Neutral Citation Number: **[2024] EWHC 1554 (Ch)**

Case Nos: 002837 of 2022

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

IN THE MATTER OF FESTICKET LTD (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
London
EC4A 1NL

Date: 21 June 2024

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL AGNELLO KC

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Between :

LEE ANTONY MANNING, CAMERON GUNN,
SIMON JAGGER
(in their capacity as Joint Administrators of
Festicket Ltd)

Applicants

— and —

2 Four 6 Marketing Limited and others

Respondents

Mr Thomas Munby KC and Ms Fiona Dewar (instructed by Greenburg Traurig LLP) for the **Applicants**
Mr Daniel Lewis (instructed by Stevens & Bolton LLP) for the **4th Respondent**
Mr Neil Fawcett (instructed by Hayden Solicitors Ltd) for the **19th Respondent**
Mr Harry Stratton (instructed by Lee & Thompson LLP) for the **26th and 56th Respondents**
Ms Sarah Bayliss (instructed by Keystone Law) for the **62nd Respondent**

Hearing dates: 5 and 6 March 2024

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JUDGMENT

Introduction

1. This is the hearing of the preliminary issue directed by my order dated 6 November 2023 made pursuant to an application for directions pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986 issued by the Applicants (the Joint Administrators of Festicket Limited, hereinafter referred to as 'the Administrators') , pursuant to my earlier order dated 7 March 2023. The issue to be resolved is essentially whether there is a trust in relation to the monies held by Festicket Ltd ('the company') in relation to ticket sales made by the company as agent for the Respondents under the company's standard agreement. The precise terms of the preliminary issue are set out below. Reference to the Respondents relate to their numbering as set out in the attached schedule to the application notice.

2. I heard from Leading and Junior Counsel on behalf of the Administrators who argued against the creation of a trust. The 4th, 19th, 26th 56th and 62nd Respondents were represented before me by Counsel. The 3rd, 44th 61st, 75th (V and W) Respondents had submitted correspondence and/or witness statements. Certain Respondents had asserted that the issue relating to whether a trust existed had to be determined in accordance with German law and those Respondents are the subject of separate directions relating to expert evidence so those issues are not before me for the purposes of the application notice. The terms of the agreement between the company and the 3rd Respondent contain an express trust provision. In those circumstances, there appears to be no need to make any declaration or directions in relation thereto.

Background to the preliminary issue hearing and the position of the 62nd Respondent

3. Prior to this hearing, I heard various applications made by the Administrators, who were appointed on 12 September 2022, seeking directions as well as seeking Berkeley Applegate orders. The Respondents to the application for directions are promoters of festivals and concerts who had entered into agreements with Festicket Ltd to act as their ticket agent. Many of those Respondents asserted that the sums held by the Administrators were held on trust for them. Whilst a number of the

Respondents asserted that an express trust existed of the ticket sales proceeds under the particular agreement entered into, the vast majority of the Respondents asserted that a trust of the proceeds of the ticket sales arose from the terms of the company's standard ticket agency agreement which the majority of them had entered into. The 4th and 19th Respondents submitted, through their respective Counsel, that the issue relating to whether a trust had been created under the terms of the company's standard agreement, was a matter suitable for determination by way of a preliminary issue. There are two versions of this agreement, being a pre July 2022 and a post July 2022, but there is in reality no material difference between the terms of the two agreements as I deal with later in this judgment.

4. After hearing representations from Counsel for the Administrators and those Counsel for the Respondents represented before me the earlier directions hearings, it appeared to me that the issue relating to a proprietary claim might be suitable for determination by way of a preliminary issue in so far as the matter could be dealt with on the basis of the written agreements rather than requiring any oral evidence or disclosure or cross examination. Accordingly, by earlier order dated 14 July 2023, I directed (paragraph 14) that by 4 pm on 20 October 2023, any Respondent wishing to claim that monies held/ receivable by the company were held on trust for its benefit should file a witness statements of fact and any legal submissions on which it intended to rely. Such evidence and/or legal submissions should make clear:-
(1) the basis on which it is said that a trust arises; and
(2) whether a trust is alleged over any monies currently held by Stripe Payments Europe Limited.

5. That order was served by the Administrators upon the Respondents in accordance with the order dated 7 March 2023 which had provided detailed provisions in relation to service of the paragraph 63 application upon the Respondents as well as providing for any documents/orders thereafter to be served by uploading upon the document sharing platform which had been set up by the Administrators under earlier orders. The 62nd Respondent was served with the paragraph 63 application in accordance with CPR part 6 and/or the Insolvency Rules. Thereafter, in accordance with the July 2023 order, documents and orders were served by being uploaded onto the platform. The paragraph 63 application joined all event promoters regardless as to whether the

particular promoter had asserted a proprietary claim over the monies held by the Administrators. Non-promoters were also joined in cases where they had asserted a claim that monies held in the name of the company were held on trust for them. Ultimately before me, only those who had executed the pre July 2022 standard terms and conditions were represented and made submissions.

6. At the hearing on 6 November 2023, after considering the evidence and legal submissions which had been filed in accordance with paragraph 14 of the 14 July 2023 order and hearing counsel for the various Respondents and for the Administrators, I directed that the hearing of a preliminary issue was appropriate. The preliminary issue (which was drafted between counsel and thereafter considered and approved by me) is as follows :-

"Whether on a proper construction of the following documents there was a trust (of any kind) created in respect of the proceeds of ticket sales:
(1) The Company's pre-July 2022 standard form template "Ticket Sales Agent Agreement";
(2) The Company's post-July 2022 standard form template "Ticket Sales Agent Agreement"
(3) The Ticket and Package Sales Agreement dated 30 March 2021 between AEG Presents Ltd and Festicket Ltd; and
(4) The Sponsorship Agreement and Ticket Sales Agreement dated 2021 between Garaca and Festicket Ltd".

7. The further directions set out in the order dated 6 November 2023 provided for the Administrators to reply to the legal submissions and file any evidence. There was a direction enabling reply evidence to be filed but only if truly responsive. No further directions were given in relation to evidence as this had already been dealt with by the earlier order dated 14 July 2023. As can be noted, the preliminary issue involved consideration of the relevant documents and whether effectively those documents created a trust of the monies held by the company. None of the evidence filed in accordance with paragraph 14 of the 14 July 2023 order had sought to rely on factual evidence which would require, potentially, disclosure and factual evidence being filed by the Administrators or any consideration of the need for cross examination. Clearly these factors were extremely relevant to the decision in relation to directing a preliminary issue in this case.

