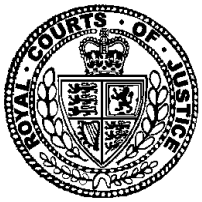

Neutral Citation Number: [2025] EWHC 133 (Comm)

Case No: CL-2023-000170

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 29/01/2025

Before :

Peter MacDonald Eggers KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

TACTUS HOLDINGS LIMITED (IN ADMINISTRATION)	**Claimant**
- and -	
(1) PHILIP MARK JORDAN **(2) WILLIAM MILLERET-SPENCER** **(3) THOMAS HINDLE** **(4) ROBERT WOOLLEY** **(5) ROBERT SUTHERLAND** **(6) SCH BURSELL LIMITED** **(7) SIMON CHARLES HINGSTON BURSELL**	**Defendants**
- and -	**Applicant**
CHILLBLAST LIMITED	

- -

David Berkley KC and Robin Howard (instructed on a direct access basis by Chillblast Holdings Limited) for the Applicant
Alexander Polley KC and Joshua Crow (instructed by Freeths LLP) for the Defendants
The Claimant was not represented at the hearing.

Hearing dates: 11th and 12th December 2024

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Wednesday 29th January 2025.

Peter MacDonald Eggers KC:

Introduction

1. This is an application by Chillblast Limited ("**Chillblast**") for an order that it be substituted for Tactus Holdings Limited ("**Tactus**") as the Claimant in these proceedings. The application is made pursuant to CPR rules 19.2 and 19.4.

2. Chillblast makes the application by reason of the fact that it entered into a Deed of Assignment dated 13th May 2024 ("**the Tactus Assignment**"), by which Tactus purported to assign to Chillblast its rights, title and interest arising in respect of the Share Purchase Agreement dated 18th February 2022 ("**the SPA**") concluded between Tactus and the First to Fifth Defendants ("**the Sellers**") for the purchase and sale of shares in a company called Box Holdings (BHAM) Limited ("**Box Holdings**"), which owned an online technology retail business operated by its subsidiary Box Ltd. The Sixth and Seventh Defendants advised the Sellers on the SPA.

3. The Defendants object to Chillblast's application to be substituted for Tactus as the Claimant on two grounds:

   (1) The Tactus Assignment is ineffective because the SPA prohibited such an assignment.

   (2) The Tactus Assignment is void on the grounds that it is contrary to public policy, being champertous.

4. The Defendants contend that, by reason of these grounds, the Court has no jurisdiction to order substitution or should exercise its discretion against granting the application.

5. I shall address each of these issues in turn after considering the factual background to the application.

Factual background

6. Tactus is now in administration. Before then, Tactus had invested, as a holding company, in a number of companies operating in the technology retailing and wholesaling sectors. One such company was Decision Logic Ltd ("**DLL**"), which

Tactus acquired in November 2021 but is now in administration. DLL carried on business as "*Chillblast*", but DLL is not the same company as the applicant.

7. On 1st December 2021, Tactus and its subsidiaries as borrowers and Santander UK Plc ("**Santander**") as lender concluded a Revolving Credit Facility Agreement ("**the Facility**"). Under the terms of the Facility, multiple loans could be made by Santander to the Borrowers, including Tactus, up to the "*Commitment*" of £10,000,000. However, by clause 4.2 of the Facility, there was no obligation to advance a "*Rollover Loan*" insofar as an Event of Default (defined by clause 24) was continuing. Under the Facility, the Borrowers were obliged to open and maintain bank accounts (including a Holding Account and a Mandatory Prepayment Account) with Santander.

8. On 18th February 2022, Tactus and the Sellers entered into the SPA for Tactus' acquisition of Box Holdings, which operated an online technology retail business through Box Ltd. On 28th February 2022, a Deed of Variation to the SPA was agreed and the sale was completed.

9. From late 2022, Tactus experienced financial difficulties by reason of a downturn in trade amongst Tactus' operating subsidiaries. The cause of such difficulties is in dispute.

10. On 7th December 2022, Tactus sent a letter of claim to the Sellers, including claims based on deceit and breach of contract. It appears that during the preparation of the completion accounts in May 2022 it became apparent that the underlying EBITDA of the business had been substantially overstated. Tactus relied on this in support of a claim for breach of warranty under the SPA.

11. On 28th March 2023, Tactus commenced and served the current proceedings against the Sellers for breach of warranty under the SPA and against all the Defendants for deceit and conspiracy in connection with the SPA. The claims for breach of warranty in the approximate sum of £18 million relate to alleged errors in Box Ltd's accounts and are disputed.

12. The Sellers have issued their own counterclaim for approximately £4.3 million against Tactus in respect of moneys said to be due under the SPA.

13. On 3rd August 2023, following the close of pleadings, the Defendants issued an application for summary judgment for the dismissal of the claim. On 1st March 2024, Mr Simon Colton KC (sitting as a deputy judge of the High Court) dismissed Tactus' claims except for the claims based on breach of contractual warranty. An order to that effect was sealed on 13th March 2024. The result of this is that the Sellers remain the only effective defendants. The claims against the Sixth and Seventh Defendants were entirely dismissed.

14. On 19th January 2024, Box Ltd was placed into administration. Mr Michael Lennon and Mr Mark Blackman, both of Kroll Advisory Ltd, were appointed as Joint Administrators.

15. On 14th February 2024, Chillblast was incorporated under the name Wilder Bidco Limited ("**Bidco**"). The directors of Tactus (Mr Richard Winsland and Mr Scott Brenchley) are also directors of Bidco / Chillblast. Another former director (and also a former shareholder) of Tactus, Mr Michael Fletcher, is said to have "*a personal stake in Chillblast of 3.7%*" (Mr Winsland's third witness statement dated 12th December 2024, para. 6) and was until 31st March 2024 a director of Chillblast.

16. On 21st March 2024, a Deed of Assignment of Facility Agreement ("**the Santander Assignment**") was entered into between: (1) Santander; (2) Wilder Group Companies including Bidco; (3) Tactus; and (4) the Guarantors. By the Santander Assignment, all of Santander's rights, title and interest in respect of the debts owed by Tactus under the Facility (and the "*Finance Documents*", including the "*Security*" as defined) were assigned and transferred to Chillblast in exchange for a payment of £750,000 plus Additional Consideration (which by clause 3.1 comprised 10% of the "*Net Claim Proceeds*", meaning the sums received by the Wilder Group Companies, including Chillblast, or Tactus in respect of the claims made in this litigation, 10% of Tactus' costs paid by the Defendants, and all sums received by Chillblast pursuant to the Facility which relate to the administration of Box Ltd). According to clause 9.2.2 of the Santander Assignment, the amount outstanding in respect of the debts owed by Tactus to Santander as at the date of the Santander Assignment was approximately £2.76 million. Chillblast alleges that it paid £750,000 to Santander in accordance with clause 2.2 of the Santander Assignment.

17. There are additional provisions of the Santander Assignment which should be noted. By clause 6 of the Santander Assignment, Tactus (and the Guarantors) agreed that Santander would be irrevocably and unconditionally released from its obligations under the Facility and that it (and the Guarantors) would make no claim against Santander. By clause 7, Chillblast agreed to give notice to Santander should it intend to enforce the Security and not to assign the Finance Documents to any other person without Santander's consent. By clause 8, Chillblast confirmed that it made its own independent analysis and decision to enter into the Santander Assignment and that it would continue to be responsible for making its own independent analysis and investigations into Tactus' creditworthiness and financial condition and into the Finance Documents.

