[2023 Gib LR 701]

IN THE MATTER OF CASTLE TRUST AND MANAGEMENT SERVICES LIMITED (in administration)

SUPREME COURT (Restano, J.): October 27th, 2023

2023/GSC/041

Companies—liquidators—appointment—joint administrators of hopelessly insolvent company appointed as joint liquidators

Joint administrators of a company sought the discharge of the administration order and their appointment as joint liquidators.

Castle Trust & Management Services Ltd. ("CTMS") was licensed and regulated by the GFSC to provide corporate and trustee services. The cell liquidator of Cells E, F and G of the Inspirato Fund No. 2 PCC Ltd. had applied for an administration order in respect of CTMS. It was said that the cells had purchased loan notes from a trust of which CTMS was the trustee and the loan notes were secured by debentures granted over the assets of the trust. The cells had not received a return on their investment and repayment of some £3.77m. had been sought from CTMS on the premise that CTMS was personally liable for the trust's debts. CTMS claimed there was a substantial dispute as to whether it had assumed personal liability to repay the loan notes beyond the assets in the trust fund. The Chief Justice granted an administration order in respect of CTMS and appointed the joint administrators (that judgment is reported at 2023 Gib LR 413).

The Court of Appeal refused to stay the administration order pending the determination of CTMS's appeal, but the joint administrators gave an undertaking that they would not dispose of CTMS's assets otherwise than in the course of business without the leave of the court (that judgment is reported at 2023 Gib LR 495).

The joint administrators now applied for the discharge of the administration order and for their appointment as joint liquidators of CTMS on the basis that the objectives of the administration could not be achieved because CTMS was insolvent. They submitted that CTMS, which had numerous legal claims, judgments and orders against it, was hopelessly insolvent and that its insolvency extended well beyond the Inspirato debt. The joint administrators considered CTMS to be both cash flow and balance sheet insolvent. There was no prospect of it surviving as a going concern.

A director of CTMS, Mr. Knight, submitted that CTMS was solvent and that there were significant failings in the joint administrators' accounting review. He submitted that irremediable damage would be done to CTMS if it were to be put in liquidation. A company voluntary arrangement ("CVA") was the appropriate course.

CTMS's creditors unanimously voted in favour of the application. The GFSC supported the application and rejected the proposal by Mr. Knight that a CVA would be preferable to a liquidation.

The main issues raised by the application were (a) whether the objectives of the administration were incapable of achievement such that the administration order ought to be discharged; (b) whether the court was satisfied that CTMS was insolvent; and (c) whether the court should, in the exercise of its discretion order that joint liquidators be appointed over CTMS.

The joint administrators submitted that CTMS had no standing to challenge this application. Mr. Knight submitted that CTMS retained a residuary power to oppose an application such as the present. However, he was the only one of the three directors who opposed the application: one director approving the application and the other being unable to consider the matter.

Held, appointing the joint administrators as joint liquidators:

(1) If a majority of the CTMS board of directors had opposed the application, the starting point in considering its standing would have been s.71(1)(b) and point 19 of Schedule 1 of the Insolvency Act 2011. It would be a somewhat anomalous result if, as a matter of principle, a company could not challenge an application such as the present on the basis that that power had been assumed by the administrators, when they were in fact bringing the application. It was not an answer to say that s.232 of the Act provided a route for an aggrieved person, but only once the liquidation order was made. The better view was that a company's board of directors retained a residuary power to challenge an application of this sort that would otherwise be a one-sided affair. In the present case, the exercise of that residuary power did not arise because a majority of CTMS's board of directors did not support the opposition to the application. Nevertheless, because of the timing of these developments (it not having become clear until Mr. Knight filed evidence and provided a skeleton and bundle for the hearing), it was not appropriate to shut Mr. Knight out of court. On this basis Mr. Knight was permitted to oppose the application (paras. 10–13).

(2) The main objectives of the administration were incapable of achievement. CTMS could not be rescued. The company's accounts showed that it was a business in decline and that it had experienced two years of heavy losses. Further, there had been an accumulation of claims made against it, resulting in an adverse decision, two judgments and an arbitration award so far. It was not realistic on the materials before the court to say that further investigations and defending the claims would turn around CTMS's fortunes, even if that were a financially viable course, which did not seem to be the case. At best, the position appeared to be that

there might be ways to mitigate some of the losses. CTMS was hopelessly insolvent. The joint administrators were unable to pay the premium for CTMS's insurance, which meant that since September 2023 it had been unable to trade or generate any further income. That also meant that its clients would need to find alternative fiduciary service providers urgently. If the administration continued, it was subject to an undertaking preventing the joint administrators from selling CTMS's assets, which it appeared was largely its portfolio of clients. The efforts of the joint administrators so far had shown how dire CTMS's position was, and a continuation of the administration would be at odds with the intention behind it because it was likely that the chance to sell CTMS's portfolio of clients would be lost (paras. 88–93).

(3) The court would exercise its discretion to appoint liquidators. In addition to the above matters which pointed to the appointment of liquidators being the correct way forward, the court noted the support of the creditors' committee and the GFSC. Further, the correct position was that CTMS was not opposing the application and that Mr. Knight was the only director of CTMS who opposed the application. Although Mr. Knight suggested that a CVA was the appropriate course, a CVA required the approval of the majority of a company's creditors and the GFSC's consent, whereas in the present case the creditors and the GFSC favoured liquidation. In any event, a CVA was entirely unrealistic in the circumstances. CTMS's business could not be saved as a going concern and it would be inappropriate for Mr. Knight to retain any control over CTMS in circumstances where there were clearly concerns about his management and where the joint administrators were investigating possible claims against him. Mr. Knight was seriously underestimating the nature and cost of the challenges facing CTMS. CTMS was insolvent and the proper course at this stage was for the administration to be converted into a liquidation. The court would therefore make an order appointing the joint administrators as joint liquidators (paras. 95–103).

Cases cited:

(1) *BNY Corp. Trustee Servs. Ltd.* v. *Eurosail-UK 2007-3BL plc*, [2013] UKSC 28; [2013] 1 W.L.R. 1408; [2013] 3 All E.R. 271; [2013] BCC 397; [2013] 1 BCLC 613; [2013] Bus. L.R. 715, considered.

(2) *Brake* v. *Chedington Court Estate Ltd.*, [2023] UKPC 29; [2023] 1 W.L.R. 3035, referred to.

(3) *Carman* v. *Bucci*, [2014] EWCA Civ 383; [2014] 2 BCLC 49, considered.

(4) *Carter Holt Harvey Woodproducts Australia Pty. Ltd.* v. *Commonwealth of Australia*, [2019] HCA 20; 93 ALJR 807, referred to.

(5) *Closegate Hotel Development* v. *McLean*, [2013] EWHC 3237 (Ch); [2014] Bus. L.R. 405, referred to.

(6) *Dooley* v. *Castle Trust & Mgmt. Servs. Ltd.*, [2022] EWCA Civ 1569; [2023] IlPr7; [2023] Pens. L.R. 4, considered.

(7) *Equity Trust (Jersey) Ltd.* v. *Halabi*, [2022] UKPC 36; [2023] A.C. 877; [2023] 2 W.L.R. 133; 2022 (2) JLR 318, referred to.

Legislation construed:
Insolvency Act 2011, s.10(1): The relevant terms of this subsection are set out at para. 23.
s.46: The relevant terms of this section are set out at para. 27.
s.62: The relevant terms of this section are set out at para. 28.

C. Grech (instructed by Signature Litigation) for the joint administrators of Castle Trust & Management Services Ltd. (in administration);
A. Christodoulides with *M. Ullger* (instructed by Ullger Law Ltd.) for Stephen Knight, a director of Castle Trust & Management Services Ltd. (in administration).

