

Neutral Citation Number: [2019] EWHC 1187 (Ch)

Claim No: HC-2017-002735

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 20 May 2019

Before
Joanna Smith QC sitting as a Deputy Judge of the High Court

B E T W E E N:

- (1) **FIRST NATIONAL TRUSTCO (UK) LIMITED**
(2) **BAHIA BLANCA CLUB B LIMITED**

Claimants

and

- (1) **KEVIN PAGE**
(on his own behalf and as representative for all 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**

Defendants

Mrs Talbot Rice QC and Mr Ben Waistell (instructed by Keystone Law LLP) for the
Claimants

Mr Alan Gourgey QC and Mr Jack Watson (instructed by Ashtons Legal) for the Defendants

Hearing dates: 20, 21, 22, 25, 26, 27, 29 March and 2 April 2018

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated authentic.

Deputy Judge Miss Joanna Smith QC:

Introduction

1. At its heart, this dispute concerns three main issues as follows:
 - (i) First – the question of where the liability should fall for taxes levied on the Second Claimant, Bahia Blanca Club B Limited (“**BBCB**”) by the Spanish Tax Authorities (“**the Spanish Taxes**”) in the sum of €2.7m in respect of various timeshare apartments (“**the Apartments**”) at the Bahia Blanca Timeshare Resort in Gran Canaria (“**the Resort**”). In short, the Claimants (whose roles in the timeshare structure I shall return to in more detail later) say that the timeshare owners, who are members of the Bahia Blanca Holiday Club (“**the Club**”) are obliged to indemnify them in respect of that liability. This claim is pursued against the First Defendant, Mr Kevin Page (“**Kevin Page**”), on his own behalf and as a representative of the members of the Club which is an unincorporated association, and the Third Defendant, Bahia Blanca Leisure Limited (“**BBL**”), a company now standing in the shoes of the Founder Member of the Club which is itself owned and controlled by Kevin Page and his brother, the Second Defendant (“**Paul Page**”) (together “**the Pages**”).
 - (ii) Second – the question whether the Fourth Defendant, Bahia Blanca Leisure SL (“**BBL SL**”), a Spanish company also owned and controlled by the Pages, should be ordered to transfer the Apartments back to BBCB in circumstances where it is alleged that it purchased the Apartments in late 2015 knowing of a breach of trust on the part of the Claimants such that it now holds the Apartments on constructive trust for the Claimants. This involves an allegation of knowing receipt. Until the third day of the trial the Claimants also pursued a claim of dishonest assistance against BBL SL and the Pages, but this allegation was dropped by way of amendment in the form of a Re-Re-Amended Particulars of Claim (“**the RRAPoC**”) in respect of which I gave permission on the third day of the trial. For present purposes it is important to note that the upshot of this amendment was that the personal claim against Paul Page was dropped (although he remained a Defendant to the claim in the RRAPoC) and that changes were made to the plea of knowing receipt. Whilst these changes were not objected to by the Defendants on the pragmatic grounds that to do so might disrupt the trial, nevertheless they made it clear that it would be their case (and had always been their case) that the knowing receipt claim had no real prospect of success. I shall return to this later.

- (iii) Third – the entitlement of the First Claimant, First National Trustco (UK) Limited (“**FNTC**”) to recover payment of outstanding remuneration and expenses which are said to be due and owing to it by the Club.
2. Stating the issues shortly as I have done above, however, belies the very considerable complexity of the legal arguments arising, in particular, in relation to the first two issues. This complexity is a function, in part, of the way in which the Claimants’ case has developed throughout the litigation, with substantive amendments being made to the legal arguments right up to the production of the RRAPoC at trial. The List of Issues in the trial bundle identified 25 issues (some with numerous sub-issues) which the court was required to decide and although an effort was made in relation to the first main issue identified above (liability for the Spanish Taxes) to refine the various sub-issues (in a document which was agreed by the parties after the trial and is attached hereto at Appendix 1 (“**App 1**”)), there remain numerous hotly disputed issues of law and fact to be addressed.
 3. Whilst the Claimants’ written submissions were relatively concise, the Defendants written opening skeleton ran to 133 pages and their written closing submissions ran to 177 pages. Together, the parties provided me with approximately 90 authorities in the form of six lever arch files at the commencement of the trial, together with two additional supplemental bundles of authorities in advance of oral closing submissions. It was agreed that oral closings would last for 1 day each, subject to the Claimants being given a short time at the end to reply, but this was nevertheless insufficient time for all of the numerous arguments to be adequately covered, much less for me to be taken in detail through the authorities. I have taken all of these materials into account in producing this judgment although it is obviously not necessary or appropriate for me to refer to everything.
 4. By way of a route map, I deal with the factual background in section A, the witnesses in section B, the issue of the entitlement to an indemnity in respect of the Spanish Taxes in section C, the claim of knowing receipt in section D and the claim for fees and expenses in section E.

A. Factual Background

5. Before I can consider the outstanding issues, I must address the factual background to the claim, which involves looking in some detail at the timeshare structure, the suite of documents which put the timeshare structure in place and the various roles of the main protagonists in relation to that structure.

