Neutral Citation Number: [2026] EWCA Civ 1023

Case No: CA-2025-003009

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Mr Simon Gleeson sitting as a deputy judge of the High Court
[2025] EWHC 2166 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2026

Before :

LORD JUSTICE ARNOLD
LADY JUSTICE FALK
and
LORD JUSTICE ZACAROLI

- -

Between :

(1) GLINT PAY LTD **(2) GLINT PAY SERVICES LTD** **(3) GLINT PAY UK LTD**	**Appellants**
- and -	
(1) JASON DANIEL BAKER **(2) GEOFFREY PAUL ROWLEY**	**Respondents**

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Philip Marshall KC (instructed by **Greenwoods Legal Services Limited**) for the **Appellants**
Lexa Hilliard KC and Jack Watson KC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents**

Hearing dates: 21 & 22 July 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Zacaroli:

1. This appeal concerns the validity of the appointment of administrators in circumstances where it is alleged that their appointment out of court was solely for an improper purpose.

2. It is an appeal from the order of Mr Simon Gleeson sitting as a deputy High Court judge, in which, for the reasons contained in his written judgment dated 18 August 2025, he struck out the appellants' claims.

Facts in outline

3. The first appellant, Glint Pay Ltd (**GPL**), is the holding company of the second and third appellants, Glint Pay Services Ltd (**GPSL**) and Glint Pay UK Ltd (**GPUK**). I will refer to the appellants collectively as **Glint**. GPSL is an authorised electronic money institution and GPUK is the owner of specialist technology used in Glint's business.

4. At the time of the appointment of administrators, in September 2019, Glint was in "start-up" mode. It had developed an app which permits the use of a debit card linked to the price of gold. It is common ground for the purposes of this application that it was, at least prior to the acceleration of the loan which led to the appointment of administrators, solvent on both a balance sheet and cash-flow basis.

5. On 22 January 2019, GPL obtained a loan (the **Loan**) from Brahma Finance (BVI) Limited (**Brahma**). The Loan was secured by a guarantee and debenture entered into on the same date, pursuant to which GPSL and GPUK guaranteed the obligations of GPL under the Loan and each of the obligors granted fixed and floating charges over their assets (the **Debenture**).

6. The fixed charges in the Debenture were over freehold and leasehold property, fixtures and fittings, plant and machinery, rents receivable, goodwill, uncalled capital, stocks, shares, bonds, securities, and intellectual property rights. The floating charges in the Debenture were over all the undertaking and all property assets of the obligors.

7. "Secured Assets" were defined in the Debenture as "all the assets, property and undertaking for the time being of the Obligors subject to the Security created by, or pursuant to, this deed (and references to the Secured Assets shall include references to any part of them)". "Security" was defined to include both the fixed and floating charges.

8. In May 2019 Glint was approached by a company called Niven Alpha Pte Limited (**Niven**) with an offer to purchase 51% of the shares in GPL. Niven was a special purpose vehicle incorporated for the purpose of acquiring Glint. It was established by a venture capital investment firm, Nimoi Holdings, whose main shareholder was a Singapore based company co-founded by Mr David Fergusson (**Mr Fergusson**) called Global Precious Metals.

9. GPL's board rejected Niven's offer. On 5 June 2019, Niven approached Brahma with an offer to acquire the Loan and Debenture. It did so pursuant to a deed of assignment dated 3 July 2019.

10. On 15 July 2019 Mr Fergusson emailed Mr Cozens, a director of each of the companies, with the following information requests (the **15 July Requests**), purportedly made pursuant to the Debenture:

> "1. Minutes of any Board meeting held since entering into the [Loan];
>
> 2. Cash balances for Glint Pay Ltd and all its subsidiaries as at the end of each calendar month since entering into the [Loan];
>
> 3. A list of trade and other creditors for Glint Pay Ltd and all its subsidiaries as at the end of each calendar month since entering into the [Loan];
>
> 4. Details of any intercompany lending or creditor arrangements between Glint Pay Ltd and any of its subsidiaries as at the end of each calendar month since entering into the [Loan];
>
> 5. Any information relevant under Clause 1.4 and 1.11 of Schedule 3 or [sic] the Guarantee and Debenture."

(Clause 1.4, which related to representations, warranties and breaches of covenant is not relevant.)

11. The requests numbered 2-4 are of particular relevance on this appeal. These were purportedly made pursuant to §1.11.1 of Schedule 3 to the Debenture (**§1.11.1**). Schedule 3 contained numerous undertakings by the obligors. These included, at §1.11, obligations to:

> "1.11.1 give the Lender such information concerning the location, condition, use and operation of the Secured Assets as the Lender may require;
>
> 1.11.2 permit any persons designated by the Lender and any Receiver to enter on its premises and inspect and examine any Secured Asset, and the records relating to that Secured Asset, at all reasonable times and on reasonable prior notice; and
>
> 1.11.3 promptly notify the Lender in writing of any action, claim, notice or demand made by or against it in connection with all or any part of a Secured Asset or of any fact, matter or circumstance which may, with the passage of time, give rise to such an action, claim, notice or demand, together with, in each case, the Obligor's proposals for settling, liquidating, compounding or contesting any such action, claim, notice or demand and shall, subject to the Lender's prior approval, implement those proposals at its own expense."

12. On 26 July 2019, Mr Cozens responded, saying that Glint was under no obligation to provide the information sought in requests numbered 1-4, and that there was no current relevant information to be provided in response to the request numbered 5.

