Neutral Citation Number: [2020] EWCA Civ 107

Case No: A3/2019/1334

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHANCERY DIVISION)
Joanna Smith QC
HC2017002735

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2020

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

(1) FIRST NATIONAL TRUSTCO (UK) LIMITED **(2) BAHIA BLANCA CLUB B LIMITED**	**Appellants /Claimants**
-and-	
(1) MARY LOUISE McQUITTY (as Personal Representative of the Estate of Kevin Page (Deceased) and as Representative for all the other members of the unincorporated association known as Bahia Blanca Holiday Club) **(2) PAUL DONALD PAGE** **(3) BAHIA BLANCA LEISURE LIMITED** **(4) BAHIA BLANCA LEISURE SL**	**Respondents/ Defendants**

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Elspeth Talbot Rice QC (instructed by **Keystone Law**) for the **Appellants**
Alan Gourgey QC and Jack Watson (instructed by **Ashtons Legal**) for the **Respondents**

Hearing date: 23 January 2020

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Approved Judgment

Lord Justice Peter Jackson:

1. This appeal turns on the construction of an indemnity clause in a Deed of Trust. It raises no new point of law.

2. The Appellants seek a declaration that the clause (Clause 14) obliges the First and Third Respondents to indemnify the First Appellant for €2.7 million of Spanish taxes levied on the Second Appellant as the legal owner of timeshare apartments in the Canary Islands. That claim was dismissed by Joanna Smith QC, sitting as Deputy Judge of the High Court, in a decision dated 20 May 2019. She also dismissed a range of other arguments in support of the declaration, based on estoppel, trustee indemnities and claims for knowing receipt; claims for dishonest assistance were abandoned before trial. There is no appeal from those conclusions. The only aspect of the decision that is subject to this appeal, for which permission was given by Lewison LJ on 1 July 2019, concerns the construction of Clause 14.

3. The First Appellant is First National Trustco (UK) Ltd ('FNTC'). It is a company incorporated in England and Wales that is part of the First National Trustee Company Group, a professional trustee operating in the timeshare leisure business and acting as trustee for 100-150 timeshare resorts in Spain. FNTC is the Trustee of this timeshare scheme and owns the Second Appellant, Bahia Blanca Club B Limited ('BBCB'), a company which itself holds the title to the apartments that are the subject of the timeshare scheme.

4. The timeshare owners are members of the Bahia Blanca Holiday Club ('the Club'). The First Respondent is representative of the Members. The Third Respondent, Bahia Blanca Leisure Limited ('BBLL'), stands in the shoes of the Founder Member of the Club.

Background

5. Timeshare resorts in Spain are commonly held through a club trust structure, under which the legal ownership of individual apartments is vested in an owning company, in this case BBCB. The owning company is in turn wholly owned by an independent custodian trustee, in this case FNTC, which holds and controls the owning company in trust for the benefit of the Members of the Club from time to time. Members each purchase occupation rights over the apartment in the form of individual weeks and thus enjoy rights of occupation and become subject to the rights and obligations set out in the Constitution of the Club.

6. The Bahia Blanca Timeshare Resort ('the Resort') in Gran Canaria, created in 1988, made various timeshare apartments available to members of the public. TS International PLC ('TSI') was the owner and developer of the property on which the apartments were built and was the Founder Member of the Club.

7. The legal framework for the Club is to be found in its Constitution, the Deed of Trust and the Management Agreement. The latter documents appear in draft as Schedules to the Constitution.

The Constitution

8. The Club was established by a Constitution dated 1 January 1988. It was executed by TSI as Founder Member and is subject to English law. The Constitution governs the rights of Members of the Club and also sets out the role of the Committee, which carries out the decision-making in respect of the Resort. The Objects of the Club appear at Clause 4:

> "4. Objects.
>
> The Club shall be a non-profit making Club whose object is to secure for its Members the ownership of exclusive rights of occupation of the Apartments for such specific periods in each year as shall be allocated to Members in perpetuity."

