[2020] EWHC 1605 (Comm)

Case No: CL-2017-000744

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 June 2020

Before :

MR JUSTICE FOXTON

- -

Between :

CNM ESTATES (TOLWORTH TOWER) LIMITED — **Claimant**

- and -

(1) VeCREF I SARL
(2) VENN PARTNERS LLP
(3) SIMON PETER CARVILL-BIGGS
(4) FREDDY KHALASTCHI

Defendant

- and –

KNIGHT FRANK LLP

Third Party

- -
- -

Jeremy Cousins QC and **Peter Dodge** (instructed by **HFW LLP**) for the Claimant
Mark Simpson QC and **Niamh Cleary** (instructed by **Kennedys Law LLP**) for the Third and Fourth Defendants

Hearing dates: 8 and 9 June 2020
Draft judgment circulated: 16 June 2020

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Monday 22 June 2020.

Mr Justice Foxton:

Introduction

1. This is the trial of a number of preliminary issues in proceedings commenced by the Claimant ("CNM") against various parties, including the Third and Fourth Defendants ("the Receivers") arising from a property development undertaken by CNM, and the loan and security agreements entered into in connection with that development.

2. CNM was represented by Mr Cousins QC and Mr Dodge instructed by HFW LLP, and the Receivers by Mr Simpson QC and Ms Cleary instructed by Kennedys Law LLP. I would like to record my gratitude to both legal teams for the excellence of the written and oral presentations, which has made my job both easier, and more difficult.

3. CNM contends that various breaches of contract and duty were committed by the Defendants in the exercise of rights arising under the loan and security agreements, including breaches by the Receivers of their equitable duty to exercise reasonable skill and care in obtaining the best price reasonably obtainable on the sale of the security.

4. The Receivers deny those breaches on the facts, but they also pleaded that CNM's claims against them are precluded by various terms of the security documents. On 9 July 2019, Christopher Hancock QC, sitting as a deputy Judge of the Commercial Court, ordered that the ambit and effect of the clauses relied upon should be determined between CNM and the Receivers by way of a trial of preliminary issues. By the time of that trial, two contractual provisions were relied upon by the Receivers as defences to CNM's claim:

    i) Clause 19.1 of a Debenture dated 1 October 2015 ("the Debenture"); and

    ii) Clause 16.10(a)(i) of the Intercreditor Agreement dated 1 October 2015 ("the ICA").

5. An issue was also raised as to whether clause 19.1 of the ICA gave the Receivers a basis, if they succeeded at trial, for recovering costs which could not be recovered under CPR 44 (or, perhaps, a basis for seeking any such costs order on an indemnity basis). However, the Receivers did not contend that clause 19.1 provided a defence to CNM's claims. In these circumstances, I have decided that any issues as to the effect of clause 19.1 in a costs context are best left for decision as and when any order for costs is sought. However, the construction of clause 19.1 is relevant to the argument as to the effect of clause 16.10(a)(i). For that purpose I have assumed, without deciding the point, that CNM's argument that clause 19.1 only extends to claims by third parties, and not by parties to the ICA is correct.

The Background

6. CNM is a property developer which wanted to finance the acquisition and development of a property in Surbiton known as Tolworth Tower ("the Development Site"). To that end, it raised development financing in the form of:

i) a senior facility agreement ("the SFA") entered into between CNM as borrower and the First Defendant ("VeCREF") as lender on 1 October 2015; and

ii) a mezzanine facility agreement ("the MFA"), entered into between a company called CNM Estates (Tolworth Tower MB) Limited ("CNM MB") as borrower, and Tolworth Tower Limited as lender, also on 1 October 2015.

7. A company called Situs Asset Management Limited ("the Security Agent") was appointed as the security agent under both the SFA and the MFA. The Development Site was charged as security for both loans by the Debenture (to which CNM was a party) and by a mortgage dated 2 October 2015. In addition, on 1 October 2015 the parties to the SFA and the MFA (including CNM) entered into the ICA. I accept that the Debenture and the ICA are likely to have been drafted at the instigation of the lenders. However, this was a significant commercial development, and I do not accept the suggestion that I should approach the interpretation of the Debenture and the ICA on the basis that the contracts were concluded between parties of unequal bargaining power. In any event, it is clear that the relevant provisions of the ICA were essentially on market terms.

8. On 28 April 2017, an instalment payable under the MFA was not paid, leading the Security Agent to notify CNM and CNM MB of what were said to be Events of Default under the SFA and MFA. On 24 July 2017, VeCREF sold its rights under the SFA to a company called Tolworth Loan Limited, which was connected to Meadow Capital Management Limited ("Meadow").

9. On 10 August 2017, the Security Agent appointed the Receivers as joint Law of Property Act receivers of the Development Site. On 11 October 2017, the Receivers appointed the Third Party ("Knight Frank") to act in relation to the disposal of the Development Site. By a contract dated 8 December 2017, the Receivers agreed to sell the Development Site to Tolworth Tower Investment Limited, a company connected with Meadow, in consideration of the release of all liabilities owed by CNM and CNM MB under the SFA and the MFA.

10. CNM brings various claims arising out of these events. CNM's claims against the Receivers allege that the Receivers failed to comply with their duty to exercise reasonable skill and care in exercising their functions, and in particular to obtain the best price reasonably available on the sale of the Development Site. For their part, the Receivers contend that they made all reasonable and proper arrangements to market the property, and obtained the best price available in the market following an appropriate sales process, having regard to price and transactional risk. They also contend that they are not liable for any of the losses claimed in any event, due to exclusion clauses in the Debenture and the ICA.

11. It is not disputed that, although the Receivers are not parties to the Debenture and the ICA, they are entitled to enforce the provisions they rely upon by reason of the Contracts (Rights of Third Parties) Act 1999, as both contracts specifically provided that the Receivers could rely on any clauses of those agreements which expressly conferred a benefit on them. However, the legal effect of those provisions is very much in dispute.

The duty owed by the Receivers to CNM as a matter of general law

12. There was no dispute between the parties that as a matter of general law, the Receivers owed CNM as mortgagor an equitable duty to take reasonable skill and care to achieve the best price reasonably obtainable for the Development Site ("the Equitable Duty of Care"). Whether or not that duty is properly called a fiduciary duty (in the light of Millett LJ's observations as to the characteristics of such duties in Bristol & West Building Society v Mothew [1998] Ch 1, 16-17), it is clearly a duty imposed by equity for the protection of the mortgagor, subsequent encumbrancers and sureties, rather than one which arises under common law or by way of an implied contractual term (Yorkshire Bank plc v Hall [1999] 1 WLR 1713, 1728).

13. Nonetheless, as was also common ground, the Equitable Duty of Care is capable of being modified or excluded by an appropriate contractual term. The issue in this case is whether the two contractual terms relied upon by the Receivers achieved this effect.