13. On 12 August 2019, Niven wrote to GPL's shareholders offering 49% of the shares in Niven in exchange for 51% of the shares in GPL. Shareholders were invited to a webinar on 30 August 2019 to discuss Niven's recapitalisation plan for Glint. At the webinar, Mr Fergusson referred to the fact that, in the absence of an agreed process, Niven would acquire the business through a "pre-pack" administration, which it was in the process of preparing. On the same date, Niven's solicitors wrote to GPL, giving notice that GPL's failure to provide the information requested under §1.11.1 constituted an event of default under §11.2 of the Loan ("The Borrower fails (other than by failing to pay), to comply with any provision of any Finance Document"). The letter informed GPL that the Loan, together with all interest and any other outstanding amounts, was immediately due and payable and that the Security (as defined in the Debenture) was enforceable. It demanded payment of all outstanding amounts (£1.65 million plus interest pursuant to the Loan and £75,685 being Niven's costs to date in connection with enforcing its rights under the Loan and Debenture).

14. On 4 September 2019, Glint's solicitors wrote to Niven's solicitors, asserting that Niven's actions were not taken in support of its legitimate interests pursuant to the Loan and Debenture, and indicating that GPL was in the process of making arrangements to prepay the Loan in full.

15. On 18 September 2019, Niven gave notice under Rule 3.17 of the Insolvency Rules 2016 of appointment of the respondents (the **Administrators**) as administrators over the affairs, business and property of each of GPL, GPSL and GPUK by the holder of a qualifying floating charge.

16. The administration was short-lived. GPL succeeded in raising alternative finance. On 10 October 2019 GPL repaid the Loan and Niven entered into a deed of release of its security.

17. On 19 November 2019, an agreement, executed as a deed, was entered into between, among others, GPL, GPSL and GPUK, the provider of the new funding to Glint, the Administrators, and Mr Cozens (the **Waterfall Agreement**). It was executed on behalf of the companies twice, once by the Administrators and once by Mr Cozens. Recital (A) to the Waterfall Agreement stated that "the Joint Administrators were appointed as joint administrators" of each of the Glint companies on 18 September 2019.

18. The Waterfall Agreement contained provisions, among other things, for the capitalisation of the major part of the new lending to GPL, repayment of all outstanding creditors of Glint, the payment of the Administrators' remuneration and expenses, and for the application to court by the Administrators for the approval and determination of their remuneration and expenses and their discharge pursuant to paragraph 98(2)(c) of Schedule B1 (**Schedule B1**) to the Insolvency Act 1986 (**IA 1986**).

19. Annexed to the Waterfall Agreement were letters from each of the companies, and Mr Cozens, written in their capacity as creditor or shareholder in one or other of the companies, confirming that they would not object to "the former Joint Administrators' fees and remuneration incurred in relation to the administration of GPL up to the end of "Week 10" as set out in the fee estimate appended to this letter" and agreeing to the remuneration being fixed on a time cost basis (the **Remuneration Letters**).

20. On 6 December 2019, Insolvency and Companies Court Judge (**ICCJ**) Prentis made an order in relation to each of the three companies in which the Administrators' remuneration was fixed on a time-cost basis. The Administrators received more than £1.5 million in remuneration and expenses across the three companies.

21. The order of ICCJ Prentis also provided that the Administrators were discharged from liability "in respect of any action or omission as Administrators in the administration of the Company with effect from 00:01 on 25 December 2019".

22. Shortly after that order, Glint made an application with a view to rendering the discharge subject to any claims that were notified to the Administrators before 25 December 2019, specifically referencing the potential claim that the Administrators were invalidly appointed. The application was eventually determined by ICCJ Jones in September 2020. He concluded that there was no need for such a provision because if Glint succeeded in showing that the Administrators were invalidly appointed there would have been no administration and thus no discharge of the Administrators. There was no appeal against that decision.

23. After a delay of more than four years, Glint commenced these proceedings against the Administrators, seeking equitable compensation or damages for trespass, on the grounds that the Administrators were never validly appointed. By this time, Niven had ceased to exist.

24. The claim against the Administrators was based, first, on the contention that there was no event of default, so that the security was not enforceable. Glint's argument was that §1.11.1 only related to information as to certain types of assets, specifically real property or fixed assets (or, as the argument developed at the hearing, only tangible assets), and not to all "Secured Assets" as defined in the Debenture more generally.

25. The second basis of Glint's claim was that the Administrators' appointment was made in bad faith and for an improper motive because (see §60 of the particulars of claim):

(1) Niven's purpose and intention was to asset-strip Glint for the benefit of Niven and its related companies;

(2) Niven had no interest in recovering its alleged debt, or rescuing Glint as a going concern, or achieving a better result for the company's creditors as a whole than would be likely if the company were wound up.

26. Glint also contended that there was no effective assignment to Niven of the relevant rights. That was rejected by the judge, and there is no appeal against that part of his decision.

27. The Administrators applied, by application notice dated 17 December 2024, to strike out the claim, alternatively for summary judgment against Glint.

<u>The Judge's judgment</u>

28. The judge made an order striking out Glint's claims. In fact, his grounds for doing so – that they disclosed no reasonable grounds for bringing the claims and Glint had no real prospect of succeeding on them – meant that he was in reality in part striking them out and in part granting summary judgment to the Administrators.

29. On an application to strike out, the court proceeds on the basis that the pleaded allegations are true and determines whether the claim is nevertheless bound to fail (see for example *Three Rivers v Bank of England (No.3)* [2003] 2 AC 1, at §117 per Lord Hutton). On an application for summary judgment, in contrast, the court may look at evidence and determines whether the claim (or defence) has a realistic prospect of success. Nothing of substance, however, turns in this case on the conflation of the two in the judgment.

30. The judge concluded that there was no arguable case that Glint's failure to provide the information sought by the 15 July Requests did not constitute an event of default. He rejected Glint's argument that §1.11.1 applied only to fixed charge assets (specifically that the information sought must concern the "location, condition, use and operation of the Secured Assets"), finding (at §56) that "I do not believe that the use of these words has the effect of limiting the power conferred by the section which is for the chargee to ask for information about the charged property in general".

31. Even if that was wrong, he held that the information requests fell at least to some extent (which was all that was necessary) within the wording of §1.11.1: cash balances, for example, have a "location" and a "use", and trade creditors may have a "condition" in the sense of their days due.

