**Neutral Citation Number [2018] EWHC 1743 (Ch)**

**Claim No:HC 2017-001575**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

Royal Courts of Justice
Strand, London, WC2A 2LL
Date 12/07/2018

**Before**
**Philip Marshall QC (sitting as a Deputy Judge of the High Court)**

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**Between :**

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| **FRASER TURNER LIMITED** | **Claimant** |
| **- and -** | |
| **(1) PRICEWATERHOUSECOOPERS LLP** | **Defendants** |
| **(2) PETER DICKENS** | |
| **(3) RUSSELL DOWNS** | |

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Mr David Lord QC and Richard Bowles (instructed by Collyer Bristow LLP) for the Claimant
Mr Daniel Bayfield QC and Stephen Robins (instructed by Clifford Chance LLP) for the Defendants

Hearing dates: 20th to 21st June 2018

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para.6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

**MR PHILIP MARSHALL QC:**

## Introduction

1. This is the hearing of an application by the Defendants made by application notice dated 21 December 2017, for an order striking out the Particulars of Claim or alternatively for summary judgment against the Claimant under Part 24 of the Civil Procedure Rules.

2. After that application was issued the Claimant commenced its own application to amend the Particulars of Claim on 20 February 2018 (although a further draft of the proposed amendments was provided on Friday, 15 June 2018).

3. It is agreed between the parties that the application to strike out or for summary judgment against the Claimant should be considered with reference to the latest version of the draft amended Particulars of Claim ("the APOC"). If that statement of case would fail to survive an application to strike out or for summary judgment then the proceedings should be dismissed. If, however, it would survive such an application there are no separate further grounds for opposing amendment so that permission ought then to be granted as a matter of course.

4. As is described in further detail hereafter, the Claimant advances five categories of claim in the APOC: (1) a claim for damages for procuring a breach of contract; (2) a claim for damages for conspiracy to cause loss by unlawful means; (3) damages for breach of duty as administrators; (4) damages for misfeasance; and (5) relief pursuant to paragraph 74(3)(a) of Schedule B1 of the Insolvency Act 1986. The conspiracy claim itself relies on two forms of unlawful means, namely procuring a breach of contract (the claim in category (1) above) and breach of administrators' duties (the claim in category (3) above). The misfeasance claim overlaps entirely with the claim for breach of duty in category (3).

5. In so far as the application to strike out or for summary judgment concerns the claims for procuring a breach of contract and conspiracy to cause injury by so doing, the sole area of focus is upon the issue of whether there was a breach of contract on the true construction of the relevant agreement. For the purposes of this hearing, in regard to these claims, there has been no attempt by the Defendants to rely on other grounds such as the lack of a maintainable case regarding the requisite knowledge or intent that would need to be established for such a claim to succeed applying decisions such as that of the House of Lords in OBG Ltd. v Allen [2008] 1 A.C. 1.

6. As regards the approach to be adopted in determining their applications, the Defendants relied upon the guidance of the Court of Appeal in ICI Chemicals & Polymers Ltd. v

TTE Training Ltd. [2007] EWCA Civ 725, at [12] – [14], where Moore-Bick LJ (with whom Ward and Buxton LJJ agreed) stated:

*"12….It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.*

*13 In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome."*

*14 Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction".*

(see also in this regard the more recent decision of the Court of Appeal in Global Asset Capital Inc. v Aabar Block SARL [2017] 4 WLR 163, at [27]).

7. I did not understand the counsel for the Claimant seriously to challenge the submission that the points arising on the application to strike out or for summary judgment were short points of law or of construction on which the court did have all the necessary evidence to determine the issue and that they had had an adequate opportunity to address them in argument. In any event, for the reasons which appear below, I do consider this to be a case in which the court should "grasp the nettle" (to use Moore-Bick LJ's words) and decide the short points of construction and law that arise. In my judgment this is not a case where the Claimant has pointed to some further evidence that has not yet come to light, which it has not had an opportunity to deploy, which

would put a different light on the contract to be construed or which would affect the determination of the questions of law arising on the application.

**Background**

8. The following description of the background is largely derived from the Claimant's evidence and skeleton argument.

9. The Claimant provides consultancy services to the mining industry, with a particular expertise in relation to West Africa.

10. As part of this work, in October 2005 it was engaged by London Mining PLC ("London Mining") to assist it, among other things, in procuring the purchase of a lease of the Marampa mine in Sierra Leone. This was subsequently formalised in a Facilitation Agreement dated 28 February 2007 ("the Facilitation Agreement"), under which, in consideration for its services the Claimant would receive certain royalties. These consisted of a royalty of US$0.10 per tonne of iron ore sold from the Marampa mine and a further royalty of 2% of gross yearly sales from that mine.

11. In December 2009 the wholly owned subsidiary of London Mining, London Mining Company Limited ("LMCL"), a company formed in Sierra Leone, obtained a 25 year mining lease (subsequently extended to 40 years in 2012), to exploit the Marampa Mine.

12. Shortly before the above lease was acquired London Mining stated publicly that it no longer considered that it owed the Claimant certain royalties that the Claimant believed that it was entitled to under the Facilitation Agreement. As a result, in December 2011, the Claimant issued proceedings in the High Court against London Mining for declaratory and other relief.

13. In March 2012 settlement negotiations took place which were successful. The terms of settlement were set out in three agreements between the Claimant and London Mining and LMCL dated 8 June 2012, namely, a termination deed, a services deed and a royalty deed ("the Royalty Deed"). The terms of Royalty Deed are central to the present proceedings and I address them in greater detail below. In summary, however, they provided that, in consideration for the settlement LMCL would pay a royalty to the Claimant of 0.3% of all iron ore produced at the Marampa Mine and this obligation was guaranteed by London Mining ("the Royalty").

14. Between October 2012 and April 2014 LMCL maintained payments to the Claimant in respect of the Royalty. The Claimant would, pursuant to the terms of the Royalty Deed issue an invoice for payment to LMCL. The sum invoiced was calculated based on information provided by LMCL and London Mining, who would, following publication of its results on the stock exchange, provide information to enable such an invoice to be prepared.

15. In July 2014, the First Defendant, PricewaterhouseCoopers LLP ("PwC") was engaged by London Mining to provide analysis and advice in relation to the short term cash flow of both London Mining and LMCL.

16. In September 2014 it became clear to the Claimant that London Mining was in some financial difficulty. LMCL had failed to make any payment in respect of an invoice rendered by the Claimant dated 1 September 2014 in respect of the Royalty.

17. On 7 October 2014, PwC was engaged once again. This time they were engaged to act for London Mining and its secured creditors to provide advice in relation to the future financing of London Mining.

