the fund.

24 It is also SK's evidence that, since receiving JW's application, he contacted David Taylor who was a major investor in the project. In a letter addressed to SK dated December 8th, 2020 he states as follows:

> "I confirm I lent money to Keith Bayliss which he then settled on the KB Foundation so that the Trustees of that trust could invest in the acquisition of the Kingdom Bank and Hume businesses as follows:—
>
> £800,000 in November 2013
>
> £800,000 in July 2014
>
> I also invested directly into Hume another £2M directly from my own resources.
>
> I confirm that you made it clear to me before I entered into the arrangement that Castle Trust and Management Limited as Trustees of the KB Foundation were acting as Trustees only and their liability to repay loans was explicitly limited to the actual assets available in the KB Foundation Trust. In other words, the Trustees were not liable to repay any sums that I might lend unless there was sufficient money in the KB Foundation Trust. This was the reason I chose to lend

> monies to Mr Bayliss rather than KBF, given that KBF was to issue Loan Notes to Inspirato Cells E, F and G, and would be encumbered by them. The limits of the liability of CTMS seemed to me to be fair and market normal. You explained that Castle Trust and Management Limited were a licensed entity that provided trustee services for a number of other clients/trusts unrelated to the KB Foundation Trust and that their liabilities had to be ring fenced in order to protect Trusts one from another in the event of failures and insolvency."

By way of chronology, the payments which David Taylor says he effected would have been made before the cells were formed.

25 For his part, on December 14th, 2022, Keith Bayliss emailed SK on the following terms:

> "Thank you for your recent emails about CTMS liabilities with respect to the KB Foundation.
>
> I remember discussing this with you and David Taylor. We were aware that CTMS was acting as trustee of the KBF Foundation and you expressly told me and David Taylor that the liability of CTMS to repay the investment was limited to the value of the assets held by the trust. I was also present during a series of telephone calls in late 2014 when you made these points to senior management within Hume and XCAP. The Loan Notes issued by the KBF Foundation and purchased by Inspirato Cells E, F and G were understood to be secured against debentures and the liabilities, in the result that the business/ investment failed, were similarly limited to the assets of the KBF Trust."

26 Flowing from that email at para. 32 of his witness statement, SK asserts that:

> "Keith Bayliss was in constant contact with the directors of XCAP and senior management of Hume and I would have expected him to inform them of the entirely market normal limitations in the liability of CTMS qua trustees. Even if he did not inform them about that limitation I certainly did in at least one conversation that I held with directors of XCAP and Hume which is entirely reflective of my contemporaneous correspondence with Keith Bayliss and my contemporaneous communication with David Taylor. This happened a long time ago, but I do recall various conference calls with them including Jonathan Freeman, Guy Peters and David Burrows and in one of those calls I did reiterate this point. This would have been in December 2014."

27 As regards SK's witness statement, reliance is placed by Mr. Feetham in the principles set out in *Long* v. *Farrer & Co.* (12) ([2004] EWHC 1774 (Ch), at paras. 57–61, *per* Rimer, J. as he then was) in support of the

proposition that SK's evidence must be accepted as true unless any aspect of it is manifestly incredible.

28 Shortly after the hearing of this application the Court of Appeal handed down its judgment in *In re King* (11), Sir Colin Rimer J.A. considered and contextualized the principles in *Long* v. *Farrer & Co.* Contrasting the principles with those in *Browne* v. *Dunn* (3), he said (2023 Gib LR 1, at para. 155):

> "The *Long* v. *Farrer* principles are concerned with a different situation. They affirm that, save to the extent that such evidence is manifestly incredible, it is not possible for a court to disbelieve the evidence given by a witness in an affidavit or a witness statement in the absence of the cross-examination of the witness. *Long* v. *Farrer* itself arose in bankruptcy proceedings in the Chancery Division of the English High Court of Justice. It was a decision of mine, reached after argument from two counsel well experienced in insolvency law. Save only that it may have been the first decision to apply the relevant principles also to witness statements, I was not purporting to establish any new principles but was applying those already well-established in relation to the treatment of evidence given by affidavit. The use of affidavits in litigation pre-dated *Browne* v. *Dunn* (to which no reference was made in *Long* v. *Farrer*) and I regard it as quite possible that the *Long* v. *Farrer* principles in relation to affidavits also pre-dated that decision."