18. On the same day, 21st March 2024, three of Tactus' subsidiaries - DLL, TL Realisation 2024 Limited and CCLCL Realisations 2024 Limited - sold their businesses and assets to Chillblast. On 2nd April 2024, these companies entered into administration and Chillblast (as floating chargeholder) appointed Mr Lennon and Mr Blackman of Kroll Advisory Ltd as Joint Administrators of these companies.

19. On 9th April 2024, Bidco was renamed as Chillblast.

20. On 13th May 2024, Tactus and Chillblast entered into the Tactus Assignment, by which Tactus purported to transfer and assign to Chillblast "*such rights, title and interest as it may have in the SPA and the Claim to hold the same for the Assignee absolutely*" (the "*Claim*" referred to the claims made by Tactus against the Defendants). The consideration payable for the said assignment was £1 and a debt reduction of £1 million (the Initial Consideration), Deferred Consideration of £49,999 payable in the event that the assignment survives any challenge to its validity (clause 2.3), and a share of the "*Net Claim Proceeds*", being the proceeds of the current litigation (15% up to £10 million and 30% above £10 million). The Tactus Assignment was executed by Mr Brenchley on behalf of both Tactus and Chillblast (as witnessed by Mr Winsland).

21. On 23rd May 2024, Tactus was placed into administration. Mr Lennon and Mr Blackman of Kroll Advisory Ltd were appointed as Joint Administrators.

22. On 21st June 2024, Chillblast issued the application for an order for its substitution for Tactus as the Claimant in these proceedings. The application is supported by witness statements of Mr Winsland, who is a director and the Chief Financial Officer (CFO) of

Chillblast. He was also a director and the CFO of Tactus prior to its administration. The application is based on the submission that Chillblast has taken an assignment of Tactus' breach of warranty claims.

23. By a letter addressed to the Court dated 29th November 2024, Blake Morgan LLP, acting on behalf of the Joint Administrators of Tactus, stated that Tactus' administrators "*have not taken a position in relation to the Substitution Application*" and "*the Joint Administrators do not plan on attending the Hearing …*".

CPR rule 19.2

24. Before addressing the issues in dispute between the parties, I must consider the meaning and application of CPR rule 19.2. (CPR rule 19.4 provides that the Court's permission is required for an order for substitution and sets out the relevant procedure.)

25. CPR rule 19.2(4) provides that:

> "*The court may order a new party to be substituted for an existing one if -*
>
> *(a) the existing party's interest or liability has passed to the new party;*
>
> *(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings*."

26. During the hearing of the application, two issues arose for consideration, namely (1) the requirements of CPR rule 19.2(4), and (2) the standard of proof to be applied upon the disposal of the application under CPR rule 19.2(4).

<u>The requirements of CPR rule 19.2(4)</u>

27. The first issue was whether the Court's jurisdiction to make an order for substitution pursuant to CPR rule 19.2(4) was established if either of the requirements in sub-rules (a) and (b) is satisfied or only if both of these requirements are satisfied.

28. At first glance, it is difficult to conceive of a reason why one party should be substituted for another party as the Claimant unless the interest of the other party had been transferred to a new party. In other words, it was difficult to conceive of a reason why the substitution of a new party was desirable within the meaning of sub-rule (b) other than in the case of sub-rule (a). This had inclined me to the initial view that sub-rules

(a) and (b) were cumulative, and not disjunctive, requirements to establish the Court's jurisdiction to allow substitution of a party. This initial view was consistent with the fact that the jurisdictional requirements for the addition of a new party to the proceedings pursuant to CPR rule 19.2(2) were expressed to be disjunctive, sub-rules (a) and (b) being separated by the word "*or*"; there is no similar provision in CPR rule 19.2(4). Indeed, there might be circumstances where, even if an existing party's interest had passed to a new party, it was not desirable for that new party to be substituted for the existing party.

29. However, the parties drew my attention to the fact that CPR rule 19.2(4) had been amended by the Civil Procedure (Amendment) Rules 2023 (SI 2023/105), rule 12(2), on 6th April 2023, whereby the word "*and*" which had originally been at the end of CPR rule 19.2(4)(a) was omitted. The only reason I can think of for omitting the word "*and*" in these circumstances is that the intention was to render it sufficient to establish the Court's jurisdiction to make an order for substitution of a party either if the requirements of sub-rule (a) are satisfied or if the requirements of sub-rule (b) are satisfied. On this interpretation, there is no need for the requirements of both sub-rules (a) and (b) to be satisfied in order to establish the Court's jurisdiction to make an order for substitution.

30. Nonetheless, Chillblast relied only on its rights as an assignee by reason of the Tactus Assignment to justify its substitution for Tactus as the Claimant in these proceedings. Chillblast did not rely on any additional reason why it was desirable within the meaning of sub-rule (b) for it to be substituted for Tactus.

31. Accordingly, having regard to the grounds of the Defendants' objection to the application, if the assignment purported to be effected by the Tactus Assignment is ineffective either because of the contractual prohibition in the Tactus Assignment or by reason of public policy (champerty), the Court's jurisdiction to make an order for substitution will not have been established.

<u>The standard of proof</u>

32. The second issue is to what standard must the applicant - in this case, Chillblast - establish that there has been a valid assignment so as to engage the Court's jurisdiction under CPR rule 19.2(4).

33. Mr David Berkley KC, who appeared on behalf of Chillblast with Mr Robin Howard, submitted that:

(1) The threshold for the application for substitution to meet is that of a "*good arguable case*" (*Allergan Inc v Sauflon Pharmaceuticals Ltd*, unreported, 2nd February 2000, para. 4).

(2) In *PeCe Beheer BV v Alevere Ltd* [2016] EWHC 434 (IPEC), at para. 32-39, the Court approached the relevant standard on the basis of there being a real prospect of success (essentially the test applicable on a summary judgment application).

(3) Accordingly, following the approach to dealing with applications for summary judgment as explained in the oft-quoted judgment of Lewison, J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), para. 15, the Court must consider whether the applicant has a "*realistic*" as opposed to a "*fanciful*" prospect of success and in making this assessment, the Court should avoid a "*mini-trial*", but at the same time is entitled to scrutinise the evidence in relation to the application and have regard to evidence which is reasonably expected to be adduced at trial. If the Court were to conclude that there are reasonable grounds for believing that a fuller investigation into the facts of the case would affect the outcome of the case, the Court should hesitate to hold that there was no real prospect of success. However, if there is a short point of law or construction raised on the application and the Court has before it all the evidence necessary for the determination of that point, the Court should be prepared to consider determining that issue of law or construction at the hearing of the application.

(4) The present case is unsuitable for summary determination of the merits, because the issues which the Defendants have raised cannot be conclusively decided without a fuller investigation into the facts at trial and the Court should hesitate before making any final decision without a trial. At the very least, Chillblast has a real prospect of establishing that it has acquired the rights of action by assignment and/or it is desirable to add Chillblast so that the Court can resolve all the matters in dispute in the proceedings. This consideration applies

especially to the objection that the Tactus Assignment is void on grounds of public policy (champerty).

34. Mr Alexander Polley KC, who appeared on behalf of the Defendants with Mr Joshua Crow, submitted that:

(1) This is not an application for joinder of an additional party, but an application for the substitution of the Claimant by a different party (the authorities relied on by Chillblast concern applications for joinder). The Court plainly cannot substitute the Claimant on the basis of a merely arguable case that the intervenor (Chillblast) has title. It must decide whether or not the Claimant's interest has actually passed to the applicant. It would be entirely unsatisfactory for the question of title to sue to be resolved at trial after such substitution because, if that issue goes against Chillblast, Tactus would retain title to sue and might issue new proceedings (necessitating a second trial).