18. Then on 10 October 2014 the board of London Mining announced that London Mining would not continue as a going concern and that they would take steps alongside PwC in order to place the company into administration. London Mining was then placed into administration by its directors on 16 October 2014. On the same day, the Second and Third Defendants, Mr Downs and Mr Dickens (at the relevant time a Partner and Director of PwC, respectively), were appointed as the joint administrators.

19. After the administration commenced, Mr James Turner, a director of the Claimant made contact with PwC. The details of the communications that ensued are relevant to the claims based on alleged breach of duty, misfeasance, and for relief pursuant to paragraph 74(3)(a) of Schedule B1 of the Insolvency Act 1986 and I address them in detail when considering those claims below. I merely note that it is said by Mr Turner in his evidence that, during these various communications, he asserted that the Royalty was an obligation that was *"transferrable to any buyer of London Mining, LMCL or the Marampa Mine"* and he claims that Mr Downs did not disagree.

20. On 22 October 2014 terms were agreed with Timis Mining Corporation (SL) Limited ("Timis Mining") for the purchase of the business and assets of LMCL. The term sheet provided that Timis Mining would purchase the business and assets of LMCL. The terms did not cater for the transfer of any obligation to Timis Mining to pay the Royalty.

21. In the evening of 31 October 2014 Mr Dickens and Mr Downs (along with a Mr Felix Addo of PricewaterhouseCoopers (Ghana) Ltd) were appointed as joint receivers of LMCL by its secured lenders. On the same day they completed the sale of the business and assets of LMCL, including the Marampa Mine, to Timis Mining. No provision was made for Timis Mining to take on the obligation to pay the Royalty.

22. The Claimant now complains that, despite Mr Turner's frequent conversations with Mr Downs during the course of the administration in relation to the Royalty Deed and the previous involvement of PwC, Mr Dickens and Mr Downs as advisers in relation to the affairs of London Mining, the Defendants did not draw the Royalty Deed to the attention of Timis Mining.

23. Subsequently, Timis Mining has indicated through its solicitors, Herbert Smith Freehills LLP, in a letter dated 2 March 2015 that at the time that it entered into the sale agreement it had no knowledge of the Royalty Deed nor its terms. The Claimant has also served a short witness statement from Mr Vasil Timis, ostensibly the owner of and controlling influence in Timis Mining, in which he states that: *"I believe that had I known about the Fraser Turner royalty prior to the acquisition, I would have likely endeavoured to ensure that such royalty was honoured, either by having Timis Mining take on the royalty obligation… or alternatively, by seeking to negotiate some comparable commercial arrangement with Fraser Turner in respect of their royalty…"*

24. The Claimant submitted a proof of debt in the administration of London Mining on 10 March 2015. This proof included a claim for debt in respect of the "Ongoing royalty" which was expressed in relevant part as follows: "*The Royalty Deed dated June 2012 was ongoing for the life of the mine and was to be transferred upon acquisition of the mine by any third party…Please see in particular clauses 3.5 and 6.2 of the Royalty Deed. In short it was incumbent to ensure that the royalty transferred to Timis Corp*".

25. On 15 March 2017 the joint administrators of London Mining admitted the proof of debt in full including the ongoing royalty element in the sum of £14,300,000 but subject to a note stating "*This element is admitted on the basis that the Company guaranteed royalty payments to FT under the Royalty Deed. The references to purported obligations to transfer the royalty obligations to Timis Corp were not relied on in reaching the decision to admit".*

26. On 24 April 2017, the discharge of the administrators of London Mining from liability was ordered to take effect on 29 April 2017 save in relation to the Claimant's claims and on 30 July 2017 London Mining was dissolved.

**<u>The Claims founded on Breach of Contract</u>**

27. I address first the claims that depend on the Claimant establishing a relevant breach of contract. These are the claims regarding procuring a breach of contract and conspiracy to cause injury by so doing advanced in paragraphs 6 to 7, 11, 121 to 133 and 135 to 136 in the APOC (with causation and loss then being pleaded thereafter). In the summary of these claims in paragraphs 6 to 9 of the draft statement of case they are said to be founded on the contention that the Royalty Deed contained a term that London Mining and LMCL had agreed to transfer the obligation to pay the Royalty to any purchaser of the Marampa Mine and that this term was breached when the joint receivers of LMCL sold the assets of that company (including the mine) to Timis Mining *"without attempting to transfer [the Claimant's] right to its 0.3% royalty".*

*<u>The Royalty Deed</u>*

28. Counsel for the Claimant referred to the following recitals and provisions of the Royalty Deed for the purposes of founding the claims based on breach of contract.

29. Recital (C) recorded that: *"The Parties have agreed that London Mining shall pay, or procure the payment of, a Royalty to Fraser Turner on the terms set out in this Deed."*

30. The provision providing for the Royalty was clause 3.1 which stated: *"LMCL or the Relevant Entity shall pay and London Mining shall procure that LMCL or the Relevant Entity shall pay a royalty to Fraser Turner of 0.3% ... of the Market Value of all Marampa Iron Ore sold by LMCL or the Relevant Entity less [certain costs and fees], to be calculated in accordance with this Clause 3 ("the Royalty")."*

31. The defined terms used in this provision had the following meanings: "Market Value" was defined as: *"the sale value of Marampa Iron Ore receivable by LMCL or the Relevant Entity in an arms length transaction…"*. The term "Relevant Entity" was defined as *"the relevant Subsidiary of London Mining or LMCL which holds a licence to operate a Mine."* The term "Marampa Iron Ore" was defined as "*Iron Ore extracted from Marampa."* "Marampa" was itself a defined term meaning "*that area in Sierra Leone, West Africa, referred to in Schedule A to the 2009 Mining Lease…"*.

32. Clause 3.3 provided that: "*The Royalty shall be payable in arrears from 1 April 2012 and shall continue to be payable for the duration of Iron Ore Production."* The phrase *"Iron Ore Production"* was a defined term meaning "*the production of Iron Ore from Marampa by LMCL, London Mining or any Subsidiary of either of them."*

33. Clause 3.4 set out the mechanics for payment: "*Within five (5) Business Days following the announcement of London Mining's half year and annual financial results, London Mining shall provide Fraser Turner the Sales Value Statements and the Tonnage Statements in respect of the Marampa Iron Ore sold and shipped… during the relevant six month period included in the results (and in the case of the annual results, the second 6 month period following the 6 months period reported in the half year results) (each a "relevant six month period") and Fraser Turner shall issue an invoice addressed to LMCL or the Relevant Entity (as applicable) for the correct Royalty payable for the relevant six month period (a "Royalty Payment")…"* "Sales Value Statements" were statements of the respective sales value receivable FOB the vessel for Marampa Iron Ore sold at the designated Sierra Leone offshore loading facility of shipment after deducting various taxes and duties payable by LMCL or "the Relevant Entity". "Tonnage Statements" were statements prepared and delivered to the Sierra Leone Director of Mines, as certified by the accredited representative of LMCL or "the Relevant Entity" and the accredited representative of the National Revenue Authority of Sierra Leone, stating the total tonnage of Marampa Iron Ore of each kind, grade and quantity shipped by LMCL in arm's length transactions from Sierra Leone in that month or audited statements in a similar form.

