Neutral Citation Number: [2023] EWHC 1880 (TCC)

Claim No: HT-2021-000281

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Date: 26 July 2023

B e f o r e :

MR JUSTICE WAKSMAN

(1) USAF NOMINEE NO. 18 LIMITED
(2) USAF NOMINEE NO. 18A LIMITED
AS NOMINEES HOLDING ON BARE TRUST FOR
(3) APEX GROUP TRUSTEE SERVICES LIMITED (FORMERLY KNOWN AS SANNE TRUSTEE
SERVICES LIMITED) ACTING AS MANAGING TRUSTEE OF
USAF PORTFOLIO 18 UNIT TRUST

Claimants

- and -

WATKIN JONES & SON LIMITED

Defendant

Fenner Moeran KC, Jonathan Selby KC and **Alexandra Bodnar** (instructed by Walker Morris LLP, Solicitors) for the Claimant
Fiona Parkin KC, Nicole Langlois and **Omar Eljadi**
(Instructed by DLA Piper UK LLP, Solicitors) for the Defendant

JUDGMENT

Hearing dates: 27-29 March 2023

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INTRODUCTION

1. In this case, there are three Claimants, USAF Nominee No. 18 Limited, USAF Nominee No. 18A Limited and Apex Group Trustee Services Limited, to which I shall refer individually as C1, C2 and C3 or collectively, "the Claimants." No distinction is made between the Claimants in terms of the claims they make. They are all, or purport to be, trustees of one kind or another. The Defendant, Watkin Jones & Son Ltd ("WJ") is a building contractor.

2. The claims concern what is said to have been the defective design and construction of the external façade of a building known as Jennens Court in Birmingham ("the Property"). The contract under which WJ was engaged was a JCT 1998 Edition with Contractor's Design, with bespoke amendments, dated 4 July 2007, for the design and construction of 586 ensuite student bedrooms in cluster flats, some retail units and a dance studio ("the Development"). The cost of the Development was £17.98m. Practical Completion occurred on 27 July 2009 with a Final Certificate issued on the same day.

3. On 22 February 2008,WJ provided a collateral warranty ("the CW").

4. In mid-2020, following an inspection of the Property, concerns were raised about the suitability of the cladding which was later replaced. The total cost of the replacement works was £3.797m.

5. C1 and C2 are the present registered title holders to a long lease of the Property ("the Lease"). Its duration is 150 years from 24 August 2007.

6. The claims made by the Claimants against WJ are for damages for breach of the CW ("the CW claim") and/or negligence ("the Negligence claim") and/or under the Defective Premises Act 1972 ("the DPA claim"). The latter was recently added by amendment in the light of the extension to the limitation period provided for by section 135 of the Building Safety Act 2022.

7. The trial of these claims is set down for 10 days commencing on 15 January 2024.

8. However, apart from the substantive dispute on the claims, which has been fully articulated in detailed statements of case, WJ has also taken a number of points as to whether any of the Claimants has title to sue at all ("the Title to Sue Dispute"). If WJ were to succeed on its core points here, none of the Claimants will have title to sue in the way in which they do at present. Depending on the extent of WJ's success, amendments would at least be required and other parties might have to be joined, without which the action would fall to be dismissed. The Claimants deny that there is any impediment to their ability to bring these proceedings.

9. On 16 February 2023, I ordered that there be a 3-day trial of Preliminary Issues, all relating to the Title to Sue Dispute. This is my judgment on those Preliminary Issues following that trial.

10. Although there are 17 Preliminary Issues in total, there are two core disputes between the parties:

(1) The first is whether, by reason of a merger in 2009 under Jersey law, of the companies referred to below as B1 and B2, there was a defect in the appointment of trustees thereafter which adversely affected the ability of each of C1, C2 and C3 to bring these proceedings. I refer to this as the Trust Element of the Title to Sue Dispute;

(2) The second is whether, in any event, the Claimants, or any of them, disposed of their interests in the Long Lease and the CW to Wells Fargo Bank NA London Branch ("WF") by way of absolute assignment pursuant to a security agreement with WF. I refer to this as the Security Element of the Title to Sue Dispute. No application to join WF has thus far been made.

CHRONOLOGY OF RELEVANT EVENTS

11. In order to make sense of the Title to Sue Dispute, and which parties are involved, I need to set out the somewhat complex chronology of documents and events and in doing so, I will introduce the relevant parties. There are two parts to this chronology. The first part deals with the Trust Element while the second part is concerned with the Security Element.

12. On 31 March 2006, a Trust Instrument, governed by Jersey law, was executed between RBSI Trust Company Limited and RBSI Custody Bank Ltd (both Jersey companies) as trustees, and Cordea Savills Fund Managers (Jersey) Limited ("Cordea Limited"), another Jersey company, as Manager ("the TI"). The TI related to the establishment of a unit trust scheme pursuant to Article 7 (3) of the Trusts (Jersey) Law 1984 ("the TJL") to be known as the Cordea Savills Student Fund ("the Fund") to make investments in what was described as the Seed Portfolio and other property. It is common ground that the Fund was to and did invest in the Development.

13. The trustees referred to above changed their names on 2 July 2007 to BNP Paribas Services Trust Company ("B1") and BNP Paribas Securities Services Custody Bank Ltd "("B2").

14. On 16 January 2007, the freeholder of the Property, Advantage West Midlands ("Advantage") agreed to grant the Lease (which is presently vested in C1 and C2), to WJ. Pursuant to that agreement, Advantage executed the Lease in favour of WJ on 24 August 2007. However, by a Supplemental Agreement made on the same day between Advantage, WJ, and B1 and B2 as trustees, WJ agreed to assign the lease to B1 and B2.

15. In fact, the actual assignment to B1 and B2 occurred some time later, on or around 22 February 2008. This followed an initial assignment to an English company called Pureluck Limited ("Pureluck") which was the original developer and which had made the original JCT contract (referred to above) with WJ. That earlier assignment was made on or about 30 January 2008 and the price paid for it was stated in the Property Register to be £5.76m. The price paid shortly thereafter by B1 and B2 for the onward assignment to them was £5.96m. The interposition of Pureluck in this respect is not material for present purposes.

16. There was also, on 22 February 2008, the execution by WJ of the CW. In fact, the CW was initially in favour of Pureluck. But at or about the same time, the benefit thereof was transferred to B1 and B2.

17. Accordingly, going forwards, B1 and B2 now held the legal title to the Lease as well as the benefit of the CW. It is not in dispute that they held both of them as trustees of the Fund.

18. On 27 March 2009, Advantage transferred its freehold interest in the Property to Birmingham City Council ("Birmingham").

19. However, there then occurred an event which lies at the heart of the Trust Element of the Title to Sue Dispute. This was the merger, under Jersey law, of B2 and a different BNP company called BNP Paribas Services Trust Co. (Jersey) Ltd ("B3"), another Jersey company ("the Merger"). I will need to explore the detail of the Merger below but at this stage, it is sufficient to note the following:

(1) The key statutory provision is Article 127G of the Companies (Jersey) Law 1991 ("the CJL") as inserted by the Companies (Amendment No. 6) (Jersey) Law 2002 ("the 2002 Amendment"). It reads as follows:

> "127G Completion of merger
>
> (1) Upon the delivery to the registrar in accordance with Article 127F of the documents to which that Article refers the registrar shall, if those documents comply with that Article, register the merged company and issue to it a certificate of incorporation under Article 9.
>
> (2) Upon the issue of the certificate of incorporation -
>
> (a) the merging companies are merged and continue as one company as provided in the merger agreement or, in the case of a merger under Article 127C, the resolutions approving the merger;
> (b) all property and rights to which each merging company was entitled immediately before the certificate of incorporation is issued become the property and rights of the merged company;
> (c) the merged company becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which each of the merging companies was subject immediately before the certificate of incorporation is issued; and
> (d) all actions and other legal proceedings which, immediately before the certificate of incorporation is issued, were pending by or against any of the merging companies may be continued by or against the merged company,
>
> and the merging companies cease to be companies incorporated under this Law.
>
> (3) The registrar shall record that a company has, by virtue of paragraph (2), ceased to be a company incorporated under this Law."

I refer to the above as "A127G".

(2) At the time, (and indeed subsequently) English law did not have a like provision for the merger of English companies;

(3) For the purposes of the merger, B2 and B3 each passed a special resolution. B2's resolution approved its merger with B3, stating that B2's issued share capital would be added to that of B3, with its own shares being cancelled. B3's resolution was a mirror image. It approved the merger and the addition to its own share capital of B2's issued share capital, with B3's own shares not being cancelled;

(4) Those special resolutions were registered with the Jersey Financial Services Commission ("the JFSC");

(5) The merger itself occurred on 30 June 2009 as shown by a "Certificate of Incorporation on the Merger of Two Limited Companies" from the Jersey Companies Registrar dated 30 June. This recorded the merger of B2 and B3 and stated that they "continue as one company, being" B3 with its existing registration number 6043;

(6) Finally, by a letter addressed to B2 dated 7 July 2009 from the Deputy Registrar, the receipt of the relevant documents for the merger was acknowledged and it went on to state that B2 ceased to be a company incorporated under the law on 30 June. It then said:

> "Having ceased to be a company under the Law, the company BNP PARIBAS SECURITIES SERVICES CUSTODY BANK LTD cannot be reinstated".

20. On 5 December 2011, B1 and B3 as trustees of the Fund, and Cordea Limited entered into an Amended and Restated Trust Instrument and a Supplemental Trust Instrument by which the TI was modified in respects which are not material for present purposes. However, I note that Recital A to the Amended and Restated Trust Instrument, when referring back to the original TI, referred to RBSI Trust Company Limited and RBSI Custody Bank Ltd (the former names of B1 and B2) as "the Original Trustees" and in Recital B, B1 and B3 (defined in the title as the "Trustees") are referred to as the "current trustees" of the Trust. Recital A to the Supplemental Trust Instrument, does not make reference to "the Original Trustees", but Recital B is in the same terms as Recital B for the Amended and Restated Trust Instrument.

21. By a Deed of Variation made on 28 November 2013 between Birmingham and B1 and B3, as Trustees of the Fund, the Lease was varied. By section 6 of this document, headed "Trustees Liability", the liability of B1 and B3 was limited to the assets held on trust for the time being of the Fund which were in their possession or control as trustees. Further they and their successors in title as trustees of the Fund had no obligation to meet any claim or liability under the Deed except to the extent that it could properly be met out of trust assets.

22. On 8 July 2014 a number of significant events occurred:

(1) A Supplemental TI was made between B1, B3 and Cordea Limited. One of the changes made was to permit the Trust to operate by a single Managing Trustee in place of the existing two Trustees and a Manager;

(2) B1 and B3 formally retired as trustees and Cordea Limited retired as Manager, and were replaced by Pavilion Trustees Ltd ("Pavilion"), another Jersey company, pursuant to an instrument of Appointment, Retirement and Removal;

(3) B1 and B3 transferred the Long Lease to Pavilion;

(4) By a Deed of Assignment, B1 and B3 assigned the benefit of the contract documents relating to the Development, including the CW, to Pavilion ("the First Assignment").

23. There is a question (see below) as to whether, at the time, any notice was given of the First Assignment. The Claimants say that there was, because of a copy of such a notice dated 21 July 2014 which was recently found in the files of Nabarro LLP, which acted for Pavilion back in July 2014 ("the 2014 Notice"). However, there is a dispute between the parties as to whether this notice was ever sent, or at least received. That factual dispute will be determined at the main trial hereafter, not now. The Claimants further allege that in any event, notice of

the First Assignment was given later by letters dated 22 September 2020 and 22 July 2021, each being sent by email on those days.

24. On 9 December 2015, Pavilion retired as Managing Trustee and C3, then known as Sanne Trustee Services Limited, but now known as Apex Group Trustee Services Ltd (another Jersey company), was appointed in its place.

25. On 4 August 2016 Pavilion assigned the CW to C1 and C2 ("the Second Assignment"). In the Deed of Assignment, the latter were expressed to be acting as nominees, holding on bare trust for C3 as Managing Trustee. On the same day, the Lease was transferred to C1 and C2 by Pavilion, the TR1 stating expressly that they were holding it on trust for C3 as itself the trustee for the Trust. That transfer was registered at the Land Registry on 1 September 2016. These transactions explain why, in the title of these proceedings, C1 and C2 are described as nominees holding on bare trust for C3, and C3 is itself described as managing trustee of the Trust.

26. The name of the Fund has itself changed on at least two occasions. Prior to 4 August 2016 it had become known as USAF Portfolio 14 Unit Trust and then on that date it changed its name to USAF Portfolio 18 Trust ("UP18T"). Nothing turns on those changes of name. However, I should add that the remedial works undertaken to the cladding and other aspects of the façade to the Property at issue in these proceedings were paid for out of the assets of the UP18T fund.

27. That completes the chronology of the Trust Element. I now turn to the Security Element.

28. The events of 4 August 2016 described in paragraph 25. above were a precursor to (at least) three separate but related agreements concerned with the provision of a £100m loan facility to USAF No. 18 Ltd Partnership, acting through its general partner USAF GP No 18 Ltd ("USAF 18 Ltd"). The provider of the facility was WF as lead arranger, agent and security arranger for a consortium of banks. The 3 agreements are a Facility Agreement, Security Agreement and a Security Agreement over Intra-Group Loan Agreements, each dated 11 August 2016.

29. The principal agreement with which I am concerned is the Security Agreement to which the parties were WF on the one hand, acting as security agent, and a number of companies on the other, which included C1, C2 and C3.

30. Clause 2.1 (c) of the Security Agreement ("Clause 2.1 (c)") provides as follows:

> "Each Chargor, with full title guarantee and as security for the payment of all Secured Liabilities, assigns to the Security Agent by way of security:
> [...] (ii) all its Receivables;
> [...] (vii) all its Assigned Agreements;… "

THE ISSUES BROADLY STATED

31. Here, I expand on the Trust Element and the Security Element of the Title to Sue Dispute, so as to provide a more detailed picture of the competing positions of the parties. This summary does not, however, deal with some of the more nuanced arguments made by each side, which will be considered in context below.

The Trust Element

The Claimant's position

32. The Claimants contend that the effect of the Merger was that B2 now continued in existence as part of B3. Further, and without more, the legal title to the Lease, along with the benefit of the CW, were now vested in B1 and B3 by operation of law, namely A127G. Further, and again by operation of law, B3 now became the "other" trustee to B1, which had previously been B2.

33. Thereafter, B1 and B3 were in all respects the trustees of the Fund and were entitled to act as such. Accordingly, they were entitled to execute the documents which they did on 8 July 2014 so that they and Cordea retired and Pavilion replaced them, and the Lease and the benefit of the CW were assigned to Pavilion. Thereafter, Pavilion had full capacity to act as the single Managing Trustee of the Fund and make further dispositions and agreements.

34. Accordingly, and moving forwards, C3 was properly appointed in place of Pavilion on 9 December 2015. Further, Pavilion had title to assign the benefit of the CW and the Lease to C1 and C2 as its successors in title, to hold on trust for C3.

35. On that footing, C1 and C2 had and continue to have title to bring the claims presently made against WJ under the CW. Further, and as holders of the Lease, they had and have *locus* as the property owners to bring the DPA Claim. This is because, under s1(1) (b) of the Defective Premises Act ("the DPA"), they were owed the relevant duties by WJ, since each of them was a "person who acquires an interest (whether legal or equitable)…" in the Property. The Claimants accept that C1 and C2 would not have standing to bring the Negligence Claim. However, C3 does, because it is the ultimate successor in title to B1 and B2 who held the Lease at the material time, ie when the works at the Property were being undertaken.

36. Yet further, the fact that all of the Claimants expressly hold their interest upon trust (in the case of C1 and C2, for C3, and in the case of C3, for the beneficiaries of the Trust) does not affect their ability to bring these claims, nor does it impede their ability to recover damages for the losses caused by WJ.

