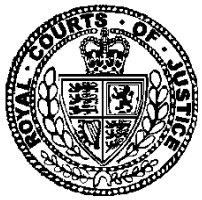

Neutral Citation Number: [2018] EWHC 934 (Ch)

Case No: HC-2017-002111 and
CR-2011-001172

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL

Date: 26/04/2018

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

AM HOLDINGS LIMITED — **Applicant**

- and -

(1) MARK CHARLES BATTEN
(2) STEPHEN JOHN LE PAGE — **Respondents**

- -
- -

Simon Davenport QC and Aidan Casey QC (instructed by **Rosenblatt**) for the **Applicant**
Ben Valentin QC (instructed by **Linklaters LLP**) for the **Respondents**

Hearing dates: 20–21 March 2018

- -

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.

……

KELYN BACON QC

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. The customary law of insolvency in Guernsey, which remains largely applicable in the case of personal insolvency, involves a procedure known as *désastre*. That procedure does not, however, apply in the case of corporate insolvency, which is governed by a statutory regime contained in various parts of the Companies (Guernsey) Law 2008 ("the 2008 Law"). It is the provisions of the 2008 Law that are the subject of the present applications.

2. There are two opposing applications, which cover essentially the same ground. Both applications arise out of proceedings brought by AM Holdings ("AMH") in relation to the conduct of Mr Batten and Mr Le Page ("the administrators") in 2010–11, while they were the joint administrators of AMH and its subsidiaries, all Guernsey-registered companies (collectively "the companies").

3. AMH complains that the administrators breached their duties by selling – it is said at an undervalue – the main asset of the companies, which was a portfolio of properties in the City of London referred to as the Leadenhall Triangle ("the properties"). On that basis AMH has issued two claims against the administrators: (i) a claim under the Cross Border Insolvency Regulations 2006 ("the CBIR") and (ii) a Part 7 claim. Its application in these proceedings is an application for permission to examine the conduct of the administrators under paragraph 29(2)(c) of Schedule 2 to the CBIR. The administrators say that permission should be refused, and have also made an application for the CBIR claim and the Part 7 claim to be struck out, or for summary judgment to be given in their favour on both claims.

4. While the principles relating to the respective applications are not identical, the substantive grounds on which the administrators say that permission should be refused are essentially the same as the grounds on which they say that the claims should be struck out or summarily dismissed.

5. The applications are supported by witness statements on both sides, as well as expert reports covering issues of Guernsey law and procedure. AMH's expert is Mr Michael Adkins, an Advocate of the Royal Court of Guernsey, and previously a barrister and solicitor in Australia and then a solicitor in England and Wales. The administrators' expert is Mr Ian Swan, also an Advocate of the Royal Court of Guernsey, and previously a barrister in England and Wales. Following sequential reports from Mr Swan and then Mr Adkins, the experts drafted a joint memorandum recording the areas of agreement and disagreement between them.

6. At the hearing AMH was represented by Mr Simon Davenport QC and Aidan Casey QC, and the administrators were represented by Mr Ben Valentin QC. At the close of the hearing I gave permission for, and received, supplemental written submissions from Mr Valentin on a specific issue which I will refer to as the estoppel point, and a written reply from Mr Davenport and Mr Casey on all points in the case.

The AMH administration proceedings

7. The companies, which as I have said were all incorporated in Guernsey, were until the disputed administration proceedings the owners of the Leadenhall Triangle properties. The acquisition and potential development of the properties was financed by a loan facility with Lehman Brothers, secured against the properties. Lehman Brothers subsequently split the loan between various senior and junior lenders, and the senior lender appointed Hatfield Philips International ("HPI") as servicer of the loan.

8. In April 2010 the loan matured, and the companies failed to repay it. After unsuccessful negotiations between the companies and HPI concerning the possible restructuring of the loan, HPI applied to the Guernsey Court to place the companies into administration. AMH did not know that HPI was intending to apply for an administration order until the application was made on Friday 29 October 2010, with the intention that the companies should be placed into administration the following Monday. In the event that application was adjourned and heard on 16 November 2010, by which time the companies had been able to secure representation and put in evidence opposing the administration order.

9. The Guernsey Court found in favour of HPI and made an order appointing Mr Batten and Mr Le Page as the joint administrators of the companies. At the time, the administrators were the partners of (respectively) PricewaterhouseCoopers LLP and PricewaterhouseCoopers CI LLP. They are now both retired. The Guernsey experts are agreed that the administration order was valid. There is, however, a dispute as to the powers that the order granted the two administrators, which I address further below.

10. Since the properties are located in London, the administrators sought recognition from the English Courts of the Guernsey administration proceedings as foreign main proceedings. By way of ancillary relief, they sought an order under Article 21(1)(e) CBIR entrusting them with the administration and/or realisation of the companies' assets in England, including the properties. The appropriateness of this relief was not challenged by any of the companies' creditors or shareholders, and a recognition order was duly made on 11 February 2011, which included the ancillary relief sought.

11. By the time that the administration order was made, the unpaid loan stood at approximately £172 million, and the companies were balance sheet insolvent. HPI did not wish to consider further restructuring proposals, and the administrators took the view that there was no realistic prospect of refinancing the loan. They therefore decided that the best course of action was to sell the properties, and they appointed Cooke & Powell as sales agents.

12. Before the administration order was made, HPI had been approached by Henderson Global Investors ("Henderson") with a proposal to purchase the properties, and it appears that there were some preliminary discussions between HPI and Henderson during 2010. Henderson renewed its proposal with the administrators in early 2011, offering to purchase the properties for a

total of £174m. The administrators declined to agree a sale to Henderson prior to the formal marketing of the property, but did agree that if the marketing produced a bid of more than £177m, Henderson would be given the opportunity to price-match the higher bid. That agreement was embodied in two documents: a contract for sale and a share purchase agreement. Both agreements were dated 14 April 2011 and were concluded between the companies (in administration), the administrators and Vanquish Properties, which was an SPV set up by Henderson for the purposes of this transaction.

