IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number 2022/GSC/14

2018/ORD/008

BETWEEN:

(1) RENNES FOUNDATION
(2) NORTHERN ASSET INVESTMENTS LIMITED
(3) FRANCIS CLAESSENS

Claimants

-and-

(1) DOMAIN VENTURE PARTNERS PCC LIMITED (IN CELL ADMINISTRATION)
(2) IAIN SIMON ROACHE
(3) JUNO NOMINEES LIMITED (formerly GT Nominees Limited)
(4) JUNO FUND SERVICES LIMITED (formerly Grant Thornton Fund Administration Limited)

Defendants

2018/ORD/021

BETWEEN:

CHRISTINA MATTIN

Claimant

-and-

(1) DOMAIN VENTURE PARTNERS PCC LIMITED (IN CELL ADMINISTRATION)

(2) JUNO FUND SERVICES LIMITED
(3) DOMAIN MANAGEMENT LIMITED
(4) IAIN SIMON ROACHE

Defendants

2018/ORD/031

BETWEEN:

(1) BRAGANZA II AB (FORMERLY KNOWN AS BRAGANZA AB)
(2) BOND HOUSE SYSTEMS LIMITED
(3) HILDE BARTLETT

Claimants

-and-

(1) DOMAIN VENTURE PARTNERS PCC LIMITED (IN CELL ADMINISTRATION)
(2) IAIN SIMON ROACHE

Defendants

SIR PETER CARUANA KCMG QC with **CHRISTOPHER ALLAN** (instructed by **PETER CARUANA & CO**) for the **Claimants in 2018 Ord 008**

KEITH AZOPARDI QC with **KELLY POWER (**instructed by **TSN)** for the **Claimant in 2018 Ord 021**

DANIEL FEETHAM QC with **DARREN MARTINEZ** (instructed by **HASSANS**) for **Claimant 1 in 2018 Ord 031**

STEPHEN ffRENCH DAVIS (instructed by **GOVERNOR'S STREET CHAMBERS**) for **Claimants 2 & 3 in 2018 Ord 031**

EDWARD BENNION-PEDLEY with JEEVAN DASWANI (instructed by **DASWANI & CO)** for **Iain Simon Roache**

NICHOLAS CRUZ (instructed by **CRUZLAW)** for **Domain Venture Partners PCC Limited (in Cell Administration)**

CHARLES SALTER with JUSTIN PHILLIPS (instructed by **PHILLIPS)** for the **Juno Nominees Limited and Juno Fund Services Limited**

Judgment date: 17 June 2022

JUDGMENT

1. Where necessary, to distinguish between the three actions, I refer to them as "the Rennes Action"; "the Mattin Action" and "the Braganza Action" respectively. As regards parties, the common denominators in these three claims are two Defendants, Domain Venture Partners PCC Limited (in Cell Administration) ("DVP") and Iain Simon Roache ("IR").

2. By an Order of 9 April 2019 I directed that the 3 actions be heard together on the terms set out in that Order and that two preliminary issues be determined in relation to what has come to be referred to (accurately or otherwise) as the "Performance Guarantee Trust" ("the PGT" or "Trust Letter"). To properly understand the preliminary issues it is necessary to set out the essential background and in so doing I draw from skeleton arguments and earlier judgments.

3. DVP is a Gibraltar Experienced Investor Fund and Protected Cell Company which is now in Cell Administration pursuant to an Order dated 23 April 2018, appointing Edgar Lavarello of PwC as Administrator ("the Administrator"). Although DVP has other Cells, no shares in them were ever issued, so DVP and Cell A are effectively the same.

4. DVP was formed to fund applications for 60 top level internet domain names ("TLDs") with each bid for a TLD made by one of sixty special purpose vehicle companies ("the Bid Vehicles"). The Bid Vehicles were mostly named after the domain names for which they would bid, by way of example, "dot Accountant Limited" and "dot Cricket Limited". IR was the primary founder and promoter of DVP.

5. Domain Management Limited ("DML") is a Gibraltar company wholly owned by IR and was a conduit for IR's control of DVP and the underlying investments. The preliminary issues do not, at least directly, affect DML. IR also held 80% of shares in Famous Four Media Limited (in Liquidation) ("FFM"). FFM provided management services to the Bid Vehicles. FFM is not a party to these proceedings, although at an earlier stage there was satellite litigation between it and the Administrator (see *Premier Registry Limited & others v Famous Four Media Limited (in liquidation) [2019] Gib LR 73]).*

6. Juno Fund Services Limited (formerly, Grant Thornton Fund Administration Limited) was the fund administrator for DVP, whilst Juno Nominees Limited (formerly GT Nominees Limited) held a number of shares in the Bid Vehicles (together "the Juno companies"). The Juno companies adopt a neutral stance on the preliminary issues. They do not assert any interest in the shares the subject of the preliminary issues, save that as trustees (or former trustees) they assert a right to be indemnified, and so far as necessary assert a lien or charge over any such shares, so as to satisfy those rights of indemnity.

7. Each of the 60 Bid Vehicles had an authorised nominal share capital of 100 ordinary shares, carrying no economic rights but affording control of the company and 100,000 redeemable preference shares carrying all the economic rights. DML was appointed as director of the Bid Vehicles. Before DVP issued a Private Placement Memorandum to raise capital, all ordinary shares were issued or transferred to DVP, giving DVP shareholder control over each Bid Vehicle.

8. A Private Placement Memorandum ("Bid Vehicle PPM") was issued for each Bid Vehicle on around 15 October 2011 and all are known to have been amended on or around 28 March 2012. As set out in each Bid Vehicle PPM, the offering of preference or investment shares was in two distinct forms, as follows:

   i. The first category was the shares to be offered to IR himself, as the principal founder of the business:

      "*During the Offer Period, the Fund shall offer for subscription 66,750 Investment Shares (representing 66.75% of the authorised Investment Share capital) to Iain Roache at a nominal value of £0.01 with a premium consisting of certain intellectual property and contractual rights that he has brought to the Fund.*"

   ii. The second category was the shares to be offered to DVP (which in turn would be funded by the investors in DVP) described as follows:

      "*During the Offer Period, the Fund shall offer for subscription 33,250 Investment Shares (representing 32.25% of the authorised Investment Share capital) at an aggregate price of £1,000,000 [£1 million] which represents a nominal value of £0.01 per share and the remaining amount being share premium*."