1 **RESTANO, J.:**

Introduction

This is my judgment on an application made on August 17th, 2023, by Edgar Lavarello and Luke Walsh, both of PricewaterhouseCoopers Ltd. who are currently the joint administrators of Castle Trust & Management Services Ltd. ("CTMSL"). They seek the discharge of the administration order in respect of CTMSL, and for their appointment as joint liquidators of CTMSL. This is therefore an application seeking the conversion of an administration regime into a liquidation. The application is made on the basis that the objectives of the administration cannot be achieved because CTMSL is insolvent.

2 The application is supported by the witness statement of Edgar Lavarello dated August 17th, 2023, and it was originally listed for hearing on August 25th, 2023. At that hearing, Mr. Christodoulides, purporting to act for CTMSL, opposed the order being sought. The hearing was adjourned by agreement at that point as there was a creditors' meeting scheduled to take place on August 31st, 2023 where the joint administrators' application would be discussed and voted on. In the event, the creditors unanimously voted in favour of the relief sought by the joint administrators. This adjournment also enabled a timetable to be set in the lead up to a hearing providing for the filing of further evidence, and skeleton arguments. I therefore ordered that the matter be listed for hearing after September 27th, 2023.

3 In fact, the matter was then listed for hearing on (rather than after) September 27th, 2023. Mr. Christodoulides expressed concern about the slightly earlier listing of the hearing even though this did not interfere with the timetable. By then, Mr. Knight had filed his evidence in opposition to the application. This included a five-page witness statement dated September 12th, 2023 exhibiting a witness statement that he had made dated September

8th, 2023 for an appeal before the Court of Appeal. He had also filed the witness statement of a forensic accountant, Gordon Hodgen, dated September 8th, 2023. Mr. Walsh had also filed a witness statement dated September 20th, 2023 in reply to the evidence filed by Mr. Knight and providing an update to the court. Skeleton arguments had also been filed by both sides at that point.

4 Perhaps the real reason for Mr. Christodoulides' concern was the fact that the listing notice issued to the parties notifying them of the hearing of September 27th, 2023 had not been brought to his attention by his firm when it was issued, and the hearing only came to his attention at a very late stage. Mr. Christodoulides also said that there was a Court of Appeal hearing on October 9th, 2023 and, in his submission, it was preferable for that to take place before this application because the outcome of that hearing would have a bearing on the joint administrators' application. In any event, given the scope of the challenge to the application it became clear that there was insufficient time to deal with the matter in the time allocated for it at that point. It was against that background that the matter was again adjourned to October 18th and 19th, 2023 when the application was finally heard. I should also add that in the course of these earlier hearings, Mr. Christodoulides indicated that he might apply to cross-examine the joint administrators on their witness statements, but nothing came of this.

5 The GFSC supports the application and it has rejected the proposal made by Mr. Knight that a CVA would be preferable to a liquidation.

6 A large number of issues have been raised in this application by the parties, not only about CTMSL's finances, but its underlying businesses and related matters. Whilst it is neither desirable nor appropriate to set out every single issue, especially as an urgent determination of this application is required, the fact that they do not feature expressly in this judgment does not mean that they have been overlooked.

Standing

7 The joint administrators submitted that CTMSL had no standing to challenge this application. They said that the Act did not provide for this, nor did the Chief Justice's order of May 30th, 2023 that only referred to the directors retaining the power to appeal his decision appointing them. Mr. Grech who appeared for the joint administrators, also referred to *Brake* v. *Chedington Court Estate Ltd.* (2), where the standing of a bankrupt to challenge a decision of his trustee in bankruptcy was considered under the Insolvency Act 1986. He said that this authority showed that there could be no power vested in CTMSL or its directors to challenge this application.

8 Mr. Christodoulides said that the correct position was that a company such as CTMSL retained a residuary power to oppose an application such

as this and he relied on *Closegate Hotel Development* v. *McLean* (5) as authority for that proposition. Further, he said that *Brake* was irrelevant because it concerned whether a bankrupt had standing under the Insolvency Act 1986 to challenge transactions entered into by their trustee in bankruptcy in situations where the relief sought would have no impact on their position within the bankruptcy.

9 However, a more fundamental factual issue arose on the first day of the hearing regarding CTMSL's standing to oppose this application. This arose because it was unclear to me whether a majority of CTMSL's board of directors in fact supported the opposition to the application. Whilst it was clear from the documents filed that Mr. Knight was challenging the appointment of joint liquidators, there was nothing in the documents before the court confirming that the other two directors of CTMSL, namely Colin Gibbs and Paula Bullock, supported this course by the company. Following inquiries about this, Mr. Grech confirmed that Ms. Bullock, who was present in court, supported the joint administrators' application, and that then left Mr. Gibbs. After a short mid-morning adjournment to enable the parties to establish Mr. Gibbs' position, an email was produced dated October 18th, 2023 from Charles A. Gomez & Co. acting for Mr. Gibbs, and this states as follows:

> ". . . As you and Mr. Christodoulides know because you have seen the medical report of Dr. Vielma dated 17th August 2023 Mr. Gibbs is in no fit mental state to be involved in any litigation or other stress inducing matters; the doctor advises that any stress could have 'fatal consequences.'
>
> He is in no position to consider, let alone oppose any applications or otherwise engage in legal proceedings.
>
> In the circumstances I trust that Mr. Gibb's condition will be considered by all concerned and reserve all his rights and those of his family."

10 Mr. Christodoulides accepted that this meant that he was in difficulties because, contrary to the impression given, a majority of CTMSL's board of directors did not oppose the joint administrators' application. Mr. Christodoulides said that when he was instructed on July 11th, 2023, his general instructions had originally come from both Mr. Gibbs and Mr. Knight although at that point they could not have included any reference to this application, which came later. He added that Charles Gomez had notified him on September 7th, 2023 that he had been "approached" by Mr. Gibbs, but Mr. Christodoulides said that as far as he was concerned this did not alter his instructions from CTMSL. He said that the first he heard about Mr. Gibbs' position was on the morning of October 17th, 2023.

11 In the light of these last-minute developments, it was clear that at least as at October 17th, 2023, and as Mr. Christodoulides accepted, a majority

of CTMSL's directors did not oppose this application. Mr. Christodoulides went on to say, however, that Mr. Knight still wished to proceed with his objections to the application, and that he was aware of the risks that came with this course. By this point Mr. Knight had filed evidence in opposition to the application and Mr. Christodoulides had provided a skeleton and bundle for the hearing.

12 In the event that CTMSL did have a majority to oppose the application, the starting point in considering its standing to oppose this application is s.71(1)(b) and point 19 of Schedule 1 of the Insolvency Act 2011 ("the Act"). This refers to the powers that pass to administrators, including the power to make or defend an application for the winding up of a company. It seems to me that it would be a somewhat anomalous result if, as a matter of principle, a company could not challenge an application such as this one on the basis that that power had been assumed by the administrators, when they are in fact bringing the application. Nor is it an answer to say, as Mr. Grech suggested, that s.232 of the Act provides a route for an aggrieved person but only once the liquidation order is made. The better view, as explained in *Closegate Hotel Development* (5), is that the board of directors of a company retain a residuary power to challenge an application of this sort that would otherwise be a one-sided affair.

13 In this case, however, the exercise of that residuary power does not arise for the reasons set out above. Nevertheless, because of the timing of these developments, I did not consider that it would have been appropriate to shut Mr. Knight out of court, nor did the joint administrators commend such a course. It was on this basis alone that Mr. Knight's opposition to this application was entertained, but nothing should be read into that going forward.

