[2023 Gib LR 799]

THE HIDEAWAYS CLUB LIMITED v. KABEL

SUPREME COURT (Restano, J.): December 20th, 2023

2023/GSC/047

Documents—interpretation—business common sense—when construing commercial documents, court to ascertain objective meaning from language used by parties—court to construe contract as whole—if two possible meanings, court to prefer construction consistent with business common sense

The parties referred certain preliminary issues to the court for determination.

These proceedings concerned an agreement entered into by The Hideaways Club Ltd. ("the club"), the claimant in these proceedings; The Hideaways Club Property Company Ltd. ("the property company"); and Lakshmi GmbH. The agreement related to a fractional ownership scheme that provided investors with access to holiday homes for specified periods, as well as shares in a fund owning those holiday homes. The club maintained and ran the properties, the property company owned the properties and Lakshmi GmbH was an investor. The defendant in these proceedings was Lakshmi's representative. The critical issue between the parties was whether investors could cease to be members of the scheme that allowed them to make use of the properties, and thus stop being liable for annual cost contributions ("ACC"), whilst remaining as shareholders in the property company. The defendant (and others) considered that it was possible to do so and they had stopped paying the ACC. The club did not consider that this was possible and brought this claim for non-payment.

The parties agreed that five documents together constituted the agreement that governed the contractual relationship between them: (i) the private information memorandum dated December 19th, 2007; (ii) the subscription agreement dated July 1st, 2008; (iii) the club membership form dated July 1st, 2008; (iv) the club constitution dated February 12th, 2008; and (v) the articles of association dated September 20th, 2007.

The parties agreed to refer to the court seven preliminary issues as to the construction of the agreement:

"a. Is the Defendant correct in his assertion that membership of the Claimant runs for 12 calendar months as asserted at paragraph 36.6 of the Defence and Counterclaim and that as a result Annual Cost Contributions (hereinafter 'the ACC fees') are no longer payable in

the event that a member's membership is frozen pursuant to [cl.] 17.3 of the February 2008 Club Constitution, as pleaded at paragraphs 36.1 of 38.1 of the Defence and Counterclaim?

b. In the event that a member is more than 26 weeks in arrears in paying the ACC fees, is the Claimant obliged contractually to terminate that membership, expel the member in question and attempt to forfeit that member's share under clause 17.4 of the February 2008 Club Constitution, as pleaded at paragraph 4. 36.3 and 37.6 of the Defence and Counterclaim?

c. Does the Claimant's failure to attempt to exercise any rights it may have as set out above extinguish a member's indebtedness for outstanding ACC Fees as pleaded at paragraph 4 of the Defence and Counterclaim?

d. Subject to a–c above and the proper exercise of any rights the Claimant may have, is a member's obligation to pay the ACC an enduring and accumulating obligation throughout the subsistence of the membership, and does such obligation endure until such time as membership is terminated?

e. Is the express consent of the members required before the Claimant can amend the terms of the February 2008 Club Constitution as it deems necessary or expedient from time to time for the better and more effective running of the Club under paragraph 2.4 of the 2008 Club Membership Form and [cll.] 14.1 and 18.3 of the February 2008 Club Constitution as asserted by the Defendant at paragraph 9 of the Defence and Counterclaim inter alia?

f. Does the Gibraltar Timeshares and Related Contracts Act 1997 ('the Act') apply to the totality of the Agreement or just to an Applicant's cancellation rights under paragraph 8.1 of the 2008 Club Membership Form and paragraph 7 of the 2007 Private Information memorandum?

g. If the answer to questions e to f is yes, can the Claimant rely on paragraph 2.4 of the 2008 Club Membership Form as the Defendant's consent to future amendments of the February 2008 Club Constitution without express consent approval in appropriate circumstances on each occasion or does this contravene S.5(5) of the Act?"

Paragraph 2.4 of the club membership form provided:

"The Applicant acknowledges and agrees that the Club Constitution may be amended by the Club Company from time to time for the better and more effective running of the Club and gives his consent thereto."

The following rules of the club constitution were also relevant:

Rule 13.5: "If the Annual Contribution has not been paid within four weeks of its due date the provisions of 17.3 shall apply."

Rule 17.3: "Where the whole or any part of the relevant Annual Contribution or any Membership is unpaid more than four weeks after the making of the demand for such contribution, the Member shall for that year lose his rights to the use of the Properties, and, the Member

will not be able to make any further reservations or use any further services of the Club until payment has been received (and until paid any outstanding booking will be deemed cancelled in accordance with Rule 11)."

Rule 17.4: "If the relevant Annual Contribution shall remain unpaid for more than 26 weeks the Club shall be entitled to terminate the rights of Membership of the defaulting Member in accordance with the following procedure . . ."

In respect of preliminary question (a), the claimant submitted that (a) when the scheme was originally conceived membership of the club was not compulsory and investors were able to invest solely in the property company without enjoying the timeshare-like benefits of the club; (b) the defendant had elected to become a member of the club; (c) whether investors joined the club by choice or as a requirement, it was not possible for them to relinquish their membership of the club and remain as pure investors in the property company; (d) the exit route for investors who no longer wanted to remain as members was to sell their shares; (e) the payment of the ACC was like services charges payable by owners of a property in a block of apartments, where the obligation to pay continued until the property was sold; (f) the investors were all self-certified as experienced investors who had confirmed that they had read and understood the documents comprising the agreement; and (g) membership of the club was linked to shareholding in the property company, and it could only be relinquished with the sale of the shares. The defendant submitted that (a) the PIM that applied when the defendant invested in the property company made it clear that ownership of shares and membership of the club were separate, and that club membership was optional for the defendant; (b) the intention of the parties could not have been to force the defendant, an investor who elected to join the club, to remain a member, which was an impermissible change in what the parties had agreed; (c) the clear intention of the parties was that membership would run for 12 months, given the repeated references to "annual" and "yearly" throughout the agreement; (d) the club guide dated March 2008 referred to payment of annual costs, to a member resigning "during their membership year" and to increases in the ACC taking effect on the member's "renewal date"; (e) the claimant's website at the time that the agreement was entered into referred to the annual nature of the membership; (f) if the obligation was ongoing, it was so unusual and onerous that it should have been clearly identified in the agreement; (g) rr. 13.5 and 17.3 of the constitution made it clear that non-payment of the ACC for four weeks resulted in the member losing his rights to use the properties; (h) it followed that a member could not be expected to continue to pay for a service that the club had stopped him from using, and the application of r.17.3 extinguished future liability to pay the ACC; and (i) it would be absurd for the club to be able to claim future fees when the member could not enjoy membership of the club.

In respect of preliminary question (b), the claimant submitted that (a) r.17.4 of the club constitution made it clear that the club was entitled to

expel defaulting members and forfeit their shares but that it was not obliged to do so; and (b) the meaning contended for by the defendant did not reflect the clear wording of this rule and would allow members to terminate their membership by not paying the ACC. The defendant submitted that (a) where the ACC was owing for 26 weeks or more, the club was contractually obliged to terminate the defendant's membership within a reasonable time; (b) to conclude otherwise would result in an unreasonable outcome, namely the ongoing liability to pay the ACC; and (c) the club was obliged to enforce because this duty was "baked into the Agreement."

In respect of preliminary question (c), the claimant submitted that the club's decision not to exercise a right could not extinguish the enduring liability to pay ACC fees contrary to the clear terms of the club constitution. The defendant submitted that (a) once he lost his right to use the properties for non-payment of the ACC in 2020, the club could not claim three years of ACC by failing to exercise its rights under r.17.4 of the club constitution; and (b) once he lost the rights to enjoy the properties, the club was obliged to terminate his membership and his ongoing obligation to pay the ACC ceased.

In respect of preliminary question (d), the claimant submitted that (a) the obligation to pay the ACC was an enduring one; (b) the defendant, as an experienced investor, must have appreciated that property ownership, albeit joint or fractional ownership, would include concomitant costs of upkeep and maintenance of the properties, which could not simply be discontinued at will; and (c) the enduring nature of the relationship was confirmed in the PIM that stated that the shares would not be redeemed by the property company and the ability to realise the investment depended on someone acceptable to the property company being willing to purchase the shares. The defendant submitted that (a) the obligation to pay the ACC could not be an enduring one and had in fact ended at the expiry of the 26-week period; (b) because he had the option to become a member of the club, it was unfair and unreasonable to impose an enduring obligation on him to pay the ACC for a membership that he had now been prevented from using; and (c) because the club had breached the terms of the agreement, he had a right to rescind it.