(2) The very purpose of the law of champerty is to avoid defendants having to litigate against the maintainer of the litigation (here, Chillblast). That purpose would be defeated if Chillblast were entitled to be substituted in any event.

(3) The wording of CPR rule 19.2(4) itself provides the Court with a discretion to substitute a party with a new party where the existing party's interest has passed to the new party. The Court must determine whether those conditions are actually met, not whether they are arguably met. To do otherwise would be to re-write the rule and/or exceed the power granted to the Court.

(4) The Court must therefore decide whether Chillblast has discharged the burden of establishing that the conditions for substitution are met on the evidence. On the facts of this case, that means the Court must resolve whether Chillblast has taken a valid assignment of the cause of action. Accordingly, the applicable standard of proof which Chillblast must satisfy in order to establish a valid assignment is that based on the balance of probabilities.

(5) In any event, even if the Defendants must show that Chillblast's case is not properly arguable, they can do so. There are no material disputes of fact, and the Court can, and should, grasp the nettle and determine the application of the

law to the facts at this stage. For this purpose, the Court should consider who has the better of the argument.

35. I found this a challenging issue. On the one hand, when dealing with interlocutory applications such as this, the Court tends to require a lesser standard of proof than one based on the balance of probabilities, which is the standard most appropriate for trial. Furthermore, according to the authorities relied on by Mr Berkley KC, the standard to be applied in respect of an application for joinder of an additional party is that of a good arguable case (*Allergan v Sauflon*) or a real prospect of success (*PeCe Beheer v Alevere*). The two standards are different (*cf. Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514, para. 88-89). Further, it might be thought odd to have a different standard for applications for joinder and for substitution when the Court's jurisdiction is sourced from the same rule (CPR rule 19.2).

36. On the other hand, the result of an order for substitution is not only that the applicant (in this case, Chillblast) becomes a party to the proceedings but the existing party (in this case, Tactus) ceases to be a party. The tension becomes obvious where the applicant and the existing party take opposing positions on the application (of course, in the present case, Tactus have adopted a neutral position). If the standard to be applied were merely that of a good arguable case or a real prospect of success that there had been a transfer of interest from the existing party to the applicant, the existing party would lose any right it has - at least in this action - to pursue its claim based on an inappropriately low standard (whereas on a summary judgment application, the existing party's claim would fail only if its case had no real prospect of success).

37. In this respect, there is a meaningful difference between an application for an order for substitution pursuant to CPR rule 19.2(4) and an order to join an additional party pursuant to CPR rule 19.2(2).

38. In these circumstances, I accede to Mr Polley KC's submission that the applicant for an order for substitution must demonstrate on the balance of probabilities that it has acquired the existing party's interest.

39. However, such a high standard is still unsatisfactory at the interlocutory stage, where there has been no disclosure or evidence. One way to offset this difficulty is for the

Court to require a higher standard on an application for an order for substitution but if that standard is not met, the Court could instead allow the applicant to be joined as an additional party, so that the party who would otherwise be substituted remains a party to the action, provided that there is a good arguable case or a real prospect of success in support of the newly added party's title to sue, and allow the issue of title (for example, based on an assignment) to be tried.

40. In approaching this application, the Court should, insofar as it can, resolve any issue of law or construction concerning the validity of the Tactus Assignment, which purportedly passed Tactus's interest to Chillblast. Similarly, if the facts relating to the application are common ground between the parties or are relied on by one party and not contradicted by the other party in circumstances where there was no practical difficulty in adducing contradictory evidence, the Court can resolve the application on the basis of such facts, insofar as they are relevant, without much difficulty.

41. If, however, the validity of the assignment is dependent on a matter of fact which is in dispute and if a party has a plausible basis for establishing that fact as a matter of evidence, which is not plainly and obviously contradicted by other evidence, the Court should accept that there is a real prospect of the applicant establishing that fact. Of course, the establishment or contradiction of such factual matters does not necessarily mean that the assignment is valid or not valid. In such cases, the Court must decide whether there is a good arguable case or a real prospect of a valid assignment or passing of an interest by the substituted party to the new party being established. If there is such a good arguable case or a real prospect, the Court should be satisfied that the jurisdictional grounds under CPR rule 19.2(2) for the joinder of the applicant are met. If not, the Court should dismiss the application.

42. Where the burden of proof resides in the context of the existence of a valid assignment may be in question. For example, it may be that the applicant need prove that there is a valid assignment, but there may be some circumstances where the respondent may have to explain why the relevant assignment was never valid or ceases to be valid.

43. That all said, in the present case, in my judgment, the Court is in a position to dispose of the application whatever the burden and standard of proof. This is because the

disposal of the application rests on issues of law and construction and, insofar as the facts are relevant, they are not seriously in issue.

Is there a contractual prohibition against the Tactus Assignment?

The SPA provisions

44. Clause 2.1 of the Tactus Assignment purported to assign to Chillblast the rights, title and interest belonging to Tactus in the SPA and in Tactus' claim against the Defendants. The claim against the Defendants was reduced by the Court's grant of summary judgment to Tactus' claims for breach of warranty in the SPA against the Sellers.

45. Clause 13.1 of the SPA provides that:

> "***ASSIGNMENT***
>
> *13.1 No party shall assign, transfer, charge, make the subject of a trust or deal in any other manner with this agreement or any of its rights under this agreement or purport to do any of the same without the prior written consent of the other party except that the Buyer may:*
>
> *13.1.1 assign the benefit of any provision to which it is entitled from time to time, in whole or in part to any company which is for the time being a member of the Buyer's Group provided that and subject to the condition that if any such company ceases to be such a member of the Buyer's Group then the Buyer shall procure that upon such cessation the rights under this agreement shall be reassigned or transferred back to the Buyer; or*
>
> *13.1.2 assign the benefit of any provision to which it is entitled from time to time, grant security over or assign by way of security in whole or in part to any lender who provides financial facilities to the Buyer,*
>
> *provided, in each case, no assignee shall be entitled to greater damages or other compensation than that to which the Buyer would have been entitled had it not assigned the rights under this agreement as aforesaid*."

46. Clause 13 of the SPA therefore prohibits the assignment of the SPA or rights under the SPA without the consent of the other party, unless one of the two exceptions applies.

47. This means that if the assignment of debts owing or sums due under the SPA is prohibited by the SPA, any purported assignment will be ineffective. As Lord Browne-

Wilkinson said following a review of the authorities in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, at page 108:

> "*… the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense. If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties*."

48. In this case, there is no suggestion that the Sellers consented to the Tactus Assignment. Chillblast, however, submits that the exception in clause 13.1.2 applies (there is no suggestion that clause 13.1.1 applies).

49. This gives rise to a simple question of construction, namely whether Chillblast is a "*lender who provides financial facilities*" to Tactus within the meaning of clause 13.1.2 of the SPA. It is an issue which the Court can address on a summary basis in the disposition of the application for substitution.

50. The principles of contractual interpretation were unsurprisingly not in dispute. Recently, Lord Hamblen summarised those principles in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2; [2023] 1 WLR 575, at para 29:

> "*(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
>
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
>
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated*."

The parties' submissions

51. Mr Berkley KC on behalf of Chillblast submitted that:

(1) The words "*lender*" and "*financial facilities*" are not defined terms in the SPA and should be accorded their natural and ordinary meaning. This was nonetheless a carefully drafted document.

(2) In accordance with the natural and ordinary meaning of the words used, by reason of its entry into the Santander Assignment, Chillblast became a lender who provided financial facilities to Tactus. Chillblast did not call in the credit facility and demand repayment but continued to provide credit to Tactus as the Borrower and Obligor under the Facility.