The history behind the application

14 CTMSL is a regulated provider of corporate and trustee services.

15 On June 9th, 2021, Joanne Wild was appointed cell administrator of cells E, F, and G of Inspirato No. 2 PCC Ltd. ("Inspirato"). By a further order dated June 23rd, 2022, Ms. Wild was appointed as cell liquidator over these cells. Those orders were made based on a debt due to the cells arising from the purchase by the cells of fixed rate 6% loan notes from the KB Foundation under certain loan notes. Payment under those loan notes had become due, and Ms. Wild on behalf of the cells then demanded repayment from CTMSL as trustee of the KB Foundation for the sums due under those loan notes, namely £3,771,327.67. Payment was not made. Although CTMSL admitted that this debt was owed under the loan notes, its position was that it was not liable for the debt personally, and that Inspirato's liquidator can only look to the assets of the KB Foundation for payment, which are in fact insufficient to satisfy this debt.

16 Ms. Wild then applied for the appointment of administrators over CTMSL, which the Chief Justice granted on May 30th, 2023 (reported at 2023 Gib LR 413). In his judgment, the Chief Justice concluded that there was no substantial dispute as to the debt that CTMSL owed personally, and that as a result CTMSL was insolvent. He found that there was a reasonable prospect that an administration order would achieve a better result for the creditors than liquidation, and he appointed Mr. Edgar Lavarello and Mr. Luke Walsh insolvency practitioners of PricewaterhouseCoopers Ltd. to be CTMSL's joint administrators.

17 CTMSL is appealing the Chief Justice's order as it contends that it is not personally liable for that debt, and applied for a stay pending appeal. The application for a stay was refused by the Chief Justice, and he gave his reasons for that decision in an ex tempore judgment dated May 30th, 2023. In this judgment, the Chief Justice ordered that the directors of CTMSL retain the power to prosecute an appeal against that decision. Further, provided that they used their best endeavours to ensure that the appeal was heard at the next session of the Court of Appeal, he also ordered that the administrators should not without the leave of the court dispose of any assets other than in the ordinary course of business in the meantime.

18 These orders did not become effective until the determination of a renewed application for a stay was made to the Court of Appeal. The Court of Appeal heard that application on June 27th, 2023, and dismissed it in a judgment dated June 28th, 2023 (reported at 2023 Gib LR 495). This meant that as from that point, the joint administrators were able to take over the management of CTMSL's business. This, however, was subject to an important limitation. Paragraphs 40 and 41 of the judgment of Rimer, J.A. (*ibid.*) record the fact that the joint administrators provided an undertaking to the Court of Appeal that pending the determination of CTMSL's appeal they would not dispose of CTMSL's assets other than in the ordinary course of business. This was designed to hold the ring pending the appeal on the administration order, and reflected the terms of the Chief Justice's order of May 30th, 2023.

19 The joint administrators say that they gave that undertaking at a time when they did not appreciate the extent of CTMSL's insolvency that they now appreciate extends well beyond the Inspirato debt. They have since applied to be released from that undertaking.

20 Rimer, J.A. stated as follows (*ibid.*, at para. 22):

> "22 It is, however, clear that, at the hearing on May 30th, the Chief Justice was informed neither of the November 2022 High Court judgment nor of the pending winding up petition. I presume that was because Hassans, Mr. Knight's lawyers, were unaware of its existence. The existence of a pending winding up petition against CTMS based on an unsatisfied judgment debt of nearly £3.75m. was obviously

relevant to the disposal of the stay application that CTMS was making. Mr. Knight should have disclosed it."

21 As regards the financial position of CTMSL, Rimer J.A. further stated as follows (*ibid.*, at para. 27):

"27 I make clear that my brief summary of Mr. Knight's position with regard to the various judgments and awards against CTMS is indeed just that. He has dealt with them at length in his evidence and his explanations, at times complicated, are not easy to summarize. Ultimately, however, the details behind these claims and his explanations about them are not of direct materiality. It may perhaps be that, given time, and but for the making of the administration order, the judgment debts, petition and arbitration awards might somehow be satisfied or otherwise disposed of. But I take the view that this court cannot make any assumptions as to that. As matters stand, the Chief Justice has found CTMS to be liable to the liquidator for a sum of £3,771,327.67 that it has failed to pay. In 2022, the English High Court and Court of Appeal gave judgments against CTMS for sums of £3,744,964.08 and £140,000 respectively that it has failed to pay. CTMS is the subject of arbitration awards totalling £828,756.46 that it has failed to pay. Its said liabilities total something approaching £8.5m. It has paid none of it and such failure gives rise to an inference of material insolvency. It is facing a petition for its compulsory winding up on the ground that it is insolvent. It is also facing the QROPS claims for compensation of some £10m. Mr. Knight put before us CTMS's latest management accounts, which include a balance sheet as at April 30th, 2023 showing total net assets of £921,458. The creditors include the unsatisfied *Dooley* judgment for £140,000, but none of the other liabilities I have referred to. If they are taken into account, CTMS is massively insolvent."

22 As stated above, when this matter was last before me, Mr. Christodoulides said that the application made by the joint administrators to the Court of Appeal to be released from their undertaking should be dealt with before this application. The Court of Appeal was due to hear that application on October 9th, 2023 but, in the event, that application did not proceed as the Court of Appeal considered that this application should be determined first.

The legal framework

23 Under s.10(1) of the Insolvency Act 2011:

"A company—

. . .

(b) is insolvent if—

(i) it is unable to pay its debts as they fall due; or

(ii) the value of its liabilities exceeds its assets."

24 The reference to inability to pay debts as they fall due is known as "the cash flow test," and the reference to liabilities exceeding assets is known as "the balance sheet test."

25 In *BNY Corp. Trustee Servs. Ltd.* v. *Eurosail-UK 2007-3BL plc* (1), the Supreme Court of the United Kingdom referred to the "cash-flow" test and said that this was concerned with debts falling due from time to time in the reasonably near future, as well as debts currently due. What is the reasonably near future for this purpose will depend on all the circumstances, but especially on the nature of the company's business. Beyond the reasonably near future any attempt to apply a cash-flow test becomes completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. This is not an exact test, and the burden of proof is on the party which asserts balance sheet insolvency.

26 The application of *Eurosail* was considered by the Court of Appeal in *Carman* v. *Bucci* (3). The court observed that the balance sheet test and the cash flow test in the Insolvency Act 1986 were two tests which feature as part of the same exercise, namely to determine whether a company is unable to pay its debts. In the course of his judgment, Lewison, L.J. provided the following helpful summary of the *Eurosail* decision ([2014] EWCA Civ 383, at para. 27):

"27. In my judgment the following points emerge from the decision of the Supreme Court in *Eurosail* (and in particular the judgment of Lord Walker):

i) The tests of insolvency in section 123 (1) (e) and 123 (2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986: para [37].

ii) The cash-flow test looks to the future as well as to the present: para [25]. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business: para [37]. The test is flexible and fact-sensitive: para [34].

iii) The cash-flow test and the balance sheet test stand side by side: para [35]. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para [30]. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present

assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: para [37].

iv) But it is very far from an exact test: para [37]. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para [38]. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para [42]."

27 The powers of an administrator insofar as are relevant, as set out in s.46 of the Act:

"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.

(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."

28 The present application is made under s.62 of the Act that allows an administrator to apply to the court for an administration order to be discharged. This provides as follows:

"62.(1) The administrator of a company may at any time apply to the Court for the administration order to be discharged or to be varied and, if the order is to be discharged, the administrator may apply for the appointment of a liquidator.

(2) An administrator shall make an application under subsection (1) if—

(a) he considers that the objectives of the administration have been fully achieved or that the objectives are incapable of achievement; or

(b) he is required to do so by a meeting of creditors summoned for the purpose.

(3) On the hearing of an application under subsection (1), the Court may discharge or vary the administration order and make such consequential provision as it considers appropriate, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order it considers appropriate, including an order under section 63."

