Neutral Citation Number: [2019] EWCA Civ 344

Case No: A4/2017/2669 and 2726

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION COMMERCIAL COURT
CHRISTOPHER HANCOCK QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
[2017] EWHC 2177 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE FLAUX
and
LORD JUSTICE MOYLAN

- -

Between:

CHUDLEY & OTHERS	**Appellants**
- and -	
CLYDESDALE BANK PLC (Trading as Yorkshire Bank)	**Respondent**

- -
- -

Mr Stephen Cogley QC and Mr Christopher Jay (instructed by **Foot Anstey LLP**) for the **Appellants**
Mr Ian Wilson QC and Ms Rebecca Zaman (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing dates: 20 and 21 February 2019

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APPROVED JUDGMENT

Lord Justice Flaux:

Introduction

1. The appellants appeal with the permission of the Full Court granted on 30 October 2018 against the orders dated 24 August and 14 September 2017 of Christopher Hancock QC sitting as a Deputy High Court Judge in the Commercial Court. By that order, the judge dismissed the appellants' claim against the respondent bank ("the bank"). The first appellant and Mr Bean (whose estate is the fourth appellant) were former business partners. They and their wives, the second and third appellants, made a failed investment in the Cape Verde Islands. Their claim against the bank was put on the basis of a number of causes of action, but this appeal concerns only one of those, a claim in contract on the basis that there was a contract between Arck LLP and the bank contained in a letter of instruction ("LOI") dated 20 November 2008 from the former to the latter of which the appellants were entitled to claim the benefit under the Contracts (Rights of Third Parties) Act 1999.

2. In summary on this part of the case, the judge found that there was no binding contract between Arck and the bank contained in the LOI. If there had been a binding contract, the judge would have concluded that the appellants were entitled to claim the benefit of it under the 1999 Act. The judge went on to find that, even if there had been a contract of which the bank was in breach, this had not caused the appellants to lose the monies they invested. The appeal relates to these two issues: (i) was there a binding contract (the "no contract" issue) and (ii) if so, did the bank's breach of contract cause the appellants' loss (the "no loss" issue).

The factual background

3. The judge dealt with the facts in considerable detail in section 3 of his judgment from [10] to [145]. For the purposes of this appeal, it is not necessary to repeat all that detail, but rather I shall focus on the facts relevant to those two issues.

4. On 28 July 2006, Richard Clay and Kathryn Clark incorporated Arck, ostensibly to promote property development schemes. Some time that year they were introduced to Mr Carl Ashley, a senior partner of the bank employed in the Nottingham Business Centre. For present purposes, the first transaction introduced by Arck to the bank was the Santiago Golf Resort ("SGR") in the Cape Verde Islands which Mr Clay mentioned in March 2007. By June 2007 he told Mr Ashley that Arck would soon be taking deposits from clients on individual reservations for property.

5. On 28 June 2007, an account opening form was filled in at the bank relating to an account to be called 'Arck LLP – Segregated Client Account', account number 29544074 (the "074 Account"). The authorised signatories were Mr Clay and Ms Clark. On 29 June 2007, an account opening checklist was filled in. Apparently on that same day, the account was entered onto the bank's central core system.

6. On 23 July 2007, Mr Clay emailed Mr Tilly, a solicitor at Geldards LLP, and Mr Warsop, an accountant at UHT Hacker Young, to tell them that Arck had set up a segregated client account at the bank for a specific purpose, and to request assistance in relation to certain documents. In summary, the email stated that:

i) Arck sought financing from private equity clients for the development of a resort, the Santiago Golf Resort, in Cape Verde;

ii) In return for investors placing a deposit on a plot, Arck would agree to buy back the plot, at a profit for investors, on a particular date;

iii) Money invested would be deposited in Arck's 'Segregated Client Account', in respect of which Arck would be able to access only the interest, not the capital sums;

iv) In the interests of "our security and the security of the clients", and "to provide confidence to clients", Arck sought "a 'professional' signature on this account", hence the contact with Mr Tilly and Mr Warsop.

7. Following correspondence between Mr Tilly and Mr Clay, on 10 August 2007, another solicitor at Geldards, Mr Strickland, was asked by Mr Clay to produce certain documentation which Mr Strickland understood Mr Clay intended to present to potential investors: (i) a draft LOI to the bank to be printed on Arck letterhead instructing the bank to open a segregated client account in respect of the SGR project with monies deposited in the account to be dealt with in accordance with the terms of the LOI and (ii) a "to whom it may concern" letter to be signed by Geldards once the bank had signed the LOI setting out the manner in which the account was to be operated.

8. This SGR LOI (the first of a series) was signed and returned by Mr Ashley on 14 August 2007. On receipt of the signed LOI, Geldards drafted the "to whom it may concern" letter. After Mr Ashley had signed the LOI, steps were taken by the bank towards opening the segregated client account. However, as the judge found, neither that account nor any other segregated client account referred to in subsequent LOIs was ever opened. From August 2007 onwards, monies provided by investors were paid into the 074 account, which was not governed by any LOI.

9. In the period between the signature by Mr Ashley of the SGR LOI and his signature of the LOI in issue on this appeal, Mr Ashley signed two other LOIs. One dated 15 August 2007 related to the Fernie development project in Canada and the other, dated 11 November 2008, related to the Estrela Santiago Resort development project in Cape Verde.

10. On 20 November 2008, Mr Ashley signed the LOI in relation to the Paradise Beach project ("the PB LOI") which is in issue in these proceedings. Since the appellants found their claim on its alleged contractual effect it is necessary to quote it in full:

> "Dear Sirs,
>
> We hereby irrevocably and unconditionally instruct you to open a bank account for the sole purpose of the development of the Paradise Beach Resort Sal Cape Verde ("the Project") and be named 'ARCK LLP - Segregated Client Account' (the "Account") being an interest bearing deposit account in our name at Yorkshire Bank of East Midlands Regional Business Centre… (or any successor in business of that bank from time to time) ("the Bank"), and to hold and deal with all monies standing

> to the credit of the Account from time to time together with all interest accruing thereon (the "Balance") as follows:
>
> 1. All interest accruing on the Balance is to be paid to Arck LLP's account with the Bank sort code 05-06-41, account number 29504702 on the first business day of each month or otherwise as we shall direct from time to time; and
>
> 2. Subject to paragraph 3 (below) the remainder of the Balance is to be held in the Account until 1 August 2010 and thereafter paid to such persons and in such accounts as Arck LLP may direct;
>
> 3. Sums may be withdrawn from the Account and paid to such persons and in such amounts as Arck LLP may direct before 1 August 2010 on receipt by the Bank of an unconditional undertaking from Jose Limon Cavaco, the solicitor acting on behalf of Oliveira, Martins, Esteves e Associados Sociedade De Advogados, the lawyer for Paradise Beach Aldeamento Turistico Algodoeiro S.A. confirming that such withdrawn sums will forthwith be applied towards project costs and repaid before 1st August 2010.
>
> No variation to the terms of this letter shall be effective if it would change the terms upon which you hold the Balance in the Account as set out above.
>
> Please sign and return to us the enclosed copy of this letter to indicate your agreement to its contents."