A caveat which could potentially be engaged in the present application is then to be found (*ibid.*, at para. 160):

> "There are of course exceptions to the application of the *Long* v. *Farrer* principles in the way I have described. For example, applications for administration orders in respect of an insolvent company (being orders which of course *do* deal with the parties' final rights) may be opposed but sometimes have to be heard with the utmost urgency; and in *Highberry Ltd.* v. *Colt Telecom Group plc* . . ., Lawrence Collins, J. (as he then was) said ([2002] EWHC 2503 (Ch), at para. 35):
>
> > 'It seems to be plain that the nature and purposes of an application for an administration order, the nature of the enquiry by the court, and the usual urgency of the application, make it inevitable that only very exceptional circumstances will justify an order for disclosure or cross-examination in proceedings for an administration order.'"

Although this is an application for an administration order, in my judgment there is no reason why the principle in *Long* v. *Farrer* should be avoided. The present application is predicated entirely upon the liabilities created by

the loan notes specifically whether or not CTMS is personally liable, it is a long standing liability and not one which makes the determination of this application one of urgency so as to displace the application of the principle. I therefore take account of SK's evidence, mindful of, and applying *Long* v. *Farrer.*

The applicant's submissions

29 In very short, for JW it is submitted that the application stems from a debt which is due and owing by CTMS to the cells. That the debts have never been disputed as being owed to the cells. That CTMS is the sole trustee of the KBF and it entered into the relevant loan transactions with each of the cells in its capacity as trustee for the KBF. That in respect of those transactions the cells were each a third party in relation to CTMS.

30 It is further submitted that the fundamental position under Gibraltar law is that:

(i) the KBF has no separate legal personality;

(ii) contracts entered into in respect of the KBF are entered into by its trustees (in this instance CTMS) who are personally liable on them; and that

(iii) CTMS's liability towards the cells is personal, as with any other contracting party that enters into an arm's length transaction with another third party.

Flowing from that, it is also said that for CTMS to have excluded personal liability under the loans it would have had to expressly set that out in the contractual documents. That there is nothing whatsoever in the documentation which contractually limits CTMS's personal liability. That this is the only way in which CTMS could have limited its personal exposure.

31 It is also submitted that CTMS is insolvent as it is unable to pay its debts as they fall due in that it has not paid the demand from the cells. And further, that once the debt to the cells is taken into account, based on CTMS's latest set of filed accounts at Companies House Gibraltar, its liabilities exceed its assets.

32 As regards the debentures, for the reasons I have previously given, for present purposes I discard those parts of the submissions by which an administration order is sought on the basis of the debentures affording the cells a floating charge over CTMS. However, reliance is also placed upon the debentures in that these were registered in the Charges Register of CTMS's register at Companies House and it is said that they do not seek to place any limit on CTMS's liability or state that they are limited to assets beneficially owned by the KBF.

The respondent's submissions

33 The overarching submission advanced by Mr. Feetham is that there is a substantial dispute as to whether CTMS is liable for the debt. He submits that the threshold for establishing the division between personal and fiduciary liability is not particularly high. In support of that proposition he relies upon the judgment of Lord Penzance in *Muir* v. *City of Glasgow Bank* (14) (4 App. Cas. at 368):

> "Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning upon which the exemption of the Appellants from personal liability has been based and enforced in argument.
>
> But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability on these debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted . . .
>
> But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to shew that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject-matter—the intention of the parties to that contract was apparent that his personal liability should be excluded; and that although he was a contracting party to the obligation the creditors should look to the trust estate alone."

It is further submitted that the court needs to be satisfied that on a balance of probabilities the debt is due, bearing in mind the limitations of the jurisdiction in which that determination is to be made. In that regard reliance is placed upon the English High Court judgment in *Highberry Ltd.* v. *Colt Telecom Group plc* (9) where Mr. Justice Lawrence Collins (as he then was) dealing with an application by creditors who petitioned for an administration order for the disclosure of documents and directions for cross-examination said ([2002] EWHC 2503 (Ch), at para. 53):

> "I accept the submission for COLT that it would plainly be disproportionate for the court to enter into a protracted and minute examination of COLT's position and prospects for the future in the context of an administration petition; and such an examination is not necessary for the fair disposal of the issues. It would be quite wrong to treat the hearing of an administration petition as if it were a trial. The consideration of the issues is not intended to be done by way of a very detailed and protracted investigation as in a trial."