29 This application is made pursuant to s.62(2)(a), namely that the joint administrators consider that the objectives of the administration are incapable of achievement.

30 Under s.63 of the Act, where the court makes an order for the discharge of an administration order made in respect of a company and the court is satisfied that the company is insolvent, it may, amongst other things, appoint the administrator to be the liquidator under subs. (2).

The issues

31 The main issues which this application raises are as follows:

(1) Are the objectives of the administration incapable of achievement such that the administration order ought to be discharged?

(2) Is the court satisfied that CTMSL is insolvent? and

(3) Should the court in the exercise of its discretion order that joint liquidators be appointed over CTMSL?

The parties' rival submissions in outline

32 At the heart of this application is the question of CTMSL's alleged insolvency. The joint administrators' position, as set out in their witness statements, is that CTMSL is hopelessly insolvent, and that there is no prospect of it surviving as a going concern. Their view is that CTMSL has been trading insolvently for some time and that the administration could never have saved it to begin with, a fact that they established when they were able to consider the company's position properly following their appointment. Following an examination of numerous legal claims, judgments and orders made against CTMSL, their view is that the number and value of claims and awards against the company means that it cannot continue trading and that it is insolvent. In their view, CTMSL is both cash flow insolvent and balance sheet insolvent.

33 The joint administrators first provide details of CTMSL's financial position as at June 28th, 2023. They state that they were alarmed to find that CTMSL, as a regulated company, only had £3,947.66 in the bank at this point. Further, the profit and loss accounts for CTMSL also showed

considerable deficits for 2022 and 2023, namely –£912,493, and –£674,861 respectively.

34 The management accounts also show a deterioration of what used to be a profitable business as follows:

Quarter ended	Revenue	Expenses	Profit (loss)	Profit margin %
Oct 21	£415,346	£228,872	£186,474	45%
Jan 22	£386,859	£246,547	£140,312	36%
Apr 22	£436,906	£229,457	£207,449	47%
July 22	£466,520	£888,249	(£421,719)	–90%
Oct 22	£370,230	£362,809	£7,421	2%
Jan 23	£306,014	£369,558	(£63,544)	–21%
Apr 23	£301,403	£334,343	(£32,940)	–11%
June 23 (2 months)	£163,109	£198,907	(£35,798)	–22%

35 The joint administrators also state that despite the year-on-year decline in the company's profits, Mr. Knight was being paid around £30,000 p.m., employee costs stood at £36,000 p.m., and £9,350 p.m. was payable in rent and service charges. Further, from the sums paid to Mr. Knight, around £20,000 p.m. was attributed to marketing costs, which corresponded to between 22% and 26% of the company's income for the years ending 2021 to 2023. Entries taken from CTMSL's nominal ledger also show that Mr. Knight was using CTMSL's bank account for his own personal expenses, which were then being designated as marketing expenses for CTMSL. Mr. Lavarello also states that an internal accountant at CTMSL had informed him that Mr. Knight would pay for his personal expenses through CTMSL and that he would then instruct his employees to create an invoice to cover these expenses that would be posted as marketing expenses for CTMSL. Mr. Grech submitted that these arrangements had the hallmarks of a sham.

36 Turning to CTMSL's asset position, this was given as £1,083,186 by CTMSL as of June 30th, 2023. The joint administrators regard this figure as artificially high. It comprises the sum of £986,808 for debtors and receivables, but the joint administrators say that this includes bad debts that should have been written off. In the joint administrators' view, a true figure for these debtors and receivables is the considerably lower figure of around £216,000. Further, the joint administrators consider that the figure given for financial assets and investments, namely £611,978, has also been considerably overstated by CTMSL, and that a more accurate figure for this would be £100,000.

37 By way of summary, Mr. Lavarello provides the following table in his witness statement incorporating his adjustments that shows that rather than having assets of more than £1m., CTMSL has a liability of £199,228.

	June 30th, 2023	Adjustment	Restated
Tangible assets	£28,444	–	£28,444
Financial assets and investments	£611,978	(£511,978)	£100,000
Debtors and receivables	£986,808	(£770,436)	£216,372
Cash	£3,924	–	£3,924
Creditors and other liabilities	(£547,968)	–	(£687,968)
Net assets	**£1,083,186**	**(£1,282,414)**	**(£199,228)**

38 The joint administrators also calculated that the amount payable to creditors in the short term was £225,716.88, and they expressed concern at several large claims against CTMSL which had been omitted from the company's accounts referred to below.

39 An update was provided by Mr. Walsh setting out the true financial position as the joint administrators saw it as at September 20th, 2023, as follows:

Cash as at September 12th, 2023		**£96,638**
Expenses of the administration		
General trade expenses	(£36,875)	
Employee September Salaries (pro rata)	(£8,725)	
August PAYE and SI	(£6,691)	
Legal fees	(£73,630)	
Petitioning creditor legal fees	(£168,332)	
Administrators fees and disbursements		
Pre-administration	(£66,151)	
Legal matters	(£127,299)	
Secondment	(£37,155)	
General administration	(£264,514)	
Administration expenses incurred and unpaid		**(£789,372)**
Shortfall of cash less administration expenses		**(£692,734)**
Claims received or identified		
Preferential creditors	(£19,226)	
Unsecured creditors		
Angelus Law (*Dooley* claim)	(£35,000,000)	
Insolvency & Law (HSG claim)	(£5,589,084)	
Inspirato Fund (Cells E, F, & G)	(£3,867,660)	
Insolvency & Law (Charis claim)	(£3,744,964)	
Preston Turnbull LLP	(£913,095)	
Tamara Novicka (HSG claim)	(£105,000)	

Other unsecured claims	(£407,099)	
Total claims received or identified		**(£49,646,128)**
Total current shortfall of administration assets over expenses and claims		**(£50,338,862)**

40 As can be seen from these figures, the joint administrators' conclusion is that there is a shortfall of over £50m. and that most of this debt arises from claims against CTMSL by unsecured creditors.

41 Mr. Knight states that CTMSL is solvent. He states that there are significant uncertainties surrounding debts relied on by the joint administrators that they will not investigate, including whether CTMSL can enforce a right of indemnity over trust assets when it has acted as a trustee. Mr. Knight also relies on the evidence of Mr. Hodgen who states that there are significant failings in the joint administrators' accounting review, and who concludes that CTMSL has net assets of £66,110 based on the following summary of findings.

	Mgmt accounts June 30th, 2023	Adjustments Mr. Lavarello considers necessary	Restated June 30th, 2023 by Mr. Lavarello
Tangible assets	£28,444	£0	£28,444
Financial assets and investments	£611,978	(£511,978)	£100,000
Debtors and receivables	£986,808	(£770,436)	£216,372
Cash	£3,924	£0	£3,924
Creditors and other liabilities	(£547,968)	(£176,000)	(£723,968)
Net assets	**£1,083,186**	**(1,458,414)**	**(375,228)**

	Reversal of unnecessary adjustments	Restated June 30th, 2023 as I consider to be correct
Tangible assets		£28,444
Financial assets and investments	£150,000	£250,000
Debtors and receivables	£115,338	£331,710
Cash		£3,924
Creditors and other liabilities	£176,000	(£547,968)
Net assets	**£441,338**	**£66,110**

42 One clear difference of opinion relates to the value to be attributed to "assets and investments." The joint administrators have given a figure for this of £100,000 and Mr. Hodgen gives a figure of £250,000.

43 Mr. Hodgen's challenges the figure of £100,000 because he states that this is wrongly based on a distressed valuation of CFAL. He also relies on

the fact that CFAL has investments under management of $200m., and on a draft report from BDO that had previously valued CFAL at £800,000.

