Neutral Citation Number: [2023] EWCA Civ 36

Case No: CA-2021-000695

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mr. Justice Foxton
[2021] EWHC 1272 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday 20 January 2023

Before :

LORD JUSTICE PHILLIPS
LADY JUSTICE CARR
and
LORD JUSTICE SNOWDEN

- -

Between :

PHOENIX GROUP FOUNDATION **(a foundation established under the laws of Panama)**	**Appellant/ Eighth Respondent**
- and -	
HARBOUR FUND II LP **and others**	**Respondents**

- -

Sebastian Kokelaar and Stephen Ryan (instructed by **Richard Slade and Company**) for the **Appellant**, Phoenix Group Foundation

Daniel Saoul KC and Richard Hoyle (instructed by **Harcus Parker Limited**) for the **Respondents** (the "Settlement Parties" as defined below), including Harbour Fund II LP

Hearing dates: 5-6 October 2022
Additional written submissions made on 21 December 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00 a.m. on 20 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden:

Introduction

1. This is an appeal by Phoenix Group Foundation ("Phoenix"), a foundation established under the laws of Panama, against one aspect of the order of Foxton J ("the Judge") dated 11 June 2021 (the "Order"). The Order followed a lengthy trial and gave effect to the Judge's decisions in a judgment which was handed down on 18 May 2021: see [2021] EWHC 1272 (Comm) (the "Judgment"). The appeal is brought with the permission of the Judge and raises questions of the requirements for a valid equitable assignment of future property.

2. In the relevant part of the Order, the Judge declared that such future distributions as may be paid or payable to SMA Investment Holdings Limited ("SMA"), a Marshall Islands company, as sole shareholder of a group of BVI and Isle of Man companies (the "Arena Companies"), will be held by SMA on the terms of a trust referred to in the Judgment as "the Harbour Trust".

3. The Harbour Trust was declared pursuant to an investment agreement dated 10 July 2013 under which a litigation funder, Harbour Fund II LP ("Harbour") provided funding for proceedings in the Commercial Court by a company known as Orb a.r.l. ("Orb") and others associated with it (together the "Orb Claimants"). In very broad terms, the Harbour Trust applied to any proceeds recovered or received by the Orb Claimants or their affiliates (which the Judge held would include SMA) as a result of success in the Commercial Court proceedings; and the beneficiaries of the Harbour Trust included the Orb Claimants and Harbour.

4. Phoenix contends that the Judge was wrong to find that when received, such future distributions from the liquidations of the Arena Holdcos would be held on trust by SMA on the terms of the Harbour Trust. Phoenix contends that the distributions were the subject of a valid equitable assignment by SMA to Phoenix pursuant to the terms of a document entitled the "Liquidation Inter-Creditor Settlement Agreement" (the "LICSA") which was entered into on 29 April 2016 to settle a number of disputes between various parties, including, in particular, the Commercial Court proceedings. In essence, Phoenix contends that as a consequence of such equitable assignment, if and when SMA acquires a right to be paid any such distribution, it will automatically, and without more, hold that right and any resultant payment on trust for Phoenix as assignee.

5. By a Respondent's Notice, the Respondents to Phoenix's appeal (including, in particular, Harbour) contend that (contrary to the Judge's further findings) any rights to such distributions that Phoenix obtained by virtue of the LICSA would not in any event take priority over the claims of those interested under the Harbour Trust. The issues raised by the Respondent's Notice include the fundamental question of whether equity regards a beneficiary under a trust as having a unique interest which is "carved out" of the trust asset and hence not available to any other person (the so-called "disability" model), or as an interest in relation to the asset which may (or may not) have priority over the competing interests of other persons, according to various equitable principles (the so-called "priority" model). The issues also include the question of whether Phoenix should be denied recognition of any rights as assignee by reason of the equitable doctrine of "no clean hands".

6. Given the complexity of the issues, it was readily apparent that the time estimated by the parties for the hearing of both the appeal and the Respondent's Notice was inadequate. As a result, the Court determined to hear the issues on the appeal first and reserved judgment, adjourning argument on the issues relating to the Respondent's Notice. This judgment therefore deals only with the issues arising on the appeal.

The Factual Background in Outline

7. The wider dispute tried by the Judge was sketched in paragraphs [1]-[5] of the Judgment. The details of that dispute were justifiably described by him as being of "labyrinthine complexity". Thankfully, and due in no small measure to the clarity of the Judgment, it is possible to simplify the factual background considerably for the purposes of the appeal. I shall do so on the basis of the Judge's findings of fact, many of which were hotly contested at trial, but (with one possible exception to which I shall return) none of which are challenged for the purposes of this appeal.

The main characters

8. As the Judge explained, the disputes which he tried concerned competing claims to various items of property, which included the shares in the Arena Companies. The disputes originated in dealings between two central individuals described by the Judge as "colourful entrepreneurs", together with various companies and individuals associated and aligned with each of them, and a number of governmental agencies and court officers appointed to recover and realise assets to pay confiscation orders and/or creditors of some of them.

9. The first such character is Dr. Gerald Martin Smith ("Dr. Smith") who was for a time the chief executive of Orb which was the holding company for a property empire that included a large number of hotels operated under the "Thistle" brand. Dr. Smith's wife (now ex-wife) Dr. Gail Cochrane ("Dr. Cochrane") was a director and sole shareholder of Orb, and she was the sole shareholder of SMA, holding those shares as nominee for Dr. Smith.

10. Dr. Smith served a prison sentence in 1993 for theft from a company pension fund, and in 2006 he was sentenced to eight year's imprisonment for the theft in 2002 of £35 million from a company called Izodia plc. The Serious Fraud Office (the "SFO") then obtained a confiscation order against Dr. Smith in 2007 for about £41 million, and enforcement receivers (the "Receivers") were appointed in 2008 to recover property in satisfaction of that order. At the time of the Judgment, about £72 million was still outstanding under that confiscation order.

11. The second central character in these proceedings is Mr. Andrew Ruhan ("Mr. Ruhan"), a businessman with property interests. Through companies that he owned or controlled, Mr. Ruhan entered into an arrangement with Dr. Smith in 2003 under which Orb transferred various properties to Mr. Ruhan's companies in return for cash and loan notes which Dr. Smith intended to use to repay the monies that he had stolen from Izodia.

12. In 2004, Mr. Ruhan caused to be established an Isle of Man discretionary trust (the "Arena Settlement") of which he was originally a discretionary beneficiary, and into which he subsequently transferred a number of assets including those acquired from

Orb together with the shares in the Arena Companies. The Arena Settlement was administered by two professional service providers based in Switzerland and the Isle of Man, namely Mr. Simon Cooper and Mr. Simon McNally.

13. Mr. Ruhan is also associated with Phoenix. Although the Judge declined in the Judgment to make any findings as to the precise relationship between Mr. Ruhan and a Mr. Anthony Stevens ("Mr. Stevens"), who was the sole director of a BVI company which was the sole council member of Phoenix, he subsequently held, after a second trial, that Mr. Stevens had acted at the relevant times (and in various matters) as a nominee for Mr. Ruhan: see Hotel Portfolio II UK Limited and others v Ruhan, Stevens v Phoenix Group and others [2022] EWHC 383 (Comm).

The 2012 Commercial Court proceedings

14. Whilst still in prison and prior to his release in 2010, Dr. Smith sought to persuade the Receivers to bring claims against Mr. Ruhan based upon what Dr. Smith alleged were oral agreements which he had entered into with Mr. Ruhan for Orb and others to have a profit share on the development of the properties which had been transferred to Mr. Ruhan's companies in 2003. These efforts eventually led to the commencement of the Commercial Court proceedings in 2012 by the Orb Claimants against Mr. Ruhan.