The Creation of the Club and its Structure

6. In Spain, timeshare resorts are commonly held pursuant to a club trust structure, which I understand from the evidence to have been widely used since the mid 1980s. Pursuant to this structure, the formal ownership of individual apartments is vested in and maintained by an owning company (or companies) the membership of which is limited to an independent custodian trustee which holds and controls the owning company in trust for the benefit of the Members of the club from time to time. This ensures that the apartments can be made available for the benefit of members of the timeshare club, who each purchase occupation rights over the apartments in the form of individual weeks. The members of the timeshare club thus enjoy rights of occupation and are subject to the rights and obligations set forth in the constitution of the club.
7. The Resort in this case was created in or about 1988 for the purpose of making the Apartments (which it seems at this time were still in the process of being developed) available to members of the public who could purchase timeshare weeks. TS International Plc (which later changed its name to TS International Ltd) (“**TSI**”) was the owner of the property on which the Apartments were built and the Founder Member of the Club.

The 1988 Constitution

8. The Club was established by a Constitution dated 1 January 1988, executed by TSI and governed by English law (“**the Constitution**”). The Constitution governed the rights of Members of the Club and the role of the Committee, which was to carry out the decision making in respect of the Resort. The Club was to be a non-profit making club whose object was 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. Pursuant to the 1988 Constitution, TSI as Founder Member, agreed to transfer the Apartments (as identified from time to time in an Appendix annexed to the Constitution in the Fourth Schedule) to the “Owning Company”, as defined, which TSI agreed to procure would not engage in any trading activity, but would keep the Apartments free from any mortgage, lien or encumbrance.
10. I shall return to the detailed provisions of the Constitution later in this judgment, but for present purposes suffice to say that the Owning Company was defined as “Midmark 10 Limited” (“**Midmark**”), a company limited by guarantee and incorporated in Scotland. Membership of the Owning Company was to be limited to an independent custodian trustee or joint trustees (“**the Trustee**”) 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*”. The Trustee,

identified in the Constitution as Midland Bank Trust Company Limited and Landmark Title & Trust Limited, together acting as joint trustees, was obliged to use its control over the Owing Company to permit the Members' occupation of the Apartments.

11. In consideration for the transfer of the Apartments to the Owing Company and ownership of the Owing Company being vested in the Trustee, TSI was entitled to 51 Membership Certificates created in respect of each Apartment transferred (51 for each Apartment corresponding to the number of weeks available). TSI could sell those Membership Certificates to members of the public and was entitled to all unsold Membership Certificates in relation to each Apartment.
12. 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 pursuant to Membership contracts whereby they signed up to the constitution of the Club.
13. The Constitution creates a Committee of five: three Ordinary Members of the Club, elected to the Committee, and two appointed by the Founder Member. The Committee was invested with 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.
14. TSI, on behalf of the Club, delegated the Club's management and administration of the Apartments and their contents, and any other property belonging to the Club, including the responsibility for collecting all reasonable costs for such management and administration from the Members of the Club, to Mantenimientos de Morgan SL by agreement dated 31 November 1988.
15. It is the Claimants' case in these proceedings that, notwithstanding the identification of Midmark as the Owing Company in the Constitution, no Apartments were ever in fact transferred to Midmark. Instead, the Claimants say that the 10 Apartments listed in the original Fourth Schedule to the Constitution were all transferred to Bahia Blanca Club “A” Limited (“**BBCA**”), a wholly owned subsidiary of FNTC incorporated in the Isle of Man. The Apartments subsequently added in later editions of the Fourth Schedule were all transferred to BBCB, a wholly owned subsidiary of FNTC, incorporated in Northern Ireland. In circumstances I shall describe in more detail later on, the 10 Apartments originally owned by BBCA were subsequently transferred to BBCB in 2000.

The Deed of Trust

16. Pursuant to the Constitution, the Trustee would hold and control the Owing Company pursuant to the terms of a Deed of Trust, which set out the rights and duties of the Trustee.
17. Three executed Deeds of Trust between TSI and the Trustee have been disclosed in this case, all dated (somewhat oddly and obviously inaccurately) the 31 November 1988. Two of these documents (signatory numbers 623872 and 623873 respectively) are identical in their terms and one includes slightly different wording (on which the Claimants seek to rely) in Recital A (signatory number 623874). Neither the Claimants nor the Defendants have any direct evidence as to the circumstances in which these three documents came to be executed. For present purposes, suffice to say that one of the issues in this case, which I must decide, is whether the Deed of Trust with signatory number 623874 is, in fact, the governing Deed of Trust.
18. It is common ground that the Deed of Trust (whichever document is the governing Deed) includes in Recital C a definition of the Trust Property, which is of significance in this case, makes provision in clause 13 for the Founder Member to pay or procure that the Club shall pay to the Trustee such fees as may from time to time be agreed as remuneration for the performance of its duties and, importantly, includes in clause 14 an undertaking from the Founder Member (for itself and on behalf of the Club) to indemnify the Trustee against all costs, liabilities and expenses. I shall return to the detail of these provisions in due course.

The Changing Identity of the Trustee

19. By a Deed of Retirement dated 31 December 1990, Midland Bank Trust Company Ltd retired as trustee, leaving Landmark Title and Trust Limited as the sole remaining trustee company. Recital C to the Deed of Retirement recorded that it was intended that “*the Property now in the Trust...shall be transferred to the Continuing Trustee*”. Details of the Property now in Trust were set out in the Second Schedule which identified “*All shares in Midmark 10 Limited registered in the name of the Retiring Trustee*”.
20. On 3 January 1997, FNTC, a limited company incorporated in England and Wales with company number 02425251 (then named First American Trustee Company (UK) Limited), took over as Trustee from Landmark Title and Trust Limited (then named First American Title Insurance Company (UK) Limited) by a Deed of Appointment and Retirement. Recital C to this Deed again recorded that it was intended that “*the Property now in the Trust...shall be transferred to the Continuing Trustee*”. However, the details of the Property in Trust now set out in the attached Second Schedule differed from those of the earlier Deed of Retirement. Now the Property in Trust was identified as “*Membership of the following Owing Companies registered in the name of the Retiring Trustees or its subsidiaries...*”. Three Owing

Companies were then identified, namely (i) BBKA, (ii) BBCB and (iii) Midmark. BBKA was identified as holding 10 Apartments; BBCB was identified as holding in excess of 90 Apartments; and Midmark appeared not to hold any Apartments.