9. Under Clause 7, TSI agreed to transfer the apartments to the 'Owning Company'. This was initially Midmark 10 Ltd, a company limited by guarantee and incorporated in Scotland. Membership of the Owning Company was limited to an independent custodian trustee (or joint trustees) who was to hold and control the Owning Company in trust for the benefit of the Members of the Club from time to time upon the terms of the Deed of Trust. Clause 8 provides:

> "8. Rights of Occupation.
>
> [TSI] shall procure that the Owning Company engages in no trading activity whatsoever but shall keep the respective Apartments free from any mortgage, lien or encumbrance and shall not suffer or permit anything to be done which might prejudice the rights of use and occupancy of the Club and its Members in the Apartments, and shall permit occupation thereof as follows: …"

10. The original joint trustees were Midland Bank Trust Company Ltd and Landmark Title & Trust Ltd. Since January 1997 that role has been performed by FNTC alone.

11. In consideration for the transfer of apartments to the Owning Company and the vesting of the ownership of the Owning Company in the Trustees, TSI was entitled to 51 membership certificates created in respect of each apartment transferred. It could sell its membership certificates to members of the public and was entitled to all unsold membership certificates in relation to each apartment. A membership certificate entitled the Member to use and occupy the relevant apartment for a specified week in each year. Individual purchasers of timeshare weeks – the Ordinary Members – were granted rotational rights of occupation under membership contracts that also contained their agreement to be bound by the Constitution.

12. Clause 11 of the Constitution concerns the Committee, made up of three Ordinary Members of the Club (who are elected) and two who are appointed by the Founder Member. The Committee has the power to:

> "… do all things that may be necessary for the carrying out of the objects of the Club and for its general management and shall be entitled to delegate to the Management Company such

> of its powers as may be appropriate to enable the Management Company to properly perform its functions."

and (amongst a number of specific powers) it has the power provided by Clause 11(f)(v):

> "(v) Except insofar as delegated to the Management Company under the Management Agreement, to enter into all contracts and agreements which the Committee may deem necessary or desirable in connection with the management of the Club and to apply the funds of the Club in payment of the expenses of management, administration and running of the Club."

13. Clause 12 of the Constitution concerns the Members' liability for management expenses. I cite it in full as we received argument about the relevance, if any, of subclauses (a)(v) and (b), which must be read in the context of the clause as a whole.

> "12. Member's Liability for Payment of Management Expenses etc.
>
> (a) The Members of the Club shall contribute in accordance with the terms of the Management Agreement to all reasonable costs incurred by the Club including and without prejudice to the generality of the foregoing the following:
>
> (i) Maintenance, repair, redecoration, cleaning, and (where necessary) renewal of the Apartments, services and facilities provided by the Club or the Management Company for the benefit of the Members whether exclusive or in common with others entitled thereto.
>
> (ii) Maintenance, repair and (when necessary) replacement of furniture, equipment, utensils, provisions, furnishings, fittings and fixtures in or about or pertaining to the Apartments.
>
> (iii) Insurance of the Apartments and the contents thereof owned [by] the Club for the full reinstatement cost thereof, and other insurance whether or not relating to the Apartments which the Committee or the Management Company shall consider necessary or appropriate for the Members' benefit.
>
> (iv) The full amount of the rent payable by the Management Company to any Member if it rents from a Member in order to facilitate maintenance, repair or reconstruction works, such rent to be calculated at the Management Company's then current published rates.
>
> (v) All outgoings incurred in respect of the Apartments including electricity, gas, water, rates, contributions to the

> community of property owners to which the Apartments belong and any taxes or other charges or impositions whether of an annual or recurring nature or otherwise.
>
> (vi) All work and acts which are required to be done to comply with any statutory provisions or the directions or notices of any governmental, local or public authority.
>
> (vii) Any reasonable charges which may be incurred in the management and preservation of the value of the Club's property and the running of the Club's affairs or the provision of services by the Management Company, including the provision of reception and security services.
>
> (viii) The maintenance of a sinking fund (if one is established) for the replacement of capital items of the Club's property.
>
> (ix) The maintenance of any reserve funds requested by the Trustee in accordance with the Deed of Trust.
>
> (x) The fees and expenses of the Trustee and all other costs, expenses or payments to the Trustee under the Deed of Trust and the fees and expenses of the auditor, lawyers and other professional advisers hereinbefore referred to.
>
> (xi) Membership fees of any golf, tennis or other club pursuant to any arrangements made by the Founder Member or the Committee or the Management Company.
>
> (b) Save insofar as the same may have been delegated by the Management Agreement hereinbefore referred to the Committee shall have sole discretion in deciding what monies should be spent for any of the foregoing purposes and when the same shall be expended."