13. The properties were marketed for sale by way of an information memorandum sent out on 8 April 2011. A number of first-round offers were made in response to that, following which the administrators decided to discuss the offers with the bidders to ascertain their highest final positions. That resulted in four offers, the highest of which was an offer by Brookfield Office Properties ("Brookfield") for £191m. Henderson then increased its offer to £188m, and the administrators accepted that offer despite the fact that it was £3m lower than the Brookfield bid. Their stated reason for doing so was, essentially, that the Brookfield offer was conditional and carried various transactional risks (including the risk of delay), whereas Henderson's offer was unconditional and immediate.

14. The administrators' conduct of the sale negotiations and decision to sell to Henderson was the subject of correspondence between the administrators (and their representatives) and SJ Berwin solicitors, acting on behalf of the shareholders, directors and a major creditor of AMH. On 23 May 2011 the administrators sent a letter to SJ Berwin explaining the reasons for their decision, and setting out the final price agreed with Henderson. In response, on 27 May 2011, SJ Berwin asked that once the administration costs and secured creditors had been repaid, the administrators should apply to terminate the administration and discharge themselves as administrators. That request was repeated in subsequent correspondence.

15. The sale to Henderson was completed on 16 June 2011. Following the repayment of the administration costs and secured debt, the sale proceeds left a dividend to be paid to AMH of approximately £12.5m. On 5 August 2011 the administrators duly applied to the Guernsey Court for the administration order to be discharged, and for their own release and discharge from liability. The application was supported by an affidavit from Mr Batten, which provided an account of the administration and explained the administrators' reasons for deciding to sell the properties to Henderson rather than to Brookfield. On 9 August 2011 the Guernsey Court granted the application and terminated the administration order, discharging the administrators. It ordered that AMH should be returned to its directors so that it could continue to trade as a going concern, but ordered that AMH's subsidiaries should be wound up, with Mr Batten and Mr Le Page appointed as the joint liquidators.

16. On 20 February 2012 AMH's director Mr Benady signed a letter which confirmed the terms of the share purchase agreement that had been made on 14 April 2011, subject to an amendment set out in that letter. The letter noted, however, that Vanquish Properties had denied AMH's directors access to the

agreement in question; it had instead given SJ Berwin the opportunity to read the agreement, and they had done so.

Pre-action applications and correspondence

17. Three years passed after the events described above, during which the administrators heard nothing further from AMH. Then on 13 May 2015 AMH's solicitors (who by then were Rosenblatt) wrote requesting pre-action disclosure. Following correspondence, a pre-action disclosure application was issued on 5 June 2015 against HPI, Cooke & Powell and Mr Batten, seeking disclosure of various categories of documents relating to the administration of AMH and the sale of the properties. The allegations made at the time (in the evidence supporting the application) included allegations of an unlawful means conspiracy and suggestions of claims in deceit.

18. Meanwhile on 17 April 2015 AMH had also issued an application seeking pre-action disclosure from Henderson, based on similar allegations. On 7 July 2015 Rose J ordered pre-action disclosure to be provided from Henderson, in relation to the period April 2010 to June 2011, and disclosure was provided by Henderson in or around September 2015. In December 2015 AMH discontinued its application against HPI, Cooke & Powell and Mr Batten and agreed to pay Mr Batten's costs.

19. On 30 March 2017 AMH sent a letter before claim to Linklaters, solicitors for the administrators, inviting the administrators to agree to a standstill period for pre-action correspondence. A standstill agreement was signed on 7 April 2017 and was set to expire on 31 July 2017. Linklaters' response to the letter before claim was sent on 2 June 2017.

The claims and applications

20. On 26 July 2017 AMH filed its CBIR claim and its Part 7 claim. The CBIR claim is short. It seeks, pursuant to paragraph 29(2)(c) of Schedule 2 to the CBIR, the Court's permission to examine the administrators' conduct as the foreign representatives in relation to AMH. It also seeks, pursuant to paragraph 29(4)(a)–(c) of the CBIR, orders that the administrators account for property misapplied by them and pay compensation for breach of duty or misfeasance. The grounds for seeking those orders are said to be that the administrators misapplied AMH's property, breached their fiduciary and other duties to AMH, and are guilty of misfeasance.

21. The Part 7 claim form and, subsequently, particulars of claim, set out more detailed particulars. On its face this is an entirely separate claim, which was apparently filed out of an abundance of caution lest the CBIR claim not prove in itself sufficient. AMH accepts, however, that in order for either claim to proceed it requires the court's permission under paragraph 29(2)(c) of Schedule 2 to the CBIR.

22. The administrators' applications seeking the strike out or summary disposal of both the CBIR claim and the Part 7 claim were filed on 8 December 2017.

23. A consent order providing for directions for the hearing of the opposing applications was made on 10 October 2017. In particular, the order provided that the parties should have permission to adduce expert evidence from one expert each on Guernsey law on any issue relevant to their respective applications. That is the basis on which the reports of Mr Swan and Mr Adkins were filed.

24. The final application before me is AMH's application for permission to amend its particulars of claim, in the event that its claims proceed. Draft amended particulars of claim were attached to AMH's skeleton argument for this hearing, and it was agreed at the start of the hearing that I should deal with this in the course of determining the other issues.

The issues

25. It is common ground that nothing turns on the different way in which the grounds of claim are expressed in the CBIR claim and the Part 7 claim respectively. As I have already noted, AMH has always accepted that it requires permission for either claim to proceed, and at the hearing Mr Davenport acknowledged that the Part 7 claim could not, therefore, be regarded as a freestanding claim. The issues in both claims were therefore treated by both parties as being, effectively, rolled up, and I have dealt with the claims on that basis.

26. It was also common ground before me that AMH's allegations in both claims boil down to essentially three complaints:

    i) that the administrators did not have the power to sell the properties, because the administration order made by the Guernsey Court did not specify the purpose for which it was made;

    ii) that even if they did have the power to sell the properties, the administrators breached their duties by deciding to sell the properties rather than attempting to refinance the companies' debt; and

    iii) that the properties were in any event sold at an undervalue.

27. AMH argues that all three complaints are sufficiently arguable that it should get permission under paragraph 29(2)(c) of Schedule 2 to the CBIR.