37. Insofar as is necessary, and so far as the Lease is concerned, the Claimants rely on section 58 of the Land Registration Act 2022 ("section 58") which provides that, as they are the lessees shown on the Title Register, they are conclusively presumed to hold the legal title in the Lease.

WJ's position

38. The first argument made by WJ is that the result of the Merger was <u>not</u> that B3 assumed the mantle of B2, as it were. B3 did not, as a result of A127G acquire any of the property or rights or liabilities of B2. Nor is it deemed so to have done. The only way that B3 could have them vested in it is first, and crucially, if it had been appointed as a trustee in place of B2 - but it never was. This means that B3 never became a trustee and had no power to act as such, even though this is what it purported to do. Instead, B2 *qua* B2 remained a trustee albeit now as part of B3. But while it remained so, it lacked the capacity to <u>act</u> as such since it had ceased to exist as a separate company. The effect of all of this is that the subsequent attempt by B3 (along with B1) to appoint Pavilion as the single Management Trustee was invalid. Equally invalid were the transfers of the Lease and the benefit of the CW from Pavilion to C1 and C2.

Because it never became a trustee itself, Pavilion had no power either to appoint C3 which was therefore never validly appointed itself as a trustee.

39. Since C3 is not the trustee of the Fund and has no standing to bring these claims, neither do C1 and C2, either because the transfers to them by Pavilion were invalid or in any event because their claimed standing is only as trustees for C3 as itself trustee of the Fund. But C3 is not in fact a trustee.

40. All of the above is concerned with the question of the "trusteeship" of B3 (or not) and its consequences. However, WJ also says that the transfer of the CW to C1 and C2 by Pavilion was substantively defective anyway. This is because, at least under English law, there needed to have been a transfer of the CW by novation or assignment from B1 and B2 jointly, to B1 and B3 jointly. Yet there was never any form of transfer. Further, the effect of the Merger under Jersey law here is irrelevant, since this question of transfer must be decided under English law. On that basis, B1 and B3 never jointly acquired the benefit of the CW and so were incapable of transferring it to Pavilion. From that point on, any transfer by Pavilion would be of no effect. Accordingly, the benefit of the CW never passed to C1 or C2. Furthermore, and even if there was somehow an assignment of the CW from B1 and B2 to B1 and B3, there was no notice of that assignment. This means that there could only have been an equitable assignment and the legal interest in the CW remained with B1 and B2. B1 and B3 only ever had, at best, an equitable interest in the CW and they could not have passed anything greater than that to Pavilion and the same goes for Pavilion and then C1 and C2.

41. As for the transfer of the Lease to C1 and C2, while it cannot be gainsaid that they are the legal owners (by virtue of section 58) this takes them no further. That is because they are explicitly bringing the proceedings as nominees (i.e. trustees) for C3 as Managing Trustee. But C3 is not the validly appointed trustee. Accordingly, there is no present basis on which C1 and C2 can bring the claims against WJ under the DPA.

42. As for the claim in negligence, WJ says that at best, any such claim must be based on the notion that WJ owed a duty of care to the trustees for the time being of the Trust. That could only be C3 or its predecessors, Pavilion or before it, B1 and B2. There could be no relevant duty owed to C1 and C2 because they only acquired an interest in the Property (via the Lease) in 2016. Thus far, the Claimants would agree (see paragraph 35. above). However, as for C3, this was not a properly appointed (or "true") trustee nor was Pavilion, nor B3 before it (see paragraph 63 of WJ's Skeleton Argument). Accordingly, there can be no claim in negligence either. I should add that WJ denies that any substantive duty of care would have been owed to B1 and B2 anyway, but that is an argument for the main trial, not for now.

The Security Element

43. WJ's core point here is that whatever interests and claims were possessed by C1 and C2 in 2016, by reason of the Security Agreement and in particular Clause 2.1 (c), there was an absolute assignment thereof by C1 and C2 to WF. The effect of this is that the only party who could now bring the claims would be WF. Or at least it would be necessary to be joined as a party or consent to the claims being brought on its behalf, before the claims could be heard. As none of this happened, the claims must fail at this stage. Another outcome would be that amendments would have to be made to the Claim Form in respect of the capacity in which the Claimants sue.

44. The Claimants' answer to this core point is that there was no absolute assignment but only the creation of a security interest in favour of WF which does not prevent C1 and C2 from bringing these claims as a matter of substance.

THE EVIDENCE

45. There are a number of key documents which need to be construed and a number of points which are said to arise, either as a matter of Jersey or English law. As to the former, I have reports and I have heard evidence from two Jersey law experts. They were Advocate Simon Franckel, instructed by WJ, and Advocate Raulin Amy, instructed by the Claimants.

46. Advocate Franckel produced two reports dated 22 December 2022 and 14 March 2023. Advocate Amy also produced two reports, dated 19 January and 14 March 2023.

47. Otherwise, there was no live evidence; there were witness statements filed in support of WJ's strikeout application and WJ's application for a trial of preliminary issues. They do not now take the matter any further.

48. Both experts were instructed to opine on the scope and effect of A127G with particular regard to the situation where, as here, the merging companies were both corporate trustees. This is because of the Claimants' contention that B2's role as a trustee or its "trusteeship" became vested in B3 instead, and without more, as a result of the Merger. This was because of the operation of A127G. WJ rejects that proposition.

THE PRELIMINARY ISSUES

49. I can now set out the Preliminary Issues to be decided. They are as follows:

> "A: The effect of the 2009 Merger:
> 1. In determining whether the merger between BNP Bank Co and BNP Jersey Trust Co ("2009 Merger") operated so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?
> 2. If the answer to Issue 1 above is English law:
> (a) As a matter of English law does the 2009 Merger have the effect that BNP Bank Co's rights under the Collateral Warranty were held thereafter by BNP Jersey Trust Co?
> (b) If the answer to Issue 2(a) is "No" what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty Claims in this action?
> 3. If the answer to Issue 1 above is Jersey law, do the provisions of Article 127G(2) of the Companies (Jersey) Law 1991 (as amended by the Companies Law (Amendment No 6) etc.) ("CJL 1991") operate so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co?
> 4. If the answer to Issue 3 above is "No", what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty claims in this action?
> (a) As a matter of English law does the 2009 Merger have the effect that BNP Bank Co's rights under the Collateral Warranty were held thereafter by BNP Jersey Trust Co?
> (b) If the answer to Issue 2(a) is "No" what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty Claims in this action?
> 5. In determining whether the 2009 Merger operated so as to have the effect that BNP Bank Co's title to the long lease in the Property was thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?
> 6. If the answer to Issue 5 above is English law, as a matter of English law:
> (a) Did the 2009 Merger have the effect that BNP Bank Co's title in the long lease was thereafter held by BNP Jersey Trust Co?
> (b) On the basis that s. 58 of the Land Registration Act 2002 confers upon the First and Second Claimants "deemed" title to a property which forms part of assets held as part of the PT18UT, are the

First and Second Claimants persons who "acquire an interest (whether legal or equitable) in the dwelling" and, as such, persons to whom a duty is owed under (and can bring proceedings for breach of) s.1(1)(b) of the Defective Premises Act 1972?
7. If the answer to Issue 5 above is Jersey law, as a matter of Jersey law, do the provisions of Article 127G(2) of the CJL 1991 operate so as to have the effect that BNP Bank Co's title to the long lease was thereafter held by BNP Jersey Trust Co?
8. If the Answer to Issue 7 is "No" what happened to BNP Bank Co's rights to the title to the Property upon the 2009 Merger and does this affect the Claimants' ability to bring the DPA and tortious claims in this action?
9. Do the provisions of Art 127G(2) CJL 1991 operate so as to have the effect that BNP Jersey Trust Co was thereafter the co-trustee of the P18UT with BNP Trust Co, such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the Pl8UT?
10. If the answer to Issue 9 is "No", could BNP Trust Co nonetheless continue to act as a "sole trustee" following the 2009 Merger such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the Pl8UT?
11. If the answer to Issue 10 is "No", does the Third Claimant nevertheless have standing to bring these proceedings on behalf of the beneficiaries of the P 1 8UT?
12. What was the nature of the interest in (i) The Collateral Warranty and (ii) the long lease held by each of the Claimants immediately prior to their execution of the Security Agreement with Wells Fargo in August 2016?
(a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014?
(b) On the assumption that such notice was not given?
13. Does clause 2.1(c) of the Security Agreement assign to Wells Fargo Bank N.A all (or any) of such rights, title and interests that each of the Claimants then had in:
(a) The Collateral Warranty; and/or
(b) Any claims and causes of action the Claimants may otherwise have had against the Defendant for breach of the Collateral Warranty, negligence, and/or breach of s. 1(1) of the Defective Premises Act 1972 — including, for the avoidance of doubt, in relation to claims and causes of action for breach of s.1(1) of the Defective Premises Act 1972, was it possible to effectively so assign such claims and causes of action or was such assignment prohibited by reason of s.6(3) of that Act; and/or
(c) The long lease?
14. If and to the extent that the answer to Issue 13 is "Yes" was such an assignment a legal or equitable assignment? In respect of the Collateral Warranty only, this question is to be answered:
(a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014.
(b) On the assumption that such notice was not given.
15. If and to the extent that the answer to Issue 14 is that the assignment to Wells Fargo operated as a "legal assignment" do any of the Claimants have standing to bring these proceedings?
16. If and to the extent that the answer to Issue 14 is that the said assignment was equitable in nature do any of the Claimants have standing to bring these proceedings:
(a) On their own account?
(b) As trustees for Wells Fargo?
17. If (which is to be determined at trial) notice of the First Assignment to Pavilion was not given to the Defendant on or around 21 July 2014 then was notice of the First Assignment either on or around 22 September 2020 or 22 July 2021 capable of being effective, notwithstanding the occurrence of events between 21 July 2014 and 22 September 2020 and/or 22 July 2021?"

THE TRUST ELEMENT

50. I shall deal with each Preliminary Issue below, but I begin by considering the overarching and fundamental question on the Trust Element, which is one of Jersey law. This is whether A127G applies to the case of merging corporate trustees. If it does not, then a number of consequences follow in terms of acts or dispositions purportedly carried out or executed by B3 which I have summarised above.

A127G, TRUSTEESHIP, PROPERTY AND RIGHTS

51. As refined prior to and during the trial, the position of both sides now is that it does not follow from the Merger that B2 was dissolved as a company. However it has ceased to be a corporate entity in its own right and is no longer shown as incorporated as it had been before. The latter is what the Deputy Registrar said in terms in the letter dated 7 July 2009 referred to at paragraph 19.(6) above.

52. The Claimants' position is that B2 continues to exist but only as part of B3, as the new Certificate of Incorporation on the Merger dated 30 June 2009 states. It then follows from A127G (a) to (c) in particular that legal title to the Lease and the benefit of the CW which had vested in B2 jointly with B1, and as trustees, were now vested in B1 and B3 without more. The same applied to B2's rights and obligations as trustee.

53. WJ's position, as already noted, is that such vesting does not occur where the underlying substantive rights or property are held by the merging company (i.e. B2) as trustee and in any event the trusteeship does not move from B2, as it were.

54. This was the principal area of dispute between Advocates Franckel and Amy and so I turn first to consider their evidence. For these purposes, I shall refer to B3 as being the company which merged with B2 and the merged company which now purportedly has all the relevant rights and property vested in it, as "Newco" albeit that it has the same name and company number as B3.

55. Advocate Franckel qualified as an English solicitor in 1989 and then, following a move to Jersey, qualified as an Advocate there in 2004. He established his own firm in 2008 and is a sole practitioner. He specialises in dispute resolution concerned with contentious and non-contentious trusts. He also deals with insolvency, contentious probate and professional negligence matters along with partnership/shareholder disputes. He has appeared in a number of Jersey trust law cases as well as some non-trust cases. He has also published a number of articles.

56. Advocate Amy qualified as an English solicitor in 2000 but never practised there. He became an Advocate in Jersey in 2003 and has been employed by Ogier (Jersey) LLP (or its predecessor) since October 2000. He has been a partner in its corporate department since 2007. He is also the practice partner for the firm's Jersey office. He has worked predominantly as an adviser on corporate and finance-related transactions and this has included specifically dealing with mergers of companies and the establishment, acquisition and financing of Jersey Property Unit Trusts ("JPUTs"). The Trust here is a type of JPUT.

57. I will deal with the detail of their respective evidence below, but I make a few general observations about the experts at the outset. First, being primarily a trusts litigation lawyer, Advocate Franckel accepted that he is not a corporate specialist like Advocate Amy, and does not work in the areas of mergers and acquisitions. On the other hand, Advocate Amy is not a trusts lawyer though he deals with JPUTs; but on the essential question of the effect of a merger under A127G, he has had much more cause to deal with that provision than Advocate Franckel. Second, overall, I found Advocate Amy to be a more persuasive witness. His evidence was very clear and he made concessions where appropriate. On occasion, Advocate Franckel seemed to be too much an Advocate in his own cause, he was reluctant to make

concessions where they were appropriate, and sometimes his approach seemed unrealistic. There is also no doubt that on the specific point as to whether A127G encompasses the merger of trustee companies (a common phenomenon in Jersey) he is in a minority of Jersey lawyers in the view that he takes. He has not written any papers on the subject and has never actually been involved in such a merger because he does not do merger work.

58. I should also at this stage refer to some materials which are pertinent to the key trusteeship issue. First, there is the decision of the Royal Court of Jersey in *Re Capita* [2011] JRC 138. Here, Capita, a corporate trustee, made an application against the Jersey Financial Crimes Unit for disclosure of a substantial number of documents which the Unit had seized from a Mr Arthur as part of a fraud investigation. Mr Arthur had been a director of a former trustee of the trust and had dealt with its affairs. Capita now needed to see these documents, as they were records of the trust's affairs which would assist Capita in resolving issues over the trust's assets and liabilities. The Unit was willing in principle to provide disclosure but only with Mr Arthur's consent. Although the latter had said he would provide an appropriate written consent, he did not do so. In those circumstances, the Unit was not prepared to release the documents without an order of the court.

59. On the underlying merits of the application, the Court agreed that it was well-founded and of course, no one was positively opposing disclosure. However, the Bailiff (the most senior judge in Jersey) clearly wished to be satisfied that Capita was the valid trustee and entitled to make the application (although again, no one was positively contending that it was not). To that end, the Bailiff said as follows:

> "1. This is an application by Capita Trustees Limited in its capacity as trustee of the Dunlop Settlement. That trust was established in 1999 and is governed by Jersey law. In February 2001 Stirling Trustees Limited was appointed as trustee in place of the former trustee. On 10 September, 2007, a formal merger took place between Stirling and Capita under the Companies (Jersey) Law 1990 and Capita is the continuing company after the merger. Accordingly, Capita has been the trustee of the trust since that date…
>
> 6…. In our judgement there can be no doubt that Capita is entitled to these documents. Capita is, in law, now the same company as Stirling which was the trustee of the trust throughout the relevant period. Mr Arthur was at all times either Stirling's director or its employee or its agent and he was carrying out all he did on behalf of Stirling in its capacity as trustee. Capita is therefore entitled to demand these documents or copies from Mr Arthur who is under an obligation to produce them."

60. On any view, the Bailiff considered that Capita had effectively replaced Stirling as the current trustee because it was the "continuing company after the merger" by reason thereof. Capita was now the "same company as Stirling". Although he does not say so in terms, this can only be because of the effect of A127G and Advocate Franckel does not suggest otherwise. Although the point was not argued out because there was no one to take it, the decision in *Capita* is obviously of some significance here. It was the clearly expressed view of the Bailiff that A127G did indeed include the position of merged corporate trustees, along with other merged companies.

61. Second, on 11 April 2016 a consultation paper was published by the Jersey government on various proposed amendments to the Trusts (Jersey) Law 1984 ("the TJL"). Part of that paper stated as follows:

> "**6. Confirmation of the appointment of a corporate trustee post-merger**

6.1 From time to time a corporate trustee merges with another corporate body. The TJL84 is silent as to whether, following that merger, the newly formed corporate body continues as the validly appointed trustee of a particular trust without further action. Reference is made to the relevant sections of the Companies (Jersey) Law 1991 ("CJL91"), namely Part 18B.