8. By application notice dated 22 November 2023, the 62nd Respondent applied for relief from sanctions in relation to its failure to comply with the order dated 14 July 2023 having failed to file its legal submissions and evidence as directed in that order. The evidence in support of the relief does not challenge that the relevant documents and the order dated 14 July 2023 were properly uploaded upon the document sharing platform but asserts that the 62nd Respondent had simply failed to check the platform because it believed that the matters going on before the court related to the costs of the Administrators. This was, it is averred, a simple oversight. I pause to note that the paragraph 63 application for directions was served in accordance with normal service requirements. The evidence does not assert that this was not properly served. The evidence filed with the application notice seeks to rely upon correspondence and exchanges effectively going beyond the terms of the preliminary issue. The witness statement of Mr Grant Smith dated 20 November 2023 alongside its exhibit sought to rely upon conversations, representations and emails relating to events prior to the signing of the written agreement dated 1 January 2021. Ms Baylis' skeleton argument confirms that this is what the 62nd Respondent seeks to argue and rely upon where she asserts that the trust claim arises, in addition to the terms of the written agreement, from:-

(1) The previous terms and conditions between the 62nd Respondent and Event Genius (which was taken over by the company) were subject to an express trust which continued; and

(2) Express promises had been made in a series of emails to hold the 62nd Respondent's ticket revenue on trust in a separate account. ('the additional grounds')

9. When the application was considered by me on 6 February 2024, I directed that relief from sanctions would be granted to enable the 62nd Respondent to participate in the preliminary issue hearing in relation to its assertion that a trust was created by reason of the written agreement, being the pre July 2022 standard form agreement of the company. That enabled the 62nd Respondent to participate in the hearing before me in the same way as the other Respondents even though it was in breach of the terms of my earlier order. However, I did not grant relief from sanctions in relation to the 62nd Respondent being entitled to rely upon the evidence filed to argue anything beyond that as part of the preliminary issue hearing. Having read the application notice and its grounds as well as the witness statement of Mr Grant Smith, it appeared to me

that the grounds raised went well beyond the terms of the preliminary issue and would require a variation of the preliminary issue as well as a further hearing. This contradicts what is set out in the 62nd Respondent's application notice itself which states,

'The 62nd Respondent's agreement with the Company appears to have been on the Company's standard terms like many of the other Respondents so its legal submissions are unlikely to differ from the submissions already made by many of the other Respondents. The 62nd Respondent's would simply submit a short witness statement exhibiting its agreement and some limited correspondence it had with the Company on the issue. This can be served within fourteen days of the grant of the Order permitting it to do so. The 62nd Respondent's would participate in the action to a limited extent but its involvement is unlikely to cause any significant increased costs or have any material effect on the trial length. Nor will it impact on any other deadlines in the proceedings such that the proper conduct of this litigation is not imperilled. This minor breach will not cause any delay to the proceedings, require any adjournments or otherwise prejudice any part or the proceedings'

10. Ms Bayliss, on behalf of the 62nd Respondent, sensibly accepts in her skeleton argument that it is not possible to deal with the additional grounds without some cross examination. Her skeleton also contains a hint that further evidence would need to be filed, which I assume she means from the 62nd Respondent. She makes no reference to disclosure or indeed of the preparation and filing by the Administrators of evidence in reply. She also makes no reference to what appears to me to be in reality an application seeking to vary the terms of the preliminary issue as approved and ordered by me. I disagree with her submission that the parties will not be prejudiced by relief from sanctions in relation to this part of her application relating to the additional grounds.

11. In my judgment, the parties will be prejudiced. The preliminary issue was directed and drafted on the basis of the evidence and the legal submissions which were filed in accordance with the order of July 2023. That order was served upon the 62nd Respondent. As was clear, based on those legal submission and evidence, the preliminary issue which was ordered related to submissions being made in relation to the construction of the written agreements. I determined that it was sensible and

appropriate to direct the preliminary issue. Had some of the Respondents sought to argue, as the 62nd Respondent now seeks to do, that the court would need to consider factual evidence peculiar to certain Respondents, direct disclosure and hold effectively a trial of the issue, I doubt that the case would have been appropriate for a preliminary issue direction. This is why I directed by the July 2023 order for Respondents to file and serve both any evidence and legal submissions before any order relating to a preliminary issue was made.

12. In those circumstances, the 62nd Respondent is seeking for me to reconsider the terms of the preliminary issue directed by me after all Respondents, including the 62nd Respondent were provided with the opportunity to file and serve evidence and legal submissions. This is prejudicial to Respondents who have participated to date on the basis of the evidence and legal submissions filed. There are also the additional costs which would need to be incurred by the Administrators which may well fall to be taken out of the sums held by them which prejudices both those asserting a proprietary claim and unsecured creditors. In my judgment, the breach of the order of July 2023, whilst described as inadvertent, really has no real justification bearing in mind that service was effected in accordance with the terms of the previous orders. Equally, relief from sanctions will incur further costs by the Administrators to deal with the additional grounds as well as a further hearing. Additionally, there would need to be a variation of the terms of the preliminary issue or the direction of a new preliminary issue. These are all matters prejudicial to the Respondents.

13. In the circumstances, I am not prepared to grant relief from sanctions in relation to the evidence relating to the additional grounds as part of the preliminary issue which has been directed by me. No grounds for a variation of the terms of the preliminary issue have been placed before me. The acceptance by Ms Bayliss that there would need to be a further additional hearing if I allow the 62nd Respondent's evidence to be admitted will increase costs as well as necessitating a variation to the terms of the preliminary issue. I will hear submissions when this judgment is handed down in relation to whether it is appropriate to direct any hearing in relation to the additional grounds by way of any further preliminary issue, or whether the additional grounds will be determined at some later stage in the administration.

The preliminary issue

14. I have set out above the terms of the preliminary issue. I am grateful to counsel for their skeleton arguments and their submissions. In essence what needs to be determined is an issue of construction, but I will set out a very brief background somewhat repetitive of what I have already set out above.

Brief Background

15. The company was a ticket platform provider selling tickets for a variety of UK and international events (mainly music festivals) on behalf of the organisers/promoters of the events. The company also sold 'add on' services such as accommodation packages to end customers, being typically members of the public. The preliminary issue relates to some of the agreements as between the company and the promoters, hereinafter called the Respondents. The company's contractual agreements differed as between different promoters, but the vast majority of them used the standard form agreements produced by the company. There are two standard form agreements, one used prior to July 2022 and the other post July 2022. Some of the Respondents used different agreements. AEG, the 3rd Respondent had written terms which expressly create a trust of the sums held by the company. The company's agreements using its standard forms (whether pre or post July 2022) contain no express trust provisions or an express obligation upon the company to retain the ticket sales receipts in a separate account. The preliminary issue is concerned primarily with the company's standard form agreements and whether they created a trust of ticket sales receipts, or any part thereof.

16. The relationship as between the Respondents and the company appears as a principal and agent relationship. No one before me sought to argue some other type of relationship existed. The transactions with customers which were entered into with the company were effected with Stripe Payments Europe Ltd as its payment method provider pursuant to a master services agreement. The company had its contract with Stripe directly. The preliminary issue only concerns whether a trust has been created as between the company and the Respondents. There may well be other issues arising in relation to the master services agreement and Stripe, but those issues are not before me nor require any further background details in this judgment.

17. As is set out in the third witness statement of Mr Lee Manning (one of the Administrators) dated 22 December 2023, from his investigations since his appointment as administrator, the company did not segregate ticket sales proceeds (which would have been received from Stripe). The company operated five accounts and sums were paid into and out of those accounts without it appears any segregation.

The various agreements – pre July 2022 and post July 2022

18. As already set out above, there are two versions of the Company's standard terms and conditions, a version pre July 2022 and a post July 2022. None of the Respondents who were represented or who had sent letters to the court relating to their position, had post July 2022 agreements. The Administrators do seek a determination in relation to the post July 2022 terms, but there is little difference between the two versions. I will deal with the post July 2022 terms once I have considered the legal principles and submission of the Respondents in relation to the pre July 2022.