The Deed of Trust

14. As noted, the Deed of Trust made between the Founder Member and the Trustee sets out the rights and duties of the Trustee. It is, perhaps ominously, dated 31 November 1988. Clause 4 establishes the Trust. Clauses 6 – 17 concern the scope of the trusteeship and the protections enjoyed by the Trustee. Of these it is only necessary to recite Clauses 7 and 14.

> "7. The Founder Member for itself and on behalf of the Club and each member thereof hereby covenants with the Trustee:
>
> (a) To pay on demand all payments whatsoever (including rent, rates, service or maintenance charges, interest, costs, expenses and damages) covenanted or agreed to be paid (whether contingently or otherwise) under the terms of any instrument by which the Trust Property or any part thereof,

> was transferred to the Owning Company or for which the Club or the Trustee may otherwise be liable;
>
> (b) At all times during the continuance of the Trust to observe and perform all the covenants, terms and conditions contained in the instrument by which the ownership of the Apartments was transferred to the Owning Company and which on the part of the Owning Company is to be observed and performed.
>
> (c) To indemnify and keep fully and effectually indemnified the Trustee from and against all actions, claims, demands, losses, damages, costs and expenses made against or suffered or Incurred by the Trustee arising directly or indirectly from any breach, non-observance or non-performance of any of the covenants contained in paragraphs (a) and (b) of this clause."

While there is no suggestion that the indemnity at subclause (c) applies to the Spanish Taxes, both parties make play of its drafting to support their interpretation of Clause 14.

15. We come then to Clause 14, which is the foundation of the Appellants' case on appeal:

> "14. The Founder Member for itself and on behalf of the Club hereby undertakes to indemnify and hold harmless the Trustee from and against all costs, liabilities and expenses which may result from the performance by the Trustee of their duties hereunder and the Trustee shall be kept fully indemnified by the Club and the Founder Member against all losses, claims, demands, expenses and other liabilities made or incurred in connection with the Trust Property or in any other way in connection with the holding by the Trustee of the office of custodian trustee hereunder. The Trustee shall have the right if at any time it considers it desirable so to do to require that the Founder Member or the Club shall deposit with the Trustee as a reserve fund such sum as shall be reasonably necessary in support of the indemnity contained in this clause." (underlining added)

It is common ground between the parties that for the purposes of this issue, the membership interest in BBCB that is held by FNTC falls within the definition of Trust Property.

16. Finally, Clause 19 provides for modification of the Trust Deed:

> "19. The Committee of the Club and the Trustee may by deed supplemental hereto modify or add to the provisions of this Deed in such manner and to such extent as they may consider necessary or expedient provided that unless the Trustee shall

> certify in writing that in its opinion such modification, alteration or addition does not materially prejudice the interests of the Club or the then existing Members and does not operate to release any of the parties hereto from any responsibility to the Club or to its then existing Members no such modification or addition shall be made without the sanction of a resolution of Members pursuant to the Constitution."

The Management Agreement

17. By a further agreement of the same (evidently mistaken) date as the Deed of Trust, TSI (on behalf of the Club) delegated the Club's management and administration of the apartments and their contents to Mantenimientos de Mogan SL as Management Company. By clause 1 of the Management Agreement the Management Company agreed to exercise its powers in the best interests of the Club and to comply with all reasonable requirements of the Committee in its performance of its duties.

Subsequent changes

18. As already noted, FNTC became sole trustee in 1997. In 1998, after events that it is unnecessary to chart, the Third Respondent, BBLL, replaced TSI as Founder Member. BBLL was an entity set up by the brothers Paul and Kevin Page for this purpose. At around the same time the Fourth Respondent, Bahia Blanca Leisure SL ('BBL SL') was set up by the Pages to manage the commercial operations at the Resort. Further, the original management company was replaced with Mantenimientos de Bahia Blanca SL.

19. Between 1998 and 2003 there was an unsuccessful attempt by other members of the Committee to remove FNTC as Trustee. Kevin Page, as representative of BBLL, then became Chairman of the Committee, a position he held until his death in December 2019, since when he has been represented in these proceedings by his personal representative.

20. By a written resolution on 27 May 2005, FNTC amended the BBCB Memorandum and Articles of Association. This resolution recorded that FNTC was the sole guarantee member of BBCB. The new Memorandum of Association for BBCB recorded as one of its objects:

> "the holding of legal title to certain apartments at [the Resort] for the exclusive enjoyment, use and occupation by the members from time to time of the Club… and to sell, lease, timeshare, grant rights in or over, improve, manage or develop all or any part of the said apartments at the direction of the said Club, provided that the Company shall not carry on any other business or trade whatsoever."