28. By the time of the hearing the administrators' case was, first and foremost, that AMH is not entitled to bring the present claims against them, because in granting the discharge order on 9 August 2011 the Guernsey Court released the administrators from their liabilities for their acts (and omissions) in the course of the administration, save to the extent that the administrators had incurred personal liability by virtue of s. 379(4) of the 2008 Law. The administrators say that personal liability under that section only concerns liability to third parties and not liability to the company itself. I will refer to this as the "construction point".

29. If they are wrong about that, the administrators say that AMH's substantive case on the three complaints set out above is in any event so weak that it should not be permitted to proceed.

30. As a further fallback the administrators rely on an estoppel said to arise from a particular term in the 14 April 2011 share purchase agreement, as endorsed by the Benady letter of 20 February 2012. They also rely on various other factors concerning the way in which these proceedings were brought, which are said to add support to the argument that the claims should fail at this stage.

31. It is convenient to start with the construction point, not only because it is, analytically, a threshold point that AMH has to surmount before any examination of the merits of its three complaints can be made, but also because for the reasons set out below I consider that the administrators' construction of s. 379(4) of the 2008 Law is clearly correct. I will then, for completeness, address the other issues.

32. First, however, it is appropriate to set out the relevant tests for the permission, strike out and summary judgment applications, and the way that those tests are to be applied in light of the fact that the substantive claims turn on the application of Guernsey law.

Tests for permission, strike out and summary judgment

33. Paragraph 29 of Schedule 2 to the CBIR is headed "Misfeasance by foreign representative". It provides in material part as follows:

> "(1) The court may examine the conduct of a person who –
>
> (a) is or purports to be the foreign representative in relation to a debtor; or
> (b) has been or has purported to be the foreign representative in relation to a debtor.
>
> (2) An examination under this paragraph may be held only on the application of –
>
> (a) a British insolvency officeholder acting in relation to the debtor;
> (b) a creditor of the debtor; or
> (c) with the permission of the court, any other person who appears to have an interest justifying an application.
>
> (3) An application under subparagraph (2) must allege that the foreign representative –
>
> (a) has misapplied or retained money or other property of the debtor;
> (b) has become accountable for money or other property of the debtor;

> (c) has breached a fiduciary or other duty in relation to the debtor; or
> (d) has been guilty of misfeasance."

34. There is no authority that directly addresses the test for the grant of permission under paragraph 29(2)(c). It is, however, common ground that the provisions in paragraph 29 are modelled on paragraph 75 of Schedule B1 to the Insolvency Act 1986 ("the 1986 Act"), which concerns the examination of an English administrator or former administrator. A notable difference between the two provisions is that paragraph 75, had it been applicable, would not have permitted the examination of the administrators, since the remedy there is not available to the company itself. Nothing turns on this, however, given the terms of paragraph 29(2)(c): it is not in dispute that, subject to the requirement for permission, AMH has standing to bring its CBIR claim. What is more relevant for present purposes is that paragraph 75(6) of Schedule B1 to the 1986 Act provides that:

> "An application under sub-paragraph (2) may be made in respect of an administrator who has been discharged under paragraph 98 only with the permission of the court."

35. In *Katz v Oldham* [2016] BIPR 83, Registrar Derrett said at §§5–7 that the applicable test for the grant of permission under paragraph 75(6) should be the same as under the other provisions of the 1986 Act concerning permission to bring misfeasance claims against a liquidator who has been released and claims against trustees in bankruptcy. The principal criteria, she considered, are "first, whether or not a reasonably meritorious cause of action has been shown; and secondly, whether giving permission for its prosecution is reasonably likely to result in benefit to the estate." It was common ground before me that while the second of those considerations is not relevant here, the first of those considerations is relevant and is the test that I should apply in the context of paragraph 29(2)(c).

36. What is disputed is whether, in determining whether there is a reasonably meritorious case, I should have regard *only* to the substantive merits of the case (Mr Davenport's argument), or whether other considerations are or may be relevant, such as – in this case – the fact that the administrators were discharged by the Guernsey Court without AMH raising, at that stage, the complaints that it now makes about their conduct (Mr Valentin's argument).

37. I do not think that the fact that an administrator has been discharged can be, in and of itself, a reason for denying permission under paragraph 29(2)(c). In the analogous domestic situation under paragraph 75(6) of Schedule B1 to the 1986 Act, the fact that permission may be given to proceed with a claim against a discharged administrator means that the discharge cannot itself be a ground for denying permission. Rather, the point is that (as Registrar Derrett acknowledged at §§10–11 of *Katz v Oldham*) in such a situation there should be a filter to protect the discharged administrator against vexatious claims. The same should apply to paragraph 29(2)(c).

38. The primary issue in determining whether there is a reasonably meritorious case should therefore be the substantive merits of the claim. I do not exclude the possibility that there might, exceptionally, be other factors that could be taken into account. If, however, there is a claim that is in substance reasonably meritorious, I consider that the court should be slow to deny permission on some other ground such as the history of the proceedings.

39. As for the tests for striking out and summary judgment, there was no dispute about the relevant principles. CPR r. 3.4 provides that a claim may be struck out on the grounds that the statement of case discloses no reasonable grounds for bringing the claim, or is an abuse of process. Alternatively, the claim may be dismissed summarily under CPR r. 24.2 if the court considers that the claimant has no real prospect of succeeding.

40. It is common ground that in an area of law that is uncertain and developing, it is not normally appropriate to strike out a claim on the basis of assumed facts rather than the actual facts found at trial: see e.g. *Barrett v Enfield* [2001] 2 AC 550, at pp 557F–G and 558C. By contrast, Mr Davenport accepted at the hearing that a pure point of law that is decisive of the proceedings, and which does not turn on any disputed factual issue, may be determined on a strike out or summary judgment application. His position was, however, that his substantive claims raise disputed issues of fact that are not suitable for strike out or summary determination, and he argued that the construction point turns on Guernsey law which requires cross-examination at trial.