32. The Administrators had also argued that Glint had breached §1.11.3 of Schedule 3, because Glint had failed to inform the lender of two claims or potential claims. The judge rejected that argument. The Administrators contend, by their respondents' notice, that the judge was wrong to do so.

33. The judge also concluded that there was no arguable case that the appointment of the Administrators was invalid. He recorded Glint's argument that the purpose of the appointment was not to obtain repayment nor for any other statutory purpose, but was wholly for a collateral purpose. He noted Glint's argument that this was made clear because when repayment of the sums claimed was offered, Niven tried to refuse payment. He concluded, however, at §74, that the objectives of Niven were "to enable an independent office holder to take control of the assets". That, he said, was not rendered improper because (as he accepted) the reason they wanted such an independent officer appointed was in order to have the opportunity to acquire the business from that independent officer.

34. He cited in support of this conclusion *Re Aartee Bright Bar Ltd* [2023] EWHC 606 (Ch); [2023] BCC 704 (***Aartree***), in which HHJ Stephen Davies (sitting as a judge of the High Court) noted (at §41) that it would not be improper for an appointor to be motivated, in whole or in part, by the belief that the appointment of an administrator was likely to achieve the statutory purpose:

> "even if it could not be said that the appointor would necessarily receive payment in full, or possibly even any payment at the conclusion of the administration and even if it could not be said that on an objective analysis his own economic interests would better be suited by not appointing an administrator. There is no reason, in my view, why the appointor should not be motivated, in whole or in part, by what he considered in good faith was a desire to improve the position

> of the general body of creditors, or to enable an independent officer to take control of the assets or to investigate alleged misconduct on the part of those in control of the company."

35. Glint argued, in the alternative, that a term is to be implied into the Debenture to the effect that any request for information must be exercised honestly and in good faith. That, too, was rejected. Specifically, the judge rejected the argument that there was any duty akin to that explained in *Braganza v BP Shipping Ltd* [2015] UKSC 17, in the context of a contractual term vesting a power to exercise a discretion which may affect both parties. The courts have sought to ensure that such contractual powers are not abused, by applying a term which may vary according to the terms of the contract and the context in which the decision-making power is given: *per* Lady Hale at §18. The judge held that no such duty existed here (see §85):

> "In my view, a chargee exercising a right under the charge document is in the same position as a lender exercising a right to terminate under a loan document – he is absolutely entitled to act in accordance with his own interests as he perceives them to be, and a man is not to be subject to any requirement of rationality in pursuing his own interest for his own account."

36. Finally, the judge held that even if he was wrong so far, Glint was estopped by conduct from contending that the Administrators were invalidly appointed by reason of the stance taken by it in relation to the application for the Administrators' remuneration, as set out in the Waterfall Agreement and the Remuneration Letters.

37. Relying on *LA Micro Group (K) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429; [2022] 1 WLR 336, at §26 (followed in *Malik v Malik* [2024] EWCA Civ 1323; [2025] 4 All ER 409 at §32 to §36), the judge held that in circumstances where Glint had supported the application before ICCJ Prentis, which could only have been made if the Administrators were validly appointed, it is an abuse of process for Glint now to bring a claim whose fundamental basis is that they were not.

38. The judge noted that he had heard argument on a number of different types of estoppel, but rejected them, at least for the purposes of the strike out application.

Grounds of appeal

39. Glint appeals, with the permission of Falk LJ granted on 18 February 2026, on nine grounds. These are, in summary:

    (1) The judge failed to construe §1.11.1 as applying only to assets which had a "location, condition, use and operation", which did not include the assets in respect of which information was sought by the 15 July Requests.

    (2) The judge was wrong to find that contextual material regarding the dealings between Glint and Brahma was of no assistance to the process of construction on the grounds that the Debenture was executed as a deed, was assignable and was registered at Companies House.

(3) The judge adopted an improper approach to the issue of construction of the information provisions in §1.11, in particular because he lacked the documentation that could reasonably be expected to be available at trial relevant to construction.

(4) The judge erred in concluding that the lack of response to the 15 July Requests unarguably constituted a breach of the information provisions in the Debenture.

(5) The judge erred in concluding that the exercise of the power of appointing the Administrators was for a proper purpose: it was not open to him to do so on the limited materials before him; and it involved an error of law in confusing the incidental effect of the exercise of a power with its true and/or predominant purpose.

(6) The judge erred in holding that an implied term of the type described in *Braganza* did not arise in connection with the exercise of the power of appointment.

(7) The judge erred in law in holding that Glint was bound by the doctrine of *res judicata* or that an issue estoppel arose against them in respect of the determinations made by ICCJ Prentis.

(8) The judge erred in holding that Glint was estopped, or guilty of an abuse of process, by reason of the entry into the Waterfall Agreement.

(9) The judge was wrong to treat the principles applicable to an action to strike out the claim form and particulars of claim as the same as those applicable to an application for reverse summary judgment.

40. In granting permission, Falk LJ noted that there was a lack of clarity as to whether the proper purpose argument was maintained in respect of the appointment of the Administrators, the request for information or both. She granted permission on the basis that it covered both.

41. The issues fall under three broad heads: construction of the debenture; improper purpose; and estoppel/abuse of process.

<u>Construction of the Debenture</u>

42. Glint's essential argument is that "Secured Assets" is used in different parts of the Debenture to mean different things, its meaning is in each case to be gleaned from the context in which it is used and, in §1.11.1, it is used only to refer to tangible assets, because only such assets are capable of having a "location, condition, use and operation".

43. I accept that "Secured Assets" does not always refer to *all* of the assets subject to the security granted by the Debenture in each place that it is used within the Debenture. In §9.3 of the Debenture, for example, which (among other things) renders the lender, any receiver and any administrator immune from liability "by reason of entering into possession of a Secured Asset", it is clear that Secured Asset can only refer to an asset capable of being possessed. Similarly, §11.11 of the Debenture, which enables a receiver to "let any Secured Asset for any term and at any rent", clearly only relates to real property.