34 Mr. Feetham goes on to submit that the issues which arise are fact sensitive and inappropriate to deal with in the context of an application for an administration order. Thereafter, on the merits themselves, four arguments are advanced:

(i) a separate agreement limiting liability, evidenced by the December 10th, 2014 letter;

(ii) that as a matter of construction the liability of CTMS is limited;

(iii) that there is an implied term limiting liability; and

(iv) estoppel.

Separate agreement

35 It is submitted for CTMS that by their nature the loan notes were not a negotiated contract signed by both parties, but offers made by KBF acting by its trustee CTMS, accepted by the cells. That the loan notes do not contain an entire agreement clause and as a matter of legal principle there is nothing which prevents the parties from reaching an agreement outwith the agreement governed by the loan notes. That CTMS proposed the investment on the terms of the loan notes. That SK, in his capacity as director of both CTMS and the cells, made it clear that any investment in the loan notes would be subject to the agreement that CTMS would not be personally liable. That SK's knowledge of this condition is to be attributed to the cells. And in any event that it was known to the cells, not least because it was also known to Hume and XCAP as set out in SK's first witness statement at para. 32. That the cells subsequently invested on that basis. That the December 10th, 2014 letter evidences that agreement between CTMS and the cells, namely that CTMS was contracting on behalf of the KBF on the basis that it was limiting its liability to the trust assets. That although undoubtedly these are matters which would have to be considered in a Part 7 Claim, for present purposes it establishes a substantial dispute so as to defeat the application for an administration order. That the fact that CTMS may have put itself in a position of conflict is no answer to the issue presently before the court and that in that regard it is open to JW to bring a claim for breach of fiduciary duty.

36 It is further submitted that the existence or otherwise of this separate agreement is fact sensitive, with this having to be determined against the background of the KBF having been set up in 2012 for the acquisition of the Kingdom Bank. And that when one of three investors pulled out Hume stepped in, with the cells being created so that Hume would take up the investment. That the original investors, invested on the basis that CTMS's liability was limited and likewise the cells when stepping into the investment did so on the same basis. Reliance is placed upon those other investments as being relevant evidence as to how CTMS *qua* trustee accepted these.

37 It is also submitted that the limitation of liability by CTMS by virtue of a separate agreement needs to be considered against further relevant background, which includes the fact that CTMS are professional trustees, who were not sharing in the profit of the investments by the KBF. Mr. Feetham poses the rhetorical question, why would CTMS underwrite the investment in those circumstances?

38 As regards submissions which I shall turn to touching upon the transferability of the loan notes and its impact upon the construction of their terms, in the context of the separate contract the submission advanced is that the issue simply does not arise, because this is a distinct contract between CTMS and the cells. That if a loan note were assigned to a third party, that third party would not be bound by the separate agreement limiting CTMS's liability.

Construction of the loan note

39 The submission advanced for CTMS is succinctly set out in its skeleton argument as follows:

> "33. The obligation to repay the Loan Notes is on 'KBF'
>
> a. Clause 5.1: 'KBF shall pay to the relevant Noteholder . . .'
>
> b. Clause 5.2: 'All payments under this Instrument . . . shall be made by KBF to the Noteholders.'
>
> c. Events of Default include where 'KBF fails to pay any principal or interest on any of the Notes . . .'
>
> 34. KBF is defined as: 'KB Foundation, a Gibraltar ·trust acting by its trustee [CTMS].' The trust does not have separate legal personality. Accordingly, references to 'KBF' and 'the trust' must be to the trust fund (i.e. that body of cash and property comprised in the trust fund). It is the fund, acting by its trustee, that 'shall pay' the debt comprised in the Loan Notes. So, on a plain and ordinary reading, the Loan Notes provide that the trust fund 'shall pay' the debt."

It is submitted that the present case is closely analogous to *Gordon* v. *Campbell* (7), albeit in reverse, in that rather than the trustee saying he assumes the liability as "trustee only" the loan notes make clear that the liability is on the trust fund only.

Implied term

40 Reliance is placed by Mr. Feetham upon Lady Hale's summary of the two circumstances in which a term might be implied in *Geys* v. *Société Générsale, London Branch* (6) ([2012] UKSC 63, at para. 55):

> "[I]t is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it: see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, *Liverpool City Council v Irwin* [1977] AC 239."

Reliance is placed by CTMS upon both categories.