The proper approach to the construction of exemption clauses

14. The legal principles applicable when construing contracts generally, and those specifically invoked when it is alleged that the terms of a contract exclude a primary duty which would otherwise arise under general law or by reason of terms to be implied in law, or exclude or restrict the secondary obligations which arise on the breaches of those primary obligations ("exemption clauses"), have not always marched hand-in-hand. There have been various recent judicial statements which suggest that the construction of exemption clauses involves the same approach as that used for the construction of other contractual terms (e.g. Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd [1997] EWCA Civ 154, [46] and Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC), [24]-[26]).

15. Some commentators (e.g. Stelios Tofaris, "Commercial Construction of Exemption Clauses" [2019] LMCLQ 270-296) have argued that the logical outcome of this progressive assimilation of the applicable principles is the discarding of all of the special principles of construction traditionally deployed when addressing exemption clauses. However, it is clear that that those special principles remain relevant to the court's construction of exemption clauses, not least because, appropriately applied, they assist the court in achieving the outcome at which the general principles of contractual construction are aimed: of ascertaining the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them by using the language in the contract to mean" (Lord Neuberger PSC in Arnold v Britton [2015] AC 1619, [13]). CNM relied upon three such special principles in this case.

The Gilbert-Ash principle

16. The first is described by Sir Kim Lewison as the principle that "clear words are necessary before the court will hold that a contract has taken away the rights or remedies which one of the parties to it would have had at common law" (*The Interpretation of Contracts* 6th para. 12.19). That principle is particularly associated with Lord Diplock's judgments in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689, 717 and Photo Production Ltd v Securicor Transport [1980] AC 827, 850, Lord Diplock noting in the latter case that:

> "The degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations".

17. While the principle is sometimes referred to using the label *contra proferentem*, its application does not depend on what can sometimes be a rather sterile analysis as to who the *proferens* of the clause is (see Briggs LJ in Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128, [18]), and no doubt for this reason some judges have sought to detach the principle from that label (e.g. Moore-Bick LJ in Transocean Drilling UK Ltd v Providence Resources plc [2016] 2 All ER (Comm) 606, [20] and Professor Burrows QC in Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), [34(iii)]). The Gilbert-Ash principle provides a particularly clear demonstration of the ability of special principles of construction to serve the overall purpose of the general principles of contractual construction. As Moore-Bick LJ observed in Stocznia Gdynia v Gearbulk Holdings Ltd [2010] QB 27, [23]:

> "I would not accept … that as the law stands today there are two competing approaches struggling for supremacy: one requiring clear express words, the other favouring the natural meaning of the words used. It is important to remember that any clause in a contract must be construed in the context in which one finds it, both the immediate context of the other terms and the wider context of the transaction as a whole. The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be".

18. There can be no doubt that the Equitable Duty of Care is such a legal right, and that a clause which it is said excludes or modifies that duty attracts the operation of the Gilbert-Ash principle. However, it is also clear that a court will not strain to find an ambiguity in a clause said to have this effect, and that if the words of the clause are clearly and fairly susceptible of only one meaning, the court will give effect to that meaning (Photo Production, p.851).

The Canada Steamship framework

19. The second special principle CNM relies on concerns attempts to exclude or limit liability for negligence (it being common ground that the Equitable Duty of Care constitutes negligence for this purpose), and the approach to determining whether a clause in a contract has achieved this effect is set out in Lord Morton's opinion in Canada Steamship v The King [1952] AC 192, 208:

> "Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:-
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision …

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada : 'In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.'

(3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence,' to quote again Lord Greene in the Alderslade case. The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants".

20. Before considering the three-stage framework in more detail, it is necessary to say a little more about the correct characterisation of the approach set out in that case in the light of more recent authority. A number of judges have emphasised that the three-stage approach provides a guideline or helpful framework for the court's analysis, but is not a rule of law to be applied with the rigour of a taxing statute. In Smith v South Wales Switchgear Co Ltd [1977] AC 165, 177-178, Lord Keith noted that the three tests were "not rules of law but simply applications of wider principles of construction". More recently, in HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank [2003] 1 All ER (Com) 349, [11], Lord Bingham qualified his summary of the effect of applying Lord Morton's principles by refence to what should "ordinarily" be inferred from the application of the tests, but noted that:

> "Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code. The passage does not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result. The courts' task of ascertaining what the particular parties intended, in their particular commercial context, remains".

21. That is not in any way to diminish the relevance of the three-stage framework for a court faced with the argument that a liability for failure to take care has been excluded by a contractual term. The utility of the Canada Steamship framework has been endorsed at the highest level, including by all of their lordships in Smith v South Wales Switchgear, and more recently, it was applied by the Supreme Court to resolve a disputed issue of contractual construction in Geys v Société Generale, London Branch [2013] AC 523. However, the more recent authorities have provided a helpful reminder that the Canada Steamship framework is a means to an end – assisting the court in determining whether the contractual language used in context is sufficiently clear to communicate to a reasonable person that liability for negligence has been excluded – rather than an end in itself.

22. The first stage in Lord Morton's framework concerns the issue of whether the language clearly and unambiguously exempts a party from liability for negligence. While the second stage is said to apply "if there is no express reference to

negligence", it has long been recognised that the first stage will be satisfied by words which make it clear that the clause exempts liability for negligence, even if the word "negligence" is not used. Lord Fraser in Smith v South Wales Switchgear Ltd at p.173 stated that he could "not see how a clause can 'expressly' exempt or indemnify the proferens against his negligence unless it contains the word 'negligence' or some synonym for it". However, this was not intended to limit the operation of the first rule to clauses which use one of a limited number of pre-approved terms. Some contractual provisions which do not expressly refer to negligence or a synonym for negligence may nonetheless make it very clear that negligence is excluded, such that no further enquiry is required: for example HIH Casualty or Taberna Europe CDO II v Selskabet AF1 [2016] EWCA Civ 1261.

23. In particular, this may be the case when the clause makes it clear that there will only be liability for limited types of conduct or in particular circumstances, with all other types or bases of liability being excluded. In Mineralimportexport and others v Eastern Mediterranean Maritime Ltd (The Golden Leader) [1980] 2 Lloyd's Rep 573, p.574, Lloyd J observed of the Canada Steamship guidelines in the context of a clause of this type:

> "Like all rules of construction Lord Morton's test is a guide designed to ascertain the true intention of the parties. It should not be applied rigidly or mechanically so as to defeat their intentions. In the present case the owners have, by cl. 2, accepted liability in three cases, and three cases only, namely improper or negligent stowage, personal want of due diligence to make the vessel seaworthy, and personal act or default of the owners or their manager. By accepting liability in respect of those three matters only, and I emphasize the word 'only', they have beyond doubt excluded liability in respect of all other causes: see Westfal-Larsen and Co. A/S v. Sugar Refining Co. Ltd. [1960] 2 Lloyd's Rep 206 expressly approved by Mr. Justice McNair in The Brabant, [1967] 1 Q.B. 588. It seems to me somewhat arid to argue whether the exclusion of negligence is express or implied. The clause expressly adverts to negligence. It accepts liability for negligence in some respects, but in those respects only. It follows that it excludes negligence in all other respects. There is no ambiguity. To hold the owners liable for negligence in any respect other than those mentioned in the clause would be to defeat the plain intention of the clause".