44. The question, therefore, is whether there is anything in the context of §1.11.1 which requires "Secured Assets" as used in it to be limited to only tangible assets.

45. Mr Marshall KC, for Glint, first submitted that the words "location, condition, use and operation" of the Secured Assets must be read conjunctively, so that Glint could only be required to respond to a request for information concerning all four aspects of a Secured Asset or, at least, that to be a Secured Asset within §1.11.1 the asset must be one which had each of a location, a condition, a use and an operation.

46. I do not accept this submission. As Ms Hilliard KC, for the Administrators, observed, the word "and" is often used to mean "and/or". In my view, this is just such a case. The words identify the features of Secured Assets (their location, condition, use and operation) about which a lender "may" require information. It would make no commercial sense for Glint to be required to answer a request only if the information sought concerned all four features of a particular asset, and for the lender to be required, for instance, to ask about the location of an asset when it knew perfectly well where it was located, in order to make a valid request about its condition. If a request can legitimately ask about one or other of the features of an asset, there is no basis for concluding that before a Secured Asset can fall within §1.11.1 it must have all of those features.

47. Mr Marshall alternatively submitted that even if read disjunctively, all of the four features of a Secured Asset about which a request could be made indicate that the only permitted subject matter of a request was tangible, as opposed to intangible assets.

48. With reference to the 15 July Requests, he submitted that it was not a natural use of language to refer to the "location" "condition", "use" or "operation", of cash balances or trade creditors or intercompany lending arrangements. Further, "trade or other creditors" were not an asset at all, and for that reason were outside the ambit of a legitimate request under §1.11.1.

49. This submission fails to give full effect to the wording of the clause, having regard to the content of the defined term "Secured Assets", and wrongly focuses on the particular information sought, as opposed to the Secured Asset to which the information sought relates.

50. If the phrase "Secured Assets" is replaced with the content of that defined term, §1.11.1 permits a request to be made for "information concerning the location, condition, use and operation of [all the assets, property and undertaking for the time being of the Obligors]".

51. It is not an unnatural or strained use of language to contemplate a request for information which concerns the condition or operation of the "undertaking", being the subject matter of the floating charge granted by each of the companies.

52. An important source of potential value in the security granted by the Debenture is likely to be the business and undertaking as a whole, particularly where the security package granted by GPL includes its shares in the subsidiaries in which the business is conducted and the goodwill of the business, making a sale of the business as a going concern, upon enforcement by the security-holder, readily achievable.

53. A request for information about cash balances, trade creditors or inter-company lending is clearly a request for information that concerns the operation and condition of the "undertaking".

54. A similar point answers Mr Marshall's submission that §1.11.1 enables a request to be made only of *existing* Secured Assets, so that it was impermissible to ask about bank balances and trade creditors at previous month-ends. It would be relevant to the current condition and operation of the undertaking to know, for example, whether bank balances had over recent months been reducing or trade creditors increasing.

55. Glint contends that its construction is supported by reference to the genesis of the documentation. The evidence shows that the parties used, as a template, documentation which Brahma had itself used in relation to lending to third parties for the purpose of financing the purchase of real property or where security over real property had been provided. Such matters, however, are at best evidence of negotiations between the parties and as such are inadmissible. Even if they explained *how* the language appeared in §1.11.1, they do not assist in understanding the meaning of that language. Assuming (although the evidence does not go this far) that the exact phrase "location, condition, use and operation" derives from a clause in a document which granted security only over real property, that does not mean that, when the parties transposed that wording into a document that granted a floating charge over the whole of the borrower's undertaking and a fixed charge over its goodwill, the parties did not intend that those words could apply to information concerning the condition or operation of that undertaking.

56. The remainder of Mr Marshall's submissions were directed at the judge's reasoning that it would be contrary to "ordinary commercial sense" to apply a literalist construction to the words, as it was clear that the words were intended to give the holder of the floating charge rights to information which would "ordinarily be given to the holder of a floating charge". Mr Marshall submitted that there was no evidence before the judge as to "ordinary commercial practice" and that this was not in any event a standard loan document: it was a short-term bridging loan (having a term of less than a year); the lender was also an equity investor (being granted warrants); the lender was provided with the most recent financial information on inception of the Loan; the lender was entitled to attend board meetings; and the whole of the interest due for the term of the Loan was prepaid (by way of deduction from the sum advanced).

57. My own conclusion as to the meaning of §1.11.1 is not based on ordinary commercial practice or the extent to which the holder of a standard floating charge might expect to have such a right to information, and I would not adopt the judge's reasoning in that regard. The force is therefore taken out of Mr Marshall's arguments. They do not, in my view, undermine the conclusion I have reached. The features of the Loan and Debenture to which Mr Marshall referred do not point one way or the other as to the interpretation of §1.11.1. Notwithstanding the short-term nature of the Loan and the other features relied on, the Loan granted rights to the lender, such as that an event of default occurred upon Glint being unable to pay its debts as they fell due, and representations were made (deemed to be repeated daily) as to the accuracy of the financial information provided. It would not be surprising to find such rights supported by a broad right to request information.

58. Finally, Mr Marshall criticised the judge's conclusion (at §49 of his judgment) that extrinsic evidence as to the negotiating background between Glint and Brahma is of no assistance because the Debenture was executed as a deed, was registered at Companies House and was expressed to be assignable, in reliance on *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch 305.

59. The *Cherry Tree* case concerned the extent to which background material which did not appear on the face of a registered charge, while admissible, could properly influence the construction of the charge. Lewison LJ, at §130, said:

> "The reasonable Reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public."

60. It is unnecessary to determine whether the judge was correct in this regard, because the only matters to which Glint could point as potentially relevant to construction of §1.11.1 were the features of the Loan to which I have referred above and the genesis of the template originally used for the Debenture. For the reasons given above, none of those matters has the impact for which Glint contends.