19. Mr Lewis on behalf of the 4th Respondent divided the terms into two categories, being what he called 'commercial terms' which contain provisions specific to the promoter (being the Respondents) and the 'terms and conditions' which are in the company's standard form. The agreement needs of course to be considered as a whole but the division made by Mr Lewis is helpful to be able to distinguish between the types of terms. The commercial terms were specific to each Respondent in relation to the commission percentage agreed and also in relation to when payments were to be made to the respective Respondent in terms of percentage and period of time. Despite these differences in relation to the times and percentages, none of the Respondents sought to argue that its particular period of time or percentage made a difference to the trust argument. The argument centred around the restrictions, it was submitted, were placed on the company in relation to what it could do with the ticket sales proceeds. Ms Bayliss did seek to argue that the lack of the 'advance' provisions made a difference for her client. I deal with this below. The standard terms and conditions did not change as between the various Respondents and the company.

20. I am grateful to counsel for the various Respondents who ensured that there was, in general, a lack of repetition in relation to the submissions made. Mr Lewis on behalf of the 4th Respondent set out what were essentially submissions supported by the other Respondents who were represented before me. I will consider these submissions by referring to Mr Lewis but I accept and appreciate that the arguments raised were those of all the Respondents. I will also deal with submissions made by the other Respondents in so far as they sought to augment or differ to a degree from those of Mr Lewis. I will set out the legal principles before setting out the terms of the agreements relied upon by the Respondents. Despite the number of cases which the Administrators have included in their written submissions as well as referring to them in their skeleton argument and before me, it does not seem to me that the general principles relied upon by the Respondents are really disputed by the Administrators. Essentially the Administrators submit that on the terms of the agreements, the trust is not established. This is an issue for construction of the terms of the agreement. Endless citation of authorities which have different facts, different terms in the agreements and different surrounding circumstances is not really of assistance. Before setting out the terms and conditions, I will set out the legal submissions and principles.

Legal submissions and principles

21. Mr Lewis submits that the there is an implied trust in favour of the 4th Respondent which arises by reason of (1) the agency of the company to act on behalf of the 4th Respondent in selling tickets and (2) the commercial terms. He relies on the general principles relating to establishing the existence of an implied trust, for which he submits there is no definitive test. In Lewin on Trusts (20th edition (8-004) the authors discuss the concept of implied trust and state,

"The expression is sometimes used to refer to trusts created by the sufficiently declared intention of a settlor or testator (now regarded as a sub-division of express trusts), but in circumstances where it is necessary for an inference to be drawn from the available admissible evidence that this was what the settlor intended; for example those trusts sometimes called inferred or precatory trusts."

22. In the House of Lords *case of in Twinsectra Ltd v Yardley [2002] 2 A.C. 164 at [99],* Lord Millett stated*:*

"There is clearly a wide range of situations in which the parties enter into a commercial arrangement which permits one party to have a limited use of the other's money for a stated purpose, is not free to apply it for any other purpose, and must return it if for any reason the purpose cannot be carried out. The arrangement between the purchaser's solicitor and the purchaser's mortgagee is an example of just such an arrangement. All such arrangements should if possible be susceptible to the same analysis."

23. As part of his submissions, Mr Lewis also referred me to the agency case in the Supreme Court of *Bailey v Angove's PTY Limited [2016] UKSC 215*. The case concerned two issues, being (1) in what circumstances will the law treat the authority of an agent as irrevocable and (2) whether the receipt of money at a time when the recipient knows that imminent insolvency will prevent him from performing the corresponding obligation, can give rise to liability to account as a constructive trustee.

24. At paragraph 19, Lord Sumption stated,

"An agent has a duty to account to his principal for money received on his behalf. It is, however, well established that the duty does not necessarily give rise to a trust of the money in the agent's hands. That depends on the intentions of the parties derived from the contract, or in some cases from their conduct. As a broad generalisation, the relations between principal and agent must be such that the agent was not at liberty to treat as part of his general assets money for which he was accountable to his principal. This will usually, but not invariably, involve segregating it from his own money. The editors of Bowstead and Reynolds on Agency, 20th ed (2014), 219, para 6-041, put the matter in this way:

> *"the present trend seems to be to approach the matter more functionally and to ask whether the trust relationship is appropriate to the commercial relationship in which the parties find themselves; whether it was appropriate that money or property should be, and whether it was, held separately, or whether it was contemplated that the agent should use the money, property or proceeds of the property as part of his normal cash flow in such a way that the relationship of debtor and creditor is more appropriate."*

25. The identified issue for me is whether, on the proper interpretation of the written agreement, a trust is created. Clearly the intentions of the parties, objectively ascertained from the written agreement are relevant. It is accepted by the

Respondents, that the parties' subjective intentions are irrelevant. Again a useful passage from *Twinsectra* makes this point at para 71:-

"A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them."

26. There was some debate between me as to what was decided in *Re Kayford Ltd [1975] WLR 279* with the Respondents relying upon what was set out by Mr Justice Megarry at page 282, being

"Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements."

27. Mr Munby submitted that the facts of *Re Kayford* are important. In that case, the company itself constituted itself as a trustee by its conduct in setting up a separate bank account to segregate customer deposits from the company's own monies in order to safeguard them in the event of insolvency. Mr Munby asserts that the above quote is essentially restricted to a case such as *Re Kayford* where a trust was inferred by the creation of the segregated bank account even if all the relevant sums were paid into that one account rather than being separate bank accounts. The funds were held in a mixed bank account. In my judgment, Mr Munby's reading *Re Kayford* is too narrow. It is clear that one of the common characteristics of an implied trust is the segregation of the relevant funds. That can be seen in the passage above relied upon by Mr Lewis from *Bailey*. It is accepted before me that no separate account existed in this case or that its existence was a term of the agreement. However, a failure to have such a term is not, in my judgment, fatal to the argument of the Respondents. It is one of the factors to be considered. As the Supreme Court stated in *Bailey*, whether the agent was at liberty to treat part of his general assets as money to which he was accountable to the principal, is another important factor.

28. Mr Lewis also submitted where a trustee is free to and does use trust assets for its own benefit, this, in itself, does not negate the existence of the trust. He relied upon a passage from *Re Lehman Brothers International (Europe) (In Administration) [2012] 2 BCLC 151*. This is a Court of Appeal case relating to whether trusts had been

created in relation to complex financial instruments known as RASCALS. The terms of those instruments bear little resemblance to the agreements before me, but Mr Lewis sought to rely upon the more general statement set out at paragraph 68 :-

'It is clear that the case of a trust under which the trustee is free to, and does, use the trust assets for its own benefit, in certain respects at least, without accounting to the beneficiary for such dealings, is unusual. It is also clear that in the present circumstances there are likely to be practical problems in unravelling the entitlement of relevant parties under such a trust, once the music stops. Nevertheless, I agree with the judge in declining to hold that this factor is sufficient to show that there was no trust at all because there was no common objective intention that there should be one. For the reasons given by the judge it seems to me that the common objective intention was the other way, namely that the affiliate should acquire a beneficial interest. The practical problems may not have been appreciated, particularly because, so long as all went well, they would not arise.'

29. As is clear from the above passage, the Court of Appeal stated that whilst a trust would be unusual in a situation where the trustee is free to use the trust assets for his own benefit without accounting to the beneficiary for those dealings, that factor is not determinative to establish that there was no trust. A slight variation on this point was relied upon by Mr Lewis in his reference to a passage in Bowstead on Agency 22nd edition where it states that the agreement between the agent and the principal may permit the agent to have recourse to funds collected upon behalf of the principal to discharge obligations owed by the principal to the agent but that this does not prevent the existence of a trust of the money collected by the agent. Mr Lewis points to the commercial terms which he asserts allowed the company to have recourse to the funds collected to discharge sums owing to the company from the Respondent. I will come back to this point.