44 The joint administrators say that the £250,000 valuation is not realistic when one looks at CFAL's losses, and that Mr. Knight unrealistically relies on previously overly optimistic financial forecasts. Further, they say that the investments under CFAL's management belong to CFAL's largest client, and they refer to email exchanges with this client. These exchanges indicate that CFAL's main client is prepared to terminate its business with CFAL and find another provider, or it is prepared to acquire CFAL's business, that it says is of no interest to any other party, on a distressed basis for $15,000.

45 The joint administrators also challenge some other figures used by Mr. Hodgen to reach his conclusion. They say that Mr. Hodgen assumed a turnover in 2023 of £893,665, when in fact the 2023 accounts only showed a turnover of £119,691. Further, they say that the amount payable to creditors and other liabilities is £687,968, and not £547,968 as Mr. Hodgen states.

46 Further, Mr. Knight said that TSN's claim for £151,132.13 could be challenged because it related to fees arising from an illegal contract to perform legal services in England which TSN was not authorized to undertake. He also said that the sum of £17,695, which related to legal fees claimed by Locke Lord (UK) LLP referred to trust work which should be excluded and paid for from relevant trust assets.

47 Mr. Knight's conclusion was that irremediable damage would be caused to CTMSL if it were to be put into liquidation. In his oral submissions, Mr. Christodoulides added that whilst it was never an issue that CTMSL was under pressure, it had traded profitably for thirty years and had paid its debts, and that the only reason that it found itself in this position was because of the claims it was now facing. He said that there were various complex problems to be considered, and that the best course in his submission was for the administration to continue with the undertaking given by the joint administrators to the Court of Appeal to remain in place. Whilst initially, Mr. Knight said that a CVA was the appropriate course at this stage instead of an administration regime, Mr. Christodoulides later suggested that a CVA could run alongside the administration.

48 Turning now to the claims. I will deal first with the Inspirato claim, which is the reason why CTMSL went into administration in the first place. Having concluded that CTMSL was personally liable for this debt, and that there was no prospect that CTMSL could be rescued as a going concern because CTMSL was insolvent, the Chief Justice said that administration was preferable for CTMSL to liquidation. This was because administrators would be able to understand the value of the business, evaluate what assets it had and if appropriate sell assets. Things have since moved on. First, with the undertaking given by the joint administrators referred to above pending

appeal. Then, with the joint administrators taking the view that CTMSL is hopelessly insolvent and needs to be put into liquidation, and that they need to be released from that undertaking.

49 The next claim is the *Dooley* action that concerns claims made by 62 members of two qualifying recognized overseas pension schemes (QROPS) against CTMSL that acted as trustee and pension administrator. The claimants invested some £10.5m., and they claim to have lost a substantial value of their pension because of "unregulated, high risk, illiquid and wholly unsuitable" investments. These claims have been brought in the High Court in London. Although initially CTMSL successfully challenged the jurisdiction of the English courts to deal with this claim, the Court of Appeal overturned that decision. Following that decision, the claimants were awarded their costs, and CTMSL was ordered to pay £140,000 by way of interim costs, as well as the repayment of £11,000 that the claimants had paid in respect of costs following the first instance decision.

50 As a result of CTMSL's failure to pay these amounts due or file a defence, the claimants obtained a judgment against it on March 7th, 2023. The time to appeal this judgment has now passed, and no application has been filed for a stay of execution of the judgment. Although the assessment of damages hearing was scheduled to be heard after June 28th, 2023, this was stayed pending the administration order that came into force on June 28th, 2023.

51 The joint administrators consider that this claim is worth at least £10.5m., which is the sum that the pensioners lost, but that it could be as much as £35m. In this regard, they refer to an email from Martin McKenna of Angelus law dated July 18th, 2023 providing a rough assessment of the claim although Mr. McKenna states that ultimately an actuarial valuation of the claims will be required. Mr. McKenna also states that he had had sight of two insurance policies, one of which sought to exclude liability for these claims, and which he sets out in his email. He also states that CTMSL appears to be significantly underinsured.

52 The joint administrators' view is that whether the claim is £10.5m., or £35m., CTMSL does not have the financial resources to pay those amounts. Further, he states that even if the judgment debt is covered by the professional indemnity insurance, the cover provided is significantly lower than the value of the claim.

53 Mr. Christodoulides said that the approach of the joint administrators to this claim was too pessimistic. First, he said that the joint administrators had not conducted a proper review of this claim. He said that the Court of Appeal had noted that the proceedings in England were not about the mismanagement of the trusts once established, but rather whether the pensions should have entered into the schemes in the first place. Further, he said that the claims made against CTMSL concerned its alleged conduct

in encouraging and permitting pension transfers, which the Court of Appeal said would be hotly contested litigation. Mr. Christodoulides therefore submitted that the joint administrators had simply accepted the value of the claim attributed to it by the claimants' solicitors without having considered the claim themselves. He also said that Mr. Knight had offered to pay for the costs of these proceedings personally.

54 The second point made by Mr. Christodoulides was that TSN had acted improperly in English proceedings, as it is not authorized to practice in England & Wales under the Legal Services Act 2007. He said that the fact that they acted in those proceedings is clear from the judgment of the Court of Appeal which refers to counsel having been instructed by TSN Law, and the fact that counsel instructed in that case was not able to accept direct access instructions as was clear from his practising certificate. In his submission, this required an investigation, not only because it called into question whether TSN could claim the sum of £151,132.13 by way of fees for this matter, but also because a claim might lie against TSN that might assist CTMSL. This, he said would be based on negligence and an illegal contract having been entered, and may well entitle CTMSL to be put back into the position that it would have been in had the illegal contract not been made. A further point made about this by Mr. Knight in his witness statement was that Mr. Lavarello had a conflict of interests because his brother is a director of TSN. Finally, Mr. Christodoulides said that the possibility of the pensioners making a claim against a compensation fund should be explored by the joint administrators.

55 In response, the joint administrators provided an email exchange with TSN dated September 13th, 2023 setting out TSN's position. This states that TSN did not act for CTMSL in the English proceedings but only assisted it with that claim. Further, TSN states that it stopped assisting CTMSL with this matter when its fees were not paid, that it ceased to act on December 30th, 2022, and that CTMSL had time to file its defence which was due on January 25th, 2023. The joint administrators say that Mr. Knight has failed to explain why, if there is a defence to the claim, CTMSL failed to take action to defend these proceedings at the time.

56 I turn now to other claims that fall into a different category because they concern debts incurred by CTMSL as a corporate trustee. Mr. Christodoulides submitted that it was important to look at CTMSL's right of recourse against trust assets in these cases, which could result in CTMSL being reimbursed or exonerated for claims from "trust creditors" from trust assets. He said that these assets could be available for the benefit of "trust claims" and should not be available to CTMSL's general body of creditors. In Mr. Christodoulides' submission, this was a complex issue, and the correct approach was not to simply accept these claims as the joint administrator appeared to be doing without further consideration of these issues. For these reasons, Mr. Christodoulides said that putting CTMSL

into liquidation would have the effect of putting a corporate trustee into liquidation, and that could create more problems than it solved. In particular, he said that this might force CTMSL's resignation as trustee, which could result in a loss of control as to what happened after that. He said that there was no evidence that the joint administrators had considered any of this properly. He also said that the support of the creditors' committee for this application had been obtained on the basis that they would not be making any recovery, but that they had not been informed by the joint administrators about all these issues.