11. That LOI was also signed by Mr Clay and Ms Clark on behalf of Arck. As the judge noted it differed from the earlier LOIs in that it did not simply provide for the retention of the sums in the account until a certain date, but provided that funds could be paid out before 1 August 2010 on receipt of a solicitor's undertaking that the monies would be repaid. This was confirmed by the "to whom it may concern" letter provided by Geldards.

12. One of the principal documents produced in relation to the Paradise Beach project was the Arck "Paradise Beach Sale and Repurchase Contracts (SARP) Key Features and FAQs" document dated 14 January 2009. The judge set out the relevant terms at [98], but in summary it provided that by a Promissory Contract of Purchase and Sale already agreed between Paradise Beach and Stirling Mortimer Global Property Fund PCC, Paradise Beach promised to sell to Stirling Mortimer the freehold of 'Unit X' of the Paradise Beach project (clause 1.1); and Stirling Mortimer promised to pay to Paradise Beach a purchase price, 'Y Euros', upon completion and the handing over of keys of 'Unit X' (clause 1.2). Pursuant to the SARP contract, Paradise Beach promised to sell to 'Investor A', and Investor A promised to buy from Paradise Beach, a benefit corresponding to a part of the future purchase price for £15,000 and Investor A promised to resell that benefit to Paradise Beach, and Paradise Beach promises to re-purchase that benefit for £18,240 on 1st June 2010.

13. The payments and repayments were to be effected as follows. The initial purchase of the benefit by Investor A would be effected by depositing £15,000 into the 'Segregated Client Account' of Paradise Beach's agent, namely Arck LLP. From there, on receipt by Arck of a letter of undertaking issued by McGuire Desmond, a firm of solicitors in Cork ("the MD LOU"), that £15,000 would be transferred to McGuire Desmond's client account at the Bank of Ireland. The re-purchase of the benefit by Paradise Beach would be effected by depositing £18,240 into Arck LLP's 'Segregated Client Account' for onward payment to Investor A.

14. The MD LOU which was to be issued to an investor on subscription to a SARP was designed to ensure that when Paradise Beach received monies on completion of the project, those monies would be paid through to the Arck account for onward payment to investors. In particular, the MD LOU provided that McGuire Desmond would make such payment as may be due to investors under the SARP contract into Arck's 'Segregated Client Account' on receipt of (a) a schedule signed by Arck Marketing Limited and Paradise Beach acknowledging the payment of monies to Paradise Beach by a party to the SARP Contracts, and details of such payment; and (b) the sale proceeds from any unit in the Paradise Beach development or the release to the beneficial ownership of Paradise Beach of at least 6,000,000 Euros held in escrow.

15. In December 2008, Mr Chudley the first appellant and Mr Bean (whose estate is the fourth appellant, he having died in 2013) were approached by Mr Reynolds on behalf of Aspire, an independent financial adviser with which client agreements were signed. In February 2009, Mr Reynolds introduced them to the Paradise Beach project. There were meetings about this investment opportunity in February.

16. On 12 March 2009, the first appellant and Mr Bean had a meeting with Mr Clay at the Day's Inn at Leicester Forest east services at junction 21 of the M1. Notwithstanding the first appellant's oral evidence to the contrary, the judge found (i) that the appellants were not given a copy of the MD LOU before that meeting ([236(4)] of the judgment); and (ii) that the first appellant was not given a copy of the PB LOI at the meeting and did not rely upon it prior to investing ([237] of the judgment). There is no appeal against those findings of fact.

17. The first appellant accepted in cross-examination that the decision to invest was made at that meeting, which is borne out by the fact that Ms Berry of Aspire emailed the Arck SARP application forms to the first appellant at 17.04 that day, together with payment instructions to pay the investment funds into Arck's 074 account. On 19 March 2009, the first and second appellants transferred £990,000 into the 074 account, having agreed 66 SARPs. On 24 March 2009, the third appellant and Mr Bean transferred £600,000 into the 074 account, having agreed 40 SARPs. Those monies were paid out of the 074 account by the bank at the direction of Arck. After some chasing, in June 2009, the first and second appellants received copies of their 66 SARPs and the third appellant and Mr Bean received copies of their 40 SARPs. These were signed and returned to Arck.

18. In the last quarter of 2009, Mr Reynolds passed on to the first appellant a number of encouraging messages from Mr Clay about the progress of the Paradise Beach development. On 23 March 2010, Mr Reynolds emailed Mr Bean telling him that Arck had said the payout on 1 June 2010 was still on course. On 25 May 2010, with that repayment date imminent, the first appellant emailed Mr Reynolds asking for an update

and was told there was no news although Arck redemptions were expected throughout June.

19. This changed radically when on 28 May 2010, out of the blue, Mr Reynolds emailed the first appellant saying that the developer was not in a position to pay redemptions at present due to delays in the construction and that redemptions should not be expected until February 2011.

20. On 29 June 2010, the first appellant attended a meeting with Mr Clay, at which Mr Clay informed investors that McGuire Desmond held 11,000,000 Euros in escrow, which was more than the sum due to the investors. However, on 27 July 2010, in reply to an email from solicitors instructed by the first appellant, Coodes, dated 1 July 2010, McGuire Desmond made clear there were no sums in escrow for the benefit of the SARP investors. It followed that there was thus no security for the investors. The first appellant complained to Mr Reynolds. Not long after, on 7 September 2010, Aspire went into liquidation.

21. On 1 November 2010, Mr Clay indicated that he had received confirmation from Paradise Beach that they would begin to pay out on SARPs in the week beginning 15 November 2010, which was clearly not true. Thereafter, on 6 May 2011, Coodes sent a letter before action to Paradise Beach, indicating that they intended to bring a claim for breach of contract, to which the response was that any claim was premature and would have to be brought in the courts of Cape Verde.

22. In December 2011, other investors commenced proceedings against Mr Clay and Arck and obtained a freezing injunction, notice of which was given to the bank. On 15 February 2012, there was a meeting at the Novotel at Birmingham International Airport between the investors, Mr Clay and representatives of Paradise Beach. Those representatives disclosed that the Paradise Beach development had been subject to a fraud in 2008 involving the extraction of money by various parties and that as a result, Arck had been engaged to raise further funds through the sale of SARPs. All funds invested via the SARPs had been used for the project. 530 units were complete and ready for occupancy, but the Stirling Mortimer funded sales, on which the SARPs depended, would probably not complete.