30. All of the parties referred to the case of *Re Fleet Disposal Services Ltd [1995] BCC 605*. Mr Munby was keen to emphasise his submission that this case was in some way the high watermark of decisions relating to where a court has construed that a trust exists. In my judgment, each case will depend upon the terms of the agreement and other facts peculiar to the case in question. I do not accept that in some way this case can be described as a high watermark decision relating to the existence of a trust. I found this case a very useful one which sets out the approach taken by the Judge (Mr Justice Lightman), his consideration of the various factors which existed

in that case and his ultimate decision based on those factors peculiar to that case. It provides a useful reminder that each of these cases are fact specific and therefore it is difficult to rely on other cases. A court needs to approach these cases based on their own facts in seeking to construe the terms and ascertain the intention of the parties from the terms of the agreement and any relevant surrounding circumstances.

31. *Fleet* concerned an application for directions by the liquidator of the company for determination of whether the respondent company (Nortel) had a proprietary interest in assets held by the liquidator representing proceeds of sales of cars by the company as agent for Nortel. The agreement between the company and Nortel provided for the company to pay sale proceeds (less commission and agreed costs) to Nortel five days after receipt by the company. According to an addendum, all repayments were to be made on separate cheques. All proceeds of sale were paid into one account and all payments to Nortel were made out of that account despite there being no provision in the agreement itself for a separate account. The account was used for the proceeds of sale of other principals' cars. The issue was whether effectively the company had received the proceeds of sale as trustee. Before the Judge, there was evidence about how the company operated a separate account for proceeds of cars sales and that the account existed before the parties entered into the agency agreement. The company sold cars as agent but also sold cars that it owned.

The Judge set out at the question as follows:-

'The question whether Nortel had a proprietary interest in the proceeds of sale of its cars on receipt of the same by the company is one of construction of the agency agreement in the light of the surrounding circumstances at the time when it was made, and these circumstances include the intentions of the parties express or to be inferred: see Neste Oy v Lloyds Bank Ltd [1983] 2 Ll Rep 658 at p. 663. The intentions for this purpose are limited to intentions of the parties communicated to, or reasonably to be inferred by, each other, and do not extend to private uncommunicated intentions. Accordingly the established but uncommunicated intentions on the part of the company (and its advisers and the bank) that the company should be entitled to use the moneys in the agency account as its own free moneys is not relevant for this purpose, for it was never so stated nor reasonably to be inferred.'

32. An important part of the surrounding circumstances, as noted by the Judge, was that the agency account (into which the proceeds of car sales as agent were placed) was not a term of the agreement, but this was a selling point of the company as agent, that there was a designated separate account. The Judge then continued:-

'One surrounding circumstance was that the agency account existed; that all sale proceeds of cars sold as agent were paid into this account and all payments to principals were made out of this account; that this arrangement was intended to continue; and that this was communicated by the company to Nortel as (in the words of Mr Dicker, counsel for the liquidator) a selling point of the company as agent. For this purpose, I attach little (if any) importance to the designation of this account as 'the agency account', for Mr Farrington did not attach importance to the name; indeed he was uncertain as to the name of the account. The importance is the existence of the separate designated account.

I turn second to the relationship between the parties. The company was Nortel's agent for sale. As it seems to me, notwithstanding 'the general disinclination of the courts to see the intricacies and doctrines connected with trusts introduced into everyday commercial transactions' (see Neste Oy v Lloyds Bank [1983] 2 LI Rep 658 at p. 665), that is a relationship where, in respect of moneys received by the agent representing the proceeds of sale of the principals' property, the court is particularly ready to infer a trust: it is not readily to be inferred that the agent is intended to be able to finance his business out of the proceeds of sale of his principal's property: see e.g. Re Cotten (1913) 108 LT 310 and Re Hallett's Estate (1880) 13 ChD 696.

I turn third to the agency agreement. It contains no express term whether the proceeds of sale should be held as trustee or retained in a separate account. But there are indications of a trust relationship, or at least language consistent with it. Provision is made for 'payment of sale proceeds five days after receipt of moneys' (a short period) and payment by separate cheques - language and provisions at least to some degree apposite to a trust and inapposite to a mere accounting relationship- certainly inapposite to a running account.
Taking these factors together it seems to me that a trust relationship is appropriate to the commercial relationship which existed between these parties and I can see no unfair or undue consequences for the company or its unsecured creditors (consider Lord Napier and Ettrick & Anor v Hunter & Ors [1993] AC 713 at p. 744C-H). Indeed the company had the opportunity expressly to exclude any trust obligation when it drafted its standard contract and agreed the agency contract, for it had this matter very much in mind. Far from doing so, the selling point was made of the separate account and no disclaimer of any trust obligation was expressed.'

33. The Judge then balanced against the finding of a trust relationship the factors which had been stressed by Counsel for the Applicant liquidator being (1) absence of express term; (2) the retention by the company of the interest in respect of the five day period; (3) the account was used as a receptacle for the proceeds of sale for all principals' cars and not merely Nortel's. This was a mixed account. The Judge took into account these factors. He stated that whilst the agreement did not contain an express term for a separate account, the Judge considered that this was because the company had made clear to Nortel that the separate account was in existence. The

Judge did not consider whether the interest factor or the fact that there were other moneys in the account fatal to a finding of a trust relationship.

34. In the case before me, there are no surrounding circumstances such as the existence and operation of a separate account at the time of entry into the agreement. The case before me relies exclusively on the construction of the terms of the agency agreement (with there being some slight variations in relation to particular terms such as when sums were to be remitted to the respondents as promotors). It is clear from *Fleet* that no single factor in that case was given so much weight that it defeated the creation of the trust. In my judgment, *Fleet* provides a good example of the approach taken by the court in construing the terms of an agreement in order to determine if a trust has been created. I turn now to the specific submission in relation to the terms of the agreements.

The terms of the agreement

35. As already stated above, the terms in relation to the pre and post July 2022 version consist of the commercial terms and the standard terms and conditions. The commercial terms (with some changes peculiar to certain Respondents) state that *"the agent will be the exclusive online ticket agent on 'all events owned, promoted and/or managed (in whole or in part) by the Promoter[Respondent] or its Associates during the term…*' ". This is subject to specific exemptions whereby the company is not the exclusive online ticket agent. The commercial terms allow for an advance to be made by the company to the Respondent to be used by the Respondent for the purposes of '*creating, developing, sourcing or otherwise organising an Event pursuant to this agreement'.* The commercial terms provide particular terms in relation to the advance fee payable and in particular permitting the Respondent to offset any amount owing by it to the Respondent in connection with any events. The commercial terms also provided for a series of 'trigger points' enabling the company to seek to recover the entirety of the outstanding advances made.

36. The commercial terms state that the Respondent shall pay to the company booking commission, delivery commission (if any), administration charges and transaction fees in accordance with the provisions in the agreement, in so far as applicable. The booking fee chargeable by the agent on each purchase of a ticket is 10% of the full

value of the ticket and 5% of all the ancillaries, being items provided by the respondent (as defined). There are further provisions relating to a rebate which is dependent upon the number of sales. In relation to the 4th Respondent, at a two week interval, the company will calculate the booking commission owed to it for the previous 2 week period and send to the Respondent an invoice for the relevant amount, the entirety of which the agent shall be entitled to retain.