41 In relation to the first category, it is submitted that CTMS is a professional trust services provider and that the cells and their officers knew this was the limited basis and purpose for which CTMS was engaged. In other words, that it was always agreed that CTMS was contracting as trustee only. That this needs to be seen in the context of the background knowledge available to the parties to the investment agreement (the cells and CTMS) that included an understanding of the nature of the trust service business in Gibraltar and in particular that such service providers are paid an annual fee to manage trust settlements and are not co-investors. Moreover, that there was no expectation that a personal or other guarantee would be provided by CTMS.

42 It is further submitted that the same argument can be made by reference to the second category of implied terms—those that apply to particular sectors. It is said that it is a generally accepted principle within the trust service providing community, that professional trustees do not assume personal liability beyond the value of their indemnity.

43 Mr. Feetham accepts that any proposed implied term cannot be inconsistent with the express terms and submits that the loan notes do not

expressly state that CTMS was liable to repay the debt over and above the assets in the trust fund but that rather the obligation to repay the loan notes is on the KBF. That this is entirely consistent with an implied term that the trustee is not personally liable to the extent of any deficiency in the trust fund.

Estoppel

44 The submissions in relation to estoppel were not developed substantively. As I understand it, essentially it is again said that the original investors in the KBF invested on the basis that CTMS's liability was limited. That SK on behalf of the cells, by the December 10th, 2014 letter, acknowledged that CTMS was taking the investment on the basis that its liability was limited to the trust assets. That this is enough to establish an estoppel.

Discussion

45 An application for an administration order should not be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of such an order (or in the exercise of the powers afforded to the court by s.59 of the Insolvency Act, the appointing of a liquidator) is materially different in nature from the consequences of a Part 7 ordinary action. However, the court must be alive to the injustice that can arise when a debtor who wishes to avoid such an order, cynically raises issues claiming that a dispute exists which cannot be determined without detailed consideration of the evidence and cross-examination of witnesses. In determining whether there is a substantial dispute the court must therefore consider the evidence and submissions in much the same way as it would do when hearing an application for summary judgment.

46 To make an administration order I must be satisfied that the company is insolvent or is likely to become insolvent. In the present case actual insolvency is predicated entirely upon whether CTMS is personally liable to the cells in respect of the sums due under the loan notes. The primary issue which therefore falls for determination is whether there is a substantial dispute as to whether or not CTMS is liable. A dispute will not be "substantial" if it has no real prospect of succeeding.

Separate agreement

47 As I understand the submission, essentially what is being asserted is that SK *qua* director of CTMS *qua* trustee of KBF contracted with SK *qua* director of Inspirato and consequently of the cells, that in respect of the investment by the cells in the loan notes, CTMS's liability was limited to the trust assets. Given that this would be an agreement between two distinct entities, the fact that SK was on the board of directors of both entities would

evidently not of itself prevent the creation of a contractual relationship between them.

48 At para. 4 of his witness statement SK asserts that:

> "No trustee in its right mind, ever would (or to my mind in Gibraltar ever has) [assume personal liability] it is clear, in any event, from the contemporaneous documents . . . that Inspirato invested in the notes *on the expressly agreed* basis that CTMS had no liability beyond the value of the fund." [Emphasis added.]

What his evidence fails to address is how a contractually binding agreement with that express term was concluded. There is no evidence as to offer, acceptance, consideration or how the distinct corporate entities negotiated and subsequently entered into the agreement. As regards the December 10th, 2014 letter I fail to understand how it can be said to evidence such a contract given that it is a letter from SK on behalf of Inspirato to Mr. Bayliss who was the settlor and protector of the KBF. It is not a letter by CTMS *qua* trustee to Inspirato/the cells limiting liability or an acknowledgment by Inspirato/the cells acknowledging the limitation of liability on the part of the trustee, rather it is an explanatory letter to Mr. Bayliss. It may evidence SK's subjective intent to limit the liability of CTMS but in my judgment it fails to evidence a separate contract between CTMS *qua* trustee and Inspirato, particularly in circumstances in which, beyond asserting the express term, no particulars whatsoever of that alleged contract are provided.

49 I note SK's evidence to the effect that he would have expected Mr. Bayliss who was in constant contact with the directors of XCAP and senior management of Hume to inform them of the limitations in the liability of CTMS *qua* trustees and his recollection of having done so himself at least on one occasion in December 2014. Applying the principle in *Long* v. *Farrer* (12) I accept that evidence. But in my judgment that is evidence of pre-contractual negotiations or discussions with those providing the funds to Inspirato for it to invest in the KBF Foundation via the loan notes. It is not evidence of a wholly unparticularized separate contract between CTMS *qua* trustee of the KBF and Inspirato/the cells.

