Appeal Ref: A3/2018/1802
Claim No. HC-2017-001575

Neutral Citation No: [2019] EWCA Civ 1290
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESSAND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
(Mr Phillip Marshall QC sitting as a deputy judge of the High Court)

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 19/07/2019

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE MALES
and
MR JUSTICE SNOWDEN

Between:

FRASER TURNER LIMITED

Claimant/Appellant

and

(1) PRICEWATERHOUSECOOPERS LLP
(2) MR PETER DICKENS
(3) MR RUSSELL DOWNS

Defendants/Respondents

- -

Mr David Lord QC and **Mr Richard Bowles** (instructed by **Collyer Bristow LLP**) for the **Appellants**

Mr Daniel Bayfield QC and **Mr Stephen Robins** (instructed by **Clifford Chance LLP**) for the **Respondents**

Hearing dates: 25th and 26th June 2019

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Approved Judgment

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This appeal raises questions of both contractual interpretation and the duties owed by administrators at common law and under paragraph 74 of Schedule B1 to the Insolvency Act 1986 ("paragraph 74").

2. Mr Phillip Marshall QC, sitting as a deputy judge of the High Court, struck out all the claims made by the claimant, Fraser Turner Limited ("FT"), against the first defendant, PricewaterhouseCoopers LLP ("PwC"), and against the second and third defendants, Mr Peter Dickens ("Mr Dickens"), an erstwhile director of PwC and Mr Russell Downs ("Mr Downs"), a partner in PwC.[1] The judge also refused FT permission to amend its Particulars of Claim in the form of a draft that was before the first instance court (the "APOC").

3. Messrs Dickens and Downs (the "Administrators") were joint administrators of a mining company, London Mining PLC ("London Mining") and joint receivers (with Mr Felix Addo of PwC (Ghana) Ltd) of London Mining's wholly owned Sierra Leonean subsidiary, London Mining Company Ltd ("LMCL").

4. In outline, a settlement agreement was entered into on 8th June 2012 between FT, London Mining, and LMCL, under which FT was to receive a royalty of 0.3% of the market value of iron ore produced at the Marampa mine (the "mine"), which was at the time owned by LMCL (the "Royalty Deed"). London Mining had obligations to procure "LMCL or the Relevant Entity [defined as a subsidiary of London Mining or LMCL holding a licence to operate the mine]" to pay the royalty,[2] to provide certain sales and tonnage statements,[3] and to guarantee LMCL's or the Relevant Entity's payment of the royalty.[4]

5. When the insolvencies of London Mining and LMCL supervened in October 2014, questions arose as to FT's continuing right to receive royalties under the Royalty Deed. Ultimately, the business and assets of LMCL, including the mine itself, were sold by the joint receivers of LMCL to Timis Mining Corporation (SL) Limited ("Timis Mining") without the purchaser knowing anything about, let alone agreeing to be bound by the terms of, the Royalty Deed.

6. There are really only the following four main issues before the court on this appeal:-

   i) Was the judge right to hold that, after a sale of the mine, terms should be implied into the Royalty Deed to the effect that London Mining had a continuing obligation to procure and guarantee payment of royalties?[5]

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1 The judgment of 12th July 2018 is at [2018] EWHC 1743 (Ch), and the order under appeal is of the same date.

2 Under clause 3.1 of the Royalty Deed.

3 Under clause 3.4 of the Royalty Deed.

4 Under clause 6.1 of the Royalty Deed.

5 At paragraph 54.4 of his judgment.

ii) Was the judge right to refuse to interpret the Royalty Deed or to imply a term so as to provide an obligation on London Mining and/or LMCL to procure a purchaser of the mine to pay the royalties or enter into an accession deed?[6]

iii) Was the judge right to hold that the Administrators owed FT no duty to protect it against losses caused by the failure to procure a purchaser to pay the royalties or to enter into an accession deed?

iv) Was the judge right to hold that FT could have no claim against the Administrators under paragraph 74?

7. I will return to these issues, after summarising some essential factual background, the terms of the Royalty Deed and the judge's judgment (the "judgment").

Factual background

8. I have taken most of the essential facts from paragraphs 9-26 of the judgment.

9. FT provided consultancy services to the mining industry, with particular expertise in West Africa. In October 2005, FT was engaged by London Mining to help it procure the purchase of a lease of the mine in Sierra Leone. That engagement was subsequently formalised in a Facilitation Agreement dated 28th February 2007 under which FT would receive a royalty of US$0.10 per tonne of iron ore sold from the mine and a further royalty of 2% of gross yearly sales.

10. In December 2009, LMCL obtained a 25-year mining lease (subsequently, in 2012, extended to 40 years) to exploit the mine. A dispute developed as to whether London Mining still owed the further royalties to FT under the Facilitation Agreement. FT issued proceedings in the High Court in December 2011. The settlement of those proceedings resulted in the Royalty Deed (and two other agreements),[7] which provided for LMCL to pay FT the 0.3% royalty guaranteed by London Mining (the "Royalty"). The Royalty was duly paid between October 2012 and April 2014.

11. In July 2014, PwC was engaged by London Mining to provide analysis and advice in relation to the short-term cash flow of both London Mining and LMCL. In September 2014, it became clear to FT that London Mining was in some financial difficulty. LMCL had failed to pay FT's invoice dated 1st September 2014 in respect of the Royalty. On 7th October 2014, PwC was engaged to act for London Mining and its secured creditors to provide advice in relation to future financing. On 10th October 2014, the board of London Mining announced that it and PwC would put London Mining into administration, which happened on 16th October 2014.

12. After the administration commenced, Mr James Turner, a director of FT ("Mr Turner"), made contact with PwC. Mr Turner's evidence was that he had emailed and spoken to Mr Downs between 16th and 27th October 2014. He had informed Mr Downs of the basic terms of the Royalty Deed. He had stressed that the Royalty was an obligation that was transferrable to any buyer of London Mining, LMCL or the mine and that the Royalty Deed needed to be drawn to the attention of any potential buyer of the mine, and he had sent Mr Downs a copy of the Royalty Deed. At no

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6 Either an "Accession Deed" as defined under the Royalty Deed or a similar instrument.