15. Mr. Ruhan was formally removed as a discretionary beneficiary of the Arena Settlement in March 2012. This was ostensibly done to avoid the risk of adverse revenue action for the trust arising from his UK residence. Messrs. Cooper and McNally were then named in the class of discretionary beneficiaries. Although Mr. Ruhan at first denied in the 2012 Commercial Court proceedings that he had any interest in the Arena Settlement, Messrs. Cooper and McNally in fact held their interests as beneficiaries of the Arena Settlement as nominees for him.

16. As indicated above, on 10 July 2013 the Orb Claimants entered into an investment agreement with Harbour, under which Harbour agreed to provide funding for the Commercial Court proceedings in return for a share of any proceeds, which were to be held on the terms of the Harbour Trust which was declared under the agreement.

The IOM Settlement

17. After the commencement of the Commercial Court proceedings, in 2013 the Orb Claimants obtained Norwich Pharmacal orders in the Isle of Man against Messrs. Cooper and McNally, alleging various serious improprieties by them and seeking evidence for use in the Commercial Court proceedings against Mr. Ruhan.

18. Following the making of those orders, Dr. Smith and Dr. Cochrane began negotiations on behalf of the Orb Claimants with Messrs. Cooper and McNally which ultimately led to a settlement agreement which was documented in late 2013 and early 2014 (the "IOM Settlement"). Under that IOM Settlement, in return for wide-ranging releases, Messrs. Cooper and McNally transferred certain assets to SMA for the benefit of the Orb Claimants (the "Transferred Assets"). The Transferred Assets included the shares in the Arena Companies, which Messrs. Cooper and McNally claimed to own beneficially, but which they in fact knew were held pursuant to the terms of the Arena Settlement. The Judge found that SMA (through Dr. Smith and Dr. Cochrane) chose to play along with the fiction that the shares in the Arena Companies were beneficially

owned by Messrs. Cooper and McNally in order to facilitate their transfer under the IOM Settlement.

Continuation of the Commercial Court proceedings

19. The IOM Settlement was disclosed to Mr. Ruhan in the Commercial Court proceedings in April 2014. This prompted Mr. Ruhan to withdraw his earlier denials that he had any interest in the Arena Settlement and instead to seek to amend his pleadings to claim that he was indeed interested in the Arena Settlement, and to join Messrs. Cooper and McNally as defendants to a counterclaim that the transfer of the shares in the Arena Companies to SMA by them pursuant to the IOM Settlement had been a breach of trust and fiduciary duty.

20. Various interim applications in the Commercial Court proceedings were heard and decided by Cooke J in February 2015. Cooke J was highly critical of the conduct of the Orb Claimants in relation to the IOM Settlement, and found in large measure against them. A few weeks after Cooke J's judgment, Dr. Cochrane took steps to place the Arena Holdcos into creditors' voluntary liquidation in the BVI, and joint liquidators were appointed (the "Joint Liquidators"). Shortly thereafter, Cooke J granted a worldwide freezing injunction against the Orb Claimants, Dr. Cochrane and SMA in respect of Mr. Ruhan's counterclaim in the amount of £67.3 million.

21. These developments led to settlement discussions between the parties to the Commercial Court proceedings in April and August 2015. They were, however, unsuccessful and the parties resumed their hostile approach to the litigation during early 2016. This culminated in a hearing before Popplewell J in March 2016, during which he gave directions for trial and granted further injunctive relief against the Orb Claimants in relation to the IOM Settlement.

22. There were then further discussions between, primarily, on the one side, Dr. Smith and those associated with him (including Dr. Cochrane and SMA), and on the other side, Mr. Ruhan and those associated with him (including Mr. Stevens and Phoenix). These discussions resulted in a settlement which was encapsulated in a suite of documents which were executed in Geneva on 29 April 2016 (the "Geneva Settlement").

The Geneva Settlement

23. The Judge described the overall effect of the Geneva Settlement in paragraph [302] of his Judgment as a compromise under which, in return for the mutual release of claims,

    i) Mr. Ruhan surrendered the equitable interest which he had asserted in the Transferred Assets as part of a negotiated settlement under which Phoenix acquired rights under the LICSA (whatever they were); and

    ii) those representing the Orb Claimants were willing to undertake the commitments in the LICSA as part of the price for Mr. Ruhan surrendering his asserted equitable interest, such that Dr. Cochrane and SMA would no longer hold the shares in the Arena Holdcos subject to such rights.

24. The relevance of this analysis for present purposes is that the Judge also held that the Harbour Trust was only constituted when Mr. Ruhan relinquished his claims to the

Transferred Assets under the Geneva Settlement, and that if the LICSA amounted to a valid equitable assignment by SMA in favour of Phoenix, the proceeds of the Commercial Court proceedings falling within the Harbour Trust would not include the subject matter of that equitable assignment.

25. For present purposes, the two relevant documents forming part of the Geneva Settlement were (i) a loan note under which Dr. Cochrane agreed to pay £73.75 million to Phoenix, with various provisions designed to provide an incentive for staged payments and a "Final Repayment Date" of 31 December 2017, coupled with a negative pledge over certain specified assets said to be worth a total of £80.2 million (the "Loan Note") and (ii) the LICSA.

The Loan Note

26. The Loan Note was entitled "Loan Note Instrument Constituting £73,750,000 Unsecured Loan Note due 2018" and identified Dr. Cochrane as the "Obligor" and Phoenix as the "Noteholder". By its operative clause 2, in consideration for Phoenix procuring certain parties to enter into the Geneva Settlement, Dr. Cochrane undertook to pay to the order of Phoenix the amount of £73.75 million on the terms and conditions of the instrument. By clause 3 of the Loan Note, that principal amount would be reduced by £2.5 million if a transaction identified as the "Sentrum Share Transfer" occurred prior to 30 November 2016.

27. Clauses 4 and 5 contained provisions as to interest and default interest. Clause 6 was headed "Repayment and Prepayment", and in clause 6.1 set out a timetable for repayment of the Loan Note. Subject to the possibility under clause 6.1(b) of Dr. Cochrane making a reasonable request for postponement which Phoenix could not unreasonably refuse, clause 6.1(a) provided that Dr. Cochrane would repay the full outstanding principal amount of the Loan Note and accrued interest five days after the date of the Loan Note - i.e. 4 May 2016.

28. That payment obligation was, however, then subject to a series of provisos in clauses 6.1(a)(i)-(iv) as to staged payments, each of which provided that if a certain amount was paid by a fixed date, the obligation to pay the remaining outstanding amount and interest would be deferred. So, if £3 million was paid by 31 May 2016, the remaining outstanding principal would become due on 29 July 2016; if a further £17 million was paid by 29 July 2016, the remaining outstanding principal would become due five business days after 30 November 2016; and if £15 million was paid on 30 November 2016, the remaining outstanding principal would become due five business days after 31 December 2017.

29. Clause 6.2 was headed "Voluntary Prepayment" and provided,

> "[Dr. Cochrane] may prepay part or the entire Note by notifying [Phoenix] in writing five (5) Business Days in advance. [Dr. Cochrane] may only do this if the notice specifies the amount of the prepayment which, if it is less than the outstanding balance of the Note, must be a minimum of £250,000."