(3) The exception for lenders was expressly included as a qualification in a carefully drafted agreement and, from the perspective of the contracting parties, under the SPA their words are clear and certain in their effect.

(4) Chillblast has been substituted for Santander as a result of the Santander Assignment and Chillblast stands in the position *vis à vis* Tactus as a lender to Tactus, and so has become a lender who provides financial facilities to Tactus.

(5) Chillblast was providing financial facilities to Tactus because it acquired Santander's rights under the Facility, which provided a revolving credit facility.

(6) In any event, insofar as the assignment to Chillblast was not effective as against the Sellers, it was effective at least in equity as between Tactus and Chillblast, such that its equitable interest entitles Chillblast to participate in these proceedings and, moreover, it might well be possible to infer that Tactus would hold the damages claimed in these proceedings on a constructive trust for Chillblast (*Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70, 79; *Don King Productions Inc v Warren* [2000] Ch 291, 319-320).

(7) Therefore, the assignment by Santander to Chillblast satisfies the exception under clause 13.1.2 of the SPA.

52. Mr Polley KC submitted on behalf of the Defendants that the Tactus Assignment was prohibited by clause 13.1 of the SPA because:

(1) Chillblast was not a "*lender*" because financial lending forms no part of its ordinary business. Chillblast operates a business selling computers. Properly understood, the requirement that the assignee be a "*lender*" would be satisfied only by a person who is in the business of or is otherwise accustomed to lending to unrelated third parties and not by someone who merely happens to be a creditor of Tactus.

(2) Even if Chillblast was a "*lender*", it was not a lender which provided financial facilities to Tactus. Chillblast simply acquired, at a substantial discount, from Santander an existing debt under the Facility. Chillblast was a creditor, not a lender providing financial facilities. Chillblast did not in fact provide any money or other financial facility to Tactus at all. Chillblast was never more than a (secured) creditor. It did not provide any actual banking or lending facilities to Tactus, not least because Tactus was insolvent and was placed in administration within two months of the Santander Assignment.

(3) Chillblast did not in fact provide financial facilities to Tactus and did not assume any obligations to provide financial facilities in any event because by the date of the Santander Assignment, an Event of Default had occurred by reason of Box Ltd having been placed into administration (clause 24.7 of the Facility).

(4) The terms of the Santander Assignment demonstrate that Chillblast had no intention of acting as a financial service provider at all. The Santander Assignment was not a mere assignment of a lending arrangement; the consideration for the Santander Assignment included a share of the proceeds of the current litigation as well as all sums received by Chillblast pursuant to the Facility.

(5) Clause 13.1 of the SPA required that the permitted assignee be an arms-length third party to Tactus. Such a requirement is implicit in the phrase "*lender who provides financial facilities*". This is underscored by the fact that clause 13.1.2 of the SPA appears immediately after clause 13.1.1, which deals expressly with related parties. Notably, clause 13.1.1 permits assignment only to group companies, *i.e.* companies in common ownership with Tactus or owned by Tactus and, even then, if an assignee under clause 13.1.1 leaves the Tactus

Group, they are required to re-assign the rights to Tactus. Given that context, it would make no sense for clause 13.1.2 to circumvent the limitations of clause 13.1.1, by allowing an assignment to wider related entities without consent simply because they were creditors of Tactus.

(6) Chillblast does not satisfy the requirement that it is an arms-length, unrelated third party, because Tactus was related to Chillblast in various ways.

(7) The Defendants' construction of clause 13.1 makes commercial sense, whereas Chillblast's interpretation is commercially absurd in that the exception to clause 13.1.2 could be readily side-stepped by an assignee lending money to the assignor.

(8) Clause 13.1 is structured to prevent assignments, save in narrowly specified circumstances (either with consent, or to group companies, or to financial institutions in a relationship with Tactus). The parties plainly intended to place real limits on their ability to assign their contractual rights (as is commonplace, for obvious reasons). By comparison, clause 25 of the Facility permitted assignments to other banks or financial institutions or other entities "*regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets*".

(9) There is no place for the imposition of a trust, even if an assignment is prohibited, by reason of the terms of clause 13.1 (see *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep 495).

Discussion

53. In my judgment, Chillblast does not fall within the description of a "*lender who provides financial facilities to [Tactus]*", by reason of the Santander Assignment, having regard to the following considerations.

54. First, Chillblast is not a "*lender*" to Tactus. This is because Chillblast acquired no more than the rights of action against Tactus arising under the Facility (and Finance Documents) which had previously belonged to Santander. Chillblast did not advance funds to Tactus by way of a loan.

55. The Santander Assignment transferred or assigned to Chillblast the rights of Santander in respect of the sums outstanding under the Facility and owed by Tactus (as well as the Finance Documents). There is no sense in the Santander Assignment that the obligations which had been borne by Santander as the Lender under the Facility were likewise transferred to Tactus. Of course, Santander was released from its obligations under the Facility to Tactus (such as the obligation to advance further loans and to maintain the Holding and Mandatory Prepayment bank accounts for the benefit of Tactus), but that does not mean that the mantle of those obligations was assumed by Chillblast. In other words, the Santander Assignment did not operate as if it were a novation whereby Santander's role as lender was taken up by Chillblast.

56. As a result, as Mr Polley KC submitted, Chillblast became a creditor of Tactus. That does not mean it also became a lender. Similarly, if a lawyer, architect or broker provided services to a client, and if the bills for fees due to them for their services were assigned to a third party, that third party does not by reason of the assignment become a lawyer, architect or broker. In other words, if a butcher, baker or candle-stick maker were to assign to a third party a debt owed to them for their services as butchers, bakers or candlestick-makers, that third party assignee does not thereby become a butcher, baker or candlestick-maker.

57. Second, clause 13.1.2 of the SPA contemplates that a lender must be a person who at the date of the assignment is providing "*financial facilities*" to Tactus. At the date of the Tactus Assignment, Chillblast was not providing financial facilities to Tactus by reason of the Santander Assignment or at all. The notion of "*financial facilities*" involves a person - in this case, it must be a "*lender*" - providing the borrower the means of obtaining monetary resources on credit. There is no indication in the Santander Assignment that Chillblast took on this burden of providing financial facilities. Indeed, by the date of the Santander Assignment, there had been an Event of Default which meant that there was no continuing obligation on the part of the Lender under the Facility to advance a further loan.

58. Third, I accept Mr Polley KC's submission that the words "*any lender*" would ordinarily convey the meaning of a person who is engaged in the business of lending money at interest. This is especially so when one considers the entirety of the phrase in clause 13.1.2 - "*any lender who provides financial facilities*" - which means that the

person who is described as the lender is in a position to provide financial facilities. That does suggest to me that there should be an "arms-length" relationship between the lender and the borrower (Tactus).

59. Fourth, as to the argument that an ineffective assignment might nonetheless give rise to a trust in respect of the relevant rights of action belonging to Tactus in favour of Chillblast, whatever the mechanism for the inference of such a trust, I do not consider that it could survive the contractual prohibition in clause 13.1 of the SPA which is not only against assignments, but also against trusts. Clause 13.1 provides that (with emphasis added): "*No party shall assign, transfer, charge, **make the subject of a trust** or deal in any other manner with this agreement or any of its rights under this agreement or purport to do any of the same …*".