7 The Termination Deed and the Services Deed, which are not relevant to the issues in this appeal.

stage did Mr Downs disagree with anything Mr Turner had said. Mr Turner's evidence was that he understood that the Administrators would review the Royalty Deed and consider its effect, and that they would draw the Royalty Deed to the attention of any purchaser. Mr Turner said that Mr Downs had led him to believe that he was aware of the terms of the Royalty Deed and that FT considered that it had to be transferred to any purchaser, that Mr Dickens would do everything necessary to draw the Royalty Deed to the attention of a purchaser of the mine and that the Administrators would ensure that a purchaser would agree to take on responsibility for the Royalty.[8]

13. On 22nd October 2014, terms were agreed with Timis Mining for the purchase of the business and assets of LMCL. The term sheet provided the terms of purchase, but did not cater for the assumption by Timis Mining of any obligation to pay the Royalty.

14. The joint receivers of LMCL were appointed on 31st October 2014, and immediately completed the sale of the business and assets of LMCL to Timis Mining. FT complains that, despite Mr Turner's frequent conversations with Mr Downs about the Royalty Deed and the previous involvement of PwC, the Royalty Deed was not drawn to Timis Mining's attention. Timis Mining's solicitors confirmed on 2nd March 2015 that it had no knowledge of the Royalty Deed at the time of the sale.

15. Mr Vasile Timis, the ostensible owner and controlling influence of Timis Mining, made a statement saying that he believed that, had he known about the Royalty prior to the acquisition of the mine, he "would have likely endeavoured to ensure that such royalty was honoured, either by having Timis Mining take on the royalty obligation … or alternatively, by seeking to negotiate some comparable commercial arrangement with [FT] in respect of their royalty…". Mr Timis also said in his statement that Mr Turner's connections in Sierra Leone "would have been very helpful in terms of making [the mine] a success after the transaction".[9]

16. On 10th March 2015, FT proved in London Mining's administration for an ongoing royalty saying that "[t]he Royalty Deed dated June 2012 was ongoing for the life of the mine and was to be transferred upon acquisition of the mine by any third party … see in particular clauses 3.5 and 6.2 of the Royalty Deed. In short it was incumbent to ensure that the royalty transferred to [Timis Mining]". On 15th March 2017, the administrators admitted the proof in full in the sum of £14.3 million subject to a note stating that the ongoing element was "admitted on the basis that [London Mining] guaranteed royalty payments to FT under the Royalty Deed. The references to purported obligations to transfer the royalty obligations to [Timis Mining] were not relied on in reaching the decision to admit". FT ultimately received a dividend of £16,459.74.

17. On 24th April 2017, the Administrators were discharged from liability save in relation to FT's claims, and on 30th July 2017 London Mining was dissolved.

18. On 26th May 2017, FT issued a claim form alleging that:-

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8 See paragraphs 40-54 of Mr Turner's statement.

9 See paragraphs 4-6 of Mr Timis's statement.

i) The defendants breached the Royalty Deed by failing to draw it or the Royalty to the attention of Timis Mining and failing to transfer the Royalty Deed (or the underlying obligation to pay the Royalty) upon the sale of the mine.

ii) The defendants induced and/or procured London Mining and LMCL to breach the Royalty Deed.

iii) The defendants acted together to ensure that the mine was sold to Timis Mining (i) without the Royalty Deed being drawn to the attention of Timis Mining, and any request being made to Timis Mining to assume a contractual obligation to pay the Royalty, in breach of London Mining and LMCL's contractual obligations, and (ii) as quickly as possible without regard to the interests of the unsecured creditors of London Mining and/or LMCL and in order to ensure that PwC received the sum of US$3.5 million payable on the sale.

iv) Messrs Dickens and Downs breached their duties to FT and the other creditors of London Mining and/or were liable for misfeasance and/or have acted negligently in failing to ensure that (a) proper steps were taken to obtain a proper price for the business and assets of LMCL, and (b) FT's contractual rights were brought to the attention of Timis Mining and to request it to assume a contractual obligation to pay the Royalty.

v) Messrs Dickens and Downs were liable under paragraph 74 for unfairly harming FT's interests.

19. On 21st December 2017, the defendants applied for summary judgment under CPR Part 24 and/or to strike out the Particulars of Claim. On 20th February 2018, FT applied to amend its particulars of claim in the form of the APOC. It was agreed that, if the strike out failed, FT could rely on the APOC.

20. On 12th July 2018, after a two-day hearing, the judge struck out FT's claims. On 24th October 2018 Floyd LJ gave permission to appeal on five grounds that have been argued in this court.

The Royalty Deed

21. Clause 1 defined certain terms as follows:-

> "**Marampa**" means that area in Sierra Leone, West Africa, referred to in Schedule A to the 2009 Mining Lease…
>
> **"Marampa Iron Ore"** means Iron Ore extracted from Marampa;
>
> "**Market Value"** means the sale value of Marampa Iron Ore receivable by LMCL or the Relevant Entity in an arms length transaction …
>
> **"Iron Ore Production**" means the production of Iron Ore from Marampa by LMCL, London Mining or any Subsidiary of them;
>
> "**Purchaser"** means a third party either (i) who acquires Control of LMCL and/or a Relevant Entity as the case may be pursuant to a Change of Control

> or (ii) acquires all or substantially all of the assets of LMCL and/or a Relevant Entity as the case may be;
>
> "**Relevant Entity"** means the relevant Subsidiary of London Mining or LMCL which holds a licence to operate a Mine;