6.2 It is the view of the Working Group that whilst it is strongly arguable on the statutes that a valid appointment of a corporate trustee would continue to be valid notwithstanding any subsequent merger, it was nevertheless desirable to introduce confirmatory wording into both the TJL84 and the CJL91 to put the point beyond doubt.

6.3 It is proposed that the following (or words to this effect) be inserted into the TJL84:

"A trustee which merges with another company pursuant to the provisions in the Companies (Jersey) Law 1991 shall continue to be a duly appointed trustee of a trust notwithstanding its merger with another company."

6.4 And the following (or words to this effect) be inserted into the CJL91 at Article 127FN(2)(b):

(1) When a merger is completed in which the merged body is a company or a body falling within Article 127B(3) -

(a) all property and rights to which each merging body was entitled immediately before the merger was completed become the property and rights of the merged body;

(b) the merged body becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations which include (for the avoidance of doubt) rights and obligations entered into as a trustee or within another fiduciary capacity, to which each of the merging bodies was subject immediately before the merger was completed;…"

62. Third, I refer to the minutes of the Jersey Trust's Law Working Group meeting of 21 September 2016. Advocate Franckel was not a member of that working group. The minutes referred to a report from a Ms Richardson (LR), a government representative as follows:

"**Section 6 - Confirmation of appointment of a corporate trustee post-merger**

LR advised that section 6 of the Consultation Paper considered whether confirmatory wording was required to put beyond doubt that a newly merged corporate body continues as the validly appointed trustee of a particular trust without further action.

LR reported that the general perception was that it was not necessary but that if an amendment to this effect would produce clarity then it was desirable to make the amendment. Such amendment would be intended to be made in the Companies Law.

GC commented that it would be helpful for trust companies merging, but agreed that this should be contained within the Companies Law."

63. Finally, I refer to the response to the paper ("the Response") which was published on 11 January 2017 along with the government's comments. There were 21 individual responses including from a number of law firms, the Jersey Association of Trust Companies and some corporate and individual trustees and the Chancery Bar Association. Advocate Franckel did not provide a response. On the question raised by paragraphs 6.2-6.4 of the consultation paper, the Response stated as follows:

"**Section 6: Confirmation of appointment of a corporate trustee post-merger**

Question 14 Do you consider that the TJL84 and CJL91 should be amended to introduce confirmatory wording to put beyond doubt the point that the newly merged corporate body continues as the validly appointed trustee of a particular trust without further action?

The general perception of respondents was that amendment was not strictly necessary but as certainty and clarity were welcome all those respondents who made comment on this section, supported putting the matter beyond doubt by way of the amendments.

One respondent (a trade association) considered it desirable if the amendment could cover both Jersey and foreign law trusts.

The same respondent suggested it might be preferable for any clarifications to, in fact, be placed within the CJL91 rather than the TJL84, relying on Dicey & Morris (15lh Ed. Vol 2 para 30-011) which indicates that the question of whether a corporation has been amalgamated with another corporation is determined by the law of its place of incorporation. In this circumstance, the provision could also usefully confirm that other fiduciary offices held by trust companies, such as executorships, would also

transfer in accordance with the merger provisions. A second respondent (trust company) considered that (wherever the provision was) it should be wide enough to include other fiduciary arrangements such as escrow arrangements and nomineeships.

Question 15 Do you consider that the CJL91 should be amended to resolve any potential doubt as to (i) the need to give notice to creditors who have dealt with the merging entity solely in that entity's capacity as trustee? and (ii) the need for the corporate trustee planning to undertake a merger to give notice to itself?

All respondents agreed that it should not be necessary for notice to be given to creditors who dealt with the merging entity solely in that entity's capacity as trustee nor for a corporate trustee to give notice to itself. It was also suggested that it should be made clear that it is not necessary to give notice to beneficiaries or to any other person who is owed duties under trusts of which the corporate trustee is trustee..

Question 16 Are there any other points that need clarification related to the merger of a corporate trustee with another corporate body?

No other points were raised.

Given the support for the amendments and the comments set out above, the Government is minded to make the amendments as proposed (subject to drafting amendments of the Law Draftsman) at paragraphs 6.3 and 6.4 of the Consultation Paper but to make these amendments to the CJL91. Furthermore, this will give the opportunity to add in to the CJL91, wording to the effect that any licence held by either of the merging companies shall not pass to any merged company unless the permission of the relevant licensing or regulatory authority is granted."

64. Despite the above, in the event, no amendment dealing with this point was ever made, to either the TJL or the CJL. Neither expert knew why not, but one can only assume that it was because in the end, it was not regarded as a priority given the general perception that the trustee point was covered byA127G anyway. Advocate Franckel also confirmed in evidence that he had not written to any professional body on this question.

65. On the core point about trusteeship, I consider first the evidence of Advocate Franckel. In his first report, he made reference to various provisions of the TJL. These included Article 17 which provides for how a new trustee may be appointed if the trust instrument does not do so. Article 19 does the same thing for retiring trustees. Both provisions make express reference to the need for all things to be done which are required to vest trust property in the new trustee or divest it from the retiring trustee.

66. As for A127G, he said that there were no words there which could have the effect of substituting Newco for B2 as trustee. While A127G (2) (b) refers to the "property and rights" of the merging companies now becoming the property and rights of the merged company, this does not assist. That is because, under Jersey trust law, assets held by the merging company (here B2) in its capacity as trustee are not property and rights to which it is entitled. This proposition is drawn from some provisions in the TJL. First, Article 21 (6) imposes a duty on a trustee to keep trust property separate from his own personal property. Further, Article 54 of the TJL in its amended form (Article 50 in the original) provides as follows:

> "54. Nature of trustee's estate, following trust property and insolvency of trustee
>
> (1) Subject to paragraph (2) -
>
> (a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and
>
> (b) such property shall not be deemed to form part of the trustee's assets…"

67. Article 54, like Article 51 (referred to below) fall within a section of the TJL containing "provisions of general application" applicable to Jersey trusts and where the context permits, foreign trusts.

68. Thus, according to Advocate Franckel, A127G (2) (b) cannot apply to trust property held by a trustee, here being the trust property held by B2 along with B1, prior to the Merger.

69. Advocate Franckel's view was that the way to ensure that here, B3, did become the new trustee in place of B2 and was constituted as a joint owner of the relevant rights and properties was as follows: First, there should be a Deed of Retirement and Appointment ("DORA") executed by B1, B2, Newco and the Manager and in favour of Newco as the new trustee. The DORA itself would have to be approved by each of B1 B2 and B3 prior to the merger and would identify the relevant trust assets to be transferred. There would need to be a Special Resolution to this effect from each of them. As this was not in fact done, B3 never became a trustee and never became owner of any of the relevant rights.

70. In his second report, Advocate Franckel amplified these points. He now referred to Clause 29 of the Trust Instrument which set out the procedure for the removal or retirement of trustees in these terms:

> "29. REMOVAL OR RETIREMENT OF TRUSTEES
> (a) One or both of the Trustees may:
> (i) be removed by Extraordinary Resolution; or
> (ii) retire by written notice served on the Manager.
> (b) In either case, the Manager shall use its best endeavours to find new trustees and upon doing so, the Trustees and the Manager shall, by instrument supplemental hereto, appoint such new trustees to be the Trustees in place of the retiring Trustees.
> (c) The retirement or removal of a Trustee shall not take effect until the later of the date specified in the Extraordinary Resolution or Notice and the date of appointment of a replacement Trustee approved by the JFSC."

71. Since, in this case, there was no process of retirement of B2 and appointment of Newco, Newco never validly became a trustee. The effect of that, however, was that B2 remained a co-trustee with B1 because it was not dissolved as a result of the Merger even though it no longer had any separate corporate identity and had ceased to be a company in its own right. However, since it no longer had any separate identity it could not in any way act as a trustee, or indeed act at all. This would be analogous to an as-yet unremoved trustee who could no longer act as a result of mental or physical incapacity. This analysis would mean that the relevant property interest previously held by B2 was now in something of a limbo. It did not revert back to B1 as a surviving trustee because on this analysis, B2 remained as a trustee, albeit non-functioning. Nor could the property be said still to be held by B2 since it no longer had any separate corporate personality. This is why the Claimants suggested that the result would be that the property would be *bona vacantia*.

72. Advocate Franckel makes the further point that, while A127D-E provide for members and creditors of the intended merging companies to object to the proposed merger and for the Jersey Court to rule on the issue if necessary, there is no similar provision to allow objections from the beneficiaries of the trust where the merging companies are the trustees. Hence, he infers, it cannot have been contemplated by the legislature that A127G was dealing with the merger of corporate trustees at all.

73. A yet further point is that the Trust here constituted an "Expert Fund" which fell within Article 3 of the Collective Investment Funds (Jersey) Law ("CIFJL"). This meant that any "functionary" of the Trust, which would include the trustees, needed a permit or licence from the JFSC.

74. Advocate Franckel goes on to say that all of the somewhat unusual consequences of the Merger for trustees could here have easily been avoided. First, B1 B2, Newco and the Manager could have entered into a DORA prior to the Merger taking place, as referred to above. Equally, the property and other interests could have been the subject of a transfer from B1 and B2 to B2 and B3 again, just prior to the merger. B2 and B3 could also have obtained an "in principle" approval from the JFSC to grant a licence to Newco.

75. Alternatively, he says that a different corporate structure could have been set up to begin with. This would involve B2 not being the original corporate trustee alongside B1 but rather creating an SPV ("special purpose vehicle") subsidiary to act as the trustee for the specific trust. If B2 later merged with B3 (and the SPV would then be regarded as a subsidiary of Newco) the status of the SPV itself as trustee would be entirely unaffected. Mr Franckel said that the use of an SPV is commonly done with Jersey trust companies.

76. In cross-examination, he was pressed to explain further his conception of the position of B2 after the Merger. He accepted that, in order to be a trustee, there had to be a person, natural or corporate, which is obviously true. Yet he also accepted that B2 itself no longer had a separate corporate personality as opposed to now being a part of Newco. On that basis, it is very difficult to see how B2 can be said to still remain as trustee albeit an ineffective one. What Advocate Franckel did not suggest was that B2's trusteeship had simply been eliminated leaving one trustee only, namely B1. But what he was at pains to resist was the suggestion that because B2 only now exists as a part of and through Newco, which <u>is</u> a separate entity, the relevant trustee and property holder must now be Newco. Yet there is no meaningful sense in which it can be said that B2, as distinct from Newco, still exists.

77. A further point of difficulty for Advocate Franckel concerned the operation of A127G (2) (d) which provides for actions by or against the merging companies now being continued without more, as it were, save to change the name to Newco. But if A127G had no application to the case of merging trustees, there is a lacuna. If B2 was the relevant defendant prior to the Merger, it cannot now be sued, since it is no longer a legal person - but neither can Newco. When dealing with this issue in cross-examination, Advocate Franckel's evidence was somewhat unclear. He seemed at one stage to be saying that an action against a trustee (which then merged with another corporate trustee) could continue against Newco provided that no trust property was involved but if it was, then A127G (2) (d) would not apply. In which case, the action would effectively be stymied. If there were two trustees that <u>might</u> not matter, but there need not always be two trustees as indeed became the case here, assuming that the changes to the TI were validly made. Advocate Franckel said it was all a question of capacity. I can quite see that, in theory, there could be a company, X, which merged with company Y and part (but not all) of X's functions happen to be as a trustee of a particular trust. What Advocate Franckel seems to be saying is that A127G (2) (d) would apply in all respects save any which concerned X's capacity as a trustee. Thus, for example, if a tenant of the trust property held by X and let out for the benefit of the trust as legal owner, had a claim against X as landlord, that claim could not be continued against Y because it concerned X in its capacity as a trustee.

78. This could produce some very odd situations. Moreover, there is nothing in A127G (2) (d) which distinguishes between proceedings relating to trust property and those relating to personal (i.e. non-trust) property. Advocate Franckel accepted this but said that this was taking the provision in isolation which one should not do, for the purpose of interpreting

A127G as a whole. What he meant by this is that one had to read sub-section (d) in the light of the previous sub-sections. We returned to the question of sub-section (d) later in his evidence when I asked some further questions about his analysis. I wanted to know, in the case of a claim against a single trustee, how the claimant could resolve the position following a merger. Advocate Franckel said that the claimant could apply to the court for directions, including the appointment of a new trustee, under Article 51 of the TJL. In the meantime, the title of the action would remain as it always had been but until the court intervened, nothing further could be done. This seems a somewhat impractical and unnecessary consequence if it was to apply in every case of merging trustee companies. I refer further to Article 51 below.

79. The mainstay of Advocate Franckel's argument, as it seems to me, was that, for the purposes of sub-section (b), the property and rights which became the property and rights of Newco were limited to those to which, in our case, B2 was "entitled" to use the language of the provision. But B2 was not "entitled" to any property and rights held by it on trust. Hence they never became Newco's. He prayed in aid of this, Article 54, as set out in paragraph 66. above. However, that then raises the question as to whether the definition of trustees' assets for the purposes of that Article is coterminous with the property and rights to which B2 was "entitled" for the purpose of the merger provisions of the CJL and in particular A127G. As a matter of both language and logic, I do not see why they should necessarily be the same. That is not least because the CJL here is concerned with corporate identity and attributes upon a merger when on any view the only remaining corporate entity after the merger is Newco. There is nothing to suggest that there could be a partial merger, with part of the company's assets that were trust property left behind somehow. The only alternative is that what Advocate Franckel is really saying is that, at least in the case of professional corporate trustees like B1 and B2, of which there are many in Jersey, and which play an important role in the financial services offered there, the merger provisions including A127G have no application at all to trustee companies. In other words, they are simply unable to merge in this way. If that is the case, it would seem that there have already been many invalid mergers because Advocate Amy said that Jersey trust companies have often, in his experience, merged. The Merger here is a case in point where, for reasons of corporate administration, one subsidiary in a group of companies engaged in banking and other financial services is to be merged with another. Advocate Franckel could not opine on that situation since he does not do merger work. Moreover, he has not actually come across any of the arrangements which he said could get round the problems inherent in the non-application of A127G to corporate trustees.

80. He also made clear that for the purposes of interpreting the language of A127G, I had to consider sub-paragraph (c) which provides that the "other obligations" to which each of the merging companies had been subject, prior to the merger, became the obligations of Newco. Here he said that "obligations" excluded obligations of trustees. It is difficult to see why this follows, especially in the case of a trustee company all of whose obligations would be *qua* trustee, owed either to the beneficiaries or to third parties in respect of trust property or other dealings relating to the trust. But there is nothing in sub-section (c) which makes this distinction.

81. I should add here that neither Advocate Franckel nor Advocate Amy contended that the process of construing a statute under Jersey law was in any material sense different from that process when dealing with a law of England and Wales.

82. However, Advocate Franckel had a broader point about A127G which was that if it covered the merger of corporate trustees, it would mean that there was an absence of the normal controls that would govern a change of trustees. In effect, he thought that there was a clash between the corporate law provisions of A127G and principles of trust law, if his interpretation was not followed. That is why he said, for example, that beneficiaries have no say in the proposed merger unlike the company's creditors or shareholders. It is also why he pointed to the fact that the trustees of the Trust here needed to have a licence - and yet this was somehow being sidestepped if they could simply merge through A127G. He deployed this argument to support a purposive construction of the provision which would militate against the interpretation contended for by the Claimants.

83. I have to say that I thought these concerns were overstated. First, and as he ultimately accepted, a trustee company wishing to merge should consider whether the merger is appropriate for the purposes of the Trust. He questioned whether that would actually happen, but that does not answer the point that it would be part of the trustee's duties to consider this. And as a counter-point on a practical level, it would be hard to see what could be objected to about a merger which is no more than a reorganisation of professional corporate trustees, as here, even if there could be companies which had a trustee role but were not in fact professional trustees.