37. The accounting and payment provisions differ slightly depending upon the relevant Respondent. The changes relate to the period of time for when the relevant percentages of the sums need to be remitted to the Respondent. In relation to the 4th Respondent, those terms are as follows:-

'1.In respect of each Event, at the end of each month during the Term, Agent shall deduct (and retain) from the Ticketing Revenue, the Booking Commission, the Advance and any other amounts owed to Agent by the Promoter in respect of that Event (Deductible Amounts).
2. In respect of each Event, within 7 days of the end of each 2 week period during the Term, Agent shall issue the Promoter with a written report detailing: (i) the Full Value Ticket Price Revenue; (ii) the Ticketing Revenue; (iii) the total of the Deductible Amounts; and (iv) the Ticketing Revenue after the deduction of the Deductible Amounts and ongoing Payment Plan Revenue, accrued during the previous calendar month for each Event (the Report) and remit an amount equal to 80% of the Net Revenue set out in the Report to the Promoter and shall remit the remaining 20% of the Net Revenue to Promoter within 7 days of the conclusion of the relevant Event. For the avoidance of doubt, 20% of the total Revenue for all completed sales for each show will always be hold by the Agent during the sale campaign. For the avoidance of doubt, the same campaign ends 7 days after each event happened.
If the Ticketing Revenue for a particular period is less than the Deductible Amounts (except the Advance), Agent shall invoice the Promoter for the shortfall and the Promoter shall pay Agent such amount within 7 days of receipt of such invoice.
4. Nothing in the foregoing shall limit or prevent Agent from deducting all or part of any Advance (or other) amounts properly owed by the Promoter to Agent from the Ticketing Revenue and the Promoter acknowledges and agrees that this may mean that it receives less than the 50% pursuant to (b) above (and the other percentages shall be adjusted accordingly) or that it receives no Net Revenue for a particular 2 week period.
5. Agent may at any time during the Term, at its sole discretion, elect to provide Promoter with a payment/payments of a specific amount of money to be used solely by the Promoter for the purposes of creating, developing, sourcing or otherwise organising an Event pursuant to this Agreement (individually and collectively constructed as an Advance). The Agent shall be able to withhold payment (for such period as it determines, including indefinitely) if it has reasons to believe that: (i) there is a material change in the Event; (ii) there is a material change in the Promoter (or circumstances affecting the Promoter); or (iii) there has been a breach

of this Agreement, including, but not limited to, situations where: (a) Promoter no longer has the requisite licence or permissions from the relevant third party licensor of the Event Intellectual Property (which would cause Promoter to breach clauses 6.2.6 and 6.2.7); (b) adverse weather conditions (or any other Force Majeure Event such); (c) an Insolvency event affecting or threatened against the Promoter; or (d) any other material changes'

38. The standard terms and conditions provide for choice of proper law (English law), the definitions of various terms, obligations placed upon the company and obligations upon the Respondents. These also deal with warranties, insurance, termination, its definition and effect, and data protection. There is also a good faith clause in the standard terms which was relied upon by all the Respondents before me as supporting their trust argument. It states as follows:-

'*4.1 In consideration of (and conditional upon) Agent's receipt of the Agent Commission, during the Term of this Agreement Agent shall:*
4.1.1 supply the Services using reasonable care and skill;
4.1.2 act towards the Promoter conscientiously and in good faith;
4.1.3 act in accordance with sound commercial principles in its relations with Customers and potential Customers;
4.1.4 describe itself in all dealings with the Tickets and in all associated advertising and promotional material and (if any description is provided there) at its premises as the "official exclusive ticket agent" or similar (as Agent shall determine at its sole discretion) of the Promoter'

39. Ms Bayliss (62nd Respondent) and Mr Stratton (26th and 56th Respondents) also relied on certain of these standard terms as part of their arguments relating it warranties and contractual liability and I will deal with these below.

40. There is also an entire agreement clause which states:-
'This Agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous drafts, agreements, arrangements, and understandings between them, whether written or oral, relating to the subject matter.'

All of the Respondents before me accepted that they were bound by the terms of the agreement which includes this entire agreements clause.

Submissions

41. The starting point for Mr Lewis was the express appointment of the company as 'exclusive online ticket agent' and 'exclusive agent' for the Respondents in the collection of ticket revenue. He submitted that the existence of an agency relationship is one of the instances in which a trust relationship can arise in respect of money collected on behalf of the principal. This is one of the issues also considered in *Fleet* with reference to the passages at page 609 which makes it clear that a trust relationship can arise in agency cases as much in other commercial transactions. Mr Lewis highlighted the passage at page 609 which I have set out again below, being commercial transactions, that:-

'is a relationship where, in respect of moneys received by the agent representing the proceeds of sale of the principals' property, the court is particularly ready to infer a trust:
it is not readily to be inferred that the agent is intended to be able to finance his business out of the proceeds of sale of his principal's property'.

42. Mr Lewis relies on the following terms as follows :-

(i) clause 5.5 states,

> *"Agent shall not become the owner of any Tickets nor of any other goods delivered from the Promoter to Agent"*

Mr Lewis submitted that as the beneficial title in the tickets did not pass to the company under the terms of the agreement, then equally it must follow that the proceeds on the sale of the tickets did not pass either.

(ii) clause 5.2 of the standard terms and conditions states as follows:-

> *"Agent shall process all sales of Tickets allocated to it through the Ticketing Platform and it shall account to the Promoter for such sale proceeds in accordance with the Commercial Terms and clause 7"*

Mr Lewis submits that the company was therefore required to 'account' to the Respondents for the proceeds of sales of the tickets.

(iii) The company had a limited right to *"deduct and retain from the Ticketing Revenue, the Booking Commission, the Advance and any other amounts owed to the Agent by the Promoter in respect of that Event (Deductible Amounts)"*

Mr Lewis submitted that therefore the company had to account to the Respondents for the ticketing revenue less any agreed retention. Clause 7 states:-

'7.1 Subject to the Promoter complying with its obligations under this Agreement, Agent shall:
7.1.1 process all payments for Tickets it sells through the Ticketing Platform;

7.1.2 pay to the Promoter all monies due to the Promoter in respect of such sales of Tickets in accordance with the Commercial Terms;
7.1.3 ensure that the Promoter can access details of all Ticket sales made on the Ticketing Platform'

In relation to the accounting and payment clauses in the commercial terms which I have already set out above, Mr Lewis highlighted the use of the words 'Agent shall deduct and retain' in paragraph 1. As for paragraph 2, Mr Lewis submitted that this supported his case because it demonstrated clearly the sums which had to be accounted for payment to be remitted.

(iv) Pursuant to clause 3.1, standard terms and conditions, the company appointed the Respondent as, *"its exclusive agent to provide the Services through the Term on the terms of this Agreement and Agent hereby accepts the appointment on those terms"*

The 'services' to be provided by the company were defined in standard terms and conditions as follows :-

> *"Services means the provision of a Ticketing Platform, sale of Tickets by Agent on behalf of Promoter and, if agreed between the parties in writing, provision of access control for the Event"*

Mr Lewis submitted that this meant that the company was providing the 'services' of selling tickets as agent for the Respondent and not selling on its own behalf.

(v) According to clause 4.1.2 of the standard terms and conditions, the company was required to 'act towards the promoter conscientiously and in good faith'. Mr Lewis relies upon the existence of the good faith obligation as being consistent with the company having the fiduciary duties of a trustee.

(vi) According to clause 4.1.4 standard terms and conditions, the company was required to disclose its status as 'official exclusive ticket agent or similar' to customers so that all parties, Mr Lewis submitted, knew that the company was not dealing as a principal.