22. Clause 3 provided for the Royalty as follows:-

> "**3.1** Subject to clauses 3.6 and 7.9 below, LMCL or the Relevant Entity shall pay and London Mining shall procure that LMCL or the Relevant Entity shall pay a royalty to [FT] of 0.3% … of the Market Value of all Marampa Iron Ore sold by LMCL or the Relevant Entity less … (the "**Royalty**") …
>
> **3.3** The Royalty shall be payable in arrears from 1 April 2012 and shall continue to be payable for the duration of Iron Ore Production.
>
> **3.4** Within five (5) Business Days following the announcement of London Mining's half year and annual financial results, London Mining shall provide [FT] the Sales Value Statements and the Tonnage Statements in respect of the Marampa Iron Ore sold and shipped … during the relevant six month period included in the results … and [FT] shall issue an invoice addressed to LMCL or the Relevant Entity (as applicable) for the correct Royalty payable for the relevant six month period (a "**Royalty Payment**") …
>
> **3.5** In the event of a Change of Control of LMCL and/or a Relevant Entity or LMCL and/or a Relevant Entity ceasing to hold all or substantially all of its assets (the new holder of those assets herein after referred to as the "**New Asset Holder**"), clause 3.4 shall be amended to read as follows: "Within 3 months of the end of each 6 month period ending 30 June and 31 December in each year (each a "relevant six month period"), LMCL and/or a Relevant Entity or the New Asset Holder (as the case may be) shall provide to [FT] the Sales Value Statements and the Tonnage Statements in respect of the Marampa Iron Ore sold and shipped … during the immediately preceding relevant six month period and [FT] shall issue an invoice addressed to LMCL and/or the Relevant Entity or the New Asset Holder (as applicable) for the correct Royalty for the relevant six month period (a "Royalty Payment"). …
>
> …
>
> **3.9** LMCL or the Relevant Entity shall pay and London Mining shall procure that LMCL or the Relevant Entity shall pay any invoice issued in accordance with clause 3.4 within thirty (30) calendar days of the invoice having been received by London Mining at the Designated Address.
>
> **3.10** Payment of all Royalty Payments shall be made by telegraphic transfer within thirty (30) calendar days of receipt of any invoice in cleared funds to the Bank Account or such other account as is specified by [FT] in writing to London Mining from time to time."

23. Clause 6 was headed "Guarantee" and provided as follows:-

> "6.1 In the event that LMCL or the Relevant Entity fails to pay any Royalty

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

24. Clause 7.8 provided as follows:-

> "**7.8** Subject to clause 6.2, London Mining or LMCL, or a Relevant Entity shall not be entitled to assign their respective rights under this Deed, or subcontract or transfer any of their rights or obligations hereunder without the prior written consent of [FT], such consent not to be unreasonably withheld or delayed."

25. Clause 12.11 provided as follows:-

> "**12.11** Each Party shall (at its own expense) promptly execute and deliver all such documents and do all such things as may be required for the purpose of giving effect to the provisions of this Deed."

26. Part A of Schedule 1 set out the "Form of Accession Deed" in the following terms:-

> "2. The Purchaser hereby undertakes to [FT] to comply with the provisions of, and to perform all the obligations of [London Mining] contained in the Deed (other than the obligations contained in clause 6.1 of the Deed) so far as they

> may remain to be observed and performed and the Purchaser shall become a party to the Deed as if the Purchaser was named in the Deed as [London Mining]."

27. Part B of Schedule 1 set out the "Form of Deed of Guarantee" in the following terms:-

> "2. The Guarantor hereby undertakes to [FT] to comply with the provisions of, and to perform the obligations of [London Mining] contained in clause 6.1 of the Deed [i.e. London Mining's guarantee obligation] so far as they may remain to be observed and performed and, for the purposes of clause 6.1 of the Deed, the Guarantor shall become a party to the Deed as if the Guarantor was named in the Deed as [London Mining]."

C. The judge's judgment

28. In relation to the claims for procuring breach of contract and conspiracy to injure, the judge's determination was limited to the questions of contractual interpretation. As he explained, there had been no attempt to "rely on other grounds such as the lack of a maintainable case regarding the requisite knowledge or intent that would need to be established for such a claim to succeed applying decisions such as that of the House of Lords in *OBG Ltd. V. Allen* [2008] 1 A.C. 1".

29. The judge said that the court should "grasp the nettle" because short points of law or construction were raised on which the court had all the evidence it needed (see *ICI Chemicals & Polymers Ltd v. TTE Training Ltd* [2007] EWCA Civ 725 at paragraphs 12-14 per Moore-Bick LJ).

30. The judge said that the claims were founded on the contention that the Royalty Deed contained a term that London Mining and LMCL had agreed to transfer the obligation to pay the Royalty to any purchaser of the mine, and that this term was breached when the joint receivers of LMCL sold the mine to Timis Mining without attempting to transfer FT's right to its 0.3% royalty.

31. The judge considered the law on contractual interpretation and implied terms at paragraphs 40-48. He cited the well-known passage at paragraph 15 of Lord Neuberger's judgment in *Arnold v. Britton* [2015] UKSC 36, where he said:-

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

32. The judge then summarised paragraphs 17-23 of Lord Neuberger's judgment in *Arnold v. Britton* and cited well-known principles and *dicta* from *Wood v. Capita Insurance Services* [2017] UKSC 24, *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900, *Marks & Spencer plc v. BNP Paribas Securities Services* [2016] AC 742 at [18]-[21], and *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 180 CLR 266 at 283.

33. The parties were generally in agreement as to the applicable law. However, the judge noted at paragraph 46 that there was some disagreement about the fifth principle set out in Lord Neuberger's speech in *Marks & Spencer*, that an implied term "must not contradict any express term of the contract". The issue was whether that principle could be extended so as to exclude implied terms which deal with the same subject matter as express terms. Having cited *Broome v. Pardess Co-operative Society of Orange Growers* [1940] 1 All ER 603 at 612C-D, *Persimmon Homes (South Coast) Ltd v. Hall Aggregates (South Coast) Ltd* [2008] EWHC 2379 (TCC) at paragraph 46(b), and *Irish Bank Resolution Corp Ltd v. Camden Market Holdings Corp* [2017] 2 All ER (Comm) 781 at paragraph 36, the judge concluded at paragraph 48 that there was "no absolute rule that, if there is an express term covering a particular subject, that necessarily excludes the possibility of any implied term where there is no linguistic inconsistency. Rather, the correct approach, reflecting common sense, is that the existence of such an express term makes the co-existence of a further implied term on the same subject unlikely and especially so in a lengthy and carefully drafted document on which legal professionals have been advising". I can say at once that I agree.