34. The Royalty Deed provided for a change of control of LMCL and/or "the Relevant Entity" or the sale or transfer of all or substantially all of the assets of LMCL and/or "the Relevant Entity". In such circumstances, clause 3.5 provided that "*In the event of a Change of Control of LMCL and/or a Relevant Entity or LMCL and/or a Relevant Entity ceasing to*

*hold all or substantially all of its assets (the new holder of those assets herein after referred to as the "New Asset Holder"), clause 3.4 shall be amended to read as follows: "Within 3 months of the end of each 6 month period ending 30 June and 31 December in each year (each a "relevant six month period"), LMCL and/or a Relevant Entity or the New Asset Holder (as the case may be) shall provide to Fraser Turner the Sales Value Statements and the Tonnage Statements in respect of the Marampa Iron Ore sold and shipped (except where clause 3.6 applies) during the immediately preceding relevant six month period and Fraser Turner shall issue an invoice addressed to LMCL and/or the Relevant Entity or the New Asset Holder (as applicable) for the correct Royalty for the relevant six month period (a "Royalty Payment")…".*

35. Clause 6 of the Royalty Deed then provided under the heading "Guarantee" as follows:

> *"6.1 In the event that LMCL or the Relevant Entity fails to pay any Royalty Payment … when it falls due for payment, Fraser Turner may notify London Mining of such failure and provide London Mining with a properly issued invoice addressed to London Mining in respect of the sum due. In such event, London Mining shall, whether or not there has been a Change of Control of LMCL or the Relevant Entity on the due date for payment of such invoice (but subject to clause 6.2), make payment of the amount due to Fraser Turner within thirty (30) calendar days of receipt of such invoice at the Designated Address. This payment obligation shall survive termination of this Agreement to the extent that it has accrued prior to termination.*
>
> *6.2 In the event of a Change of Control of LMCL or the Relevant Entity or a Purchaser acquiring all or substantially all of the assets of LMCL and/or the Relevant Entity:*
>
> *6.2.1 London Mining's obligations under this Deed other than the obligations contained in clauses 6.1 and 9 shall cease immediately upon the execution by the Purchaser of an Accession Deed;*
>
> *6.2.2The guarantee in clause 6.1 shall cease to apply immediately upon the Purchaser or any other third party executing a Deed of Guarantee which for the avoidance of doubt may be done at any stage after a Change of Control of LMCL or the Relevant Entity or a Purchaser acquiring all or substantially all of the assets of LMCL and/or the Relevant Entity provided that at some time the Net Assets of the Purchaser or such other third party executing the Deed of Guarantee are equivalent to or greater than US$215,774,000 (being the Net Assets of London Mining as at 31 December 2011).*
>
> *6.3 In the event that a Relevant Entity commences Iron Ore Production, London Mining shall procure that it gives notice to Fraser Turner and the Relevant Entity shall enter into a direct obligation for a royalty with Fraser Turner".*

36. The form of the "Accession Deed" (and the Deed of Guarantee) was set out in Part A of Schedule 1 to the Royalty Deed. Clause 2 of the "Accession Deed" provides: *"The Purchaser hereby undertakes to Fraser Turner Limited to comply with the provisions of, and to perform all the obligations of London Mining Plc contained in the Deed (other than the obligations contained in clause 6.1 of the Deed) so far as they may remain to be observed and performed and the Purchaser shall become a party to the Deed as if the Purchaser was named in the Deed as London Mining Plc."*

37. The final two provisions referred to were clauses 7.8 and 12.11. Clause 7.8 provided that "*Subject to clause 6.2, London Mining or LMCL, or a Relevant Entity shall not be entitled to assign their respective rights under this Deed, or subcontract or transfer any of their rights or obligations hereunder without the prior written consent of Fraser Turner, such consent not to be unreasonably withheld or delayed.*" Clause 12.11 provides that *"Each Party shall (at its own expense) promptly execute and deliver all such documents and do all such things as may be required for the purpose of giving effect to the provisions of this Deed."*

<u>*Alleged Express and Implied Terms*</u>

38. Based on the above provisions the Claimant alleges the following as express terms that arose in the event of a sale of the Marampa Mine:

    38.1. It is alleged clause 3.5 of the Royalty Deed automatically amended clause 3.4 and imposed an "*obligation upon LMCL and/or London Mining to secure the agreement of the new owner of the Marampa Mine to pay or procure payment of the…Royalty"*;

    38.2. It is further alleged that *"LMCL and/or London Mining were under an express obligation to obtain a completed "Accession Deed" upon the transfer of the Marampa Mine to any new purchaser"* under which the new purchaser would pay or procure payment of the Royalty;

    38.3. It is also said that *"London Mining and/or LMCL were under an express obligation to obtain a completed "Deed of Guarantee" executed by a party fulfilling the criteria set out"* in clause 6.2.2 of the Royalty Deed;

    38.4. It is alleged that *"London Mining and/or LMCL were under an obligation to take all necessary steps to draw the Royalty Deed to the attention of any potential purchaser of the Marampa Mine"*; and

    38.5. Finally it is alleged that *"London Mining and/or LMCL owed an express duty to act in good faith at all times including…in complying with its obligations set out above"*.

See paragraph 27 of the APOC.

39. The Claimant alleges in the alternative that the terms alleged in paragraphs 38.1 to 38.4 above were implied terms or that there was an implied term to use all reasonable endeavours to secure the agreement of any new owner of the Marampa Mine to pay or procure payment of the Royalty and to obtain an executed Accession Deed.

*Analysis*

40. The parties were largely agreed on the relevant principles to be applied to the construction of express terms and the implication of terms in a commercial contract.