24. Clarke J reached a similar conclusion in Monarch Airlines Ltd v Luton Airport Ltd [1998] 1 Lloyd's Rep 403, 408:

> "I respectfully agree with the approach adopted by Mr. Justice Lloyd in that passage. All depends upon the particular clause, but, like him, it appears to me that where the clause is in the form of 'not liable unless' or 'only liable if' it may well not be appropriate to consider each of the questions raised by Lord Morton. In any event, in my judgment the clause with which I am concerned can properly be analysed in much the same way as Mr. Justice Lloyd analysed the clause in The Golden Leader. Under cl. 10 there is to be no liability arising from any act, omission, neglect or default unless done with intent to cause damage or recklessly and with knowledge that damage would probably result. Thus there is only to be liability in any of those cases if there is an intention to cause damage or if there is relevant recklessness. Mr. Webb submits that the clause does not expressly refer to negligence, but, in my judgment, it would make a nonsense of the clause if the

> airport company was to be liable for what might be called ordinary negligence, but only liable for other neglect or default if the test of intention or recklessness was satisfied".

25. The second and third stages in the framework concern clauses which do not achieve the requisite clarity on their express terms alone. If the clause is not capable of extending to negligence on its ordinary meaning, then that is the end of the enquiry. If, however, the language of the clause is ambiguous in its effect, then consideration of whether or not there is some other realistic basis for liability may provide the requisite clarity as to its intended operation. In Hollier v Rambler Motors (AMC) Ltd [1972] 2 QB 71, 78-9, Salmon LJ said:

> "There are many cases in the books dealing with exemption clauses, and in every case it comes down to a question of construing the alleged exemption clause which is then before the court. It seems to me that in Rutter v Palmer, although the word 'negligence' was never used in the exemption clause, the exemption clause would have conveyed to any ordinary, literate and sensible person that the garage in that case was inserting a clause in the contract which excluded their liability for the negligence of their drivers … It follows that no sensible man could have thought that the words in that case had any meaning except that the garage would not be liable for the negligence of their own drivers. That is a typical case where, on the construction of the clause in question, the meaning for which the defendant was there contending was the obvious meaning of the clause".

26. While approached sequentially in Lord Morton's framework, stages two and three are in essence part of the same enquiry (whether the parties have made it clear that they intend the clause to apply to liability in negligence in circumstances in which the words are capable of so applying, but an intention to exclude liability for negligence is not sufficiently clear from the express words alone). Having considered both stages two and three (if applicable), the court must still stand back and ask whether it has been made clear that liability for negligence is excluded (Onego Shipping & Chartering BV v JSC Arcadia Shipping [2010] EWHC 777 (Comm), [57] Hamblen J). As Stephenson LJ noted in Lamport & Holt Lines v Coubro & Scrutton (M & I) Ltd (The Raphael) [1982] 2 Lloyd's Rep 42, 51:

> "There is no artificial rule to compel the Court either to construe a clause as covering negligence because it has no other subject matter or as not covering negligence because it might have a subject matter too improbable and far-fetched to have been contemplated and covered."

27. At the third stage, the alternative basis of liability at which it is said the clause may have been aimed must be a "realistic one" against which it may reasonably have been supposed that one party to the contract would have wanted protection. In The Raphael, Donaldson LJ said that the alternative liability must "not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it" (p.45). May LJ suggested that at stage three the court should "discard any ground to which, on a reasonable assessment of all the circumstances at the time the underlying contract was made, it is unlikely that the parties would have addressed their mind" (p.49). Stephenson LJ referred to a liability that is "reasonably likely to have been contemplated by him as requiring that he should be protected against it" (p.51).

28. Further, while the fact that there is no alternative form of liability against which it may realistically be supposed that the parties intended to provide will usually be sufficient, this is not an invariable rule. In Rutter v Palmer [1922] 2 KB 87, 93, Scrutton LJ put the point as follows:

> "If the only liability of the party leading the clause is a liability for negligence, the clause will *more readily* operate to exempt him."

(emphasis added).

29. In Hollier v Rambler Motors (AMC) Ltd, pp.78-80, Salmon LJ said of this passage:

> "Scrutton L.J. was far too great a lawyer, and had far too much robust common sense, if I may be permitted to say so, to put it higher than that 'if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him.' He does not say that 'if the only liability of the party pleading the exemption is a liability for negligence, the clause will necessarily exempt him.'"

30. He noted that the contrary approach would have the effect of making "the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means."

The meaningful obligations principle

31. The third special principle of construction, referred to by Mr Cousins QC as "the meaningful obligations principle", is summarised in *The Interpretation of Contracts* at para. 12.13 as follows:

> "The court will not interpret an exemption clause so as deprive the contractual undertakings of one party of all effect".

32. It is clear that the principle is capable of applying to a single obligation, as well as in those cases when a clause would relieve a party in substance of its contractual obligations generally (as in Mitsubishi Corp v Eastwind Transport [2005] 1 All ER (Comm) 328, [27]-[33]). The most recent application of that principle was by Flaux J in AstraZeneca UK Ltd v Albemarle International Corp [2011] EWHC 1574 (Comm), in which he rejected a construction of a clause which would leave the counterparty with no effective remedy for one party's breach of an express obligation, noting at [313]:

> "In construing an exception clause against the party which relies upon it … the court will strain against a construction which renders that party's obligation under the contract no more than a statement of intent and will not reach that conclusion unless no other conclusion is possible. Where another construction is available which does not have the effect of rendering the party's obligation no more than a statement of intent, the court should lean towards that alternative construction. This is an application of the principle enunciated by Lord Roskill in Tor Line A/B v Alltrans Group of Canada Ltd (The TFL Prosperity) [1984] 1 WLR 48 at 58–9. A more recent example of that approach to construction can

> be found in one of the cases cited by Mr Odgers himself, the decision of Ian Glick QC sitting as a Deputy High Court Judge in Mitsubishi Corp v Eastwind Transport [2005] 1 All ER (Comm) 328 (paragraphs 25 to 33)."

33. It will be noted that, in contrast to the Gilbert-Ash and Canada Steamship principles (at least as currently interpreted), the meaningful obligations principle remains a context in which it is open to the court to strain to avoid a particular construction, rather than one which requires ambiguity on a fair reading before the principle comes into play. No doubt for that reason, it will only be appropriate where the effect of the clause is to denude an express obligation in the contract of all meaningful content or, as it sometimes put, to render it "wholly illusory". The principle bears some similarities to the principle of non-derogation from grant, where a party appears to confer a benefit or right in one part of a contract but then contends another provision takes it away, a principle which has on occasion been invoked in contractual contexts far removed from its real property origins (e.g. Esso Petroleum Co Ltd v Addison [2003] EWHC 1730 (Comm) [47]–[49]).