21. FNTC is part of the First National Trustee Company Group (apparently the world's leading provider of business and legal solutions for resort developments) and is a highly resourced and experienced professional trustee operating in the timeshare leisure business. It is professional trustee for something in the region of 100-150 timeshare resorts in Spain and it holds itself out as having considerable experience of dealing with issues arising in the timeshare sector, including, as I understand it, issues arising in respect of Spanish taxes.

The involvement of the Pages in the Club and changes to its controlling entities

22. In the late 1980s/early 1990s, the Pages' father, through the family business Dewfresh Mushrooms Limited ("**Dewfresh**"), purchased shares in TSI, acquiring a shareholding of about 20% of its shares. It seems that he was of the view that the opportunity to sell timeshare weeks was potentially very lucrative. Indeed, during the 1990s, Dewfresh financed the development of additional Apartments to be added to TSI's portfolio at the Resort.
23. However, by the late 1990s, TSI had run into financial difficulties and Dewfresh called in its loans. This led to the acquisition in 1998 of the assets in TSI by BBL which had been set up by the Pages for this purpose. By an assignment dated 21 April 1998, BBL also assumed the rights and obligations of TSI as the Founder Member under the Deed of Trust and the Constitution of the Club. At or around the same time, the Pages (i) set up BBL SL to manage the commercial operations at the Resort, namely the bar, restaurant, supermarket and office accommodation; (ii) replaced the original management company with Mantenimientos de Bahia Blanca SL ("**the Management Company**").
24. Following BBL taking over as Founder Member, Kevin Page was appointed to the Club Committee as representative of BBL.
25. There is a dispute between the parties as to the extent of the Pages' involvement in the management of the Club between about 1998 and 2003. However, putting the matter as neutrally as possible for present purposes, it is common ground that during this period, there was an attempt by Mr Wade Bostock ("**Wade Bostock**") and his stepfather, Mr Ray Bostock, a solicitor, ("**Ray Bostock**"), respectively Chairman and member of the Club Committee (together "**the Bostocks**"), to remove FNTC as Trustee (the Claimants describe this rather colourfully as "*the unlawful hijack*" of BBCB). This led to the Bostocks procuring that members of the Committee of the Club, including Kevin Page, were registered as directors of

BBCB at the Northern Ireland Register of Companies in place of FNTC's appointed directors (Messrs Broomhead, Gardner-Bougaard and McLean, and the company secretary, Mr Declan Kenny) and attempting to procure a similar situation in relation to BBKA, albeit that this latter attempt failed.

26. It is the Claimants' case that as part of this attempted "*hijack*" (i) Mr Adrian Diaz-Saavedra ("**Mr Diaz-Saavedra**"), a Spanish lawyer, was appointed as BBCB's Fiscal Representative in Spain (it being a requirement of Spanish law that a non-resident company which owns Spanish property must appoint a Fiscal Representative); (ii) the Bostocks purported to amend the articles of association of BBKA and BBCB and produced an amended Club Constitution ("**the New Constitution**") and a new Deed of Trust ("**the New Deed of Trust**") which named a new company, Bahia Blanca Holiday Club Limited, as Trustee.
27. Further, on 26 December 2000, a Deed of Adaptation was executed by BBCB, BBL and the Management Company pursuant to new Spanish timeshare legislation passed in 1998 and known as Law 42/1998 relating to rights of occupation and the application of tax rules. Pursuant to the Deed of Adaptation, the scheme of timeshare was formally recognised as a pre-existing scheme in accordance with Spanish law and Members' rights, as Members of the Club, were recorded as protected rotational rights of occupation. The Deed of Adaptation referred to the New Constitution and the New Deed of Trust and recorded that the Club would continue in existence for a period of 50 years, after which it would be dissolved.
28. On the same day, the 10 Apartments held by BBKA (and thus still under the control of FNTC as Trustee) were transferred to BBCB, such that from this point onwards, BBCB held all of the Apartments at the Resort. The Deed of Adaptation was registered at the Spanish Land Registry on 22 February 2005.
29. FNTC discovered the steps that had been taken in an attempt to remove it as Trustee and following the threat of legal proceedings, the Bostocks were eventually removed from the Committee at or around the end of 2003. Kevin Page took over as Chairman of the Committee and Mr Richard Pennington, a solicitor and partner in the firm of Ward Gethin Archer Limited ("**Richard Pennington**") replaced Ray Bostock as a Committee Member, appointed on behalf of BBL, as Founder Member.
30. Thereafter, FNTC was reaffirmed as Trustee pursuant to the Deed of Trust, re-established as owner and controller of BBKA and BBCB and, subject to the tax issues identified below, there followed a period of relative stability for the Club during which a working relationship between FNTC and the Club Committee appears to have been established. FNTC appointed PWC to

investigate the tax position further. The Club agreed to settle outstanding Trustee fees and expenses and continued to pay fees and expenses on an annual basis in settlement of invoices from FNTC. By a written resolution on 27 May 2005, FNTC amended the BBCB Memorandum and Articles of Association so as to replace those filed during the period of the Bostocks' control of the Club. This resolution recorded that FNTC was "*the sole guarantee member of [BBCB]*".