57 In his oral submissions, Mr. Christodoulides referred in general terms to *Equity Trust (Jersey) Ltd.* v. *Halabi* (7). He submitted that this decision had clarified that a trustee's right of indemnity was proprietary in nature and commended the judgment of Lord Richards, JSC and Sir Nicholas Patten ([2022] UKPC 36, at paras. 56–105). Mr. Christodoulides also said that the Privy Council had adopted the reasoning of the Australian courts in *Carter Holt Harvey Woodproducts Australia Pty. Ltd.* v. *Commonwealth of Australia* (4). In his submission, this was a powerful right that CTMSL enjoyed, and it was important for this to be investigated by reference to the primary documents establishing these trusts, something that the joint administrators appeared to be overlooking altogether. Further, he said that it was important to divide any debts between what he termed the "corporate estate," where assets and liabilities are not linked to CTMSL's trusteeship, and the "trust estate" where indemnities existed. He also said that the value of CTMSL's right to an indemnity should be reflected in CTMSL's accounts in some way or another, possibly by way of a note.

58 The first claim falling into the "trust estate" category is a claim made by Michael Allen and others against Avantis Wealth Ltd. ("Avantis") and CTMSL. The claim concerns investments totalling £3,315,000 in Charis Capital Management ("Charis") by way of loan notes promoted by Avantis and where CTMSL acted as security trustee for the claimants. When Charis defaulted on these loan notes, the claimants brought a claim in the High Court in London. The claim against CTMSL was primarily for breaching their duty of care as security trustee.

59 CTMSL's defence was struck out due to its failure to comply with an unless order, and a judgment was then entered against it totalling £3,744,964.08 plus costs. On March 20th, 2023, CTMSL was provided with formal notice that the claimants had assigned the judgment debt to Insolvency and Law Ltd. ("I&L"). In June 2023, I&L filed a petition in the UK courts to wind up CTMSL, and Mr. Walsh persuaded I&L not to proceed with it.

60 There are two other similar claims both of which involve a similar structure, namely a UK entity raising funds to develop property using loan notes to investors, with CTMSL acting as security trustee and having a

charge over the assets. The first relates to High Street Group ("HSG") where a claim for £5,589,083.58 by note holders assigned to I&L has been submitted in the administration. The joint administrators say that HSG has been placed in administration and that its assets, despite being the subject of a debenture in favour of CTMSL, were transferred out of HSG to another entity. Further, they say that I&L has informed them that it is considering a third-party claim for negligence against CTMSL and that further to legal advice received, I&L considered that it had a good case. The other claim is by Ridgemere Developments Ltd., and again there appears to have been a default under the loan notes although no actual claim has been submitted yet.

61 Mr. Knight again considers that the joint administrators' approach to these claims is too pessimistic. He states that to determine whether CTMSL has personal liability it is necessary to consider all the documents for each transaction. He refers to the security deed and states that CTMSL was acting solely in an administrative and mechanical capacity. Further, he states that it is not clear whether the joint administrators have considered any of the transaction documents or security documents to establish whether claims can be made against CTMSL's own assets.

62 As for the judgment and winding-up petition in the Charis claim, Mr. Knight says that CTMSL had adequate security over land and shares in a development to cover this liability. Further, he said that CTMSL had applied through the English courts to put the development company into liquidation, and that he had been in touch throughout with Anthony Hyams of InsolvePlus who had been appointed as the liquidator, and that the plan was to put together a rescue plan or realise this security.

63 In response, Mr. Walsh says that he has considered the Ridgemere trust deed, and he considers that it is drafted in such a way that makes it difficult for CTMSL to enforce its security. Mr. Grech also said in his oral submissions that if the allegations of negligence against CTMSL are borne out, this may make it difficult to rely on any indemnity.

64 Finally, I turn to the Turnbull Preston LLP claim for fees. Further to an arbitration award dated March 27th, 2023 ordered CTMSL, Mr. Knight and others are required to pay £865,731.15. Mr. Knight refers to the background to this debt which arises from his relationship with former clients, Mr. and Mrs. Crowther and their business operating vessels providing services in the construction of offshore wind farms and oil and gas subsea operations. These ships were owned by Castle Ship Management Ltd., which Mr. Knight said was beneficially owned by him through Castle Nominees Ltd. under a standard bare trust. The ships were then bareboat chartered to Atlantic Marine & Aviation LLP ("AMA"), the partnership that previously owned the vessels.

65 Following divorce proceedings between Mr. and Mrs. Crowther, Mr. Knight states that he instructed Preston Turnbull LLP to set aside a freezing injunction made against him and companies he controlled from disposing of four of these vessels. After further litigation, a settlement was entered into by Mr. and Mrs. Crowther in respect of her claim to beneficial ownership of the vessels. There followed a dispute between Preston Turnbull LLP and Mr. Knight which was referred to arbitration and which resulted in the arbitration award against CTMSL for this amount.

66 Mr. Christodoulides said that this was not a case of CTMSL acting as a security trustee but rather as a bare trustee and that it was therefore the legal owner of the ships. As such, he said that CTMSL ought to have right of reimbursement because of the liability that arose from CTMSL's trusteeship. Further, he stated that the value of the vessels is $10m., that hire has not been paid under the bareboat charter and that the arbitration award could be settled from the refinancing of the vessels.

67 Mr. Walsh, however, rejects Mr. Knight's proposal. He states that he has been informed by CTMSL's employees that the ships are ultimately owned by Braemar Employee Benefit Trust. Thus, his view is that it would only be possible to refinance the vessels for the benefit of Braemar Employee Benefit Trust, and not to repay the Preston Turnbull LLP debt.

Analysis

68 Putting to one side for a moment the large claims that run into the millions, I deal first with Mr. Knight's challenge to the joint administrators' conclusion that CTMSL is insolvent even before these claims are taken into account.

69 I do not consider that Mr. Hodgen's conclusion that CTMSL has net assets of £66,110 is a sound one, although I note that his instructions have come from Mr. Knight and that he does not appear to have been provided with an accurate and current picture of CTMSL. In particular, I do not consider that Mr. Hodgen's upwards adjustment to £250,000 in respect of "financial assets and investments" is accurate for the reasons given by the joint liquidators and in the light of their exchanges of CFAL's largest client which I have set out above. Indeed, it appears that the value given to this item by the joint liquidators of £100,000 may itself be excessive in the light of the position taken by the CFAL's largest client, namely, buy CFAL for $15,000, or take its business elsewhere.

70 Mr. Hodgen also appears to have overestimated turnover and underestimated amounts payable to creditors and other liabilities in light of the figures provided by the joint administrators. Without going further into disagreements between the joint administrators and Mr. Hodgen about smaller sums, and even putting to one side TSN's claim for fees, one can see that contrary to what Mr. Hodgen states, and considering the updated

figures provided by Mr. Walsh, a realistic analysis of CTMSL's current balance sheet shows that its liabilities exceed its assets.

71 One then needs to look at the position more broadly. There is no real prospect of CTMSL generating income going forward. This is because the premium for CTMSL's professional indemnity and directors' and officers' insurance policy was due for renewal on September 25th, 2023, and due to lack of funds, the joint administrators were unable to renew it.

72 There are then the various claims that CTMSL is facing. Turning first to the Inspirato claim, the Chief Justice has held that there is no substance to Mr. Knight's defence to that claim worth over £3.7m., and an appeal is pending. At this stage, therefore, the position is that CTMSL has been held liable for this sum, and that it is due by CTMSL personally, as the Chief Justice's decision has held that the corporate documents do not limit CTMSL's personal liability contrary to what CTMSL contended.

73 The Court of Appeal in considering Mr. Knight's application for a stay pending appeal observed that it could not express a view on its outcome. All they said was that they were not of the view that CTMSL's proposed appeal had no prospect of success. Mr. Knight has not produced any further material to explain the basis on which CTMSL is purporting to pursue the appeal. Further, whether the appeal will go ahead now appears to be in doubt in the light of Mr. Gibbs' clear statement that he is in no position to consider, let alone oppose, any applications or otherwise engage in legal proceedings. It therefore looks like the board of CTMSL does not have a majority to pursue an appeal. At this stage, I consider that the joint administrators are correct to deal with the Chief Justice's judgment as establishing a significant debt owed by CTMSL.