34. The judge concluded that there was no express term or implied term of the type claimed in the APOC.

35. The judge first explained why the Royalty Deed was not to be interpreted as including the procuring obligation contended for, as follows:-

> "51.1. It is important to bear in mind that the Royalty Deed was a document forming part of a suite of agreements that were professionally drafted with eminent solicitors representing the parties (Norton Rose LLP representing the Claimant and Travers Smith LLP representing London Mining and LMCL). They were evidently drawn up following negotiations that took place over several months (between March to June 2012). In my judgment this aspect gives added force to the observations of Lord Neuberger in Arnold that the plain and ordinary meaning of the language used will normally be the surest guide to the true interpretation of the agreement.
>
> 51.2. I do not regard the plain and ordinary meaning of any of the provisions relied upon by the Claimant as giving rise to the express terms set out in the APOC. Far from it. As to this:
>
> 51.2.1. The most obvious place to include an obligation on the part of London Mining to procure that any purchaser of the Marampa Mine enter into an "Accession Deed" or otherwise take on an obligation to pay the Royalty would have been in clause 6. But no such wording appears. Instead clause 6.3 limits the obligation on the part of London Mining to procure that a party enters into a direct obligation to pay a royalty to the Claimant to the situation where that

party is a "Relevant Entity" that has commenced "Iron Ore Production". If there really was an obligation to procure that a third party acquiring the mine should enter into a similar obligation it would have been straightforward to have so provided.

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

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

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

36. Secondly, the judge rejected FT's argument based on commercial common sense for three reasons:-

i) The question of whether the settlement, of which the Royalty Deed formed part, was prudent or imprudent from the point of view of FT was difficult to determine without a comprehensive review of the preceding Facilitation Agreement and the entirety of the settlement package, none of which had been attempted.

ii) It had been held in *Arnold v. Britton* that the natural meaning of the language used is not to be disregarded simply because it would mean that the agreement might then be imprudent for one of the parties.

iii) The contention that it did not make sense for London Mining to have a continuing obligation to pay the Royalty on a change of control, but not on a sale of the mine, was founded on the assumption that London Mining would have no continuing liability to pay the Royalty after a sale of the mine, which he held to be wrong.

37. The judge rejected FT's contention on implied terms for the following reasons:-

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

> 54.2. Clause 6.2.1 expressly provided for the consequences following from a purchaser acquiring all or substantially all of the assets of LMCL or a "Relevant Entity", which in practice would be likely to be the [mine]. In those circumstances London Mining's obligations under the Royalty Deed, with certain exceptions (most particularly those arising under clause 6.1) were to cease immediately upon the execution of an "Accession Deed" by the purchaser. The natural meaning of this provision is that absent the execution of an "Accession Deed" the obligations of London Mining under the Royalty Deed would continue.
>
> 54.3. Similarly clause 6.2.2 expressly provided for what was to occur in respect of the guarantee obligations of London Mining under clause 6.1 where a purchaser acquired all or substantially all of the assets of LMCL or a "Relevant Entity". The guarantee obligations of London Mining would cease to apply where a "Deed of Guarantee" (in the form specified in Part B of Schedule 1 to the Royalty Deed) was executed by that purchaser and it met specified financial requirements. The natural meaning of this provision is that the guarantee provided by London Mining under clause 6.1 was to continue in the absence of these conditions being fulfilled.
>
> 54.4. Both parties have pointed to the difficulties of implementation of the literal wording of the Royalty Deed that arise if London Mining remained subject to its obligations under that deed in circumstances in which a purchaser had acquired the [mine]. For example, the Royalty provisions in clause 3.1 refer to the royalty as being a percentage of "Marampa Iron Ore" sold "by LMCL or the Relevant Entity" and not by reference to iron ore derived from that mine that was sold by a purchaser of their assets. There are similar difficulties with a large number of the definition provisions and some of the other clauses. Read literally they tie the obligations of London Mining to pay the Royalty to the sale of iron ore and the operating activities of LMCL or a "Relevant Entity". In my judgment, however, this is an instance where there plainly is the need to imply a provision to make the Royalty Deed operate effectively and in so far as necessary the above references should by implication be extended so as also to cover the production and sale of iron ore by a purchaser where London Mining had not escaped from its continuing obligations by virtue of the execution of an "Accession Deed" or "Deed of Guarantee" under clause 6.
>
> 54.5. As regards the suggested difficulty in implementing the invoicing arrangements under the Royalty Deed, where London Mining remained liable to pay the Royalty despite a purchaser acquiring the mine, I am not persuaded that these exclude the analysis set out above. … In essence [FT] contended that there might be insuperable difficulties in obtaining the data required to prepare and provide "Sales Value Statements" and "Tonnage Statements" where the mine had been acquired by a purchaser but LMCL or a "Relevant Entity" or London Mining remained responsible for providing such statements to the Claimant. The only basis for this suggestion was an assertion in Mr Turner's witness statement that the information to be provided in such statements was not available from any source than London Mining/LMCL while the mine was operated by them. … Even assuming [that] was correct,

> however, it would then support the implication of a term that LMCL or the "Relevant Entity" and London Mining were required to use their best endeavours to obtain such information from a purchaser of the mine. …"

38. The judge concluded that there was no need to imply any such terms, it would not be reasonable or equitable to do so, and the terms proposed were not so obvious as to go without saying. Accordingly, the judge dismissed FT's claims for breach of contract, procuring breach of contract and conspiracy to procure such breaches.

39. In relation to the breach of duty claims against the Administrators, the judge recorded that FT accepted that, to succeed, it had to show (a) a special relationship between FT and the Administrators, and (b) the existence of special circumstances (which were said to be the dissolution of London Mining, and the existence of special damage caused to the Claimant as opposed to creditors as a whole).

40. The judge held that, even accepting Mr Turner's evidence, this did not justify a finding of assumption of responsibility by the Administrators, because it was "very far from sufficient to give rise to a special relationship of the type required to establish a duty to FT specifically separate from the body of creditors of London Mining as a whole".