41. I will address the substantive issues below. It is, however, convenient to deal here with the correct approach to the evidence of Guernsey law in the context of the present applications. It is well established that issues of foreign law are issues of fact, albeit a special kind of fact. This point was discussed extensively in the recent judgment of Simon Bryan QC in *The Krygyz Republic v Stans Energy Corporation* [2017] EWHC 2539 (Comm), [2018] 1 Lloyd's Law Rep 66, §44 *et seq.* Foreign law must in general, be proved by expert evidence, and the court should not take it upon itself to conduct its own research into the foreign law in question. Nor may the court construe foreign legislation by applying principles of interpretation that have not been established by the evidence: *The Krygyz Republic*, §49.

42. It follows that if what is in issue is the interpretation and effect of a foreign statute, expert evidence is required as to the relevant principles of statutory interpretation, and the various different sources that may be drawn on by the court in interpreting the statute. These may include case-law (if any) and other materials such as *travaux préparatoires*, if reference to the *travaux* is recognised as an aid to interpretation in the foreign law in question. If there is a dispute between the experts on the applicable principles of statutory interpretation or the relevant source material, that will normally be a matter for evidence at trial. Where for whatever reason the court does not have the benefit of oral evidence and cross-examination on the areas of dispute, it will have to exercise its judgment as to which expert is to be preferred on the basis of the materials before it. In that case the court is entitled to (and indeed will generally have to) look at the relevant sources itself: *The Krygyz Republic*, §122.

43. However, once the principles of statutory construction applicable to the foreign law in question are established, and the relevant source material has been set out, the task of applying those principles and the relevant source material to the question of construction of the foreign statute is a matter for the judge, not the experts. While the experts may have an opinion on that, and may express that opinion in their expert reports, their opinion on that point is simply legal submission; it is not expert evidence and it does not have to be tested in cross-examination.

44. Accordingly if – as in the present case, in relation to the construction point – the strike out or summary disposal of a claim is sought on the basis of a pure point of foreign law, and if the experts are agreed as to (i) the statutory provisions that are applicable to the issue, (ii) the principles of statutory construction under the foreign law in question, and (iii) the relevant source material, then it is in my view open to the court to determine the matter summarily on the basis of the relevant principles as set out by the experts and the material that has been put before it.

45. With these observations in mind, I turn to the construction point.

The construction point

46. The construction point is a short point of Guernsey law, and it arises from the fact that, as I have set out above, the administration order was terminated by the Guernsey Court on 9 August 2011 and the administrators were at that point discharged by the Court.

47. The discharge order provided at paragraphs 1 and 2 that:

> "(1) With effect from 11:18am on 9 August 2011 the Administration Orders be discharged pursuant to section 283 of the Companies Law and that the fees incurred by the Joint Administrators as set out in the affidavit of Mark Batten sworn on 8 August 2011 be fixed and the Applicants are entitled to payment of those fees from the Companies' assets in priority to all other claims.
>
> (2) On the making of the order pursuant to section 382 of the Companies Law at paragraph 1 above, the Applicants shall vacate office pursuant to section 384(1)(c) of the Companies Law and further shall be released and discharged from all liability both in respect of their acts and omissions in the administrations and otherwise in relation to their conduct as joint administrators, except to the extent that they have incurred personal liability by virtue of section 379(4) of the Companies Law."

48. The terms of paragraph 2 mirror the terms of s. 385(2) of the 2008 Law. It is convenient to set out the s. 385(1)–(3), for context:

> "**Release of administrator**

> **385.** (1) A person who has ceased to be the administrator of a company (or cell, as the case may be) has his release with effect from –
>
> (a) in the case of a person who has died, the time at which notice is given to the Court that he has ceased to hold office,
> (b) in any other case, such time as the Court may determine.
>
> (2) Where a person has his release under this section he is, with effect from the time of release, [and subject to subsection (4),] discharged from all liability both in respect of his acts and omissions in the administration and otherwise in relation to his conduct as administrator, except to the extent that he has incurred personal liability by virtue of section 379(4).
>
> (3) However, nothing in this section prevents the exercise, in relation to a person who has his release under this section, of the Court's powers under section 422."

49. The effect of s. 385(2), as essentially repeated in paragraph 2 of the discharge order in this case, is that the making of the administration order discharged the administrators from all liability in relation to their conduct of the administration, save to the extent that they had incurred "personal liability by virtue of section 379(4)". S. 385(3) also preserves liability under s. 422, a point that I will return to below.

50. It is common ground that AMH cannot bring the present claims against the administrators unless those claims fall within the s. 385(2) carve-out. AMH must therefore show that the claims – if established – would give rise to "personal liability" on the part of the administrators within the meaning of s. 379(4).

51. The interpretation of s. 379(4) is therefore at the heart of the construction point. That provision is contained in a section that deals with the powers of an administrator. The material parts of that section are as follows:

> "**General powers of an administrator**
>
> **379.** (1) The administrator may do all such things as may be necessary or expedient for the management of the affairs, business and property of the company (or cell, as the case may be).
>
> (2) Without prejudice to subsection (1), and unless the Court orders otherwise, the administrator has the powers specified in Schedule 1.

> (3) The administrator may apply to the Court for directions in relation to –
>
> > (a) the extent or performance of any function, and
> > (b) any matter arising in the course of his administration,
>
> and on such application the Court may make such order, on such terms and conditions, as it thinks fit.
>
> (4) In performing his functions the administrator is deemed to act as the company's agent (or the protected cell company's agent in the case of a cell), but shall not incur personal liability except to the extent that he is fraudulent, reckless or grossly negligent or acts in bad faith."

52. The question is what is meant by "personal liability" in subsection (4). The administrators say (supported by the expert report of Mr Swan) that the phrase is solely concerned with the liability of an administrator to third parties. AMH says (supported by the expert report of Mr Adkins) that it refers to *all* personal liability of the administrators, including their liability to the company itself.