30. Clause 6.3 made provision for Phoenix to require Dr Cochrane to prepay the Loan Note either if it became unlawful for Phoenix to hold the Loan Note or to allow it to remain

outstanding, or if Dr. Cochrane breached the provisions of the negative pledge clause in the Loan Note (see below).

31. Clause 6.5 of the Loan Note then provided,

> "[Dr Cochrane], as ultimate beneficial owner of [SMA], will procure direct payment by the Liquidators to [Phoenix] of all payments [SMA] or related parties are entitled to receive under the [LICSA] and [SMA] is entitled to receive as shareholder of the Arena Holdcos. Any such payments received by [Phoenix] shall be applied as prepayments in respect of the Note."

32. Clauses 6.6 and 6.7 made provision for the order of application of any prepayments and various other conditions as to prepayments.

33. Clause 13 contained a number of general covenants by Dr. Cochrane to Phoenix and clause 13.2 provided for Dr. Cochrane to procure the release of a negative pledge SMA had given in favour of the liquidators of the Arena Holdcos over certain of its assets.

34. Clauses 13.3 to 13.5 included a negative pledge clause (the "Negative Pledge") in relation to certain "Relevant Assets" of which Dr. Cochrane was said to be the beneficial owner. Under the Negative Pledge, Dr. Cochrane undertook (among other things) that neither she nor any legal owner would sell, transfer or otherwise dispose of, or grant security over, the Relevant Assets without the consent of SMA. The Relevant Assets were defined by reference to a Schedule to the Loan Note which listed a large number of pieces of real property located in various jurisdictions, and items of personal property. The aggregate value of the Relevant Assets was given as £80.2 million. Clause 13.10(b) provided that the parties to the Loan Note would meet on a monthly basis to review the status of the Relevant Assets.

35. Clause 13.7 then provided,

> "13.7 Ranking of Obligations
>
> The Obligor shall procure that any of its unsecured and unsubordinated obligations and liabilities under this Deed rank, and will rank, at least pari passu in right and priority of payment with all its other unsecured and unsubordinated obligations and liabilities, present or future, actual or contingent, except for those obligations and liabilities mandatorily preferred by law of general application."

The LICSA

36. The parties to the LICSA were SMA, Dr. Cochrane, Phoenix and its BVI subsidiary company, Minardi Investments Limited ("Minardi").

37. As the Judge observed, although the parties had access to legal advice, the LICSA contained "various drafting infelicities", which I have set out unaltered in the extracts below.

38. The recitals to the LICSA set out some of the background to the disputes between the various parties, and identified the "Arena Estate" somewhat imprecisely as the "entire asset portfolio of Arena", including the Arena Holdcos and the "After Discovered Assets" as defined in the IOM Settlement.

39. The recitals then continued:

> "J. Minardi is a creditor of Unicorn [one of the Arena Holdcos] and thus a substantial claimant upon the Arena Estate.
>
> K. The liquidation of the Arena Estate continues, with joint liquidators from the firms Quantuma and Krys Global being appointed over the Arena Holdcos and various Arena Group Companies from August 2014 onwards (the "Joint Liquidators").
>
> L. [SMA] is the shareholder of the Arena Holdcos but not a creditor. [SMA] and Dr. Cochrane are warranting that they own or control or are the ultimate beneficial owner(s) of all the creditors except the following: Minardi [and a series of named companies and individuals].
>
> M. The Parties have agreed to work together and to immediately upon execution of this Agreement compromise or procure the compromise of their claims and those of their Related Parties. In particular the Parties will work together, in the utmost good faith and on an open book basis, to ensure an orderly and speedy winding up of the liquidation of the Arena Estate and its affairs and the distribution of the Arena Estate assets to the Parties.
>
> N. The Parties have agreed that Minardi will receive 50% of all distributions made by the Liquidators except those made to the following parties [a series of named persons].
>
> O. Dr. Cochrane, as ultimate beneficial owner of [SMA], will procure the direct payment to Phoenix from the Liquidators in prepayments of her debt to Phoenix under the loan note instrument ("the Loan Note") all payments to [SMA] or related parties are entitled to receive under this Agreement and [SMA] as shareholders of the Arena Holdcos."

40. Section 2 of the LICSA, entitled "Settlement Steps", contained the following operative clauses:

> "2.2 Both Parties agree to complete or procure the completion of the Conditions Precedent on the date of this Agreement.
>
> 2.3 [SMA] and Minardi hereby agree to take all necessary actions that are required to conclude the liquidation of the Arena

> Estate in a timely manner and distribute the Assets and cash of the relevant liquidations of the Arena Holdcos and the Arena Estate in the manner proscribed [sic] under the terms of this Agreement. In particular, irrespective of any other right or entitlement, Minardi will receive 50% of all distributions made by the Liquidators except those made to the following third parties: [a series of named persons].
>
> 2.4 Dr. Cochrane, as ultimate beneficial owner of [SMA], undertakes to procure the direct payment to Phoenix from the Liquidators in prepayments of her debt to Phoenix under the Loan Note all payments to [SMA] or related parties are entitled to receive under this Agreement and [SMA] as shareholders of the Arena Holdcos.
>
> …
>
> 2.6 [SMA] and Minardi shall direct the Joint Liquidators to make payments as described in clauses 2.3 and 2.4 above. In this respect, they undertake to inform the Joint Liquidators in writing that they entered into this Agreement as per schedule 4.
>
> [2.7] The Parties have agreed that as soon as practicable, the Minardi Reserved Assets will be transferred by the Liquidators to Minardi…[SMA] undertakes to give whatever directions is required to the Liquidators to facilitate such transfer … 50% of the respective values (as listed in Schedule 3) for each asset effectively transferred to Minardi will be applied as a prepayment of the Loan Note."

41. The Minardi Reserved Assets were listed in Schedule 3 to the LICSA and had a combined total value of £8,110,000.

42. Schedule 4, as referred to in clause 2.6 of the LICSA, contained the text of a notice to be sent to the Joint Liquidators of the Arena Holdcos (the "Notice"). This stated,

> "Dear Sirs,
>
> We write to you in your capacity as the Joint Liquidators of [the Arena Settlement], and its holding companies [the Arena Holdcos], their subsidiaries and the after discovered assets also transferred to SMA (together, the "Arena Holdcos").
>
> We hereby put you on notice that Dr. Cochrane, SMA, Minardi and Phoenix entered into a confidential liquidation inter-creditor settlement agreement on ___ April 2016 (the "Agreement"). Pursuant to the Agreement, SMA and Minardi have agreed to take all necessary actions that are required to quickly and efficiently conclude the liquidation of the Arena Holdcos such that the proceeds of such liquidation (including the sums owed to Unicorn by the other Arena Holdcos) (the "Arena Estate") are

> realized and distributed in a timely manner and in the manner proscribed in the Agreement.
>
> In particular, the parties to the Agreement have agreed that irrespective of any right or entitlement, Minardi is entitled to receive 50% of all distributions from the Arena Estate made by the Joint Liquidators, save for any distributions made to [a series of named persons]. Moreover, Dr Cochrane, as ultimate beneficial owner of SMA, undertook to procure that all payments SMA or its related parties are entitled to receive under the Agreement or as shareholder of the Arena Holdcos be made by the Joint Liquidators directly to Phoenix, the parent company of Minardi.
>
> [signed]
>
> [Dr. Cochrane]
>
> [SMA]
>
> [Minardi]
>
> [Phoenix]."