60. In *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep 495, Rix, LJ considered that such a prohibition would stall the creation of a trust, although in the case before him there was no such prohibition. Rix, LJ said at para. 87-88:

> "*87. In these circumstances, my conclusions under this issue are as follows. The fact that a prohibition on assignment between A and B cannot allow a third party, C, as A's purported assignee, to bring a direct contractual claim against B is not in dispute. It was held in Linden Gardens to be the consequence of the contractual prohibition …*
>
> *88. The ineffectiveness of the assignment in breach of a prohibition on assignment is understandable. It is not merely a matter of contract but of property. Although the would-be assignor has legal title to property in the form of a chose in action, he lacks the power, because of the terms on which the property is held, to transfer that property so as to entitle the transferee to exercise those contractual rights himself against the other party to the contract. However, he does not lack the power to render himself a trustee in equity of the property concerned. He would only do that if the prohibition on assignment extended as far as prohibiting a declaration of trust*."

61. In the same case, Waller, LJ came to the same view (para. 30). Indeed, Waller, LJ then cited (at para. 31) the decision of Lightman, J in *Don King Productions Inc v Warren* [2000] Ch 291, 321: "*If one party wishes to protect himself against the other party declaring himself a trustee, and not merely against an assignment, he should expressly so provide. That has not been done in this case*.".

62. I should make it clear that had there been no prohibition against the creation of a trust in clause 13.1 of the SPA, I make no decision on whether such a trust could have arisen on the facts of this case, although I am sceptical.

63. Therefore, as a result of my finding that, by reason of the Santander Assignment, Chillblast was not a lender who provides financial facilities within the meaning of clause 13.1.2 of the SPA, the Tactus Assignment was ineffective, with the result that the interest of Tactus did not pass to Chillblast so as to satisfy the requirements of CPR rule 19.2(4)(a). In addition, given that Chillblast is unable to establish that it had acquired Tactus' interest in the claims against the Sellers, I am not satisfied that it is desirable to substitute Chillblast for Tactus so that the Court can resolve the matters in dispute in the proceedings within the meaning of CPR rule 19.2(4)(b).

64. Accordingly, the application must be dismissed on this ground.

Is the Tactus Assignment void on the grounds of champerty?

65. The Defendants submit that even if the assignment of Tactus' rights of action in respect its claims for breach of warranty under the SPA to Chillblast were not prohibited by the terms of the SPA, the Tactus Assignment is nonetheless void on grounds of public policy in that it is champertous.

The law relating to champerty

66. Champerty occurs where there is an agreement by which one person undertakes to maintain or support litigation by another person, whether by an assignment or other means, in exchange for a share of the proceeds of that litigation where the maintainer has no legitimate interest in the claim being litigated and where the maintenance occurs without just cause or excuse (*Farrar v Miller* [2021] EWHC 1950 (Ch), para. 14). Such an agreement in the absence of such an interest is treated as "*wanton and officious intermeddling with the disputes of others*" (*Giles v Thompson* [1994] 1 AC 142, 161, 164).

67. Originally, champerty and maintenance were criminal and civil wrongs, but the crime and the tort have been abolished by sections 13(1) and 14(1) of the Criminal Law Act 1967. However, this legislation did not affect the rule that the law will not recognise

the assignment of a "*bare right of action*" on the ground that such a transaction savours of champerty or maintenance.

68. Champerty is a doctrine whose object is to protect the "*purity of justice and the interests of vulnerable litigants*"; its application requires consideration whether the intervention of the assignee is harmful to the administration of justice or to the interests of the parties directly affected by the assignment, in particular the defendants to the assigned claim (*Giles v Thompson* [1994] 1 AC 142, 164; *Massai Aviation Services v The Attorney General* [2007] UKPC 12, para. 13).

69. The law of champerty has altered over its history to reflect the changing nature of public policy and must accommodate itself to changing times (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 702; *Giles v Thompson* [1994] 1 AC 142, 164). At its heart, however, the law is concerned to prohibit a claim being maintained by a person who has no genuine or legitimate interest in the claim, meaning that the party is a "*stranger*" to it. The existence of a legitimate interest lies at the centre of the doctrine in that the law does not allow the transfer of a "*bare right to litigate*" from a person who has allegedly suffered a wrong to an uninterested person. The legitimate interest is generally considered to be a commercial interest, especially if the relevant right of action arises in respect of a commercial transaction. However, the legitimate interest need not be of a commercial nature. In the present case, it is the existence of a legitimate commercial interest which is in issue.

70. The assignment should be commensurate with the relevant legitimate commercial interest, but that is not to say that the assignee could not profit from the assignment, but if the profit were excessive, that might properly be a factor in deciding whether the relevant agreement exceeded the assignee's otherwise genuine commercial interest (*Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499; *Massai Aviation Services v The Attorney General* [2007] UKPC 12, para. 17).

71. In *Farrar v Miller* [2022] EWCA Civ 295, Arnold, LJ stated at para. 22:

> "*The first rule is that a bare cause of action (i.e. not one ancillary to a property right or interest) can only be assigned where the assignee has a genuine commercial interest in enforcing the claim. At one time, it was thought that a bare cause of action could never be assigned because that amounted to trafficking in*

> *litigation, but that is no longer the law. In Trendtex Trading Corp v Credit Suisse [1982] AC 679, the House of Lords held that, as Lord Roskill put it at 703:*
>
> > *"... in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty ... if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance*."

72. How then to determine whether such the transferee or maintainer has a legitimate interest in the claim? This requires the Court to consider the totality of the relevant transaction and its surrounding circumstances and consider whether it tends towards the corruption of public justice (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 703; *Giles v Thompson* [1993] 3 All ER 321, 333; [1994] 1 AC 142, 164). A number of factors will bear on this inquiry.

73. An important question is whether the interest exists apart from the assignment itself. Of course, upon the taking of an assignment of a right of action, the assignee will by reason of the assignment, if valid, have an interest in the claim, but that of itself is not sufficient to enable the assignment to take effect. The legitimate interest must therefore exist independently of the assignment being challenged (*Giles v Thompson* [1993] 3 All ER 321, 333, 347). The legitimate interest may precede the assignment (for example, if an insurer takes an assignment of a right of action belonging to an insured it is insuring or it has indemnified (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 703) or the interest may be created in other contemporaneous transactions to which the assignment relates and is subordinate (for example, where a mortgagee has an interest in property by reason of the mortgage and takes an assignment of certain rights of action by way of additional security for any loan advanced).

74. Where the assignee has acquired a property interest or right and the right of action assigned is an incident of that interest or right of property, the assignee is thereby likely to have a sufficient interest in the claim (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 703; *Farrar v Miller* [2021] EWHC 1950 (Ch), para. 54(1)(b); aff'd [2022] EWCA Civ 295). The acquisition by the assignee of a property interest or right together with a related but incidental right of action is said to be a separate justification

for upholding an assignment from the assignee having a legitimate commercial interest, because it is the property interest or right which is being purchased, not the right of action (*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 703). The interest or right of property in this context must be distinguished from the treatment of the right of action itself as property of an incorporeal nature. In any case, the existence of such a property interest or right would of itself create a legitimate interest.

75. In *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, Trendtex contracted to sell consignments of cement and a letter of credit was issued by the Central Bank of Nigeria (CBN) in respect of the purchase price. Trendtex had a claim against CBN for some US$14 million on the grounds of a repudiatory breach of the letter of credit because CBN refused to accept documents tendered under the letter of credit. Credit Suisse had financed Trendtex's purchase of cement from German suppliers and had anticipated that its loans to Trendtex would be recouped by means of the CBN letter of credit. Credit Suisse funded the costs of the action against CBN and then Trendtex agreed, on 4th January 1978, to assign its claim against CBN to Credit Suisse. In that agreement, reference was made to the fact that Credit Suisse had received an offer from an anonymous third party for the acquisition of this claim against CBN and Trendtex consented to the onward sale of the claim. Five days later, on 9th January 1978, Credit Suisse entered into agreement to assign that claim to that third party. The question arose whether the agreement between Trendtex and Credit Suisse was champertous.