50 Were this a summary judgment application, CTMS would have no real prospect of defending the claim on this ground.

Construction of the loan note

51 The principles that apply when interpreting a document were recently considered by the Court of Appeal in *Rennes Foundation* v. *Domain Venture Partners PCC Ltd.* (15), in which Sir Colin Rimer, J.A. said (2022 Gib LR 298, at para. 72):

"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* . . ., 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.'"

52 A contract falls to be interpreted when the language is ambiguous. Despite Mr. Feetham's creative submission, in my judgment there is simply no such ambiguity. Adopting the language of Lord Hodge in *Investec Trust (Guernsey) Ltd.* v. *Glenalla Properties Ltd.* (10) ([2019] A.C. 271, at para. 59) "There must be words negativing the personal liability which is an ordinary incident of trusteeship." On a plain reading of the loan notes there are no such words.

53 In my judgment that of itself is sufficient to dispose of this ground of challenge, the construction argument affords CTMS no real prospect of challenging the debt.

54 But if I am wrong and there is a residual ambiguity in the loan notes, the following considerations would lead me to the same conclusion:

(i) the December 10th, 2014 letter, which of course is not one between CTMS *qua* trustee and the cells but rather between CTMS on behalf of the cells and the settlor/protector is at most a document evidencing pre-contractual negotiations. It is trite that pre-contractual negotiations are to be excluded as inadmissible in construing a contract (*Chartbrook Ltd.* v. *Persimmon Homes Ltd.* (4));

(ii) where an instrument, as the loan notes are, is expressly negotiable, as a matter of principle of construction the court should be slow to permit some collateral arrangement to influence the construction of the document (*BNY Mellon Corp. Trustee Servs. Ltd.* v. *LBG Capital No. 1 plc* (2)); and

(iii) although the debentures may not be enforceable in Gibraltar, that does not detract from the assistance they may provide in interpreting the loan notes. As set out in *Chitty on Contracts*, 33rd ed., at 13–065 and 1053–1054 (2018): "Contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner."

The debentures were registered in the Charges Register of CTMS's register at Companies House. They define the borrower as "[CTMS] as the trustee of the KB Foundation." They do not place any limit on CTMS's liability or state that they are limited to assets beneficially owned by the KBF. As provided for in the loan notes they grant fixed charges over shares held by the "Borrower" in KBF Holdings Ltd. and KBF Holdings (Asia) Ltd. Significantly, they also grant a floating charge over all of the assets and undertaking of the "Borrower." In the absence of any limiting words, the floating charge must be a charge over CTMS's own assets.

55 In all those circumstances the background circumstances relied upon, which includes investments by others made in the KBF Foundation other than through the cells, would in my judgment not impact upon the construction of the loan notes.

56 It may very well be that SK subjectively intended for CTMS to limit its liability, but as Lewison, L.J. put it in *Cherry Tree Invs. Ltd.* v. *Landmain Ltd.* (5) ([2013] Ch. 305, at paras. 132–133):

> "132. Even the staunchest advocates of the court's ability to consider extrinsic evidence stop short at saying that by the process of interpretation the court can insert whole clauses that the parties have mistakenly failed to include. In his well-known article 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577, 586 Lord Nicholls of Birkenhead wrote:
>
> > 'The flexible approach, I add, would not render the remedy of rectification redundant. If by oversight parties omit an agreed clause from their contract, interpretation would not provide a remedy. The words included in the contract could not be interpreted to include the meaning intended to be conveyed by the clause which, accidentally, had been omitted.'
>
> 133. Likewise Professor Burrows wrote in *Construction and Rectification*, p 96:
>
> > 'Say, for example, the parties orally agreed that there should be a time-bar clause in the contract but that this clause was mistakenly omitted from the written contract. The omission of that clause would not be obvious from the document itself. It is hard to see that construction, as opposed to rectification, could cure the problem.'"

And in relation to the application of commercial common sense, as Lord Neuberger put it in *Arnold* v. *Britton* (1) ([2015] UKSC 36, at para. 19):

> "[C]ommercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."

Implied term

57 In *Marks & Spencer plc* v. *BNP Paribas Secs. Servs. Trust Co. (Jersey) Ltd.* (13), Lord Neuberger set out the requirements for the implication of a term into a contract. In concluding his summary in respect of the test of business efficacy ([2016] A.C. 742, at para. 21) he rephrased that a "term can only be implied if, without the term, the contract would lack commercial or practical coherence."