41. In relation to the modern approach to construction both sides referred to and relied upon the Supreme Court decision in Arnold v Britton [2015] UKSC 36 where Lord Neuberger stated, at [15]:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…"*

42. Lord Neuberger went on at paragraphs [17] to [23] of his judgment to explain that:

> 42.1 *"the reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision"*;
>
> 42.2 *"the less clear [the words] are… the more ready the court can properly be to depart from their natural meaning"*;

42.3 *"commercial common sense is not to be invoked retrospectively... Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made"*;

42.4 *"a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed"*;

42.5 *"one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties"*; and

42.6 *"in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties ... if it is clear what the parties would have intended, the court will give effect to that intention"*.

43. In Wood v Capita Insurance Services Ltd [2017] UKSC 24 the Supreme Court, while adopting the approach in Arnold, stated that the decision had not altered the principles set out by the Supreme Court in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900. Lord Neuberger then went on at [10] to state that: *"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."*

44. In relation to implied terms both sides accepted that the leading decision was that of the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742 where, at [18]-[21], Lord Neuberger confirmed the continuing applicability of Lord Simon's conclusion in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 283 that *"for a term to be implied, the following conditions ... must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract*".

45. As to these requirements, I understood the following to be uncontentious:

45.1. It is not enough to show that the term is a reasonable one for it to be implied into the contract. Reasonableness may be a necessary requirement before a term will be implied but it is not sufficient. A term should not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them (see Marks & Spencer at [21] to [23]). The process of

implying a term into the contract must not become the rewriting of the contract in a way which the Court believes to be reasonable, or which the Court prefers to the agreement which the parties have negotiated: Ali v Petroleum Co of Trinidad and Tobago [2017] UKPC 2 at [7].

45.2. The test which must be applied by the Court when seeking to imply a term into a contract as a matter of fact is whether the term satisfies the test of "business necessity" (see Marks & Spencer at [17]). The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion (see Ali at [7]).

45.3. The idea that the implied term must be "so obvious that it goes without saying" overlaps with the second requirement, in that it is aiming to identify the presumed common intention of the parties and is likely to produce the same result. As explained in Chitty on Contracts, (32nd Edition), at [14-005]: *"Traditionally, an implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap ... Both are predicated to depend on the presumed common intention of the parties"*.

45.4. The fact that the term must be "capable of clear expression" means that it must be reasonably certain. In Torre Asset Funding Ltd v The Royal Bank of Scotland plc [2013] EWHC 2670 (Ch), at [151] Sales J emphasised that: *"Clarity, certainty and predictability of interpretation are always important factors when considering whether a term should be implied into an arm's length commercial agreement"*. He said at [152(x)]: *"In order to satisfy the test for implication, the proposed implied term must be reasonably certain. Where there is a variety of proposed terms or where a proposed term could be expressed in different ways, that may be a good indication that it is not sufficiently certain*". See also in this regard Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd [2009] 1 Lloyd's Rep 391, (at [25]) and Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472, at 482.

45.5. It has been generally more difficult to persuade the court to imply terms into complex commercial arrangements. The reason is that given in BP Oil International Ltd v Target Shipping Ltd [2013] 1 Lloyd's Rep. 561, where Longmore LJ said (at [19]) that where parties had taken elaborate trouble to set out their agreement over several pages, the idea that there was a lacuna which the court had to fill was inherently unlikely. More recently the same point was made in Liberty Investing Ltd v Sydow [2015] EWHC 608 (Comm), at [11] where Leggatt J said: *"If the parties had intended to impose an obligation on one or other of them, the ordinary expectation is that they would have said so. That expectation is all the stronger in a case where, as here, the*

*parties have expressed their bargain in a detailed written contract which has been prepared with the assistance of high-powered City solicitors*".

46. There was some disagreement between the parties with regard to the fifth principle set out in Lord Neuberger's speech in Marks & Spencer, that an implied term *"must not contradict any express term of the contract"*. The issue was whether this principle could be extended so as to exclude implied terms which deal with the same subject matter as express terms as well as those which are strictly inconsistent with them.

47. I was referred to Broome v Pardess Co-operative Society of Orange Growers (Est. 1900) Ltd [1940] 1 All ER 603, where MacKinnon LJ said at 612C-D: *"Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject-matter, as to which there is an express provision, that there is also an implied provision or condition in the contract"*. I was also referred to Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379 (TCC) where Coulson J said at [46(b)]: *"An express term in a contract excludes the possibility of implying any term dealing with the same subject-matter as the express term"*. Both of these decisions predated the recent guidance provided in the Supreme Court, including that in Marks & Spencer. There has, however, been a more recent decision in Irish Bank Resolution Corp Ltd (in special liquidation) v Camden Market Holdings Corp [2017] 2 All ER (Comm) 781, in which the Court of Appeal at [36] cited and applied Broome in the context of addressing a claim based on an alleged implied term. Beatson LJ, summarised the position at [35] where he stated: *"I therefore turn to the inconsistency grounds. There can be two sorts of inconsistency; direct linguistic inconsistency and substantive inconsistency. The second type of inconsistency may be difficult to distinguish from the position where the parties have entered into express obligations with respect to a particular subject matter, and it is argued that a further term should be implied in relation to the same subject matter. It is well established that, particularly where the contract is lengthy and carefully drafted, the courts will be very reluctant to imply a further term even if it does not actually conflict with the express terms"*.

48. In my judgment, in light of the Court of Appeal decision in Irish Bank Resolution Corp, the observations of Coulson J in Persimmon Homes overstate the position. There is no absolute rule that, if there is an express term covering a particular subject, that necessarily excludes the possibility of any implied term where there is no linguistic inconsistency. Rather, the correct approach, reflecting common sense, is that the existence of such an express term makes the co-existence of a further implied term on the same subject unlikely and especially so in a lengthy and carefully drafted document on which legal professionals have been advising.

49. Applying the above principles when considering the Royalty Deed I have come to the firm conclusion that there is no express term or implied term of the type claimed in the APOC.

50. The argument of the Claimant that there were express terms of the type set out in the APOC proceeded along the following lines:

50.1. Reliance was placed on recital (C) which it was said referred to London Mining paying or procuring the payment of the Royalty but without this procurement obligation being limited to LMCL or a "Relevant Entity".

50.2. It was said that the terms of clause 3.5, which provided for a "New Asset Holder" to be invoiced for the Royalty instead of LMCL or a "Relevant Entity" as appropriate, connoted a contractual entitlement to the sum invoiced on the part of the Claimant as against a party acquiring the Marampa Mine. It is argued that these provisions make no sense unless there was an obligation on the part of London Mining or LMCL to procure that the "New Asset Holder" (a) supplied the Sales Value Statements and Tonnage Statements required to calculate the Royalty (since such information would only available to that "New Asset Holder" after it had acquired the mine) and (b) paid the invoice.