43. It is clear (and was accepted by the parties on appeal) that (i) the various references to the "Joint Liquidators" and the "Liquidators" in the LICSA were to the same office-holders, and (ii) that the grammar and syntax of clause 2.4 of the LICSA were incomplete and that the clause should be read consistently with the Notice and clause 6.5 of the Loan Note as follows,

> "2.4 Dr. Cochrane, as ultimate beneficial owner of [SMA], undertakes to procure the direct payment to Phoenix from the Joint Liquidators in prepayments of her debt to Phoenix under the Loan Note all payments ~~to~~ [SMA] or its related parties are entitled to receive under this Agreement and [SMA] is entitled to receive as shareholder~~s~~ of the Arena Holdcos."

Events after the Geneva Settlement

44. After execution of the Geneva Settlement, copies of the Notice, signed by Dr. Cochrane on her own behalf and on behalf of SMA, and signed by Mr. Stevens on behalf of Minardi and Phoenix, were sent to the Joint Liquidators under cover of letters dated 9 May 2016 from Akin Gump (the lawyers then acting for Mr. Stevens and Phoenix). The covering letters simply stated, "Please find enclosed a letter of notification for your attention."

45. Also shortly after the Geneva Settlement was concluded, a solicitor for one of Dr. Smith's associates submitted a Suspicious Activity Report to the National Crime Agency ("NCA") in relation to the Loan Note, contending that the payment to Phoenix might amount to tax evasion by Mr. Ruhan. The NCA thereupon refused permission for Dr. Cochrane to make the first payment due under the Loan Note. No payments have been made under the Loan Note.

46. Orb and Dr. Cochrane subsequently defaulted on the litigation funding agreement that they had entered into with Harbour, which in November 2016 obtained bankruptcy (*en désastre*) orders against them from the Royal Court of Jersey. The effect of such orders was to vest the property of Orb and Dr. Cochrane in the Viscount of the Royal Court of Jersey (the "Viscount") as administrator of their respective estates (with the exception of property which was already the subject of a *saisie judiciaire* which the SFO had earlier obtained in relation to Dr. Smith's property).

47. In the Commercial Court proceedings, in 2018 Popplewell J directed that there be a trial to determine ownership of the Transferred Assets (the "Directed Trial"). That Directed Trial was fixed to commence in January 2020.

48. On 5 September 2019, a number of the parties to the proceedings entered into a settlement agreement (the "Settlement Parties" and the "Settlement Agreement") which allowed them to adopt a common position in relation to their claims. The Settlement Parties included the SFO, the Receivers, the Viscount (as administrator of the estates of Orb and Dr. Cochrane), Harbour, Stewarts Law LLP (who acted for the Orb Claimants in the Commercial Court proceedings) and the Joint Liquidators.

49. The consequence of the Settlement Agreement was that the main protagonists in the Directed Trial before the Judge (and on the appeal before us) were Phoenix on the one hand, and the Settlement Parties on the other.

The liquidations of the Arena Holdcos

50. The realisation of assets in the liquidations of the Arena Holdcos and their subsidiary companies by the Joint Liquidators has continued. The possibility of SMA obtaining a right to distribution of a surplus from one or more of those liquidations arises by virtue of section 207(3) of the BVI Insolvency Act 2003 ("section 207(3)") which provides,

> "(3) Any surplus assets remaining after payment of the costs, expenses and claims [of creditors (including interest) and the liquidators] shall be distributed to the members in accordance with their rights and interests in the company."

51. A number of estimates of the likely amount and timing of payment of future distributions have been made from time to time. In May 2020, the Joint Liquidators estimated that the surplus in one of the Arena Holdcos (Ballaugh) might be between £20.5 million and £25.6 million, but no distributions have been made to date.

The Judgment

52. At the Directed Trial, Phoenix contended that the provisions of clauses 2.4 and 2.6 the LICSA (and/or the giving of the Notice) constituted an equitable assignment by SMA to Phoenix of SMA's future rights to receive a distribution from the Joint Liquidators of any surplus arising in the liquidations of the Arena Holdcos. As indicated above, Phoenix's purpose in making that argument was to obtain priority in respect of any such monies over the competing claims of those interested under the Harbour Trust.

53. At paragraph [258] of his Judgment, the Judge identified that SMA's future right to payment of a surplus under section 207(3) in respect of the liquidation of any of the

Arena Holdcos was a mere expectancy which was capable of being the subject of a valid agreement to assign in equity provided that value was given for the agreement: see Norman v Federal Commissioner of Taxation (1963) 109 CLR 9. In that regard, the Judge recorded that it was common ground before him that Phoenix gave value for the rights which it acquired under the LICSA.

54. In paragraphs [259] – [263] of his Judgment, the Judge then set out the legal principles relevant to determining whether clauses 2.4 and 2.6 of the LICSA constituted an equitable assignment.

55. The Judge first noted that an equitable assignment could be effected either (a) by the assignor informing the assignee that he had transferred the chose to the assignee, or (b) by an instruction from the assignor to the debtor to pay the assignee.

56. The Judge then adopted and expanded upon the summary of the requirements for a valid equitable assignment set out by Peter Whiteman QC in Phelps v Spon-Smith [2001] BPIR 326, namely,

> "…it is well established that it is not necessary for an equitable assignment to follow any particular form … What is necessary … is [1] that there should be an intention to assign, [2] that the subject-matter of the assignment should be so described as to be capable of being identified at the time of the alleged assignment and [3] that there should be some act by the assignor showing that he is transferring the chose in action to the (alleged) assignee."

57. As to the first requirement of intention, the Judge referred to the dictum of Lord Macnaghten in William Brandt's Sons v Dunlop Rubber [1905] AC 454 at 462,

> "But, says the Lord Chief Justice, 'the document does not, on the face of it, purport to be an assignment nor use the language of an assignment.' An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

58. The Judge also referred to the decision of the Court of Appeal in Burridge v MPH Soccer Management [2011] EWCA Civ 835 ("Burridge") to the effect that whether a written document amounted to an assignment was a question of construction of the document.

59. He then quoted from *Guest on the Law of Assignment* (3rd edition) ("*Guest*") at 3-11 (footnotes omitted),

> "For an assignment, there must be a clear expression of an intention to make an immediate and irrevocable transfer of the chose to the assignee …. It must be plain that the assignor intends

> by the request to divest himself of the chose and vest it in the assignee. The intention must be determined objectively: the subjective intention of the assignor is irrelevant. The test is how the direction would be understood by a reasonable obligor, having regard to the words used, the nature and purpose of the transaction and the relevant surrounding circumstances…"

60. On the second question of identification of subject matter, the Judge referred to the dictum of Lord Macnaghten in Tailby v Official Receiver (1888) 13 App Cas 523 ("Tailby") that the subject matter of an assignment had to be "of such a nature and so described as to be capable of being ascertained and identified", together with that of Lord Watson who said that "mere difficulty in ascertaining all the things which are included in a general assignment … will not affect the assignee's right to those things which are capable of ascertainment or are identified."

61. The Judge then also cited *Guest* at 1-45 (footnotes omitted),

> "The subject-matter of the assignment must be capable of ascertainment and identified with sufficient certainty to establish what is being assigned. If a creditor simply instructs his debtor to pay a sum of money to a third party, but does not specify the debt or fund out of which payment is to be made, the instruction will fail as an assignment. But an order to pay out of money owed by the debtor to the creditor or out of a specific fund coming to the debtor may be an assignment. Where the whole of a debt or fund is assigned, it is not necessary to state the amount. If part of a debt or fund is being assigned, it may be expressed as a monetary amount or as a fraction or percentage of the debt or fund. However, an assignment of an indeterminate portion of a debt or fund would fail for uncertainty. It is also necessary to determine that the claimed right was included in the assignment."