Exemption clauses in the context of the Equitable Duty of Care

34. Finally, so far as the applicable legal principles are concerned, it is necessary to consider the authorities which have specifically considered attempts to exclude a receiver's Equitable Duty of Care, not because they involve the application of principles which are different from those already considered, but because those decisions may form part of the context in which reasonable parties entering into a mortgage or similar agreement transact.

35. In American Express International Banking Corp v Hurley [1985] 3 All ER 564, 571, Mann J dealt in peremptory terms with the suggestion that a clause providing that a power of sale could be exercised "without being responsible for any loss which may be occasioned to the Mortgagor thereby" relieved the mortgagee for liability for breach of the Equitable Duty of Care, noting that:

> "It is now elementary that an exclusion of liability for negligence must be expressly conferred … There is here no express conferment of such an exclusion".

36. In Bishop v Bonham [1988] 1 WLR 743, clause 3 of a charge over shares provided:

> "you may without notice to the depositor sell the securities or any of them in such manner and upon such terms and for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit. You shall have no liability for any loss howsoever arising in connection with any such sale and you may apply the net proceeds of sale and any moneys for the time being in your hands in or towards discharge of the moneys and liabilities hereby secured and the depositor undertakes to pay you forthwith any difference between such net proceeds and moneys so applied and the moneys hereby secured."

37. Slade LJ noted at p.752 that the Equitable Duty of Care was "undoubtedly capable of being excluded by agreement". He referred to the Canada Steamship guidelines, and concluded that the argument failed at stage two because the first sentence of clause 3 conferred only a power of sale in accordance with the duties imposed by general law,

and that the reference in the second sentence to "such sale" was similarly circumscribed (p.756). He also considered the third test, when responding to a submission that his construction left the exempting words in clause 3 devoid of "any practical effect", stating:

> "One can, without difficulty, envisage a sale by the chargee which has been effected with due care, but in the event proves to have been at a substantial undervalue and correspondingly causes substantial corresponding loss to the chargor. In such a case, the exempting words would clearly apply. However, the wording of clause 3 is not sufficiently clear either to authorise the chargee to effect a sale which would otherwise be in breach of the duty of care imposed on him by the general law, or to exempt him from liability in respect of such sale. Had it been intended to give protection to a negligent mortgagee appropriate and unambiguous words could readily have been devised to meet this purpose".

38. It is not clear, in the scenario put forward by Slade LJ, what alternative form of legal liability he thought might apply in circumstances in which the chargee had acted "with due care", and it may be that the judge had in mind a factual situation in which claims against the chargee might be expected to be forthcoming, rather than one in which there was an alternative legal basis for such claims other than the Equitable Duty of Care. Slade LJ clearly regarded it as particularly significant that the Equitable Duty of Care had been clearly formulated some 14 years before the charge in Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949) and that there had been no attempt to include words clearly referring to the Equitable Duty (p.756).

39. It can fairly be said that Bonham itself became part of the context in which charges and mortgages were subsequently drafted and agreed. The editors of *Lightman and Moss on the Law of Administrators and Receivers of Companies* (6th edn, 2017), [13-059], refer to Bonham and state:

> "Hence a clause exempting a mortgagee from responsibility for loss occasioned to the mortgagor on exercise of the power of sale will not exonerate a mortgagee from liability for negligence to the mortgagor; an exclusion of liability for negligence must be expressly conferred".

40. The editors of *Megarry and Wade: The Law of Real Property* (9th, 2019) observe at [24-018] that "although a mortgagee may exclude liability for loss caused to the mortgagor on sale, such clauses are narrowly construed" (citing Bonham). To similar effect, the editors of *Fisher and Lightwood's Law of Mortgage* (15th, 2019) at [28-09] cite Bonham for the proposition that "clauses attempting to limit liability will be strictly construed". No draftsperson approaching the task of excluding the Equitable Duty of Care could have been under any illusions as to the nature of the task.

Clause 19.1 of the Debenture

41. The first of the two clauses the Receivers now rely upon is clause 19.1 of the Debenture. This provides:

> "19 Liability of Security Agent and Receiver
>
> 19.1 Liability

> Neither the Security Agent, any Receiver nor any of their respective Delegates and sub-delegates (whether as mortgagee in possession or otherwise) shall either by reason of:
>
> (a) taking possession of or realising all or part of the Secured Assets; or
>
> (b) taking any action permitted by this Deed,
>
> be liable to a Chargor or any other person for any costs, losses or liabilities relating to any of the Secured Assets or for any act, default, omission or misconduct of the Security Agent, any Receiver or their respective Delegates and sub-delegates in relation to the Secured Assets or otherwise".

42. I shall deal first with Mr Cousins QC's submission that clause 19.1 is not concerned with excluding the liability of the Receivers for their own acts, omissions or defaults, but is a provision intended to relieve each of the Security Agent, the Receivers, their respective Delegates and sub-delegates from vicarious liability for the acts, neglects or defaults of any of the others. Mr Cousins QC described this approach as adopting a "distributive construction". He referred me to Lord Millett's explanation of that term in AIB Group (UK) Ltd v Martin [2002] 1 WLR 94, [16]:

> "A distributive construction is commonly adopted when a plural subject is followed by a plural predicate and the plurals are broken down into their component singulars. An example from everyday speech would be to say: 'A and B took their children to school.' Prima facie the word 'their' means 'belonging to both of them'. But this is not its only possible meaning, and if A and B are not married it is obviously not its meaning. In that case the word 'their' means 'of each of them'. But this means that A and B took *their respective* children to school, not each other's children. The children are distributed to the relevant parent. And it goes further than that. Although the word 'school' is in the singular, it may conceal a plural. If necessary, the sentence means that A and B took the children to their respective schools."

43. However, the practical application of a distributive approach to construction here proved a good deal more elusive than a definition of what it is. Mr Cousins QC's distributive rendering of the clause in submissions involved more metaphorical red ink than any legitimate exercise in construction could properly accommodate and, in particular, it had no scope to operate in the first part of the clause ending in the first reference to "Secured Assets". I am unable to accept that this is the true meaning of clause 19.1.

44. Mr Cousins QC's principal argument, however, was that clause 19.1 did not stipulate with anything like the requisite clarity that the Equitable Duty of Care was excluded, and that the Receivers' argument to the contrary failed at each of the three stages of the Canada Steamship framework.

45. In his oral submissions, Mr Simpson QC for the Receivers accepted that there was no express reference to negligence for the purposes of the first stage. However, he contended that the words "for any act, default, omission or misconduct" met the requirement of the second stage and, that in the circumstances it was fanciful to

suppose that the clause was aimed only at liabilities other than the Equitable Duty of Care.