50.3. It is then said that to make the clause 3.5 provisions operate effectively, and having regard also to the provisions of clause 6, there must be an express obligation for the "New Asset Holder" to enter into an "Accession Deed" (in the form provided for in Part A of Schedule 1 to the Royalty Deed).

50.4. Further support for this argument is sought to be drawn from clauses 7.8 and 12.11. The former was said to indicate that the Claimant was to be party to an arrangement under which the obligation to pay the Royalty was transferred to a purchaser of the Marampa Mine and the latter required London Mining and LMCL to do all things required to ensure that a purchaser of the Marampa Mine entered into an "Accession Deed".

50.5. The above construction arguments are said to reflect commercial common sense given that in the proceedings between the Claimant and London Mining that were settled by the Royalty Deed, only part of the royalties payable were in dispute and given that the Royalty was to continue to be payable where there was a change of control of LMCL or "the Relevant Entity".

51. I do not accept these submissions for the following reasons:

51.1. It is important to bear in mind that the Royalty Deed was a document forming part of a suite of agreements that were professionally drafted with eminent solicitors representing the parties (Norton Rose LLP representing the Claimant and Travers Smith LLP representing London Mining and LMCL). They were evidently drawn up following negotiations that took place over several months (between March to June 2012). In my judgment this aspect gives added force to the observations of Lord

Neuberger in Arnold that the plain and ordinary meaning of the language used will normally be the surest guide to the true interpretation of the agreement.

51.2. I do not regard the plain and ordinary meaning of any of the provisions relied upon by the Claimant as giving rise to the express terms set out in the APOC. Far from it. As to this:

51.2.1. The most obvious place to include an obligation on the part of London Mining to procure that any purchaser of the Marampa Mine enter into an "Accession Deed" or otherwise take on an obligation to pay the Royalty would have been in clause 6. But no such wording appears. Instead clause 6.3 limits the obligation on the part of London Mining to procure that a party enters into a direct obligation to pay a royalty to the Claimant to the situation where that party is a "Relevant Entity" that has commenced "Iron Ore Production". If there really was an obligation to procure that a third party acquiring the mine should enter into a similar obligation it would have been straightforward to have so provided.

51.2.2. The wording of clause 3.5 does nothing more than indicate to whom an invoice is to be submitted in appropriate circumstances. These included as a possible candidate a "New Asset Holder" but this is a long way from the creation of an obligation on London Mining or LMCL to require any such party to enter a direct obligation or an "Accession Deed". The provision simply caters for the possibility that an Accession Deed might have been entered into. It does not make it mandatory.

51.2.3. Clause 7.8 merely requires the consent of the Claimant to any assignment or "transfer" of obligations, it does not make it mandatory for London Mining or LMCL to arrange such a "transfer". Had that been the intention it would have been relatively easy to have provided for this in terms.

51.2.4. Clause 12.11 is the type of clause commonly seen in commercial agreements requiring a party to assist in the implementation of the obligations undertaken under other provisions of the agreement. It does not create a separate and independent obligation itself of the type contended for by the Claimant.

51.3. Further I do not accept the arguments based on commercial common sense. Whether or not the settlement, of which the Royalty Deed formed part, was prudent or imprudent from the point of view of the Claimant would be difficult to determine without a comprehensive review of the preceding Facilitation Agreement and the entirety of the settlement package. There was no attempt to provide such a comprehensive analysis in either the Claimant's evidence or submissions. But in any event, I bear in mind the observation in Arnold that the natural meaning of the language used is not to be disregarded simply because it would mean that the agreement might then be imprudent for one of the parties. The other point, that a continuing obligation

for London Mining to pay the Royalty where there was a change of control but not where there was a sale of assets would make little sense, is founded on the assumption that London Mining would have no continuing liability to pay the Royalty after a sale of the Marampa Mine. In my judgment, that is by no means the case, for reasons that appear below.

52. I therefore conclude that the claim that the Royalty Deed contained express terms in the form alleged in the APOC fails.

53. As regards implied terms counsel for the Claimant relied on similar matters to those set out above on the issue of express terms, particularly those regarding alleged commercial common sense, to support the argument that it was necessary to imply a term in the form claimed in the APOC. In addition great emphasis was placed on the alleged fact that it was evidently intended that the Royalty would continue to be payable after a sale of the mine and that "Sales Value" and "Tonnage Statements" could only be provided by a purchaser of the mine. Therefore, it was argued, the purchaser would have to be under an obligation to produce these and this could only be so if the obligations of London Mining and/or LMCL had passed to that purchaser. Otherwise the process of invoicing for the Royalty would be impeded.

54. I also do not accept these submissions for the following reasons:

    54.1. The Royalty Deed contains express provisions in clause 6 covering the situation of a change of control of LMCL or a "Relevant Entity" and a purchaser acquiring all or substantially all of their assets. Applying the authorities mentioned previously, it is inherently unlikely that a further term is to be implied in these circumstances on the same topic, particularly where the agreement was negotiated over several months and professionally drafted.

    54.2. Clause 6.2.1 expressly provided for the consequences following from a purchaser acquiring all or substantially all of the assets of LMCL or a "Relevant Entity", which in practice would be likely to be the Marampa Mine. In those circumstances London Mining's obligations under the Royalty Deed, with certain exceptions (most particularly those arising under clause 6.1) were to cease immediately upon the execution of an "Accession Deed" by the purchaser. The natural meaning of this provision is that absent the execution of an "Accession Deed" the obligations of London Mining under the Royalty Deed would continue.

    54.3. Similarly clause 6.2.2 expressly provided for what was to occur in respect of the guarantee obligations of London Mining under clause 6.1 where a purchaser acquired all or substantially all of the assets of LMCL or a "Relevant Entity". The guarantee obligations of London Mining would cease to apply where a "Deed of Guarantee" (in the form specified in Part B of Schedule 1 to the Royalty Deed) was executed by that purchaser and it met specified financial requirements. The natural meaning of this

provision is that the guarantee provided by London Mining under clause 6.1 was to continue in the absence of these conditions being fulfilled.

54.4. Both parties have pointed to the difficulties of implementation of the literal wording of the Royalty Deed that arise if London Mining remained subject to its obligations under that deed in circumstances in which a purchaser had acquired the Marampa Mine. For example, the Royalty provisions in clause 3.1 refer to the royalty as being a percentage of "Marampa Iron Ore" sold *"by LMCL or the Relevant Entity"* and not by reference to iron ore derived from that mine that was sold by a purchaser of their assets. There are similar difficulties with a large number of the definition provisions and some of the other clauses. Read literally they tie the obligations of London Mining to pay the Royalty to the sale of iron ore and the operating activities of LMCL or a "Relevant Entity". In my judgment, however, this is an instance where there plainly is the need to imply a provision to make the Royalty Deed operate effectively and in so far as necessary the above references should by implication be extended so as also to cover the production and sale of iron ore by a purchaser where London Mining had not escaped from its continuing obligations by virtue of the execution of an "Accession Deed" or "Deed of Guarantee" under clause 6.