84. Second, on the basis of Advocate Amy's evidence (see below) and as one might imagine in a jurisdiction like Jersey, there have historically been mergers between trustee companies and they do not appear to have given rise to any difficulties so far as the relevant trusts are concerned. Certainly, Advocate Amy was unable to point to any.

85. Third, as to the question of the need for a new licence for Newco, Advocate Amy explained how, in practice, the JFSC would be involved in any merger anyway, and the question of any necessary licence would be dealt with at that stage.

86. Accordingly, I do not consider that the supposed adverse consequences for trusts envisaged by Advocate Franckel are realistic. They cannot form the basis of an argument which rests on a purposive interpretation of A127G. Indeed, if there really were the sort of difficulties suggested by Advocate Franckel, it would be remarkable if they were not raised by trust lawyers in particular either at the meeting to discuss the consultation paper, or in the Response, both of which are referred to above.

87. As for how Newco should then take over the trusteeship of B2 and the relevant trust property, as suggested by Advocate Franckel, he was cross-examined on this. It was pointed out that there may be temporal problems since, for example, Newco would not exist *qua* Newco at the time when B1 and B2 resolved to appoint it and issues of that kind. I daresay that there could be ways found to avoid those problems, but the real question is whether resort to them was needed at all. It is only necessary if Advocate Franckel is correct in his underlying interpretation of A127G. The same goes for the powers of the Jersey Court under Article 51 of the TJL. This provides as follows:

> "**51 Applications to and certain powers of the court**
>
> (1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit.

(2) The court may, if it thinks fit -

(a) make an order concerning -

(i) the execution or the administration of any trust,

(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise,

(iii) a beneficiary or any person having a connection with the trust, or

(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;

(b) make a declaration as to the validity or the enforceability of a trust;

(c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration.

(3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with leave of the court, by any other person.

(4) Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.

(5) Subject to any order of the court, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed as a trustee."

88. No doubt the court could be asked to make all sorts of orders dealing with the appointment and retirement of the trustees and so on; but on Advocate Franckel's analysis, this would be necessary in every case of merging trust companies if one of his other routes did not work. That would seem unduly burdensome and again, only becomes necessary if one adopts his interpretation. As with the other routes suggested, I do not think that this provides an easy answer to the problems caused by his interpretation and in particular as to the position of B2.

89. I now turn to what Advocate Franckel had to say about *Capita* and the other materials referred to in paragraphs 58.-63. above. As for *Capita*, Advocate Franckel made the fair point that, as indicated above, the issue of the effect of the merger was not actually disputed before the Bailiff. But as for the Bailiff's reasoning he also said that it was simply wrong. On that point, and having regard to *Capita* and the other materials, Advocate Franckel's initial position, as set out in his second report, was that there were "two schools of thought" about the applicability or otherwise of A127G to corporate trustees. But that is not a fair representation of the views, at least to judge from the materials before me. When pressed on the point, Advocate Franckel eventually had to accept in the light of the materials that the "widely held view" on this provision was in accordance with Advocate Amy's interpretation, not his. He said there were still dissenting voices. As to who they were, he did not identify any specific lawyers other than himself, at which point, Ms Langlois, junior counsel for WJ, intervened to say that she, as a Jersey-qualified lawyer, held that view as well. She, of course, is a lawyer on the case, not an expert witness. But the real point is that the true position appears to be that Advocate Franckel is in a distinct minority on this question. He accepted that, because he agreed that the majority view was against him, as it were.

90. Of course, my task in analysing the expert evidence (which has to be considered as a matter of fact since it concerns foreign law) is not to count votes, as it were. But Advocate Franckel's somewhat disingenuous approach, as I saw it, to the views held by practitioners in Jersey counted against his overall credibility. As did the fact that at some points in his cross-

examination, particularly towards the end of Day 2 and the beginning of Day 3, he came across as somewhat argumentative and not objective, as if he had to pursue his personal point of view, come what may.

91. Overall, I did not find Advocate Franckel to be a persuasive witness and I did not find his arguments persuasive. I now turn to the core evidence of Advocate Amy. I thought it was generally impressive. He was clear in his views and made concessions where appropriate. In particular, he accepted that his field of expertise was Jersey corporate law including its law of mergers, and that he was not a trusts lawyer. He accepted that he did not have English law expertise.

92. A key element of his cross-examination focused on the issue as to whether a trusteeship attached to a particular company could form part of its attributes for the purposes of the merger given effect by A127G. Advocate Franckel's point, of course, was that it did not. Advocate Amy accepted that trust companies like B2 and B3 were regulated financial institutions because, among other things, of the services they provided as professional trustees. This is why they would require a licence or similar authority from the JFSC. He also accepted, as is obvious, that A127G says nothing about the transfer of any licence held by a company like B2 into Newco, assuming that Newco would need a new licence even though it retained its previous company number, as to which no evidence was adduced before me.

93. However, the practical point he made on a number of occasions was that what happened in mergers of this kind was that, although the merger would be approved by the Jersey Registrar of Companies (usually in practice his Deputy) the JFSC would inevitably be involved to ensure that there were no regulatory matters that needed to be attended to. Although he had not seen any evidence of licences being obtained or discussed in connection with the Merger here, "it would absolutely be the case that they would have got the necessary consents under Jersey law to facilitate the merger first". The Registrar would not allow the merger to go ahead without seeing that the necessary approvals were in place. Indeed, the Jersey Companies Registry itself forms part of the JFSC and the Head of each of those bodies is actually the same person. Further, notwithstanding the use of the word "shall" in A127G as regards the Registrar's issue of a certificate on the merger, the Registrar would not in practice issue a certificate if he was not completely satisfied about any licensing issue. While it was true that A127G did not make any specific reference to the licence position with regard to merging trustee companies, the way it works in Jersey, as he described it, came from his own knowledge and experience. See further paragraphs 8.1-8.3 of his first report. Advocate Franckel did not suggest otherwise, nor could he, since his expertise did not lie in corporate law including mergers.

94. Advocate Amy did not accept that if English lawyers wanted to know what the position was, they could simply look at the statute. They would consult a firm of Jersey lawyers like his own, and receive the explanation which he gave to the court. That is obviously correct, in my view.

95. I appreciate that this is a question of practice in Jersey which does not directly go to the interpretation of A127G. However, it does explain why the unattractive consequences said by Advocate Franckel to flow from Advocate Amy's interpretation, were not ones likely to arise in practice. Indeed, Advocate Amy accepted that in theory, and putting licensing to one side, it would be possible for a trustee company to merge with another company which happened to

be a fraudulent operator, and was entirely unsuited to act as a trustee. Provided the documents specified in A127G were supplied, then there would be a merger. But this was an extreme example and while it might be possible in theory, it seems very unlikely in practice since certainly, with professional corporate trustees there would then be the need for an appropriate licence to be put in place. In truth, there is nothing inherently odd in the position that the effect of a merger from the point of view of corporate identity property and obligations is one thing, while questions of licensing are another. One also has to remember that none of the supposed concerns about the effect of the merger provisions on trusts articulated by Advocate Franckel ever seem to have emerged, at least not formally, in any consultation response or in the trust lawyers working group minutes.

96. Further, and as Advocate Amy pointed out more than once, the issue here is not about transfer from one company to another; it is about merger by operation of law which is very different. This is why Advocate Amy did not accept the point made to him in cross-examination about Clause 29 of the TI referred to in paragraph 70. above. This dealt with the appointment and removal of trustees. He accepted that B2 was not removed by an extraordinary resolution, or retired. He also accepted that sub-paragraph (c) said that the retirement or removal of the trustee could not happen until the appointment of a new trustee approved by the JFSC. He also agreed that Newco needed to be approved by the JFSC, but not because of this clause - rather, because of the operation of financial services law as a precursor to merger. Clause 29 (c) was not relevant because it was dealing with the removal or appointment of trustees and not merger. He added later that the terms of a trust instrument could prohibit any kind of merger between trustees although this TI did not do so. But it would not necessarily stop the merger itself.

97. A further point made concerned the references to "original" and "current" trustees made in the documents referred to in paragraph 20. above. Advocate Franckel refers to these in his second report. B3's name now needed to be added and B2's removed, from further trust documents because of the Merger. But using this terminology was no doubt convenient and from any objective point of view, and with knowledge of the Merger, I do not think one can draw from this language that there had been some (on WJ's case, invalid) retirement and appointment of trustees which should have been governed by Clause 29 of the TI. The language used does not entail the fact that must have been a "transfer". Accordingly, this point does not assist WJ.

98. On a related point, Advocate Amy also said that A127G should be interpreted widely so that there was no question but that, for example, the fiduciary duties of a trustee in the position of B2 became the duties of Newco without more. He referred to the fact that in other contexts, legislation would, for example, specifically exclude trust property if this exclusion was required - as occurs in Jersey's bankruptcy laws. This shows that if there was a need to make some sort of carve-out in respect of merging corporate trustees, it could and would have been done expressly.

99. A related matter concerns the particular language used in A127G (a) – (c). His view was that the fact that the merging companies then continue as one company (i.e. Newco) meant that no separate transfer was required. This did not mean that the language of sub-paragraphs (b) and (c) was redundant. These sub-paragraphs explain or clarify what is happening in a merger under this section. And if he had to point to something that would encompass the notion of duties previously held by B2 *qua* trustee now being in Newco, he would refer to the use of the word "obligations" in the phrase "contract, debt and other obligations". I agree with him when

he said that fiduciary duties would fall under that expression and that it should not be construed *eiusdem generis* with "contract". Indeed, he thought it would be perverse if, after the merger, a group of duties still somehow remained with B2 even though it had now become part of B3. I also agree with that.

100. However, I need also to refer to Advocate Amy's evidence about the word "entitled". This was in the context of whether trust property became the property of Newco without more. WJ's position was that A127G (b) relating to how the merged company has the property and rights to which the prior merging company was "entitled" had no effect for corporate trustees. That is because they had no "entitlement" to trust property in the first place. He did not at that point agree with that proposition. It is right that he then went on to agree with Ms Parkin KC that the words of Article 54 reflected the position that trust lawyers do not recognise trustees as being entitled to trust properties. But of course, it depends for what purpose one is talking about entitlement to trust property. He returned to the topic later on when he observed that while, absolutely, he was not a trust law expert, there was a whole raft of partners and other Jersey trust lawyers who had concluded as he did, and had not interpreted "entitled" in A127G, as Advocate Franckel would have it.

101. What I have said thus far, in relation to the evidence of Advocates Franckel and Amy is sufficient for me to conclude that on the first key question as to whether A127G applies to corporate trustees as well as other companies, it clearly does. Or to put it in a more nuanced way, it covers the extent to which a company acts as a trustee in addition to any other way in which it acts.

102. In addition to the above matters, there was a particular submission made by Ms Parkin KC on the interpretation of A127G which derived from the House of Lords case of *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014. The starting point for the argument was that there was no material difference between English and Jersey law as to the proper construction of a statute and as already noted, the experts did not suggest otherwise and neither do I.

103. *Nokes* was a case about s154 of the Companies Act 1929. The original Article 127 of the CJL (which is still in force) is in substantially the same terms. It provides as follows:

> "**Provisions for facilitating company reconstruction or amalgamation**
> (1) This Article applies where application is made to the court under Article 125 for the sanctioning of a compromise or arrangement proposed between a company and any persons mentioned in that Article;
> (2) If it is shown
> (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of a company or companies, or the amalgamation of 2 or more companies; and
> (b) that under the scheme the whole or part of the undertaking or the property of a company concerned in the scheme ("a transferor company") is to be transferred to another company ("the transferee company"),
> the court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters -
> (i) the transfer to the transferee company of the whole or part of the undertaking and of the property or liabilities of a transferor company,
> (ii) the allotting or appropriation by the transferee company of shares, debentures, policies or other similar interests in that company which under the compromise or arrangement are to be allotted or appropriated by the company to or for any person,
> (iii) the continuation by or against the transferee company of legal proceedings pending by or against a transferor company,

(iv) the dissolution, without winding up, of a transferor company,
(v) the provision to be made for persons who, within a time and in a manner which the court directs, dissent from the compromise or arrangement,
(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(3)If an order under this Article provides for the transfer of property or liabilities, then -

(a) that property is by virtue of the order transferred to, and vests in, the transferee company; and
(b) those liabilities are, by virtue of the order, transferred to and become liabilities of that company, and property (if the order so directs) vests freed from any hypothec, security interest or other charge which is by virtue of the compromise or arrangement to cease to have effect.

(4) Where an order is made under this Article, every company in relation to which the order is made shall cause the relevant Act of the court to be delivered to the registrar for registration within 14 days after the making of the order; and in the event of failure to comply with this paragraph, the company is guilty of an offence.

(5) In this Article, "property" includes property, rights and powers of every description and "liabilities" includes duties."

104. In *Nokes*, there had been a transfer of a colliery from one company to another under a scheme of arrangement. One of the employees of the transferred colliery was fined by the Magistrates for non-attendance at work. He argued that he could only be fined if he was indeed employed by the transferee company. He then argued that he was not, because the scheme of arrangement was ineffective to transfer his contract of employment from the transferor company without his consent. At first instance and in the Court of Appeal, this argument was rejected, but it was accepted by a 4:1 majority in the House of Lords. Section 154 permitted the Court to provide for the transfer of the undertaking, property and liabilities of the transferor company and sub-section (4) thereof stated that property included "property, rights and powers of every description and the expression 'liabilities' includes duties". This is replicated in Article 127 (5). The transferor company was dissolved following the transfer.

105. In his judgment, Viscount Simon LC observed that many kinds of contract could not in fact simply be transferred by such an order without more. Further, the word "contract" did not appear in section 154. Rather, when the section referred to "transfer" it was not contemplating the transfer of rights (in particular the right to the services of an employee) which are themselves incapable of transfer. Certainly (and he limited himself to this) it did not cover the transfer of contracts of personal service. If the legislature had intended that employees should be transferred to a new employer without their consent, plainer words could have been devised to say so.

106. Lord Atkin took a somewhat broader view. He thought that if there had been a transfer permitted here, it would mean that it would cover all sorts of contracts of employment or other aspects of personal service or leases of property held without a right of assignment, or rights to sue for defamation and other rights too. He considered that such legal consequences would be "remarkable" and a "revolution in the law". Prior to the enactment of the 1929 Act, none of that would have been possible. He then said this:

> "Much stress has been laid on the general words in the definition clause, s. 154, sub-s. 4 : "In this section the expression 'property' includes property rights and powers of every description and the expression 'liabilities' includes duties." But it has been the duty of the Court on countless occasions to construe general words cutting down the generality to the obvious intention of the Legislature. The words of the learned author of Maxwell on Statutes, 8th ed., p. 73, appear to me to afford a true canon of construction. After saying that there are certain objects which the Legislature is presumed not to intend, and that a construction which would lead to any of them is therefore to be avoided, he continues : " One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express, terms or by clear implication,

> or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give hem a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law."

107. *Nokes* was followed in *Re Skinner* [1958] 1 WLR 1043 by Sachs J (as he then was). The issue here was whether Grindleys Bank was still entitled to pursue an action for probate of a will of which it was executor. This arose because Grindleys had entered into a scheme of arrangement whereby all of its assets and liabilities would be transferred to another bank but not any property vested in Grindleys as personal representatives of any deceased person. Sachs J noted that the scheme did not vest any property of the deceased in the trustee bank. First, this was because the office of executor was one of "personal trust" and could not be properly assigned by the executor unless in the course of carrying out the duties of that office. Second, he said that Nokes had made clear that only those rights which were capable of being lawfully transferred could be transferred by sections 206 and 208 of the Companies Act 1948 (which succeeded section 154 of the 1929 Act). The result was that Grindleys, which remained in existence, retained its position as executor, and could continue the underlying probate action.