31. The new Memorandum of Association for BBCB recorded its objects (amongst other things) as:

"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".

32. Kevin Page has remained as Chairman of the Club Committee ever since. His brother, Paul Page, has never been a member of the Committee and describes himself in his witness statement as a "sleeping partner".

The Spanish Taxes

33. In or around 2000, the Spanish Tax Authorities (the Agencia Estatal de Administracion Tributaria ("**the AEAT**")) carried out a tax audit over BBCB and, notwithstanding attempts by the Bostocks and Mr Diaz-Saavedra to persuade the authorities that BBCB, as a non trading company, could not have any liability to pay corporation tax, an enforcement notice regarding BBCB's Corporate Income Tax liability was served on BBCB on 9 November 2001 for the years 1996, 1997 and 1998 demanding payment of the sum of €390,048.30. In 2005 and 2006 respectively, two further enforcement notices were served on BBCB for the period 1999-2002 relating to (i) a demand for Non-Resident Entity Special Property Tax in the amount of €365,755.17; and (ii) 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 together with interest for late payment subsequently became due.
34. These demands for tax by the AEAT were appealed by Mr Diaz-Saavedra and Lujan Grant Thornton, who were retained by and acted on the instructions of the Club Committee. It appears to have been their advice that the appeals were likely to succeed. The Defendants' case is that, at this stage, the Committee had not considered in detail or taken advice as to whether (in the event that the appeals did not succeed) the Club was in fact liable for the tax. The Defendants

say that the Club pursued the appeals on the assumption that it might be liable and that in those circumstances provision was made for that potential liability in the Club's accounts and in the creation of a reserve fund. The Claimants say, however, that the Club operated at all material times on the assumption that, if the appeals failed, the Club would ultimately be liable to pay the Spanish taxes, an assumption that they say was shared by both Claimants.

35. Mr Diaz-Saavedra acted as BBCB's Fiscal Representative for the purposes of the appeals and there is a dispute between the parties as to whether FNTC approved his role.
36. In circumstances where the tax demands from the AEAT went unpaid, it placed "embargoes" on the titles to the Apartments held by BBCB (notwithstanding that appeals were being pursued). It is common ground that these embargoes are akin to a legal charge on the property, entitling the AEAT (if it chooses to do so) to sell the property in order to raise funds to meet the tax liability.
37. After many years, the appeals ultimately proved fruitless. 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 Nacional rejected the appeal in respect of BBCB's Special Non-Resident Entity Tax liability and on 11 June 2014, the Supreme Court rejected the final appeal in respect of BBCB's Non-Resident Income Tax liability.
38. In the meantime, the Club's Committee, having received advice that enforcement by the AEAT was likely to prove difficult, decided at its AGM on 6 August 2011 to release the reserve fund that had been collected for payment of the Spanish Taxes and to use the money instead to refurbish, upgrade and modernise the Resort for the benefit of its Members. The Members of the Club were informed of this decision at their AGM on 10 November 2011.

The Sale of the Apartments

39. In 2012, after learning that the latest appeal against the Non-Resident Income Tax had failed, there was some discussion in correspondence to which I shall have to come in more detail later, as to the Club's options. This included the potential for Kevin Page, or a Spanish company set up for the purpose, to bid for the bare titles to the Apartments at auction, in the event that the AEAT were to put the titles up for sale.
40. Between 2012 and 2015, very little transpired; the AEAT took no further action and it appears to have been hoped by all parties that the embargoes would fall foul of Spain's four year limitation period and that the obligation to pay tax would fall away. However, in March 2015,

the AEAT confirmed that an auction would now take place and there was further correspondence as to the steps that the Club should take.

41. An auction was finally held by the AEAT on 27 May 2015 but (as was expected in circumstances where the Apartments were subject to rights of occupation on the part of the Members of the Club) no bids were received on either the first, or second, auction (the second taking place within half an hour or so of the first). Thereafter, however, a one month period for direct allocation began on 2 June 2015 during which it was possible for any bidder to purchase the Apartments. It was during this period that the Defendants say Kevin Page made a final decision to bid for the Apartments and indeed he instructed Mr Diaz-Saavedra to make a bid on or about 29 June 2015 for the bare titles to the Apartments (identified as 59 Type A and 46 Type B Apartments) in the sum of €80,000. This first bid was not accepted and so an increased offer was made of €110,000 on or about 13 July 2015.
42. It is the Defendants' case that the increased offer was made on behalf of the Management Company, but that, in error, the AEAT in fact accepted the offer on behalf of BBL SL. Thereafter, the Apartments were transferred to BBL SL and the embargoes were extinguished; a Certificate of Allocation of the bare titles to the Type A and Type B Apartments in favour of BBL SL was issued on 22 December 2015.
43. It is common ground that the Defendants did not inform FNTC that a bid had been made for the Apartments by the Management Company and did not immediately inform FNTC that the bid had been accepted by the AEAT and that the Apartments had been transferred to BBL SL. On 6 February 2016, by way of an email to FNTC's accounts department, Richard Pennington notified FNTC that, in light of the sale of the title deeds to the Apartments, FNTC was no longer the owner of the title deeds and was therefore not entitled to charge any sums to the Club. Richard Pennington did not at this stage mention that BBL SL was the new owner. However, a copy of the Certificate of Allocation was provided to FNTC on or about 17 February 2016.
44. Since the purchase of the Apartments by BBL SL, a new Constitution ("**the 2016 Constitution**") has been prepared for the Club stating that legal title to the Apartments is to be held by a Trustee Company on trust for Club Members and reflecting that it is to "*continue in existence without limit as to time*". At the Club's AGM on 17 November 2016, a formal vote was held on the adoption of the 2016 Constitution which was passed unanimously.
45. For the sake of completeness, I should add that there are 6 apartments which were not transferred to BBL SL; their title deeds remain in the custody of BBCB. I was given no

explanation for this, but assume that these 6 apartments were not, for whatever reason, the subject of embargoes and so were not put up for auction by the AEAT.