41. In relation to the law on duties arising from a special relationship, the judge cited *Oldham v. Kyrris* [2004] BCC 111 at paragraph 143, *Peskin v. Anderson* [2001] BCC 874 at paragraphs 31-34, and *Sharp v. Blank* [2017] BCC 187 at paragraph 12. He held that the requirements for such a duty to arise had not been satisfied. The judge pointed out that Mr Turner had not referred to any representation by Mr Downs upon which he relied, nor to anything that Mr Downs had said or done that suggested he was prepared to act in any other way than as an administrator who was protecting the interests of creditors generally. He commented that it would have been surprising if an assumption of responsibility or special relationship had arisen, since FT's interests "were potentially adverse to those of the remaining creditors and would potentially have caused significant difficulties for the administration". He also said that the purchaser taking on responsibility for the Royalty would have been "likely to result in a reduction in the consideration realised on sale and thereby to cause prejudice to other creditors". Moreover, Mr Timis's evidence that he would have been prepared to take on the responsibility for the Royalty without asking for a lower price did not alter his conclusion because "[e]ven assuming the evidence of Mr Timis was entirely credible … that is not something that any reasonable administrator could have foreseen".

42. The judge then rejected the suggestion of special circumstances, based on London Mining's dissolution preventing FT making a misfeasance claim under paragraph 75 of Schedule B1 of the Insolvency Act 1986. He cited *Pulsford v. Devenish* [1903] 2 Ch 625, *James Smith & Sons (Norwood) Ltd v. Goodman* [1936] Ch 216, and *HIH Casualty and General Insurance* [2006] 2 All ER 671 at paragraphs 115-121 in order to hold that this was not a case of a special class of breach (such as, for example, where administrators caused loss to a creditor by distributing assets without regard to his claim). If such a special duty had existed, it would have caused potential problems for the administration.

43. Finally, the judge rejected the claim for unfair harm under paragraph 74, having cited Blackburne J in *Four Private Investment Funds v. Lomas* [2009] 1 BCLC 161 at [33]-[39], and referred to *Re Springfield Retail Ltd* [2010] CSOH 115, on the grounds that it was impossible to see how any harm caused was unfair, when seeking to persuade a purchaser to take on the obligation of paying the Royalty would have harmed the insolvent estate.

FT's arguments

44. FT focused its argument on the contention that the process of contractual interpretation required the court to determine the objective intentions of the parties from the words of the contract. Clauses 3.5, 3.10, 6.2 and 12.11 of Royalty Deed clearly demonstrated, according to FT, that the parties intended and expected the Royalty to be invoiced and paid after a sale of the mine as well as after a sale of the shares in LMCL. Accordingly, the Royalty Deed should be construed in that way, or terms should be implied to achieve that commercial expectation.

45. When pressed about the precise terms that FT submitted should be implied, Mr David Lord QC, leading counsel for FT, presented an amended draft APOC in which the following implied terms were contended for:-

> "In contemplation of and/or upon the sale or transfer of the Marampa Mine to a third party, London Mining and/or LMCL were under an obligation to:
>
> (i) Secure the agreement of the new owner of the Marampa Mine to pay or procure payment of the 0.3% Royalty on terms which are the same as the terms of the Royalty Deed and in particular Clauses 3.5 and 3.10 thereof; and/or
>
> (ii) Obtain an executed Accession Deed [in the form set out in Schedule I Part A to the Royalty Deed, amended so that the Purchaser of the mine undertook to FT to comply with the provisions of, and perform all the obligations of LMCL contained in the Royalty Deed so far as they remained to be performed and agreed to become a party to the Royalty Deed as if the Purchaser was named in the Royalty Deed as LMCL]".

46. FT submitted that the Royalty Deed worked perfectly well on the sale by London Mining of the shares in LMCL, but the terms of the definition of "Market Value" and clauses 3.1 and 3.3 made clear that no Royalty was payable by London Mining or LMCL and that there was no continuing guarantee liability under clause 6.1 after the sale of the mine.

47. The implied terms contended for might have been formulated differently in different documents as the case progressed, but the intention of the parties was clear from the Royalty Deed. A term requiring London Mining and/or LMCL to procure the purchaser to agree to pay the Royalty or enter into an accession deed is obvious and necessary to make the Royalty Deed work as the parties intended.

48. FT submitted that there must have been an arguable case that the Administrators owed FT a duty, because Mr Turner's evidence could not be rejected at the strike out stage. This applied whether or not FT's interpretation arguments were accepted. The

circumstances were special, because Mr Turner's belief that the Administrators would draw the Royalty Deed to the attention of a Purchaser and ensure that it would agree to take on responsibility for the Royalty was entirely reasonable on the evidence. It might have been different if the Administrators had filed evidence to explain what they had done, but they have not. There was no evidence that the Administrators even thought there was a conflict between the interests of FT and other creditors.

49. In relation to FT's claim under paragraph 74, it submitted that the harm it sustained was the loss of the Royalty or alternatively the loss of opportunity to obtain the Royalty from the owner of the mine. Paragraph 74 only required the applicant to be a creditor. FT has sustained loss as a creditor. It has been treated unfairly as it has been led to believe that the purchaser would be asked to pay the Royalty, and it has lost its claim against that purchaser.

The defendants' argument

50. The defendants supported the judge's reasoning, and have not filed any respondents' notice. Nonetheless, Mr Daniel Bayfield QC, counsel for the defendants, objected to Mr Lord submitting another draft APOC with newly drafted implied terms during the hearing. He submitted that there were two fundamental points on the alleged implied terms. First, this was a situation where the parties agreed express provisions to protect FT in the event of an asset sale. Those provisions may or may not work, but, because they have attempted to do so, a different mechanism cannot be implied. Secondly, FT has been wholly unable to identify any clear, certain and obvious term that should be implied to make the Royalty Deed work on an asset sale.