62. On the third requirement of a manifestation of the intention to make an immediate transfer, the Judge referred again to Phelps v Spon-Smith at [41]. The Judge also cited the dictum of Blackburne J in Finlan v Eyton Morris Winfield [2007] EWHC 914 (Ch) at [33] that what was required for an equitable assignment was,

> "… some outward expression by the assignor of his intention to make an immediate disposition of the subject matter of the assignment. It must be possible to identify some act on the assignor's part from which his intention then and there to divest himself — in favour of the assignee — of the right or interest to be assigned, on the terms which have been agreed, can be inferred."

63. Applying those principles to the facts, the Judge then held, at paragraph [264] of the Judgment, that on its proper construction, the LICSA did not amount to an equitable assignment by SMA of its future rights under section 207(3) arising from the liquidations of the Arena Holdcos. The Judge's reasoning, at paragraphs [265] - [268], was based upon a combination of two related points.

64. First, the Judge held that clause 2.4 of the LICSA referred to an obligation to pay Phoenix, but it only imposed a personal procurement obligation on Dr. Cochrane and did not impose any direct obligation upon SMA. The Judge held that clause 2.4 also did not use language that indicated that SMA had any intention to divest itself of its future rights under section 207(3) and to vest them in Phoenix. The Judge described the absence of any such direct promise on the part of SMA as "striking".

65. The Judge further held that although clauses 2.3 and 2.6 did impose obligations on SMA, clause 2.3 did not purport to transfer any rights, and clause 2.6 was mere machinery designed to facilitate performance of Dr. Cochrane's procurement obligations under clause 2.4. In that latter regard, the Judge referred to the Notice which SMA and Minardi were required to send to the Joint Liquidators under clause 2.6, and noted that it contained no reference to any transfer by SMA of any rights.

66. Secondly, the Judge held that although clause 2.4 of the LICSA provided that any payments that might be made to Phoenix were to be treated as pre-payments of Dr. Cochrane's obligation under the Loan Note, (a) if the LICSA had been intended to be an outright transfer of SMA's rights, there was a risk of over-payment of Phoenix, (b) the LICSA did not purport to be a security and the Loan Note stated that it was unsecured, (c) there was no proviso in the LICSA for re-assignment back to SMA of any surplus after discharge of the Loan Note, and no such proviso could be implied; and (d) if what was being assigned by SMA was the right to receive distributions up to the outstanding amount of the Loan Note, this would be an assignment of an indeterminate portion of a debt which would fail for uncertainty of subject-matter.

The arguments on appeal

67. On appeal, Phoenix contended that the Judge erred in failing to read clauses 2.3, 2.4 and 2.6 of the LICSA together. Phoenix contended that, in combination, these clauses amounted to an immediately valid agreement by SMA to take all necessary steps to transfer to Phoenix its future rights to receive distributions from the Joint Liquidators up to the amount outstanding under the Loan Note at the time of the relevant distribution(s). Phoenix contended that the Judge was wrong to hold that such an agreement would fail for uncertainty, because it will be possible to quantify the outstanding amount under the Loan Note as and when distributions come to be made from time to time by the Joint Liquidators, and thus to ascertain how much of the distributions should be paid to Phoenix.

68. Phoenix further contended that, on the facts, the parties contemplated that the surplus arising in the liquidations would be less than the amount required to satisfy Dr. Cochrane's obligations under the Loan Note. Phoenix asserted that this was the reason for such sums being expressed to be applied in "prepayment" of the Loan Note; and it also explained why the parties did not include any provisions for the LICSA to take the form of a security for the payment of Loan Note, or consider it necessary to include any proviso for re-assignment of SMA's rights or any obligation on Phoenix to repay any over-payment. Phoenix submitted that the Judge was wrong to take the contrary view that there was a risk of overpayment if the LICSA did not constitute a security or contain a proviso for re-assignment, and that he was therefore wrong to place weight upon these factors in deciding that the LICSA did not amount to an immediate and irrevocable agreement by SMA to assign such rights.

69. As a general point, Mr. Kokelaar submitted that the effect of the Judge's interpretation of the LICSA was to "defeat entirely" the bargain that had been struck between the parties in the Geneva Settlement. That was, he contended, because the Orb Claimants and those claiming through them would be entitled to keep the Transferred Assets free of any claims by Mr. Ruhan, but nothing has been paid to Phoenix under the Loan Note.

70. For the Settlement Parties, Mr. Saoul KC essentially contended that the Judge was right for the reasons that he gave. He contended that on its true interpretation, the LICSA was intended to be an agreement by SMA to assign its future rights under section 207(3) only if and when Dr. Cochrane required such assignment to be made pursuant to her procurement obligation in clause 2.4. He submitted that this interpretation was consistent with the fact that the Notice was merely informative and did not itself amount to a payment direction to the Joint Liquidators. Further, Mr. Saoul submitted, the Judge was right to hold that if the LICSA was intended to be an agreement by SMA to assign only part of its future rights up to the amount outstanding under the Loan Note at the relevant time, this would fail to be an immediately valid equitable assignment for reasons of uncertainty.

Analysis

71. As the Judge correctly identified, the starting point of the analysis is that at the time of the Geneva Settlement, SMA had no existing right to participate in a distribution of surplus assets from the liquidations of any of the Arena Holdcos. Such a right would only come into existence under section 207(3) once a surplus had been identified after payment of all creditors, costs and expenses of the particular liquidation in question. In legal terms, therefore, SMA had no existing property or any chose in action, but only a number of mere expectancies.

72. Such non-existent property cannot be the subject of a legal assignment under section 136 of the Law of Property Act 1925. Nor can it be the subject of a presently subsisting trust. Such future property can, however, be the subject of an agreement to assign which, provided certain requirements are met, will be given effect in equity.

73. The authorities to which the Judge referred establish that the basic requirements of equity in order to give effect to an agreement to assign future property are (i) that there should be a clear outward expression of an immediate and irrevocable intention on the part of the assignor to divest himself of the future property and vest it in the assignee; (ii) the future property to be transferred must be described with sufficient clarity in the agreement, so that it can be ascertained whether any particular item of property coming into existence and into the hands of the assignor falls within the scope of the agreement, and (iii) value must have been given for the agreement to assign. If those requirements are met, an equitable interest in the property will automatically vest in the assignee at the moment the assignor acquires it, so that it will thereafter, and without more, be held on trust by the assignor for the benefit of the assignee.

74. Those principles were not in dispute between the parties on appeal. What was in dispute on the appeal was the Judge's application of those principles to the terms of the LICSA. In particular, the issue between the parties was whether the Judge was right to reject Phoenix's argument that the terms of the LICSA showed that SMA had an immediate and irrevocable intention to vest in Phoenix its future rights to distributions from the liquidations of the Arena Holdcos, either up to the amount required to satisfy the Loan

Note or subject to some implied proviso for reassignment or security; or whether the Judge was right to find that the terms of the LICSA showed that SMA only intended to give a payment direction to the Joint Liquidators, and thereby to transfer its rights to a distribution from the liquidations, if and when procured to do so by Dr. Cochrane.