9. In turn DVP also issued a Private Placement Memorandum ("the DVP PPM") to raise capital by selling redeemable Preference A shares to investors. The DVP PPM also went through various iterations, with that dated 29 February 2012 being the current version as at 5 April 2012 which was the closing date for subscriptions for the DVP preference shares. Paragraph 10.4 of the DVP PPM would have made it clear to investors that all the financial capital for the Bid Vehicles was to be derived from the investors in the DVP preference shares:

> *"What the Investment Covers*
> *The investment by Cell A into the Bid Vehicles shall provide all the venture capital funding to enable the Bid Vehicles to pay for costs associated with the filings of applications by each Bid Vehicle for the gTLD licenses [sic]...*
>
> *It should be noted that those Bid Vehicle Investment Shares that are not held by Cell A may be issued at their nominal value of £0.01. These may be held by Iain Roache; investors of strategic importance to the Bid Vehicles (for example in providing potential exit routes or providing assistance in the commercialisation of the registry licences); such other parties as the Board of Directors of the Bid Vehicles determine in its absolute discretion. It is not intended that any Bid Vehicle Investment Shareholder other than Cell A shall contribute to the cost associated with the filing of the applications to ICANN for the gTLD registry licences."*

10. Whether or not, as is said on behalf of Christina Mattin ("CM"), it follows that therefore prior to the closing of the subscription to DVP on 5 April 2012, the Bid Vehicles were essentially valueless, or alternatively as IR contends, that by virtue of the fact that they were well placed to bid for ICANN registries they had intrinsic value and goodwill, is (as in an earlier application) of no consequence to the issues which fall to be determined.

11. Apart from the investment in the Bid Vehicles through DVP, investors were offered two additional incentives:
    i. Strategic Investor Direct Equity ("SIDE"); and
    ii. The Performance Guarantee Trust ("PGT").

The SIDE

12. The provisions dealing with SIDE are to be found at [10.2.4] of the DVP PPM. Essentially it provides for an additional incentive to what are designated as *"strategic investors"*, that is to say investors making a capital commitment of £5 million or more to DVP, by which IR *"by way of a private transaction"* offered an upfront grant of *"direct equity"* in the Bid Vehicles from his own shares of Bid Vehicles preference shares. *"Direct equity"* in the sense that investors would

hold these shares directly in the Bid Vehicles in contradistinction to their indirect interest in the Bid Vehicles via their holdings in DVP.

13. The SIDE is germane to the issues which fall to be determined for two distinct reasons:

    i. because an aspect of the claim in the Rennes Action is that it is said by those claimants that they did not acquire their SIDE allocation in the Bid Vehicles, and consequently there is a nuance in the submissions advanced on their behalf (which as I understand it is not challenged by any party) as to how this impacts upon their interpretation of the PGT; and

    ii. more significantly, because on behalf of IR it is argued, that the valuation methodology applied to the SIDE is to be applied to the PGT. The relevant parts of [10.2.4] provide:

        > *"Strategic investors providing a minimum Capital Commitment to the Cell A of £5,000,000 will be given by lain Roche (by way of a private transaction) direct equity in the underlying Bid Vehicles in addition to their holdings in Cell A (the 'Direct Allocation'). The direct equity allocations shall be:*
        > *.....*
        > *Subject to sufficient Bid Vehicle Investment Shares being held by Iain Roache such Direct Allocation shall be distributed pari passu across all Bid Vehicles on the basis of the Valuation in the Valuation Book"*

14. The valuation book was produced by Messrs Sochalls Chartered Accountants, at the time a two partner accounting firm based in London ("the Valuation Book"). I shall turn to it in greater detail below.

The PGT

15. The PGT arises or is evidenced by a letter dated 5 March 2012 from IR to prospective investors. It reads:

    "5th March 2012

To whom it may concern,

I hereby confirm that £42,000,000 worth of direct equity (the "Direct Equity") in the Bid Vehicles of which is held in my name shall be held on trust in the name of T&T Nominees Limited (a fiduciary company regulated by the FSC and controlled by partners of Triay and Triay) for benefit of the investors in Domain Venture Partners PCC Limited until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has be [sic] repaid to them ("the Repayment Event"). Upon the Repayment Event the legal and beneficial title of such equity shall revert to Iain Roache. Should the Repayment Event not take place within 54 calendar months from the Closing Date of Domain Venture Partners PCC Limited the Direct Equity shall be transferred to the Participating Shareholders in Domain Venture Partners PCC Limited pari passu based on the size of their Capital Commitments in Domain Venture Partners PCC Limited.

For the sake of clarity terms defined in or whose interpretation is provided for in any Private Placement memorandum of the Fund shall have the same meaning when used in this Agreement unless separately defined in this Agreement."

16. Although post-dating the PGT, relevant given the submissions advanced are the following distinct sets of communications.

17. In CM's case she received the PGT in an email from IR dated 7 March 2012, in which he also enclosed a redlined version of the DVP PPM with an enhanced allocation of SIDE investments. In relation to the PGT, IR stated:

    "I have also attached the letter confirming my pledge of GBP42 million of my own equity holding as security against the investor funds."

18. On 28 September 2012 Robert Maroney (who is an investment advisor; a very minor investor in DVP and who has advised and represented CM in relation to her investment in DVP) emailed IR inquiring as to whether the vehicle through which the £42m worth of equity was to be held had been established. There followed emails between IR, Charles Melvin (also of DVP) and Adrian Hogg of the Juno companies (but not Robert Maroney) culminating in an email dated 4 October 2012 from IR confirming that £42m worth of shares in

the top 20 Bid Vehicles, calculated on the basis of the Valuation Book, were to be held by GT Nominees Limited on trust ("the 4 October 2012 instruction"). It is not in dispute that the Juno companies did not action that request.