58 I accept Mr. Shaw's submission that CTMS fails to make out any arguable case that the loan notes lack commercial or practical coherence without the implication of the exclusion of personal liability in that the loan

notes simply proceed on the fundamental proposition of Gibraltar trust law that a trustee is personally liable without limit on contracts he enters into on behalf of the trust.

59 To CTMS's contention that its business model would collapse if it was personally liable, and the suggestion that as a matter of practice professional trustees in Gibraltar do not expose themselves to personal liability beyond the trust assets, the short answer is that as experienced professional trustees, it would have been open to CTMS to have expressly limited its liability.

Estoppel

60 As aforesaid, Mr. Feetham did not develop his submissions on estoppel in any meaningful way and did not identify which type of estoppel he was seeking to rely upon.

61 Central to the principle of estoppel is the prevention of unconscionable conduct and the principle that "the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt, or accept, for the purpose of their legal relations" (*Grundt* v. *Great Boulder Pty. Gold Mines Ltd.* (8) (59 CLR at 674)).

62 The answer to this undeveloped submission is that it is very difficult to understand how estoppel can arise in circumstances in which SK was involved in both sides of the transaction. As formulated, the submission does not start to establish a real prospect of challenge to the debt.

The statutory objectives test

63 Having failed to establish that there is a substantial dispute as to the debt, it follows that I am satisfied that CTMS is insolvent.

64 Given the sums due by CTMS pursuant to the loan notes, and the relatively modest profit margins, there is no prospect that the objective of rescuing the company as a going concern can be met. The remaining issue is whether there is a reasonable prospect that an administration order would achieve a better result for the creditors as a whole than would be likely if the company were to enter into liquidation, without first being in administration.

65 CTMS is said to be a successful trust and corporate service provider, employing staff and servicing 55 trusts and 200 pension schemes. It is evident that the creditors of CTMS will not be entitled to any of the assets which are held by it on trust and that the administrators would have to continue to manage the trusts for the benefit of the beneficiaries.

66 By its skeleton argument, CTMS submits that neither liquidation nor administration nor a combination of the two is likely to achieve any benefit for the creditors over and above realising the available non-trust assets. Rather, that it would merely add a layer of entirely unnecessary costs. This

is because, again, the administrators would not have access to any trust assets. All that would happen is that administrators, rather than the current management, would take over administration of the settlements at a greatly increased cost. The creditors would not benefit at all; they would lose out, as any spare capital or realisable assets would be consumed in costs.

67 Implicit in that submission is that CTMS should continue without insolvency processes being engaged. Given my determination as regards CTMS's liability in respect of the loan notes and its consequent insolvency, it follows that one of the two processes must be engaged. In my judgment there is a reasonable prospect that administration will achieve a better result for creditors. CTMS is an entity regulated by the GFSC and it is the holding company of two subsidiaries which are also actively engaged in regulated financial activities. The three companies will presumably each have a substantial portfolio of clients and the business conducted by the three entities may have significant value. An order for administration would, in the first instance allow the administrators an opportunity to understand the value of the business being undertaken by CTMS and its subsidiaries, evaluate what assets these companies have, and if appropriate sell CTMS's portfolio to another company operating in the sector.

68 That administration as opposed to liquidation is likely to be the better option was implicitly accepted by the proposal advanced by Mr. Feetham on instructions from SK, that any administration order be stayed for a few months to allow the directors of CTMS to sell the business. However, as a proposal it is one which in my judgment does not have merit. CTMS is insolvent and therefore an appropriately qualified insolvency practitioner should be appointed.

Conclusion

69 For the foregoing reasons, in my judgment there is no substantial dispute as to the debt; it follows that CTMS is insolvent. Also, in my judgment there is a reasonable prospect that an administration order would achieve a better result for the creditors than liquidation.

70 JW properly acknowledges that given that she is the liquidator of the cells she would not be free from conflict and she seeks the appointment of Edgar Charles Lavarello and Luke Walsh, both licensed and experienced insolvency practitioners of PricewaterhouseCoopers Ltd., Gibraltar, to act as joint administrators who would then act entirely independent of Inspirato and consequently the cells. Both consent to the appointment.

71 I grant the administration order sought and appoint Mr. Lavarello and Mr. Walsh as joint administrators.

Order accordingly.