The interpretation of the LICSA

75. As the Judge held, resolution of these issues depends upon the correct interpretation of the LICSA: see Burridge.

76. In that respect, the Judge was right to point out that the central clause 2.4 of the LICSA, which is the only clause that specifically referred to payments that SMA might become entitled to receive as a shareholder of the Arena Holdcos, did not contain any expression of intention by SMA to transfer or divest itself of any such rights or impose any obligation upon SMA to do so. Nor did Recital O to the LICSA refer to any such divestment or transfer of rights by SMA. Rather, clause 2.4 contained only a personal obligation by Dr. Cochrane to procure direct payment to Phoenix of all future amounts that might become due to SMA as shareholder in the Arena Holdcos. That personal obligation upon Dr. Cochrane was also the only provision reflected in Recital O to the LICSA. In my view, the Judge was entirely right to describe the absence of any such direct obligation or undertaking by SMA in the central clause of the LICSA – especially in a document drawn up by lawyers – as "striking".

77. The force of that point is not diminished by reference to clauses 2.3 and 2.6 of the LICSA. Although both clauses contained an undertaking by SMA, neither referred specifically to any intention on the part of SMA to transfer or assign any of its future rights to Phoenix.

78. Clause 2.3 was couched in very general terms referring to SMA doing what was necessary to bring about future distributions as "proscribed" [sic] by the terms of the LICSA. That language is very far from an indication by SMA that it thereby intended to divest itself of its future rights in favour of Phoenix.

79. Clause 2.6 contains more specific language, but again there was no express wording to the effect that SMA was thereby assigning or transferring any of its rights to Phoenix. Instead, in the first sentence of clause 2.6, SMA undertook to direct the Joint Liquidators to make payments to Phoenix "as described in clauses 2.3 and 2.4". So far as distributions from the Arena Holdcos might be concerned, that was a reference to such payments as Dr. Cochrane might be obliged to procure would be made to Phoenix under clause 2.4.

80. Under clause 2.4, any payments that Dr. Cochrane procured to be made directly to Phoenix by the Joint Liquidators were to be applied as prepayments of Dr. Cochrane's debt to Phoenix under the Loan Note. That wording was also reflected in clause 6.5 of the Loan Note. The concept of prepayment was not defined in the Loan Note, but the expression was used in clause 6.2 of the Loan Note to connote voluntary prepayments by Dr. Cochrane - i.e. payments which she might choose to make before the Loan Note fell due in accordance with its other terms, specifically clause 6.1. The concept of prepayment and the terms of clause 6.2 also necessarily signified that the amount of any such prepayments should not exceed the amount outstanding under the Loan Note at the relevant time.

81. At the time of the Geneva Settlement, however, the timing of completion of the liquidations of the Arena Holdcos was uncertain, as was the amount of any surplus that might become available for distribution to SMA from any of those liquidations. It was possible – and clause 2.3 of the LICSA plainly envisaged that efforts should be made to ensure - that some distributions should become available in a timely manner. But there was no indication whatever in the documents or evidence that the parties envisaged that distributions would necessarily become available to enable payment of £3 million by 31 May 2016 (i.e. within one month) and an additional £17 million by 29 July 2016 (i.e. within a further two months) which was what would be required by clause 6.1 to postpone the Loan Note becoming repayable in full (which it otherwise would do five days after the date of the Loan Note - i.e. 4 May 2016.

82. As a consequence, at the time of the Geneva Settlement and viewed objectively, there was no certainty that distributions from the liquidations of the Arena Holdcos would be available to avoid the Loan Note falling due in full in accordance with its terms. It was entirely possible that Dr. Cochrane would herself have to find some or all of the money to make payments under the Loan Note. In that regard, it should be recalled that the Loan Note identified a large number of "Relevant Assets" which were said to be beneficially owned by Dr. Cochrane and which were subject to the Negative Pledge.

83. At the time of the Geneva Settlement and viewed objectively, it was also possible that some of the distributions that might become due to SMA from the liquidations of the Arena Holdcos would not be able to be applied as "prepayments" of the Loan Note as envisaged by clause 2.4 of the LICSA and clause 6.5 of the Loan Note. That might be so either because the Loan Note would already have become due in full as a result of a failure to meet the schedule of payments required to postpone that date, or because the liquidation in question might not have been concluded before the Loan Note became due five business days after the Final Repayment Date of 31 December 2017.

84. It was also at least possible, depending upon whether there was a reduction in the principal amount of the Loan Note as a result of completion of the Sentrum Share Transfer, as a result of the deemed prepayment following transfer of the Minardi Reserved Assets, or as a result of payments made by Dr. Cochrane from other sources to postpone the Loan Note from becoming due in full, that as and when distributions became available from the liquidations of the Arena Holdcos, their amount might exceed the remaining balance then due under the Loan Note.

85. As indicated above, Mr. Kokelaar criticised the Judge for observing that if all distributions from the liquidations of the Arena Holdcos were to be paid directly to Phoenix, there was a risk of overpayment. However, given the objective factors that I have just described, in my judgment this was a realistic possibility at the time of the Geneva Settlement, and the Judge was right to take it into account when construing the LICSA.

86. Given these uncertainties and the risk of overpayment, if SMA had been intending at the time of the LICSA to use its future rights to distributions from the Arena Holdcos to benefit Phoenix, the most obvious thing for SMA to have done would have been to agree to assign its future rights to Phoenix by way of security for the discharge of Dr. Cochrane's obligations under the Loan Note. That was, of course, the mechanism which was used in cases such as Tailby, and which has been used as the basis for lending secured over receivables for well over 150 years. But that was not done. The LICSA

conspicuously omitted any language suggesting that SMA intended to confer any rights on Phoenix by way of security, whether by way of a charge or a proviso for reassignment of rights on satisfaction of the Loan Note.

87. In that respect, the Judge was right to rely on the fact that the Loan Note stated on its face that it was unsecured. In addition, in clause 13.7, the Loan Note specifically provided that the obligations under it would rank *pari passu* with Dr. Cochrane's other unsecured liabilities. Although SMA was not a party to the Loan Note, that document was referred to in the LICSA, and via Dr. Cochrane, SMA was plainly well aware of its terms. It would therefore be entirely artificial to interpret the LICSA without reference to the Loan Note. Contrary to Phoenix's submissions, these factors indicate that the parties did turn their minds to the question of whether security should be provided for Dr. Cochrane's debt, and decided against it.

88. That point is further reinforced by the fact that although Dr. Cochrane purported to be the beneficial owner of the Relevant Assets listed in the Schedule to the Loan Note, Phoenix did not bargain for or obtain any security over those assets. Instead, Phoenix merely took a personal covenant from Dr. Cochrane in the form of the Negative Pledge in relation to those assets. Having foregone taking security over existing real and personal property in which Dr. Cochrane had an interest, it would be surprising if the parties had intended Phoenix to have security over the more speculative rights that SMA might have to future distributions from the Arena Holdcos.

89. In my judgment, therefore, the Judge was right to regard the fact that the LICSA was not framed as an assignment by way of security and did not contain a proviso for reassignment of rights, as a further strong indicator against a conclusion that SMA intended, by entering into the LICSA, immediately and irrevocably to agree to vest all its future rights in respect of distributions from the Arena Holdcos in Phoenix.

90. An additional point upon which the Judge relied in support of his interpretation of the LICSA related to the terms of the Notice which SMA was required to send to the Joint Liquidators by clause 2.6. At paragraph [266(iii)] of his Judgment, the Judge expressed the view that in light of the fact that the second sentence of clause 2.6 starts with the words "in this respect", the obligation that SMA undertook in the first sentence of clause 2.6 should be interpreted in light of the performance required by second sentence. That approach was plainly correct. So too was the Judge's observation that, reflecting the second sentence of clause 2.6, the Notice was in limited terms, simply informing the Joint Liquidators that the LICSA had been entered into and that Dr. Cochrane had a procurement obligation under it. The Notice did not contain any reference to a transfer of rights by SMA to Phoenix at all. I agree with the Judge that this supports the conclusion that SMA did not intend to make an immediate commitment to transfer its future rights.