19. Just over two years later, by an internal DVP email dated 29 October 2014 from Charles Melvin to Ian Roache (and to Peter Young and Geir Rasmussen) Charles Melvin came up with three scenarios to show how the £42m could be spread across the portfolio in an *"efficient"* manner, and concluding:

> *"Surprisingly, based on the current levels of distributions/anticipated distributions resulting from the withdrawals the scenario requiring the lowest amount of reserves is scenario 1 - which as explained before is the most objective method ($1.1m - rather than $1.75m or $1.25m)."*

20. Put in context, it is not in issue that by the end of 2016 distributions of some US$46,000,000 had been effected of which at least US$32,000,000 were made to IR, with the bulk of the payments made in 2014 and 2015. What in effect was being said in that concluding paragraph was that IR could circumscribe his exposure under the PGT by reserving US$1.1m.

21. Although payments may have been made to some claimants, it is not in dispute that none of them have received the full capital investment plus the hurdle rate of 15% as provided for in the PGT, either within 54 calendar months or thereafter.

The DVP PPM and its Valuation Provisions

22. To understand the competing arguments it is necessary to consider various provisions in the DVP PPM and the distinct methodologies for the purposes of valuing the Bid Vehicles. At [10.3] with the entitlement *"Valuation of the Bid Vehicles"* it provides:

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

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

23. In his Skeleton Argument Mr Azopardi describes the Valuation Book somewhat pejoratively as *"a fantastical document bordering on the fictitious"*. Rather, it is possibly better described as a valuation based on exceptionally unlikely assumptions and with highly improbable projected values which would have required all the bids for gTLDs to have been successful. To some extent that is evident from [10.3] of the DVP PPM itself and it is apparent from the *"Assumptions"* at page 10 of the Valuation Book which states:

*"**3. Revenue Stream estimations for each Bid Vehicle and Consolidated Revenue Streams***

These have been based on the following assumptions:
Cell A is fully funded and has applied for all 60 proposed registry licences
Cell A is successful in all 60 registry licence applications
All 60 registries become operational at the same time
All 60 registries remain in the portfolio for a five year period; and
There are no material adverse changes affecting the ability of Bid Vehicles 90% of their distributable profits (following reserves of 10% being held)"

All this of course in the context of a fund targeted at experienced investors.

24. That said, the DVP PPM; the Bid Vehicles standard PPM and the Articles of Association contain provisions which also prescribes the use of a Net Asset Formula. In the Definitions section of the DVP PPM it is referred to interchangeably as *"Cell A Net Asset Value"* or by its acronym, *"CANAV"*. CANAV and the valuation of Cell A are dealt with in detail at Section 11 of the DVP PPM. For present purposes its significance is limited to the fact that it provides for the valuation of the A shares to be undertaken in accordance with International Financial Reporting Standards which in the Definitions sections links it to principles and standards established by the International Accounting Standards Board. By way of example reference to CANAV is made at Section 10 of the DVP PPM which is entitled *"Investment Objective, Strategy and Policy"* and which at 10.1 in bold states:

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

The order in the Braganza Action

25. Following an application for summary judgment in the Braganza action, which was not opposed by IR, by Order dated 8 January 2019, I made a declaration that:

> *"Pursuant to the Trust Letter, £42 million worth of shares owned beneficially or legally by [IR] in the 16 Bid Vehicles listed in Schedule 1 to this Order are held on Trust for [Braganza II AB] and subject to paragraph 2 below, the Original and/or Step-In Investors in [DVP] listed in Schedule 2 to this Order, to be shared pari passu amongst them."*

Paragraph 2 of the Order deals with the competing claims between investors.

26. The 16 Bid vehicles listed in Schedule 1 were Bid Vehicles which were successful in becoming the registry for the gTLD for which they applied ("the Active Registries"). There is a 17th Bid Vehicle, dot Gift Limited, which does not operate a registry, but which withdrew its application for .gift in exchange for a 50% share in the profits of the successful applicant. The remaining Bid Vehicles were unsuccessful bidders.

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

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

The 9 April 2019 Order and the Identification of the Preliminary Issues

29. The two Preliminary Issues are identified in the Order as follows:

> *"13.1 Whether, on the proper interpretation of the provisions of the trust to which the Order relates (the "Performance Guarantee Trust") and in relation to Preference Shares in the Special Purpose Vehicle (hereafter "Shares"), the reference in the letter dated 12 March 2012 to "£42 million worth" of Shares held by Mr Iain Simon Roache is a reference to Shares with an actual real current value of £42,000,000.*
>
> *…*
>
> *13.3 Whether the Order should be amended to include all of the Special Purchase Vehicles (in addition to the sixteen to which the Order currently relates) in which Mr Iain Simon Roache holds or has held Shares."*

30. The first and principal issue which falls for determination is the share value which is subject to the PGT. That is to say, does *"£42 million worth of direct equity"* mean equity with an actual real current value of £42m or is that value to be calculated using a different measure, in particular is it to be calculated by reference to the Valuation Book or other valuation criteria in the DVP or Bid Vehicles PPMs.

31. The second preliminary issue is succinctly summarised by Mr Bennion Pedley in his Skeleton Argument, namely whether the Declaration in the Braganza Action should be varied so as to refer, not just to the shares in the Active Registries but also to shares in Bid Vehicles which had not successfully bid for Registry Agreements. Albeit that summary does not necessarily sit comfortably with certain submissions which he advances and which touch upon the instructions given by IR in the 4 October 2012 email.