23. On 21 March 2012, Mr Clay and Ms Clark were arrested and charged with fraud and, in the case of Ms Clark, forgery. We were told that Mr Clay was charged with eight counts of fraud (including in relation to Paradise Beach) and pleaded guilty to three counts (none of which involved Paradise Beach). Ms Clark pleaded to one count of fraud (which related to Paradise Beach but had nothing to do with opening a bank account) and one count of forgery. They were subsequently sentenced in 2015 to terms of imprisonment, in the case of Mr Clay, 10 years. Arck had gone into liquidation on 11 April 2012. Following internal disciplinary proceedings within the bank, on 12 November 2012, Mr Ashley was found guilty of gross misconduct and gross negligence and summarily dismissed.

24. Various proceedings have been commenced and claims made by the appellants. In April 2014, they made a claim under the support scheme set up by the bank for investors. They relied upon the PB LOI. It is not clear exactly how and when the appellants obtained that document, but it is likely that it was as part of a disclosure process with solicitors acting for other investors. What is tolerably clear is that they did not have a

copy and indeed did not know of its existence when they first instructed solicitors in 2010 or when the date referred to in the LOI of 1 August 2010 passed.

25. In October 2015, the first and second appellants brought a claim for breach of contract against Paradise Beach in Cape Verde. Those proceedings are apparently ongoing. Proceedings were brought by both the Chudleys and the Beans under the Financial Services Compensation Scheme against Aspire and in July and December 2016 respectively the Chudleys and the Beans received compensation of £100,000.

26. The first and second appellants commenced the present proceedings in the Commercial Court on 5 March 2015. The third and fourth appellants were joined by amendment on 19 June 2015. The trial took place over seven days in March and April 2017. As we have said, the judge delivered his judgment on 24 August 2017, dismissing all the claims.

The judgment below

27. It is only necessary to consider the judge's judgment in relation to the issues which arise on this appeal and under the Respondent's Notice, namely (i) his conclusion that there was no binding contract between Arck and the bank; (ii) his conclusion that if there was a binding contract, it was one of which the appellants could take the benefit under the 1999 Act and (iii) even if there was a binding contract of which the appellants could take the benefit under the 1999 Act and the bank was in breach of that contract, the breach was not causative of any loss to the appellants.

28. Having recorded the parties' respective submissions as to whether the PB LOI was a binding contract, the judge set out what he said was the correct analysis at [155]. He said at [155(1)] that he accepted that if the question was properly characterised as one of intention to create legal relations, then in a commercial context the burden of showing a lack of intention was on the party denying such intent. The burden was a heavy on. This was particularly relevant where the alleged contract was in writing.

29. However, in his view, the real question in the present case was whether the document (i.e. the PB LOI) was the only relevant evidence. The question was thus: "*whether, viewed objectively, and by reference to the facts known to both parties at the time of the contract (including each party's knowledge of the other's intention) there was a contract*" ([155(3)]). The judge referred to the decision of Walker J at first instance in *So v HSBC Bank Plc* [2007] EWHC 2819 (Comm) from which he quoted extensively, to the effect that the LOI in that case was not a binding contract. That case went on appeal to this Court on a different point. The appeal was dismissed but the judgments in this Court do not address the present issue. The judge considered Walker J's decision was authority for the proposition that where the objective facts known to both parties included the fact that neither party intended to be legally bound, then this, objectively, would give rise to the conclusion that there was no contract.

30. Applying that analysis, the judge said the question became an evidential one-was he satisfied that Mr Clay did not intend the LOI to be legally binding, either as a new instruction or as contractual variation of the existing instruction in relation to the 074 account, that Mr Ashley understood this and agreed and that Mr Clay knew that Mr Ashley did not believe the LOI to be binding. The judge went on to say at [156] that the *"real question…is whether the apparently unconditional wording of the PB LOI*

was qualified by an agreement between the Bank and Arck that some further precondition needed to be satisfied before the obligation was to be triggered."

31. The judge recognised that on this question he only had the evidence of Mr Ashley and what emerged from the documentation. He rejected Mr Ashley's evidence that the contract was intended to be conditional upon approval by the FSA. However, what was clear from the pre-contractual documentation was that there was some precondition to the opening of the accounts. The judge thought the clearest evidence of this was in relation to the first SGR LOI where initial steps were taken to open an account but no account was ever opened. Thereafter no steps were taken to set in train account opening procedures which might have been expected had the obligations apparently undertaken in the LOIs come into effect. The judge recognised that this might be said to be equally consistent with the bank undertaking an obligation but then breaching it, but Mr Ashley had no reason to breach instructions. If the agreement to open an account was unconditional, there was no difficulty in complying with it and no downside in doing so.

32. The judge thus concluded at [157], he said not without some hesitation, that there was no concluded and unconditional contract on the terms of the PB LOI.

33. He then considered the appellants' alternative case that the LOI varied the existing mandate for the 074 account and rejected the argument that there was a variation. The LOI related to a new account, not to the pre-existing account. He concluded overall at [160] that objectively the bank and Arck did not agree that a new account would be opened and would be operated in a particular way.

34. He then considered, albeit obiter, the issue whether, if contrary to his conclusion, there was a binding contract, the appellants were entitled to take the benefit of it under the 1999 Act. He set out the relevant parts of section 1 which provide:

> "1 Right of third party to enforce contractual term.
>
> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."

35. Section 2(1) of the 1999 Act provides:

> "2 Variation and rescission of contract.
>
> (1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if—
>
> (a) the third party has communicated his assent to the term to the promisor,
>
> (b) the promisor is aware that the third party has relied on the term, or
>
> (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it."

36. The judge noted that the question was therefore whether: (i) the contract purported to confer a benefit on a third party and (ii) the appellants were expressly identified in the contract as a member of a class or as answering a particular description. He set out the parties' respective arguments and then at [168] rejected the bank's case on the first part of the question, holding that the entire purpose of a document such as the PB LOI is to provide a safeguard to third parties whose monies are being deposited with the bank. It is a benefit conferred on those third parties that their monies will not be released until specific contingencies are met.

37. On the second part of the question, the judge set out the rival submissions and referred to the decision of the Court of Appeal in *Avraamides v Colwill* [2006] EWCA Civ 1533; [2006] BLR 76 on which the bank relied and the decision of the Court of Appeal in *The Laemthong Glory (No. 2)* [2005] EWCA Civ 519; [2005] 1 Lloyd's Rep 688 and my decision at first instance in *The Alexandros T* [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep 579, on which the appellants relied. The judge said at [180] that in the light of those authorities two questions arose: (i) can the beneficiary be identified by a process of construction and is that process necessary here and (ii) can the same term satisfy both the requirements of section 1(3)?