74 Mr. Knight indicated that the outcome of the Supreme Court decision suggests that there may be a claim in professional negligence against CTMSL's advisors. This, however, was nothing more than an assertion on the part of Mr. Knight in response to the adverse outcome for CTMSL on this claim. I do not consider that a reference of this sort to such a claim alters the position regarding this debt.

75 There is then the *Dooley* claim. The first issue that needs to be addressed here is the fact that CTMSL was ordered to pay £140,000 arising from its failed jurisdictional challenge. This was not paid and, as a result, judgment was entered against CTMSL on March 7th, 2023. Mr. Knight has not explained why he allowed this to happen, other than to say that TSN were not authorized to act in English proceedings. Mr. Knight has also said very little about any substantive defence that might exist to that claim and has focused on complaining about how ready the joint administrators have been to accept the claim. Given that Mr. Knight was a director when these proceedings were commenced and was involved in the arrangements that led to the claim being brought, one would have expected Mr. Knight to say

more about any substantive defences that he considers exist to this claim, and why judgment was entered.

76 Although the Court of Appeal's judgment *Dooley* v. *Castle Trust & Mgmt. Servs. Ltd.* (6) dealt only with the jurisdiction challenge, this provides some background to the claim. This refers to this claim arising from a "pension scam" whereby a Cypriot intermediary, possibly acting for CTMSL as a "middleman" was said to have been paid large amounts for the transfer of UK pensions to Gibraltar. The pensioners contend that they had valuable UK-based pensions, and because of these arrangements, they ended with inappropriate, expensive, offshore pension arrangements with CTMSL, invested in unregulated collective investment schemes of little or no value.

77 The Court of Appeal's judgment sets out the particulars of claim and this makes it clear that the claim against CTMSL is that it engaged in a joint venture and/or common design to engage in activities involving the commission of torts against the pensioners. Further, several personal claims are advanced against CTMSL based on duties that it is alleged it owed the pensioners in tort, contract and as a fiduciary which are set out more fully in the pleading.

78 Carr, L.J. states in the concluding paragraph of her judgment that nothing in the judgment determines any of the substantive issues of law or fact in what will no doubt be hotly contested litigation. These comments are unsurprising as the issue before the Court of Appeal was only jurisdiction. This background, however, suggests that if this claim is to be defended, it is likely to be complex and costly litigation. This is all further complicated by the fact that judgment has now been entered against CTMSL. At the very minimum to defend the proceedings, the order for costs against CTMSL of £140,000 will have to be paid and the sum of £11,000 returned to the claimants following their successful appeal on jurisdiction. CTMSL's financial position hardly allows for any of this at present. Even if the judgment is not set aside and there is to be a contested hearing on damages, that too appears to be a complex exercise.

79 Based on the limited materials before the court, I cannot say what might be achieved from defending the *Dooley* claim, contesting the amount of damages claimed, or whether anything will be achieved from suing TSN. What can be said with some certainty is that these are not straightforward matters, and that they are likely to result in considerable cost. That does not mean that the joint administrators should not fully investigate these matters, but it hardly provides an answer to CTMSL's state of insolvency at this stage.

80 Mr. Knight has stated that he is prepared to fund this litigation and generally introduce funds into CTMSL, but this appeared to me to be a vague offer. There was no evidence provided by Mr. Knight about his

financial position, whether realistically he has the means to fund this sort of expensive litigation, and whether he has properly costed it. Further, one would have thought that if he did have the means to fund this litigation, he would have paid the order requiring payment of £140,000, returned the £11,000 owed to the claimants, and ensured that a defence was filed rather than allow CTMSL to be put into this situation.

81 The offer to fund this litigation also appears to be at odds with Mr. Knight's demands for payment by the joint administrators of a personal dividend due to him personally of around £100,000, and which CTMSL is holding. The joint administrators have also made demands for payment of sums that appear to be due by Mr. Knight to CTMSL and CFAL of £57,542.51 and £118,775 respectively. These demands are based on accounting records maintained by CTMSL when Mr. Knight was still a director. Mr. Knight has requested further information in relation to these sums claimed, and no payment has been made. Based on this information, the offer by Mr. Knight to introduce funds into CTMSL rings hollow. The fact that the joint administrators may have claims against Mr. Knight personally also complicates matters in this regard. In my view, little or no weight can be given to Mr. Knight's offer in the evaluation of CTMSL's solvency.

82 Another point made by Mr. Christodoulides in the course of his oral submissions was that the pensioners in the *Dooley* claim might be able to claim against a compensation fund. This was not really developed in any meaningful way, but even if that were possible, it might not be an end to the matter. Compensation schemes often take an assignment of claims when they pay out which would mean that the claims against CTMSL would not necessarily be extinguished if this were to happen.

83 It might well be premature to give a value to this claim of either £10.5m. or £35m., and there may well be avenues that need to be explored before simply accepting the claim. The joint administrators are correct in my view, however, to regard this claim as one that places a further significant financial strain on an already insolvent company. Further, as Mr. Christodoulides accepted, there is no question of trustee security being available in this case.

84 I turn now to the Charis, Ridgemere and HSG transactions. These three transactions appear to have arisen in similar circumstances where CTMSL has acted as security trustee. In the case of the Charis transaction, there is a judgment debt of over £3.7m., which is the basis on which a winding-up petition has been brought against CTMSL. Further, a claim has been filed by Ridgemere for over £5m. in the administration.

85 Even if one proceeds on the basis that CTMSL can be indemnified as a trustee and that it enjoys a proprietary right in that regard, what Mr. Knight's assessment appears to overlook is that this is unlikely to be an

entirely straightforward process, and that legal proceedings in the UK may be required to enforce CTMSL's security. Mr. Walsh also makes the point that if the Ridgemere trust deed is anything to go by, it may be difficult for CTMSL to enforce its security. This will all need to be considered carefully, including the value of the security. Even if there is light at the end of the tunnel, my view is that the enforcement process alone will again place a financial strain on CTMSL, and that there are no guarantees for a full recovery.

86 The position regarding the Preston Turnbull LLP claim is similar. An arbitration award has been made against CTMSL in the sums of £865,731.15. Mr. Knight says that this can be settled by refinancing ships, but Mr. Walsh does not consider this to be feasible. It is not possible to say with any certainty whether a positive outcome can be achieved by CTMSL, but it seems to me that, once again, the resolution of this matter cannot be said to be straightforward, it will require funds, and the position at present is that there is an unsatisfied arbitration award against CTMSL.

87 Against that background, the first issue for the court's consideration is whether the objectives of this administration are incapable of achievement?

88 It does not seem to me that CTMSL is capable of rescue. The company's accounts show that it is a business in decline, and that it has experienced two years of heavy losses. Further, there have been an accumulation of claims made against it, resulting in an adverse decision, two judgments and an arbitration award so far. The Chief Justice has found that the documents governing the Inspirato claim do not limit CTMSL's liability as it thought it did. The *Dooley* claim is not a claim brought against CTMSL in its capacity as a corporate trustee, and it therefore does not have trust assets it can look to for an indemnity. The potential claim against TSN is at best something to be explored, but hardly provides a cast iron defence to this claim. Even when one looks at the claims where CTMSL enjoys a right of indemnity against trust assets, it remains to be seen what those assets are, how effective the enforcement process is, and the cost involved in all of that.