53. There is no doubt that if the words "personal liability" are read in isolation, divorced from any statutory context, they do not import the limitation for which the administrators contend. Neither expert has suggested, however, that s. 379(4) should be interpreted solely according to the literal meaning of the words "personal liability". On the contrary, it is agreed that:

    i) the Guernsey courts apply similar principles of statutory construction to those applied in England;

    ii) in construing legislation the Guernsey courts are entitled to have regard to the *travaux préparatoires*, and the joint memorandum records the experts' agreement that there are no other *travaux* relevant to the construction of s. 379 that have not been cited in the two expert reports;

    iii) it is relevant to consider the surrounding legal and factual circumstances, including in particular the practical consequences of the opposing interpretations contended for by the parties (a point that both Mr Swan and Mr Adkins rely upon, although unsurprisingly referring in each case to different consequences that are said to be relevant);

    iv) it is relevant to consider the interaction between s. 379 and other provisions of the 2008 Law; and

    v) it is relevant to consider the policy of the statute.

54. The experts are also agreed that there is no Guernsey case law directly relevant to the construction of s. 379. It follows that the section has to be interpreted on the basis of the relevant principles of statutory construction,

including in particular those set out at (iii) to (v) above, and any relevant *travaux préparatoires*. Applying those principles of construction, and the *travaux* set out in the expert reports, I consider that the administrators' construction of the words "personal liability" is clearly correct.

55. The starting point in the analysis is that the clause "but shall not incur personal liability …" is preceded by and linked to a provision that stipulates that the administrator is deemed to act as the company's agent. The experts' joint memorandum records, in this regard, their agreement that the first clause of s. 379(4):

> "is concerned with the position of the administrator as agent of the company during the course of the administration and that, accordingly, any construction of the extension of the limitation provided in the second clause should be a logical corollary, or incidence, of the administrators' position as an agent."

56. In that context, I agree with Mr Valentin that "personal liability" in s. 379(4) must be read as distinguishing the liability referred to from any liability that the administrator incurs on behalf of his principal. That distinction indicates that what is referred to throughout s. 379(4) is liability for the acts of the company carried out through the administrator, *not* liability for the administrator's conduct vis-à-vis the company. That in turn is consistent with the fact that s. 379 as a whole concerns the powers and not the duties of the administrator.

57. "Personal liability" in this context therefore means the administrator's personal liability to third parties for acts carried out on behalf of the company, in the exercise of the administrator's powers. It is (in other words) a provision clarifying that in certain cases of serious misfeasance, the performance of the administrator's functions may give rise to personal liability to third parties. It is not a provision that purports to define the scope of *all* liability of the administrator, including liability for breaches of duty to the company itself.

58. That interpretation might have been a little clearer if the conjunction between the first and the second clause of s. 379 had been "and" rather than "but". According to the *travaux préparatoires* set out in Mr Swan's report, the genesis of the second clause can be traced back to the Protected Cell Companies Ordinance 1997, section 22(4) of which stated:

> "In exercising his functions and powers the Administrator is deemed to act as the agent of the protected cell company, and shall not incur personal liability except to the extent that he is fraudulent, reckless or grossly negligent, or acts in bad faith."

59. What happened when that provision was extended to companies more generally (first by way of a 2005 amendment to the Companies (Guernsey) Law 1994, and subsequently in the current form in the 2008 Law) was that the word "and" was replaced with the word "but". Nothing in the *travaux* put before me indicates, however, that this change of wording was intended to

change the meaning of the concept of "personal liability" in the second clause of the provision.

60. The administrators' interpretation of s. 379(4) is, moreover, supported by the fact that there is a quite separate provision in s. 422 of the 2008 Law that deals with (among other things) the liability of an administrator for misfeasance or breach of duty to the company itself:

> "**Remedy against delinquent officers**
>
> **422.** (1) Where in the course of the winding up of a company it appears that any person described in subsection (2) –
>
> (a) has appropriated or otherwise misapplied any of the company's assets,
> (b) has become personally liable for any of the company's debts or liabilities, or
> (c) has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company,
>
> the liquidator or any creditor or member of the Company may apply to the Court for an order under this section.
>
> (2) The persons mentioned in subsection (1) are –
>
> (a) any past or present officer of the company,
> (b) any other person who, directly or indirectly, is or has been in any way concerned in or has participated in the promotion, formation or management of the company.
>
> (3) On an application under subsection (1) the Court may examine the conduct of the person concerned and may order him –
>
> (a) to repay, restore or account for such money or such property,
> (b) to contribute such sum to the company's assets,
> (c) to pay interest upon such amount, at such rate and from such date,
>
> as the Court thinks fit in respect of the default, whether by way of indemnity or compensation or otherwise."

61. It is common ground that s. 422 could be invoked against an administrator of a company, and the effect of s. 385(3) is that the court's powers under s. 422 are preserved even following the release and discharge of an administrator. It is also common ground that s. 422 only applies in the context of a liquidation, and is not a remedy available to the company itself. Nevertheless what the section does is to provide an explicit set of remedies for misfeasance or breach

of fiduciary duties by the administrator in relation to the company. The existence of that separate set of remedies strongly suggests that s. 379(4) was not intended to address the administrator's liability for the very same conduct.

62. Indeed, if AMH's construction of s. 379(4) were correct, that would produce a bald contradiction between the scope of an administrator's liability to the company as supposedly set out in s. 379(4) (limited to fraud, recklessness, gross negligence and bad faith) and the liability referred to in s. 422 as giving rise to a cause of action (extending to both misfeasance and simple breach of fiduciary duty). Effectively, on AMH's interpretation of s. 379(4), s. 422 would be inapplicable as against an administrator save in the cases of the serious misfeasance referred to in s. 379(4).

63. There is, however, nothing in s. 422 to suggest that it is intended to be limited in that way. Nor do any of the materials put before me by the two experts suggest that an administrator should be protected from all liability to the company save for serious misfeasance. Quite the contrary, Mr Adkins' report states that the administrators of a Guernsey company are "likely to be subject to similar general fiduciary duties as an administrator of an English company under English law", which would include "the duty to avoid conflicts of interest, the duty to act faithfully, the duty to exercise powers in good faith for a proper purpose and the duty to act within their delegated powers." Mr Adkins also refers repeatedly to the common law duty of care and skill that is owed by an administrator to the company. The existence of general duties of that nature is inconsistent with AMH's contention that s. 379(4) absolves an administrator from all breaches of those duties save in the case of fraud, recklessness, gross negligence or bad faith.