The Spanish Taxes

21. In or around 2000, the Spanish tax authorities, the AEAT, carried out a tax audit over BBCB and on 9 November 2001 an enforcement notice regarding Corporate Income Tax liability was served, demanding payment of the sum of €390,048.30 for the years

1996-1998. Two further enforcement notices were served on BBCB in 2005 and 2006 for the period of 1999-2002 relating to a demand for Non-Resident Entity Special Property Tax in the amount of €365,755.17 and a demand for the payment of Non-Resident Income Tax, initially in the sum of €1,133,611.14 but later reduced to €504,576.13. A 20% penalty for late payment and interest was added. These demands were appealed by the Committee on behalf of the Members. On 15 October 2009, the Spanish Supreme Court rejected the appeal in relation to BBCB's corporate tax liability; on 23 November 2013 the Audencia National rejected the appeal in respect of BBCB's Special Non-Resident Entity Tax Liability; and on 11 June 2014, the Supreme Court rejected the appeal in respect of BBCB's Non-Resident Income Tax Liability.

22. The AEAT placed embargos on the titles to the apartments held by BBCB. This was akin to a legal charge entitling the AEAT to sell the property to discharge the unpaid tax.

23. In the meantime, the Club's Committee decided at its AGM on 6 August 2011 to release the reserve fund that had been collected from the membership for payment of the Spanish Taxes and use the money instead to refurbish and modernise the Resort for the benefit of its Members, who were informed of this decision at their AGM on 10 November 2011. This decision was made after the Committee had received advice that enforcement by the AEAT was likely to prove difficult.

The sale of the Apartments

24. In May 2015, the AEAT arranged for an auction to raise funds to meet the unpaid taxes but no bids were received. After that the titles to all but six of the Apartments were bought by BBL SL, the Fourth Respondent, at the behest of Kevin Page. A Certificate of Allocation of the bare titles of the Apartments was issued in favour of BBL SL in December 2015. The Respondents did not inform FNTC of this process and it was not until February 2016 that it learned that BBL SL was the new owner of the Apartments.

25. After the purchase of the Apartments by BBL SL, a new constitution was prepared and a formal vote on the adoption of it was passed unanimously on 17 November 2016. Other steps, including the execution of a new deed of trust and the appointment of a new trustee have been prevented by an undertaking given by the Respondents within these proceedings.

26. On 21 March 2017, BBCB received a demand from HMRC pursuant to the Mutual Assistance Recovery Directive 2010/24/EU for payment of Spanish Taxes in the sum of £2.24 million. On 7 April 2017, FNTC wrote to BBLL requiring BBLL to put FNTC in funds to pay the tax demand. Proceedings were commenced by FNTC and BBCB on 19 September 2017.

The Judge's Decision

27. The hearing began on 20 March 2019 and was concluded on 2 April 2019. The Judge handed down a notably comprehensive and careful judgment on 20 May 2019, dismissing all the grounds upon which the Claimants relied: 2019 EWHC 1187 (Ch). Reference can be made to paragraphs 71-82, which directly concern the issue arising

on this appeal. The remainder relates to (a) the six other rejected grounds for a declaration regarding the Spanish taxes, (b) whether BBL SL is constructive trustee of the Apartments for BBCB on the basis of a breach of trust, and (c) a claim by FNTC to recover payment of outstanding remuneration and expenses said to be owing by the Club.

28. Given the ease with which the Judge's judgment can be accessed, it is unnecessary to reproduce her survey of the law and of the competing submissions, and we can move directly to paragraphs 81 and 82, which contain her decision on this issue. She held that on the clear words of Clause 14 there was no scope for FNTC to recover BBCB's liability to pay the Spanish Taxes from BBLL or from the Club; the Spanish Taxes were not a liability which FNTC has incurred or in respect of which it is entitled to recover an indemnity. She gave ten reasons, which I summarise:

(1) The words of Clause 14 are clear and unambiguous. It entitles the Trustee to an indemnity in respect of liabilities incurred in the performance of its duties. Where it incurs no liability, there is nothing to indemnify it against.

(2) The Claimants' suggested addition of the words *"put in funds"* would radically alter the meaning of the clause.