46. I accept that there are contexts in which words of the kind Mr Simpson QC relies upon have been held sufficient for the second stage of the Canada Steamship analysis. In particular, in The Raphael, the words "any act or omission" were held to be "certainly wide enough to comprehend negligence" (p.45). However, the context in which the words appeared in that case was very different to the context here. In The Raphael the words appeared in a clause which began by stating that "except as stated herein …. we shall not be liable for any damage loss injury or costs", and clause 3 of the contract provided a limited form of guarantee for new material supplied in the course of work which expressly excluded "any other liability for any form of accident, consequential loss or damage whatsoever and howsoever arising" (points referred to by May LJ at p.48). Further the nature of the contract in question – the provision of stowage services – was one in which any consideration of liability would most obviously a failure to exercise due skill and care. The fact that, in one commercial and contractual setting, particular words have been held to be capable of applying to negligence does not, in my view, automatically entail that those words have the same effect in a different commercial and contractual setting.

47. The context in which the words are used is very different here. The Receivers, once appointed, could engage with the Development Site in a wide variety of ways, including entering into possession, undertaking the management of the property, retaining third party professionals or contractors, soliciting sales and through the realisation of the security and the disposition of the proceeds of sale. In these circumstances, and against the background of the acknowledged effect of the Bonham decision, the language used here does not on a fair reading exclude liability for the Equitable Duty of Care. That conclusion is reinforced by the structure of clause 19.1, with its reference to liability "by reason of … taking possession of or realising … the Secured Assets", and "taking any action permitted by this Deed". I think it more likely that the clause reflects that fact that the actions which the Receivers may have to take (entering onto someone else's land, renting out or selling someone else's property, collecting rent or the proceeds of sale in respect of someone else's property) might reasonably be seen as involving the risk of some form of complaint, just like the sale at an undervalue effected notwithstanding the exercise of due care which Slade LJ relied upon as giving content to the exclusion clause in Bonham. My conclusion is also supported by the words of clause 19.1(b) ("taking any action permitted by this Deed"), which do not suggest that the liability is concerned with actions taken in breach of duty (even if the duty arises as a matter of general law, rather than pursuant to the terms of the Debenture).

48. It is also necessary to consider the impact of the terms of the ICA, which on the Receivers' case do not exclude liability for breach of the Equitable Duty of Care altogether, but have the effect that those breaches are only actionable in cases of gross negligence or wilful default, and which on CNM's case expressly recognise that the Equitable Duty of Care is owed. The Debenture and the ICA were part of the same suite of documents through which the overall lending transaction was constituted, and as Lord Mance observed in Durham v BAI Run Off Ltd [2012] 1 WLR 867, [69]:

> "Where two contracts are linked, the law will try to read them consistently with each other".

49. The fact that, at the very least, the ICA recognises that the Receivers will be liable for breaches of the Equitable Duty of Care which result from gross negligence or wilful default is a further factor which weighs against the suggestion that clause 19.1 of the Debenture excludes that duty altogether. Whether this is a consideration which is brought into account at the second stage of the Canada Steamship test, or is the result of applying another tool of construction when ascertaining the proper construction of clause 19.1, does not matter.

50. If it is necessary to consider the third stage of the Canada Steamship framework, then I accept Mr Cousins QC's submission that there are alternative and realistic grounds of legal liability at which clause 19.1 might reasonably have been directed. These include the strict liability of the Receivers for failing to hand over the proceeds of sale, rent, a deposit or any surplus to those entitled to them, and their fiduciary duties in the true sense of that term which do not depend on breach of a duty of care. Mr Simpson QC objected that these examples would not explain the use of all the language in clause 19.1, for example the reference to omissions. However, even if that is right (and Mr Cousins QC did not accept that it was), I think it would take the third stage of the Canada Steamship framework too far to suggest that the alternative basis of legal liability must be one to which all aspects of the clause are potentially relevant. Exclusion clauses are all too frequently drawn up in wide terms because of the draftsperson's "determination to make sure that [it] has obliterated the conceptual target" (as Hoffmann LJ noted in Arbuthnott v Fagan [1995] CLC 1396, 1404). In circumstances in which it is far from clear that every word of clause 19.1 is capable of applying to a claim based on a failure to exercise reasonable skill and care, it is difficult to see why it should be fatal for Canada Steamship stage three purposes that not every part of the clause can be shown to be relevant to a non-negligence species of liability.

The ICA

The relevant terms

51. As its name suggests, the ICA is an agreement to which the Senior and Mezzanine arrangers, lenders, borrowers and the security agents were parties, and which regulated various aspects of their rights and obligations *inter se*.

52. Clause 9.5 of the ICA, on which CNM understandably places considerable emphasis, provides:

> "Duties owed
>
> Each of the Secured Parties and the Debtors acknowledges that, in the event that the Security Agent enforces or is instructed to enforce the Transaction Security prior to the Senior Discharge Date, the duties of the Security Agent and of any Receiver or Delegate owed to the Mezzanine Creditors in respect of the method, type and timing of that enforcement or of the exploitation, management or realisation of any of that Transaction Security shall, subject to Clause 11.4 (Fair value), be no different to or greater than the duty that is owed by the Security Agent, Receiver or Delegate to the Debtors under general law".

53. "Secured Parties" is defined to mean "the Security Agent, any Receiver or Delegate and each of the Creditors (other than a Subordinated Creditor) from time to time but only if it is a Party or has acceded to this Agreement, in the appropriate capacity, pursuant to Clause 17.5 (Creditor Accession Undertaking)". The Debtors comprise the Senior and Mezzanine borrowers and their associated companies who are parties to the Debenture.

54. Clause 11.4, to which clause 9.5 refers, imposes a duty on the Security Agent (but not the Receivers), to "take reasonable care to obtain a fair market value", but provides that that duty is conclusively presumed to be satisfied and the Security Agent "will be taken to have discharged all its obligations in this respect under this Agreement, the other Debt Documents and generally at law" if, inter alia, the sale is effected at the direction of or under the control of a Receiver.