61. Insofar as Mr Marshall suggested that there might be other materials adduced at trial – excluded on the judge's understanding of the consequence of the Debenture being by deed, registered and assignable – it is incumbent on a party seeking to avoid a strike-out or summary judgment to identify at least the gist of the evidence they would seek to rely on at trial as forming part of the admissible and relevant background to construction of the provision in issue. Glint has not done this, notwithstanding that, by definition, if such evidence existed it must be known to it as one of the parties to the original contract.

62. Had it been necessary to do so, however, I would not have accepted that evidence that was otherwise admissible and relevant should be excluded in this case on the bases given by the judge at §49 of the judgment. In *Pathway Finance SARL v The Defendants set out in Annex 1 to the Claim* [2020] EWHC 1191 (Ch), Simon Salzedo QC, sitting as a deputy High Court judge, reviewed the *Cherry Tree* case and more recent authorities, concluding, at §37:

> "These most recent authorities are important in the present context because they show that there is not a bright line division of documents into two categories – private and public – in respect of which different approaches to extrinsic material

> apply. Instead, the law requires a careful consideration of "the nature and circumstances of the particular instrument" which will inform the decision what, if any weight, can be given to extrinsic material known [to] the parties, but possibly not known or readily available to all those who might rely upon the document in question."

63. For the above reasons, I conclude that the judge was correct to find that the failure to provide the information sought in the 15 July Requests constituted a breach of §1.11.1, thus giving rise to an event of default under §11.2 of the Loan.

64. In light of that conclusion, it is unnecessary to consider the point raised by the respondents' notice as to whether the judge was correct to conclude that there was no failure to inform either Brahma or Niven of the existence of claims, in breach of §1.11.3.

Improper purpose

65. For the reasons which follow, I have concluded that the judge was wrong to conclude that there was no realistic prospect of Glint establishing that the appointment of the Administrators was invalid and of no effect by reason of Niven's improper purpose in appointing them.

66. It was not seriously in dispute that there is a realistic prospect of Glint establishing, as a matter of fact, that Niven's sole subjective purpose in appointing the Administrators was to achieve their objective of acquiring the assets and business of Glint. The circumstances leading up to and surrounding the appointment provide sufficient material to give rise to the real prospect of success that it was no part of Niven's subjective purpose to obtain recovery of the Loan. Those circumstances include: the assignment of the Loan followed quickly on the heels of a failed offer to acquire the shares in GPL and involved paying a price equal to the principal and interest for the remainder of the term notwithstanding that all the interest had been prepaid; the timing of the request for information, planning of a pre-pack administration and acceleration of the loan; enforcement notwithstanding the solvency of the company; and the reluctance of Niven to accept pre-payment of the Loan thereafter.

67. Neither side was able to point to any authority which had considered the validity of an out of court appointment of administrators in circumstances where the appointor was motivated by an improper purpose. Glint, however, relies on authorities which have established that the appointment of receivers in such circumstances is invalid.

68. In *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, a case concerned with an action in negligence against mortgagees and receivers appointed by them, Lord Templeman said (at p.312F-G):

> "Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee

> must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower."

69. He held (at p.314D-F) that the receiver in that case had acted, not for the purpose of enforcing the security under the debenture pursuant to which he was appointed but for the purposes of preventing enforcement by the plaintiffs under a separate debenture, on the basis that:

> "…since a mortgage is only security for a debt, a receiver and manager commits a breach of his duty if he abuses his powers by exercising them otherwise than "for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realised" for the benefit of the debenture holder."

70. Glint accepts that it would be in some difficulty if it could only establish that Niven had mixed motives, i.e. if one of its purposes was to obtain repayment of the Loan but that this was accompanied by some other improper purpose. In *Cukurova Finance International Limited v Alfa Telecom Turkey Ltd* [2013] UKPC 2; [2016] AC 923, Lord Neuberger observed at §73 that a mortgagee's security was enforceable for the purpose only of securing satisfaction of the secured debt, such that enforcement for a purely collateral purpose would be ineffective as between the mortgagor and mortgagee. The reason was that such conduct frustrates the equity of redemption. He went on, however, at §78, to hold that if a chargee enforces his security for the proper purpose of satisfying the debt, "the mere fact that he may have additional purposes, however significant, that are collateral to that object, cannot vitiate his enforcement of the security." Glint's case, however, is that Niven's only purpose was an improper one.

71. The Administrators contend that the fact that Niven may have had such a subjective improper purpose is insufficient to entitle Glint to the relief sought. They contend that a distinction is to be drawn between the appointment of receivers and the appointment of administrators.

72. Before addressing Ms Hilliard's submissions on this point, it may be helpful to provide a brief summary of the administration procedure and its relationship with administrative receivership.

73. When the administration procedure was introduced by IA 1986, an administrator could only be appointed by court order. Moreover, an application had to be dismissed if an administrative receiver had already been appointed unless the holder of the security under which they were appointed consented, or that security was liable to be set aside under one or other provisions of IA 1986: s.9(3) of IA 1986 as originally enacted. An administrative receiver was a receiver or manager appointed over the whole or substantially the whole of a company's property appointed by or on behalf of holders of any charge which, as created, was a floating charge: s.29(2)(a) of IA 1986 as originally enacted.

74. The Enterprise Act 2002 introduced a number of important changes to the administration regime. First, it effectively abolished administrative receivership, save for certain special cases which are not relevant for present purposes.

75. Second, it enabled appointments to be made by specified persons out of court.

76. Third, it identified as one of those persons the holder of a qualifying floating charge (**QFC**): paragraph 14 of Schedule B1. That paragraph defines a QFC as including a floating charge which relates to the whole or substantially the whole of the company's property and is created by an instrument which, among other things, purports to empower the holder to appoint an administrator or to make an appointment which would be the appointment of an administrative receiver under s.29(2) of IA 1986.

77. Fourth, by paragraph 3 of Schedule B1, an administrator – however appointed – is required to perform their functions with the objective of:

> "(a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors."