76. The House of Lords held that, although Credit Suisse had a genuine interest in the claim against CBN, the agreement of 4th January 1978 was champertous because its purpose was to enable the claim against CBN to be sold to the anonymous third party and for that anonymous third party to obtain what profit it could apart from the purchase price of US$1,100,000 paid to Credit Suisse. Lord Roskill said at page 704: "… *the "spoils," whatever they might be, to be got from C.B.N. were in effect being divided, the first U.S. $1,100,000 going to Credit Suisse and the balance, whatever it might ultimately prove to be, to the anonymous third party. Such an agreement, in my opinion, offends for it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils* …".

77. It is not necessarily sufficient for the existence of a legitimate interest that the assignee is or had been a creditor or shareholder of the assignor, but there may be circumstances

where the assignee's interest in the assigned right of action may be legitimate by reason of such relationships (*Massai Aviation Services v The Attorney General* [2007] UKPC 12, para. 17).

78. In *Turner v Schindler & Co*, unreported, 28th June 1991, the appellant took an assignment from a company (Kingstat) of various debts and rights of action which belonged to Kingstat recoverable from specified companies, in consideration of the payment of £1. It was conceded by the defendants that the assignment of the debts, as opposed to the causes of action in tort, were valid, but the trial judge held that there were in fact no debts owing at the relevant date.

79. The Court of Appeal held that, in order for the assignment to be treated as effective, the appellant had to demonstrate a genuine commercial interest in taking the assignment and in enforcing the relevant rights of action for his own benefit. The appellant argued that he had a legitimate interest as he was a natural brother of Kingstat's shareholders or other directors. Parker, LJ held that consanguinity did not give the appellant a common interest with the company. The appellant also submitted that such a commercial interest existed because, first, he was a creditor of Kingstat in the sum of £5,000 and, second, if Kingstat were to become insolvent, as a director he was at risk of disqualification.

80. Nourse, LJ dealt with these submissions as follows:

> "*The second of these could not possibly give the appellant a genuine commercial interest in enforcing the rights of action. It can therefore be ignored.*
>
> *Superficially, the first ground might have something to it. A creditor of a company does have a genuine commercial interest in enforcing a right of action belonging to the company. But it is not as simple as that. He does not stand alone. His interest is only as one amongst all the creditors. If the appellant had taken the assignments of the causes of action as trustee for Kingstat, ie for the benefit of the creditors and the contributories as a whole, it would no doubt have been valid; cf Guy v Churchill (1889) 40 Ch D 481. But he did not take it as a trustee. He took it for his own exclusive benefit and in that capacity he did not have a genuine commercial interest in enforcing the assignment.*
>
> *On this short ground it can be held that the assignments amounted to or savoured of maintenance and were therefore void. But I do not suggest that that is the only ground on which they can be so held. Thus at page 26H the judge said:*

> *"If these claims were in truth open to Kingstat, as a director at the date of the assignment and indeed one of the signatories of the assignment his duty must have been to have the claims pursued either by or at the very least for the benefit of the company and not to purchase them as he did for his own benefit for the sum of £1.*
>
> *In my judgment, the plaintiff has not even begun to show that he had such a commercial interest as can properly be accepted as being appropriate to justify an assignment of these alleged claims."*
>
> *What the judge was there saying, correctly as I respectfully think, was that you cannot have a genuine commercial interest in enforcing for your own benefit a right of action which you have a duty to enforce for the benefit of others. That is the simpler and more satisfactory ground for affirming the judge's decision. However we may look at it, it is impossible for us to take a different view*."

81. In *Massai Aviation Services v The Attorney General* [2007] UKPC 12, the plaintiff (CAASL) commenced proceedings in respect of a claim for damages against the government of The Bahamas and the national carrier of The Bahamas. After the commencement of proceedings, CAASL sold its business but retained this claim, which it later assigned to its sole shareholder (Aerostar) for the price of $10. The Privy Council held that this assignment was not champertous and explained at para. 21:

> "*This was not wanton and officious intermeddling in another person's litigation for no good reason. It was simply the original owners retaining part of what they owned while disposing of the rest. There is nothing contrary to public policy in allowing Aerostar to pursue the claim against these defendants and no good reason why these defendants should be permitted to escape any liability that they may have. This is not, of course, to say that a shareholder will always have a genuine and substantial commercial interest in taking an assignment of the company's claims. To take an extreme example, for a minority shareholder to buy a substantial claim for a nominal sum in the hope of making a substantial profit may well be contrary to public policy. But that is not this case. Aerostar owned all the shares in CAASL and taken as a whole the transaction was a perfectly sensible business arrangement*."

82. If the assignment has the potential of improving the financial position of an assignee, for example in altering the relative priorities of the assignees and creditors of the assignor in respect of the assigned right of action, that may be a cause for concern having regard to public policy and may speak against a sufficient legitimate interest belonging to the assignee (*Farrar v Miller* [2021] EWHC 1950 (Ch), para. 54(2)(c)). This raises the question whether the circumstances of the relevant assignment might tempt the allegedly champertous maintainer for its personal gain to inflame the

damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice (*R (Factortame) v Secretary of State for Transport* [2002] EWCA Civ 932; [2003] QB 381, para. 36).

83. It is not sufficient to create a legitimate interest that the assignee is aware of or familiar with the circumstances surrounding the claim (*Farrar v Miller* [2021] EWHC 1950 (Ch), para. 54(1)(a)). Indeed, there have traditionally been concerns about lawyers acting for a claimant assuming the benefit of a claim. There are today statutory provisions which regulate such matters (see *Farrar v Miller* [2021] EWHC 1950 (Ch)).

84. Notwithstanding the assignment of a right of action - a right to litigate - may be champertous, the sale of a debt owed to the assignor will not normally be treated as champertous. In *Massai Aviation Services v The Attorney General* [2007] UKPC 12, at para. 18, the Privy Council said:

> "*The buying and selling of choses in action is, of course, commonplace. Debts are regularly traded at a discount so that the creditor can obtain some of what he is entitled to while passing on the risks of litigation to others. Businesses are regularly sold with the benefit of their claims as well as their liabilities. Had CAASL sold all its business, including this claim, to Executive, no-one could have objected. What raised eyebrows was the sale of the business to Executive while Aerostar retained the claim. Eyebrows were raised even higher when it emerged that Aerostar had paid only $10 for the claim. This began to look like a very substantial profit, or "trafficking" in litigation*."

85. The assignment of a debt is expressly authorised by section 136 of the Law of Property Act 1925, but so is the assignment of a "*legal thing in action*". The difference between a debt and a "*legal thing in action*" (or a right of action or a cause of action) is that a debt is generally - although not always - an acknowledged liquidated sum owing by one party to another and is treated as the equivalent of a property right, whereas a right of action (for example, a claim for damages) is generally by its nature a matter intended to be litigated (see *Camdex International Ltd v Bank of Zambia* [1998] QB 22, 32, 35, 39).

The parties' submissions

86. Mr Polley KC on behalf of the Defendants submitted that the Tactus Assignment is void and of no effect, because it is champertous:

(1) The Tactus Assignment bears every hallmark of an impermissible assignment of a bare right to litigate to a third party with no legitimate interest in these proceedings in that:

(a) Chillblast is a third party which, prior to the Santander Assignment, had no independent interest in Tactus' claim against the Sellers.