The Principles of Interpretation

32. The applicable legal principles to be applied in construing the PGT are not in dispute. They were admirably summarised by Popplewell J. in the English High Court in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd [2018] 1 C.L.C.*

94 at [104] in which he encapsulates the principles from various senior authorities. It is not in dispute that they are equally applicable to a document establishing a trust. I respectfully adopt the summary:

> *"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 [1997] CLC 1243; [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] 2 CLC 923; [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."*

33. There is in this case the additional dimension that, it not being in issue that there is a trust, that the interpretation of the PGT must be one which is consistent with trust law. Put another way, the PGT cannot be interpreted in a way which would make the trust a nullity. Therefore, for the interpretation of the PGT to be legally viable the three "certainties" must be met (i) the intention to create a trust; (ii) the

subject matter of the trust must be certain; and (iii) the declaration of trust must make sufficiently clear who the beneficiaries are. For present purposes no issues arise as regards the intention to create the trust or the identity of the beneficiaries. However, certainty of subject matter is inexorably intertwined with both preliminary issues, because what these seek to resolve is precisely which assets are caught by the PGT.

Changing Positions

34. In relation to certainty of subject matter, by their Position Statement dated 5 March 2020 Hilde Bartlett and Bond House Systems Limited adopted the following stance:

> *"Bond House Systems Ltd and Hilde Bartlett (hereinafter the "Braganza co-claimants") are advised that the definition of "£42,000,000 worth of direct equity" must, for a trust to have been created by the Trust Letter, be susceptible of being identified as at the date of the Trust Letter as that is the date on which the Second Defendant in the Braganza action, lain Roache, issued the said letter…*
>
> *…*
>
> *…The Bid Vehicles at the time of the making of the purported declaration of trust consisted of 60 Gibraltar companies. Assuming the basis for valuation to be the valuations as set out in the Valuation Book, which is not conceded, this means that the declaration affects shares in the bid vehicles having a total value, as calculated in accordance with the said Valuation Book, of £42 million. However, it is not possible by reference to these factors alone to determine to which shares the said trust attaches. As such the Braganza co-claimants do not believe that the requisite of certainty of subject matter is satisfied in this case and unless the Court can identify the said Trust Shares by reference to other evidence, such as might be provided by GT Nominees Limited (now Juno Nominees Limited), there would not appear to be sufficient evidence to enable a definite determination as to the subject matter affected by the trust. Absent such new evidence from the apparent trustee, the trust would, in accordance with the normal rules, fail."*

35. Also focusing on certainty of subject matter, and although diametrically different to the submissions now advanced on their behalf, the analysis by the Claimants in the Rennes Action as set out in their position Statement also dated 5 March 2020, because of their clarity, bear consideration:

> *"4.1 The Rennes Claimants do not adopt the position that "£42 million worth" of Shares held by Mr Iain Simon Roache is a reference to Shares with an actual real current value of £42,000,000, for the reasons set out below.*
>
> *4.2 An assessment of this question must necessarily begin with a consideration of the terms of the Performance Guarantee Trust (i.e. the letter dated 5 March 2012 addressed by Mr Roache to whomever it may concern). That letter (insofar as relevant to this position statement) says that "£42,000,000 worth of direct equity ("the Direct Equity") in the Bid Vehicles which is held in my name shall be held on trust in the name of T&T Nominees Limited..."*
>
> *4.3 Implicit in the text cited at paragraph 4.2 above is the following:*
>
> *(i) The subject-matter of the trust is necessarily what it was at the time that the trust was created and cannot be something that came into existence (for example a different number of shares determined by a subsequent increase in their value) later.*
>
> *(ii) The shares in respect of which the Performance Guarantee Trust created a trust were said therein to then be worth £42 million i.e. "£42,000,000 worth of direct equity…which <u>is</u> held in my name (underlining added for emphasis).*
>
> *4.4 On 5th March 2012 there was and could have been no question of the shares in the Bid Vehicles being worth £42 million in actual real value. They were only capable of being worth £42 million by reference to the so-called "valuation book" notional valuation relevant for the purposes of the private placement memorandum (PPM).*
>
> *4.5 If Mr Roache had on the 5th March 2012 purported to create a trust of £42 million worth of direct equity shares with an actual real current value of £42 million, that would necessarily have included all the shares that he then owned in the Bid Vehicles*

and they would still be worth less than £42 million) but he would then not have been in a position to transfer Bid Vehicle shares to investors pursuant to their direct equity entitlements under the PPM and under contracts, since they would have been trust shares not beneficially owned by him.

…

4.8 Accordingly, it is the position of the Rennes Claimants that, whatever may be the legal effect of the Performance Guarantee Trust, the assets of the trust thereby created cannot exceed a number of shares greater by value than £42 million calculated in the notional value sense referred to above, and that Mr Roache continues to hold the balance of the shares left after such calculation, beneficially."

36. Because the touchstone is to *"ascertain the objective meaning of the language which the parties have chosen in which to express their agreement"* it is of no consequence whatsoever that some parties have during the course of the litigation previously supported an interpretation of the PGT completely different to the submissions which are now advanced. Indeed, IR's chameleonic approach to the interpretation of the PGT is set out in an earlier Judgment in these proceedings dated 25 June 2021 (2021/GSC/17 at [24] to [29]). There is no purpose in repeating those paragraphs because the various positions which were asserted were either devoid of merit or now advanced more substantively.

Submissions on behalf of the Claimants

£42m real current value

37. Despite earlier contradictory positions by some, all the claimants are now aligned with the propositions, as regards the value question, that *"£42,000,000 worth of direct equity"* means actual real current value of £42m and in respect of the scope of the PGT, that in addition to the 16 Bid Vehicles captured by the Braganza Order, all the Bid Vehicles in which IR holds or has held shares are caught by it. Possibly not

surprisingly, there are nuances as to how they arrive at the same conclusions.