(vii) According to clause 5.3 standard terms and conditions, the tickets were to be sold to customers on the 'standard terms and conditions for the sale of tickets' of the Respondent and not the company.

(viii) The commercial terms describe the proceeds of ticket sales as being 'held' by the company

> *"Agent shall be entitled to offset any amount owing by it to the Promoter (or any of its Associates) in connection with any Event (including in respect of ticket sales or any other revenues held by Agent in respect of any Events) against the Advance. For the avoidance of doubt, this shall permit Agent to offset and deduct the entirety of any Advance paid to Promoter (and owed to Agent)*

under this Agreement from any and all amounts held by Agent in respect of any Events (including Events subject to a separate agreement) and owed to Promoter or any of its Associates."

(ix) Reliance is also placed on clause 5.7 which states:-

"5.7 Agent will not add VAT to, or deduct VAT from, the Full Value Ticket Price. Accounting for and payment of any VAT due on the Promoter's Ticket sales through the Ticketing Platform of Agent is the obligation of the Promoter. Agent will not issue VAT receipts for the Full Value Ticket Price. The Promoter agrees to provide a VAT receipt to Customers who request one, if the Promoter is registered for VAT"

Mr Lewis submits that the obligation upon the Respondents to account for VAT is inconsistent with the company receiving the proceeds of ticket sales beneficially. Whilst all of the Respondents represented before me supported this submission, it seems to me that in reality, this is not a point which really assists their argument. This is because, as set out by Mr Munby, the liability to account for the VAT falls upon the principal as the person who makes the supply of (in this case of tickets) (section 1 of the Value Added Tax Act 1994). As the VAT liability is a matter which arises under the terms of a specific statute, in my judgment, it cannot assist the Respondents. The liability for VAT arises under tax legislation which is not in my judgment concerned about whether the parties intended to create a trust. The clause, in my judgment, ensures that the VAT liability is dealt with in accordance with the legislation. The VAT legislation would in my judgment have the same effect even if this clause was not in the agreement. Accordingly, this is not an argument which falls to be considered alongside other factors.

43. On the basis of the clauses identified and highlighted by Mr Lewis, his submission is that the agency relationship and its function as set out in the terms of the agreement are consistent with the creation of a trust and this demonstrates that this was the intention of the parties, objectively ascertained.

44. Mr Fawcett on behalf of 19th Respondent, adopted the submissions of Mr Lewis. He directed my attention to certain passages in *Re Kayford*, in particular the reference to *Re Nanwa Gold Mines Ltd [1955] 1 WLR 1080* where money had been sent on the promise to keep it in a separate account. In particular, Mr Fawcett relies upon the

passage which states that '*there is nothing in that case or in any other authority that I know of to suggest that this is essential'*. On page 282, Megarry J concludes his discussion with the following statement, *'Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements'*. As I have already indicated above, I do not accept that *Re Kayford* is to be narrowly defined as submitted by Mr Munby. I accept that an obligation to keep funds separate (or the creation of such a separate account even without such an obligation in the terms of the agreement) is not essential. However, this is one of the factors which case law makes clear is to be carefully considered in construing the agreement between the parties in order to establish whether there was an intention to create a trust. Mr Fawcett also referred me back to Bowstead and in particular paragraph 6-041 and the statement towards the end of that paragraph, *'The present trend seems to be to approach the matter more functionally and to ask whether the trust relationship is appropriate to the commercial relationship in which the parties find themselves; whether it was appropriate that money or property should be, and whether it was held separately, or whether it was contemplated that the agent should use the money, property or proceeds of the property as part of the agent's normal cash flow in such a way that the relationship of debtor and creditor is more appropriate'*. As Mr Fawcett submitted, all the indications should be considered, including, was the company entitled to use the money itself, can the company mix it with its own sums. He submits that the replies to these questions is negative because of the accounting procedure which is set out in the commercial terms. I have set those out above. The time periods in relation to the 19th Respondent in relation to accounting and payment monthly, being an obligation upon the company to issue a written report 7 days thereafter at the end of each month and remit at the same time, 85% of the net revenue (as defined). The balance of 15% is to be paid 7 days after the conclusion of the relevant event.

45. Mr Fawcett also referred me to the case of *Sports Network Limited v Joe Calzaghe CBE [2008] EWHC 2566 (QB),* where Mr Justice Coulson had to determine on an interim application whether there was a serious issue to be tried as to whether the money held from profit collected by a boxing promoter for a boxer was held on trust,

or whether it was a debt. Mr Fawcett accepts of course that the Judge in this case was not deciding that a trust had been created, but he submits that the case provides, in any event, useful guidance. The circumstances relied upon by the Judge in that case are of course different from those before me. There, there was at least one bank account created for the express purpose of receiving income from the fight. After considering the evidence before him, the Judge concluded that the only proper inference that he could draw was that the separate account was created for the purposes of the fight and it was an account into which the profits collected by the Claimant would then be paid. The Judge referred to an exchange of letters which also suggested that the Defendant would be a beneficiary entitled to 80% of the money collected by the Claimant. The Judge concluded that the arrangement suggested that the monies were being collected on behalf of the Defendant and that there was a relationship of trustee and beneficiary between the parties. There were also contrary arguments before the Judge, but the Judge concluded that the defendant had a good arguable case. This case is another example of the court considering the factors before it on the evidence. I do not consider that it really takes the issue beyond the passages from other cases I have referred to above and also the general statements made in Bowstead and Lewin.

46. Mr Fawcett also made an alternative submission that the existence of a fiduciary relationship. He relies on the definition at 6-034 in Bowstead, being

"A person will be a fiduciary in his relationships with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of their several interests."

Mr Fawcett also relied upon certain passages from Lord Justice Millett's judgment in *Bristol and West Building Society v Mothew [1998] Ch 1* at 18, being

"...A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which give rise to a relationship of trust and confidence

...

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out his trust; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal..."

He relies on the good faith obligations in the agreement (see above) and effectively on the existence of the agency relationship as well as the accounting obligations. He submits that, taken as a whole, the duty of loyalty exists. In my judgment, there is no support in the terms of the agreement in relation to an obligation of loyalty. In considering the agreement as a whole, in my judgment, the necessary elements for the existence of a fiduciary relationship simply do not exist. The accounting obligations themselves do not give rise to the fiduciary relationship. Equally, the contract does not give rise to a relationship of trust and confidence. In my judgment, this is a commercial arrangement of principal and agent whereby the obligations upon the parties are set out in the terms. The inclusion of the good faith clause does not elevate it to a fiduciary relationship. There are no grounds for asserting that a duty of loyalty exists and that the principal reposed the trust and confidence necessary for there to be a fiduciary relationship.

47. Mr Stratton on behalf of the 26th and 56th Respondents also adopted the submissions already made relating to there being a trust account. He made a further argument based on the surrounding circumstances relating to the 26th and 56th Respondents, both being Australian registered companies. In relation to the accounting and payment provisions, the company was entitled to deduct the agreed charges (which included the booking commission) on a weekly basis and 14 days after the end of the week, the company was to issue a written report and to remit to these Respondents 90% with the balance of 10% being remitted 7 days after the relevant event. The company was the exclusive sales agent. Reliance is also placed on the company's contractual liability (condition 20.1), which states that the company's liability:-

"under or in connection with this Agreement for any reason whatsoever, whether arising in contract, tort (including negligence), misrepresentation, for breach of statutory duty, or for claims arising from a series of incidents whether the same be related or otherwise, within any Contract Year shall be limited to 100% of the total value of Booking Commission paid by the Promotor [sic]under this Agreement"

Mr Stratton submits that the capping of the liability to the amount of the booking commission is only consistent with there being a trust in favour of the Respondents.