The remainder of paragraph 3 imposes a hierarchy among those objectives, so that – for example – an administrator may perform their functions with the objective specified in (c) above only if they think it is not reasonably practicable to achieve either of the objectives specified in (a) or (b).

78. For practical purposes, therefore, since 2002 a charge-holder with security such as that contained in the Debenture (which, by §4 applies paragraph 14 of Schedule B1 to the floating charge created by §3.1.11) can no longer appoint an administrative receiver, but only an administrator.

79. Ms Hilliard submitted that the subjective purpose of the appointor is irrelevant in the case of administration, and what mattered is whether, viewed objectively, the appointment was made for one of the statutory purposes. The foundation of that submission was said to be the interpretation of IA 1986.

80. In this respect Ms Hilliard relied principally on the differences between receivership and administration, most importantly the fact that, whereas an administrative receiver had been required to safeguard the interests of the appointor (i.e. to act with the purpose of protecting and enforcing the security under which they were appointed), an administrator is required to give priority, so far as practicable, to the other objectives in paragraph 3(1)(a) and (b) of Schedule B1.

81. That meant, she submitted, that it is simply not possible for the person appointing an administrator to have, from an objective perspective, an improper purpose of acquiring the business and assets of the company. If they took advice, they must have appreciated that the administrator would be required to act independently of them, with a view to rescuing the company as a going concern or achieving a better outcome

than liquidation for the general body of creditors, unless those objectives were not practically achievable.

82. I do not accept this submission, which confuses the likelihood of achieving an improper purpose, following appointment, with the existence of that purpose prior to and at the time of appointment.

83. The facts of this case provide a good illustration. Assuming in Glint's favour that it establishes the requisite subjective improper purpose at trial, Niven will be shown to have appointed the Administrators for the sole purpose of trying to achieve, e.g. via a pre-pack arrangement, the acquisition of the business and assets of Glint. It failed to do so because, in circumstances where Glint was solvent and was able both to pay all outstanding creditors and to refinance the Loan, the Administrators were bound to bring the administration to an end. Niven cannot – at least for the purposes of a strike-out or summary judgment application – be assumed to know that Glint would succeed in refinancing in time. If Glint had not done so, then in the context of a company that was balance sheet solvent and able to pay its debts as they fell due – save only for the accelerated debt due to Niven which would be addressed via the pre-pack sale – the other administration purposes in sub-paragraphs 3(1)(a) and (b) of Schedule B1 were unlikely to stand in the way of achieving Niven's purpose.

84. I do not accept Ms Hilliard's submission that Niven's purpose should be viewed in the context of a company that was clearly insolvent because it could not repay the accelerated debt. The improper purpose alleged in this case is one which, at least arguably, infected not merely the final step of appointing the Administrators, but at least the necessary pre-condition of rendering the Debenture enforceable by accelerating the loan. Whether or not the acceleration of the loan could itself be rendered void because of an improper purpose, the cash-flow insolvency to which it gave rise can hardly be prayed in aid to defeat a finding of improper purpose in the resulting appointment of the Administrators.

85. I also do not accept Ms Hilliard's submission that allowing this appeal would open the floodgates to setting aside numerous appointments of administrators, wherever they formed part of a "loan-to-own" strategy. The circumstances of this case are unusual, involving (at least, sufficiently arguably involving) a solvent company where there was no genuine purpose to protect the appointor's interests as lender or security holder. If made out, those facts are a long way from the typical loan-to-own strategy deployed by creditors of an insolvent company as a means of maximising their potential recovery.

86. The only other aspect of the statutory regime to which Ms Hilliard pointed as justifying the contention that only an objective purpose will suffice is paragraph 81 of Schedule B1. This provides as follows:

> "81(1) On the application of a creditor of a company the court may provide for the appointment of an administrator of the company to cease to have effect at a specified time.
>
> (2) An application under this paragraph must allege an improper motive—

> (a) in the case of an administrator appointed by administration order, on the part of the applicant for the order, or
>
> (b) in any other case, on the part of the person who appointed the administrator.
>
> (3) On an application under this paragraph the court may—
>
> (a) adjourn the hearing conditionally or unconditionally;
>
> (b) dismiss the application;
>
> (c) make an interim order;
>
> (d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."

87. Ms Hilliard submitted that the existence of this provision – under which a finding of improper motive could lead only to a termination of an administration from a specified date, and not its invalidity from the outset – meant that the position in equity as regards receivers could not apply to administrators.

88. I do not accept this. An application under paragraph 81 can only be made by a creditor. The court has a wide discretion to make a range of orders, which are not dependent on a finding that the appointment was solely made for an improper purpose. There is no inconsistency between creditors being provided with such a remedy, and the company itself being able to seek an order that the appointment of an administrator is ineffective from the outset because it was made for an improper purpose. The existence of paragraph 81 accordingly does not, in my judgment, preclude reliance on equitable principles developed in relation to the appointment of receivers to render the appointment by a security holder of an administrator void if done solely for an improper purpose.

89. A further aspect of paragraph 81 was mooted in argument as being relevant to this issue, namely that according to at least one first instance decision it is not a threshold condition to making an order that the court finds on the balance of probabilities that the appointment was made for an improper motive (although the presence or absence of such a finding is likely to be highly relevant to the nature of the order, if any, the court will make): see *Aartree* at §28. I have some doubts as to whether that is correct, but both parties were content to accept that it is, and we heard no contrary argument. In any event, the point adds nothing to the points made in §88 above, and I place no reliance on it.

90. Accordingly, I conclude that a finding that an appointor has a subjective improper purpose is capable of justifying the conclusion that an out of court appointment of administrators is ineffective.