54.5. As regards the suggested difficulty in implementing the invoicing arrangements under the Royalty Deed, where London Mining remained liable to pay the Royalty despite a purchaser acquiring the mine, I am not persuaded that these exclude the analysis set out above. In essence counsel for the Claimant contended that there might be insuperable difficulties in obtaining the data required to prepare and provide "Sales Value Statements" and "Tonnage Statements" where the mine had been acquired by a purchaser but LMCL or a "Relevant Entity" or London Mining remained responsible for providing such statements to the Claimant. The only basis for this suggestion was an assertion in Mr Turner's witness statement that the information to be provided in such statements was not available from any source than London Mining/LMCL while the mine was operated by them. No explanation was provided for the assertion, which would seem to depend on the ability of a third party to obtain details of statements delivered to the Sierra Leone Director of Mines regarding tonnages and sales values of iron ore produced by the Marampa Mine- a matter ultimately of Sierra Leone law on which the Claimant adduced no evidence. Even assuming it was correct, however, it would then support the implication of a term that LMCL or the "Relevant Entity" and London Mining were required to use their best endeavours to obtain such information from a purchaser of the mine. If the information could still not be obtained, despite such efforts, it would be an instance where the mechanics for determining the precise amount of consideration payable under the contact had broken down and, in the absence of agreement, the court might have to determine the Royalty payable adopting the approach described in Sudbrook Trading Estate Limited v. Eggleton [1983] 1 AC 444 and in this regard see the observations in Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA (In Liquidation) [2011] 2 Lloyd's Rep. 538, at [72].

55. In the light of the above, I reject the contention of the Claimant that the Royalty Deed contained an implied term of the type advanced in the APOC. Among other things, there was simply no need to imply any such terms having regard to the above analysis and it would not be reasonable or equitable to do so. In so far it can be said to involve a separate test, such terms would also not be so obvious as to go without saying.

56. These conclusions lead inevitably to the further result that the allegations of breach of contract which found the claims for procuring a breach of contract and for conspiracy to procure such a breach are without substance and must be dismissed.

**The Remaining Claims**

*Alleged Breach of Duty*

57. In paragraphs 138 to 142 of the APOC various breaches of duty by Mr Dickens and Mr Downs as administrators of London Mining are alleged. These duties are alleged to have been owed to the creditors of London Mining generally including the Claimant. Based on these alleged breaches of duty the Claimant claims damages for itself.

58. In both the written and oral submissions made on behalf of the Claimant I understood it to be accepted, that for it to succeed in such a claim for an award of damages to it (as opposed to an award of compensation to the estate in administration for the benefit of creditors generally) it would be necessary for the Claimant to establish a direct duty owed by Mr Dickens and Mr Downs to it specifically. In order to establish such a duty the Claimant relied on two matters: (a) a special relationship between the Claimant and the administrators; and (b) the existence of special circumstances which were said to be firstly, the fact that London Mining had been dissolved and secondly, the existence of special damage caused to the Claimant as opposed to creditors as a whole.

59. In their skeleton argument, at paragraph 99, counsel for the Cliamant relied on the following facts, derived from Mr Turner's evidence, as giving rise to a special relationship through an assumption of responsibility:

    59.1. Mr Downs had indicated that he was aware of FT's contracts on 20 October 2014 and that he would review them.

    59.2. Mr Turner had explained in emails and on the telephone that these contracts provided for a transferrable royalty, and that the Royalty would apply after a change of control or ownership. Mr Downs did not challenge what Mr Turner said.

    59.3. Mr Downs did not disagree with Mr Turner and during the course of the calls on 22 October 2014 and 26 October 2014 Mr Turner says he was led to believe that he would draw the Royalty Deed to the attention of any potential purchaser, and would

ensure that any new purchaser would agree to take on responsibility for payment of the Royalty.

60. On a fair reading of Mr Turner's evidence and the emails that he exhibits to his witness statement it is evident that he made a series of assertions to Mr Downs regarding his understanding of how the Royalty Deed operated and his allegation is that Mr Downs did not respond by contesting what he was saying. He then claims to have assumed that what he had asserted was not challenged. Even treating all of that as true, in my judgment, it would be very far from sufficient to give rise to a special relationship of the type required to establish a duty to the Claimant specifically separate from the body of creditors of London Mining as a whole.

61. The principal authority relied on by the Claimant in respect of a duty arising from a special relationship is that of the Court of Appeal in Oldham v Kyrris [2004] BCC 111, where Jonathan Parker LJ (giving a judgment with which all other members of the court agreed), at [142] cited the following passage from the earlier appellate decision in Peskin v Anderson [2001] BCC 874, concerning directors:

*'At paras. 31-34 of his judgment in Peskin v Anderson Mummery LJ said this:*

*"31... [Counsel for the directors] accepted that the fiduciary duties owed by the directors to the company do not necessarily preclude, in special circumstances, the coexistence of additional duties owed by the directors to the shareholders. In such cases individual shareholders may bring a direct action, as distinct from a derivative action, against the directors for breach of fiduciary duty.*

*32. A duality of duties may exist. In Stein v Blake [1998] BCC 316 at pp. 318 and 320 Millett LJ recognised that there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to him directly (e.g. by being induced by a director to part with his shares in the company at an undervalue), as distinct from loss sustained by him by a diminution in the value of his shares (e.g. by reason of the misappropriation by a director of the company's assets), for which he (as distinct from the company) would not have a cause of action against the director personally.*

*33. The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial*

*opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders.*

*34. These duties may arise in special circumstances which replicate the salient features of well established categories of fiduciary relationships. Fiduciary relationships, such as agency, involve duties of trust, confidence and loyalty. Those duties are, in general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person. That other person may have entrusted or, depending on all the circumstances, may be treated as having entrusted, the care of his property, affairs, transactions or interests to him. There are, for example, instances of the directors of a company making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares; or making material representations to them; or failing to make material disclosure to them of insider information in the context of negotiations for a take-over of the company's business; or supplying to them specific *146 information and advice on which they have relied. These events are capable of constituting special circumstances and of generating fiduciary obligations, especially in those cases in which the directors, for their own benefit, seek to use their position and special inside knowledge acquired by them to take improper or unfair advantage of the shareholders."*