64. The further problem with AMH's construction of s. 379(4) is that if it is correct then s. 385(2) itself, concerning the discharge of an administrator from all liability *save for* personal liability under s. 379(4), would be entirely nugatory, since on AMH's hypothesis the only liability that the administrator can ever incur is confined from the outset to the categories set out in s. 379(4). On AMH's interpretation, therefore, s. 385(2) operates to discharge an administrator from a category of liability that was never incurred in the first place. That would render the provision entirely meaningless, and Mr Adkins effectively accepts that this would be the result of his interpretation. While he argues that this is acceptable and should not prevent his construction of s. 379(4), I do not think that, absent very compelling indications to the contrary, I should construe the legislation to have such a result. There is no indication in the legislation that s. 385(2) was inserted simply for the avoidance of doubt or so as to reiterate the effect of s. 379(4). On the contrary, it is, on its face, a quite important provision which serves to delineate the extent of the administrator's ongoing liabilities following the termination of the administration. That makes it all the more untenable to suggest that it should be regarded as having no practical effect.

65. It is also clear that ss. 385(2) and (3) are intended to be complementary, in that subparagraph (2) preserves the administrator's liability as set out in the second clause of s. 379(4), while subparagraph (3) preserves the administrator's

liability under s. 422 for conduct vis-à-vis the company itself. That legislative scheme supports the administrators' construction of s. 379(4).

66. Mr Adkins' report refers to s. 426A of the 2008 Law, which was inserted by a 2015 Amendment Ordinance with effect from 3 September 2015. S. 426A(2) provides that a liquidator of a company may be released by the court, and that in such a case the liquidator is discharged from all liability in relation to acts and omissions in the winding up "other than liability arising from his own fraud, recklessness or gross negligence or except to the extent that he has acted in bad faith". Under that provision, therefore, the carve-out from the release of liability applies generally to the liquidator's liability for fraud, recklessness, gross negligence or bad faith.

67. There is no doubt that this is different to the subsisting liability of an administrator following discharge. But the direct cause of that difference is not the construction of s. 379(4). Rather, the difference arises from the fact that s. 426A(2) contains a general preservation of all liability for fraud, recklessness, gross negligence and bad faith by a liquidator, whereas ss. 385(2) and (3) are framed by reference to (and are therefore circumscribed by) the liability of an administrator under ss. 379(4) and 422. If this difference had been considered to be a problem, ss. 385(2) and (3) could have been amended in 2015 to substitute a single provision that reflected the more general wording of s. 426A(2), but no such amendment was made. Nor has either party suggested that s. 385(2) should be given an expansive interpretation so as to extend the carve-out to something that goes beyond s. 379(4). On the contrary, both experts are agreed that s. 385(2) means precisely what it says.

68. In those circumstances I do not consider that it is open to me to depart from the clear and unambiguous wording of s. 385(2). The carve-out for the liability of administrators is limited under that section to personal liability that arises under s. 379(4). For the reasons given above it is quite clear that s. 379(4) is concerned with the administrator's liability to third parties for acts carried out on behalf of the company, and does not address the scope of the administrator's liability for misfeasance or breach of duty vis-à-vis the company itself. The resulting inconsistency between the liability of a discharged administrator and the liability of a discharged liquidator is one that arises from the legislative scheme. It is not something that can or should be resolved by giving s. 379(4) an interpretation that would – contrary to ss. 385(2) and 422, as well as general Guernsey law – absolve an administrator *ab initio* from all liability in relation to the company save for serious misfeasance.

69. It follows that AMH's claims are not based on personal liability within the meaning of s. 379(4). They are accordingly not within the carve-out in s. 385(2), and must therefore fail. That is a sufficient ground to deny permission for the purposes of paragraph 29(2)(c) of Schedule 2 to the CBIR. It is therefore not necessary to consider whether AMH's claims should be struck out or dismissed summarily; had it been necessary to do so, however, I would have struck out the claims on the same basis.

The merits of AMH's claims

70. If I had found in favour of AMH on the construction point, it would have been necessary to consider the substance of AMH's claims for the purposes of the opposing applications. While my conclusions on the construction point mean that it is not strictly necessary for me to do so, the merits of AMH's substantive claims were the subject of argument and submissions on both sides at the hearing. I therefore set out my conclusions on those arguments, for completeness and in case this matter goes further.

The administrators' power to sell the properties

71. AMH's first substantive complaint is that the administrators did not have the power to sell the properties, because the administration order made by the Guernsey Court did not specify the purpose for which it was made. This allegation was not specifically advanced in the original particulars of claim, but has been added to AMH's draft amended particulars of claim.

72. The basis of this claim is s. 374 of the 2008 Law, which governs the making of administration orders by the court. The material provisions of that are as follows:

> "**Administration orders**
>
> **374.** (1) Subject to the provisions of this section, if the Court –
>
> (a) is satisfied that a company (or a cell of a protected cell company) does not satisfy or is likely to become unable to satisfy the solvency test, and
> (b) considers that the making of an order under this section may achieve one or more of the purposes set out in subsection (3),
>
> the Court may make an under this section (an **"administration order"**) in relation to that company (or that cell, as the case may be).
>
> …
>
> (3) The purposes for the achievement of which an administration order may be made are –
>
> (a) the survival of the company (or cell, as the case may be), and the whole or any part of its undertaking, as a going concern, or
> (b) a more advantageous realisation of the company's (or cell's as the case may be) assets than would be effected on a winding up,
>
> and the order shall specify the purpose for which it is made."

73. It is common ground that the effect of the provisions above is that the Court is required to specify the purpose for which an administration order is made, which must be one or both of the purposes set out in s. 374(3). It is also common ground that the administration order that was made by the Guernsey Court on 16 November 2010 did not specify, on the face of the order, the purpose for which it was made. On that basis AMH says that the administrators did not have the power to sell the properties. All they had power to do was to manage the property, and if they wanted to sell the properties they were required to return to the court to ask for the power to sell.

74. I consider that this claim has no reasonable prospect of succeeding. The two experts agree that the administration order was valid, notwithstanding its failure to identify the purposes for which it was made. Clause 3 of the order explicitly provides that:

> "The appointment of the Joint Administrators and each of them under s. 374 of the Companies Law shall take immediate effect upon the making of the Orders and they shall be entitled to forthwith exercise all powers and functions as Joint Administrators."