108. Finally, in *Re Cater Allen* [2002] EWHC 3147, Laddie J was asked to approve a scheme of arrangement under section 111 of the Financial Services and Markets Act 2002 ("FSMA") by which the banking business of one company could be transferred to another. There was no actual objection to the proposed scheme of arrangement but Counsel drew Laddie J's attention to *Nokes*. Laddie J accepted the import of what Lord Atkin had said there, but noted the reference to the fact that express terms could be used by the legislature if the intention was to give the court the power to sanction the transfer of that which was not transferable. Here, section 112 (2) of FSMA provided that:

> "An order under subsection (l)(a) may ~
>
> (a) transfer property or liabilities whether or not the authorised person concerned otherwise has the capacity to effect the transfer in question; ..".

109. Laddie J construed this position widely and said that it:

> "gives the court power to sanction, where it considers in all the circumstances that it is justified, the transfer of property or liabilities even in cases where those properties or liabilities might otherwise be non-transferable, for example by reason of express contractual provision. In my view section 112(2) does therefore provide a distinct and clear difference as between the provisions under the FSMA and the equivalent provisions under the Companies Act which were considered in *Nokes*. It bestows on the court the power to transfer just the sort of banking business which is at issue before me."

110. Accordingly, he approved the scheme of arrangement.

111. From all of this, WJ contends as follows:

(1) The position under A127, prior to the 2002 amendments which introduced A127G, was such that it would not have been possible to transfer an obligation or rights of a company acting as a trustee;

(2) A127G should be interpreted in such a way as to maintain that position notwithstanding its apparently wide wording.

112. I follow the argument, but there is a fundamental flaw in it, in my view, on the basis that the approach in *Nokes* would have applied to A127. The flaw is this: A127 is not about merger even though at one stage in the argument Ms Parkin KC referred to it as a form of "administrative merger". The word "merger" is not used at all (nor is it in section 154). Notwithstanding expressions like "amalgamation", the process is essentially one of transfer and not merger. And the results, in principle, are plainly different. That is because under A127 the transferor is, at least in principle, left behind as a separate legal entity, albeit divested of much if not all of its property. That is so even if it is then dissolved later, as part of the overall scheme, as in *Nokes*. In *Skinner*, of course, it was very much to remain and carry on the role of executor. By contrast, in the A127G merger, as already stated, there is no "remaining" transferor as a separate entity, because of the merger. And while Advocate Franckel postulates the case of B2 somehow remaining but unable to act, that has the difficulties already referred to.

113. The difference between A127 and A127G was put to Advocate Franckel. He did not have much to say about it, although at one stage appeared to think that the original A125-127 had been replaced by the 2002 amendments but in fact they were not. He said that one could view A127G as being about transfer even though it did not use that word but I think that misses the point which is that it is about merger and here, the continuation of B2 now within Newco.

114. So in my judgment, the context is very different from that in *Nokes*. And therefore it does not follow that there is a need to cut down the wide words of A127G because not to do so would mean giving effect to a "revolution in the law" due to a fundamental departure from pre-existing law. There was no "pre-existing law" on merger, as distinct from transfer.

115. In conclusion, I am quite satisfied that following the Merger, B3 became co-trustee with B1 in place of B2 by operation of law and without the need for any form of transfer. The property and rights of B2 likewise became vested in B3. This meant that there was no defect in the "chain of title" as it were from B1 and B3 down to C3 and also, as applicable, to C1 and C2.

116. In the light of that I can now turn directly to my analysis of the individual Preliminary Issues on the Trust Element ("PIs").

PI 1

117. This asks: **In determining whether the merger between BNP Bank Co and BNP Jersey Trust Co ("2009 Merger") operated so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?**

118. WJ contends that English law applies to this question because the governing law of the CW is English law. The Claimants say that it is Jersey law because the real question is about the nature and effect of the Merger which itself is provided for by A127G, and of course the companies in question are Jersey companies.

119. Here, the Claimants rely on the decision of the House of Lords in *National Bank of Greece and Athens v Metliss* [1958] AC 509. In this case, a Greek bank, X, issued bonds, themselves governed by English law. They were guaranteed by Greek bank Y. The Greek government then issued a moratorium on payments on the bonds by the banks. Later, by an act of Government, bank X was amalgamated with a further Greek bank, Y, and it was enacted that Y was the "universal successor" to the rights and obligations of the amalgamated companies

120. Bank Z resisted enforcement of the guarantee against it first, on the basis of the original moratorium. That argument was rejected. Second, it said that it was effectively a different company from Y and did not assume its guarantee liabilities. The House of Lords rejected this argument and in so doing, it clearly applied the law of Greece, recognising the various acts which had given rise to the status of bank Z. This can be seen first from the following part of the judgment of Viscount Simmonds at p525:

> "But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I believe that justice will be done if your Lordships think it right not only to recognize the fact that the new company exists by the law of its being but to recognize also what it is by the same law. It is conceded that its status must be recognized. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognizing its existence if we do not also recognize the purposes of its existence and give effect to them accordingly. If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done…
> I conclude, therefore, that the appellants fail in their first contention that they are not liable upon the bonds which were guaranteed by the old company. If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice."

121. To that may be added the observations of Lord Tucker, at p529:

> "The decree provided that the two former banks " shall " cease to exist and the entire property of each of them in its whole " (assets and liabilities) on the day of publication is considered " as being automatically contributed to the new limited liability " banking company constituted by virtue of these presents."
> English law will look at the Greek decree to determine the status of this new entity. It is contended, however, that the transfer of liabilities from the old bank to the new is no part of its status. It is said that " status " is confined to the existence, powers and dissolution of the new corporation.
> My Lords, I think the result of this appeal really turns upon this short point. It is devoid of authority… The identity of the old bank has become merged in the amalgamation by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile."

122. In other words, it is accepted that the court must look to the foreign law to see what the nature and attributes of the entity in question are. The House of Lords reach that conclusion notwithstanding the fact that the governing law of the bonds themselves was English law.

123. There is, in my judgment, a direct parallel with the situation here. English law is nothing to the point because the question does not concern the operation or interpretation of the CW. It concerns which entity had the benefit of it. Although National Bank of Greece was about the

party liable under the instrument, rather than the party able to enforce it, that makes no difference as a matter of principle.

124. I should add that this conclusion is consistent with, and indeed supported by the discussion in *Dicey, Morris & Collins* on the Conflict of Laws (16th Ed.) at paragraphs 30R-009 to 30R-113. In particular, the latter paragraph says that:

> "Whether a corporation has been amalgamated with another corporation must also be determined by the law of its place of incorporation. If that law provides for a *succession in universum jus* then the amalgamated company will be recognised in England as succeeding to the assets and liabilities of its predecessors…"

125. The other section in *Dicey, Morris & Collins* which forms part of the parties' joint authorities, covers the transfer or assignment of intangible property. Here, the answer as to which is the proper law is not straightforward. However, it does not matter because this is not a case of assignment or transfer, for the reasons already given.

126. Accordingly, the answer to PI 1 is "Jersey law".

PI 2

127. This asks: **If the answer to Issue 1 above is English law:**

> **(a) As a matter of English law does the 2009 Merger have the effect that BNP Bank Co's rights under the Collateral Warranty were held thereafter by BNP Jersey Trust Co?**
>
> **(b) If the answer to Issue 2(a) is "No" what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty Claims in this action?**

128. In the light of my conclusion on PI 1, this issue does not arise.

PI 3

129. This asks: **If the answer to Issue 1 above is Jersey law, do the provisions of Article 127G(2) of the Companies (Jersey) Law 1991 (as amended by the Companies Law (Amendment No 6) etc.) ("CJL 1991") operate so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co?**

130. Here, in my view, the answer, in the affirmative, is clear, having regard to my analysis and conclusions in paragraphs 51.-116. above. In particular, having preferred the evidence of Advocate Amy, there is no question here of any "transfer" of the benefit of the CW. It became vested in B3 (jointly with B1) because of the Merger. It is therefore irrelevant that there was no novation of the CW or assignment of the benefit therein (cf paragraphs 51-56 of WJ's Skeleton Argument).

131. The only further submissions arguing against the benefit of the CW being vested in B3 by reason of the Merger rested upon the proposition that A127G does not apply to trust property

and so in this respect and for the purposes of that provision, B2 was never "entitled" to the benefit thereof. But I have also rejected all such arguments above.

132. Accordingly, the answer to PI 3 is "Yes".

PI 4

133. This asks: **If the answer to Issue 3 above is "No", what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty claims in this action?**

134. In the light of my answer to PI 3, this does not now arise.

135. However, it is worth noting WJ's summary of what it said would be the consequence if the answer to PI 3 had been "No". It is an answer also given in relation to PI 8. What it said was that:

> "The Collateral Warranty rights remained vested in B1 and B2 jointly in their capacity as co-trustees of the P18UT and that accordingly B1 was not capable of dealing with the same without B2 being party to any transaction."

136. This answer really illustrates the difficulties of WJ's position (and the evidence of Advocate Franckel). It is based on the same assumption that notwithstanding the Merger, B2 still existed as a separate entity. Although WJ says that B2 could not deal with the benefit of the CW without B2 being a party to any transaction, B2 could not be such a party after the Merger as it had no separate identity.

PI 5

137. This asks: **In determining whether the 2009 Merger operated so as to have the effect that BNP Bank Co's title to the long lease in the Property was thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?**

138. Here, we return to the question of the applicable law. WJ says that it is English law because that is the *lex situs* of the Property. The Claimants, again, say that it is Jersey law essentially because this is not a question of transfer of any title but merger.

139. Again, I consider that the Claimants are correct. It is difficult to see why the logic of *National Bank of Greece* does not also apply here. One applies the local law of the corporate entities to see what in fact happened as a result of the Merger. Since there has been no form of transfer, no question of English law arises. Although the Merger did involve more than a change of name, because B2 was also absorbed into Newco, the change of name analogy is still useful on the question of the applicable law. The change of name was still needed to be recorded on the Land Registry here but that does not mean that English law governs the substantive question of the attributes of the entity in question i.e. here, Newco.

140. In fact, the title documents from the Proprietorship Register at the Land Registry show that initially, on 7 April 2008, B1 and B2 were shown as registered proprietors of the Lease. But a later version of the Proprietorship Register from 12 May 2010 (i.e. after the Merger) shows B1 and B3 as the registered proprietors and moreover does so as from 7 April 2008. In other words, at least as far as the Land Registry was concerned, it treated the change of reference

from B2 to B3 as no more than a change of name. That would indeed reflect the position on ownership of the Lease following the Merger.

141. The answer to PI 5 is therefore: Jersey law.

PI 6

142. This asks: **If the answer to Issue 5 above is English law, as a matter of English law:**

> **(a) Did the 2009 Merger have the effect that BNP Bank Co's title in the long lease was thereafter held by BNP Jersey Trust Co?**
>
> **(b) On the basis that s. 58 of the Land Registration Act 2002 confers upon the First and Second Claimants "deemed" title to a property which forms part of assets held as part of the PT18UT, are the First and Second Claimants persons who "acquire an interest (whether legal or equitable) in the dwelling" and, as such, persons to whom a duty is owed under (and can bring proceedings for breach of) s.1(1)(b) of the Defective Premises Act 1972?**

143. In the light of the answer to PI 5 above, PI 6 does not arise. In any event, the result would be the same as that entailed by the application of Jersey law (see PI 7 below). This is because WJ's answer to PI 6 (a) is No but this relies on the same reasons given in answer to PI 3, where I have found the answer is Yes. Accordingly, had it arisen, the answer to PI 6 (a) would have been Yes. Equally, the answer to PI 6 (b), had it arisen, would have been Yes. That is because WJ's only reason for saying that C1 and C2 are not persons who have a legal interest in the Property (through the Lease) is because they are bringing proceedings expressly as nominees for C3 and C3 is not validly appointed (see paragraphs 46-49 of WJ's Skeleton Argument). However, I have found that it was validly appointed. Therefore, WJ's objection here must fail.

PI 7

144. This asks: **If the answer to Issue 5 above is Jersey law, as a matter of Jersey law, do the provisions of Article 127G(2) of the CJL 1991 operate so as to have the effect that BNP Bank Co's title to the long lease was thereafter held by BNP Jersey Trust Co?**

145. It follows from my analysis above that, as with PI 3, the answer must be "Yes".

PI 8

146. This asks: **If the Answer to Issue 7 is "No" what happened to BNP Bank Co's rights to the title to the Property upon the 2009 Merger and does this affect the Claimants' ability to bring the DPA and tortious claims in this action?**

147. This does not now arise.

PI 9

148. This asks: **Do the provisions of Art 127G(2) CJL 1991 operate so as to have the effect that BNP Jersey Trust Co was thereafter the co-trustee of the P18UT with BNP Trust Co, such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the Pl8UT?**

149. Yet again, on the basis of my analysis above, the answer here must be "Yes".

PI 10

150. This asks: **If the answer to Issue 9 is "No", could BNP Trust Co nonetheless continue to act as a "sole trustee" following the 2009 Merger such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the Pl8UT?**

151. This does not now arise.

PI 11

152. This asks: **If the answer to Issue 10 is "No", does the Third Claimant nevertheless have standing to bring these proceedings on behalf of the beneficiaries of the P18UT?**

153. Likewise, this does not now arise. Accordingly, it is not necessary for me to decide the issue as to whether C3 would have had *locus* if it was simply a *trustee de son tort*.

CONCLUSIONS ON THE TRUST ELEMENT OF THE QUESTION OF TITLE TO SUE

154. It follows from all of the above that thus far, there is no impediment to the right of C1 and C2 to bring the CW and DPA Claims against WJ. Further, there is no impediment to the right of C3 to bring the Negligence Claim.

155. Insofar as any argument as to the *locus* of C1 and C2 was based on the fact that C3, for which they hold their claims on trust as bare nominees, was not a validly appointed trustee, that argument fails because C3 was validly appointed. For that reason, it is not necessary to delve further into the question as to whether C1 and C2 could bring the claims nonetheless, simply because they hold the benefit of the CW and the Lease. Nor has it been necessary to explore the question as to whether there had always to be two trustees under the TI or the position as to surviving trustees.

156. I now turn to the second element of the Title to Sue Dispute.

THE SECURITY ELEMENT

157. There is a distinction between what may be called "absolute" assignments and other forms of assignment like those by way of charge or which are conditional. That distinction applies whether the assignment is legal (i.e. under section 136 of the LPA 1925 ("section 136")) or equitable.

158. The key dispute underlying the Security Element is that WJ contends that the relevant assignments given by the Claimants under Clause 2.1(c) were absolute, while the Claimants contend that they were not and were, at best, forms of charge. It is common ground that if the purported assignments were not absolute but only by way of charge, then there is no impediment to the Claimants bringing these claims in their own names (albeit as trustees) resulting from any agreements made with WF. If they were absolute, then there will be some form of impediment, as described below.

159. With that brief introduction, I turn to the relevant PIs.

PI 12

160. This asks: **What was the nature of the interest in (i) The Collateral Warranty and (ii) the long lease held by each of the Claimants immediately prior to their execution of the Security Agreement with Wells Fargo in August 2016?**

> **(a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014?**
>
> **(b) On the assumption that such notice was not given?**

161. I deal first with the Lease because the answer does not depend on whether notice of the First Assignment was given or not. Both sides agree that C1 and C2 in any event held (and hold) the Lease on (express) trust for C3.

162. As for the CW, the Claimants' position is that, regardless of whether notice of the First Assignment (from B1 and B3 to Pavilion) was given, C1 and C2 never became the legal assignees of the CW. This is because notice of the Second Assignment (from Pavilion to C1 and C2) was not given at the relevant time. This meant that C1 and C2 never became legal assignees of the CW as at August 2016. However, they did become equitable assignees, holding equitable interests in the rights under the CW. If notice of the First Assignment had been given, then Pavilion retained legal title in the CW. If such notice was not given, then it was B1 and B3 who retained such title.

163. WJ also contends that C1 and C2 were equitable assignees only and regardless of whether notice of the First or Second Assignments was given or not. That contention essentially depended on WJ's position on the effect of the Merger, which I have now rejected.