38. The Claimants' overarching submission is that that the objective natural meaning of the phrase *"£42,000,000 worth of direct equity"* is actual real current value of £42m and that this aligns with its commercial purpose which was to provide security to investors in respect of their capital investment and a minimum return. That the PGT, although evidently an incentive to investors in DVP, was not a part of the investment scheme but rather an independent parallel arrangement. That it must be interpreted as a meaningful guarantee, that is to say, as securing the investors capital investments and the return on their capital, to the extent that the value in the significant majority of Bid Vehicles' shares held by IR could achieve that. And that for the PGT to achieve its purpose the value of the shares has to be calculated fairly. It is further submitted that the DVP business was a start-up established by IR, who retained a significant majority stake but with the funding to capitalise the entire business being provided by the original investors and that it is against this background that the PGT needs to be interpreted. That the PGT provided security to the original investors in case the business failed to deliver on the very substantial promised return. Put in more neutral language this was a highly speculative investment in respect of which the PGT afforded an element of security to investors. That what IR was doing in providing the PGT was to provide investors with some security for an investment by them of real money. That to import the Valuation Book when interpreting *"£42,000,000 worth"* would defeat the purpose of the PGT.

39. It is also said that strictly, the only connection between the PGT and the investment in DVP is that found in the final paragraph by which terms in the PGT which are defined in the DVP PPM (or the BID Vehicles PPMs) are to have the same meaning for the purposes of the PGT. And, that none of the terms in the PGT which can be construed

by reference to definitions in the DVP PPM such as *"Capital", "hurdle rate", "repayment event"* or *"closing date"* impact upon the interpretation of *"£42,000,000 worth of direct equity"*.

40. With a somewhat more strident approach, which does not sit comfortably with the Rennes claimants' earlier position statement, Sir Peter submits that the objective natural meaning of the words "£42m worth" is simply £42m of real money in Sterling. That a document only requires interpreting when it is unclear and conversely, that what is clear does not require interpretation.

41. Returning to the principal thread of the submissions advanced on behalf of the claimants, Mr Feetham in his skeleton submissions provides an explanation for the arithmetical significance of £42m and the contention that it supports the interpretation that it refers to actual value. His Skeleton Submissions at [11] to [13] states:

> *"11. In order to correctly construe [the PGT], it is necessary to consider the relevant context. It is as follows:*
>
> *a. There were 100,000 redeemable Class A preference shares issued by Domain.*
>
> *b. The 100,000 shares were offered at £1,000 per share.*
>
> *c. Assuming all shares were acquired, the total Capital Commitment was £100m.*
>
> *d. The agreement with investors is that, through 4 calls on the Capital Commitment, they would actually pay 42% of the Capital Commitment.*
>
> *e. It is in this way that Mr Roache arrived at the figures of £42m. The Trust Letter is based on a calculation that all of the A Shares were or would be acquired, that £100m of capital was or would be committed, and that in accordance with the investment agreements collectively £42m of that capital had or would be paid (or at least was required to be paid in accordance with the investment agreements).*
>
> *12. It is plain that Mr Roache's intention by the Trust Letter was to guarantee the investments made by the investors, in a sum matching their contributions (being 42% of their Capital Commitment). This makes perfect sense. Unless and until the*

investors recoup their contributions, plus 15%, Mr Roache would hold any or all of his shares in the Bidding Vehicles (however many is necessary), up to the value of £42m (being the sum of the investors' total contributions), on trust for those investors.

13. Mr Roache's reference to "£42,000,000 worth" of shares in the Bidding Vehicles must, accordingly, be read as referring to the actual value of the shares at any given time."

The Mattin alternate case - £42m worth to be assessed against the Net Asset Value ("NAV") / Cell A Net Asset Value ("CANAV") formulas

42. In the alternative, to the primary contention that £42m means £42m of real current value Mr Azopardi submits that, for the purposes of attributing a value of £42m to the shares at the time that the trust was declared, that this should be calculated on the basis of the NAV formula found in the Bid Vehicles PPM and/or the CANAV formula in the DVP PPM which are on similar terms. Those formulas essentially provide for the valuation of the shares in the Bid Vehicles and Cell A of DVP respectively on the basis of value of assets less liabilities, and is described in the PPMs as *"fair value"*. In support of this proposition Mr Azopardi relies upon the provision at [7.5] of the Bid Vehicles' PPMs and [9.6.2] of the DVP PPM which use NAV and CANAV respectively, for the purposes of determining the value of the shares in the event of a "Compulsory Redemption". Conceding that the NAV and CANAV formulas are not referred to in the PGT, Mr Azopardi makes the self-evident but none the less pertinent point that it equally makes no specific reference to the Valuation Book.

Direct Equity

43. What all those submissions take insufficient account of is that the final paragraph of the PGT not only incorporates definitions of terms in the PPMs but also terms found in the PGT *"whose interpretation is provided for"* in the PPMs. In the latter regard it is instructive that although *"Direct equity"* is not a defined term, reference to it is to be

found at [10.2.2] under the heading *"Introduction to Investment in Private Funds to own and manage gTLD's"* as follows:

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

44. Use of the phrase *"direct equity"* is also to be found at [10.2.4] of the DVP PPM which deals with SIDE which I have referred to before at [13].

Certainty of Subject Matter

45. Notwithstanding that counsel for the claimants cross adopted each other's submission, there were distinct approaches when reconciling their interpretation of the PGT with subject matter certainty.