89 It is not realistic to say on the materials before the court at this stage that further investigations and defending the claims on all these fronts will turn around CTMSL's fortunes, even if that were a financially viable course which does not appear to be the case. At best, the position seems to be that there may be ways to mitigate some of these losses. The critical question, however, is whether CTMSL's state of insolvency can be avoided. The answer to that question is plainly "no," and that CTMSL is hopelessly insolvent.

90 The joint administrators were unable to pay the premium for CTMSL's insurance, which means that since September 25th, 2023, it has been unable to trade, and it is unable to generate any further income. This

also means that its clients will need to find alternative fiduciary service providers urgently. Further, the joint administrators' view is that CTMSL's insurance policy includes several worrying exclusions, and that in any event, the cover is not sufficient to cover CTMSL's liability in full.

91 Nor does it seem to me that administration will achieve a better result than a liquidation. For a start, if the administration continues, it is subject to an undertaking preventing the joint administrators from selling CTMSL's assets, which it appears is largely its portfolio of around 200 clients. If matters are dragged out further, these clients will just walk away which will mean that the joint administrators will be unable to raise some money for the creditors by selling this business portfolio.

92 The other issue to consider is whether administrators would be better placed than liquidators to pursue CTMSL's right of indemnity as a security trustee. Although Mr. Christodoulides suggested that putting CTMSL into liquidation could present problems in this regard, this concern was only raised in very general terms. I do not read the authorities relied on by Mr. Christodoulides as establishing a principle that the liquidation of a corporate trustee puts it in a worse position than prior to its liquidation. In fact, the judgment of Lord Richards, JSC and Sir Nicholas Patten in *Halabi* (7) provides an overview of the nature and characteristics of the right of indemnity and they state as follows ([2022] UKPC 36, at para. 64):

> "Fifth, a trustee's right of indemnity, whatever its nature, is not lost when a trustee ceases to be a trustee. Whether or not it is a purely personal right, it remains enforceable by the former trustee and, in the case of a formal insolvency of the trustee or the death of an individual trustee, it remains enforceable for the benefit of the trustee's estate."

93 When the Chief Justice ordered that CTMSL enter administration, this was on the basis that the administrators could understand the value of the business and its assets, and if appropriate sell CTMSL's portfolio to another company operating in the sector. Given the way that the proceedings have developed, the joint administrators' undertaking given to the Court of Appeal now prevents them from selling this portfolio of clients. At a hearing on October 9th, 2023, the Court of Appeal confirmed that this application should proceed before the joint administrators' application to be released from that undertaking because if it was successful, the application before the Court of Appeal would fall away. The efforts of the joint administrators so far have laid bare how dire CTMSL's position is, and a continuation of the administration would be at odds with the intention behind it, as stated by the Chief Justice, because it is likely that the chance to sell CTMSL's portfolio of clients would be lost.

94 The next question is whether the court should exercise its discretion to appoint liquidators having regard to all the circumstances of the case.

95 As well as all the matters set out above which point to the appointment of liquidators being the correct way forward, I note that the creditors' committee support a conversion to a liquidation. Mr. Christodoulides said that when considering this, one should bear in mind that the creditors had not been properly informed about CTMSL's right of indemnity as a security trustee. I cannot say how well informed the creditors are about this issue. In any event, I do not consider that the creditors not being fully aware of this issue invalidates their approval, which was unanimous. There are significant claims that do not arise from CTMSL acting as a corporate trustee, and the conclusion of the creditors' committee stands to reason in all the circumstances. The GFSC also support this application. Whilst the support from the creditors and GFSC are not decisive factors, they militate in favour of the order sought being granted. Further, the correct position as it emerged at the hearing and as set out above, is that CTMSL is not opposing the application, and that Mr. Knight is the only director of CTMSL who is opposing the application.

96 Mr. Knight's position is that a company voluntary arrangement, or CVA, is a better option rather than liquidation. At one point, Mr. Christodoulides said that this might run alongside the administration.

97 A CVA is a formal procedure governed by Part 2 of the Act. Unlike administration where insolvency practitioners are appointed as administrators and take control of the company, a CVA is designed for companies that are considered viable. Under a CVA, a company's directors are to retain control of the company and continue its operations, provided that they abide by the terms of a formal agreement setting out the terms under which the company will pay its debts over time which includes input from creditors. This requires the approval of the majority of the company's creditors. Further, an insolvency practitioner is appointed as an interim supervisor, but their role is quite limited as the company's directors retain control. One of the main responsibilities of the interim supervisor is to help to negotiate a new set of repayment terms. Further, under s.14(1) of the Act, the GFCS's written consent is required for a CVA to be entered into. In this case, neither the creditors nor the GFSC have approved a CVA, and they both favour liquidation. The GFSC does not consider that a CVA is a viable solution in this case because:

(1) A liquidation is the only realistic way forward.

(2) The directors had the opportunity to take the CVA route prior to the appointment of the joint administrators but did not do so.

(3) A CVA would usually be appropriate where a firm's financial issues are relatively short term and the firm is very likely to recover its business to profit, which is not the case here.

(4) From the joint administrators' evidence, the GFSC is concerned that CTMSL's financial difficulties have arisen because of poor management, and it is not therefore appropriate for the directors to retain control of CTMSL.

98 In the circumstances, Mr. Knight's proposals about the CVA option do not even get off the ground. In any event, this is an entirely unrealistic proposal in all the circumstances. CTMSL's business cannot be saved as a going concern. It would also be inappropriate for Mr. Knight to retain any control over CTMSL in circumstances where there are clearly concerns about his management of CTMSL, and where the joint administrators have indicated that they are investigating possible claims against him.

99 In my view, the support by the creditors and the GFSC for the appointment of joint liquidators is justified in all the circumstances. As is often the case with directors of companies that get into difficulties, Mr. Knight appears to be taking a very rosy view of the prospect of resolving the many considerable challenges that CTMSL is facing and saving the company. In my view, however, he is seriously underestimating the nature and cost of these challenges. Taking a more realistic view, there are in fact good reasons for the order sought to be made, and for liquidators to be appointed.

100 Finally, that leaves the question of whether the joint administrators should be appointment as joint liquidators. In this regard, Mr. Knight has pointed out that Mr. Lavarello has a conflict of interests because his brother is a director of TSN, which is a creditor in the liquidator, and because TSN is potentially the subject of a claim. In response Mr. Walsh has said that this has been raised with the creditors' committee and that safeguards have been put in place to either appoint an independent regulated insolvency practitioner to adjudicate upon the claim by TSN for fees or to report to the committee on the TSN claim so that the committee members can adjudicate on the validity of the claim or otherwise. Provided these safeguards extend to any claim that might need to be investigated against TSN in respect of which no view can be taken by the court one way or another at this point, I regard this as a satisfactory way in which to deal with this issue.

101 Apart from this, Mr. Knight complained that the joint administrators had not been investigating matters appropriately, especially in relation to CTMSL's right of indemnity when it acted as a corporate trustee. Again, as is often the case for directors who are forced to cede management control of their business, it will often be difficult for them to accept that they have been sidelined, and that court appointed officers might view and approach matters differently from them. The position as I understand it is that the joint administrators are not disregarding the right of indemnity that CTSML may enjoy, but that they consider that this issue is perhaps less straightforward than Mr. Knight is suggesting.

102 Given that the joint administrators are now familiar with the affairs of CTMSL, I consider that it is appropriate for them to be appointed as joint liquidators subject to the safeguards referred to above.

Conclusion

103 CTMSL is insolvent, and the proper course at this stage is for the administration to be converted into a liquidation. I therefore make an order appointing the joint administrators as joint liquidators subject to the safeguards referred to above. They have given notice of their intention to apply for that office and no creditor has objected to their appointment.

104 The joint administrators seek an order for costs against Mr. Knight personally, and I will hear that application on the handing down of this judgment, as well as any other consequential matters that might arise.

Judgment accordingly.