48. Specific reliance was placed on the fact that both Respondents were Australian companies and the events to which the agency agreements related took place in Australia with payment in relation to fees and commissions being denominated in

Australian dollars. Mr Stratton submits that in so far as these Respondents are aware, the ticket sales receipts would have been placed in an Australian dollar account and therefore there is a degree of de facto separation. In my judgment, the difficulty with this last point is that it relates to what happened after the agreements were entered into. There is also no evidence to suggest that these Respondents were the only Australian based Respondents, or that these Respondents were aware prior to entry into the agreement, that they were the only Respondents who would have the receipts from tickets sales paid into one specific Australian dollar account. Mr Manning disagrees in his third witness statement with the use of the account being solely for receipt of sums on behalf of these two Respondents. The creation of a trust is to be determined objectively and relates to what has been agreed between the parties as ascertained by the agreement entered into and surrounding circumstances as at the time the agreement was entered into. In my judgment these particular issues raised by Mr Stratton form no part of the issue I have to determine. Reliance by Mr Stratton on the facts of *Fleet* does not assist him either. In *Fleet*, the agent expressly notified the principal as to the operation of a separate account and that it would be used before the agreement was entered into. The Judge held that the existence and operation of the separate account is one of the reasons that the principal entered into the agreement. In the case of these Respondents, there is no such evidence along these lines. Accordingly, this particular argument is not one which falls to be taken into account.

49. Ms Baylis on behalf of the 62nd Respondent also adopted the submissions already made by the other Respondents' counsel. She also made submissions relating to what she submitted was the different factual background pertaining to her clients in her two additional grounds which I have dealt with above. In relation to the issues arising under the preliminary issue, she highlights that there are no provisions in the agreement with the 62nd Respondent relating to advances. She invites me to hold that this makes her client's position stronger in that it is simpler because the sums come in and the company as agent knows what is 'needing to go back'. She points out that as there are no advances to deal with and no clause 4, which allows the company to offset what is owed to it in relation to her advances.

50. She relies on the wording used in the accounting and payment terms which in this Respondent's case enable the company to deduct and retain from the ticketing revenue the agreed charges monthly, issue a written report 14 days after each month end and remit 80% of the net revenue to the 62nd respondent with the 20% balance being remitted 14 days after the relevant event.

51. Ms Baylis adopts the limitation on liability argument of Mr Stratton and also relies upon certain linguistic choices found in the terms and conditions. She refers me to the use of the word 'retain' in the term relating to booking commission which states that, 'The Agent shall be entitled to charge and retain the following amount on each purchase of a Ticket….' She refers me to the language in clause 4 in relation to the obligations upon the company. She submits that the use of the words 'issue receipts to customers in respect of the online sales of tickets under this agreement via the ticketing platform, and to receive payment through its ticketing platform for the same on behalf of the Promoter [the Respondent] in accordance with clause 5' reflects a language whereby the company is not free to do what it wishes with the money it receives. She submits that clause 4.2 is 'mildly supportive' of the trust argument in that it states as follows :

'Agent shall not:
4.2.1 except with respect to the sale of Tickets on the behalf of the Promoter under this Agreement and as otherwise agreed in writing from time to time, act in a way which will incur any liabilities on behalf of the Promoter nor to pledge the credit of the Promoter; or
4.2.2 without prior reference to the Promoter (and then only acting strictly on the Promoter's express instructions) on behalf of the Promoter to take part in any dispute or commence or defend any court or other dispute proceedings or settle or attempt to settle or make any admission concerning any such proceedings.'

52. She submits that this demonstrates the limited role of the company as agent with its responsibilities of selling the tickets via a platform but that the company was not getting involved beyond that. She also refers me to clause 5 where the sales of the tickets are to be on the Respondents' own terms and conditions unless otherwise agreed. She relies upon the sales of tickets being on the Respondents' ticket list prices. She also relies upon the warranties whereby it is the Respondent who undertakes and agrees that all the tickets available to the company shall contain accurate information and all shall be correctly allocated to the relevant event. She submits that this reinforces the position that the company has nothing to do with the

tickets. She refers me to clause 5.2 which states that the company shall process all sales of tickets allocated on the ticketing platform and 'shall account for such sale proceeds in accordance with the commercial terms and clause 7'.

Representations of Respondents not represented in court

53. The 44th Respondent, represented by Capital Law, filed a witness statement of Mr Daniel Sion Law-Deeks dated 20 October 2023, a director of the 44th Respondent. That statement refers to the agreement which the 44th Respondent had with Ticket Arena Limited in 2019 which contained a clause that Ticket Arena would hold all ticket receipts on trust for the 44th Respondent in a separate bank account. Mr Law-Deeks then asserts that he understood that the company had acquired Ticket Arena's business in around 2019. He accepts that the 44th Respondent entered into an exclusive ticket sales agent agreement with the company on 16 July 2021 on the company's standard terms and conditions. He exhibits these and this is the pre July 2022 agreement the clauses and terms to which I have referred to above. The accounting and payment provision in this instance requires the company to issue a written report 14 days after each week and to remit 65% to the 44th Respondent with the balance of 35% being remitted 7 days after the conclusion of the relevant event. As already noted above, the company's agency agreement contains no express trust provision or the creation of a separate account. It also contained an entire agreement clause.
54. The 75V and 75W Respondents, Sand Srl and Mondo Doo filed and served a witness statement dated 17 October 2023 by Mr Russell James Beard, their solicitor. Sand Srl's accounting and payment clauses provide for the issue of a report 7 days after every 14 day period and for 80% to be remitted with the balance of 20% being remitted dafter the relevant event. In relation to Mondo, the accounting and payment clause is identical in time periods. These are both pre July 2022 agreements. The 61st Respondent has withdrawn its claim and no more needs to be set out in this judgment. The Third Respondent has an express trust clause in its agreement and as I mentioned during the hearing itself, there seems to be no need for any declaration in relation to the third Respondent.

The post July 2022 agreement

55. As the company was placed into administration on 12 September 2022, it is unlikely that there are many post July 2022 agreements. Whilst the Administrators have not identified particular Respondents who fall under the post July 2022 agreement, I have directed that the preliminary issue be capable of dealing with the post July 2022 agreement. The Administrators submit that there are no real material differences between the pre and post July 2022 versions. The post July 2022 agreement does not contain the accounting and payment terms as part of the commercial terms but instead they appear, in a more abbreviated form at clause 3 under the subheading 'Payments' with the ability to insert the agreed percentages and periods. On reading the post July 2022 agreement, its terms do not appear to enable different arguments to be placed before me in relation to the post July 2022 agreement which do not exists in relation to the pre July 2022 agreement. Accordingly, the construction of the pre July 2022 agreement will apply equally to the post July 2022 agreement.