(3) The difference in wording between Clause 14 and clauses 7 and 8 is of no significance.

(4) Clause 14 contains no obvious mistakes or infelicities.

(5) The authorities make it clear that the court should not depart from the natural meaning of words unless it is obvious from the factual background that the parties could not possibly have meant what they said.

(6) The factual background has a limited role to play in circumstances where the wording of Clause 14 is unambiguous. Even if that was not the case it is far from obvious from the factual background that the parties must have intended it to mean something different.

(7) The agreed factual background does nothing more than state the nature of the timeshare structure.

(8) There is no evidence on which to make findings as to what the parties to the agreement intended. Further: *"(d) Whilst I agree that it was certainly the case that the timeshare trust structure envisaged that the Club Members would, collectively, pay for all outgoings incurred in respect of the Apartments they were to use and occupy, I reject the suggestion that this must mean that something has gone wrong with the wording in clause 14."*

(9) Commercial common sense is an important factor to take into account when construing a contract. *"However, I am not dealing here with two rival, but equally likely, contentions as to the true meaning of the words. Instead, I have found that the meaning of the words is clear."*

(10) The Claimants' real complaint is that the Deed of Trust omits a provision that entitles the Trustee to be "*put in funds*" for liabilities incurred by another

entity, but they have not asserted the existence of an implied term to that effect or an entitlement to rectification.

29. At a later stage (paragraph 94(vi)) the Judge considered whether it would be in the best interests of the Members for the Taxes to be paid so as to prevent BBCB from being wound up and she concluded that it would not.

The Law

30. The principles to be applied when construing a commercial contract are familiar and are no different in the case of a deed of trust: "the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context": *Marley v Rawlings* [2014] UKSC 2 per Lord Neuberger at [20]. As to the relative prominence to be given to 'the words' and 'the context' in the process of interpretation, we, like the Judge, were taken to a series of well-known authorities:

- *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffmann at 912F-913F
- *Re Sigma Finance Corporation* [2010] 1 All ER 571 per Lord Mance at [12] and Lord Collins at [35-37]
- *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 per Lord Clarke at [19-23]
- *LB Re Financing No 3 Ltd v Excalibur Funding No 1 Plc* [2011] EWHC 2111 (Ch) per Briggs J at [45-46] and [59-61]
- *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at [15-23]
- *Wood v Capita Insurance Services Limited* [2017] AC 1173 per Lord Hodge at [10-15]

31. Extensive citation is unnecessary for our purposes. Two extracts from the judgment of Lord Hodge in *Wood* are sufficient:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."
>
> "12. … To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in

> the contract, so long as the court balances the indications given by each."

32. I would also record the observations of Briggs J in *Excalibur*:

> "46. Commercial absurdity may require the court to depart even from the apparently unambiguous natural meaning of a provision in an instrument, because "the law does not require judges to attribute to the parties an intention they plainly could not have had": see per Lord Hoffmann in the ICS case at page 913. …"

> "59. … Where something has gone wrong with the language, it is not in my judgment necessarily an objection to dealing with it in a way that avoids commercial absurdity that provisions have, apparently, to be rewritten, blue pencilled, or amplified so as to work rationally in particular circumstances."

33. When construing a document the court must determine objectively what the parties to the document meant at the time they made it. What they meant will generally appear from what they said, particularly if they said it after a careful process. The court will not look for reasons to depart from the apparently clear meaning of the words they used, but elements of the wider documentary, factual and commercial context will be taken into account to the extent that they assist in the search for meaning. That wider survey may lead to a construction that departs from even the clearest wording if the wording does not reflect the objectively ascertained intention of the parties.

The submissions on appeal

34. For the Appellants, Ms Talbot Rice QC submits that Clause 14 can and should be read in a way that produces the result that the Members of the Club are liable to pay the Spanish Taxes, or to put the Appellants in funds to discharge the obligation of the Second Appellant to pay them. By construing the words of the clause literally and viewing them in isolation from the Constitution and the timeshare structure, the Judge reached a conclusion that means that the Members can choose whether or not to pay any outgoings in respect of the apartments when those outgoings are incurred by BBCB as the apartments' legal owner. Meantime, BBCB, as a company without other assets and with no power to trade, has no means of paying. That produces a commercially absurd outcome that renders the timeshare scheme unworkable.