Part of a Fungible Mass

46. Mr Azopardi submits, that it is self-evident from the language of the PGT that the shares in the Bid Vehicles subject to the trust, were not specifically identified and that the declaration of trust is clearly and

expressly of £42million worth of direct equity in the Bid Vehicles. That the term Bid Vehicles not being qualified or limited it must follow that all 60 Bid Vehicles are caught by the declaration of trust. Mr Azopardi relies upon *Hunter v Moss [1994] 1 WLR 452* in support of the proposition that there can be certainty of subject matter, even if there is no segregation of the property which forms the subject matter of the trust. The principle in *Hunter v Moss* was summarised by Briggs J. *in Re Lehman Brothers International (Europe) [2010] EWHC 2914 (Ch)* at [225] as follows:

> *"iii) A trust of part of a fungible mass without the appropriation of any specific part of it for the beneficiary does not fail for uncertainty of subject matter, provided that the mass itself is sufficiently identified and provided also that the beneficiary's proportionate share of it is not itself uncertain."*

And then at [225] he went on to identify the following two principles:

> *"iv) A trust does not fail for want of certainty merely because its subject matter is at present uncertain, if the terms of the trust are sufficient to identify its subject matter in the future.*
>
> *v) Subject to the issue of certainty, the question whether B has a proprietary interest in the property acquired by A for B's account depends upon their mutual intention, to be ascertained by an objective assessment of the terms of the agreement or relationship between A and B with reference to that property."*

And later at [232] analysing the conceptual approach he said:

> *"The difficulty with applying the Court of Appeal's judgment in Hunter v. Moss to any case not on almost identical facts lies in the absence of any clearly expressed rationale as to how such a trust works in practice. There has not been unanimity among those courts which have followed Hunter v. Moss, nor among the many academics who have commented upon it, as to the correct approach. The analysis which I have found the most persuasive is that such a trust works by creating a beneficial co-ownership share in the identified fund, rather than in the conceptually much more difficult notion of seeking to identify a particular part of that fund which the beneficiary owns outright."*

47. Mr Azopardi also relies upon the English Court of Appeal decision in *Wilkinson v North [2018] 4 WLR 41* where David Richards L.J. with whose judgment Gloster L.J. agreed, at [19], relying upon *Lehman Bros,* said that *"constantly changing assets can form the subject of a valid trust"* and after expressing the view that the principle established in *Lehman Bros* went further than that in *Hunter v Moss* at [21] said:

> *"In terms of certainty of subject, I do not see a difficulty in a trust of a share of an indivisible asset, such as real property, intellectual property rights or book debts. Having regard to Hunter v Moss and the Lehman Bros case, there would not be an obstacle to a trust of an undivided share of a holding of securities or of a credit balance on a bank account."*

48. Adopting the language in *Lehman Bros of "fungible mass"* Mr Azopardi submits that in the present case the mass is the *"direct equity"* held by IR in the 60 Bid Vehicles not subject to pre-existing trusts or contractual claims, with the proportionate share subject to the trust being £42m worth thereof. That it does not matter that the £42m was incapable of precise calculation in terms of number of shares in March 2012 for two reasons:

    i. because the trust shares were intended to be security for real value capital amounts paid in by investors and interest thereon which was repayable within 54 months, that is to say September 2016; and
    ii. in 2012 the Bid Vehicles and consequently the shares, were only of speculative value because it was uncertain how many ICANN applications would be successful and how any successful acquisition of a gTLD licence would then perform. That it was only by 2016 that the performance of the investment could be gauged both in terms of the successful bids and the payments received in respect of the unsuccessful applications.

49. That therefore the real value of the shares in the BID Vehicles fell to be ascribed on the Repayment Date, because it was only at that point that it would be possible to calculate how the identifiable part of £42m of the *"fungible mass"* would be produced and how many of IR's shares would be necessary to produce that value that had been placed on trust. Mr Azopardi also puts it this way, that if a trust is established in respect of 10% of a business, the value to the beneficiaries will evidently change over time. That in the present case the value remains static at £42m but that the part of the fungible mass needed to generate those £42m will change over time even if the effect of that is that it captured all the shares held by IR.

Net All

50. Mr Feetham and Sir Peter urge the same conclusion but approach the analysis from a similar starting position but one which does not directly invoke the *fungible mass* analysis.

51. Mr Feetham submits that whilst the shares in the Bidding Vehicles as at the date of the PGT may or may not have carried a value of £42m (to which I would add they evidently did not) that this does not matter as equally it does not matter if at some point after its creation the value of IR's shareholding exceeded £42m. That the commitment was the same: to hold such number of shares in the Bid Vehicles as was necessary to meet the £42m commitment to the investors. That although the PGT is drafted in the present tense (i.e. *"£42,000,000 worth of direct equity... which is held in my name*") that this connotes no more than an understanding, assumption or aspiration on IR's part that the shares in the Bid Vehicles did at that time carry that value and does not render the PGT uncertain. That the core commitment is clear: that Mr Roach will hold so many of the shares as is necessary up to the value of £42m and therefore if the value fell or never achieved £42m then the entire shareholding would remain committed under the PGT.

52. Sir Peter's submissions are to the same effect save that he approaches the analysis on the evident premise that as at 5 March 2012 there was and could have been no question of the shares in the Bid Vehicles being worth £42 million in actual real value. Also, with a nuance that arises by virtue of the fact that the Claimants in the Rennes Action did not get their allocation of SIDE shares from IR.

53. Sir Peter properly submits that as a matter of trust law it is trite that the subject matter of the trust is necessarily what it was at the time that the trust was created and cannot be something that came into existence thereafter. In *Underhill and Hayton 18th Edition* at 8.25 it is stated as simply as:

> *"The trust property has to be certain when the trust is created not just when the trust terms are to begin to operate."*

54. His starting point is that as at 5 March 2012 *"£42,000,000 worth of direct equity"* was synonymous with all the shares held by IR which (crucially because the Claimants had not got their allocation of SIDE shares) he was then in equity free to alienate in trust. This is described by Sir Peter as "Nett All".

55. In the alternative, and on the premise that *"£42,000,000 worth of direct equity"* was synonymous with all the shares held by IR, he submits that notwithstanding that the PGT is dated 5 March 2012, it amounted to a declaration to create a trust, but it did not create it at that date. Rather the PGT was created on the terms of the PGT on the date that invitations to subscribe for Cell A Shares under the DVP PPM was closed and therefore, established by conduct on the Subscription Closure Date. That the letter of 5th March 2012, while not creating the trust, is a statement both of IR's intention to create the trust and of the terms of it. With the subject matter of the trust being all the Bid Vehicle Shares remaining in Mr Roache's beneficial ownership, namely those not required to satisfy his contractual

commitments to investors who had subscribed to Cell A Shares under the PPM by virtue of SIDE.