164. But the upshot is that, whatever may have thereafter been assigned by C1 and C2 to WF (or not) it was an equitable interest in the CW. Further, on what I have found thus far, prior to the dealings with WF, C1 and C2's interest in the CW was held by them on trust for C3, because that is what the Second Assignment expressly provided for.

PI 13

165. This asks: **Does clause 2.1(c) of the Security Agreement assign to Wells Fargo Bank N.A all (or any) of such rights, title and interests that each of the Claimants then had in:**

> **(a) The Collateral Warranty; and/or**
> **(b) Any claims and causes of action the Claimants may otherwise have had against the Defendant for breach of the Collateral Warranty, negligence, and/or breach of s. 1(1) of the Defective Premises Act 1972 — including, for the avoidance of doubt, in relation to claims and causes of action for breach of s.1(1) of the Defective Premises Act 1972, was it possible to effectively so assign such claims and causes of action or was such assignment prohibited by reason of s.6(3) of that Act; and/or**
> **(c) The long lease?**

The Law

166. For legal assignments, the requirement that they be absolute is spelled out in section 136 itself which requires the assignment to be an:

> "absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action…"

167. If there has been a legal assignment, it is common ground that only the assignee can sue in respect of the assigned right or interest. If this was the position here, then WF would have to be joined, for it would be the only proper claimant. The Claimants accept this (see Day 2/182).

168. As for an "absolute" equitable assignment, the Claimants at paragraph 74 of their Skeleton Argument say that this requires

> "a communication from the assignor to the assignee which manifests or expresses "a final and settled intention to transfer the property to the assignee there and then"…; see re Williams [1917] 1 Ch 1, at 8, and Guest on the Law of Assignments (4th edition) at paragraphs 1-57 and 3-13. Or to put it another way, "For property to be assigned in equity what is needed is the sufficient expression of an intention to assign in the context of a transaction from which it can be inferred that the property was intended to pass."

169. WJ did not disagree with this way of putting it, although it used a different formulation – see paragraph 75 of its Skeleton Argument.

170. Hereafter, where I refer to whether there has been an "absolute" assignment or not, I am referring to whether the tests set out for legal and equitable assignments in paragraphs 166. and 168. above, have been met.

171. If there has been an equitable assignment, the assignee can sue in its own name, and the assignor may (but does not have to be) joined. If (as here on this hypothesis) only the assignor has sued, then usually, the assignee will have to be joined. However, the alternative is that the assignor sues not on its own account but on behalf of the assignee as trustee therefor, and with the assignee's consent.

172. Here, WJ says that the Claimants have not brought these proceedings as trustee for WF. C1 and C2 brought them as trustees for C3, and C3 brought them as trustee for the beneficiaries of the Trust. Nor has there actually been a consent from WF to bring the claims for it. As to that, the Claimants accept that there would have to be an amendment to (at least) the Claim Form to describe correctly the capacities in which they sue as trustees. The Claimants also agree that WF's consent would have to be obtained. However, they go on to say that such consent has in fact already been given in a letter sent by WF on 19 January 2023 ("the WF Letter"). I deal below with the WF Letter and whether (if required) it constitutes the relevant consent.

173. The leading case on the distinction between absolute assignments and those which are merely by way of charge, as the distinction occurs in the context of financing agreements, is the decision of the Court of Appeal in *Bexhill v Razzaq* [2012] EWCA Civ 1376. There are some similarities between the underlying facts in that case and those pertaining here, and for that reason, it is necessary to refer to it in some detail.

174. Bexhill carried out the business of lending money to insurance brokers to enable them to offer finance to their insured clients to enable them in turn to pay their insurance premiums on an instalment basis rather than a lump sum upfront. For the purposes of funding its business,

Bexhill made a number of agreements with Barclays Bank Plc ("Barclays") pursuant to which Barclays lent a total of £5m to Bexhill and took relevant security.

175. One of the companies to whom Bexhill had provided funding was a broker called RSA which was owned and/or controlled by Mr Razzaq. He had provided a personal guarantee to Bexhill to secure the company's liabilities and also a charge over a property owned by him to secure his guarantee liabilities. In the light of arrears on the part of RSA, Bexhill brought proceedings for possession of the property pursuant to the charge. One of the arguments raised by Mr Razzaq was that Bexhill had no title to sue because the claim for possession of the property which had been charged had been assigned absolutely to Barclays.

176. Under the Facility Agreement made with Barclays, Bexhill had to make all repayments received from the brokers of the loans made to them into a special collection account from which Bexhill repaid Barclays in turn. Bexhill also covenanted to act as principal and not as agent when making its financing agreements with the brokers and without any reference to Barclays. A separate Debenture made with Barclays secured all sums payable by Bexhill to Barclays. Clause 3.1 thereof, headed "Assignments by [Bexhill]" provided as follows:

> "3.1.1 As a continuing security for the payment of the Secured Obligations…[Bexhill] assigns and agrees to assign absolutely in favour of [Barclays] all of [Bexhill's] rights, title, interest and benefit in the Receivables.
> 3.1.2 As a continuing security for the payment of the Secured Obligations, [Bexhill] hereby with full title and guarantee assigns and agrees to assign absolutely in favour of [Barclays] all of its rights, title, interest and benefit in and to each Relevant Contract and all collateral and rights thereunder."

177. Clause 3.2 was sub-titled "Fixed Charges given by [Bexhill]". By it, Bexhill charged and agreed to charge in favour of Barclays, "by way of first fixed charge" all its "…right, title, interest and benefit in and to the Collection Account….". By clause 3.2.13, Bexhill charged and agreed to charge "to the extent not effectively assigned under clause 3.1.1 by way of first fixed charge all of the Receivables".

178. Clause 3.3, headed "Notice of Assignment", provided that Bexhill undertook:

> "Immediately upon execution of this Deed (and immediately upon the obtaining of any Insurance or the execution of any Relevant Contract after the date of this Deed) [Bexhill] shall:
>
> 3.3.1 in respect of each Relevant Contract, deliver a duly completed notice of assignment to each other party to that Relevant Contract (with a copy to [Barclays]), and use its best endeavours to procure that each such executes and delivers to [Barclays] an acknowledgement, in each case in the respective forms set out in schedule 2 (Forms of notice to and acknowledgement by party to Relevant Contract) (or in such other form as [Barclays shall agree);…"

179. By clause 7.1.2 Bexhill agreed to execute a legal assignment "in such form as [Barclays] may reasonably require over all or any of the Receivables and give notice of such assignment to the relevant Debtors and/or [QRFs]". Further, Bexhill undertook to ensure that all payments received under "Bexhill Facility Agreements" were paid directly into the Collection Account. As explained in paragraph 20 of the judgment of Aikens LJ (with whom Ward and Black LJJ agreed) clause 13 "placed severe limitations on what Bexhill could do with any sums deposited in the Collection Account.… Effectively, Barclays had complete control over the sums credited to the Collection Account which had to be established by Bexhill in accordance with the BBFA [i.e. the Facility Agreement]".

180. By clause 11.1.3 Bexhill undertook to "collect all other Receivables in the ordinary course of trading as agent for [Barclays]" and immediately upon receipt "pay directly all monies which it may receive in respect of the Receivables into the Collection Account or such other account as [Barclays] may from time to time direct", but in the meantime to hold all monies so received in trust for Barclays.

181. Clause 16.1 provided that

> "…the security constituted by this Debenture shall become immediately enforceable upon the occurrence of an Event of Default which is continuing unremedied and unwaived…After the security constituted by this Debenture has become enforceable, [Barclays] may in its absolute discretion enforce all or any part of this security in such manner as it sees fit".

182. Aikens LJ held first that the sums owed to Bexhill by Mr Razzaq as guarantor were themselves Receivables, as were Bexhill's rights against him and in respect of the property, pursuant to the charge.

183. I turn first to the general points made in paragraphs 44 and 45 of the judgment which are pertinent to this case:

> "44. As a preliminary remark on this issue, it is important to recall the effect of an assignment of a right, whether or not it is a statutory legal assignment. The assignee becomes either the legal or beneficial owner of the thing in action and its benefits. He does not become a party to any contract or deed which contains or gives rise to the right. The assignee will only become a party to the contract (or deed) if there is a novation of the instrument containing or giving rise to the right.
>
> 45. Whether a particular instrument creates an "absolute" assignment or an assignment "by way of charge only" is a question of construction of the relevant instrument taken as a whole. That principle and the consequences of an assignment being "absolute" or "by way of charge only" were explained by Mathew LJ in *Hughes v Pump House Hotel Co*. In that case a builder sued to recover debts from his client under a building contract, but the defendant client asserted that the builder had assigned absolutely his right to sue for the debts to the builder's bank, by virtue of the terms of an instrument between the builder and his bank, that assignment having been given in consideration of the bank agreeing to continue to provide the builder with finance facilities. Mathew LJ said:
>
> > "In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee".
>
> Mathew LJ concluded that, upon the correct construction of that instrument, the intention of the parties was to pass to the assignees "complete control of all monies payable under the building contract" and that notice of the instrument had been given to the debtor client, so that there was an "absolute assignment" within the statute. Cozens-Hardy LJ gave a concurring judgment. The same approach on how to determine the legal effect of a security document was adopted by Millet LJ in the more recent case of *Orion Finance Ltd v Crown Financial Management*. He emphasised the need to look at the "substance of the parties' agreement" as found in the language that they have used in the document, in order to determine what the parties intended would be the legal effect of the document. In a subsequent case, Rimer J emphasised the need to prefer a construction which "makes commercial sense".

184. It was common ground that on the face of the language of clause 3.1.1 (quoted at paragraph 176. above) taken by itself, what was provided for was an absolute assignment of the Receivables. The question then was whether the wider contractual provisions and commercial considerations entailed a different result, as Mr Razzaq contended.

185. Mr Razzaq submitted that provisions like clause 16 and clause 7.1.2 (quoted at paragraphs 179. - 181. above) showed that the security created was consistent with rights being transferred only upon a default. Aikens LJ rejected this, stating that the words of clause 3.1.1 were simple and clear. He said that clause 7.1.2 "is consistent with there being an existing "absolute" assignment in equity of a thing in action". As for clause 11.1.3 (quoted at paragraph 180. above), he said that this provision

> "is concerned only with the collection of Receivables, not with the issue of whether any interest in them has been assigned "absolutely" to Barclays. It is common in the commercial world for A to act as agent for B to collect money or other property that belongs to B."

186. As for the argument that an absolute assignment in this context would be uncommercial because it was inconsistent with a lender-borrower relationship, Aikens LJ rejected this also. He said that both assignments and charges can be characterised as "continuing security" for the loan facility with Barclays. He said this at paragraph 54:

> "In my view the requirement in clause 17.1.10 of the BBFA that Bexhill must ensure that it is clearly stated to be acting as principal and not agent in respect of each Bexhill Facility and all documentation relating to it, does not point to an intention that there should be no "absolute" assignment of rights. Bexhill can be stated as being the principal to a contract with a third party, but the benefit of the rights under that contract can still be transferred to another. As already noted above, there is a difference between being assignee of a right under a contract and being the party who entered into that contract as principal. It is understandable that Barclays would not wish to take on any of the burdens of contracts with third parties, but only have the advantage of any benefits as assignee of rights."

187. He then said this at paragraph 55:

> "To my mind the deciding factor is the obligation of Bexhill in clause 3.3 of the BB Debenture to give a notice of assignment to other parties to "Relevant Contracts" and the terms of that notice, as set out in schedule 2 of the BB Debenture. The standard form of letter is much more consistent with an absolute assignment rather than one by way of charge only. Further, the standard form of letter stipulates expressly that "all rights and remedies in connection with" any agreement that is made between Bexhill and its customers (such as RSA) and "all proceeds and claims arising from" such an agreement are also assigned. The phrases "in connection with" and "arising from" are broad. To my mind they would include RSA's rights on the Charge and the right to sue Mr Razzaq in respect of it."

188. Accordingly, he held that there was an absolute assignment here although, because no express notice of it had been given by Bexhill to Mr Razzaq, section 136 did not apply to make it a legal assignment and it took effect as an equitable assignment.

189. I now turn to two first-instance decisions which have been referred to. The first is *The Balder London* [1980] 2 Lloyds 489. Here, the vessel had been time sub-chartered to the plaintiff by the defendant. However, after 9 months, the next instalment of hire was not paid and the defendant withdrew the vessel. The plaintiff sought an injunction to stop the withdrawal. One of the arguments raised was that the defendant was debarred from withdrawing the vessel because of an assignment made between it and CLS, the builder of the vessel.

190. The relevant clauses read as follows:

> "3. . . . [The defendants] HEREBY ASSIGNS to CLS all [the defendants'] rights title and interest to and in [the charter-party dated Apr. 20, 1979] and any moneys whatsoever payable [to the defendants] under the [time] Charterparty . . . PROVIDED HOWEVER that except during any Notice Period . . . all such moneys shall be payable to [the defendants] . . . and all such other rights and benefits shall accrue to and be enforceable by [the defendants],
>
> 4 (ii) [The defendants] will not except with the previous written consent of CLS agree to any material variation of the [time] Charterparty or release . . . or waive . . . the [plaintiffs] obligations . . . or consent to any such act or omission of [the plaintiffs] as would otherwise constitute such breach.

> 7. IT IS FURTHER AGREED that. . . (a) the [time] Charterparty shall not in any circumstances be determined by [the defendants] by reason of any breach . . . by [the plaintiffs] unless CLS shall first have given its consent in writing to such determination . . .”

191. The agreement further provided that a notice period would commence when the defendant or CLS notified the plaintiff that from then on, payments under the sub-charter would be made to CLS. The defendant further agreed with CLS to send to the plaintiff a notice of the assignment, and this was duly done.

192. Moccatta J held that, absent the proviso to clause 3, there was clearly an assignment which was a legal assignment since notice had been given. But he concluded that the proviso changed all of this, since it suspended the assignment save during the notice period. Accordingly, the purported assignment did not affect the ability of the defendant itself to withdraw the charter party.

193. It may be said (although Moccatta J did not express it this way) that the assignment in this case was only conditional. It was not on any view an absolute assignment.

194. The second case is *The Halcyon* [1984] 1 Lloyds Rep. 283. Here, the relevant clause read:

> “8 *ASSIGNMENT OF THE CONTRACT*
>
> (A) AS security for the payment of all moneys becoming due to the Bankers in respect of the loan and the Overdraft and interest thereon or otherwise under the terms of this Agreement THE OWNER as BENEFICIAL OWNER HEREBY ASSIGNS AND CHARGES to the Bankers:—
>
> (i) all its beneficial interest and all its benefits rights and titles in and under the Contract and all moneys (if any) payable by the Builder to the Owner thereunder and
>
> (ii) all moneys payable to the Owner in respect of the insurances effected by the Builder under the Contract and all the Owner's interest in connection with such insurances PROVIDED ALWAYS as follows:—
>
> (a) The Owner shall keep the Bankers fully and effectually indemnified from and against all actions losses claims proceedings costs demands and liabilities which may be suffered or incurred by the Bankers under or by virtue of the Contract or in respect of the Vessel . . .
>
> (b) Unless and until the Owner shall fail to observe and perform the obligations on its part to be observed and performed under the Contract and this Agreement in such a manner as in the opinion of the Bankers shall prejudice their interest hereunder and the Bankers shall have given notice to the Builder and the Owner the Owner shall be entitled to exercise all its rights under the Contract (subject as provided in this Agreement) in all respects as if this Agreement had not been made . .”

195. Staughton J held that this was an assignment by way of charge only. He first referred to the reference to “security for the payment of all moneys becoming due…” But he recognised that this was not sufficient by itself. However, he went on to rely on the expression “assigns and charges” and also the fact that the owner remained entitled to exercise all of its rights over the property until and unless certain events of default occurred under the loan agreement. In other words, and as with *The Balder*, there was a conditional element to the assignment.