46. It is the Defendants' case that it is their intention that BBL SL will hold the Apartments on trust for Members. It is also their case that the intention has always been to register the 2016 Constitution and enter into a new Deed of Trust reflecting the new identity of the trustee. Notwithstanding this stated intention, no steps were taken between the date of acquisition of the Apartments in early 2016 and April 2017 (when the Claimants demanded, and the Defendants gave, an undertaking that no steps would be taken to dispose of or deal with the Apartments) to execute a new Deed of Trust. The continuing existence of this undertaking has since prevented any steps being taken to register the 2016 Constitution or indeed to register the bare title to the Apartments in BBL SL's name.
47. On 21 March 2017, BBCB received a demand from HMRC pursuant to the Mutual Assistance Recovery Directive 2010/24/EU, for payment of the Spanish Taxes in the sum of £2,239,383.45, including interest, by 18 April 2017. This prompted a letter from FNTC to Richard Pennington, in his capacity as solicitor for BBL, on 7 April 2017 requiring BBL to put it in funds to pay the tax demand. On the same date, FNTC sent to BBL a Letter of Claim
48. These proceedings were commenced on 19 September 2017. By an Order of Deputy Master Hansen dated 2 November 2018, Kevin Page was appointed as representative party for the current Ordinary Members of the Club (besides BBL which is separately sued as a defendant and which owns approximately half of the available weeks at the Resort).

B. The Evidence

49. Much of the witness evidence in this case concerned events dating back many years to the early 2000s and it is therefore not surprising that the witnesses did not always have a clear recollection of events and had often sought to reconstruct the evidence in their statements by reference to the existing documents. In the circumstances, I approach the evidence of all witnesses with a degree of caution, reminding myself that I must seek to test it against the available contemporary documentary evidence. However, I set out below my general assessment of the witnesses insofar as may be relevant.

The Claimants' Witnesses

50. The Claimants relied upon the evidence of four witnesses of fact, only three of whom gave oral evidence.

51. First, Mr Declan Kenny (“**Mr Kenny**”) who provided three witness statements. He has been a non-executive Director of the First Names Group Board (with responsibility for FNTC), as well as Executive Chairman of FNTC since July 2013. Over the course of his time at FNTC he acquired a considerable degree of knowledge as to the Spanish taxation system, which he gained both from his own experience and from dealing with accounting and legal advisers.
52. Mr Kenny was clearly angry that the Defendants had acted in a manner which he considered to be contrary to the interests of the Club and, at times, his anger appears to have made it difficult for him to be entirely straightforward in giving his evidence; thus by way of example, he appeared to me to exaggerate the extent of his shock at the conduct of the Defendants, which he persisted in characterising as fraudulent, and he was on occasion loathe to make appropriate concessions during cross examination which he knew might be helpful to the Defendants. However, subject to these points I do not believe that he was deliberately seeking to mislead the court, although, in the circumstances, I have been particularly careful to seek to corroborate his relevant evidence, where possible, against the contemporaneous documents.
53. Second, Ms Brigit Scott (“**Ms Scott**”) who provided one witness statement. She has worked for FNTC for many years and was promoted to the role of director in 2013. She explained that her role in relation to the timeshare business has always been in a supporting, administrative capacity and that she has only ever taken action after obtaining instructions from Mr Kenny.
54. Ms Scott was candid in admitting that she did not recall the detail of events in 2012 and 2015 and she was also quite prepared to make concessions when appropriate. I have no doubt that she was an honest witness who was doing her best to assist the court, but given her lack of recall, I must obviously weigh her evidence against the contemporaneous documents, where possible.
55. Both Mr Kenny and Ms Scott gave consistent evidence about FNTC’s understanding as to liability for the Spanish Taxes over the relevant period, which evidence was largely uncorroborated. In circumstances where that evidence was largely consistent and, for the most part, unchallenged, I accept it, and shall return to it in due course.
56. Third, Ms Eva Gonzalez Ahmadabad (“**Ms Gonzalez**”) who provided one witness statement. She is the office manager of Total Spanish Solutions SL (“**TSS**”), a Spanish company based in Marbella, Malaga, Spain. Since 2011, Ms Gonzalez has worked predominantly for Ms Scott (who is her manager) and FNTC. In this role, she has worked mainly on issues relating to timeshare clubs and their properties. Ms Gonzalez gave evidence in English, albeit that Spanish is her first language. She was cross examined briefly about a few specific events and admitted

that in relation to a number of key conversations, she did not remember what had been discussed and was instead reliant upon the documents.

57. Fourth, Ms Paloma Marin (“**Ms Marin**”) who provided one witness statement on which she was not cross examined. Ms Marin is a specialist tax lawyer practising in Malaga, Spain. Since 1998 she has been retained generally to advise FNTC on Spanish law tax matters. Her evidence was primarily focussed on a description of the operation of the club trust structure of timeshare resorts in Spain, the role of the Fiscal Representative and the conduct of tax proceedings, including enforcement procedure and embargoes. She was not involved in the tax appeals pursued by the Club and had no detailed knowledge of, or involvement in, the events with which this case is concerned. In the circumstances her evidence is of only peripheral relevance to the issues I must decide.