In respect of preliminary question (e), the claimant submitted that (a) the club could change the club constitution for the better and more effective running of the club if necessary or expedient; (b) therefore there was no proper basis for the defendant to say that the consent of all the members was required for amendments to the club constitution; and (c) it would be unworkable for each member's approval to be required for amendments, however minor. The defendant submitted that (a) amendments could only be made for the better and more effective running of the club, and could not entail unilateral documentary changes to increase the defendant's liability to pay more money to the claimant or to have reduced or no real access to the properties, or to turn any right to club membership into an obligation without his consent; (b) the club and the property company had purported to make numerous unilateral variations to the agreement that

lacked consideration as they had the effect of increasing their financial benefits and limiting the defendant's rights and entitlement to enjoyment of the properties as agreed; (c) these changes were also contrary to s.5(5) of the 1997 Act that required the express consent of the defendant; (d) the amendments made to the club constitution went beyond the narrow confines of "the better and more effective running of the Club" and amounted to a breach of the duty of utmost good faith that the claimant owed the defendant; and (e) the amendments breached s.25 of the Companies Act 1930, which provided that a member of a company was not bound by any amendments to its articles after the date on which he became a member if such an amendment would increase his liability to contribute to share capital or otherwise pay money to the company.

In respect of preliminary question (f), the claimant accepted that the Timeshare and Related Contracts Act 1997 applied to the entirety of the agreement, although it was not relevant to many aspects of it. The defendant submitted that the 1997 Act applied to the entirety of the agreement, including the provisions on termination and variation of documents.

In respect of preliminary question (g), the claimant submitted that the power to amend the club constitution in the circumstances set out in the agreement was not one of the integral features of the agreement, as provided under the 1997 Act, which could only be amended with the approval of the defendant. The defendant submitted that (a) s.5(5) of the 1997 Act clearly stated that any changes to certain information contained within the timeshare contract had to be communicated to the consumer before the contract was concluded; and (b) therefore para. 2.4 of the club membership form could not be relied on by the claimant to effect amendments to the club constitution.

Held, ruling as follows:

(1) *Preliminary question (a).* There were two parts to the first preliminary question: whether club membership only ran for 12 months and whether the ACC ceased to be payable if membership was frozen. The main document that dealt with the rules on membership was the club constitution. Rule 13 pointed to a continuing obligation, rather than a membership that only ran for 12 months and came to an end after that period unless it was renewed. Thus, a member "shall be required" to pay the ACC "in each year at such levels as are set . . ." It provided that the ACC would be reviewed each year. This reading was reinforced by r.15 of the club constitution, which provided that membership could only be ended in one of four ways. The rules on resignation in r.16 made clear that the sale of the share and membership were indivisible. The centrally relevant text of the club constitution was clear in treating membership and shareholding as indivisible. A textual examination of the terms of the agreement showed that the ACC was payable if an investor remained a shareholder, and that resignation from the membership could only take place in the circumstances set out in the club constitution. This clarity made it more difficult to justify a departure from this natural meaning. While

context had its place as part of the holistic exercise that the court must carry out when construing commercial agreements, the defendant's reliance on certain select references to the club guide, 2008 website and anecdotal references to what the position might be with other sorts of clubs was too great. Those references, when viewed in their proper light, did not bear the weight that the defendant sought to ascribe to them, and he downplayed the natural and ordinary meaning of the text of the agreement, especially the club constitution. A reasonable person considering the language in the agreement drafted by skilled lawyers, and bearing in mind that this concerned an investment for experienced investors, would have understood that the ACC represented an ongoing cost for all members, whether they chose to become members or whether they were required to do so. The fact that the defendant felt aggrieved about how things had turned out was not a proper basis to reject the natural meaning of an agreement. The second part of the question concerned whether the ACC was payable if a member's membership was frozen pursuant to cl. 17.3 of the club guide. The wording of cl. 17.3 was clear: non-payment of the ACC resulted in members losing their right to enjoy the properties and make reservations until payment was received. The fact that members defaulted in making payments and lost rights accordingly did not mean the obligation to pay ACC fees was extinguished, which would be at odds with the scheme (paras. 45–66).

(2) *Preliminary question (b).* Rule 17.4 of the club constitution did not require the club to terminate membership when payment of the ACC had not been made for 26 weeks or more. The wording of r.17.4 was clear. It provided that the club "shall be entitled" and not "shall" terminate membership when payment of the ACC had not been made for 26 weeks or more. The objective meaning of a clearly worded right could not be interpreted as an obligation. This was not only consistent with the clear wording used in r.17.4 of the club constitution but also with the scheme as a whole (para. 69).

(3) *Preliminary question (c).* The club's failure to exercise rights to terminate a member's membership did not extinguish a member's indebtedness to pay the ACC. It seemed that the logic behind the defendant's case in relation to this preliminary point was the same as that advanced by him in relation to the earlier preliminary points. For the reasons outlined above, the court did not consider that there was any force in those submissions, and the club's failure to exercise rights to terminate a member's membership did not therefore extinguish a member's indebtedness to pay the ACC. This was clearly not what the club constitution provided for, nor was it consistent with the scheme as a whole (para. 72).

(4) *Preliminary question (d).* A member's obligation to pay the ACC was an enduring and accumulating obligation throughout the subsistence of the membership, and that obligation endured until such time as membership was terminated. This question raised the same issues as the previous ones, and the answer, for the reasons already given, was that the obligation to pay the ACC was an enduring one until membership was terminated in

accordance with the club constitution. The defendant also advanced an alternative argument that any liability could only exist if the club was not in breach of its obligations under the agreement, giving him a right to rescind the agreement. This raised a number of disputed factual matters that plainly went beyond the scope of the preliminary issues before the court (paras. 75–76).

(5) *Preliminary question (e).* By applying to become a member of the club and agreeing to the terms and conditions of the membership form, members agreed to para. 2.4 of that form, which provided that the club could amend the terms of the club constitution as it deemed necessary or expedient for the better or more effective running of the club. The express consent of members was not required for amendment. Thus, provided amendments made to the club constitution fulfilled the criteria, the members' consent was not required under the agreement. The defendant's submission that the amendments were not permitted under the articles of association because they increased the defendant's liability to pay more money for fewer or no services and caused the defendant unfair prejudice raised legal and factual matters that fell outside the scope of this preliminary question (paras. 84–85).

(6) *Preliminary question (f).* There was no real dispute as to the applicability of the 1997 Act to the totality of the agreement. The real issue between the parties was the scope of the 1997 Act and whether there was any contravention of the 1997 Act in this case, which led to the next preliminary question (para. 88).

(7) *Preliminary question (g).* Paragraph 2.4 of the 2008 club membership form did not in itself contravene s.5(5) of the 1997 Act. Section 5(5) of the 1997 Act set out various contractual formalities, and required that various items of information formed an integral part of the contract that could not be altered unless the parties agreed otherwise. The statutory prohibition to alteration of the contract was limited to its key features, as identified in the 1997 Act. These key features included a description of the property, additional costs payable under the contract, restriction on the use of a pool of properties and things of that nature. The factual basis on which the defendant was saying that certain key features of the club constitution had been amended contrary to the 1997 Act was not clear, but appeared to be aimed at amendments dealing with increased costs payable by the defendant, more limited rights to enjoy the properties, and other matters. It was not possible, however, to express a view as to whether the amendments in question related to features of the contract that could not be altered under the 1997 Act. This would stray into a facts-specific inquiry which would not be appropriate at this point. All that could be said now in the absence of any evidence was that para. 2.4 of the club membership form did not in itself contravene s.5(5) of the Act (paras. 91–95).

(8) When construing commercial documents such as the agreement the court's task was to ascertain the objective meaning of the language which

the parties had chosen to use to express their agreement. The court must ascertain what a reasonable person, who had all the background knowledge which would reasonably have been available to the parties at the time of the agreement, would have understood the parties to have meant. The court must consider the contract as a whole. If there were two possible constructions, the court was entitled to prefer the construction which was consistent with business common sense (paras. 30–32).

Cases cited:

(1) *Investors' Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.*, [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98; [1998] 1 BCLC 531; [1997] CLC 1243, applied.
(2) *J. Spurling Ltd.* v. *Bradshaw*, [1956] 1 W.L.R. 461, considered.
(3) *L. Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235; [1973] 2 W.L.R. 683; [1973] 2 All E.R. 39; [1973] 2 Lloyd's Rep. 53, considered.
(4) *Lukoil Asia Pacific Pte. Ltd.* v. *Ocean Tankers (Pte) Ltd. ("Ocean Neptune")*, [2018] EWHC 163 (Comm), applied.
(5) *Popely* v. *Scott*, [2001] Crim. L.R. 417; 165 J.P. 742, referred to.
(6) *Stokes* v. *Whicher*, [1920] 1 Ch. 411, distinguished.