75. As set out above, s. 379 of the 2008 Law sets out the general powers of an administrator. Under s. 379(1), the administrator may do such things as are necessary or expedient for the management of the affairs, business and property of the company, and s. 379(2) provides that the administrator has the powers specified in Schedule 1 to the 2008 Law. Schedule 1 in turn includes, in paragraph 2:

> "Power to sell or otherwise dispose of the property of the company by public auction or private contract."

76. The combined effect of clause 3 of the administration order and the provisions of the 2008 Law is therefore that, whether or not the order specified the purpose for which it was made, the administrators did have the power to sell the properties.

77. As I have recorded above, the recognition order made by the Companies Court on 11 February 2011 also entrusted the administrators with the administration and/or realisation of the companies' assets in England, and there has been no suggestion that that order is in any way invalid or inoperative.

78. It is notable that neither of the two experts contends that the sale of the properties was an act that fell outside the powers conferred by the administration order. While Mr Adkins does suggest that, since the order did not specify the purpose for which it was made, the administrators should have sought further directions from the court pursuant to s. 379(3), he does not say that failure to do so meant that the administrators did not have the powers specified in the express wording of clause 3 of the administration order, read together with the relevant provisions of the 2008 Law. On the contrary, he acknowledges that the administrators were entitled to (and indeed duty bound to) manage the affairs of the company having regard to the circumstances of

the company and in the company's best interests. That is entirely consistent with the provisions of s. 379(1) which I have cited above. If in accordance with those duties the administrators decided to sell the properties, it is clear on the face of the administration order, the provisions of the 2008 Law, and the recognition order in the English courts, that they had the power to do so. There may be an issue as to whether the administrators exercised their powers in the appropriate way. That is, however, a different question, which I address separately below in relation to AMH's second complaint.

79. Mr Davenport also referred to various English law authorities where the court considered whether certain acts were or would be within the purposes of the administration order that had been made. The high point of his submissions in this regard was the cases of *Re Powerstore* [1997] 1 WLR 1280 and *Re Designer Room* [2005] 1 WLR 1581, where the respective judges declined to give directions to administrators which they considered to be outwith the powers conferred on the administrators by the 1986 Act.

80. In the present case, by contrast, the sale of the properties was squarely within the powers conferred on the administrators by the 2008 Law, and the question is rather whether those powers were in some way suspended by the fact that the administration order did not explicitly specify the purposes for which it was made. There is no case-law that suggests that in such circumstances the administrators' explicit powers of sale were suspended; nor have I been referred to any other authority supporting that proposition.

81. I therefore conclude that the administrators did have the power to sell the properties, and that AMH's contrary argument has no reasonable prospect of success. This is a purely legal question that does not require a trial. Accordingly, even if I had found in favour of AMH on the construction point, I would have refused permission under paragraph 29(2)(c) in respect of this aspect of the claim.

The alleged breaches of duty in deciding to sell the properties

82. AMH's second substantive complaint is that the administrators breached their duties by selling the properties rather than attempting to refinance the company's debt. If AMH is (contrary to my conclusions above) correct on the construction point, then a claim of this nature may fall within s. 379(4), and hence the carve-out in s. 385(2), but only if the breach of duty can be characterised as having been fraudulent, reckless, grossly negligent or in bad faith. The original particulars of claim alleged recklessness and/or gross negligence. The draft amended particulars of claim add claims that the administrators' breaches of duty amounted to fraud on a power and/or equitable fraud, and bad faith.

83. In respect of all of those claims, the underlying objection is that once the administration order had been made the administrators did not give serious consideration to the question of rescue of the company as a going concern, but rather proceeded on the basis that the only viable option was a sale of the properties. AMH's claim that this amounts to a breach of duty in one of the ways pleaded is reinforced, it says, by the fact that the administration order did

not specify the purposes for which it was made, and the administrators did not return to the court to seek further directions. That in itself, Mr Adkins says, may have been a breach of duty. Mr Adkins also says that in those circumstances the administrators should have preferred the purpose of achieving the survival of the company over the purpose of the better realisation of the company's assets.

84. The administrators contend that this claim should not be permitted to proceed, whatever my findings on the other issues. The evidence of Mr Batten, for the administrators, was that there was no prospect of rescuing the company, since that would have required refinancing the loan which stood at £172 million at the time of the administration order, which would have required a loan to value ratio of no more than 70%. On that basis the properties would have to have been worth at least £245 million, and there was according to Mr Batten no realistic prospect of obtaining that valuation of the properties. Mr Valentin also contended that, whatever might be said about the conduct of the administrators, it certainly did not amount to fraud, recklessness, gross negligence or bad faith within the meaning of s. 374(4). On the Guernsey law issue of whether there was a hierarchy of purposes that could be pursued by the administrators, where the administration order did not specify the purpose for which it was made, Mr Swan considers that it was a matter for the administrators' judgment which purpose to pursue.

85. Had I concluded in favour of AMH on the construction point, I would have been reluctant to decide this issue summarily against AMH (whether through denying permission or giving summary judgment against AMH on this point). While there are some issues of law that might in the abstract be suitable for summary determination, such as the question of whether "fraud" within the meaning of s. 379(4) encompasses the concept of fraud on a power or equitable fraud, and whether this aspect of the draft amended particulars of claim is time-barred, the heart of this claim is a factual dispute about what the administrators did and should have done, in pursuance of their duties, in deciding whether to sell the properties or to attempt a refinancing of the company.

86. On that point the administrators' claim that no refinancing was realistically achievable is vigorously disputed by AMH, on grounds set out in their evidence. The witness statement of Mr Morris on behalf of AMH objects, in particular, that the administrators' strategy was apparently based on a valuation of the properties in July 2010 that was carried out on an incorrect basis and which was far below the offers that were subsequently made for the properties when they were marketed. In those circumstances Mr Morris says that the administrators should have obtained an independent up-to-date valuation of the properties. He also says that the administrators made no attempt to explore with AMH's shareholders whether they could achieve a funded rescue of the company. Had they done so, he contends that the shareholders could have restructured the debt in such a way as to achieve a solvent exit from the administration without the sale of the properties.