The Defendants’ witnesses

58. The Defendants relied upon the evidence of three witnesses of fact, all of whom were cross examined.
59. First, Kevin Page who was cross examined at length and in detail about his three witness statements which ranged across a period of nearly 20 years. During the course of this cross examination (and notwithstanding that the Claimants no longer need to establish dishonesty in order to succeed in their various causes of action) he was repeatedly accused of dishonesty, including in relation to the so-called “*hijack*” of the Club by the Bostocks, which appears to me to be largely irrelevant to the issues arising in these proceedings. It was suggested to him that he had deliberately and covertly sought to obtain control of the Apartments in 2015, that he had no intention of putting them into trust so as to protect the Members of the Club and that his actions had been for his own, and his brother’s, benefit and for the benefit of their companies.
60. Kevin Page appeared to me to display both patience and fortitude in dealing with this line of questioning and I make it clear at once that I do not need to, and do not, make any findings of dishonesty against him. I accept that there were times when his evidence was not always entirely consistent with his witness statements but it seemed to me that this was often due to his memory failing him, alternatively to his having convinced himself (well after the event) as to his state of mind at any particular time, as opposed to anything more sinister. In the circumstances, I do not accept the Claimants’ submission that he is a man who “*will mislead to achieve his end*”. In my judgment, Kevin Page was doing his best during his oral evidence (in difficult circumstances including his own ill health) to assist the court. However, in the circumstances, and where necessary, I have again been particularly careful to check his

evidence against the contemporaneous documents, which I have preferred insofar as there are any inconsistencies.

61. Second, Paul Page who provided one witness statement. Regrettably Paul Page admitted that he had neither drafted his statement himself and nor had he read it carefully before signing it. This led to him correcting various parts of his statement during his cross examination. It became apparent during his oral evidence that he had had little involvement in the detailed affairs of the Club and that at all times he had been guided by his brother in taking action in connection with those affairs. In the circumstances, I place little weight on his evidence.
62. Third, Mr Adrian Diaz-Saavedra who provided two witness statements to the court and was cross examined as to his involvement with the Resort going back over many years. For the most part, he gave his evidence in English albeit with some assistance from a translator where necessary. It is common ground that I should accept his evidence, which was transparently honest.
63. Finally, the Defendant also relied upon the evidence of an expert in Spanish Law, Mr Jordi Falceto (“**Mr Falceto**”), the Litigation Department Manager at Bias De Lego Abogados. Mr Falceto is an expert in Spanish civil and commercial law and has more than 17 years experience in practice before the Spanish Courts. He was measured in his answers under cross examination and he always appeared to give careful consideration to those answers, which included a number of quite complex hypothetical scenarios put to him by the Claimants. Whilst language was occasionally an issue, he appeared to me to be anxious to ensure that he understood the questions put to him before he answered them. Where matters fell outside his expertise he said so. In the circumstances I accept his opinions, although I note that there is a dispute between the parties as to whether Spanish law is applicable, a dispute I shall return to later in this judgment.

C. Liability for the Spanish Taxes

64. The issues I must decide in respect of the Claimants’ claim for Spanish Taxes are set out in App 1 and are as follows (references to numbered issues later in this judgment are to the numbering as it appears in App 1):
 - (i) Is BBLL and/or the Members of the Club obliged to indemnify FNTC or BBCB in respect of the Spanish Taxes pursuant to clause 14 of the Deed of Trust:
 - (a) owing to the fact that the tax liability is a liability incurred in connection with the Trust Property (whether the Trust Property is BBCB and/or the Apartments) and the words “*shall be kept fully indemnified*” are to be given a

broad meaning so as to apply whether or not FNTC itself is under the liability in question; alternatively

(b) because a demand or claim has been made on FNTC by BBCB; alternatively

(c) because FNTC has a liability to pay BBCB because it is duty bound to do so.

An answer in the Claimants' favour on any of these points is said by the Claimants to be capable of being dispositive of the claim for the Spanish Taxes. This is accepted by the Defendants in relation to (a) and (c) but not (b) above.

(ii) Alternatively, does FNTC and/or BBCB have a right of indemnity out of the trust property in respect of the Spanish Taxes pursuant to the Trustee Act 2000, section 31 and/or the common law?

(iii) Alternatively, are FNTC and/or BBCB entitled to seek reimbursement in respect of the Spanish Taxes from the beneficiaries of the trust pursuant to the equitable principle in *Hardoon v Belilios* [1901] AC 118?

(iv) As to (ii) and (iii) above, various issues arise, because it is accepted by the Claimants that to succeed on either of these issues they must establish that the Apartments are trust property, whether

(a) because they fall within the definition of Trust Property in the Deed of Trust (a pure point of construction) and that if the Apartments are "Trust Property" under the Deed of Trust, they must be property held on trust by BBCB for FNTC, or

(b) because they are properly to be regarded as being held on trust for Members of the Club (notwithstanding that they do not fall within the definition of Trust Property in the Deed of Trust).

(v) As to whether the Apartments fall within the definition of Trust Property in the Deed of Trust ((iv)(a) above), two issues arise which each have further sub-issues:

(a) are the Apartments "*property which was held by the Trustee for the benefit of the Club and its Members*", whether

(i) because the Apartments are held by FNTC by virtue of BBCB being simply a bare nominee company, itself holding the Apartments on bare trust for FNTC because either

A. on a true construction of Recital C, BBCB is a bare nominee;
or

B. by virtue of a common intention constructive trust, BBCB is a
bare nominee for FNTC

or

(ii) because the Club is estopped from denying that the Apartments are
Trust Property;

alternatively

(b) are the Apartments assets of an “Owning Company” as defined in Recital A to
the Deed of Trust, whether

(i) because of the true construction of the Deed of Trust, or

(ii) because of an implied term to such effect, or

(iii) by virtue of rectification to include BBCB as an Owning Company;

and are therefore both Trust Property and property held on trust by BBCB for
FNTC.