Legislation construed:

Timeshare and Related Contracts Act 1997, s.5(5): The relevant terms of this subsection are set out at para. 91.

F. Vasquez, *K.C.* with *S. Triay* (instructed by Triay Lawyers) for the claimant;
N.P. Cruz with *A. Hernandez Cordero* (instructed by Cruzlaw LLP) for the defendant.

1 **RESTANO, J.:**

Introduction

Further to a consent order dated June 9th, 2023, the parties agreed to refer to the court seven preliminary issues on the interpretation of certain provisions of an agreement entered into by The Hideaways Club Ltd. ("the club"), the claimant in these proceedings, The Hideaways Club Property Company Ltd. ("the property company") and Lakshmi GmbH. This judgment deals with those preliminary issues following a two-day hearing on November 20th and 21st, 2023.

2 Broadly speaking, the agreement in question relates to a fractional ownership scheme that provides investors with access to holiday homes for specified periods, as well as shares in a fund owning those holiday homes.

3 The club maintains and runs the properties, the property company owns the properties, and Lakshmi GmbH is the investor in this case. The defendant is Professor Kabel, Lakshmi's representative. There is a question

as to whether Professor Kabel has been properly named as a defendant, but the parties agreed to put that issue to one side for the purposes of this application.

4 The defendant is one of several investors in this scheme. He has been designated as the lead defendant for the purposes of this reference to the court by some 14 investors, all of whom are at loggerheads with the club, and many of whom have already been served with similar claims. There are also further claims that have been brought against other investors who have chosen not to contest the proceedings.

5 By way of overview, the critical issue between the parties which runs through a number of these preliminary issues largely boils down to this: whether investors can cease to be members of the scheme that allows them to make use of the properties, and thus stop being liable for annual charges, whilst remaining as shareholders in the property company. The defendant (and others) take the view that it is possible for them to stop being members of the club, and they have therefore stopped paying these charges. The club does not consider that this is possible, and it has brought this claim for non-payment of these charges.

6 Before turning to each of the preliminary issues, it is convenient to put those issues in context by properly setting out the background to this claim, and the documents governing the agreement between the parties.

Background

7 As stated above, Club Ltd. is the operating company that runs and manages the properties that form part of the scheme. These properties are owned by two property-owning companies. The first is the property company, which owns classic villa-type properties. There is another property-owning company that owns city apartments, although that other company is not relevant to this claim. These two property-owning companies are registered in Gibraltar as closed and experienced investor funds pursuant to the Financial Services (Experienced Investor Funds) Regulations 2020.

8 This scheme provides for investors to acquire a share in one or both property-owning companies. To do so, they must certify that they are an experienced investor. This allows for two potential benefits. First, the possibility that the shares will increase in value over time, if the value of the relevant portfolio of properties increases. Secondly, and somewhat like a timeshare, it allows for the use of the properties in the relevant portfolio for defined periods in any year, subject to an obligation to contribute to the cost of administering the scheme and maintaining the relevant portfolio of properties by means of an annual charge known as the annual contribution or annual costs contribution ("ACC").

9 In this case, Lakshmi GmbH purchased half a share in the property company for €132,500. The charges claimed for unpaid ACC in this claim, totalling around £19,000, correspond to charges due over two years for ownership of that half share. Lakshmi GmbH then nominated the defendant to enjoy the properties in its stead, as it is entitled to do under the agreement.

10 In around 2020, the defendant alleges that he became dissatisfied with the quality of the service provided by the club. He decided not to continue as a member, and said that he wanted to remain only as a shareholder in the property company, which the club contends is not possible.

11 It was agreed by the parties that five documents governed the contractual relationship between the parties, and that together they consist of the agreement between them ("the agreement"), namely:

(1) the private information memorandum dated December 19th, 2007 ("PIM");

(2) the subscription agreement dated July 1st, 2008;

(3) the club membership form dated July 1st, 2008;

(4) the club constitution dated February 12th, 2008; and

(5) the articles of association dated September 20th, 2007.

12 Turning now to those documents. Prior to investment, investors would have had regard to PIM issued by the property company to potential investors providing details about the scheme and how to invest in it. There have been various iterations of this document, and for the purposes of this application, the parties agreed that the applicable one is the one dated December 19th, 2007. It is clear from the PIM that in addition to subscribing for a share, shareholders also had the exclusive right to apply for membership of the club: see in particular para. 4 of the PIM's introduction, as well as cll. 2, 6, 7 and 9. The fact that membership was optional at that point, and that this has since changed, was not in issue between the parties. The PIM provides as an appendix a copy of the subscription agreement that investors would be expected to execute.

13 Paragraph 7 of the PIM provides as follows:

> "The Club Company feels that the service offered by the Club is unique and is not a timeshare as offered in the UK and Gibraltar. However, the regulations under the UK Timeshare Act 1992 and the Gibraltar Timeshare Act 1997, (together the 'Regulations'), which apply in the UK and Gibraltar respectively are broadly worded and, arguably, could embrace arrangements of the type contemplated by this agreement. The Club Company has, therefore, chosen to comply with the Regulations and has provided in the Club Application Form information and a cancellation right in accordance with the

Regulations. As it is envisaged that most applicants will apply for Club Membership at the same time as applying for a Share this will apply also to applications for Shares."

14 Paragraph 9 of the PIM further states:

"Holders of A Shares have the exclusive right either to become Full Members of The Hideaways Club themselves or to nominate someone to do so in their stead and the holders of C Shares similarly have the exclusive right either to become Non Peak Members of The Hideaways Club themselves or to nominate someone to do so in their stead which Membership gives the Member the right to use the properties owned by the Property Company subject to the terms and conditions of the Club. The terms and conditions of joining The Hideaways Club and of such use and the terms and conditions of the Club Constitution may vary from time to time at the discretion of the Club Company for the purposes of the efficient and successful running of the Club . . ."

15 The defendant signed a subscription agreement in July 2008 ("the subscription agreement") issued by the property company setting out the terms and conditions that applied to the purchase of his half share. These included the following:

"8. Cancellation right and Timeshare Act

8.1 The Property Company and the Club Company feel that the service offered by the Property Company and the Club is unique and is unlike timeshares offered in the UK. However, the regulations under the UK Timeshare Act 1992 and the Gibraltar Timeshare Act 1997, (the 'Regulations'), which apply in the UK and Gibraltar respectively, are broadly worded and, arguably, could embrace arrangements of the type contemplated by this Agreement. The Property Company and the Club Company have, therefore, chosen to comply with the Regulations. Accordingly, the Applicant, may, for any reason, cancel this Agreement by sending a completed cancellation notice, (in the form set out in Schedule 1), to the Property Company at the address shown in the notice within 14 days after the day on which the agreement is signed by the Applicant and returned to the Property Company without any financial penalty.

8.2 The following additional information is required by the Regulations to be included in this Agreement and may not be otherwise specified therein or in the Club Constitution or the Articles of the Property Company. The proposed accommodation is holiday villas and apartments principally in Europe and the Mediterranean area. The nature of the rights

which are the subject of this Agreement are set out in this Agreement as read with the Club Constitution and the Articles of the Property Company. Some of the accommodation is likely to be situated in an EEA state. The initial accommodation has been or will be acquired in 2007. After the initial acquisitions, properties may be added or sold. The accommodation will have the benefit of heating, lighting, water, maintenance and refuse collection. This will be provided by the Club Company in accordance with the Club Constitution. Admission to Membership will not result in costs to Members other than those which are specified in this Agreement, the Club Constitution, the Articles of the Property Company or any document referred to in any of them.

8.3 Unless a cancellation notice is received from the Applicant, the issue of the A Share or C Share (as the case may be) will not take place until the cancellation period according to the UK Timeshare Act 1992 and the Gibraltar Timeshare Act 1997 has lapsed.

9. Experienced Investor Fund

9.1 The Applicant confirms that he is an experienced investor within the meaning of the Gibraltar Financial Services (Experienced Investor Fund) Regulation 2005 and acknowledges that he has received and accepted the investment warnings set out in the Private Information Memorandum. The undersigned wishes to subscribe for an A Share/C Share on the terms of the Private Information Memorandum and subject to the provisions of the Memorandum of Association and the Articles of the Property Company and this Subscription Agreement. The Applicant acknowledges that except as provided herein and under applicable securities laws, this subscription is and shall be irrevocable, except that the undersigned shall have no obligations, hereunder, if this subscription is for any reason rejected or this offering is for any reason cancelled.

10. Entire Agreement etc

10.1 This Agreement as read with the Private Information Memorandum, the Club Constitution and the Articles of the Property Company forms the entire agreement between the parties on the subject matter of these documents."