62. Jonathan Parker LJ then went on to say at [143]:

*"It has not been suggested (nor could it be, in my judgment) that there is any relevant distinction for present purposes between a fiduciary duty and a common law duty of care. Further, I accept Miss Hilliard's submission that the position of an administrator appointed under the 1986 Act vis-à-vis creditors is directly analogous to that of a director vis-à-vis shareholders".*

63. Here the evidence of Mr Turner does not refer to any representation of any kind by Mr Downs upon which he relied and there is no reference to anything that Mr Downs said or did that suggested he was prepared to act in any other way than as an administrator who was protecting the interests of creditors generally. If Mr Turner had wished to have specific protection for the Claimant he could have requested undertakings or specific assurances from Mr Downs in this regard. He did none of these things. I can see nothing in the circumstances referred to that comes near to an assumption of responsibility on the part of the Defendants to the Claimant specifically or of the creation of a special relationship. I am reinforced in that conclusion by the recent observations regarding the (very different) type of instances in which a special relationship could be said to arise, in the analogous context of directors, that were set out by Nugee J in Sharp v Blank [2017] BCC 187, at [12].

64. I would add that it would have been highly surprising if any such assumption of responsibility or special relationship did arise given that the interests of the Claimant in this

context were potentially adverse to those of the remaining creditors and would potentially have caused significant difficulties for the administration. The wish of the Claimant, that any purchaser of the assets of London Mining and/or LMCL should take on responsibility for the Royalty, was likely to result in a reduction in the consideration realised on sale and thereby to cause prejudice to other creditors. The Claimant claims that this was not so by referring to the witness statement of Mr Timis and contending on the basis of it that the actual purchaser would have been prepared to take on responsibility for the Royalty without a reduction in price. Even assuming the evidence of Mr Timis was entirely credible, in my judgment, that is not something that any reasonable administrator could have foreseen and does not alter the above conclusion.

65. As regards the second basis advanced for the existence of a direct duty owed to the Claimant, namely the existence of special circumstances, counsel for the Claimant contended that this arose from the fact no misfeasance claim could be brought under paragraph 75 of Schedule B1 of the Insolvency Act 1986 now that London Mining had been dissolved. It was submitted that, applying Pulsford v Devenish [1903] 2 Ch 625 and James Smith & Sons (Norwood) Ltd. v Goodman [1936] Ch 216, a claim at common law could be brought because a statute would have created a duty but no remedy.

66. Counsel for the Defendants submitted that this basis of claim was misconceived. It elided two situations – one where an office holder breaches a duty to the company, such as where there is a failure to obtain a proper price for assets, and another where the office holder breaches duties concerned with the distribution of assets to creditors. It was submitted that where the company is dissolved the former type of breach of duty would create a cause of action that would be part of the insolvent estate and become bona vacantia. If it was to be pursued then the company would have to be restored and be put into liquidation. The latter type of breach of duty would, however, be actionable by creditors individually.

67. He relied for these propositions upon the decision in Pulsford v Devenish, at 633, where Farwell J pointed out that the duty of a liquidator to pay the debts of the company was an absolute statutory duty owed to creditors without limit in point of time and with no provision for release of the liquidator. It was a case of a statutory duty where the remedy available for breach under statute was not co-extensive in point of time with the duty. The common law then provided a remedy to deal with what otherwise would be a lacuna.

68. This analysis is supported by the decision of David Richards J in Re HIH Casualty and General Insurance Ltd. [2006] 2 All ER 671, at 704h to 706d where he said this:

*"Rights of creditors*

*115 There is a further aspect to this issue. The statutory scheme of insolvency is not only seen as binding on liquidators and the courts but also as conferring enforceable rights on creditors. Creditors do not have a proprietary interest in the assets of the company in liquidation, but they do have a personal right to the administration and distribution of the*

*assets in accordance with the statutory scheme. The position was explained by Millett LJ in Mitchell v Carter [1997] 1 BCLC 673 at 686:*

*"The making of a winding-up order divests the company of the beneficial ownership of its assets which cease to be applicable for its own benefit. They become instead subject to a statutory scheme for distribution among the creditors and members of the company. The responsibility for collecting the assets and implementing the statutory scheme is vested in the liquidator subject to the ultimate control of the court. The creditors do not themselves acquire a beneficial interest in any of the assets, but only have a right to have them administered in accordance with the statutory scheme. These principles were established in Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1976] AC 167 . They apply to all the assets of the company, both in England and abroad, for the making of a winding-up order is regarded as having worldwide effect."*

*116 If a liquidator causes loss to a creditor by disregarding his personal rights, for example by distributing assets without regard to a claim for which the creditor has proved in time and which has not been rejected, the creditor has a personal cause of action. He has a personal claim for damages against the liquidator for breach of statutory duty, certainly if there are insufficient assets available in the liquidation to make good the default. These principles were established in Pulsford v Devenish [1903] 2 Ch 624 and James Smith & Sons (Norwood) Ltd v Goodman [1936] Ch 216 (CA) .*

*117 Mr Mortimore for the Australian liquidators submitted that this principle is confined to cases where the company has been dissolved and that, while the company is being wound up, an aggrieved creditor must apply under sections 167(3), 168(5) or 212 of the Insolvency Act 1986 as appropriate and the court can then exercise its discretion to make an appropriate order to achieve equal treatment for creditors of the same class, having regard to what is in the best interests of the winding up as a whole. He relied in support of these submissions on the decision of the Court of Appeal in Kyrris v Oldham [2004] 1 BCLC 305 , and in particular on the judgment of Jonathan Parker LJ at paras 158–160.*

*118 It is important to distinguish between the claims made in cases such as Pulsford v Devenish and those made in Kyrris v Oldham . The former were personal claims for breach of statutory duty and the latter were class claims available to all the unsecured creditors...*

*119 In the case of class claims such as those made in Kyrris v Oldham, the Court of Appeal held that in the absence of special circumstances an administrator (and the same would be true of a liquidator) does not owe a duty of care to creditors individually as regards management, disposal of assets and so on.*

*120 By contrast, claims in cases such as <u>Pulsford v Devenish</u> are personal to the creditor and relate to a breach of statutory duty as regards that particular creditor. The appropriate procedure for seeking redress may depend on whether the company has been dissolved, but the nature of the right as a personal right of the individual creditor to have his own claim treated in accordance with the statutory scheme remains the same.*

*121 Just as ordinary unsecured creditors have a right to have their claims treated in accordance with the statutory scheme, so also do unsecured creditors with a statutory priority. So a liquidator or other office holder who distributes assets without paying or providing for preferential claims is personally liable to those creditors for breach of statutory duty: <u>IRC v Goldblatt</u> [1972] Ch 498".*

69. This decision was subsequently overrulled on appeal on a different point but remains good law on the issue discussed in the above passages. In my judgment it fully supports the submissions made on behalf of the Defendants and leads to the conclusion that the dissolution of London Mining per se provides no basis for the claims advanced for breach of duty in the APOC. This is not a case falling within the special class of breach actually considered in <u>Pulsford v Devenish</u>.