91. As I have noted above, the judge's decision was based upon what appears at §41 of *Aartree*. That was said, however, in a wholly different context. The company was insolvent. It could not carry on business without a rescue plan and further substantial funding. The case involved an application by a creditor under paragraph 81 of Schedule B1. The appointer – a QFC holder – appointed administrators at least in part

(albeit only as a minor consideration) because it was concerned at the reputational damage that might be caused to it by the manner in which it was being repaid its debt, potentially at the expense of other creditors. The allegation made was that the *only* proper purpose that the holder of a QFC could have in appointing administrators was to recover payment of its debt. The judge rightly rejected that argument, holding that it could not be improper to appoint administrators for the purpose of ensuring that creditors generally were better off than in liquidation and to enable an independent officer holder to carry out investigations. These were aspects of the statutory scheme. At §117 the judge said:

> "In short, it seems to me that the [appointor] in appointing administrators on the basis that it was owed a substantial sum and could not be 100 per cent certain that it would receive what it was owed in days or, possibly, even weeks from realisables alone, was entitled to say that enough was enough and this cannot amount to an improper motive."

92. *Aartree* was thus a case where the appointer had the genuine purpose of appointing administrators to achieve the statutory objectives. That was not rendered improper because it might have achieved repayment in full from realisables outside of an administration.

93. The judge concluded at §74, in reliance on *Aartree*, that there was no sufficiently arguable case of improper purpose because the appointment of the Administrators in this case would lead to an independent office holder taking control of the assets, that is a legitimate purpose for appointing administrators, and it was not rendered improper because the reason Niven wanted an independent officer holder appointed was to have the opportunity of buying the business from it.

94. The flaw in this reasoning, in my view, is that if (as is alleged by Glint) the only reason Niven wanted to have Administrators appointed was to enable them to acquire the business from them, it cannot be the case that such a motive (which is at least arguably improper) is rendered proper because the Administrators are in fact appointed as independent office holders. It would be different if part of the *purpose* of the appointment was to enable independent office holders to carry out the functions required of administrators in order to achieve the statutory objectives. That, however, is not part of the subjective purpose for which Glint contends and as to which there is a realistic prospect of success.

95. In light of this conclusion it is unnecessary to deal separately with Glint's contention that there is an implied term restricting the exercise of the power to appoint the Administrators (ground 6).

96. I will briefly address, however, the argument advanced by Glint in its skeleton argument, as developed at the hearing of the appeal, that there is an implied term in the Debenture that the power to request information is exercisable only for legitimate commercial aims. In fact, Ms Hilliard did not in the end dispute that a term of some such kind is to be implied. She was right in my view not to do so, given what was said in *Property Alliance Group v Royal Bank of Scotland plc* [2018] EWCA Civ 355; [2018] 1 WLR 3529. That case concerned a provision in a facility agreement which enabled the bank to call for, and to charge the borrower to bear the cost of, any

valuation of the properties secured in the bank's favour. In the judgment of the Court (Sir Terrence Etherton MR, Longmore LJ and Newey LJ), at §169, it was held that the power to call for valuation evidence was not wholly unfettered. While there was no question of the bank owing fiduciary duties to the borrower, and no dispute that the bank was free to act in its own interests:

> "It can, however, be inferred that the parties intended the power granted by clause 21.5.1 to be exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG maliciously."

97. Ms Hilliard submitted that there was no question in this case of §1.11.1 being used to vex Glint maliciously. That, however, was merely given as an example in *Property Alliance Group* of a use of the power that would have been improper. The principle to be derived from the case is that there is an implied limitation on the power, namely that it must be used for legitimate commercial aims. I consider that the same can be said of the power to request information in §1.11.1 – the power is to be exercised for the legitimate commercial aims of the security holder, *qua* security holder. Whether that makes any difference on the facts of this case at the end of the day is doubtful. If Glint fails to establish that the administrators were appointed for an improper purpose, it is highly unlikely that it could establish in the alternative that the request for information was done for an improper purpose. Nevertheless, I would not preclude this alternative way of advancing the case from continuing to trial.

<u>Estoppel/abuse of process</u>

98. There are four types of estoppel relied on by the Administrators: (1) estoppel by conduct (also referred to as abuse of process); (2) estoppel by convention; (3) estoppel by deed; and (4) estoppel by representation.

99. The factual basis of each is similar, and relies on the Waterfall Agreement and/or the Remuneration Letters. The context in which these were executed was that the administrations were being brought to an end so quickly that there was not time to have the Administrators' remuneration fixed in the usual way by a creditors' committee. An application to court was therefore necessary, and the court would need to know the extent to which the application was consented to or opposed by various stakeholders.

100. The Administrators contend that the only possible construction of the Waterfall Agreement and the Remuneration Letters is that the Administrators were *validly* appointed. Each of the companies agreed to the Administrators making an application to court and to them taking remuneration. These were things which were dependent on them having been validly appointed as Administrators.

101. Mr Watson KC, who argued this part of the case on behalf of the Administrators, accepted that there is a triable issue as to whether, in September 2019, Glint reserved its position on the validity of the Administrators' appointment, and whether Mr Cozens raised the possibility that the Administrators had been invalidly appointed the day after their appointment and that he was told that he would be fired if he raised it again. He submitted, however, that these points were irrelevant to each of the forms of estoppel relied on.

Estoppel by conduct/abuse of process

102. This was the form of estoppel/abuse upon which the judge reached his decision. It focuses on the application to ICCJ Prentis, and is based on the proposition that it is abusive for a person, having taken a position in one set of proceedings so as to procure a particular outcome, to take the opposite position in later proceedings.

103. The principle was explained by Sir Christopher Floyd in *LA Micro Group (UK) Ltd v LA Micro Group Inc* (above), at §26, as a form of estoppel that is "approached by means of a broad, merits-based assessment, and is not constrained by strict rules." It is material to ask, he said, whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. The matters to consider include, but are not limited to, factors identified by Ginsburg J in *New Hampshire v Maine* 532 US 742, cited by Sir Christopher Floyd at §24:

> "First, a party's later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

104. In *Malik v Malik* (above), in a judgment with which King LJ and Asplin LJ agreed, I pointed out that this form of estoppel by conduct can readily be seen as a species of abuse of process.