56. Irrespective of the approach, none of the claimants seek to challenge the submission that the settling of IR's shares pursuant to the PGT was subject to the rights acquired by investors through the SIDE such that in so far as any such shares were distributed to investors or they had a contractual right to such distribution, they were released or excluded from the PGT. As I understood it, equally Mr Bennion Pedley did not demur from that analysis.

IR's Position

57. IR's most recent position as regards value is that the reference to £42m worth in the PGT, is a reference to that value on the benchmarked valuations as set out in the Valuation Book. As regards its scope, that the shares subject to the trust are those identified in the 4 October 2012 instruction.

58. As regards the value question, Mr Bennion-Pedely submits that by its final paragraph the PGT adopts the terms in the PPMs. That the DVP PPM sets and defines the value of the Bid Vehicles premised upon the values contained in the Valuation Book and that consequently that valuation is carried through into the PGT. In support of that proposition particular reliance is placed upon clauses [10.3] and [10.2.4] of the DVP PPM (set out at [22] and [13] above) which deal with the valuation of the Bid Vehicles and the allocation of SIDE respectively, with both being undertaken on the basis of the Valuation Book. It is further submitted that the entire scheme was premised upon the equity in the Bid Vehicles having been independently valued and benchmarked by the Valuation Book. That the actual value of the shares in the Bid Vehicles was evidently speculative and that the Valuation Book although providing a valuation of a very best case scenario, provided the contractual benchmark through which to

determine the allocation of shares through both DVP and direct equity through SIDE. That the Claimants may now, in hindsight, not like the valuation in the Valuation Book, but that that is what they signed up to and that it is those valuations which dictated their respective equity participations in DVP, through SIDE and the PGT.

59. As regards the scope of the PGT and the Bid Vehicles subject to it, it is said that it is necessary to rely upon the October 2012 emails because otherwise the PGT itself would be unenforceable for lack of subject certainty. Although not developed in his oral submissions, in his Skeleton Argument Mr Bennion-Pedley accepts that the starting point is the general rule that evidence on how the parties conduct themselves post contract is inadmissible, however he submits the IR's conduct post the PGT is highly material. In the words of his skeleton:

> *"In this case, however [IR]'s conduct post the [PGT] is highly material:*
> *21.1 firstly, as an aid to construction, it is admissible by analogy under the limited exception (usually applicable to cases involving land but not exclusively so limited) in instances where the subject matter of the grant is uncertain (see Watcham v AG of the East Africa Protectorate [1919] AC 533 per Lord Atkinson at 540);*
> *21.2 Secondly, the fact that [IR] issued the Trust Instruction requiring a certain number of shares across specific bid vehicles to be placed in trust is essential as a means of "rescuing" the [PGT] from the conceptual issues rightly identified by counsel for Bond House and Miss Bartlett."*

60. As I understood it, Mr Bennion-Pedley by his oral submissions modulated that approach, submitting that whilst the PGT is a statement of intention to put shares into trust for the benefit of investors, subject to the terms within it, that there was not at that stage a declaration of trust which the Court would enforce, because the PGT by itself was unenforceable for the lack of subject certainty, with that conceptual problem being cured by the 4 October 2012 instruction. Given the fact that the top 20 Bid Vehicles, calculated on the basis of the Valuation Book referred to in those instructions do not correspond with the 16

Bid Vehicles in the Braganza Order, he sought to reconcile that conflict with the suggestion that so as not to undermine the earlier Order, the application of the trust over the Bid Vehicles identified in the October 2021 emails could simply sit alongside the Braganza Order.

Discussion

61. No detailed submissions and no oral submissions were advanced on the applicability of the *Watcham* exception. My own review of English Court of Appeal judgments in which it has been considered, leads me to the conclusion that the principle in *Watchman*, to the extent that it may remain good law, is only applicable in the context of the conveyance of land. In *Beale v Harvey [2003] EWCA Civ 1883* Peter Gibson LJ, with whom Hale LJ (as she then was) and Rix LJ agreed at [30] said:

> *"As for the argument based on subsequent conduct, I confess that I find strange the notion that the true intention of the parties to Mrs Harvey's Transfer as to what they intended to be the boundary line between their properties should be ascertained by reference to what the parties did in the first few months after the Transfer at a time when it had not been pointed out, nor had it occurred to either of them, that the wall and fence had been wrongly positioned. The authority relied on by Mr Ball for the admissibility of such evidence is the Privy Council decision in Watcham . But Mr Ball did not take us to any of the many judicial and academic expressions of doubt about the correctness of that decision on that point. It is sufficient to refer to the remarks of two judges of great experience of real property law and to one text book. In Sussex Caravan Parks v Richardson [1961] 1 W.L.R. 561 at 568, Harman L.J. described Watcham as*
> *"a case which has been long under suspicion of the gravest kind from real property lawyers".*
> *In Schuler AG v Wickham Machine Tool Sales Ltd [1974] A.C. 235 at 261, Lord Wilberforce described Watcham as*
> *"a precedent which I had thought had long been recognised to be nothing but the refuge of the desperate".*
> *He continued:*
> *"Whether in its own field, namely that of interpretation of deeds relating to real property by reference to acts of possession, it*

retains any credibility in the face of powerful judicial criticism is not before us."

Watcham, on this point, runs counter to the decisions of the House of Lords that subsequent actions cannot legitimately be used to interpret a written agreement (see Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd [1970] A.C. 583 and the Wickham case). In Chitty on Contracts (28th Ed., Sweet and Maxwell, London, 2000) para.12–124, n.36 the authors say of Watcham :

"The authority of this case is now extremely fragile."

A decision of the Privy Council is not binding on this court and I decline to follow it on this point."