55. Clause 16.10 provides:

> "Exclusion of liability
>
> (a) Without limiting paragraph (b) below (and without prejudice to any other provision of any Debt Document excluding or limiting the liability of the Security Agent, any Receiver or Delegate), none of the Security Agent, any Receiver nor any Delegate will be liable for:
>
> (i) any damages, costs or losses to any person, any diminution in value, or any liability whatsoever arising as a result of taking or not taking any action under or in connection with any Debt Document or the Security Property unless directly caused by its gross negligence or wilful misconduct;
>
> (ii) exercising or not exercising any right, power, authority or discretion given to it by, or in connection with, any Debt Document, the Security Property or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with, any Debt Document or the Security Property;
>
> (iii) any shortfall which arises on the enforcement or realisation of the Security Property; or
>
> (iv) without prejudice to the generality of paragraphs (i) to (iii) above, any damages, costs, losses, any diminution in value or any liability whatsoever arising as a result of:
>
> (A) any act, event or circumstance not reasonably within its control; or
>
> (B) the general risks of investment in, or the holding of assets in, any jurisdiction,
>
> including (in each case and without limitation) such damages, costs, losses, diminution in value or liability arising as a result of: nationalisation, expropriation or other governmental actions; any

regulation, currency restriction, devaluation or fluctuation; market conditions affecting the execution or settlement of transactions or the value of assets; breakdown, failure or malfunction of any third party transport, telecommunications, computer services or systems; natural disasters or acts of God; war, terrorism, insurrection or revolution; or strikes or industrial action.

(b) No Party (other than the Security Agent, that Receiver or that Delegate (as applicable)) may take any proceedings against any officer, employee or agent of the Security Agent, a Receiver or a Delegate in respect of any claim it might have against the Security Agent, a Receiver or a Delegate or in respect of any act or omission of any kind by that officer, employee or agent in relation to any Debt Document or any Security Property.

…

(d) Without prejudice to any provision of any Debt Document excluding or limiting the liability of the Security Agent, any Receiver or Delegate, any liability of the Security Agent, any Receiver or Delegate arising under or in connection with any Debt Document or the Security Property shall be limited to the amount of actual loss which has been finally judicially determined to have been suffered (as determined by reference to the date of default of the Security Agent, Receiver or Delegate (as the case may be) or, if later, the date on which the loss arises as a result of such default) but without reference to any special conditions or circumstances known to the Security Agent, Receiver or Delegate (as the case may be) at any time which increase the amount of that loss. In no event shall the Security Agent, any Receiver or Delegate be liable for any loss of profits, goodwill, reputation, business opportunity or anticipated saving, or for special, punitive, indirect or consequential damages, whether or not the Security Agent, Receiver or Delegate (as the case may be) has been advised of the possibility of such loss or damages".

56. Finally, clause 19.1 provides:

"Indemnity to the Security Agent

(a) Each Debtor jointly and severally shall promptly indemnify the Security Agent and every Receiver and Delegate against any cost, loss or liability (together with any applicable VAT) incurred by any of them as a result of:

…

(vii) acting as Security Agent, Receiver or Delegate under the Debt Documents or which otherwise relates to any of the Security Property (otherwise, in each case, than by reason of the relevant Security Agent's, Receiver's or Delegate's gross negligence or wilful misconduct)".

Clause 9.5: analysis

57. Clause 9.5 is the key element in CNM's argument. It is CNM's case that clause 9.5 expressly provides that the Receivers owe it the Equitable Duty of Care, and that to the extent clause 16.10(a) is said to be inconsistent with that, either that (a) gives rise to a genuine ambiguity which should be resolved against the Receivers under the Gilbert-Ash principle; or (b) it means that it is not possible for the Receivers to satisfy the second stage of the Canada Steamship framework, or (c) any clause which deprived clause 9.5 of its content has to be read down in accordance with the meaningful obligations principle.

58. In my view, CNM has overstated the effect of clause 9.5 of the ICA, which is not a clause whose function is to create or define duties owed to CNM. Rather, the purpose of the clause is to define the duties owed to the Mezzanine Creditors in the period before the Senior Lenders have been paid out (which occurs on the "Senior Discharge Date"):

    i) It is for that reason that clause 9.5 takes the form of an acknowledgement *by* (inter alios) CNM of a duty owed to the Mezzanine Creditors, rather than any acknowledgement *to* CNM of a duty owed to it.

    ii) The acknowledgement of the duty owed to the Mezzanine Creditors is limited to the duty owed in the period up to the Senior Discharge Date, presumably to address any uncertainty which might arise as to whether any duty in realising security was owed to a subordinated creditor when the debt to the senior creditor remained outstanding (cf. PK Airfinance SARL v Alpstream [2016] EWCA Civ 1318, [115]).

    iii) The purpose of the words which CNM relies upon – "no different to or greater than the duty that is owed by the Security Agent, Receiver or Delegate to the Debtors under general law" – is to describe the duty owed to the Mezzanine Creditors in this period by reference to a well-known and understood legal principle (viz the Equitable Duty of Care).

    iv) The words "under general law" are significant, being a reference to the position which prevails generally in the absence of any contractual provision to the contrary, rather than a statement of the particular duty owed to CNM in the light of the particular provisions of the ICA.

59. My attention was drawn by the parties to the decision of Mr Justice Eder in Saltri III Ltd v MD Mezzanine SA Sicar and others [2012] EWHC 3025 (Comm), a case concerning a dispute between senior and mezzanine lenders in relation to the realisation of security. The inter-creditor agreement in that case contained similar, albeit not identically worded, provisions to those in issue here. Clause 14.3 stated that the duties owed by the senior lenders to the mezzanine lenders were "no different to or greater than the duty to the Obligors that would be owed by the Security Trustee, Receiver or Delegate under general law". Clause 17.9 provided that the Security Trustee would not accept responsibility for or be liable for any loss or liability "unless directly caused by its gross negligence or wilful misconduct". The Security Trustee sought to rely on clause 17.8 at trial to contend that it could only be liable to the mezzanine creditors if gross misconduct or wilful misconduct was established, but Eder J held that the point was not open on the pleadings (p.678 and [2012] EWHC 1962 (Comm), [6]). Eder J described clause 14.3 as a clause which provided that "the

only duty of the Security Trustee to the Mezzanine Lenders in relation to sale is that of mortgagee to mortgagor" (p.708). It is a matter of passing interest only that it does not appear to have been argued in Saltri that clause 17.8 did not assist the senior lenders because it could not cut down the express provision in clause 14.3, because it is impossible to know how the argument would have developed if the senior lender had been permitted to rely on clause 17.8.

60. Similar provisions appear in the template inter-creditor agreement of the Loan Market Association ("LMA"), a market body composed of entities operating in the syndicated lending market. Clause 12.6 provides:

> "Each of the Secured Parties and the Debtors acknowledges that, in the event that the Security Agent enforces or is instructed to enforce the Transaction Security prior to the Senior Discharge Date, the duties of the Security Agent and of any Receiver or Delegate owed to the Mezzanine Creditors in respect of the method, type and timing of that enforcement or of the exploitation, management or realisation of any of that Transaction Security shall, subject to Clause 14.4 (*Fair value*), be no different to or greater than the duty that is owed by the Security Agent, Receiver or Delegate to the Debtors under general law".

61. Clause 21.11(a) provides:

> "Without limiting paragraph (b) below (and without prejudice to any other provision of any Debt Document excluding or limiting the liability of the Security Agent, any Receiver or Delegate), none of the Security Agent, any Receiver nor any Delegate will be liable for:
>
> (i) any damages, costs or losses to any person, any diminution in value, or any liability whatsoever arising as a result of taking or not taking any action under or in connection with any Debt Document or the Security Property unless directly caused by its gross negligence or wilful misconduct".