38. At [181] he held that the principled answer to the first question must be yes, there can be express identification by a process of construction of the relevant term. He considered that the Court of Appeal in *Avraamides* were not intending to suggest the contrary but what they were saying was that a process of construction which amounted to implication was not justifiable. In any event, the judge considered *Avraamides* distinguishable from the present case as there was a distinct class identified here, those who had paid money into the relevant account, much more limited than in *Avraamides* where the class would have been a broad one of anyone to whom the company owed money.

39. In relation to the second question, he said he considered this a difficult one. He had previously cited a paragraph from *Chitty on Contracts* 32nd edition [18-097], now the same paragraph in the current 33rd edition, where the editors were critical of my judgment in *The Alexandros T* and concluded: *"In particular, s1(1)(b) (intention to*

benefit the third party) and s1(3) (express identification) are separate and cumulative requirements, so that reasoning which satisfies the first of these requirements cannot, of itself, satisfy the second". At [183] the judge disagreed with this conclusion holding that, although the requirements of the statute were cumulative, it does not follow that the same term cannot satisfy both requirements. The obvious example would be if a specific individual were identified as a beneficiary. Accordingly, the judge concluded at [184] that the reference in the LOI to a client account served not only to identify that clients are intended to benefit from the contract but also served to expressly identify such clients as the category of third parties intended to so benefit.

40. The judge then considered an alternative argument by the bank that if there was a contract it had been varied or rescinded, extinguishing by virtue of section 2 of the 1999 Act any entitlement the appellants had to the benefit of it. The judge rejected that argument. The Respondent's Notice sought to contend that the judge had been wrong to reject the argument. However, Mr Ian Wilson QC for the bank sensibly did not press the point orally, essentially accepting that it added nothing to his case if he was wrong on there being a binding contract.

41. The judge went on to deal at [191] and following with the issue of whether any loss had been caused by breach of contract on the part of the bank. At [192] the judge concluded that if the PB LOI had been a binding contract, the bank would have been in breach of that contract since: (i) the bank did not open a further account into which Paradise Beach investors' monies would be paid and (ii) the bank allowed investors' monies to be paid out without prior production of the Oliveira Martins ("OM") letter of undertaking. The bank has not sought to challenge those findings of breach in its Respondent's Notice.

42. In considering the bank's arguments that even if the contract had been complied with the appellants would have lost their money anyway and that the loss was caused by the failure of the scheme, the judge considered the relevant counterfactual as to what would have happened if the bank had not breached its contractual duty. He concluded at [196] that the burden of showing what would have happened had the contract not been breached must be on the appellants, since it was a necessary part of their claim. He cited [53] of Lord Sumption JSC's judgment in *BPE v Hughes-Holland* [2017] UKSC 21; [2018] AC 599. The normal questions of proof remained: had the appellants shown that, but for the bank's breach, the loss claimed would not have been suffered; and was the breach an effective cause of the loss.

43. The judge held that the relevant standard of proof would normally be that the appellants had to establish their loss on a balance of probabilities. However, there was an exception where the claim was for loss of a chance which was dependent on the actions of a third party. Even though there was no pleaded case based on loss of a chance, the judge was prepared to consider that alternative.

44. He considered first the claim for damages not based on loss of a chance. He accepted the appellants' submission that the relevant breach was paying out the monies without having received the OM letter of undertaking. At [201] the judge said there was no real evidence put forward as to what would or would not have happened if the breach had not occurred, other than surmise. The judge then set out the elements of that "surmise": (i) had the bank not paid out the monies they would have remained in the account until 1 August 2010; (ii) although the appellants maintained that in the period between

payment of the monies to the bank in 2009 and August 2010 some enquiry would have been made, there was no evidence to support that suggestion. No enquiry had in fact been made; (iii) the judge found it hard to believe that, if the monies had not been paid out of the account in 2009, matters would not have come to a head sooner than they did and the problems with the project would have emerged earlier. However since there was little concrete evidence as to what those problems were, the judge considered it impossible to reach any firm conclusions as to the appropriate counterfactual during that period; (iv) in June 2010, the appellants would almost certainly have enquired as to what was happening with their money (as they did) since they were expecting repayment; (v) in fact they were being told in June 2010 that there was a delay in repayment. There was no enquiry of the bank at that stage, but the first appellant's evidence was that this was because he had no reason to believe the OM undertaking had not been given and thus the monies correctly paid to Paradise Beach. That evidence was corroborated by the fact that when he asked, the Paradise Beach representatives told him that the monies had indeed been paid over to the Paradise Beach scheme; (vi) the bank submitted that if the money had remained in the segregated account until 1 August 2010, the natural hypothesis is that Arck would then have directed that it be paid out to the partners in Arck, causing the appellants the same loss as they suffered by the wrongful payment out in 2009; (vii) the only evidence in this regard was that Arck were in general fraudsters so that the judge was asked to conclude that if the monies had remained in the account, Arck would have ordered payment out to themselves in August 2010 causing the appellants the same loss.

45. At [202] the judge concluded that the evidence on this aspect meant that it was wholly impossible for him to conclude that the appellants had made out their case. There was not sufficient evidence as to the reasons for the failure of the project to enable him to reconstruct what would have happened if the money had been kept in the PB account. Accordingly at [203] he concluded that the appellants had not established on the balance of probabilities that any breach of contract had caused them the loss claimed.

46. The judge then considered the bank's alternative argument that the cause of the loss was the failure of the scheme. He said it was sufficient that the breach of contract was an effective cause of the loss which he would have found it was if the LOI was binding. The failure of the project would not have broken the chain of causation. The bank has not sought to challenge this aspect of the judge's reasoning in its Respondent's Notice.

47. The judge went on at [207] to [210] to reject any claim based on loss of a chance. Since neither party sought to argue before this Court that the claim was properly analysed as being for the loss of a chance, it is not necessary to consider this aspect any further.

The grounds of appeal and Respondent's Notice

48. The grounds of appeal are somewhat diffuse and convoluted. At the conclusion of the hearing at which permission was granted, Longmore LJ said that during the discussion that day, the points had become much more focused. He indicated that counsel should agree a list of issues, no doubt contemplating a series of short, bullet points on a single sheet of paper. What emerged was a five page document (increased to six by amendment shortly before the hearing of the appeal) just as convoluted as the grounds of appeal.