91. Indeed, I consider that the point goes further. Although a valid equitable assignment can be constituted simply by an agreement between assignor and assignee, of which notice is not given to the debtor, in practice there are very good reasons why notice of an equitable assignment should always be given to the debtor: see *Snell's Equity*, 34th ed at 3-020. These include the fact that if the debtor has no notice of the assignment and pays the assignor, he will get a good discharge and will be under no liability to the assignee, who will be forced to pursue the assignor for the monies received which will be held on a constructive trust. If, however, the debtor has been given notice of the

assignment and disregards it, he will remain liable to pay the assignee: see Brice v Bannister (1878) 3 QBD 569.

92. In these regards it is vital that the language of the notice makes it clear to the debtor that he is required to pay the assignee because the debt and the right to receive payment has been transferred to the assignee, rather than merely as a consequence of some other arrangement between assignor and assignee: see James Talcott v John Lewis & Co [1940] 3 All ER 592.

93. Given these considerations and the patent hostility and distrust between the two sides to the Geneva settlement, to the objective observer it would have been obvious that if the LICSA had been intended to be an immediately binding equitable assignment of all SMA's future rights to receive distributions from the Joint Liquidators, Phoenix would have wished to do everything possible to ensure that the Joint Liquidators made such payments directly to itself. If it had an immediate entitlement to such payments, Phoenix would not have wished there to be any risk that the Joint Liquidators might make them to SMA, leaving it to pursue a constructive trust claim against SMA for the money. In such circumstances, it is inconceivable that the notice required to be given to the Joint Liquidators would not have been a clear direction requiring them to make payment of all such distributions to Phoenix rather than to SMA.

94. The Notice was, however, not in that form. Conspicuous by its absence was any actual direction by SMA to the Joint Liquidators to make payment of any monies to Phoenix. Nor did the Notice contain any of the practical information that the Joint Liquidators would require to make payments to Phoenix, such as its contact information and bank account details.

95. Further, whilst not strictly a relevant factor in interpreting the LICSA, it is also notable that when Phoenix's own solicitors came to send the Notice to the Joint Liquidators, they did so under cover of a letter that simply described it as "a letter of notification for your attention". They did not characterise the Notice as a payment direction or require the Joint Liquidators to acknowledge that they would act in any particular way in response to it.

96. In short, I agree with the Judge that the provisions of clause 2.6 and the terms of the Notice are not consistent with the LICSA being an immediate agreement by SMA to transfer all its future rights to Phoenix. Instead, the provisions of clause 2.6 and the Notice support the Judge's conclusion that SMA was merely agreeing to give a payment direction to the Joint Liquidators if and when procured to do so by Dr. Cochrane in discharge of her obligations under clause 2.4. The assignment by SMA of any receivable to Phoenix was intended to occur by the giving of such direction at that later stage, and not before.

97. That interpretation of the LICSA also avoids the issues that would otherwise arise from the uncertainty as to the timing and amounts of the distributions payable from the liquidations and the uncertainty as to the amount which might be outstanding under the Loan Note at such time(s). Since the obligation which SMA undertook in clause 2.6 was only to give a payment direction to the Joint Liquidators in the future, if and when procured to do so by Dr. Cochrane, the amount of the required payment to Phoenix could be precisely specified in light of the amount then outstanding under the Loan Note.

98. As indicated above, Mr. Kokelaar put forward various suggestions to the Judge and on appeal as to how such uncertainties could be resolved if the LICSA were to be interpreted as an immediate equitable assignment. Those suggestions were that the LICSA could be interpreted as a security, or to contain a proviso for reassignment, or as only requiring assignment of so much of a future distribution as would be required to satisfy the outstanding balance of the Loan Note. The difficulty for Phoenix with all these submissions is that there was nothing in the language of the LICSA to support such an interpretation.

99. I have already made the points that the LICSA did not expressly purport to operate by way of the grant of security by SMA for Dr. Cochrane's obligations under the Loan Note, and neither was there a proviso for reassignment that might have achieved a similar result. The submission that either mechanism should be implied to give business efficacy to the LICSA therefore simply assumes what Phoenix needed to establish – namely that the LICSA was intended to be an immediately binding equitable assignment and could not operate in any other way.

100. Moreover, so far as the grant of security is concerned, the Loan Note made it clear on its face that the parties did not intend it to be secured, and that the obligations undertaken by Dr. Cochrane would simply rank pari passu with her other unsecured and unsubordinated obligations. Those express provisions in the related document are in my judgment fatal to the implied security argument and weigh heavily against any suggestion that a proviso for reassignment should be implied to achieve the same result.

101. Mr. Kokelaar's alternative argument was that the LICSA should be interpreted as an agreement by SMA to assign such proportion of the future distributions from the Arena Holdcos as would be required to discharge the Loan Note when the distributions came to be made. Again, however, there is no wording of the LICSA that could be interpreted in that way, and the suggestion that such wording should be implied simply assumes what Phoenix needs to prove.

102. Even if the intention to assign only part of a future debt could have been found in the language of the LICSA, the Judge gave a further reason in paragraph [268] of his Judgment for rejecting Phoenix's argument, namely that an agreement to assign on such terms would fail for uncertainty of subject matter. He said,

> "…the outstanding amount of the Loan Note …was one likely to change over time – whether through increases resulting from contractual interest or decreases from pre-payments by Dr. Cochrane or credits under clause 2.7 of the LICSA. As *Guest* 1-45 makes clear, an assignment of an indeterminate portion of a debt or fund must fail for uncertainty of subject-matter because what is to be transferred must be clear at the date of the assignment. The uncertainty of subject-matter to which Phoenix's assignment case gives rise is a factor which weighs against construing clauses 2.4 and 2.6 as giving rise to an equitable assignment (as well as a factor which would prevent the assignment being valid if the intention to assign was otherwise sufficiently manifest)."

103. Mr. Kokelaar submitted that the Judge's reasoning in this respect was wrong and failed to take into account the decision in Tailby.

104. I agree that the principles set out in paragraph 1-45 of *Guest* to which the Judge referred do not provide the answer to the instant case. The relevant sentence of paragraph 1-45 of *Guest* (set out in paragraph 61 above) appears in a chapter dealing with the requirements of assignments generally, and seems to be dealing with the assignment of an indeterminate part of an existing debt or fund. Such an assignment will be invalid if it does not make clear how much of that debt or fund is being transferred at the date of the assignment. That can be done either by identifying a stated proportion of the debt or fund or a specific monetary amount. However, paragraph 1-45 of *Guest* does not, in terms, deal with an agreement to assign future debts.

105. Such an agreement was the subject of the decision in Tailby. In Tailby, the agreement in question was a mortgage under which a manufacturer (Izon) assigned to a lender to the business (Tyrell), all his stock-in-trade and the fixtures and assets at his factory, together with,

> "… all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor …"

106. After the lender died, his executors demanded repayment of the loans and enforced their security. Using a power of attorney in the mortgage, they then sold and assigned certain specified and existing book debts of the manufacturer to Tailby, who gave notice of the assignment to the debtors and collected the monies due.