62. While the language in Saltri – "which would be owed" – differs from the language used in the ICA and in the LMA's template, in my view the purpose of the language is the same in each case: namely to provide that a duty is owed to the mezzanine creditors just as a duty is owed as a matter of general law by a mortgagee (or receiver) to a mortgagor. In considering the meaning and purpose of clause 9.5, I am entitled to take into account, as part of the context, "the purpose of similar provisions in contracts of the same type": Wood v Capita Insurance Services Ltd [2017] AC 1173, [13] Lord Hodge JSC.

Clause 16.10(a)(i): analysis

63. Against the background of my analysis of clause 9.5, I turn to clause 16.10(a)(i). Mr Cousins QC advanced a number of arguments in relation to this clause. Some of these arguments can be disposed of relatively quickly, and I intend no disrespect to Mr Cousins QC's able argument by taking them first.

64. The first argument was that clause 16.10(a)(i) expressly carved out the clause 9.5 duty from its field of operation through the words "without prejudice to any other

provision of any Debt Document excluding or limiting the liability of the Security Agent, any Receiver or Delegate". However:

i) Clause 9.5, even on Mr Cousins QC's case, cannot be described as an exclusion or limitation clause. At best, for CNM, it restates the general law, rather than modifying or excluding it in the Receivers' favour. Mr Cousins QC posited the example of the clause operating to prevent the Receivers later assuming additional obligations over and above those owed as a matter of general law. Even assuming the clause did have this effect in relation to post-contractual assumptions of responsibility (which I doubt), I would not regard the non-assumption of an additional duty over and above that owed as a matter of general law as the exclusion or limitation of liability.

ii) In any event, the words in parenthesis are not intended to prevent clause 16.10(a)(i) from having effect if there are other (on this hypothesis less invasive) exclusion or limitation clauses, but to make it clear that clause 16.10(a)(i) is not intended to prevent other more invasive exclusion or limitation clauses from also taking effect in accordance with their terms.

65. Mr Cousins QC's second argument, albeit this was really advanced in support of his third and fourth arguments rather than as an independent ground, was that clause 16.10(a)(i) could be read as only applying to steps taken by the Receivers by way of enforcement (the service of a notice of demand, the acceleration of the loan following an event of default) rather than steps taken by way of realisation of security (in particular sale of the security). However, there is nothing in the wide language of clause 16.10(a)(i) which supports such a distinction. In this regard, it is noteworthy that while the ICA does have a defined term "Enforcement Action", this does not appear in clause 16.10(a)(i) nor in any clause said to inform the construction of clause 16.10(a)(i). The language which does appear in clause 16.10(a)(i) – the reference to "any diminution in value" and to "taking or not taking any action under or in connection with any Debt Document *or the Secured Property"* – is inconsistent with the argument that the clause is not intended to apply to liabilities arising from the realisation of security.

66. Mr Cousins QC's third and fourth arguments merit more extended consideration. The third argument was that, for the purposes of the Canada Steamship framework, this was a case in which there was no express reference to negligence or a synonym for negligence, and that, for the purposes of the stage two and three enquiries, it was possible to identify alternative bases for legal liability against which the clause might reasonably have been intended to provide protection. However, while clause 16.10(a)(i) does not expressly refer to liability for negligence *simpliciter* being excluded, that follows as a matter of inevitable implication from the express provision that there is only liability for acts or omissions of a more serious kind, namely gross negligence or wilful misconduct. I have concluded that this clause satisfies the requirement of the first stage in the Canada Steamship analysis.

67. I was referred to a number authorities on this issue, all of which support the conclusion I have reached. The first was the judgment of Bingham J in Swiss Bank Corporation v Brink's Mat Ltd [1986] 2 Lloyd's Rep 79, in which the clause in question provided "the company shall only be responsible for any loss of or damage to goods or for any non-delivery or misdelivery if it is proved …that such loss,

damage non-delivery or misdelivery was due to the wilful neglect or default of the Company or its own servants". While not referring to Canada Steamship, it is inconceivable, of course, that Mr Justice Bingham did not have it fully in mind. Nonetheless, he stated that he could "not see how the draftsman could have made his intention plainer, namely that Brink's Mat were only to be liable in cases of wilful neglect or default".

68. The second is the decision of Mr Justice Andrew Smith in Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479, a case in which the terms and conditions in issue provided:

> "1.1 To the extent permitted by law and the FSA Rules and save as otherwise expressly provided in these Terms and Conditions, we shall not be liable for any losses, liabilities, costs, claims, damages, expenses, demands or Taxes … other than Costs arising directly as a consequence of the gross negligence, fraud or wilful default of us or any of our directors, officers, or employees.
>
> 1.2 Without limiting the foregoing or any other provision of these Terms and Conditions (or any other agreement between us) that excludes or restricts our liability to you, we shall not, save as otherwise expressly provided in these Terms and Conditions, be liable to you for any loss or damage suffered by you directly or indirectly as a result of:
>
> (B) any decline in the value of any Investments purchased, held or sold by us on your behalf or which we have advised you to purchase hold or sell howsoever arising; ...
>
> (F) the solvency, acts or omissions of any Broker, Nominee Company, Custodian, settlement agent, Depositary or other third party
>
> unless the liability arises directly as a consequence of the gross negligence (or, in the case of liabilities arising from our custody activities, negligence), fraud or wilful default of us or any of our directors, officers, or employees".

69. The investor argued that the expression "gross negligence" in clause 1.1 meant nothing more than negligence *simpliciter*, an argument which Andrew Smith J rejected because clause 1.2 showed that the parties were quite capable of referring to negligence *simpliciter* when they wanted to. However, the judge did not decide (as Mr Cousins QC submitted he had) that clause 1.1 was only effective to exclude liability for negligence *simpliciter* because of the reference to negligence *simpliciter* in clause 1.2. Rather, he concluded that for the purposes of both clause 1.1 and 1.2, with the exception of the limited carve-out in relation to custody activities in clause 1.2, the investor had to show more than mere negligence because that was the effect of providing that there would only be liability if gross negligence or wilful default were established: [162]. This was also the position in Winnetka Trading Corp v Julius Baer International Ltd [2011] EWHC 2030 (Ch), in which Roth J construed essentially the same clauses as were in issue in Camerata to the same effect: [16].

70. Finally, I have referred above to Clarke J's statement in Monarch Airlines at p.408 that "it would make a nonsense of the clause if the airport company was to be liable

for what might be called ordinary negligence, but only liable for other neglect or default if the test of intention or recklessness was satisfied". That is equally true of CNM's argument here.