49. Perhaps wisely counsel did not refer to the list of issues at the hearing of the appeal. Rather, the argument proceeded on the basis that there were three principal issues for this Court to decide (two raised by the appellants and one by the bank in its Respondent's Notice):

(1) Whether the judge erred in concluding that the PB LOI was not a concluded and unconditional contract?

(2) Whether the judge erred in concluding that, if the PB LOI had been a binding contract, it was one of which the appellants could take the benefit under the 1999 Act?

(3) Whether the judge erred in concluding that the appellants had not established on the balance of probabilities that the bank's breach of contract had caused them the claimed loss?

50. It is those three questions to which oral submissions were directed and which I will analyse later in the judgment. As I have said, the further point in the Respondent's Notice about any contract having been varied or rescinded was ultimately not pursued by Mr Wilson QC in his oral submissions.

The parties' submissions

51. In his submissions for the appellants Mr Stephen Cogley QC was particularly critical of the judge's finding that the PB LOI was subject to some pre-condition, akin to a collateral contract which the judge was unable to identify. There was no evidential foundation for the finding of a pre-condition. He emphasised that the LOI was expressed to be an irrevocable and unconditional instruction. It was a written contractual document which according to its penultimate paragraph cannot be varied. It is possible for a document in writing not to be the full contract but there is a strong presumption that it is the full contract and only clear evidence could rebut that presumption.

52. Mr Cogley QC relied in that regard on a passage in the judgment of Lord Russell of Killowen CJ in *Gillespie Brothers v Cheney Eggar* [1896] 2 QB 59 at 62:

> "…although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

53. He also relied upon the judgment of Aikens LJ in *Barbudev v Eurocom Cable Management* [2012] EWCA Civ 548; [2012] 2 All ER Comm 963 at [30]-[32]:

> "30. The legal principles to be applied to these issues are not in doubt. On the issue of whether the parties intended to create legal relations, the leading case is now *RTS Flexible Systems Limited*

> *v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14. The court has to consider the objective conduct of the parties as a whole. It does not consider their subjective states of mind. In a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it and it is a heavy one.
>
> 31. If, as I conclude below, the agreement is found to be wholly in writing (which must be a question of fact), then the exercise of construction is a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person (ie. one with all the background knowledge reasonably available to the parties in the situation that they were in) would have understood the parties to have meant. The court must have regard to all the relevant circumstances and, in a business context, it should prefer the construction that is more consistent with business common sense.
>
> 32. On the question of an enforceable contract or not, it is for the parties to decide at what stage they wish to be contractually bound. To use the vivid phrase of Lord Bingham (as Bingham J) the parties are "masters of their contractual fate". They can agree to be bound contractually, even if there are further terms to be agreed between them. The question is whether the agreement is unworkable or fails for uncertainty. However, where commercial men intend to enter into a binding commitment the courts are reluctant to conclude that such an agreement fails for uncertainty."

54. Mr Cogley QC submitted that the bank came nowhere near satisfying the heavy burden of showing that what on its face was a binding unconditional contract was somehow subject to a pre-condition without which it was not binding. He pointed out that the bank had not pleaded a case based on the unidentified pre-condition which the judge found. The bank's pleaded case was a denial that Mr Ashley had ever signed the PB LOI, in other words a case that there was no contract whatsoever. That case was abandoned after Mr Ashley had been cross-examined. The judge also rejected at [156(1)] Mr Ashley's evidence that the LOI was conditional on the approval of the FSA. Because there was no pleaded case for the pre-condition, neither the bank nor the judge identified what the pre-condition was.

55. In the absence of any evidence to support the pre-condition, the correct analysis which the judge should have adopted was that there was a binding contract, but the bank was in breach. Mr Cogley QC submitted that there were three distinct breaches: (i) failure by the bank to open a Paradise Beach segregated client account; (ii) failure by the bank to hold the appellants' monies in the account and (iii) that the bank allowed the monies to be paid out of the account other than against an OM letter of undertaking.

56. On behalf of the bank Mr Wilson QC disputed the suggestion that there was no evidence to justify the judge's finding of a pre-condition. Whilst it was true that Mr Ashley's evidence was that he could not remember signing any of the LOIs, there was other evidence called by the bank, specifically the uncontroverted evidence of another bank

employee, Mr Colquhoun, whose witness statement dealt with the procedure that would have had to be followed to open a Paradise Beach segregated client account: completion of an account opening form and a bank mandate, money laundering procedures and Know Your Customer documentation. None of this had been completed.

57. Whilst the judge had not been able to say what the pre-condition was and Mr Wilson QC accepted candidly that he could not say either, he submitted that the judge had been entitled to infer from this inactivity in relation to what would have been necessary to open the account, that there was a pre-condition. In drawing that inference, the judge had looked at the totality of the evidence and made a finding of fact with which this Court should not interfere. Mr Wilson QC submitted that if, as the appellants contended, the bank was in breach in not opening the account, one would have expected Arck to say something and make a complaint. The riposte to that point from Mr Cogley QC was that the absence of complaint could be explained by the fact that nothing in the LOI was for the benefit of Arck as opposed to its clients who were investors in the Paradise Beach scheme.

58. In relation to the 1999 Act, the principal submission by Mr Wilson QC was that the reference to "client" in "Client Account" was not enough to amount to the express identification of a class for the purposes of section 1(3). The only express identification of a third party was at the end of paragraph 2 of the LOI: *"such persons…as Arck LLP may direct".* "Client" was just the name of the account. To get from that to what Mr Cogley QC argued was a class of investors in the Paradise Beach scheme involved a process of implication and inference which was not permissible: see *Avraamides v Colwill* at [19] per Waller LJ.

59. To the extent that the judge concluded at [182] that there was an expressly identified class in the LOI (investors who have paid money into the relevant account) that did not assist the appellants because they did not pay money into the account contemplated by the LOI which was never opened, but into the 074 account from which the money was transferred to a Bank of Ireland account as contemplated by the MD undertaking. Accordingly, the appellants were not within the class the LOI was intended to benefit. Mr Wilson QC submitted that the LOI was only intended to benefit those whose monies had been paid into a segregated Paradise Beach client account and, if no account was opened, that was the end of it, in other words the claim must fail.

60. He also submitted that there was no term in the contract intended to confer a benefit on investors. The appellants could not rely upon the same reference to "client" to satisfy section 1(1)(b) of the 1999 Act, the requirements of the two sub-sections were cumulative. There was no provision which set out the mechanism for the investors to get their money back.