107. The manufacturer then became bankrupt, and his trustee in bankruptcy sued Tailby for return of the money which he had collected. As Lord Macnaghten pointed out at page 543, the issue in the case was very limited. There was no challenge to the process by which the lender's executors had enforced their security and had sold and assigned what was by then an existing book debt to Tailby. The only argument of the trustee in bankruptcy was that an entirely general agreement to assign future book debts which was not limited to book debts generated in a specific business was too vague to be enforced in equity and hence was void ab initio. That contention was rejected by the House of Lords which held that the agreement to assign future debts was valid because if and when the security was enforced it would be possible to say whether any particular book debt then in existence fell within the description in the agreement.

108. Mr. Kokelaar was accordingly right to submit that the relevant time to focus on certainty of subject matter in relation to an agreement to assign future debts is when the agreement is enforced and the debt in question comes into existence, rather than when the original agreement is entered into. However, the obvious and important distinction between the facts of Tailby and those of the instant case is that the agreement to assign future debts in Tailby was expressed to be an assignment by way of security for the amount owing by the assignor to the assignee. Such an agreement to assign future debts by way of security is regarded as binding but conditional upon the non-satisfaction of the secured obligation, and equity will imply a right in the assignor to reassignment of any debts upon redemption: see Durham Bros v Robertson [1898] 1 QB 765 at 772-773 per Chitty LJ. Moreover, if the assignee realizes the subject-matter of the security for a sum more than sufficient to repay him, with interest and the costs, equity will require

him to account to the assignor for the surplus: see Re George Inglefield Limited [1933] Ch 1 at 27 per Romer LJ.

109. There was accordingly no argument in Tailby that the agreement to assign future book debts was invalid by reason of any uncertainty in the amount of any future debts to be assigned. That issue was resolved by the express term as to security which carried with it an implied agreement for reassignment and an accounting for any surplus. The only issue of uncertainty related to the source of the book debts which were the subject matter of the security. In the instant case, in contrast, and for the reasons that I have already addressed, the Judge rightly held that the LICSA contained no indication that it was to operate by way of security, and no such term could be implied.

110. As such, whilst the Judge's application of the principle in paragraph 1-45 of *Guest* may not have been correct, his fundamental reasoning on the interpretation of the LICSA was unassailable, and I do not see how the decision in Tailby assists Phoenix.

111. Turning, finally, to the general point made by Mr. Kokelaar, I do not accept that the effect of the Judge's conclusion that the LICSA did not amount to a valid equitable assignment was to "defeat the bargain" that had been struck between the parties to the Geneva Settlement.

112. As indicated above, the general structure of the Geneva Settlement was that Mr. Ruhan gave up his claims of an interest in the Transferred Assets and his claims for compensation for their transfer under the IOM Settlement, in return for the obligations assumed by Dr. Cochrane to Phoenix under the Loan Note, and the obligations assumed by Dr. Cochrane and SMA to Phoenix under the LICSA. The essence of Mr. Kokelaar's submission was that the commercial sense of the bargain has been defeated because those claiming through Dr. Cochrane and SMA now have the benefit of the Transferred Assets (including the right to receive distributions from the Arena Holdcos) free of Mr. Ruhan's claims, without any payments being made to Phoenix in return.

113. The true position, however, is that Mr. Ruhan's claims were disputed, and they were given up in in a settlement in return for the obligations undertaken in the negotiated agreements, whatever those obligations amounted to as a matter of law. In that regard I endorse the Judge's view, expressed in paragraph [246] of his Judgment,

> "I do not believe it would be appropriate for me to approach the LICSA with any form of pre-disposition as to the strength of one or other party's negotiation position, as to the type of deal towards which the parties were aiming or as to what would constitute a 'fair' outcome to a dispute which was so singular both in its content and in the means by which it was pursued. The documents were prepared to settle hard-fought litigation in which both parties had access to legal advice, and there is evidence that Akin Gump had some involvement on the Ruhan/Stevens side. Lord Neuberger JSC's warning in Arnold v Britton [2016] AC 1619, [19-20] that the court should not impose its own terms on the parties in the guise of construction is particularly apposite in the present context. "

114. That said, and for the reasons I have indicated above, it is clear that Phoenix was content to accept an unsecured personal covenant from Dr. Cochrane in the Loan Note and did not bargain to receive security for that covenant, even over the Relevant Assets that were said to be available. For whatever reason, Phoenix and those allied with it were prepared to take the risk that Dr. Cochrane might default on her personal obligations under the Loan Note, and the Loan Note expressly referred to Dr. Cochrane's obligations as being unsecured and envisaged that they would rank pari passu with her other unsecured and unsubordinated obligations.

115. The conclusion that Phoenix should not have any proprietary rights as equitable assignee over SMA's future rights to distributions from the Arena Holdcos which would give it security or the functional equivalent of security over those rights is consistent with that structure. Although, with the benefit of hindsight, this might not be what Phoenix would have wished it had bargained for, the fact that Dr. Cochrane has defaulted and the risk that Phoenix took has come to pass, does not defeat the contractual bargain which the parties struck.

The Settlement Parties' late argument

116. As a postscript, I should record when a draft of this judgment was in an advanced stage, the Settlement Parties notified the Court that they had just discovered that Phoenix had, on 3 November 2021, agreed a Tomlin Order staying separate proceedings that it had commenced against Dr. Cochrane in the Commercial Court. Those proceedings included a claim against Dr. Cochrane for £73.75 million plus interest under the Loan Note. The schedule to the Tomlin Order included the following term,

> "Save that nothing in this agreement or order is intended to affect, and shall not affect, the ability of [Phoenix] to recovery any money or property to which [it] may be entitled, under the Geneva Settlement … or otherwise, including in the *desastre* of [Dr. Cochrane], [Phoenix] agree[s] that [it] will not pursue the claims made by [it] in these proceedings against [Dr. Cochrane]."

117. In broad terms, the Settlement Parties contended that if (contrary to their arguments on appeal) the correct interpretation of the LICSA was that it was an agreement to assign SMA's future rights to distributions from the liquidations of the Arena Holdcos by way of security for Dr. Cochrane's obligations under the Loan Note, the agreement by Phoenix in the Tomlin Order not to pursue Dr. Cochrane under the Loan Note would operate to discharge that security.

118. The Court invited short written submissions on the point. Phoenix responded that its agreement not to proceed with its individual claim in the Commercial Court against Dr. Cochrane under the Loan Note did no more than reflect the fact that it was, by reason of her bankruptcy (*en désastre*) in Jersey, obliged to prove for such debt in those collective proceedings in Jersey rather than pursue an individual claim in England. Phoenix contended that agreeing not to pursue an individual claim in those proceedings against Dr. Cochrane for these reasons did not have the effect of discharging her underlying debt under the Loan Note or releasing any security for it, which if conferred by the LICSA, would remain enforceable. It contended that this was also made clear by the reservations at the beginning of the term in the Tomlin Order set out above.

119. In light of the conclusion that I have set out above that the LICSA did not amount to an equitable assignment by way of security for Dr. Cochrane's obligations under the Loan Note, the argument raised by the Settlement Parties does not arise. Accordingly, and beyond noting that if the point had been relevant, my preliminary view would have been that Phoenix's arguments were correct, I therefore do not consider that it is necessary to go further and to decide the point.

Disposal

120. For the reasons that I have given, I would dismiss the appeal. It follows that it will not be necessary to hear argument on the issues raised by the Respondent's Notice.

Lady Justice Carr:

121. I agree.

Lord Justice Phillips:

122. I also agree.