35. The Judge was also wrong in these specific respects:

(a) She should have placed weight on clause 12 of the Constitution, which provides for all outgoings in respect of the Apartments to be paid for by the Members and specifically sub-clause (a)(v) by which the Members agreed to pay all outgoings incurred in respect of the Apartments, including any taxes. This is all the more so when the Judge herself accepted that the scheme envisaged that the Members would collectively pay for all outgoings (see 28(8) above). Indeed, she found that the Members had paid for a number of these outgoings, including the IBI taxes (equivalent to council tax), although they were invoiced to BBCB, and that they had understood for a long time

that they were liable for the Spanish Taxes if the appeals which the Committee ran on their behalf against the Spanish Taxes failed.

(b) She erred as a matter of law in prioritising "the plain and natural meaning of the words" and in holding that the factual background had a limited role to play where the wording was unambiguous. This betrays a blinkered approach that overlooks the possibility that apparently unambiguous words may have to give way to the true meaning intended by the parties. The error is also apparent where the Judge, having accepted that commercial common sense is an important factor when construing a contract, appears to exclude it in cases where the meaning of the words is clear.

(c) The Judge was wrong at paragraph 81(ii) to regard radical alteration of the words of Clause 14 as an obstacle in the light of the observations of Briggs J in *Excalibur* at [59] (above).

36. For the Respondents Mr Gourgey QC and Mr Watson contend that it is fatal to the appeal that FNTC itself has no liability to pay taxes to the Spanish authorities and nor does it have any liability to pay the taxes levied on its wholly owned subsidiary BBCB. Clause 14 is not ambiguous (and clauses 7 and 8 show that the drafter knew what an indemnity is). It is a standard professionally-drafted indemnity clause, providing the Trustee with an indemnity. It does not extend to liabilities that have not been incurred by the Trustee or grant an indemnity to anyone else. In the face of such clear and unambiguous language, there is no scope for departing from the words of the clause unless the construction gives rise to commercial absurdity, which is not found here.

37. Even if Clause 14 could be interpreted as applying to debts owed by BBCB, and as requiring the Respondents to put FNTC in funds, the Appellants face a second hurdle. As a trustee, FNTC must apply the funds for the benefit of the Members, but here, on the Judge's unchallenged findings, it would not benefit the Members to pay the Spanish Taxes. Nor is it in the Members' interests for the Taxes to be paid to avoid the winding up of BBCB when it no longer holds the Apartments.

38. Sub-clause 12(a)(v) of the Constitution applies to 'Management Expenses', not to liabilities such as the Spanish Taxes, and sub-clause 12(b) shows that decisions about the spending of monies are at the sole discretion of the Committee.

Conclusion

39. FNTC understandably objects that the Members, who benefit from their use of the Resort, should avoid paying taxes that arise from or are connected with their enjoyment of that benefit. It points out that for most of the lifespan of the Resort, the Members have acted as if they might be responsible for the Spanish Taxes, to the extent that they saved for them and persistently appealed against them. Meantime, they have paid whatever they have needed to pay by way of utility bills and local rates in order to ensure that their benefits continue uninterrupted. However, we are not concerned on this appeal with whether the Respondents' actions might be regarded as opportunistic, but rather with their legal obligations under the agreement setting up the timeshare scheme. Having considered that question, I am in no doubt that the appeal must be dismissed.

40. In the first place, one looks at the wording of Clause 14 itself. It obliges the Founder Member and the Club to provide protection for the Trustee by way of (a) an indemnity against all liabilities resulting from the performance of its duties, and (b) an indemnity against all liabilities incurred in connection with the Trust Property or in any other connection with the office of Trustee. The Appellants rely upon limb (b). But in my view, the clause is clear both in its wording and, critically, in its intent. It is an indemnity given *to the Trustee* in respect of liabilities arising *in connection with the Trust Property* or *the holding by the Trustee of the office*. It is no more or less than a conventional indemnity clause for the protection of the Trustee. It has nothing to do with BBCB, or BBCB's liability for the Spanish Taxes, and it cannot sensibly be construed to extend to them.

41. The same conclusion is reached by considering the clause in the context of the timeshare documents to which I have referred. It sits in the middle of a series of provisions concerning the powers and protections of the Trustee. None of these provisions stretches beyond that. In my view the other contractual provisions to which we were referred shed no more light on the matter.