196. I would conclude with the following observations. First, it is clear that the exercise of determining whether there has been an absolute assignment or not is highly fact-sensitive. Further, and in particular in the context of the Security Agreement here, it may be that on a proper analysis, Clause 2.1 (c) operates as an absolute assignment in relation to some of the relevant interests and not others. Further, there may be circumstances where, within a particular class of interests purportedly assigned, some would be the subject of an absolute assignment and others would not. It all depends on the exercise of contractual interpretation in the relevant context. In other words, this is not a “one size fits all” exercise.

197. Thus, I am concerned, and only concerned, with the question of whether there was an absolute assignment in relation to the particular interests contended for by WJ.

198. Second, I bear in mind in what follows, that the Security Agreement was drafted by Linklaters and was obviously the subject of agreement between what might be described as sophisticated commercial parties, properly advised.

Relevant Provisions in the Facility Agreement

199. There are numerous parties to this agreement but the borrower is expressed to be USAF No. 18 Limited Partnership ("USAF 18LP") acting through USAF GP No. 18 Limited ("USAF 18GP"). For present purposes, the lender can be taken to be WF. The Claimants were also parties, under the description "Original Obligors". The principal amount lent was £100m to be applied for the general purposes of the borrower's group and for financing acquisitions of additional properties. Clause 17 is a set of detailed provisions concerned with the operation of bank accounts. The overall scheme was that the various forms of income obtained in respect of the provision of student accommodation, whether from individual students or colleges, would be paid into blocked bank accounts from which relevant costs and expenses could be deducted before the income was remitted to a further blocked account which would then be used for the payment of interest etc to WF.

200. In particular, there were the Rent Account, the Deposit Account, the Disposal Account and the General Account. The first three would receive rental and deposit payments and monies from the disposal of properties. Here, WF had sole signing rights. They are referred to in the Security Agreement as "Blocked Accounts". As for the General Account, this was dealt with by clause 17.8 which provided as follows:

> "17.8 *General Account*
>
> (a) Except as provided in paragraph (d) below, the Borrower has signing rights in relation to the General Account.
>
> (b) Each Obligor must ensure that any other amount received or receivable by it, other than any amount specifically required under this Agreement to be paid into any other Account, is paid into the General Account.
>
> (c) Except as provided in paragraph (d) below and subject to: (i) any restriction in any Subordination Agreement; and (ii) the requirement that amounts paid into the General Account for a particular purpose must be used for that purpose,
>
> the Borrower may withdraw any amount from the General Account for any purpose.
>
> (d) At any time when a Default is continuing or the Repeating Representations are not correct, the Security Agent may:
>
> (i) operate the General Account;
>
> (ii) notify the Account Bank and the Borrower that the Borrower*'s* rights to operate the General Account are suspended, such notice to take effect in accordance with its terms; and
>
> (ii) withdraw from, and apply amounts standing to the credit of, the General Account in or towards any purpose for which moneys in any Account may be applied."

201. Accordingly, on this account, WF could only "step in" once there had been a default by the borrower, rather like the position in *The Halcyon*.

202. The General Account is referred to in the Security Agreement as an account which is not a Blocked Account or which is an "Unblocked Account".

Relevant Provisions in the Security Agreement

203. I start with Clause 2.1 (a) and (c). Part of the latter has already been set out at paragraph 30. above, but it now needs to be reproduced in full and alongside, as it were, Clause 2.1 (a) to set out the context.

> "2. **SECURITY INTERESTS**
>
> 2.1 **Creation of Security Interests**
>
> (a) Each Chargor, with full title guarantee and as security for the payment of all Secured Liabilities, charges in favour of the Security Agent:
>
> (i) by way of first legal mortgage, all Real Property in England and Wales (including that described in Schedule 3…owned by it on the date of this Deed;
>
> (ii) by way of first fixed equitable charge, all other Real Property owned by it on the date of this Deed, all Real Property acquired by it after the date of this Deed and, to the extent not validly and effectively mortgaged under sub-paragraph (i) above, all Real Property in England and Wales owned by it on the date of this Deed;
>
> (iii) by way of first fixed charge, all its Bank Accounts to the extent not validly and effectively assigned under paragraph (c) below;
>
> (iv) by way of first fixed charge, all its Receivables to the extent not validly and effectively assigned under paragraph (c) below;
>
> (v) by way of first mortgage, all its Shares;
>
> (vi) by way of first fixed charge, all its Investments;
>
> (vii) by way of first fixed charge, to the extent not validly assigned under paragraph (c) below, all LP Partner's Interests owned by it;
>
> (viii) by way of first fixed charge, to the extent not validly assigned under paragraph (c) below, all of its rights, title and interest in and to:
>
> (i) the Partnership Deed; and
>
> (ii) any and all LP Related Rights;…
>
> (xiii) by way of first fixed charge, all its Lease Documents and all Operating Income, to the extent not validly and effectively assigned under paragraph (c) below;
>
> (xiv) by way of first fixed charge, all its Assigned Agreements, to the extent not validly and effectively assigned under paragraph (c) below are; and
>
> (xv) by way of first floating charge, ail its undertaking and all its assets… not otherwise validly and effectively mortgaged, charged or assigned by way of fixed security pursuant to this Clause 2.1)…
>
> (c) Each Chargor, with full title guarantee and as security for the payment of all Secured Liabilities, assigns to the Security Agent by way of security:
>
> (i) all its Bank Accounts;
>
> (ii) all its Receivables;…
>
> (iv) all LP Partner's Interests owned by it;
> (v) all its rights, title and interest in and to:
> (i) the Partnership Deed; and
> (ii) any and all LP Related Rights;
> (vi) all its Lease Documents and all Operating Income; and
> (vii) all its Assigned Agreements."

204. It is clear that there is a typographical error in those parts of Clause 2.1 (a) which refer to "paragraph (b) below". The reference should be to paragraph (c) and that correction has been made in what is quoted above.

205. Pausing here, in terms of the definitions used there is some common ground as to their applicability. First, "Real Property" includes the Lease which is itself specifically referred to in Schedule 3. Second, the CW and all rights to bring claims for breach of duty are "Receivables". That is because the definition thereof includes, apart from book and other debts, "Related Rights" which in turn include any rights or claims in relation to any Security Asset which itself includes the Lease. Third, WJ contends that the Lease also constitutes an "Assigned Agreement". This is because the latter expression, as defined in Clause 1.1 of the Security Agreement, includes "Headlease". That expression is in turn defined in the Facility Agreement (whose definitions are imported into the Security Agreement by Clause 1.2 thereof) as "a lease under which an Obligor holds title to a Property" and the latter in turn includes the Lease. The Claimants do not challenge this proposition. Rather, their point is that there has been no absolute assignment of any Assigned Agreement, including the Lease.

206. I now turn to some other provisions within the Security Agreement.

207. Clause 5 provides for the borrower to ensure that relevant property is registered at the Land Registry, along with any relevant mortgages and charges over property.

208. Clause 6 deals with documents. It includes the provision of relevant Land Registry documents to WF in relation to any Security Interest which has been registered, executed originals of Assigned Agreements and any other documents reasonably required by WF in relation to, among other things, Bank Accounts, Receivables and Assigned Agreements.

209. Clause 7 is headed "Notice of Assignment". Clause 7.2 requires notice to be given to tenants of the charge over Lease Documents and Operational Income. Clause 7.3 deals with the bank accounts. The notice of assignment for Blocked Accounts is at Schedule 8. In effect, it mandates the relevant bank to deal only with WF in the operation of those accounts. The notice of assignment for the unblocked accounts is at schedule 9. It instructs the bank to comply with all instructions given to it by WF. In both cases, the bank is notified of the assignment by way of security of all the assignor's rights title and interest in the bank accounts.

210. Clause 7.4 deals with Assigned Agreements. These include, specifically, Nomination Agreements whereby higher education providers agreed terms for the provision of a certain amount of student accommodation, Rent Collection Agreements (by which rent is collected by an agent) and the Operating Agreement made around the same time. It requires the sending of a notice of assignment in the form set out in Schedule 11.

211. Clauses 7.5 and 7.6 are important and provide as follows:

> "7.5 Receivables
> Each Chargor shall promptly collect all Receivables and shall hold the proceeds of collection on trust for the Secured Parties, subject to their application in accordance with the Finance Documents.
> 7.6 Restrictions on dealing with Receivables
> No Chargor shall enter into a single transaction or a series of transactions (whether related or not and whether voluntary or involuntary) to sell, factor, transfer, discount or otherwise dispose of all or any part of any of its Receivables, except as permitted by the Facility Agreement."

212. Finally, Clause 19.1 provides as follows:

> "Final redemption
> Subject to Clause 19.2 (Retention of security), if all amounts which may be or become payable by the Obligors or the Chargors under or in connection with the Finance Documents and Hedging Agreements have been irrevocably paid in full and that all facilities which might give rise to Secured Liabilities have terminated, the Security Agent shall:
> (a) as soon as practicable, following the request of and at cost of the Chargors release, reassign or discharge (as appropriate) the Security Assets from the Security Interests, without recourse to, or any representation or warranty by. the Security Agent or any of its nominees; and
> (b) return all Title Information Documents and other original documents delivered to the Security Agent under or in connection with this Deed."

The Position of WF

213. Although WF is not a party to these proceedings and no application has been made thus far to join it, it has expressed its own view in the WF Letter dated 19 January 2023 as follows:

> "Dear Sirs
>
> £150,000,000 Facility Agreement originally dated 11 August 2016 as amended pursuant to an amendment and restatement agreement dated 20 April 2022 and further amended and restated pursuant to an amendment and restatement agreement dated 12 October 2021 (the "Facility Agreement")
>
> Security Agreement dated 11 August 2016 in favour of Wells Fargo Bank NA London Branch (the "Security Agreement")
>
> As you are aware, Wells Fargo Bank N.A. ("Wells Fargo") acts as agent and security agent under the Facility Agreement and the Security Agreement (collectively the "Agreements"). Terms and expressions used in this letter have the meaning given to them in the Agreements. We are writing to you in your capacity as Borrower and Obligor's Agent.
> We understand that legal proceedings (the "Proceedings") have been commenced before the High Court in London between: (i) USAF Nominee No 18 Limited, USAF Nominee No 18A Limited and Sanne Trustee Services Limited as managing trustee of USAF Portfolio 18 Unit Trust (as "Claimants"); and (ii) Watkin Jones & Son Limited (as "Defendant"), relating to defects at a property known as Jennens Court, Queensway, Birmingham (the "Property"). Each of the Claimants are respectively Obligors under the Facility Agreement and Chargors under the Security Agreement. The Property is listed in Schedule 3 to the Security Agreement as one of the properties over which security has been granted in connection with the Facility Agreement - with the Claimants listed as the legal and beneficial holders of the long leasehold interests in the Property.
> We understand that, during the course of the Proceedings, it has been suggested that the Claimants have, by way of the Security Agreement, assigned absolutely to Wells Fargo their rights under various contracts with the Defendant and their interest in the Property.
> We do not agree with that suggestion. The Security Agreement is based on a precedent form security agreement produced by the Loan Market Association. It creates security interests over the assets (including the Property) that are the subject of that agreement - principally by way of charge or mortgage. It does not include any absolute assignments of the assets charged. It is enforceable upon an Event of Default under the Facility Agreement. Pending enforcement, Wells Fargo accepts no responsibility and has no involvement in the operation or management of the Property or the other rights or assets over which security has been granted. That remains the responsibility of the Claimants or other relevant party appointed.
> It is also the Claimants' responsibility to pursue their rights under the relevant third party contracts relating to such operation and management of the Property. In particular, Wells Fargo does not consider that the effect of the Security Agreement is to assign absolutely to it title to pursue any such claims in relation the Property (including as against the Defendant). Wells Fargo considers that it is for the Claimants, as registered proprietor of the leasehold interests in the Property, to pursue any such claims. The proceeds of any such claims may fall within the terms of the Security Agreement.
> This letter is prepared without prejudice to Wells Fargo's rights under the Facility Agreement, Security Agreement and all related documentation, whether in connection with this dispute or otherwise. All such rights are reserved."

214. Of course, WF's own subjective views as to whether or not there was an absolute assignment are irrelevant but, as already stated, there is an issue as to whether the WF Letter can

constitute a consent from WF to the Claimants to bring the present claims on its behalf. I deal with this below.

Analysis 1: PI 13 (a) and (b) - the CW and the Claims

215. I deal first with these parts of PI 13 which concern the alleged assignment of the CW itself and then all the claims made here including that made under the CW. The parties did not in any significant way distinguish between the position in relation to (a) and (b) and neither do I.

216. The starting point is that the claims are all agreed to be Receivables for the reasons already given. I then turn to the language of the opening part of Clause 2.1 (c) set out at paragraph 203. above. While the word "assigns" is used, the further word "absolutely" is not present, as it was in *Bexhill*. On the other hand, the word "charges" does not appear, as it did in the clause in *Halcyon*. Like both *Bexhill* and *Halcyon*, there is a reference to the assignment being "as security for the payment…" of the relevant debts. In fact, there is then a further similar expression "by way of security" as well. References to "security", however, do not themselves necessarily connote a charge, as both sides accept and as is implicit in *Bexhill* and *Halcyon*.

217. If one takes the opening words of Clause 2 (1) (c) by itself, I do not consider that it is clear on its face that it was creating an absolute assignment. In any event, it must be construed in context.

218. The most immediate context is Clause 2 (1) (a), also set out at paragraph 203. above. The structure of that provision, when taken with Clause 2 (1) (c) suggests that the parties' intentions were to create assignments over the relevant interests, including Receivables, as distinct from "mere" charges. But if for some reason, assignments were not created then there would be a charge. This is demonstrated by the words "to the extent not validly and effectively assigned under paragraph (c) below". This also demonstrates that the parties were well aware of the distinction between an assignment (if absolute) and a charge.

219. All of this might be thought to be a strong contextual indicator that the assignments referred to in Clause 2.1 (c) were absolute assignments with what might be described as a "fallback" position in Clause 2.1 (a) even though that provision came first. I see the force of this but do not think it makes redundant the exercise of looking at the whole context of Clause 2.1 (c), to see whether in truth there was an absolute assignment. The parties were obviously alive to the fact that notwithstanding Clause 2.1 (c) there was a possibility that one or more of the 7 different purported assignments might not amount to absolute assignments. Nor is this possibility simply about whether any purported assignment was a legal or equitable one. That is because the distinction is rather between an assignment and a charge, which goes to the substantive characterisation of the security purportedly granted. So while the scheme of Clause 2.1 (a) and (c) is a pointer in favour of a desire to create an assignment it is not a strong one in my view.

220. I then turn to Clause 7, set out at paragraph 209. above. This deals with required notices of assignment and other matters. Of course, there is no need for the agreement which creates an assignment to stipulate that a notice of assignment must be given, whether under section 136 or otherwise. If none is given, the only point is that the assignment cannot be a legal one. Nonetheless, I think that the absence of a notice of assignment requirement so far as

Receivables are concerned as a factor pointing towards a charge. It is to be recalled that Aikens LJ regarded the fact that a notice of assignment was required in relation to the purported assignment in Bexhill was a critical factor for him.

221. Within Clause 7, Clause 7.5 (see paragraph 211. above) is material here. The Claimants argue that this provision indicates a charge because if there had been an absolute assignment of the Receivables, it would not be the chargor who would collect them - it would be the "owner" i.e. WF. As against that, WJ relies on what Aikens LJ said about a similar though not identical clause in *Bexhill* to the effect that such a clause was simply dealing with the mechanics of collection not the nature of the underlying assignment and it was not unusual for a principal who owned property, to appoint the assignor as agent to make collections under it. See paragraph 185. above. I see that, especially in the context of the clause in *Bexhill*, which referred expressly to the assignor acting as agent but also where it mandated payment of the receivables to be collected into the Collection Account over which Barclays had effectively "complete control" - see paragraphs 10 and 20 of the judgment of Aikens LJ.

222. However, in this case, it is important to understand how Clause 7.5 works. While the proceeds of the Receivables were to be held initially on trust, they were then to be applied in accordance with the Finance Documents. These included the Facility Agreement. If there was a Receivable which had to be paid into the Rent Account, for example, then that is where it would go, and pending that it would be held on trust for WF.