70. The other basis for the contention that this was a case involving special circumstances was that the Claimant allegedly suffered special harm. The loss of the Royalty was said to be a different and distinct loss to that suffered by the general body of creditors. The only basis for contending that this then gave rise to a duty owed by the administrators to the Claimant were the decisions in <u>Pulsford v Devenish</u> and <u>James Smith & Sons (Norwood) Ltd. v Goodman</u>. However, I can find no support for that proposition in those authorities. On the facts of this case, had any duty of the kind alleged existed it would have caused a potential problem for the administration for the reasons I have already outlined. If the administrators were bound to persuade a purchaser to take on the obligation to pay the Royalty the likely result would have been lower consideration for the acquisition of the mine. This is a further factor that excludes the duty alleged by the Claimant on this basis.

71. Having regard to the above, subject to the claim advanced under paragraph 74 of Schedule B1 of the 1986 Act, I conclude that there is no basis in law for the claims advanced in the APOC for breach of duty or for conspiracy to injure based on such alleged breach or for misfeasance (which mirrors them).

**<u>Alleged Unfair Harm</u>**

72. The final ground for seeking relief is the statutory basis in paragraph 74 of Schedule B1 of the Act. The Claimant advanced this claim on the basis that this was a case like that of <u>Re Springfield Retail Limited</u> [2010] CSOH 115, a Scottish decision of Lord Menzies in the Court Session, where a creditor allegedly lost income as a result of the sale of an asset by insolvency office holders.

73. In my judgment this contention is also misconceived in law. These statutory provisions and their application was reviewed by Blackburne J in Four Private Investment Funds v Lomas [2009] 1 BCLC 161, at [33] to [39] where he said this:

*"33. Paragraph 74 , so far as material, provides as follows:*
*"(1) A creditor or member of a company in administration may apply to the court claiming that -*
*(a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or*
*(b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).*
*...*

*(3) The court may -*
*(a) grant relief;...*
*(4) In particular, an order under this paragraph may -*
*...*
*(b) require the administrator to do or not to do a specified thing;..."*

*The applicants, by seeking to invoke paragraph 74(1)(b) , contend that the administrators' refusal to supply the further information which they seek "...would unfairly harm the interests ...of them (whether alone or in common with some or all other members or creditors)".*

*34 This raises what is meant by "unfairly harm". Two things are apparent. First, the action complained of must be shown to have caused the complainant to suffer harm to his interests or, in the case of a proposed action of the administrator, would cause the complainant to suffer harm. In short, the applicant must show that the action complained of is or will be causative of harm to its interests....*

*36 I am not in the position to gainsay what the applicants have stated in this regard. I proceed therefore on the footing that the refusal of the administrators to provide the further information which they seek, even though the requirement to supply the information is subject to the qualifying proviso, would be harmful to one or more of the applicants.*

*37 The second aspect of the statutory requirement is that the harm must be "unfair"; harm alone is not enough. What is the ingredient implied by the need to show unfairness?*

*38 In the case of the concept of unfair prejudice, as it appears in what is now section 994 of the Companies Act 2006 , Lord Hoffmann in O'Neill v Phillips [1999] 1WLR 1092 considered (at page 1099) that the unfairness might consist in a breach of the rules regulating the basis on which it had been agreed that the affairs of the company should be conducted or in using those rules in a manner which equity would regard as contrary to*

*good faith. The context of an administration is, however, different. By paragraph 3(1) the administrator is obliged to perform his functions with the object of achieving the purpose of the administration. In the present case that is to achieve a better result for LBIE's creditors as a whole than would be likely if LBIE were wound up without first being in administration. By paragraph 3(2) the administrator is obliged to perform his functions in the interests of the company's creditors as a whole. By paragraph 4 he must perform his functions as quickly and efficiently as is reasonably practicable. By paragraph 59(1) he may do anything necessary or expedient for the management of the affairs, business and property of the Company. By paragraph 68(1) he must manage the affairs, business and property of the company in accordance with any proposals approved by the creditors under paragraph 53, subject to any directions which the court may give under paragraph 68(2).*

*39 Where, as here, where there is no suggestion that the administrators are acting other than in accordance with their obligations under Schedule B1 and the order made on 7 October it is exceedingly difficult to see how the unwillingness of the administrators to devote more time and resources than they have already to answering questions put to them by a particular group of creditors (as I shall assume the applicants to be) directed to eliciting information about assets which the creditors claim are theirs can be said to be unfair even if it can be said to be causative or likely to be causative of harm. If, as they assert and their evidence strongly suggests, the administrators are seeking in good faith to carry out their functions in the interests of LBIE's creditors and asset claimants (as I shall for want of a better expression describe former clients such as the applicants) as a whole and are endeavouring to avoid being deflected from this course by devoting what they fairly regard as a disproportionate amount of time and resources to dealing with requests for information from a particular group of former clients, such as the applicants, I feel quite unable to conclude that any case of unfair harm is established within the meaning of paragraph 74(1) . The material for contending that it is is simply not to hand."*

74. In my judgment, this is also a case in which it is impossible to see how any harm caused was unfair. I refer again to the fact that, by seeking to persuade a purchaser to take on the obligation of paying the Royalty, it could reasonably have been expected that this would cause the consideration for the purchase of the Marampa Mine to be reduced. That would have been harmful for the insolvent estate as a whole and I do not consider that it could be an unfair loss to the Claimant if the administrators sought to avoid such an outcome in the way in which they did, even assuming all of the factual evidence advanced by the Claimant was correct. I also do not consider that the Scottish decision referred to by counsel for the Claimant advances matters. Quite apart from other distinguishing features, that was not a case in which such a potential conflict between the interests of the Claimant creditor and the general body of creditors arose.

**Conclusion**

75. Having regard to the matters set out above, I have reached the firm conclusion that the claims advanced in the APOC are not maintainable. I will therefore refuse permission to amend and dismiss the proceedings.

76. I shall invite counsel to agree a minute of order reflecting this judgment and dealing with any consequential matters. If any aspect cannot be agreed I will hear further submissions.