(b) Chillblast is controlled by former directors of Tactus. Mr Michael Fletcher (a former director and shareholder of Tactus) has a shareholding in Chillblast. The interests of Chillblast's directors and shareholders (even if legitimate) cannot be attributed to Chillblast, as Chillblast is a separate legal personality and (unlike the facts in *Massai*) its shareholders are not the same as those of Tactus. The Tactus Assignment appears to have constituted a breach of duty on the part of Tactus' directors, in particular their duties to promote the success of the company (section 172 of the Companies Act), to exercise independent judgment (section 173), and to avoid conflicts of interest (section 175).

(c) Tactus, the assignor, purported to assign its rights of action against the Sellers when it was on the brink of insolvency, being placed into administration ten days later.

(d) If the claims succeed, Chillblast stands to make a huge profit from the litigation, having agreed to pay a nominal or negligible sum in consideration for the assignment (for example, if the claim for breach of warranty succeeds in its full amount of approximately £18 million, Chillblast will retain some £12 million, after accounting to Santander and Tactus).

(e) The combined effect of the Santander Assignment and the Tactus Assignment is to create Chillblast as a significant secured creditor of Tactus, leaving all other creditors with very little recovery.

(2) The Santander Assignment does not furnish Chillblast with a legitimate interest prior to the agreement of the Tactus Assignment. The Santander Assignment was directly linked to the Tactus Assignment, and required Chillblast to share

the proceeds of the current proceedings with Santander. It was part and parcel of an artificial process to try to allow the directors of Tactus to retain control of the litigation of Tactus' claims against the Sellers.

(3) The facts of this case here are near-identical to those in *Trendtex*. In *Trendtex*, the creditor (Credit Suisse) took a direct assignment of the cause of action, with the contemplation of making an onward assignment for a price to a third party with no prior interest in the claim, for the purposes of that third party making a substantial profit. In this case, the assignment has been made to the third party directly, after an assignment of Santander's rights against Tactus under the Facility to that third party, for the purposes of the third party making a substantial profit. In both instances, there was a tripartite relationship by means of which a third party with no prior interest in the relevant claims has taken an assignment, facilitated by an existing lender, for the purposes of making a substantial profit.

(4) In addition, the Tactus Assignment also raises all of the concerns regarding insolvency which arose in *Turner* and *Farrer*. Tactus is heavily insolvent. As set out in the Joint Administrators' proposals, it is not anticipated that there will be sufficient funds to pay any unsecured creditors: it is anticipated that there will be claims of more than £900,000 from trade creditors, HMRC has a preferential claim for more than £2.5 million, and the Sellers have their own counterclaim for approximately £4.3 million. If a significant recovery were made by Tactus directly on this claim, that would provide funds to pay unsecured creditors. However, if the Tactus Assignment were effective, Tactus would receive no more than approximately £3.9 million, as the balance would be payable to Chillblast in any event; in that case, it seems unlikely unsecured creditors will recover anything. This may well place Chillblast in a preferential position.

(5) It may be that the Tactus Assignment would fall foul of section 238 (transactions at an undervalue), section 239 (preference) or section 423 (a transaction defrauding creditors) of the Insolvency Act 1986.

(6) As regards the position of the Sellers if the substitution were allowed:

(a) The Sellers have a substantial counterclaim against Tactus for at least £4.3 million. If Tactus remains as Claimant and pursues the litigation, the Sellers are likely to be granted permission to continue that counterclaim, and, if both claim and counterclaim succeed, there will either be set-off, or Tactus will have funds to pay the counterclaim. On the other hand, if Chillblast is substituted, it is unclear whether the Sellers will be granted permission to pursue the counterclaim, and even if they are, the Sellers are likely to be disadvantaged if both claim and counterclaim succeed, in that most of the claim will be paid to Chillblast, and Tactus would not have sufficient funds to meet the counterclaim.

(b) The Sellers have concerns about the availability of disclosure. Most of the relevant documentation is in the possession of Tactus and/or Box Ltd, and therefore of the Joint Administrators. That this is a very real concern is demonstrated by the fact that the Sellers have made requests of Tactus for documents relating to its amended Particulars of Claim, but, despite assurances from Tactus' former solicitors that they would ask the Joint Administrators for such documents, they have received nothing to date.

(7) The Joint Administrators of Tactus have not declared a position in respect of the Tactus Assignment. As at 17th July 2024, they were still investigating the validity of the Tactus Assignment. It therefore appears that either the Joint Administrators have not completed their investigations in relation to the Tactus Assignment, or they have concluded that the Warranty Claims are not worth significantly more than Chillblast paid for them. In either case, this supports the conclusion that the Tactus Assignment is champertous.

(8) The Tactus Assignment represents trafficking in litigation for profit, plain and simple. The circumstances of the assignment to Chillblast fall squarely within the *ratio* of the principal authorities concerning champerty.

87. Mr Berkley KC on behalf of Chillblast submitted that the Court should not dispose of the question whether the Tactus Assignment is champertous at this stage of determining the application for substitution, principally because the issues raised concern matters of

"*nuance*" and degree, questions of public policy, and some of the factual submissions relied on by the Defendants were not correct; such matters are best left over to trial.

88. In any event, Mr Berkley KC submitted that the Tactus Assignment was not champertous because:

(1) The doctrine of champerty should not be allowed to be used as "*an instrument of oppression*" (*Martell v Consett Iron Co Ltd* [1955] Ch 363, 386). As a result, the doctrine has been liberalised over the last century.

(2) It is necessary to look at the agreement which is being challenged in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the parties.

(3) Chillblast is a secured lender of Tactus.

(4) Chillblast acquired subsidiary companies of Tactus and their undertakings at the same time as the Santander Assignment.

(5) Chillblast has agreed to share the proceeds of the litigation against the Sellers with Tactus in a manner which is acceptable to the Joint Administrators.

(6) It is notable that the Joint Administrators have not challenged the Tactus Assignment which they refer to in their Report and Proposals to Creditors. One of the Joint Administrators, Mr Blackman, stated in a witness statement dated 20th September 2024, at para. 7, that the Joint Administrators raise no objection to the substitution application.

(7) The Joint Administrators' stance is not surprising in that Chillblast has a genuine commercial interest in taking an assignment of the rights of action in the Claim:

(a) Chillblast paid £750,000 to Santander on 21st March 2024 in exchange for the assignment of Santander's interest and agreed to pay the Additional Consideration, including 10% of each of the "*Net Claim Proceeds*" (as defined) and the "*Costs*" (as defined) and the "*Box*

Proceeds" (as defined). Chillblast thereby acquired at least £2,760,672 of Tactus' debt to Santander.

(b) Chillblast was willing to provide Tactus with valuable consideration for the Tactus Assignment in the sum of £1,050,000, achieved by means of a debt reduction of £1 million and £49,999 of Deferred Consideration, contingent on the Assignment surviving a challenge by the Defendants, and at least a specified share of the Net Claim Proceeds.

(c) Chillblast paid the interim costs of £128,400 ordered by the Court to be paid by Tactus on the summary judgment application on 27th March 2024.

Discussion

89. Mr Berkley KC pressed the Court not to deal with the champerty issue at this interlocutory stage, rather than at trial. In this respect, I had some sympathy with Chillblast's position, especially when one must consider whether the result of the Santander Assignment and the Tactus Assignment is to provide Chillblast with an excessive profit should the right of action against the Sellers result in a recovery of substantial damages. I do not consider that the question whether any profit to be earned by Chillblast, assuming it otherwise has a legitimate interest in Tactus' claim against the Sellers, is excessive is a matter which can be determined summarily.