16 The defendant chose to become a member of the club, and this required the completion of a club membership form issued by the club

setting out terms and conditions. Clause 2 deals with membership of the club and provides as follows:

"2.1 The application process for Club Membership is set out in the Club Constitution

2.2 The Applicant's rights and obligations in respect of the Club shall be governed by this Agreement as read with the Club's Constitution as if set out in full in this Agreement.

2.3 The Applicant hereby agrees and undertakes to abide by the Club Constitution and that his Membership of the Club is subject to the terms and conditions thereof.

2.4 The Applicant acknowledges and agrees that the Club Constitution may be amended by the Club Company from time to time for the better and more effective running of the Club and gives his consent thereto."

17 Clause 8.1 of the club membership form mirrors para. 8 of the subscription agreement, and deals with "Cancellation right and Timeshare Act," and confirms the application of the Timeshare and Related Contracts Act 1997 ("the 1997 Act").

18 Further, cl. 9.1 of the club membership form, in similar terms to cl. 10.1 of the subscription agreement, states as follows:

"This Agreement as read with the Private Information Memorandum, the Club Constitution, the Private Information Memorandum and the Articles of the Property Company forms the entire agreement between the parties on the subject matter of these documents."

19 Coming back to the club constitution of February 12th, 2008 ("the club constitution") referred to above, which is a very important document for the purposes of the issues before the court. The parties agreed that the relevant version of this document for the purposes of this application is one dated February 12th, 2008, and which bears the logo and details of Forsters LLP, London solicitors. This document sets out the members' rights and obligations, and the following are key provisions.

20 Rule 13 of the club constitution provides for payment of the annual contribution and additional usage, and the following sub-rules are of relevance:

"Each Full Member shall be required to pay a Full Annual Contribution and each Non Peak Member shall be required to pay a Non Peak Annual Contribution in each year at such levels as are set from time to time by the Club Company. The Club Company shall review the Annual Contributions in each year and shall issue Members with a revised price list each 1st January." (r.13.1)

> "If the Annual Contribution has not been paid within four weeks of its due date the provisions of **17.3** shall apply." (r.13.5)

21 Rule 14.1 states that:

> "Each Member shall be bound by this Club Constitution as amended from time to time and any other rules of the Club set by the Club from time to time."

22 Rule 15 deals with cessation of membership, and r.15.1 states that:

> "Membership may only be transferred, resigned or otherwise terminated in accordance with rule **15.2** (Membership Transfer); rule **15.8** (Change of Nominated Member); rule **16** (Resignation of Membership); or rule **18** (Involuntary Termination of Membership)."

23 Rule 15.2 states that:

> "A Member (the '**Transferor**') may during their lifetime (but not before the third anniversary of becoming a Member) or by their will (or application of intestacy rules) transfer their Membership to another person (the '**Transferee**') if the Transferee meets the Club's then applicable Admission Criteria, has completed the current Membership Application Form and has been accepted for Membership by the Club Company and the Club Company does not exercise its discretion to decline to accept the Transferee as a Member . . ."

24 Rule 15.8 states:

> "A person who is a Nominated Member has no right to transfer the Membership. The holder of the Share who nominated the Nominated Member may terminate such nomination by giving the Club Company notice in writing and may become the Member himself or, at the absolute discretion of the Club Company, may nominate another person to be the Nominated Member. If the Club Company does allow another Nominated Member then it may specify any requirements that it wishes to attach to such consent including requiring the new Nominated Person to provide the necessary identification evidence."

25 Rule 16 deals with "Resignation of Membership," and the opening words of r.16.1 state that:

> "A Member will be entitled to offer their Membership and Share for sale ('**Resign**') by notice in writing and sent by registered post to the Club Company at any time after the third anniversary of their admission to full Membership under the following procedure . . ."

26 The procedure referred to above is then set out and provides, amongst other things, for a proposed vendor putting their name on a resignation list, and that resignation will only take effect after two new full members have been admitted. Rule 16(c) then goes on to state as follows:

"When a Member's Resignation takes effect the Member will be relieved of all future liability for Annual Cost Contributions which have not then fallen due (but shall not be relieved of liability for Annual Cost Contributions which have fallen due for payment and shall not be entitled to any refund of Annual Cost Contributions paid)."

27 Rule 17 deals with involuntary termination of membership. Insofar as is material, r.17.3 and r.17.4 provide as follows:

"17.3 Where the whole or any part of the relevant Annual Contribution or any Membership is unpaid more than four weeks after the making of the demand for such contribution, the Member shall for that year lose his rights to the use of the Properties, and, the Member will not be able to make any further reservations or use any further services of the Club until payment has been received (and until paid any outstanding booking will be deemed cancelled in accordance with Rule **11**)

17.4 If the relevant Annual Contribution shall remain unpaid for more than 26 weeks the Club shall be entitled to terminate the rights of Membership of the defaulting Member in accordance with the following procedure:

(a) the Club shall give written notice of the amounts unpaid to the Member (and the holder of the share if the Member is a Nominated Member) and that the Member may accordingly have his Membership terminated;

(b) at the expiration of 28 days after service of such notice if any money is still unpaid the Club shall be entitled, to expel the Member and forfeit the relevant Share (which they shall hold and transfer to an incoming new Member when required) and any rights;

(c) the Club may authorised some person to execute the instrument effecting the surrender or transfer of Membership; and

(d) the Club shall be entitled to deduct its costs of enforcing the right (including the Appreciation Payment, the Administration Contribution and any professional costs) from the sale proceedings of the Share."

28 Finally, r.18.3 states that:

"The Club Company may change this Constitution if it considers this to be necessary or expedient from time to time and shall notify such changes to the Club Members in such manner and in such times as it sees fit."

The preliminary issues

29 The seven preliminary issues, as set out in para. 7 of the order of June 9th, 2023 are as follows:

> "7. The parties agree without prejudice to other assertions contained in the Statements of Case (which are reserved until trial) that the following issues as to the correct and proper construction of the Agreement (as defined in paragraph 5 of the Defence and Counterclaim and without prejudice to the Defendant's assertions contained at paragraph 37 of the Defence and Counterclaim that there existed terms that should be implied into the Agreement) the determination of which requires no further evidence and which are common to all the Claims be decided by the Court as preliminary issues ('the Preliminary Issues'):
>
> a. Is the Defendant correct in his assertion that membership of the Claimant runs for 12 calendar months as asserted at paragraph 36.6 of the Defence and Counterclaim and that as a result Annual Cost Contributions (hereinafter 'the ACC fees') are no longer payable in the event that a member's membership is frozen pursuant to [cl.] 17.3 of the February 2008 Club Constitution, as pleaded at paragraphs 36.1 of 38.1 of the Defence and Counterclaim?
>
> b. In the event that a member is more than 26 weeks in arrears in paying the ACC fees, is the Claimant obliged contractually to terminate that membership, expel the member in question and attempt to forfeit that member's share under clause 17.4 of the February 2008 Club Constitution, as pleaded at paragraph 4. 36.3 and 37.6 of the Defence and Counterclaim?
>
> c. Does the Claimant's failure to attempt to exercise any rights it may have as set out above extinguish a member's indebtedness for outstanding ACC Fees as pleaded at paragraph 4 of the Defence and Counterclaim?
>
> d. Subject to a–c above and the proper exercise of any rights the Claimant may have, is a member's obligation to pay the ACC an enduring and accumulating obligation throughout the subsistence of the membership, and does such obligation endure until such time as membership is terminated?
>
> e. Is the express consent of the members required before the Claimant can amend the terms of the February 2008 Club Constitution as it deems necessary or expedient from time to time for the better and more effective running of the Club under paragraph 2.4 of the 2008 Club Membership Form and [cll.] 14.1 and 18.3 of the February 2008 Club Constitution as

asserted by the Defendant at paragraph 9 of the Defence and Counterclaim inter alia?

f. Does the Gibraltar Timeshares and Related Contracts Act 1997 ('the Act') apply to the totality of the Agreement or just to an Applicant's cancellation rights under paragraph 8.1 of the 2008 Club Membership Form and paragraph 7 of the 2007 Private Information memorandum?

g. If the answer to questions e to f is yes, can the Claimant rely on paragraph 2.4 of the 2008 Club Membership Form as the Defendant's consent to future amendments of the February 2008 Club Constitution without express consent approval in appropriate circumstances on each occasion or does this contravene S.5(5) of the Act?"

Discussion

30 Before turning to each of the questions, it is necessary to say a few words about the correct approach to be taken in answering the preliminary questions, which are largely concerned with the interpretation of certain provisions of a commercial agreement. The parties agreed that the correct approach when construing commercial documents such as the agreement, was correctly summarized by Popplewell, J. (as he then was) in *Lukoil Asia Pacific Pte Ltd.* v. *Ocean Tankers (Pte) Ltd. ("Ocean Neptune")* (4) ([2018] EWHC 163 (Comm), at para. 8).