223. The Receivables in question here would be the proceeds of any claims which were to be "collected" by the Claimants. On any view, the claims, while strictly within the definition of "Receivables" are not paradigm examples of receivables which is why the duty to "promptly collect" them sounds somewhat odd. Nonetheless, neither side suggested that Clause 7.5 did not apply to the proceeds of any claims. But once "collected" (if the Claimants succeed on their claims against WJ) Clause 17.8 (b) of the Facility Agreement (see paragraph 200. above) mandated that they were to be paid into the General Account, after which the borrower could do what it wanted with them. This is because there is no other particular Bank Account into which they must be paid. It is correct that there is a proviso here in sub-paragraph (c) (ii) to the effect that "amounts paid into the General Account for a particular purpose must be used for that purpose". But there is no purpose stated for which these payments (i.e. the proceeds of the claims) are to be used here. So in the case of these Receivables, the real control lay with the borrower.

224. WJ has made the general point that, as with *Bexhill*, WF is given extensive control over the Bank Accounts. That is true for the Blocked Accounts, but not for the General Account which is an Unblocked Account. Of course, in the event of default, WF can step into the General Account and that is certainly consistent with there being a charge over it. But it is not consistent with an absolute assignment.

225. For all of those reasons, I consider that Clause 7.5 and the treatment of the proceeds of the Receivables pertinent to this case are strong pointers against an absolute assignment.

226. One then turns to Clause 7.6 (cited at paragraph 211. above). The Claimants also rely on this provision on the basis that if WF was the "true owner" as it were, of the Receivables, then there would be no need to create an obligation on the chargor not to deal with the Receivables in a certain way because they were not now its receivables to deal with anyway. I see the

force of that. Of course, even with an absolute assignment, it might be a useful express restriction even if strictly unnecessary. Nonetheless, Clause 7.6 is in my judgment a pointer towards a charge.

227. A further provision is Clause 19, cited at paragraph 212. above. This refers to release, reassignment or discharge of the Security Assets "as appropriate". In other words, if the security was a charge, there would be a release or discharge and if it was an assignment, there would be a re-assignment. Since Clause 2.1 contemplated either or both forms of security, this general provision does not really assist either party here.

228. There are then some broader commercial points. First, it is said by the Claimants that if there was an absolute assignment of receivables , then it would be difficult for the Claimants to carry on their business meaningfully. A similar though not identical argument was made in *Bexhill* when it was suggested that an absolute assignment was inconsistent with a borrower-lender relationship. Aikens LJ rejected that broad proposition, saying that an assignment made by way of security was still consistent with the borrower-lender relationship. He also pointed to the fact that while there were some absolute assignments, there were charges as well.

229. In fact, in the present context, there was considerable flexibility granted to the borrower because of its right to use the General Account for its own purposes. So I do not think that there is a separate commercial point which is in favour of the Claimants here.

230. On the other hand, WJ makes a counter-point, as it were, which is that the amount of money being lent here i.e. £100m for general corporate purposes, constituted a considerable risk for WF as lender and therefore objectively, it was more likely that WF wanted to have assignments rather than charges so as to be afforded maximum protection. I do not think that there is anything in this; an extensive array of securities, even if all provided by way of charge, is hardly to be dismissed as being of no real significance.

231. Having regard to all of the matters noted above, and applying the tests set out in paragraphs 166. and 168. above, in my view, there was no absolute assignment of the Receivables, which encompassed the CW and the Claims here.

232. In the light of that conclusion it is not necessary to decide the separate point about the effect of s6(3) of the DPA.

Analysis 2: PI 13 (c) - the Lease

233. WJ does not suggest that there has been an assignment of the legal title to the Lease which was and remains with C1 and C2. And here, section 58 of the LRA 2002 is conclusive on that point.

234. However, WJ contends that the equitable interest in the Lease has been assigned by reason of Clause 2.1 (c) (vii) which relates to "Assigned Agreements". It is common ground that the Lease is an Assigned Agreement although again, in my view, it is hardly a paradigm example of it.

235. It is necessary to be clear about the relevance of this argument. According to WJ, if it is correct, it means that C1 and C2 hold their legal title in in the Lease on bare trust not for C3 but for WF. WJ goes on to say that this means that they cannot bring the DPA Claim in their own capacity - see paragraph 161 of WJ's Skeleton Argument.

236. WJ essentially argues for the conclusion that there has been a transfer of the equitable interest in the Lease in two ways. First, at paragraph 160 of its Skeleton Argument, it submits that an equitable lease has been created in favour of WF because there has been a failed attempt at a transfer of the legal title. Reliance is placed on paragraphs 18.19 and 15.01 to 15.03 of *Smith and Leslie*. The latter passages deal with the operation of the "rule" in *Walsh v Lonsdale* (1882) 2 ChD 9.

237. There was no extended discussion of these passages at the trial but having been referred to them and considering them in context, I fail to see what they have to do with the situation here. This is not a case of a failed transfer or assignment of the legal interest. Any purported assignment by C1 and C2 of their legal interest in the Lease would be completely inconsistent with their obligation to create a first legal mortgage over the Lease pursuant to clause 2.1 (a) (i). Nor is this a case of an agreement to assign (as opposed to an actual assignment) where equity might step in.

238. So I reject the contention made in paragraph 160 that an equitable lease in favour of WF has been created.

239. Paragraph 161 contends that the result of WJ's argument for an equitable lease is that "there are clear implications for the Claimants' right to claim for breach of s 1 (1) of the DPA". But first, I have rejected that argument. Second, and in any event, C1 and C2 clearly have a legal interest in the Property through the Lease, so I fail to see why they do not qualify under section 1 (1) in any event. If the argument is no more than that the Claimants have assigned the DPA Claim itself *qua* Receivable, I have already rejected that argument.

240. A second point made by WJ at paragraph 162 of its Skeleton argument is that, in any event, and regardless of the positions of C1 and C2, it was open to C3 to assign its equitable interest in the Lease to WF and has done so.

241. I do not agree, for the reasons given below, which would also stand as further reasons for rejecting the notion of the creation of an equitable lease on the basis of a failed assignment of the legal interests by C1 and C2.

242. I turn first to the provisions of Schedule 11 which set out the form of notice of assignment which is mandated by Clause 7.4 (a) of the Security Agreement. This provides as follows:

> "From: Wells Fargo Bank, N.A. … and [1 (the "Assignor)
> To: [Party to the Assigned Agreement]…
>
> Dear Sirs
> …We give notice that by an assignment contained in the Security Agreement the Assignor assigned to the Security Agent by way of security all its right, title and interest from time to time in and to the Assigned Agreements, details of which are set out in the attached schedule (the "Assigned

Agreements"), including all moneys or proceeds paid or payable deriving from the Assigned Agreements.

3. Until you receive written instructions from the Security Agent to the contrary, all moneys payable by you to the Assignor in respect of the Assigned Agreements shall be paid [into the following account: … unless and until you receive written notice from the Security Agent to the contrary, in which event you should make all future payments as then directed by the Security Agent]/[to the account notified to you by the Assignor.]

4. Despite the assignment referred to above or the making of any payment by you to the Security Agent pursuant to it:

(a) the Assignor shall remain liable to perform all its obligations under each Assigned Agreement; and

(b) neither the Security Agent nor any receiver, delegate or sub-delegate appointed by it shall at any time be under any obligation or liability to you under or in respect of any Assigned Agreement.

5. The Assignor shall remain entitled to exercise its rights, powers and discretions under each Assigned Agreement, except that the Assignor shall not and you agree that the Assignor shall not, without the prior written consent of the Security Agent:

(a) amend, supplement, vary or waive (or agree to amend, supplement, vary or waive) any provision of any Assigned Agreement;

(b) exercise any right to rescind, cancel or terminate any Assigned Agreement;

(c) release any counterparty from any obligations under any Assigned Agreement;

(d) waive any breach by any counterparty or consent to any act or omission which would otherwise constitute such a breach; or

(e) except as provided in the Security Agreement, novate, transfer or assign any of its rights under any Assigned Agreement…

9. Please acknowledge receipt of this notice of assignment and confirm that:

(a) you will pay all moneys in respect of each Assigned Agreement as directed by or pursuant to this notice of assignment;

(b) you have not received any other notice of any assignment of any Assigned Agreement;

(c) you will not claim or exercise any set-off or counterclaim in respect of any Assigned Agreement; and

(d) you will comply with the other provisions of this notice of assignment, by signing the acknowledgement on the attached copy of this notice of assignment and returning that copy to the Security Agent."

243. Clearly, this notice is intended to be addressed to the other party to the Assigned Agreement in question, which here would be the lessor. Paragraph 4 of the notice stipulates that the assignor remains liable to perform all of the obligations under the agreement and there would be no liability on the part of WF to the lessor. WJ makes the point that it is perfectly possible to assign the benefits of a contract and not the burdens, and indeed, that if the latter were transferred, this would amount to a novation. I quite see that, but it then raises the question of what, exactly, <u>was</u> being assigned here.

244. If, for example, the correct position in relation to <u>this</u> Assigned Agreement is that what was being assigned was any income stream due to the Claimants under the Lease (the existence of which is dubious, since it would have to be payments from the lessor) that is not the same as a transfer of C3's equitable interest therein. Moreover it would have nothing to do with the ability of any of the Claimants to make the DPA Claim which is the only relevance of the argument about the transfer of the Lease.

245. I also think there is force in the Claimants' point about paragraph 5 of the notice. It is very difficult to see how there could be an absolute assignment where the Claimants remain entitled to exercise all of their rights and powers under the Lease which would, of course,

include possessory rights. Equally, the prohibition on certain dealings with the Lease also within paragraph 5 (including transferring or assigning rights under the Lease) without the consent of WF pre-supposes that the Claimants would otherwise have such powers, which they would not if there had been an absolute assignment.

246. The provisions of paragraphs 4 and 5 might well be consistent with the making of a charge, but not an absolute assignment. Yet further, in this case even a charge does not make much sense where there is already an express first legal mortgage of the Lease in any event.

247. Indeed, in relation to the Lease, I find it difficult to see how (save perhaps for something like an income stream) it can have been objectively intended to do anything other than create the first legal mortgage so far as it was concerned. On any view, I cannot see that whatever might have been assigned could in any way affect the Claimants' title to sue under the DPA claim.

248. A point made by the Claimants is that the obligation to register the Lease and the mortgage pursuant to Clause 5.1 of the Security Agreement is itself inconsistent with any intention to create an absolute assignment of the Lease. I would agree with that in relation to WJ's first argument about a failed transfer of the legal interest. In relation to its second argument about the transfer of C3's equitable interest I accept that there could, in theory, be such a transfer, notwithstanding those provisions. The same position pertains in relation to Clause 6 of the Security Agreement. However, as already noted, there are other strong arguments against an absolute assignment of C3's equitable interest anyway.

249. For all those reasons, I do not consider that there was an absolute assignment of the Lease by any of the Claimants in the sense contended for by WJ.

Conclusions on PI 13

250. It follows that the answer to PI 13 is "No" in all respects, save for the issue concerning section 6 (3) of the DPA which did not arise.

PI 14

251. This asks as follows: **If and to the extent that the answer to Issue 13 is "Yes" was such an assignment a legal or equitable assignment? In respect of the Collateral Warranty only, this question is to be answered: (a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014 (b) On the assumption that such notice was not given.**

252. Strictly, this issue does not arise since I have found that there was no underlying absolute assignment anyway. However, since this is mostly common ground subject to one short point, I will deal with it.

253. It is common ground that C1 and C2 were only equitable assignees of the CW. See paragraphs 162. and 163. above. The question as to whether notice of the First Assignment was given on or around 21 July 2014 makes no difference because of the lack of a notice of the Second Assignment as at the time of the Security Agreement. Further, WJ accepts that there could be no assignment of C1 and C2's legal interest in the Lease. C3's interest was, of course, equitable.

254. While, technically it might be possible nonetheless to have a legal (as opposed to equitable) assignment of an equitable interest (including one held by the beneficiary of an equitable assignment) this point is academic. That is because, in my judgment, there was no notice of any assignment that may have been made, as required by section 136.

255. The only document upon which WJ relies to support its contention that there was such a notice is the letter dated 19 October 2022 sent by the Claimants' solicitors to WJ's solicitors ("the October 2022 Letter"). This was written in response to WJ's application to strike out the claims on the basis of a lack of title to sue, which application was later withdrawn.

256. The October 2022 Letter stated, in part, as follows:

> "Whilst the very clear language of the Security Agreement demonstrably is only creating a charge over these assets and/or an assignment by way of security only, we note that Mr Giles' statement does not address the notice requirements of section 136(1) of the Law of Property Act 1925. A legal assignment can only take place when express notice in writing has been given to the debtor, i.e. your client. Please therefore confirm what notice of assignment (if any) your client purports to rely on in support of its application, and provide a copy of the same."

257. This point was made because in the strike-out application, it was never suggested that there had been a notice of assignment. WJ now contends that the October 2022 Letter is itself a notice of assignment. That suggestion is misconceived. The whole point of the October 2022 Letter was to say, first, that there had been no assignment at all, as opposed to a charge, and second, that there was no notice anyway. As the Claimants say, this is the obverse of a notice of assignment. Its content does not fulfil the requirements of section 136, as summarised *Guest on the Law of Assignments* (4th edition) at paragraph 2-30 (cited at paragraph 119 of the Claimants' Skeleton Argument):

> "But it is submitted that, to amount to express notice, the terms of the notice must be such as to indicate with sufficient certainty to the person to whom the notice is given that there has been an assignment and it should identify the debt or other subject-matter of the assignment and sufficiently identify the assignee."

258. Accordingly, there never was any legal assignment here of any interest covered by the Security Agreement even if (contrary to my findings above) there was an absolute assignment.

259. Thus, the answer to PI 14 is: if there had been any relevant absolute assignment, it would have been an equitable and not a legal assignment.

PI 15

260. This asks as follows: **If and to the extent that the answer to Issue 14 is that the assignment to Wells Fargo operated as a "legal assignment" do any of the Claimants have standing to bring these proceedings?**

261. This does not arise.

PI 16

262. This asks as follows: **If and to the extent that the answer to Issue 14 is that the said assignment was equitable in nature do any of the Claimants have standing to bring these proceedings: (a) on their own account? (b) as trustees for Wells Fargo?**

263. Again, this point does not now arise but as there is common ground subject only to another short point, I deal with it.

264. WJ's answer to this issue is that the Claimants do not have standing to bring these proceedings on their own account, but they do as trustees for WF, provided that WF consents. See the Appendix to its Skeleton Argument under PI 16. As to capacity, the Claimants accept that amendments to the Claim Form would be necessary to show the capacity in which C1 and C2 sue.

265. As for consent, the Claimants contend that the WF Letter (set out at paragraph 213. above) amounts to such consent. I disagree. It is merely stating WF's position as to the effect of the Security Agreement here. It does not authorise the Claimants to bring the claims on its behalf as beneficiary, as the result of an equitable assignment. That is not to say that it could not do so, if that turned out to be the position, but no doubt, there would have to be an agreement between it and the Claimants as to who bears the costs etc. So a separate consent would be required.

266. In the event, of course, this point is academic.

PI 17

267. This asks: **If (which is to be determined at trial) notice of the First Assignment to Pavilion was not given to the Defendant on or around 21 July 2014 then was notice of the First Assignment either on or around 22 September 2020 or 22 July 2021 capable of being effective, notwithstanding the occurrence of events between 21 July 2014 and 22 September 2020 and/or 22 July 2021?"**

268. This point is also now academic in the light of the absence of any absolute assignment. On this issue, the parties disagree and the issue raises questions of law on which it is said that there is no relevant authority. In addition, there was no real oral argument. In those circumstances, I do not consider it necessary or appropriate to decide this point on a hypothetical basis.

CONCLUSION

269. The overall conclusion is therefore that there is no impediment to the Claimants' title to sue and the action will now proceed to trial on the substantive issues.

270. I am very grateful to Counsel for their assistance and submissions.