90. Nonetheless, there are three reasons why I shall seek to determine the issue of champerty, insofar as I can, at this stage:

(1) If it is the case that Chillblast does not have a legitimate commercial interest at all in Tactus' claims against the Sellers, whether the profit it may make is or is not excessive is not relevant. If, however, I consider that Chillblast has a sufficient interest in the claims against the Sellers, then I accept the question whether the profit which might be earned is excessive is not a matter which should be addressed at this stage.

(2) The key factual considerations underlying the question whether Chillblast has an interest in Tactus' claims against the Sellers are not a matter of dispute

between the parties and therefore there is no obvious need to await a trial to determine any factual issues which may go to assessing whether the Tactus Assignment is champertous.

(3) If, in these circumstances, the Court is satisfied to the requisite standard that the Tactus Assignment is champertous, and assuming I am wrong in my construction of clause 13.1 of the SPA, it would be preferable to determine this issue now to avoid the practical consequences of substituting the Claimant which were outlined by the Defendants.

91. Chillblast has acquired no rights of property which relate to Tactus. Accordingly, one must look for the existence of a genuine or legitimate commercial interest which Chillblast might have in Tactus' claims which have been purportedly assigned to Chillblast in order to avoid the Tactus Assignment being treated as champertous.

92. In considering whether Chillblast has such a legitimate interest, it is worth bearing in mind a shortened chronology surrounding the assignment:

(1) On 14th February 2024, Chillblast was incorporated. The directors and a shareholder of Chillblast were or had been directors of Tactus.

(2) On 21st March 2024, the Santander Assignment was concluded between, amongst others, Santander and Chillblast.

(3) On 13th May 2024, the Tactus Assignment was agreed.

(4) On 23rd May 2024, Tactus was placed into administration.

93. It is also worth considering the financial aspects of the assignment:

(1) Tactus' claim against the Sellers for breach of contractual warranty is in the approximate sum of £18 million.

(2) By the Santander Assignment, Chillblast took an assignment of the sums owing under the Facility - then said to be £2.76 million - in exchange for a payment of £750,000 and a 10% share of the proceeds of Tactus's claim against the Sellers.

(3) By the Tactus Assignment, Chillblast agreed to pay the sum of £1.05 million (including a debt reduction and a contingent payment) plus a specified share of the proceeds of the claim against the Sellers in exchange for the assignment of Tactus' claim against the Sellers.

94. It is plain that Chillblast had no involvement in the SPA or its performance. Indeed, it was incorporated only after the current proceedings were commenced. Accordingly, that leaves three possible bases on which Chillblast could be said to have an interest in Tactus' claims against the Sellers for breach of warranty in the SPA.

95. The first possible basis is the fact that its directors are or were directors of Tactus. That, however, is not sufficient to substantiate the existence of a legitimate commercial interest on the part of Chillblast. The role of a director is very much concerned with the interests of the company on whose board the director sits. The mere fact that a director also happens to be a director of another company does not mean that the interests of the two companies are aligned or concerned with the fate of each other. Indeed, the interests of a director cannot be taken to represent the interests of the company of which he or she is a director. There can be no sufficient interest to justify an assignment of a right of action by one company to another, merely because they share common directors. Indeed, in *Turner v Schindler & Co*, unreported, 28th June 1991, the Court dismissed the notion that merely because the assignment of the company's right of action was made to one of its directors was sufficient to establish a legitimate interest on the part of the assignee.

96. The second possible basis is that there is a "*common shareholding*", although I was not entirely sure what was intended to be embraced by that notion. As I understood it, the shareholders of Chillblast are not the same as the shareholders of Tactus. However, I note that Chillblast had acquired the business of certain companies which had belonged to Tactus. That again does not mean that Chillblast has a legitimate interest in Tactus' claims against the Sellers.

97. The third possible basis is that by reason of the Santander Assignment Chillblast became a creditor of Tactus in respect of the sums outstanding under the Facility (and Finance Documents) and that indebtedness was secured. This is the most substantial ground for according a legitimate interest to Chillblast, However, in my judgment, it is

not sufficient, at least on the facts of this case. Absent the Santander Assignment, Chillblast had no interest in Tactus' claims against the Sellers. A significant purpose behind the Santander Assignment - which rendered Chillblast as a creditor - was to enable Chillblast to acquire Tactus' rights of action against the Sellers. I say this because a part of the consideration agreed to be paid by Chillblast to Santander for the assignment was a share of the proceeds of those rights of action received by itself or by Tactus and, of course, at the time of the Santander Assignment, Chillblast was not in a position to receive and therefore pay any such share of the claim proceeds unless and until it acquired a valid assignment of Tactus' rights of action against the Sellers. Therefore, I accept Mr Polley KC's submission that the two assignments - the Santander Assignment and the Tactus Assignment - were part and parcel of the same transaction. This therefore amounts to unjustified intermeddling with the dispute between Tactus and the Sellers.

98. This conclusion is reinforced by consideration of the observations of the Court of Appeal in *Turner v Schindler & Co*, unreported, 28th June 1991. The assignment of the rights of action against the Sellers to Chillblast was for the benefit of Chillblast alone, not for the benefit of all creditors, with the result that the interests of the other creditors might well be prejudiced as a result of the assignment. I do not say that the interests of the other creditors would in fact be prejudiced.

99. Finally, this conclusion is not altered by the fact that Chillblast may have paid the costs ordered by the Court to be paid by Tactus on the summary judgment application. That fact does not generate the type of interest to justify the assignment.

100. Therefore, had the Tactus Assignment been otherwise effective - and I have concluded that it was not effective to transfer Tactus rights of action against the Sellers to Chillblast - the Tactus Assignment would have been void on grounds of public policy. The result of this finding would be to exclude the jurisdictional basis for allowing the substitution of Tactus by Chillblast as the Claimant in these proceedings.

The Court's decision on the application for substitution

101. For the reasons explained above, I have concluded that Tactus' interest in the claims for breach of warranty under the SPA against the Sellers has not passed to Chillblast, because the Tactus Assignment was not effective having regard to the contractual

prohibition in clause 13.1 of the SPA. If there was no such contractual prohibition, the Tactus Assignment is nevertheless void and therefore ineffective to pass Tactus' interest in the claims against the Sellers to Chillblast, on the grounds of public policy (champerty).

102. I have reached these conclusions having regard to each of the formulations of the standard of proof said to apply to an application under CPR rule 19.2(4), *i.e.* whether the relevant standard is that of the balance of probabilities, a good arguable case or a real prospect of success. That is, whatever the appropriate standard, I am not satisfied that it was met. In other words, even adopting the standard of proof advanced by Chillblast, I was not satisfied that there was a good arguable case or a real prospect that Tactus' interest in the claims against the Sellers had been passed by assignment to Chillblast.

103. This means that the jurisdiction requirements for granting the application for substitution under CPR rule 19.2(4)(a) are not satisfied. For good measure, I also conclude that absent any effective assignment, the jurisdiction grounds set out in CPR rule 19.2(4)(b) are not satisfied, because I do not consider that it is desirable to substitute Chillblast for Tactus as the Claimant so that the Court can resolve the matters in dispute in the proceedings.

104. Absent jurisdiction, there is therefore no discretion for me to exercise on the application. Insofar as I have a discretion, for the reasons explained above, I would exercise that discretion against the grant of the application.

Conclusion

105. In the circumstances, I dismiss Chillblast's application under CPR rule 19.2(4) to be substituted as the Claimant for Tactus.

106. I am grateful to the parties' counsel for their very helpful and skilful submissions. I shall deal with consequential issues insofar as they cannot be agreed by the parties.