42. Then there is the factual and commercial context. For the scheme to be a commercial proposition, timeshare purchasers have to know their potential liabilities. Here, there is no indication that the parties to the Constitution or the Trust Deed intended the Members to be liable by way of an open-ended indemnity for general taxation in unspecified amounts. Had this been their intention, they would surely have said so; indeed it would have been positively necessary as otherwise the parties would not know (a) how the Members' liability would be triggered, (b) what exactly the Members would then have to do, and (c) how the Trustee was then to act. These are matters of importance and the silence about them in documentation that in other respects descends to minute detail is in my view telling. To take an example, Ms Talbot Rice was forced to submit that as soon as the Members were informed of a demand from the Spanish tax authority, they would immediately be obliged to put the Trustee in funds for the full amount: but that is an onerous obligation and there is nothing that explains how such a mechanism would work in practice. The conclusion is that the Appellants, who have put their case for a declaration in many different ways without arguing for an implied term or for rectification, are in reality arguing for an entirely new provision providing a free-standing indemnity to the Owning Company. Their continually shifting position in framing their case is symptomatic of this core conceptual difficulty.

43. Nor is there any force in the argument that the timeshare structure is unworkable without giving the indemnity provisions an extended meaning. An arrangement by which the Members can pay what they want when they want by way of taxes and expenses may not be a tidy one, but the Resort has seemingly continued to operate. The alternative proposed by the Appellants is, as the Judge said, far from obvious. It deprives the Members of the choice of paying or not paying taxes levied on the Owning Company as they fall due. Of course, if they decide not to pay taxes, they may have to take any consequences. But that does not amount to commercial absurdity and there is nothing integral to the scheme as a whole that requires the Trustee to act as an enforcer for taxes levied on a third party that the Members do not wish to pay. Furthermore, had the Committee considered the arrangements

unworkable, it had the power under clause 19 of the Trust Deed to propose modifications.

44. Accordingly, the structure of the scheme (a) protects the Trustee from liability, (b) allows for payments that are in the interests of Members to be paid by the Club through its Committee, and (c) allows the Club, if the payments are not considered to be in the interests of Members, not to pay and to allow BBCB to be wound up. The case is quite different to *Sigma*, in which a literal reading of the contentious provision would achieve the opposite result to that intended by a clear basic scheme: see Lord Mance at [32].

45. Finally, I would not accept the Appellants' strictures about the Judge's approach. Her legal analysis might in some respects have been differently expressed. The statement, recorded at paragraph 28(5) above, that the court should only depart from plain words where the parties obviously did not mean them, does not fully accord with the approach identified at paragraph 33 above, but does not amount to a material misdirection. The isolated sentence at paragraph 25(6) (*"… the timeshare trust structure envisaged that the Club members would, collectively, pay for all outgoings…"*) makes most sense when read in context as referring to outgoings other than the Spanish Taxes and as such does not undermine the Judge's overall reasoning. Lastly, the passage quoted at paragraph 28(9) (*"I am not dealing here with two rival, but equally likely, contentions as to the true meaning of the words…"*) sets the bar too high, when all that is needed to justify a choice between alternative meanings is that they should be possible meanings, not that they should be equally likely. But this is a small slip in a long and impressive judgment and it did not lead the Judge into error. She ultimately, and in my view correctly, placed weight on the words and function of Clause 14, but not before she had also considered the wider context.

46. I therefore conclude that the proper construction of Clause 14 does not entitle the Appellants to the declaration they seek. The Judge's decision was correct and, if my colleagues agree, this appeal must be dismissed.

Lady Justice Asplin

47. I agree that the appeal should be dismissed for the reasons given by Lord Justice Peter Jackson. It seems to me that clause 14 cannot be construed as Ms Talbot Rice suggests and her criticisms of the judge are unfounded. As Lord Hodge put it in his judgment in *Wood v Capita* at [12] "it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract so long as the court balances the indication given by each." In this case, regardless of where one begins, an analysis of the relevant language, the full documentary context and the factual background drives one to the same conclusion reached by the judge.

48. In this case, the language of clause 14 itself points quite clearly to an objective meaning which limits the obligation of the Founder Member to indemnify FNTC against all costs, liabilities, expenses, losses and demands which it incurs. That is implicit in the use of the terms "indemnify" and "indemnified". Further, the fact that the indemnification is expressed to be in respect of costs, liabilities and expenses "which may result from the performance by the Trustee of their duties . . ." and to be against all losses, claims, demands, expenses and other liabilities "made or incurred in

connection with the Trust Property or in any other way in connection with the holding by the Trustee of the office of custodian trustee hereunder" supports this conclusion.