Conclusions

56. I have dealt above with some particular submissions made which I did not consider, for the reasons set out above, were really factors to be taken into account. Alongside the factors set out above, I have also considered the factual matrix. This was a commercial agency agreement between promoters and a ticket agency. The parties were of course able to negotiate the terms and conditions and this is seen from the differing retentions agreed as well as the ability of other parties, such as AEG, to insert an express trust provision into the agreement. The terms agreed are in my judgment clear and no terms are required to be implied on the basis that the terms do not make sense. None of the Respondents sought to argue that there was any ambiguity in the terms which form part of the agreement. In my judgment, the following are factors which I have taken into account (in no particular order of weight attributable to each factor): (1) there is no requirement that the ticket sales receipts were to be kept in a separate account (whether mixed with the receipts of other Respondents or not); (2) the agreement stipulated that a percentage generally around 80% was to be paid to the Respondent 14/7days after the issue of a report by the company due within either 7/14 days of the end of either 2 weeks/month during the Term detailing the deductions; (3) the agreement provided for the balance, being a sums between 20% and 5%, to be paid over after the relevant event had taken place; (4) the agreement is silent in relation to the use by the company of the sums retained

either during the 21 days/month plus period or those sums retained until after the relevant event has taken place; (5) the smallest period of time with regard to those Respondents before me is 7 days to issue the report and payment 14 days thereafter; (6) the agreement is silent in relation to any entitlement to interest in relation to either the shorter period of 21 days/month plus and the much longer period relating to sums retained until after the relevant event; (7) that the period of time when the balance of 20% or less was to be paid could have lasted a considerable time, in many cases, months; (8) the agreement contained a clear provision that title in the tickets did not pass to the company as the agent; (9) the agreement contained no prohibition relating to the use by the company of the ticket receipts; (10) the agreement contained detailed provisions relating to what could be deducted from the ticket receipts and also contained detailed provisions as to when the net receipts would be paid over to the relevant Respondent; (11) the language of certain clauses such as the use of the words 'retain', 'account' and 'deduct' was language which might assist the trust argument; (12) the liability of the company was restricted arguably to the level of the commissions percentage; (13) the agreement contained a good faith provision in relation to the company and carrying out of its obligations; and (14) this was an agreement where it is clear that the company acted as agent and its obligations reflect that it was the Respondent who provided the relevant warranties as well as pricing etc. As set out in the case law, the court can readily infer the creation of a trust in a principal/agency relationship as in relation to any other commercial relationship. None of these factors are necessarily conclusive.

57. Additionally, the clauses relating to the advances and the ability to offset the sums due from receipts being held was relied upon by the relevant Respondent as being another factor in their favour, namely that the agreement specified exactly what could be deducted or offset providing support alongside their other points that the agreement set out what could be deducted and/or retained leaving the balance the subject of a trust. In my judgment this factor, argued one way or the other, really does not progress the argument for a trust. This is because in both cases, there is silence relating to the retention of the funds and how they can be used by the company. Ms Baylis submitted that the lack of advance provisions in the 62nd Respondent's case was a factor in favour of her construction of a trust. This again, in my judgment, does not support or indeed contradict the trust argument.

58. In my judgment, taking into account the factors set out above in construing the agreement, no trust is created in respect of the proceeds of ticket sales. The detailed provisions which relate to when the net ticket receipts should be remitted to the Respondents are silent relating to the use of those sums retained prior to being paid over to the Respondents. This is particularly striking when the percentage of sums which are to be retained relate to a lengthy period, namely after the relevant event. That could be a considerable period of many months bearing in mind payment was to be made after the event for which tickets were sold. Equally, the sums to be retained before having to be paid to the Respondents are not, in my judgment, short periods of time. The shortest is 21 days. These provisions need to be placed into the context of a lack of any obligation to keep the sums retained separate or even in a mixed account which separates the ticket receipts from any company monies. There is no provision relating to interest thereon and whether it needs to be accounted for. The restriction of the contractual liability does not in my judgment really take the argument much further. I agree that it appears somewhat restrictive in relation to contractual liability, but it is difficult to equate this as being because of the creation of a trust. One does not logically follow the other. Parties are after all free to agree the terms of the agreement between them and that includes any limit on their liability. Effectively, in my judgment, what the Respondents are seeking to do is to explain that the acceptance of such a limited contractual liability could only have been agreed by reason of the creation of a trust. That, in my judgment stretches too far an objective intention to create a trust.

59. The existence of a good faith clause really takes the matter no further. It is an obligation upon the company to act towards the Respondent conscientiously and in good faith. That does not necessarily imply in some way a trust being created of the proceeds of sale. Whilst good faith obligation appear frequently in relation to trusts, the existence of a duty to act in good faith does not create the trust of the ticket sales proceeds. The existence of the good faith clause does not, in my judgment, enable a trust to be construed when it is factored into the lack of separate account or accounts, and lack of restriction relating to the use of the proceeds of ticket sales which are capable, under the terms of the agreement, of being retained for a lengthy period of

time. No Respondent sought to argue that there was a trust relating to the sums to be accounted for during the shorter period, being 21 days/month plus only, whilst accepting no trust could arise in relation to the percentage of the ticket sales receipts that were only to be remitted months after, namely when the event had taken place. In my judgment, the ability of the company to retain sums for an extremely lengthy period without any required segregation is an important factor against any trust.

60. I do not accept that properly read and construed, the accounting and payment provisions create a trust even if I take the other factors set out above into consideration. In my judgment, the ownership of the ticket by the Respondents does not enable them to argue a trust of the proceeds of sale when the payment and accounting provisions are read. Those provisions expressly allow significant sums to be retained by the company for long periods of time without any restriction on their use. This fails to elevate the position of the Respondents and the company to more than a debtor creditor relationship under the terms of the agreement. In so far as a comparison with *Fleet* is made, that case had a short 5 day period but importantly the surrounding circumstances established that a separate account was operated for the receipts. Here, there is no separate account, no restriction on the use of monies by the company and a clause which provides for the sums to be retained by the company for prolonged periods of time without any restriction on their use.

61. I do not consider the language used in the agreement as described by some of the Counsel and set out above, actually alters the position. Whilst the use of the words, 'retain', 'account for', 'remit' can be indications of an objective intention to create a trust, these do not outweigh, in my judgment, clear terms allowing the company to keep the ticket sales receipts for lengthy period of time without any restriction on where such sums were to be kept and any prohibition in their use by the company. There is no real magic in the use of 'account for' beyond that those words are commonly used in trust scenarios but its use is not restricted to cases of trusts rather than debtor/creditor. Mr Lewis' reliance on the Supreme Court case of *Re Lehman Brothers International (Europe) [2012]* does not really assist. The passage he relied upon started as follows:-

'It is clear that the case of a trust under which the trustee is free to, and does, use the trust assets for its own benefit, in certain respects at least, without accounting to the beneficiary for such dealings, is unusual'

62. In that case, by reason of the terms of the agreement, it was clear to the Judge that the objective intention was to create a trust. Before me the terms do not make me reach that conclusion. There is nothing in the terms which make this one of those unusual cases where the agent is free to use the sums as his own but a trust is created. There is nothing in the terms to prevent the company from using the ticket sales receipts and then when it had to account and pay to the Respondent in question, it uses any funds it has to make that payment. This is a debtor/creditor relationship which arises in relation to an agency agent as much as in relation to any other scenario. Equally the limited role of the agent in relation to warranties provided and its role in selling the tickets again does not lead to a trust being created. In my judgment, that type of argument could be readily applied in all agency cases and that is clearly, from the authorities I have cited for above, not the case.

63. For the reasons I have set out above, the reply to the preliminary issue in relation to the pre and post July 2022 agreements is that no trust has been created of the ticket sales proceeds. I will hear the parties as to the form of order itself when this judgment is handed down.