> "There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; *Re Sigma Finance Corp* [2010] 1 All ER 571; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900; *Arnold v Britton* [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. 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 the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a

> unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

31 I respectfully adopt that statement of the law. Further, I would add that the passage set out above cites, amongst other cases, *Investors' Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.* (1), one of the authorities relied on by Mr. Cruz, who appeared for the defendant. In that well-known House of Lords case, Lord Hoffmann restated the principles of contractual interpretation, and summarized them in five principles ([1998] 1 W.L.R. at 912). His second principle provides that consideration should be had to the whole relevant factual background reasonably available to the parties at the time of the contract. Lord Hoffmann's fifth principle, to which Mr. Cruz referred to, states that:

> "(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

32 In this way, Lord Hoffmann emphasized the importance of context in interpreting the text of an agreement, something that was central to Mr. Cruz's case.

33 Against that background, and based on those agreed legal principles, I will turn to each of the questions that fall for determination.

Preliminary question (a)

> "Is the Defendant correct in his assertion that membership of the Claimant runs for 12 calendar months as asserted at paragraph 36.6 of the Defence and Counterclaim and that as a result Annual Cost Contributions (hereinafter 'the ACC fees') are no longer payable in the event that a member's membership is frozen pursuant to [cl.] 17.3

of the February 2008 Club Constitution, as pleaded at paragraphs 36.1 of 38.1 of the Defence and Counterclaim?"

Submissions

34 For the claimant, Mr. Vasquez, K.C. submitted that when the scheme was originally conceived membership of the club was not compulsory, and that investors were able to just invest in the property company without enjoying the time-share like benefits of the club. In any event, he said that the defendant had elected to become a member of the club. He said that this optional feature changed in around 2015, and that there were only around two or three investors who had elected not to become members of the club before things changed. He said that the change had come about because the property company was unable to generate an income from the properties in its portfolio, and that the continuing nature of the obligation to pay the ACC was therefore the "lifeblood" of the scheme. I pause there to observe that there was no evidence before the court on these matters.

35 In Mr. Vasquez's submission, whether investors joined the club by choice or as a requirement, it was not possible for them to relinquish their membership of the club and remain as pure investors in the property company. He said that the exit route for investors who no longer wanted to remain as members was to sell their shares in one of two ways. First, effecting a sale through the club under the terms of the scheme itself, which operated a two-in, one-out policy (formerly three-in, one-out). Alternatively, investors could choose to sell their shares privately. He pointed out that this might mean selling at a loss, but that that was the bargain the parties struck.

36 Mr. Vasquez likened the payment of the ACC to services charges payable by owners of a property in a block of apartments, where the obligation to pay continues until the property is sold. Although he accepted that the investment was not one for the "faint-hearted," he said that the investors were all self-certified as experienced investors who had confirmed that they had read and understood the documents making up the agreement.

37 Relying mainly on a plain reading of rr. 13, 15 and 16 of the club constitution, as set out above, Mr. Vasquez submitted that the answer to the first part of this question was "no." He said that membership of the club is linked to shareholding in the property company, and that it can only be relinquished with the sale of the shares. Rule 13 provides for payment of the ACC "in each year" at the levels set by the club, which Mr. Vasquez said indicated a continuing obligation that ran with the membership. Rule 15 deals with cessation of membership, and states that membership may only be transferred, resigned, or otherwise terminated in accordance with certain rules. This includes r.15.2 dealing with membership transfer that

provides, amongst other things that after three years, members can transfer their membership to another person that meets the admission criteria. Mr. Vasquez said that this did not envisage shareholders discontinuing their membership. Further, he referred to r.16 that refers to the sale of membership and shareholding together, which relieves a member of "all future liability for Annual Cost Contributions which have not then fallen due . . ." Mr. Vasquez said that this showed that shareholding and membership went together, and that they could not be severed in the way that the defendant was suggesting. Further, he said that investors would only be relieved of future liability for payment of ACC if they sold their shareholding in this manner, and this was not extinguished by the suspension of his membership rights under r.17.3.

38 In response, Mr. Cruz said that the PIM that applied when the defendant invested in the property company made it was clear that ownership of shares and membership of the club were two separate things, and that club membership was optional for the defendant. As such, he said that the intention of the parties could not have been to force the defendant, an investor who elected to join the club, to remain a member, and that this represented an impermissible change in what the parties had agreed. Further, if the scheme could not operate without this ongoing income stream, the answer was not to alter the terms of the bargain but rather to allow the relevant companies in question to go into liquidation and for the investors to receive whatever return might be available to them. He said that whilst his client accepted that this might result in a loss, this did not justify a change the way that the scheme was operated at the expense of the investors.

39 Mr. Cruz said that the clear intention of the parties was that membership would run for 12 months given the repeated references to "annual" and "yearly" throughout the agreement. He referred, for example, to r.13 of the constitution that referred to the "annual" contribution, and the reference in r.6 to the "Membership Year." He also referred to the profile of his clients who he said were all reputable professionals to show the reasonableness of their understanding of the position.

40 Further, Mr. Cruz referred to the club guide dated March 2008, that also referred to payment of annual costs, and at para. 4.8 to a member resigning "during their membership year." This also refers to increases in the ACC taking effect on the member's "renewal date." Further, he referred to the claimant's website at the time that the agreement was entered into, which refers to the annual nature of the membership, for example: "With membership of The Hideaways Club you can use any of our beautiful and different properties throughout the year . . ." Although these are not documents that form part of the agreement, Mr. Cruz said that the court could have regard to them because they helped to "spell out" what the

parties had agreed. In support of this proposition, he relied on *Stokes* v. *Whicher* (6) ([1920] 1 Ch. at 418).

41 Further, he said that the fact that a shareholder could nominate a member in accordance with r.15.8 of the constitution clearly showed that a shareholder did not necessarily have to be a member of the club.

42 Mr. Cruz said that if the obligation was an ongoing one, it was such an unusual and onerous one that it should have been clearly identified in the agreement in accordance with the 1997 Act, the claimant's duty of good faith, and the common law. In this regard he relied on *J. Spurling Ltd.* v. *Bradshaw* (2) ([1956] 1 W.L.R. at 466), where Lord Denning said that:

> "[T]he more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

43 He also referred to *L. Schuler AG* v. *Wickman Machine Tool Sales Ltd.* (3), where Lord Reid stated ([1974] A.C. at 251):

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

44 Turning to the second part of the question, Mr. Cruz said that rr. 13.5 and 17.3 of the constitution make it clear that non-payment of the ACC for four weeks resulted in the member losing his rights to use the properties. He submitted that it followed that a member cannot be expected to continue to pay for a service that the club has stopped him from using, and that the application of r.17.3 extinguished future liability to pay the ACC. Further, that it would be absurd for the club to be able to claim future fees when the member could not enjoy membership of the club.

Analysis

45 There are two parts to this first preliminary question. First, whether club membership only runs for 12 months as alleged in para. 36.6 of the amended defence and counterclaim. Secondly, whether the ACC ceases to be payable if membership is frozen.

46 Dealing with the first part of the question. The main document that deals with the rules on membership is the club constitution. Rule 13 of the club constitution that provides for payment of the ACC is expressed in mandatory terms. Thus, a member "shall be required" to pay the ACC "in each year at such levels as are set . . ." Further, this provides that the ACC shall be reviewed in each year, and members issued with a revised price

list each January 1st. The language of r.13 points to a continuing obligation, rather than a membership that only runs for 12 months and comes to an end at the end of that period unless it is renewed.

47 This reading is reinforced by the way that r.15 of the club constitution is drafted. This provides that membership can only be ended in only one of four ways, namely transfer, changed of nominated member, resignation, and involuntary termination of membership. The rules on resignation, contained in r.16, are of particular significance. This makes it clear that the sale of the share and membership are indivisible. The fact that a member can transfer membership or nominate someone else to be a nominated member does not, in my view, undermine the indivisibility of the membership and shareholding as Mr. Cruz suggested. Rather, it provides a mechanism to allow shareholders to be relieved of the membership should they so wish, but on this limited basis. None of this points to members being permitted to allow their membership to lapse. If that was what the parties intended at the time, one would have expected this to have been specifically provided for in the rules, especially rr. 13 and 15.

48 I do not consider that the fact that the ACC is described as an "annual" or "yearly" charge in the club constitution and elsewhere suggests otherwise. This just refers to the fact that the membership fees would be payable annually, and that they would be updated as necessary.