(vi) As to whether the Apartments can be trust property, notwithstanding that they do not
fall within the definition of Trust Property in the Deed of Trust (issue (iv)(b) above),
two issues arise:

(a) does BBCB hold the Apartments on trust for the Members of the Club,
(whether indirectly through FNTC – BBCB being a bare nominee for FNTC –
or directly) by virtue of a common intention constructive trust? Alternatively

(b) Are the Club and/or BBL estopped from denying that the Apartments are trust
property?

(vii) Are the Members of the Club and/or BBL estopped from denying liability to
pay to the Claimants all costs and expenses incurred in relation to the Apartments,
including the Spanish Taxes?

65. The evidence of the witnesses to which I have already referred goes primarily to the issues in
relation to estoppel and the existence of a constructive trust.

66. The Defendants assert that there is no entitlement to an indemnity in respect of the Spanish Taxes, whichever route identified above is followed. On the contrary, they say that the convoluted nature of the Claimants' case and the extent to which that case has shifted over time, including during the course of the trial, is a clear indicator of the unmeritorious nature of its arguments. They also question FNTC's motivation in bringing these proceedings, which they say are for the personal benefit of its directors and not for the benefit of the Members of the Club. In the circumstances, they place in issue not only FNTC's motivation, but also whether the demand for an indemnity is in fact in breach of trust and void.
67. A number of the above issues involve an exercise in construction and thus the most sensible place to begin in my consideration of these issues is the applicable law on construction.

Construction: the law

68. It is common ground that the approach to construing a Trust Deed is no different from the approach the court takes in construing any other document: "*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; [2015] AC 129 per Lord Neuberger at [20]).
69. There have been a number of recent cases at the highest level dealing with the principles of construction and these are well known and not in dispute, although it is fair to say that the parties place a slightly different emphasis on the authorities, with the Claimants focussing on the circumstances in which the court may find that something has gone wrong with the language of a contract, and the Defendants emphasising that the court should not rewrite contract terms which are unambiguous.
70. I remind myself in particular of the following key statements of principle:

- (i) "*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*". The background or matrix of fact "*includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*". *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR per Lord Hoffmann at page 912-913.
- (ii) Interpretation is "*essentially one unitary exercise*" (*Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 per Lord Clarke at [21]) requiring an "*iterative process involving*

checking each of the rival meanings against the provisions of the document and investigating its commercial consequences” (*Re Sigma* [2010] 1 ALL ER 571, per Lord Mance at [12]).

(iii) “If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”, however “Where the parties have used unambiguous language, the court must apply it” *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 per Lord Clarke at [21] and [23]). Indeed, “the clearer the natural meaning [of the words] the more difficult it is to justify departure from it”. The court should not embark on an “exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning”. *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at [18]. The court will not “easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had” *Investors’ Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 ALL ER 98 per Lord Hoffmann at page 913.

(iv) The exercise of construction “...is not a literalist exercise focused solely on a parsing of the wording of the particular clause but...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” *Wood v Capita Insurance Services Ltd* [2017] AC 1173, per Lord Hodge at [10].

(v) “...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” *Wood v Capita Insurance Services Ltd* [2017] AC 1173, per Lord Hodge at [12].

C1. Issue 1: Is BLL and/or the Members of the Club obliged to indemnify FNTC or BBCB in respect of the Spanish Taxes pursuant to clause 14 of the Deed of Trust

Issue 1(a): The true construction of clause 14 of the Deed of Trust

71. Clause 14 of the Deed of Trust reads as follows:

*”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” (emphasis added).*

72. It is common ground between the parties that for the purposes of this issue, membership of BBCB falls within the definition of Trust Property, such that there is no need to establish for these purposes that the Apartments also fall within that definition – a point I shall return to later.
73. The question for the court on this issue, however, is whether the words of clause 14 which I have emboldened in the extract set out above are sufficiently wide to entitle FNTC to an indemnity from BBL (standing in the shoes of the Founder Member) and the Club in respect of the Spanish Taxes notwithstanding that (i) it is the Claimants’ stated position that FNTC is not itself liable to the AEAT for the Spanish Taxes and (ii) BBCB has liability for the Spanish Taxes but clause 14 includes no obligation on the part of the Founder Member or the Club Members to indemnify BBCB.
74. The Claimants maintain that on a true construction of the Deed of Trust and other constitutional documents entered into at the same time, the Club and BBL are liable to pay the Spanish Taxes. At trial they have advanced a case which (contrary to the Defendants’ submissions) I am prepared to accept was pleaded in a general way in paragraph 13A of the RRAPoC, as follows: the liability to pay the Spanish Taxes has been incurred “*in connection with the Trust Property*” and, properly construed, clause 14 obliges BBL and the Club to indemnify FNTC in relation to all outgoings associated with the management and operation of the Apartments.
75. The Defendants’ response is straightforward: they say that the words of clause 14 are clear and unambiguous and oblige BBL and the Club to indemnify FNTC only in respect of liabilities which it has itself incurred. The Spanish Taxes, they say, do not fall into this category.
76. For the first time in closing, the Claimants sought to advance their case on construction by inviting the court not to construe the word “*indemnified*” so as to apply only in circumstances

where FNTC itself has liability (despite the apparent reliance upon the ordinary meaning of the word “*indemnified*” in paragraph 13A.5 of their RRAPoC), but rather to construe it as meaning “*put in funds*” viz “*the Trustee shall be put in funds by the Club and the Founder Member to pay all losses, claims, demands, expenses and other liabilities made or incurred in connection with the Trust Property*”. Looking specifically for these purposes at the wording of the clause, they point to the distinction between clauses 7(c) and 8 of the Deed of Trust on the one hand (both of which refer to costs “*incurred by the Trustee*”) and clause 14 itself, on the other hand, which refers to losses, claims, demands, expenses and other liabilities “*made or incurred in connection with the Trust Property*”, the clear implication being (they argue) that in relation to clause 14, it is not necessary for the Trustee itself to have incurred the liability.