61. Mr Cogley QC submitted that the bank's submission that the LOI would only protect those who made payments into the identified account and that since no such account was ever set up, the claim must fail, was specious. It would enable the bank to avoid liability by relying on its own breach. The LOI was to be construed on the basis that its terms would be complied with and the account would be opened. Mr Wilson QC's submission that if the account was not opened, that was the end of it was also inconsistent with the judge's finding at [192] (not appealed by the bank) that if there had been a binding contract, the bank was in breach of it not only by failing to receive

investors' monies into the specific segregated client account, but also by failing to treat the monies received by the bank in accordance with the terms of the LOI.

62. Mr Cogley QC accepted that it was not possible to expressly identify by implication, but submitted that it was possible to determine whether the relevant third party was a member of a class or answered a particular description by a process of construction. That a process of construction was permissible was clear from the decision of the Court of Appeal in *The Laemthong Glory (No. 2)* particularly at [48] of the judgment of the Court given by Clarke LJ. Mr Cogley QC submitted that the whole purpose of this LOI was to benefit and protect investors. As a matter of construction of the contract as a whole, the class expressly identified was clients of Arck who invested in the Paradise Beach project.

63. The judge had also been correct to conclude that the term which expressly identified the class could also satisfy the requirements of section 1(1)(b). As the judge had said, the obvious example would be a named individual beneficiary.

64. In relation to the question whether the appellants had established that the bank's breach of contract was causative of their loss, the primary case advanced by Mr Cogley QC was straightforward. The bank had been in breach of contract in paying the appellants' monies out as it did in 2009 without having the OM letter of undertaking and the appellants' loss was the removal of the money from the account without any undertaking being produced. Because this was not a professional negligence case where, whether it is an advice case or an information case, it is expressly contemplated that the claimant will be taking further steps in reliance on the advice or the information, there was no need for the appellants to show what would have happened to the monies if they had not been paid out in breach of contract or that the monies would have come back from the investment.

65. Mr Cogley QC submitted that if the bank wanted to say that the appellants would have lost their monies anyway even if the bank had not been in breach, for example because the monies would have stayed in the account and then been paid out to Arck on or soon after 1 August 2010, it was for the bank to plead and prove that case, not for the appellants to disprove it. The judge had got the burden of proof wrong at [196] of his judgment.

66. Alternatively, Mr Cogley QC submitted that, even if the burden of proof was on the appellants, the judge had been wrong to reach the conclusion that the appellants had not shown what would have happened but for the breach. If the account had been opened and all investors' monies held in it and not paid out because no OM undertaking would have been forthcoming, he submitted that matters would have come to a head as the Paradise Beach scheme would have failed, as the judge had recognised at [201(3)]. The judge had been wrong to suggest that it was not possible to say what would have happened but for the breach. Mr Cogley QC submitted that in all probability matters would have come to a head long before August 2010. In the real world, if the investors' money had not gone into the pipeline and been received by Paradise Beach, the investors, including the appellants, would not have received their SARPs and would have demanded their money back.

67. On behalf of the bank, Mr Wilson QC submitted that the appellants had to prove loss and causation, in other words that the loss they claimed was caused by the bank's

breach. Inherent in causation is that a claimant has to show that but for the breach it would not have suffered the loss in whole or in part. He relied upon [53] of Lord Sumption JSC's judgment in *BPE v Hughes-Holland* and the most recent application of the principle enunciated in the decision of this Court in *Manchester Building Society v Grant Thornton* [2019] EWCA Civ 40. That case concerned negligent advice by an auditor in relation to the accounting treatment to reduce the volatility of the mark-to-market ("MTM") value of swaps. This Court held that in order to prove that it would not have suffered the MTM losses if the advice had been correct, the claimant had to do more than establish those losses. It had to prove the counter-factual. As Hamblen LJ said at [88]:

> "…this is a case in which, in order to prove that it would not have suffered the MTM losses if GT's advice had been correct, MBS had to do more than establish the fact of the MTM losses. It also had to prove the counter-factual, namely that that loss would not have been suffered had it continued to hold the swaps. This is an aspect of proof of loss. It is not a matter of avoidance or abatement."

68. Mr Wilson QC submitted that that principle applied in the present case. It was not the monies being paid out of the account which caused the loss, but the making of the investment. The appellants had to show that but for the breach they would have recovered their monies from the investment. He submitted that this had always been a lacuna in the appellant's case. The appellants had no evidence to support their case that, in the counterfactual, but for the breach, they would have recovered their monies. Mr Cogley QC had made sterling efforts but it was too late. He had relied on what the judge said at [201(3)] about matters coming to a head, but as the opening words of [201] made clear, together with [202] and [203], the judge was not making any finding of fact but concluding there was no evidence to support the appellants' case.

69. Mr Wilson QC submitted that in the counterfactual of no breach, the appellants would have to show three matters to establish their case: (i) that they would have paid monies into the new segregated account, not the 074 account; (ii) that they would have taken steps to get their money back before 1 August 2010; and (iii) that ultimately they would have got their money back. They could not establish those matters. There was no evidence that if the bank had opened the Paradise Beach segregated client account the appellants would have paid into that account rather than the 074 account. Arck had never deployed the LOI. The burden was on the appellants to show that they had a contractual right to recover the monies from Arck that they would have exercised before 1 August 2010. The appellants' evidence had not addressed these points and whilst the first appellant had made enquiries in 2010, it was not until substantially later that he had made attempts to get the money back.

70. There were a number of difficulties facing the appellants. There was nothing in the terms of the LOI which provided a mechanism for the return of the monies. The appellants did not have a contract with Arck pursuant to which they could enforce the return of the monies. Their contract was with Paradise Beach and they were suing on that contract in the Cape Verde courts. Furthermore, the LOI and a claim against the bank were simply not on the appellants' horizon in 2010. Mr Wilson QC relied upon a passage in his cross-examination of the first appellant where the first appellant said that in 2010 he was looking for redress against Arck and Paradise Beach but not the bank

because the possibility of a claim against the bank was not in his mind. Mr Wilson QC relied upon the fact that the appellants had only become aware of the LOI at some point in about 2014 when they claimed under the bank's support scheme.

71. He also relied upon exchanges between the judge and Mr Cogley QC at the consequentials hearing on 11 September 2017 at which, amongst other things, the judge refused permission to appeal. The judge had said that the no loss point had been raised late in the day but the appellants had not had any evidence or a positive case as to what the relevant counterfactual would have been, so could not discharge the burden of proof which was upon them to show they had suffered loss as a result of the breach. This was essentially a fleshing out of what the judge had said at [202] of his main judgment.

Analysis and conclusions

72. The LOI is expressed to be an irrevocable and unconditional instruction from Arck to the bank to open the Paradise Beach segregated client account and to hold the monies paid into it only in accordance with the terms of the LOI. To all intents and purposes it is a binding contract signed on behalf of both parties. To that extent, it differed from the LOI considered by Walker J in *So v HSBC* which was signed only as a receipt. Of course, it would always be open to one of the parties to contend and establish that what appeared to be a binding contract was in fact subject to the fulfilment of a condition precedent, which had not in fact been fulfilled, so that the contract was not binding.