62. The *Watcham* exception was again considered by the English Court of Appeal in *Ali v Lane, [2007] 1 P. & C.R. 26 (2006)* where Carnwath L.J. (with whom Maurice Kay L.J. now the President of our Court of Appeal and Waller L.J. agreed) reviewed the authorities. Whilst not finding it necessary to decide whether Peter Gibson L.J.'s last statement in the above extract was binding he referred to a passage by Megarry J. in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No.2) [1973] 1 W.L.R. 1572* in which he explained why the context of boundary disputes justified a special rule:

"One may accept to the full that it does not apply to commercial contracts or, for that matter, to any language of obligation, whatever the document. If the question is what one party is obliged to do under some document, the effect of measuring the obligation by what in fact that person has done under the document is to convert into a binding obligation what may have been done as of grace or to promote good relations or to avoid argument ...

In the Watcham case itself, as in Neilson v Poole, the matter in dispute was a matter of boundaries; and the application of the doctrine in this field involves very different considerations. Parcels clauses and plans in a conveyance not infrequently give rise to disputes on the application of what appears on the piece of paper to what lies physically on the ground. Even if there is no uncertainty as to the meaning of the words used or the ambit of what is coloured on the plan, there may still be serious problems of application. Furthermore, in these problems of application the passage of time often brings its own cure: the passing of 12 years may stifle an incipient boundary dispute, whereas it would do nothing to resolve the extent of a contractual obligation. In such

> *circumstances, it seems to me that the doctrine may still play a useful part."*

63. Carnworth L.J. then went on to conclude at [36]:

> *"The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended."*

64. To the extent that the *Watcham* exception remains good law it is evidently a principle the application of which is circumscribed to the conveyance of land. No authority has been relied upon in support of the proposition that it is capable of being applied by analogy. The upshot is that I find no basis upon which to apply the *Watcham* exception to the present case. In my judgment it is not permissible to rely upon the Trust Instructions as an aid when construing the PGT. By parity of reasoning, it is also not permissible for me to rely upon the 7 March 2012 email from IR to CM to aid in the interpretation of the PGT, it may post date the PGT by only a matter of 2 days, but it is nonetheless subsequent conduct.

65. Not having been referred to any of the above cited authorities at the hearing, when providing an embargoed copy of this judgment counsel were informed that they could, if they so wished, address me on these. That invitation was declined.

66. There is then the distinct submission as to whether the PGT was but a statement of intention, with the trust only settled by virtue of the October 2012 emails. The difficulty with that proposition is that in the Order of 9 January 2019 in the Braganza Action, which has not been

appealed and which all parties agree that they are bound by, I made a declaration that:

> *"Pursuant to the Trust Letter, £42 million worth of shares owned beneficially or legally by the Second Defendant in the 16 Bid Vehicles listed in Schedule 1 to this Order are held on Trust for the Claimant and subject to paragraph 2 below, the Original and/or Step-in Investors in the First Defendant listed in Schedule 2 to this Order, to be shared pari passu amongst them."*

By virtue of that declaration, which at the time was not opposed by IR, the trust of *"£42 million worth of shares"* was created by the PGT so it is not open to me to now find that the trust was established thereafter. And, by parity of reasoning, it follows that I do not accept that part of Sir Peter's submission in which he postulates that the Trust came into existence on the Subscription Closure Date, that is on 5 April 2012.

67. In my judgment the PGT established the trust on the date it was made, albeit a trust with two conditions precedent before a beneficiary could benefit from it. Namely:
    i. prospective investors had to become actual investors; and
    ii. the *"repayment event"* not taking place.

68. The fundamental issue that requires determination is evidently the meaning of *"£42,000,000 worth of direct equity"*. I seek to interpret that phrase applying the principles I have previously identified and also in a way that satisfies the requirement for certainty of subject matter. In the latter regard the viable interpretations are the "net all" approach; a trust of part of a fungible mass and £42m based on the Valuation Book.

69. I can deal with the net all analysis briefly. Undoubtedly it satisfies subject certainty given that all the shares held by IR as at 5 March 2012, which he was then in equity free to alienate, would be subject to the trust. However, the submission is predicated upon *"£42,000,000*

worth of direct equity" being synonymous with all of IR's direct equity. At the time the trust was settled that was undoubtedly the position, but had the fund performed as no doubt all hoped when they invested, it need not necessarily have continued to remain the case and at that stage there would have been no question that any balance in excess of £42m would not have been subject to the PGT. It follows that *"£42,000,000 worth of direct equity"* cannot be interpreted as interchangeable with all of IR's direct equity and therefore that construction of the PGT fails.

70. I also find Mr Azopardi's analysis of £42m as part of a fungible mass, as articulated by Mr Justice Briggs in *Lehman Brothers* as a trust in which there is a beneficial co-ownership share in the identified fund, as a proper basis upon which to ascertain certainty of subject matter. There is as I see it no principled difference between a *Hunter v Moss* case where there is a trust over a percentage of shares and a trust were the methodology to ascertain the subject matter of the trust is a fixed value. Equally certainty of subject can also properly be accomplished if reliance is placed upon the Valuation Book.

71. By this rather circuitous route the upshot is that the issue before me simply put is, what is the objective meaning of *"£42,000,000 worth of direct equity"* when the PGT is considered as a whole in the context of the surrounding circumstances. The arguments are evenly balanced not least because both constructions, namely £42m of real money and £42m calculated on the basis of the Valuation Book are consistent with what Popplewell J. in *Lukoil Asia Pacific* refers to as *"business common sense"*. £42m worth of real money is wholly consistent with IR providing investors with some security for an investment of real money in circumstances in which all the actual funding for the acquisition of Bid Vehicles by DVP came from those investors, with that interpretation being supported by Mr Feetham's analysis of the basis for calculating that sum. The alternative analysis is equally plausible given that both the investments in DVP and the allocation of

shares by virtue of SIDE were calculated on the basis of the Valuation Book, and although strictly the PGT sits outside that agreement it is an aspect of the overall commercial arrangement.

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

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

74. Orders accordingly and I shall hear the parties as to costs.

A E Dudley
Chief Justice

17 June 2022