51. Mr Bayfield told us that he had submitted to the judge that it did not matter if London Mining had a continuing obligation to pay the Royalty after a sale of the mine. He accepted before us that it was hard to see how the implied terms which the judge adumbrated at paragraph 54.4 of his judgment satisfied the principles for which he contended. Those principles were, briefly stated, that the court should: (i) discern the parties' intentions from the document itself, (ii) construe the meaning of the express terms before considering whether to imply terms,[10] (iii) not imply a term that contradicts an express term,[11] (iv) think it unlikely that a term will be implied where the contract deals with the same subject matter,[12] (v) regard the fact that an implied term may take several different formulations as a classic sign that it is neither necessary nor obvious,[13] (vi) not push construction beyond its proper limits in pursuit of remedying what is perceived to be a flaw in the working of a contract.[14]

52. The defendants accepted that there were drafting errors in the Royalty Deed. The drafters had wrongly assumed that, on an asset sale, there would be a continuing primary royalty obligation on LMCL or someone else, and obligations on London Mining; otherwise they would not have included an asset sale in clause 6.2.2.

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10 See paragraph 28 of *Marks & Spencer supra*.

11 See paragraph 28 of *Marks & Spencer supra*.

12 See the authorities cited by the judge above.

13 See Rix LJ at paragraph 25 in *Port of Tilbury v. Stora Enso Transport & Distribution* [2009] 1 Lloyd's Rep 391.

14 See *Re BCA Pension Trustees Ltd* [2016] 4 WLR 5, at [22], per Snowden J.

53. So far as duties were concerned, the defendants submitted that no special relationship or special circumstances giving rise to a duty of care or a fiduciary duty could possibly have arisen on the basis of Mr Turner's evidence. The Administrators were not at liberty to improve the lot of one unsecured creditor at the expense of either the secured creditors or other unsecured creditors. Their duties were owed to the company for the benefit of the creditors as a whole.

54. Mr Bayfield submitted that the paragraph 74 claim was hopeless, because, as Blackburne J had said at paragraph 39 in *Four Private Investment Funds v. Lomas supra*, where administrators have acted in the interests of creditors as a whole, no case of unfair harm is established.

First issue: Was the judge right to hold that, after a sale of the mine, terms should be implied into the Royalty Deed to the effect that London Mining had a continuing obligation to procure and guarantee payment of royalties?

55. The judge and both parties accepted that clauses 3.1, 3.3, 3.4 and 3.9 and the definitions of Relevant Entity and Iron Ore Production make clear that LMCL's primary payment obligation and London Mining's secondary procuring payment obligation only create an obligation arising from sales of iron ore from the mine made by LMCL or another direct or indirect subsidiary of London Mining.

56. The judge thought that a term needed to be implied to extend these obligations to "cover the production and sale of iron ore by a purchaser [of the mine] where London Mining had not escaped from its continuing obligations by virtue of the execution of an "Accession Deed" or "Deed of Guarantee" under clause 6". I do not agree. As it seems to me, the principles extracted from the authorities by Mr Bayfield (with which FT did not really disagree) point firmly against the need to imply any such term. In particular, the judge's proposed term would contradict the clear and expressly agreed terms of the Royalty Deed. Moreover, his reasons for the implication are not entirely clear from paragraphs 51.3, 54.4 and 55.5 of his judgment. He seems to have thought that the implication would make the guarantee in 6.1 and 6.2 workable, even in the event of a sale of the mine. In fact, however, the implications he proposed would simply impose obligations on LMCL and London Mining, which were not agreed by the parties. Moreover, in my judgment, such an implication does not assist in determining whether FT's central submissions on either interpretation or implied terms are valid.

57. For my part, I would hold that there was no basis in law to imply any of the terms suggested in paragraphs 54.4 and 55.5 of the judgment.

Second issue: Was the judge right to refuse to interpret the Royalty Deed or to imply a term so as to provide an obligation on London Mining and/or LMCL to procure a purchaser of the mine to pay the royalties or enter into an accession deed?

58. It is essential, as both parties accepted, to decide first on the proper interpretation of the Royalty Deed. Mr Lord submitted that FT's interpretation followed naturally from the parties' intentions disclosed in clause 3.5 of the Royalty Deed.

59. As I see it, however, clause 3.5 went no further than providing that, in the event of a sale of the mine to a New Asset Holder, the machinery in clause 3.4 would be

amended to provide for that entity to provide FT with Sales Value Statements and Tonnage Statements, so that FT could issue invoices to that New Asset Holder for the Royalty. That clause could not and did not impose enforceable obligations on any New Asset Holder as a third party to the Royalty Deed. The parties must be taken to have known that. The critical obligations on the parties to the Royalty Deed in the event of a sale of the mine to such a third party, are, therefore, to be found in clause 6. It is worth mentioning in passing that the payment and procuring payment obligations in clause 3.9, even when referring to clause 3.4, as amended by clause 3.5 on a sale of the mine, do not purport to place payment or procuring payment obligations on a New Asset Holder.

60. Clause 6 does not seem to me to be as difficult to understand as may have been suggested. Clause 6.1 is simply a guarantee obligation on London Mining to pay the Royalty if LMCL or another subsidiary of London Mining is operating the mine. The absence of payment obligations in respect of iron ore extracted by third parties has no effect on the operation of clause 6.1, which deals only with changes of control of LMCL or another London Mining subsidiary.

61. The problem arises from clause 6.2 which says, in its introduction, that it applies to both a change of control and a sale of the assets of LMCL, but does not have any other provisions showing how it was intended to work on a sale of the assets. Indeed, the Accession Deed that triggers the cessation of London Mining's obligations (save for the clause 6.1 guarantee and clause 9 confidentiality) simply replaces London Mining with the Purchaser, but omits to address the fact that the Royalty will not be payable at all under clause 3 once a New Asset Holder is selling the iron ore extracted from the mine. Likewise, clause 6.2.2 simply abrogates London Mining's clause 6.1 guarantee, once another guarantor signs up to the Deed of Guarantee, but also does not address that same omission.