73. The burden of establishing that what is an apparently binding unconditional contract was in fact subject to a condition precedent which had to be fulfilled before it had contractual effect must be on the party alleging that there was a condition precedent. Where that condition precedent is not contained in the written document, the party who alleges that there was a condition precedent would have to establish by evidence both that the written document did not contain the entire agreement between the parties and that it had been agreed between the parties that there would be a condition precedent that had to be fulfilled before the contract came into effect. In the present case, that burden must have been on the bank to establish by such evidence that, on the balance of probabilities, the contract was subject to a condition precedent which had not been fulfilled.

74. One of the oddities of this case is that the bank was not in fact contending for the existence of the condition precedent or pre-condition which the judge found. Accordingly, there was no pleaded case as to what the pre-condition was or how and when it was agreed between the bank and Arck. I suppose it is theoretically possible for a contract to be subject to a pre-condition but for the party relying upon it not to be able to inform the court what its terms were or how and when it was agreed, but it would seem inherently unlikely that such a case would succeed on the balance of probabilities.

75. The judge seems to have lost sight of this. The stark reality is that the bank was not in a position before the judge or this Court to say precisely what the pre-condition was or how and when it was agreed. The evidence of Mr Colquhoun about account opening procedures on which Mr Wilson QC relied would have been supportive of other evidence of the existence of a pre-condition that those procedures be followed, if there had been such other evidence. However, there was not and, in its absence, the evidence of account opening procedures was neutral, in the sense that it was equally consistent

with the bank being in breach of contract in not following those procedures and opening the account.

76. In my judgment, there was simply no evidence that the contract contained in the LOI was subject to a pre-condition or, at the very least, there was insufficient evidence of the existence of such a pre-condition to establish its existence on the balance of probabilities. In concluding that the LOI was subject to a pre-condition and therefore not binding, the judge made a finding which was unsupported by the evidence and he erred in law. Accordingly, the LOI was a valid binding contract between Arck and the bank.

77. Turning to the question whether the appellants are entitled to claim the benefit of that contract under the 1999 Act, it is quite clear that determination of whether the requirements of section 1(3) have been met, in other words whether there is express identification of a class of which the appellants are members, will depend upon the construction of the contract as a whole, viewed against the admissible factual matrix: see *The Laemthong Glory (No 2)* at [48(ii)]. Where Waller LJ says at [19] of *Avraamides* that the word "express" does not allow a "process of construction or implication", it seems to me the word "or" must be in error and should be "by". Determination of whether there is express identification of the third party as a member of a class or as answering a particular description will be a process of construction of the contract as a whole as the Court of Appeal had held in *The Laemthong Glory (No 2)*.

78. In my judgment, construing the LOI as a whole, it is clear that the reference to "a client account" in the PB LOI was express identification of the class, clients of Arck who were investing in Paradise Beach, and the appellants were within that class, so that the requirements of section 1(3) were satisfied. Furthermore, like the judge I can see no principled reason why the same term of the contract cannot also satisfy section 1(1)(b), the requirement that the term purports to confer a benefit on the third party. The principal purpose of the LOI would seem to be to protect investors and, in that context, the provision for the opening of a segregated client account is clearly intended to benefit those investors by ensuring that their monies are held by the bank in a segregated client account subject to specific conditions.

79. The editors of *Chitty on Contracts* are no doubt correct that the requirements of section 1(1)(b) and 1(3) are cumulative, but it simply does not follow that the same term cannot satisfy both requirements. The fallacy in the contrary argument can be demonstrated by a variation of the judge's example. Suppose that the LOI had referred in the opening provision to the bank opening an account named "Arck LLP Segregated Client Account for Chudley and Bean monies". That would clearly be express identification of the appellants for the purposes of section 1(3). Any suggestion that the same provision did not purport to confer a benefit on the appellants would be patently absurd and the bank would never be able to establish under section 1(2) that, on a proper construction of the LOI, the parties did not intend the term to be enforceable by the appellants, on which the burden is on the bank: see [22] of *The Laemthong Glory (No 2)*. It follows that the judge was right to conclude that he would have decided the 1999 Act issue in favour of the appellants.

80. It may be said that it is somewhat serendipitous that the appellants can take the benefit of the contract contained in the PB LOI, given that they were unaware of its existence

at the time of their investment and when they first sought to recover that investment in 2010. However, the appellants' claim is not reliance based (their negligent misstatement claim having failed at trial) but is for breach of contract and it is not a requirement of the 1999 Act that a third party who is entitled to the benefit of a contract was aware of the contract at the time it was made or at any particular time thereafter.

81. In relation to the issue of loss, I consider that Mr Cogley QC is correct that the loss suffered by the appellants as a consequence of the bank's breach was the payment out of their monies in 2009 without any OM undertaking. Contrary to the judge's view, it is not a necessary part of the appellants' claim that they demonstrate what would have happened to the monies if there had not been a breach. As the judge recognised at [197], the *SAAMCO* principle was not engaged in the present case, since there was no question of the scope of the bank's duty in negligence. It follows that he was wrong to rely upon what Lord Sumption JSC said in *BPE v Hughes-Holland* at [53] which did engage the *SAAMCO* principle and which concerned the essential ingredients of the claimant's claim where that principle was engaged. Likewise the judgment of this Court in *Manchester Building Society* concerns the application of that principle so that it is not relevant here. To the extent that the bank contended that the monies would have remained in the account until August 2010 and then been legitimately paid out by the bank to Arck pursuant to the LOI and thus lost to the appellants, that was for the bank to plead and prove.

82. In any event, wherever the burden of proof lay, I agree with Mr Cogley QC that if the bank had not breached the contract and the appellants' and other investors' monies had remained in the account (as they would have done since, as was common ground, there never would have been any OM letter of undertaking presented to the bank) matters would have come to a head long before the 1 August 2010 date, probably in about August 2009. Mr Cogley QC's point that, if the money had not been received by Paradise Beach, the appellants would not have received their SARPs is probably a false point, since it seems to have been payment of the monies into the Arck segregated client account, in fact of course the 074 account, which triggered the issue of the SARPs. However, even if the appellants had received their SARPs, the reality is that Paradise Beach would not have received the investment monies to fund the project and would have raised queries.