105. There are significant difficulties in applying this principle to the facts of this case, for the following reasons. First, it applies where a party has taken inconsistent positions in two sets of proceedings. Glint was not a party to the earlier proceedings.

106. Second, even if the principle extends to Glint because, although not a party, it supported the Administrators' application by way of the Remuneration Letters, an important (if not decisive) aspect of the broad merits-based assessment is that the party has *procured* or *obtained* an outcome in the first proceedings. That is not a fair analysis of the outcome before ICCJ Prentis, where Glint merely acquiesced in the relief sought by the Administrators for their own benefit.

107. The three matters ordered in the Order of 6 December 2019 were (1) the Administrators' remuneration was fixed on a time cost basis, and capped at their fee estimate (just over £1.5 million); (2) the Administrators obtained their discharge from liability as administrators from 25 December 2019; and (3) the Administrators' costs of the application were to be paid as an expense of the administration. Each of those was for the benefit of the Administrators.

108. At most it might be said that Glint benefited to some extent from the cap being placed on the Administrators' remuneration. As ICCJ Prentis observed during the hearing,

however, a cap is commonplace: rule 18.30 of the Insolvency Rules 1986 precludes an administrator drawing remuneration in excess of a fee estimate without approval. There was in this case no issue about the cap: the Administrators were not contending for more and it cannot be said that this aspect of the Order was in some way a victory for Glint. On the contrary, if Glint's claims are made out at trial, it will no doubt be its case that burdening the companies with remuneration in excess of £1.5 million was something they should not have been exposed to at all.

109. Third, it is not at all clear that, in the absence of the Waterfall Agreement or the Letters, ICCJ Prentis would have made any different order. The question of the validity of the appointment was not raised before him. On the Administrators' case, the validity of any application by administrators for relief in the course of an administration will depend upon the administrators having been validly appointed. A court, however, will not routinely, if ever, give any active consideration to whether the administrators were validly appointed. The validity of appointment will simply be assumed.

110. It does not appear that the fact that Glint had reserved its rights to challenge the validity of the appointment was brought to ICCJ Prentis' attention. That is no cause for criticism of the Administrators or their advisors. What matters is, if it had been raised, what would have happened? Mr Watson submitted that there could have been only one outcome: ICCJ Prentis would have had no option but to have refused to make any order unless and until the validity of the Administrators' appointment was resolved. That is because the court has no jurisdiction to make an order fixing the basis of administrators' fees, or discharging them from liability as administrators, if they are not validly appointed in the first place.

111. I find that an unlikely proposition. The validity of the Administrators' appointment on the facts of this case could not have been resolved quickly, but would have involved litigation lasting months at least. On Mr Watson's case, during that time the purported administration could not have been brought to an end, but would have remained in place, with potentially dire consequences for Glint's business, while further substantial expenses and remuneration were incurred. It was not unreasonable for Glint to opt to bring what they saw as an improper administration to an end on the basis of a "pay now and litigate later" approach, by consenting to what needed to be done in order for the administrators' appointment to come to an end while reserving their right to object to the validity of the appointment.

112. In those circumstances, to avoid the unnecessary continuation of a process that – whether validly commenced or not – should be brought to an end, I think it would have been open for the court to take the pragmatic approach of making an order on the footing that the administrators were validly appointed, without prejudice to the companies' right to contend otherwise in the future. I observe that this is not a case where, on Glint's case, the court lacked jurisdiction in the fundamental sense that because of the subject matter of the case it had no power to hear it at all. Rather, it was said to lack jurisdiction in the sense that one or more statutory requirements needed to be complied with before it could exercise its jurisdiction in the particular case: see, for example, *Khan v Singh-Sall* [2023] EWCA Civ 1119, per Nugee LJ at §41 to §44.

113. These difficulties mean that, at the very least, it cannot be said that on a broad assessment of the merits at trial, Glint's claim will unarguably be characterised as an abuse of process. The judge was accordingly wrong to strike out the claim on this basis.

Estoppel by convention

114. The requirements of estoppel by convention were summarised by Briggs J in *Revenue and Customs Comrs v Benchdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174, at §52 (cited with approval, subject to a minor caveat, in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39; [2022] AC 886 *per* Lord Burrows at §45):

> "i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
>
> iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

115. The Administrators contend that the recitals to the Waterfall Agreement contained a clear and unambiguous common assumption that the Administrators were validly appointed, which the Administrators relied on by not applying for directions but instead simply exiting from administration, and by taking remuneration and paying it to their firm. At best, in my judgment, this raises questions of fact which need to be investigated at trial before a conclusion could be reached in the Administrators' favour. Whether there was a shared assumption that the statement that the Administrators had been "appointed" meant that they had been *validly* appointed, particularly when Glint had reserved its position in this respect, is far from clear. Similarly, whether the Administrators would have acted differently, and in what way, had it been made clearer that Glint was *not* agreeing that the Administrators' appointment was valid is something which needs to be investigated at trial. It may be relevant in that context that Glint wrote within weeks of the order of ICCJ Prentis, giving notice of claims – including that the Administrators had been invalidly appointed – with a view to such claims being carved out of the Administrators' release.

Estoppel by representation and Estoppel by deed

116. Mr Watson fairly accepted that if estoppel by convention could not be determined summarily against Glint, then the Administrators could not succeed at this strike-out/summary judgment stage in respect of representation either by estoppel or by deed. It is unnecessary, therefore, to say anything more about them.

Conclusion

117. For the above reasons, while I accept that the judge was correct to find that the failure to respond to the 15 July Requests constituted an event of default, he was wrong to conclude that Glint's claim that the Administrators were invalidly appointed had no realistic prospect of success. I would accordingly allow the appeal against his decision to strike out the claim, or grant the Administrators summary judgment in respect of it.

Lady Justice Falk

118. I agree.

Lord Justice Arnold

119. I also agree.