62. There is, however, an overarching reason why the Royalty Deed cannot be construed as FT contends. That is because FT seeks, by its interpretation, to impose on London Mining and LMCL an obligation to procure a New Asset Holder to pay the Royalty directly to FT. But there is no relevant obligation on either London Mining or LMCL to procure any such thing on a change of control; so why, one might ask rhetorically, should the Royalty Deed be construed as imposing such an obligation on a sale of the assets?[15]

63. Clause 6.2.1 provides that London Mining's procuring payment obligations under clause 3.1 shall cease when a third party executes an Accession Deed. It does not impose any obligation on London Mining to procure the execution of an Accession Deed. Likewise, clause 6.2.2 provides that London Mining's guarantee obligation under clause 6.1 shall cease when a third party executes a Guarantee Deed. It does not impose any obligation on London Mining to procure the execution of a Guarantee Deed.

64. In these circumstances, it is very hard to understand how the Royalty Deed could be construed, either as a result of the aspirational provisions of clause 3.5 or the further

[15] It is true that clause 6.3 provides for such a procuring obligation where a Relevant Entity commences Iron Ore Production, but that is an isolated instance not generally applicable on any other change of control.

assurance obligations in clause 12.11, as imposing an obligation on London Mining or LMCL on a sale of assets that is not imposed on them on a change of control. In *Dear v. Jackson* [2013] EWCA Civ 89, McCombe LJ made clear at [35] that a further assurance clause that required the "parties … to take such other actions as may be reasonably required to … give effect to" the agreement first requires "one to know what the parties have agreed that the agreement shall do". Clause 12.11 is to the same substantive effect as the clause in *Dear v. Jackson supra*. FT has not pointed to anything that has not been done that the Royalty Deed actually, by its terms, requires to give it effect. Clause 12.11 does not assist in interpreting the true meaning of clause 3.5 or the Royalty Deed as a whole.[16]

65. I accept that the Royalty Deed can be said to 'work' in the event of a change of control of LMCL. It seems likely that the parties envisaged a change of control of LMCL as the most likely way of selling the mine, because of the need to operate through a compliant Sierra Leonian subsidiary. But none of that means that the Royalty Deed can be construed as imposing broad procuring obligations of a kind that are not otherwise envisaged by its terms. The Royalty Deed provides for London Mining to be bound by a continuing effective guarantee if there is a sale by a change of control of LMCL. It does not provide for any continuing effective guarantee by London Mining if there is a sale of the assets because, in such a situation, save in respect of arrears of royalty, there is no continuing primary royalty obligation. When LMCL or London Mining's subsidiaries stop selling ore from the mine, the Royalty stops, so London Mining's guarantee under clause 6.1 has nothing to bite on.

66. FT's case cannot, I think, be saved by the implication of terms. None of the rules applicable to the implication of terms is satisfied. First, it is less likely that new unexpressed obligations will be implied into a contract negotiated and drafted by professional lawyers on both sides. Secondly, the suggested term is not obvious or necessary to give effect to the agreement. It would impose an entirely new type of obligation, not otherwise contemplated for third party sales, upon London Mining. Thirdly, the suggested term would not give effect to the intentions of the parties, even as gathered from clause 3.5 as contended for by FT. The parties seem to have understood that further contractual obligations would need to be agreed in various cases where sales or changes of control occurred. There is no reason to suppose that they thought there would be an automatic obligation to procure that a purchaser signed up to pay the Royalty to FT in all cases; rather the reverse. London Mining remained on the hook in some situations, but not in others, and it could get itself off the hook in specified ways in yet other circumstances. All this is hardly surprising bearing in mind that the parties' lawyers, at least, would have understood how difficult it would be to protect FT against the insolvency of London Mining and its subsidiaries. It is, therefore, less remarkable than Mr Lord contended that the Royalty Deed failed to provide FT with the watertight protection that it would no doubt have liked.

67. The fourth reason why a term cannot be implied is that a term is less likely to be implied when the parties have considered the situation concerned, but not expressed the mechanism that is contended for. The fifth reason is simply that there is no single implied term or set of implied terms that can be suggested as being necessary to make

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[16] FT referred also to *Millen v. Karren Millen Fashions* [2016] EWHC 2104 (Ch) at [222]-[247], but those passages do not take the matter any further.

the Royalty Deed work. FT has had more than one attempt at formulating the implied term it says is obvious. Its latest attempt is to allege that London Mining and/or LMCL were under an obligation to secure the agreement of the Purchaser of the mine to pay or procure payment of the Royalty on the terms of Royalty Deed and in particular clauses 3.5 and 3.10 and/or to obtain an executed amended form of the Accession Deed. We can assume for present purposes, as Mr Lord submitted, that these two formulations are to the same effect. Another way of achieving something similar, but not identical, would have been if the parties had added the New Asset Holder into clause 3.9 so that it had read "LMCL … shall pay and London Mining shall procure that LMCL … ***or the New Asset Holder*** shall pay any invoice issued in accordance with clause 3.4 …". That possibility would at least have the benefit of using an existing mechanism in the Royalty Deed. What it demonstrates, however, is that, whilst the parties may have made some error in the drafting of the Royalty Deed, the nature of that error is far from clear. Was it intended that London Mining should continue to be liable for the Royalty until an Accession Deed and/or Deed of Guarantee was executed as the judge thought? Was it intended that there should be a simple procuring obligation to pay the Royalty placed on London Mining in the event of a sale of the mine? Or was it intended that London Mining should be required to go the whole hog, and procure the Purchaser to accede to the full gamut of the Royalty Deed as is now alleged by FT? There are likely to be many more possibilities and combinations. The court cannot speculate as to which, if any of them, is what the parties may have intended. It may be that they intended none of them. It is wholly unclear from the words of the Royalty Deed and the relevant factual matrix put forward by the parties.

68. I have, therefore, concluded, that the judge was right to refuse to interpret the Royalty Deed or to imply a term so as to provide an obligation on London Mining and/or LMCL to procure a Purchaser of the mine to pay the royalties or enter into an accession deed. This may seem a hard outcome in a case where FT has been able to point to what seem to be drafting errors. In my judgment, however, the court should be slow to assume that such errors have been made, when it knows nothing of the circumstances in which the Royalty Deed and the other two agreements were entered into. One can envisage good reasons for exiguous provisions being made on an asset sale. We simply do not know.

69. I return finally to the insolvency context of this case. It cannot be a complete surprise that FT is left to prove in London Mining's administration, when both it and LMCL became hopelessly insolvent. That brings me, therefore, to the breach of duty claims that are said to apply even if London Mining was not obliged to procure the Purchaser to pay the Royalty.