49 This preliminary question refers specifically to para. 36.6 of the amended defence and counterclaim. This pleads that s.4.3 of the club guide, referring to membership running for 12 calendar months, was an express term of the agreement. The club guide is not one of the documents that forms part of the agreement, and cl. 9 of the terms and conditions attached to the club membership form (and cl. 10 of the subscription agreement) state that that document, together with the club constitution, the PIM and the articles of association form the entire agreement between the parties. In his submissions, Mr. Cruz put this part of the defendant's case in a slightly different way, and said that the club guide helped "spell out" what the parties had agreed. In this regard, he relied on the following quote from the judgment of Russell, J. in *Stokes* v. *Whicher* (6) ([1920] 1 Ch. at 418):

> "[I]f you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction continues all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together . . ."

50 *Stokes* v. *Whicher* is a case where the purchaser's name was not included in a contract, which only referred to "I" as the purchaser. A cheque for payment of the deposit due under the contract was attached to the carbon copy of the contract. It was held that in these circumstances, it would not unduly strain the law if the cheque was read side by side with

the contract to form a complete contract. In that context, the judge said that the cheque could be connected to the contract used to "spell out" the identity of the vendor in the contract, and thus the argument that the contract was deficient in that regard failed.

51 The facts here are completely different, and the principle for which *Stokes* v. *Whicher* is authority has no application here. There is no question of filling in a gap in the agreement here. The agreement is governed by an extensive and complete set of documents, not including the club guide, drafted by skilled professionals, and where there is no gap. In my view, what the defendant is seeking to do is to use the club guide to recast the nature of the agreement, rather than filling in any gaps. That does not mean that the guide should be dismissed out of hand. The court's function is not simply a literalist one, focused only on the wording of the agreement. The wider context must also be considered in assessing what the objective meaning of the language used means. The club guide, therefore, is part of the wider context that the court can draw on to ascertain the objective meaning of the language in the agreement.

52 When one looks at the introduction to the club guide, however, it is clear that this is a document designed to allow members to make the most of their membership and that it deals with reservations, how the properties can be used, and so forth. This shows the nature of this document, and that it is aimed at the practical side of the membership rather than setting out the parties' rights and obligations.

53 Section 4 of the club guide deals with membership. Section 4.3 states that membership runs for 12 months from the date when the share has been allocated and the ACC is paid. Section 4.5 also refers to the increased ACC taking effect from the member's "renewal date." Section 3.11 also refers to points being carried forward into the following "membership year." Section 4.8, also refers to a member resigning during their membership year. Pausing there, if one were to look at these references on their own, they might suggest that according to the club guide membership only runs for 12 months as the defendant says. Section 4.8, however, also states that membership resignation can only take place after three years, that it is subject to the "three in, one out" resignation policy, and that members who have resigned are only replaced when their shares are sold. Although not particularly well drafted, none of this would make any sense if members could resign by simply not renewing their membership, and yet remain as shareholders. The inaccurate reference to the "renewal," which should probably refer to "anniversary" (consistently with the terms of the club constitution), is therefore self-evidently inaccurate. It is hardly, however, a sound basis to mount the case that the defendant has sought to advance on interpretation of the agreement in all the circumstances.

54 In a similar way, Mr. Cruz referred to the 2008 version of the website and relied on the fact that this refers to members enjoying properties throughout the year, points being rolled over to the next year, and so on. The fact that the membership is ongoing does not mean that rules cannot apply about how points can be rolled over from year to year and things of that sort. This is another example of the defendant taking an informal document that deals with day-to-day matters about the membership, and using references in it to strain the clear meaning in the agreement itself.

55 In any event, it is also worth noting that the 2008 website, described the investment as buying a fraction of a high value asset that could be used for a corresponding fraction of the time, and that owners would pay annual management fees to cover upkeep and maintenance. It went further and stated that unlike a second home, investors could leave the effort of upkeep to the club by paying the ACC. It also stated that investors were not just buying the right to use properties, but that they were buying a stake in the whole portfolio. These references are again consistent with a bargain where ongoing costs are a feature.

56 In my view, the centrally relevant text of the club constitution is clear in treating membership and shareholding as indivisible. A textual examination of the terms of the agreement shows that the ACC is payable if an investor remains a shareholder, and that resignation from the membership can only take place in the circumstances set out in the club constitution. This clarity makes it more difficult to justify a departure from this natural meaning.

57 Whilst context has its place as part of the holistic exercise that the court must carry out when construing commercial agreements, the defendant's reliance on certain select references to the club guide, 2008 website and anecdotal references to what the position might be with other sorts of clubs occupied the field far too much. Those references when viewed in their proper light do not bear the weight that Mr. Cruz sought to ascribe to them, and he downplayed the natural and ordinary meaning of the text of the agreement, especially the club constitution, in his interpretative evaluation. In all the circumstances, this material is a far distance from what is needed to show that the parties had a different intention from that stated in the agreement, and that something has gone wrong with the language in the agreement.

58 Moving on, a feature of the background that the parties were agreed on was that at that the time the defendant invested in the property company, he had the option to become a member of the club. The gist of the defendant's case in this regard was that as joining the club was optional, this feature indicated that there should be a corresponding optional exit from the membership.

59 As stated above, once the defendant chose to enter into the agreement, the terms on which he was doing so are clear, and there is no suggestion that there was a corresponding option to drop out as a member of the club. Those terms represent part of a coherent scheme based on the material before the court. The relevant PIM states that most investors in the property company were expected to apply for club membership at the time of the defendant's investment. Further, the agreement made it clear that properties were selected both for suitability for members' use and potential for growth in value. There was therefore always an investment objective to the scheme, but it was clear that there was no guarantee that the property company's assets would increase, and that the price of shares could go up or down. Further, Part II of the PIM provides further information on several issues, including fees and expenses. This states that the property company bears the initial costs of acquiring, fitting out and disposal of the properties out of the subscription price paid for the shares, and that on joining the club, members would be required to pay the applicable fees covering the maintenance of the properties as well as the running of the club. How this worked is then set out in the club constitution, as explained above.

60 In my view, a reasonable person considering the language in the agreement drafted by skilled lawyers, and bearing in mind that this concerned an investment for experienced investors, would have understood that the ACC represented an ongoing cost for all members, whether they chose to become members, or whether they were required to become members. No doubt, the hope would have been that payment of the ACC would represent a fair price the use of the properties, and that the price of the shares would increase. The fact the defendant feels aggrieved about how things have turned out is not a proper basis to reject the natural meaning of an agreement. If a contractual arrangement, if interpreted in accordance with its natural language, has worked out badly for one of the parties that is not a reason to depart from the natural language. It is not the function of the court to relieve parties from the consequences of an agreement that has not worked out in the way that they thought, or to penalize an astute party. In this connection, it is important to bear in mind that the defendant is advancing a number of claims in his amended defence and counterclaim including breach of contract, misrepresentation, breach of a duty of utmost good faith, and unfair prejudice, but these are all matters for trial.

61 Mr. Cruz also said that the obligation to pay on ACC on an ongoing basis was such an onerous or unusual obligation in the circumstances, that it should have been drawn to the defendant's attention on various counts. He relied on the "red hand rule" referred to in Lord Denning's judgment in *J. Spurling* v. *Bradshaw* (2) about the need to draw a counterparty's attention to an unreasonable clause. Mr. Cruz also submitted that the claimant's control of the property company with the golden B preferential

shares meant that it owed the defendant and other minority shareholders a fiduciary duty of good faith, and even a duty of the utmost good faith. Mr. Cruz said that on both counts, full disclosure of all material facts was required, including the ongoing nature of the membership, and that the absence of any such warning also showed that no such obligation formed part of the agreement.

62 Dealing first with the "red hand rule," the first obvious point to make is that we are not dealing with an exclusion clause, which is the context in which Lord Denning made his remarks. Mr. Cruz sought to draw an analogy between an exclusion clause, and the ongoing nature of the ACC which he said was as onerous as an exclusion clause. The factual basis on which Mr. Cruz made this submission, however, was not something which, as far as I could see, the parties had agreed on. Indeed, Mr. Vasquez said rather than being unduly onerous, the ongoing nature of the membership was to be expected for this sort of investment in a company that owns a portfolio of properties. Either way, I cannot see how the court can form a view on whether the obligation was an onerous one or not, given the way that this preliminary issue has been referred to the court for adjudication.

63 Similarly, the allegation that the claimant owed a duty of utmost good faith to the defendant, and that it breached this duty is an issue that is disputed on the pleadings, and it is one of the issues to be resolved at trial.