71. Mr Cousins QC's final argument is that clause 16.10(a)(i) has to be read down because, if interpreted as the Receivers contend it should be interpreted, it has the effect of substantially limiting the duty which clause 9.5 expressly recognises is owed, an argument advanced either at the second stage of the Canada Trust framework or in support of the meaningful obligations principle.

72. I have already explained why I have concluded that clause 9.5 does not create or enshrine an obligation in favour of CNM. But Mr Cousins QC can argue that this takes the Receivers only so far, because clause 9.5 does create or enshrine a duty in favour of the Mezzanine Creditors which duty is, on the Receivers' construction, significantly modified by clause 16.10(a)(i). Nonetheless, it is clear, in my view, that clause 16.10(a)(i) and clause 9.5 can be read together, and that it cannot be said that the provisions are so in conflict, or that the latter so eviscerates the former on the construction the Receivers contend for, that I should strain in favour of some other construction.

73. As I have explained, clause 9.5 is not the legal source of the duty of care owed to CNM – that remains the Equitable Duty of Care. It simply provides that a similar duty is owed, under the conditions set out, to the Mezzanine Creditors, thereby providing a cause of action to the Mezzanine Creditors (just as the "general law" provides a cause of action to the mortgagor). However, the mere fact that the circumstances in which or extent to which there can be liability in respect of that cause of action are limited by later clauses in the ICA does not mean that those provisions are inconsistent, still less that the latter renders the former nothing more than a statement of intent. It is a very familiar drafting device that the parties' primary obligations appear in express terms early in a contract, and clauses limiting the circumstances in which claims for breaches of those obligations can be pursued or the extent of any liability in respect of them appear in later clauses.

74. To take an obvious example from this case, clause 16.10(d) provides that in no circumstances are the Receivers to be liable for "any loss of profits, goodwill, reputation, business opportunity or anticipated saving, or for special, punitive, indirect or consequential damages". There is no doubt that this provision reduces the extent of any liability for breach of the Equitable Duty of Care, and, if the only loss suffered on the occasion of a particular breach was loss of profit, would remove that liability altogether. However, Mr Cousins QC rightly accepted that this clause can happily co-exist with the Equitable Duty of Care (and, it can be added, with the duty which clause 9.5 recognises is owed to the Mezzanine Creditors).

75. This is equally true of clause 16.10(a)(i), save that in the case of that clause, the Receivers will only be liable where the circumstances giving rise to the breach of the Equitable Duty of Care (or of the clause 9.5 obligation to the Mezzanine Creditors) result directly from gross negligence or wilful misconduct. I accept, as Mr Cousins QC submitted, that neither gross negligence nor wilful misconduct are causes of action under English law. However, far from assisting CNM, this makes it clear that clause 16.10(a)(i) is not inconsistent with any cause of action conferred or recognised by clause 9.5. Rather it restricts the factual circumstances in which that cause of

action can be pursued to those where the enhanced fact pattern can be made out. Mr Cousins QC's Schrödinger submission – "the same duty as to realising a proper price cannot exist, yet not exist, at the same time" – misstates the position. The Equitable Duty of Care is owed, but breaches of that duty are only actionable where the facts which give rise to those breaches involve gross negligence or wilful default.

76. For these reasons, I have concluded that clause 16.10(a)(i) clearly limits the liability of the Receivers for breach of the Equitable Duty of Care to cases of gross negligence or wilful default. That conclusion is consistent with the views expressed in *Paget's Law of Banking* (15th, 2018) as to the effect of clause 21 of the LMA standard inter-creditor agreement at [11-019]:

> "Inter-creditor agreements usually also contain a range of exclusion clauses that protect the security agent from liability. One example of a particularly widely drawn clauses provide that the agent is not liable for 'any damages, costs or losses to any person, any diminution in value or any liability whatsoever arising as a result of not taking any action' and the only limitation upon the breadth of that exclusion is that losses must not be attributable to the security agent's 'gross negligence or wilful misconduct'. The security agent's officers, employees and agents also benefit from equally expansive contractual provisions".

77. I have reached my conclusion by considering the terms of clause 16.10(a)(i) alone. However, my conclusion is reinforced by clause 19.1 of the ICA. In Canada Steamship, the Privy Council reached a provisional conclusion on the issue of whether clause 7 exempted the Crown from liability for negligence to the lessee, before going on to consider the argument that clause 17 of the lease required the lessee to indemnify the Crown for any liability the Crown had to third parties arising from the same negligence. Lord Morton recognised that the construction of clause 17 was a matter which was relevant to the ambit of clause 7, stating the Board "entirely agree with the view expressed by the majority of the Supreme Court as to the close inter-relationship of these two clauses" (p.211). He continued (p.214):

> "If their Lordships had agreed with the Supreme Court that clause 17 extended so far as to cover negligent acts of the Crown's servants, they might well have had to reconsider the provisional view already expressed as to clause 7".

78. In the Supreme Court of Canada ([1950] SCR 532, 547), Rand J had suggested that "it would seem rather absurd to say that the fire so far as it damaged the goods of a third party gave rise to a right in the Crown … for indemnity … but that claims for damage to like property of the Steamship company were not within the broad language of paragraph 7". Estey J (p.553) pitched the incongruity at the more modest level of an "anomaly" rather than an "absurdity".

79. In this case, clauses 16.10(a)(i) and 19.1 both carve out from their field of operation the consequences of the Receivers' "gross negligence or wilful misconduct". The indemnity in clause 19.1 extends to "any cost, loss or liability. …. incurred by any of them as a result of acting as Security Agent, Receiver or Delegate under the Debt Documents or which otherwise relates to any of the Security Property". Unlike clause 16.10(a)(i), the indemnity is not restricted to the claims of those who are parties to the ICA or in relation to whom the Receivers are, for certain purposes, fiduciaries, but extends to third parties (for example those injured on the Development Site). The

most obvious basis on which the Receivers might have a liability to third parties was negligence or the failure to take care. Using Salmon LJ's language in Hollier v Rambler Motors (AMC) Ltd, pp.78-9, no sensible person could have thought that the words of clause 19.1 had any meaning except that the Receivers were entitled to an indemnity in respect of any liability they come under to non-parties to the ICA for negligence relating to the Secured Property. The incongruity which would arise if clause 19.1, with its carve-out for gross negligence and wilful misconduct, did require CNM to indemnify the Receivers for liabilities to third parties arising from the Receivers' negligence *simpliciter*, but clause 16.10(a)(i), with the same carve-outs, did not relieve the Receivers from liability to CNM for negligence *simpliciter*, provides further support for my construction of the latter clause.

Conclusion

80. For the reasons set out above:

i) Clause 19.1 of the Debenture does not exclude the Receivers' liability for breach of the Equitable Duty of Care.

ii) By reason of clause 16.10(a)(i) of the ICA, the Receivers will only be liable for breach of the Equitable Duty of Care where the liability in question is directly caused by the Receivers' gross negligence or wilful misconduct.