49. Further, rather than point away from attributing the normal meaning of indemnity to the word when used in clause 14, it seems to me that the use of that term in clause 7(c) in a manner which is not challenged suggests that its normal meaning should be attributed to it in clause 14. I can see no relevant distinction for this purpose, between the use of the phrase "incurred by the Trustee" in clause 7(c) and "incurred in connection with the Trust Property or in any other way in connection with the holding by the Trustee of the office of custodian trustee . . ." in clause 14. If something different had been intended, it seems to me that different words would have been used.

50. I also agree with Mr Gourgey that Ms Talbot Rice's construction of clause 14 is neither the natural and ordinary meaning of the words used, read in context, nor does it achieve her desired result. She says that "kept fully indemnified" in clause 14 should be read as "put in funds". It seems to me that that phrase has a completely different meaning from the words used in clause 14 read as a whole and in context, and it is not necessary to adopt it in order to avoid commercial absurdity (to which I shall turn below). In practical terms, it also fails to meet the situation in relation to the payment of Spanish Taxes levied upon BBCB which Ms Talbot Rice says reveals the absurdity in the first place. Even if the objective meaning of the language in clause 14 were that FNTC must be "put in funds" in relation to liabilities, the liabilities in question are expressed to be those of FNTC itself.

51. Furthermore, I am not driven to conclude that something must have gone wrong with the language of clause 14 because it creates a commercial absurdity which cannot have been intended and which would warrant a departure from the natural and ordinary meaning of the words. Although as Ms Talbot Rice points out, it is possible that commercial absurdity may require the court to depart even from the apparently unambiguous natural meaning of a provision (see *LB Re Financing No 3 Ltd v Excalibur Funding No 1 Plc* at [46] per Briggs J as he then was) this is not such a case. There is nothing which has clearly gone wrong with the wording and there is nothing commercially absurd about clause 14 in the context of the structure of the time share scheme as a whole.

52. In this regard, Ms Talbot Rice took us to *Re Sigma Finance Corporation* where the Supreme Court held (Lord Walker dissenting) that too much weight should not be placed on the natural and ordinary meaning of a clause where, when interpreted in light of the agreement as a whole, a literal interpretation frustrates the commercial intentions of the parties. However, *Sigma*, as Mr Gourgey pointed out, was a case in which the clear wording of the clause in question conflicted with several other express provisions in the document. As I have already said, this is not such a case.

53. Although there are a few infelicities in the suite of documents, they were professionally drafted and form a coherent whole. The Constitution provides expressly that the Members of the Club must contribute in accordance with the terms of the Management Agreement to all reasonable costs incurred by the Club and provides a non-exhaustive list which includes "all outgoings in respect of the Apartments . . .": clause 12(a) of the Constitution. However, clause 12(b) of the Constitution provides that save to the extent that a matter may have been delegated

under the Management Agreement, the Committee shall have "sole discretion" in deciding what monies should be spent. In summary, clause 1 of the Management Agreement provides that the management and administration of the Apartments is delegated to the Management Company and makes express reference to the matters set out at clause 12(a) of the Constitution. It also states that the Management Company is responsible for the exercise of the powers of the Committee in clause 12(b) of the Constitution and that the powers shall be exercised "in the best interests of the Club . . .". If an expense is incurred, the powers having been exercised in the best interests of the Club, the Management Company is entitled to collect the appropriate proportion of the expense from each Member pursuant to the Constitution: clause 3 of the Management Agreement.

54. It seems to me that that there is nothing commercially absurd about that structure or about clause 14 in that context. Only liabilities and expenses which are met under those provisions can be collected from the Members. In practice, that is inconsistent with Ms Talbot Rice's preferred construction of clause 14 which would require the Founder Member, on behalf of the Members, to put FNTC in funds in relation to a liability which was not incurred pursuant to clause 1 of the Management Agreement and the powers in clauses 12(a) and (b) of the Constitution. The judge found expressly that the payment of the Spanish Taxes would not be in the best interests of the Members.

55. For all these reasons, I would construe clause 14 in the same way as the judge and I would dismiss this appeal.

Lord Justice Henderson

56. I agree with both judgments.