64 Mr. Cruz also referred to the effect of the 1997 Act. This is dealt with below in response to preliminary issue (f), and for the reasons set out there, I do not consider that this affects my reasoning in the context of this first preliminary issue either.

65 As is clear from para. 7 of the order dated June 9th, 2023, the parties agreed that this determination was made without prejudice to other assertions made in the statements of case, including the defendant's case that terms should be implied into the agreement, which matters were all reserved for trial. Further, this states that the determination as to the correct and proper interpretation of the agreement requires no further evidence. The court's interpretative function for the purposes of this application, as agreed by the parties, is therefore largely based on the text of the agreement. Whilst context forms part of the interpretative process, that context for the purposes of this hearing, as agreed between the parties, is limited. Beyond the agreement itself, this extends to little more than a few additional documents included in the hearing bundle, in particular the club guide and 2008 website. The sorts of issues raised by both parties at the hearing, but in particular Mr. Cruz, therefore go well beyond the constraints inherent in this application. If a broader canvass was needed for the purposes of interpreting the agreement encompassing such matters, the matter should have been left for trial.

66 The second part of this question concerns whether the ACC is payable if a member's membership is frozen pursuant to cl. 17.3 of the club guide. The wording of r.17.3 is abundantly clear: non-payment of the ACC results in members losing their right to enjoy the properties and make reservations until payment is received. Thus, if members want to continue using the properties, they must make payment of the ACC. The fact that members have defaulted in making payment, and that they lose rights accordingly, does not mean the obligation to pay ACC fees is extinguished. That would be at odds with the scheme, as outlined above.

Preliminary question (b)

> "Is the Defendant correct in his assertion that membership of the Claimant runs for 12 calendar months as asserted at paragraph 36.6 of the Defence and Counterclaim and that as a result Annual Cost Contributions (hereinafter 'the ACC fees') are no longer payable in the event that a member's membership is frozen pursuant to [cl.] 17.3 of the February 2008 Club Constitution, as pleaded at paragraphs 36.1 of 38.1 of the Defence and Counterclaim?"

Submissions

67 Mr. Vasquez submitted that r.17.4 of the club constitution makes it clear that the club is entitled to expel defaulting members and forfeit their shares, but that it is not obliged to do so. In his submission, the meaning contended for by the defendant does not reflect the clear wording of this rule, and it would allow members to terminate their membership by not paying the ACC.

68 Mr. Cruz submitted that where the ACC was owing for 26 weeks or more, the club was contractually obliged to terminate the defendant's membership within a reasonable time. Further, he submitted that to conclude otherwise would result in an unreasonable outcome, namely the ongoing liability to pay the ACC. Thus, he submitted that the club was obliged to enforce, because this duty was "baked into the Agreement." Thus, he returned to his argument on the first question above. At the hearing though, Mr. Cruz indicated that he was not pressing his case on this second preliminary question.

Analysis

69 The wording of this rule is clear. It provides that the club "shall be entitled," and not "shall," terminate membership when payment of the ACC has not been made for 26 weeks or more. Thus, this rule is permissive only, and does not impose a duty on the club to terminate membership. In my view, the objective meaning of a clearly worded right cannot be interpreted as an obligation. This is not only consistent with the clear

wording used in r.17.4 of the club constitution, but it is also consistent with the scheme as a whole as outlined above.

Preliminary question (c)

> "Does the Claimant's failure to attempt to exercise any rights it may have as set out above extinguish a member's indebtedness for outstanding ACC Fees as pleaded at paragraph 4 of the Defence and Counterclaim?"

Submissions

70 Mr. Vasquez said the club's decision not to exercise a right could not extinguish the enduring liability to pay ACC fees contrary to the clear terms of the club constitution.

71 Mr. Cruz, on the other hand, said that once the defendant lost his right to use the properties for non-payment of the ACC in 2020, the club could not claim three years of ACC fees by failing to exercise its rights under r.17.4 of the club constitution. In the defendant's submission, once he lost the rights to enjoy the properties, the club was obliged to terminate the membership, and his ongoing obligation to pay the ACC ceased.

Analysis

72 It seems to me that the logic behind the defendant's case in relation to this preliminary point is the same as that advanced by him in relation to the earlier preliminary points. For the reasons that I have set out above, I do not consider that there is any force in those submissions, and the club's failure to exercise rights to terminate a member's membership does not therefore extinguishes a member's indebtedness to pay the ACC. This is clearly not what the club constitution provides for, nor is it consistent with the scheme as a whole.

Preliminary question (d)

> "Subject to a–c above and the proper exercise of any rights the Claimant may have, is a member's obligation to pay the ACC an enduring and accumulating obligation throughout the subsistence of the membership, and does such obligation endure until such time as membership is terminated?"

Submissions

73 This preliminary question largely raises the same issue as preliminary question (a), and the parties' submissions largely overlapped. Thus, Mr. Vasquez again submitted that that the obligation to pay the ACC was an enduring one. Further, he said that the defendant, as an experienced

investor, must have appreciated that property ownership, albeit joint or fractional ownership, would include concomitant costs of upkeep and maintenance of the properties, and that such concomitant costs could not simply be discontinued at will. Further, he said that the enduring nature of the relationship was confirmed in the PIM that states that the shares will not be redeemed by the property company and the ability to realise the investment depends on someone acceptable to the property company being willing to purchase the share.

74 Mr. Cruz said that the obligation to pay the ACC could not be an enduring one, and had in fact ended at the expiry of the 26-week period. He repeated that because he had the option to become a member of the club, it was unfair and unreasonable to impose an enduring obligation on him to pay the ACC for a membership that he has now been prevented from using. Additionally, he said that because the club has breached the terms of the agreement, that the defendant has a right to rescind it.

Analysis

75 This question raises the same issues as the previous ones, and the answer, for the reasons that I have already given, is that the obligation to pay the ACC is an enduring one until membership is terminated in accordance with the club constitution.

76 The defendant also advanced an alternative argument that any liability could only exist if the club was not in breach of its obligations under the agreement as pleaded in paras. 38–60 of his amended defence and counterclaim giving him a right to rescind the agreement. This raises a number of disputed factual matters that plainly go beyond the scope of the preliminary issues before the court.

Preliminary question (e)

> "Is the express consent of the members required before the Claimant can amend the terms of the February 2008 Club Constitution as it deems necessary or expedient from time to time for the better and more effective running of the Club under paragraph 2.4 of the 2008 Club Membership Form and [cll.] 14.1 and 18.3 of the February 2008 Club Constitution as asserted by the Defendant at paragraph 9 of the Defence and Counterclaim inter alia?"

Submissions

77 Mr. Vasquez submitted that cl. 2 of the club membership form Membership agreement, and rr. 14.1 and 18.3 of the club constitution make it clear that the club could change the club constitution for the better and more effective running of the club, and if necessary or expedient. Further, he said that this was clearly signalled in para. 9 of the PIM. Mr. Vasquez

submitted that the plain meaning of these words could not be contested, and that this provides the club with the flexibility to adjust the rules to better administer the affairs of the club as it considers appropriate provided that this was necessary, expedient and for the better running of the club. He said, therefore, that there was no proper basis for the defendant to say that the consent of all the members was required for amendments to be made to the club constitution. Further, he added that it would be unworkable for each member's approval to be required for amendments, however minor. Mr. Vasquez provided a table in his skeleton argument setting out the amendments made to the club constitution to show that these changes were not detrimental to the members.

78 Mr. Cruz said that amendments could only be made for the better and more effective running of the club, and could not entail:

> "unilateral documentary changes (as has been effected recently by the Claimant) to increase the liability of the Lakshmi/Defendant to otherwise pay more money to the Claimant, or have reduced, or no real access to the Properties, including setting limits and short periods for use of accumulated points (that are converted to holidays) to be used, or turn any right to Club membership into an obligation without giving his consent . . ."

79 Further, he said that the club and the property company had purported to make numerous unilateral variations to the agreement that lacked consideration as they had the effect of increasing their financial benefits and limit the defendant's rights and entitlement to enjoyment of the properties as agreed. Mr. Cruz also provided a table tracking the changes to the PIM and club constitution to demonstrate significant substantive changes.

80 Mr. Cruz submitted that these changes were also contrary to s.5(5) of the 1997 Act that required the express consent of the defendant. In his oral submissions, Mr. Cruz accepted that minor changes could be made, provided that they did not change the relationship between the parties. Further, he said that the amendments made to the club constitution went beyond the narrow confines of "the better and more effective running of the Club," and that they amounted to a breach the duty of utmost good faith that the claimant owed the defendant.

81 Finally, Mr. Cruz said that the amendments breached s.25 of the Companies Act 2014, and its predecessor in the Companies Act 1930. These statutory provisions provide that a member of a company is not bound by any amendments to its articles after the date on which he became a member if such an amendment would in any way increase his liability to contribute to his share capital or otherwise pay money to the company.