<u>Third Issue: Was the judge right to hold that the Administrators owed FT no duty to protect it against losses caused by the failure to procure a purchaser to pay the royalties or to enter into an accession deed?</u>

70. The question of whether a director or another agent is liable in tort for economic loss has been well rehearsed. In *Williams v. Natural Life Health Foods* [1998] 1 W.L.R. 830, Lord Steyn explained at page 835 that, in order to establish personal liability, there must have been an assumption of responsibility such as to create a special relationship with the director or agent. The test for an assumption of responsibility is an objective one, and the primary focus must be on things said or done by the

defendant in dealings with the claimant, judged in the light of the relevant contextual scene, with the primary focus on exchanges which cross the line (see also, in this connection, the cases cited by the judge: *Peskin v. Anderson supra* at paragraphs 31-33, *Oldham v. Kyrris supra* at paragraphs 142-3, and *Sharp v. Blank supra* at paragraphs 9-13).

71. The position of an administrator is no different, as Jonathan Parker LJ pointed out at paragraph 143 in *Oldham v. Kyrris*. The judge was, therefore, in my judgment, right, in the absence of specific representations being relied upon, to have been looking for special circumstances or a special relationship that amounted to an assumption of responsibility to FT. He was also right to say that neither Mr Turner's nor Mr Timis's evidence gave any support to FT's case that such a special relationship or special circumstances existed in this case.

72. All that happened here was what happens in hundreds of administrations every year. A creditor brought its particular problem to the attention of the administrator, who listened politely and said he would look into it. No promises were made, nor are any alleged. All that is alleged is that Mr Turner believed that the Administrators would do as he had asked. If he did so believe (and we must accept what he says at face value at this stage of the case), he was, I am afraid to say, commercially naïve. It was the duty of the Administrators in acting for London Mining to achieve the best realisation of its assets for the benefit of all the creditors.[17] It would not have been open to them to prefer the interests of one creditor over the others, and I may say, there is nothing in the evidence to suggested that they ever intimated they would do so. Even if Mr Timis might have agreed to pay the royalty for external commercial reasons, that does not make any difference to the Administrators' duty to obtain the best possible price for the assets. The duty of the joint receivers was to achieve the most for the secured lenders. They too would have had no business risking the value they were getting for the mine by asking Mr Timis to pay an expensive royalty.

73. I might say that, in my judgment, the same position would most likely have applied even if London Mining and LMCL had express or implied obligations to procure that a purchaser paid the Royalty. FT was a creditor of London Mining and LMCL. As I have said, the Administrators owed a duty to London Mining to sell the assets for the benefit of all the creditors. And as Norris J said in *BLV Realty Organization Ltd v. Batten* [2010] B.P.I.R. 277 at [20]: "[i]t may be in the interests of the creditors as a whole that one particular contract with one particular creditor is terminated (even wrongfully)".[18] As the judge said, had they asked Mr Timis to pay the Royalty, the chances were that he would have wanted to pay less for the mine. That is not a question of evidence; it is a matter of commercial reality of a kind that administrators face all the time. It would probably not have been a risk that the Administrators could

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17 See Lightman & Moss on the Law of Administrators and Receivers of Companies, 6th edition, at [12-025]-[12-026].

18 Norris J continued by saying: "for example if the administrators thought that a particular service could be provided more cheaply or to a higher standard than was currently being done by a creditor with a continuing contract for a service necessary to ongoing trading, with a beneficial result to the creditors as such. Or it may be that whilst in general ongoing contracts with creditors were being terminated (even wrongfully), one particular contract (e.g. to maintain the principal asset) was kept in being, with a beneficial result to the creditors as such. It would in each case be the interests of the creditors as a whole that would have to prevail over the particular interest of individual creditors: and that might result in different treatment".

properly have taken. On the evidence, the Administrators said nothing to Mr Turner that could fairly have been interpreted as leading FT to believe anything different. A trial at which further evidence could be given of these facts would not change these hard, but essential, realities of commercial life.

74. The judge was, therefore, right to hold that the Administrators owed FT no duty of the kind alleged by FT. On the evidence of Mr Turner, no special relationship was created between the Administrators and FT, and no special circumstances have been shown to exist such that a duty was created. The Administrators had no duty to protect FT as a single creditor of London Mining and LMCL against losses caused by the failure to procure Timis Mining either to pay the Royalty or to enter into any kind of accession deed.

Fourth Issue: Was the judge right to hold that FT could have no claim against the Administrators under paragraph 74?

75. Paragraph 74 provides as follows:-

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

76. In *Four Private Investment Funds supra* at paragraph 39, Blackburne J made it clear that there could be no unfairness sufficient to engage paragraph 74 without a suggestion that the administrators were acting otherwise than in accordance with their obligations under Schedule B1 of the Insolvency Act 1986 or an order of the court. There, as here, the Administrators were, as it seems to me, seeking in good faith to carry out their functions in the interests of the creditors as a whole. Accordingly, the judge was right here too to hold that any harm that might have been caused to FT by selling the mine without procuring Timis Mining to pay the Royalty could not have been caused "unfairly" within the meaning of paragraph 74.

77. Moreover, FT is not really complaining that it suffered harm in its capacity as a creditor of London Mining. That is a necessary requirement for a claim to be brought under paragraph 74: see e.g. *Re Coniston Hotel (Kent) LLP* [2015] BCC 1 at [36]. In this case, FT was admitted to proof in the administration of London Mining for its claim to future payments of Royalty, and it received a dividend together with other creditors. FT's substantive complaint is that the Administrators did not assist it, in its private capacity, to obtain a new royalty contract with Timis Mining. That would, had it been achieved, have given FT a benefit not available to other creditors of London Mining, and might have resulted in a lower price being realised from the sale of the mine, to the detriment of creditors generally.

Conclusion

78. For the reasons I have tried to give as shortly as possible, this appeal must be dismissed.

Lord Justice Males:

79. I agree.

Mr Justice Snowden:

80. I also agree.