83. It is more likely than not, given how the first appellant reacted when he was told in 2010 that return of the investment was delayed, that if he had learnt (as he would have done on this hypothesis in about August 2009) that the monies invested had not been paid over to fund the construction and completion of the project but remained in the account with the bank, he and the other appellants would have demanded their money back and the existence of the LOI would have come to light. In this context, despite Mr Wilson QC's arguments to the contrary, the admissions by the first appellant in cross-examination that on the facts which occurred he was not aware of any potential claim against the bank are of no assistance in determining what would have happened on the counterfactual hypothesis that the bank had complied with the terms of the LOI.

84. It is no answer to any of this that the monies were in fact paid into the 074 account. The judge found at [192] that if there was a binding contract (as I have concluded there was) the bank was in breach in two respects: (i) in not opening the segregated client account to which the LOI referred and (ii) in allowing investors' monies to be paid out without production of the OM letter of undertaking. If the bank had not breached the contract

in the first respect, the monies would have been deposited in the new segregated client account and the bank's contrary argument essentially seeks to take advantage of its own breach in an impermissible way.

85. I consider that it is clear that if the bank had not been in breach the monies would have remained in the account and the appellants would not have suffered the loss they did. The judge was wrong to conclude at [202] and [203] that the appellants had not established that their loss was caused by the bank's breach of contract. The appellants were entitled to recover their pleaded loss as damages for the bank's breach of contract.

86. It follows that, for the reasons I have given, I consider that the appeal should be allowed and that judgment should be entered for the appellants.

Lord Justice Moylan

87. I agree with both judgments.

Lord Justice Longmore

88. I agree with the judgment of Flaux LJ but would like to put my conclusion on the Contracts (Rights of Third Parties) Act 1999 in my own words. This presupposes that the PB LOI does indeed constitute a contract between Arck and the bank.

89. The contract contained in the PB LOI does not expressly provide that the Paradise Beach investors, who transfer their money into an account with the bank, may enforce the term requiring money to be paid out of the account on receipt of the OM undertaking. Section 1(1)(a) is therefore not applicable. But section 1(1)(b) provides that a third party may enforce such a term, if the term purports to confer a benefit to him, always subject to section 1(2). In my view the term requiring receipt of the OM undertaking before money is distributed is a term which purports to confer a benefit on the Paradise Beach investors – otherwise what is its point?

90. Section 1(2) provides that section 1(1)(b) does not apply if, on a proper construction of the contract, it appears that the parties to the contract did not intend the term to be enforceable by the third party. This is a carefully calibrated provision. The Law Commission report which preceded the 1999 Act (Law Commission No. 242) para 7.1 considered six possible tests of enforceability and its ultimate recommendation was contained in paragraph 7.6 of the report:-

> "We therefore recommend that:
>
> (8) the test of enforceability should be as follows:
>
> a) a third party shall have the right to enforce a contractual provision where that right is given to him – and he may be identified by name, class or description – by an express term of the contract (the "first limb");
>
> b) a third party shall also have the right to enforce a contractual provision where that provision purports to confer a benefit on the third party, who is expressly identified as a beneficiary of that provision, by name, class or description ("the

> second limb"); but there shall be no right of enforceability under the second limb where on the proper construction of the contract it appears that the contracting parties did not intend the third party to have that right ("the proviso")."

91. In further discussion of the second limb of the above test the Law Commission said this in para 7.17:-

> "This limb is concerned to cover those situations where the parties do not expressly contract to confer a legal right on the third party. In general terms it establishes a rebuttable presumption in favour of there being a third party right where a contractual provision purports to confer a benefit on an expressly designated third party. But that presumption is rebutted where on the proper construction of the contract that parties did not intend to confer a right of enforceability on the third party. In our view, this second limb achieves a satisfactory compromise between the aims of effecting the intentions of the contracting parties while not producing an unacceptable degree of uncertainty in the law."

And this is in para 7.8:-

> "(iii) The presumption of enforceability is rebutted where the proper objective construction of the contract is that the parties did not intend the third party to have the right of enforceability. The onus of proof will be on the contracting parties (usually in practice the promisor), so that doubts as to the parties' intentions will be resolved in the third party's favour. A promisor who wishes to put the position beyond doubt can exclude any liability to the third party that he might otherwise have had."

92. Thus, whereas the recommendation could have been that a party could only enforce a term conferring a benefit upon him if the contact gave him an express right to do so, the ultimate conclusion was that was not necessary and that, if the promisor wished to exclude that right, he could always do so. There is nothing in the PB LOI which indicates that the investors in the Paradise Beach scheme should not be allowed to enforce the term requiring money to be paid out against the OM undertaking. Neither the bank nor Arck had any interest in enforcing the term; the investors were the only persons who had such interest and it would therefore be surprising if the contract were construed to mean that they could not.

93. If, then, the contract does purport to confer a benefit on a third party and the contract, on its proper construction, is not to be construed to the effect that the term is to be unenforceable by the third party, there is a yet further requirement in section 1(3) that the third party be expressly identified in the contract. That can be "by name" or "as a member of a class" or "as answering a particular description". It is clear that the appellants are not identified by name, but the PB LOI is intended to benefit those clients of Arck who invest in the Paradise Beach development by transferring their money to the bank. The fact that it is not Arck who provides its own money, or Arck for whose benefit the term requiring the OM undertaking is agreed, is shown by the name of the

intended account, "Arck LLP - Segregated Client Account", which is to be opened "for the sole purpose of the development of the Paradise Beach Resort". On the natural construction of the PB LOI, therefore, the persons intended to benefit are those clients of Arck who transfer money for the Paradise Beach development. That is an express designation of a class and there is no need for any implication to achieve that result. The inhibition against implication laid down by this court in *Avraamides v Colwill* at [19] is therefore not infringed.

94. This case is therefore a clearer case of identification than *The Alexandros T* in which my Lord sitting at first instance construed the word "underwriters" in a marine insurance settlement agreement to include those acting for underwriters in the litigation as their agents. Once one reaches the conclusion that the word "underwriters" in one part of a settlement agreement includes their agents, that is the meaning of the word in other parts of that agreement. Despite the criticism contained in para 18-097 of the current (and previous) edition of *Chitty on Contracts*, I do not see how Flaux J can be wrong to have concluded that the agents were to have the benefit of the contract and be entitled to sue upon it. The Canadian case of *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 S.C.R. 299, the citation of which is suggested might have led to a different result, was not dealing with legislation framed in the same way as the English 1999 Act. The fact that the court held that the warehousemen were "implied" beneficiaries for the purpose of a decision at common law does not mean that one can only conclude that the word "underwriters" includes underwriters' agents by a process of implication for the purpose of the 1999 English Act. But it is not necessary for the purposes of this case to decide whether *The Alexandros T* was correct since, as I have said, there is in this case an express class designation for the purposes of section 1(3) of the Act.

95. I agree that this appeal should be allowed and judgment be entered for the appellants.