Analysis

82 This preliminary question is concerned with whether the consent of the members is required to effect amendments for the better and more effective running of the club under the provisions specified in para. 9 of the amended defence and counterclaim. This is a narrow question which is concerned with the interpretation of the specific provisions identified in this preliminary question, and in particular, whether a proper reading of them requires the consent of members for amendments to the club constitution for the better and more effective running of the club.

83 Both sides, however, advanced arguments about the nature of these amendments by references to the changes in the text, principally of the club constitution, which strayed into evidential matters beyond the scope of this hearing. In the absence of any evidence, the court cannot now properly reach any views about the nature and effect of these amendments with a view to assessing whether the club has gone beyond the power it enjoys to amend.

84 The discrete question that the parties agreed should be referred to the court was limited to whether the members' consent is required for amendments that the club deems necessary or expedient for the better and more effective running of the club under the provisions of the club membership form and club constitution identified. On this basis, the obvious answer to this question is that by applying to become a member of the club and agreeing to the terms and conditions of the membership form, members agreed to para. 2.4 of that form. As set out above, that states that the defendant acknowledged and agreed to the club constitution being amended from time to time subject to the qualification that they should be for the "better and more effective running of the club," and he gave his consent thereto. This is then reinforced by paras. 14.1 and 18.3 of the club constitution, with the only slight variation that the qualification to amendments made contained in r.18.3, namely that they should be "necessary or expedient from time to time and shall notify such changes to club members in such manner and at such times as it sees fit." Thus, provided amendments made to the club constitution fulfil these criteria, the members' consent is not required under the agreement.

85 Finally, I refer to the defendant's submission that the amendments were not permitted under the articles of association. The way that he put this argument was that these amendments were not permitted because they increased the defendant's liability to pay more money for less or no services or no practical access to the properties and have caused the defendant unfair prejudice. Again, I consider that this argument raises legal and factual matters that clearly fall outside the scope of this preliminary question.

Preliminary question (f)

> "Does the Gibraltar Timeshares and Related Contracts Act 1997 ('the Act') apply to the totality of the Agreement or just to an Applicant's cancellation rights under paragraph 8.1 of the 2008 Club Membership Form and paragraph 7 of the 2007 Private Information memorandum?"

Submissions

86 At the hearing, Mr. Vasquez's position on this preliminary question appears to have moved on because he accepted that the 1997 Act applied to the entirety of the agreement, although he added that it was not relevant to many aspects of it such as the PIM or the articles of association. He said that those documents do not concern the administration of the members' rights to occupancy. Rather, they are primarily concerned with the terms governing the potential shareholder's investment in the experienced investors fund by means of acquisition of a shareholding in the property company, and the management of the affairs of that company. To the extent that the 1997 Act was relevant, he said that the club said that it had fully complied with its requirements.

87 Mr. Cruz pointed out that the club had pleaded that the 1997 Act only applied to the "cooling off" period afforded by the 1997 Act, and that Mr. Vasquez had subsequently conceded the position more generally. Mr. Cruz submitted that 1997 Act applied to the entirety of the Act, including the provisions on termination and variation of documents.

Analysis

88 In the event, there was no real dispute over the applicability of the 1997 Act to the totality of the agreement. Both parties agreed that the position was akin to that in *Popely* v. *Scott* (5), where the Divisional Court upheld the decision of the magistrates' court that it would be illusory to separate a share purchase agreement from a vacation club which investors were able to join. The court there therefore held that the share purchase agreement was caught by the applicable Timeshare Act and Regulations. The real issue between the parties here was the scope of the 1997 Act, and whether there was any contravention of the 1997 Act in this case, which leads to the next preliminary question.

Preliminary question (g)

> "If the answer to questions e to f is yes, can the Claimant rely on paragraph 2.4 of the 2008 Club Membership Form as the Defendant's consent to future amendments of the February 2008 Club Constitution without express consent approval in appropriate circumstances on each occasion or does this contravene S.5(5) of the Act?"

Submissions

89 Mr. Vasquez submitted that the power to amend the club constitution in the circumstances set out in the agreement was not one of the integral features of the agreement, as provided under the 1997 Act, which could only be amended with the approval of the defendant.

90 In response, Mr. Cruz submitted s.5(5) of the 1997 Act clearly stated that any changes to certain information contained within the timeshare contract had to be communicated to the consumer before the contract was concluded. In this regard, he referred to Part 1 of schedule 1 of the Act that includes a requirement that the exact nature and content of rights be provided, as well as an outline of additional obligatory costs imposed under the contract, the type of costs and an indication of amounts (*e.g.* annual fees, other recurrent fees, special levies, local taxes). Thus, Mr. Cruz went on to say that para. 2.4 of the club membership form could not be relied on by the claimant to effect amendments to the club constitution because of the requirements of the 1997 Act.

Analysis

91 Section 5(5) of the 1997 Act provides as follows:

> "(5) The information referred to in section 4(1) shall form an integral part of a regulated contract and shall not be altered unless—
>
> (a) the parties expressly agree otherwise; or
>
> (b) the changes result from unusual and unforeseeable circumstances beyond the trader's control, the consequences of which could not have been avoided even if all due care has been exercised,
>
> and any changes to the information referred to in section 4(1) shall be communicated to the consumer, on paper or on another medium easily accessible to the consumer before the contract is concluded and shall be expressly mentioned in the contract."

92 Section 4(1) as referred to above states that before a consumer is bound by any timeshare contract, a trader shall in good time provide standard information for timeshare contracts as detailed in the three-part schedule 1 to the 1997 Act. The first part of this schedule contains a table setting out standard information that needs to be provided for timeshare contracts and includes matters such as the details of the trader, details of the product/property including the nature and content of the right, the price, the facilities and matters of that sort. Part 2 requires general information to be provided including a withdrawal period of 14 days. Part 3 sets out six items of additional information to which the consumer is entitled, namely:

(1) information about the rights acquired;

(2) information of the properties;

(3) additional requirements for accommodation under construction;

(4) information on the costs;

(5) information on termination of the contract;

(6) additional information.

93 Section 5(5) of the 1997 Act sets out various contractual formalities, and requires that various items of information form an integral part of the contract that cannot be altered unless the parties agree otherwise. Thus, the statutory prohibition to alteration of the contract is limited to its key features, as identified in the 1997 Act. These key features include a description of the property, additional costs payable under the contract, restriction on the use of a pool of properties and things of that nature.

94 The factual basis on which the defendant was saying that certain key features of the club constitution had been amended contrary to the 1997 Act was not clear, but appeared to be aimed at amendments dealing with increased costs payable by the defendant, more limited rights to enjoy the properties, and other matters set out above in the context of preliminary question (e). It is not possible, however, to express a view as to whether the amendments in question relate to features of the contract that cannot be altered under the 1997 Act. As I have already said, this would stray into a facts-specific inquiry not appropriate at this point. All that can be said now in the absence of any evidence is that para. 2.4 of the club membership form does not in itself contravene s.5(5) of the Act.

95 I should add for the sake of completeness that s.5(5)(a) of the 1997 allows for parties to agree to alterations, but this appears to be aimed at amendments made to the contract before it is concluded.

Summary of conclusions

96 It follows from all that I have said, that I have largely decided the preliminary questions in favour of the club, as follows:

(a) The defendant is not correct in his assertion that club membership runs for 12 calendar months and that as a result, ACC fees are no longer payable in the event that a member's membership is frozen pursuant to r.17.3 of the club constitution.

(b) Rule 17.4 of the club constitution does not require the club to terminate membership when payment of the ACC has not been made for 26 weeks or more.

(c) The club's failure to exercise rights to terminate a member's membership does not extinguish a member's indebtedness to pay the ACC.

(d) A member's obligation to pay the ACC is an enduring and accumulating obligation throughout the subsistence of the membership, and that obligation endures until such time as membership is terminated.

(e) The express consent of the members is not required for the club to amend the terms of the club constitution, as it deems necessary or expedient from time to time for the better and more effective running of the club under para. 2.4 of the club membership form and paras. 14.1 and 18.3 of the club constitution.

(f) The 1997 Act applies to the totality of the agreement, although it is only relevant to certain parts of it.

(g) Paragraph 2.4 of the 2008 club membership form does not in itself contravene s.5(5) of the 1997 Act.

97 I hope that the parties will be able to agree a draft order in respect of the answers to the preliminary questions. If there are any consequential matters that cannot be agreed, including case management directions as necessary, they can be dealt with at the handing down of the judgment or at a further hearing.

Ruling accordingly.