87. These, it seems to me, are detailed factual points that cannot be determined on a summary basis. Mr Valentin did not address them in great detail either in his

skeleton argument or at the hearing. While he did submit that AMH's case in this regard was unmeritorious, I do not consider that AMH's evidence is so implausible that I can properly reject its factual claims out of hand at this stage. The related legal points (including any limitation points raised in relation to the draft particulars of claim) ought to be decided in the factual context as found at trial. I would therefore have given permission for this aspect of the claim to proceed to trial.

The alleged sale at an undervalue

88. AMH's third substantive claim is that the administrators breached their duties by selling the properties at an undervalue to Henderson, rejecting the higher bid that had been made by Brookfield. This claim is put on the same basis as AMH's second substantive claim: namely that it was a breach of duty amounting to fraud, recklessness, gross negligence and/or bad faith within the meaning of s. 379(4) and therefore (if AMH is correct on the construction point) within the carve-out in s. 385(2).

89. As with the second substantive claim, the underlying dispute is one of fact. Both Mr Morris and Mr Batten have addressed in some detail in their witness statements the circumstances in which the administrators proceeded to sell the properties to Henderson at a price that was not the highest offer. The factual dispute between the parties was, again, not one that was addressed by Mr Valentin in great detail. While he did argue that the sale to Henderson was justified on various grounds, I consider that AMH's claim, based in particular on the discrepancy in the treatment of Henderson and Brookfield, would have been sufficiently meritorious to be permitted to proceed to trial.

The estoppel point and related arguments

90. The final question is whether the administrators are right to say that, irrespective of the merits of the three substantive claims advanced by AMH, permission should be denied and/or the claims should be dismissed summarily on the basis of an estoppel arising from the share purchase agreement of 14 April 2011 as confirmed in Mr Benady's letter of 20 February 2012, or on the basis of the way in which AMH has pursued the claim generally.

91. The basis for the estoppel argument is clause 9.1 in the 14 April 2011 share purchase agreement, which provided that

> "it is declared and agreed that the administrators shall incur no personal liability whatsoever or howsoever arising and whether formulated in contract or tort or by reference to any other right or remedy under or in connection with this agreement or any transaction instrument, assurance, agreement, covenant, deed or other arrangement, document or act relating to this agreement."

92. The administrators contend that this clause, taken together with Mr Benady's letter of 20 February 2012 which confirmed the terms of the share purchase agreement, acted as a contractual release of liability vis-à-vis AMH. Mr Valentin's argument on this point was set out primarily in his supplemental

written submission filed after the hearing, and Mr Davenport responded in his written reply.

93. I do not consider that it would be appropriate to deny permission for the claims, or to dismiss them summarily, on this ground. As Mr Davenport pointed out, it is a question of Guernsey law whether administrators may validly contract out of their liabilities to the company in the way that clause 9.1 purports to do. But the Guernsey law experts do not address this point at all in their reports. That is presumably because the administrators did not say that they intended to rely on this argument as a ground for dismissal of the case until a letter from their solicitors sent on 8 March 2018, only a week prior to the exchange of skeleton arguments. The consequence of that, however, is that there is no evidence at all on the issue of Guernsey company law that is raised by this argument.

94. Mr Valentin relied on a decision of Warren J in *Halliwells LLP (In Administration) v Austin* [2012] EWHC 1194 (Ch), in which summary judgment was given on the basis of a deed releasing the relevant defendant from liability save in respect of fraud. This is however an English law judgment, not a judgment dealing with Guernsey company law. Moreover the defendant in question was not the administrator of the company but was rather a former member of Halliwells LLP. The judgment does not, therefore, address the question of whether administrators may contract out of their fiduciary duties to the company.

95. If it were necessary to decide this point, therefore, it would be a matter for trial, on the basis of appropriate evidence of Guernsey law on this issue. In light of that conclusion I do not need to address Mr Davenport's other responses to the estoppel point.

96. Mr Valentin's final fallback arguments concerned the way in which AMH's claim has been pursued. He relied on the fact that the shareholders of AMH themselves requested that the administrators should apply for their discharge as administrators, and that Mr Benady filed an affidavit in January 2012 which did not make any criticism of the way in which the administration had been conducted. He also relied on the fact that considerable time passed between the discharge of the administrators and the requests for pre-action disclosure that I have referred to at paragraphs 17–18 above, and the further time that then elapsed before AMH sent its letter before claim to Linklaters.

97. None of those points are sufficiently compelling to justify denying permission, or summary dismissal of the claims. As I have said above, there might be an exceptional case where factors other than the merits of the claims might justify a refusal of permission under paragraph 29(2)(c). The points set out above do not, however, fall into that category.

Conclusion

98. My conclusion is therefore that permission under paragraph 29(2)(c) of Schedule 2 to the CBIR is denied, for the entirely of AMH's claims, on the basis that the claims are not based on the personal liability of the

administrators within the meaning of s. 379(4) of the 2008 Law. They are therefore not claims that subsist following the administrators' discharge, pursuant to s. 385(2) of the 2008 Law.

99. If, contrary to that conclusion, I had found that AMH's claims fell under s. 379(4) and accordingly were within the carve-out in s. 385(2), I would have granted permission in relation to AMH's second and third claims (concerning the alleged breaches of duty in deciding to sell the properties rather than refinancing the debt, and the alleged sale at an undervalue), and I would have rejected the applications for the strike out or summary dismissal of those claims. I would not, however, have given permission for AMH's first claim (alleging lack of power to sell the properties) to proceed, as I consider that this aspect of the claim has no reasonable prospect of success.

100. Finally and for completeness, as to the procedural issue concerning the CBIR and Part 7 claims, Mr Davenport suggested that the Part 7 particulars of claim should effectively stand as the particulars of the CBIR claim, and that the Part 7 claim should then be stayed pending the determination of the CBIR claim. If I had permitted these claims to proceed, I consider that this would have been an appropriate way of resolving the issue of the multiple sets of proceedings.