77. Furthermore, Mrs Talbot Rice QC, on behalf of the Claimants, invites the court to stand back and to investigate the factual background to the Deed of Trust and the implications of the rival constructions. She argues that an examination of the factual and commercial background clearly reveals that the Defendants’ interpretation produces an uncommercial and, therefore, she says, objectively unintended, result.

78. In particular she relies upon the following background factors, which are, in themselves, common ground:

(i) The Deed of Trust forms part of a suite of documents that were put in place with the intention of creating a timeshare structure, namely a resort in which members of the public can purchase the right to occupy an apartment for an identified week or weeks; this is the object of the Club as stated in article 4 of the Constitution (entered into on the same day as the Deed of Trust).

(ii) The Deed of Trust is therefore to be construed in the context of these other documents and against the background of this commercial intention.

(iii) The use of the Apartments by Members lies at the heart of the timeshare structure.

(iv) It is clear from the Constitution that the Apartments were to be protected by being held in a trust structure for the benefit of the Members.

79. In addition, Mrs Talbot Rice relies on some further background factors which are disputed by the Defendants and to which I shall return below. In particular, she argues that:

(i) The reason for the transfer of the Apartments to an Owning Company was to keep the Apartments separate from the Trustee’s other assets;

- (ii) The company/companies to which the Apartments were transferred were and are mere nominees in the sense that they were never intended to have any interest in, or obligations in respect of, the Apartments transferred to them, as is apparent from articles 7 and 8 of the Constitution.
- (iii) Accordingly, there can have been no intention that this company/companies should pay outgoings associated with the Apartments which were transferred to it/them, for it/they had nothing with which to defray such expenditure.
- (iv) Indeed the Constitution made express provision for payment of such expenditure: article 12(a) of the Constitution provides as follows: “*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...* (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*” (***emphasis added***).

80. Against the background set forth above, the Claimants contend that when the Resort was set up in 1988, the parties to the Deed of Trust can only have intended that the Resort would operate as a timeshare resort and that it would “work”; in other words that the Members of the Club (who are automatically bound by the terms and provisions of the Constitution, the Deed of Trust and the Management Agreement upon their election to membership) would be liable for all expenses and outgoings connected with their occupation of the Apartments. The parties cannot have intended, it is said, that an expense connected with that occupation would fall to be paid by a nominee company with no assets and no ability to recover any such expenditure from the Club Members.

81. Notwithstanding these persuasive arguments, I am not prepared to reject the plain and natural meaning of the words in clause 14. My reasons are as follows:

- (i) the words of clause 14 are, to my mind, clear and unambiguous. On a natural reading of its words, clause 14 is a provision that is intended to entitle the Trustee to an indemnity in respect of liabilities that it incurs in the performance of its duties, in connection with the Trust Property or with its office of custodian trustee. In circumstances where the Trustee incurs no liability, there is nothing to hold it harmless against.

- (ii) the Claimants’ suggested addition of the words “*put in funds*” would have the effect of radically altering the meaning of clause 14. Indeed, I can see no sensible basis on which the words “*shall be kept fully indemnified*” can be construed to mean “*put in funds*” where there is no pre-existing liability.
- (iii) I am not impressed by the suggested distinction between clauses 7 and 8 of the Deed of Trust on the one hand and clause 14 on the other. The fact that a similar concept has been expressed in slightly different terms elsewhere does not mean that I should put a strained interpretation on clause 14. The relevant part of clause 14 makes it clear that “...*the Trustee shall be kept fully indemnified...against [liabilities] made or incurred in connection with the Trust Property*”. In my judgment the ordinary meaning of these words does not confer a right to an indemnity in respect of liabilities incurred by an entity other than the Trustee.
- (iv) Furthermore, I do not accept the Claimants’ contention that a reading of the words in clause 14 involves obvious “infelicities”, such as to justify a departure from their natural meaning. Clause 14 contains no obvious mistakes or infelicities.
- (v) The authorities to which I have already referred make it clear that the court should not go down such a path, save where it is obvious from the factual background that the parties could not possibly have meant what they said.
- (vi) I accept the Defendants’ submission that the factual background has a limited role to play in circumstances where the wording of clause 14 is unambiguous. However, even if that were not the case, it is in my judgment far from obvious from the factual background on which the Claimants rely that the parties must have intended clause 14 to mean something different.
- (vii) The agreed factual background referred to in paragraph 78 above does not assist the exercise of construction one way or the other. It does nothing more than state the nature of the timeshare structure that was set up in 1988 to facilitate the development of the Resort.
- (viii) As for the disputed factual background referred to in paragraph 79 above:
- (a) I note that I have no evidence from the individuals who actually entered into the Deed of Trust, and so, beyond what is evidenced in the suite of documents that set up the trust structure, I cannot make any findings as to what they thought or understood at the time.

- (b) The suggestion that the reason for the transfer of the Apartments to an Owning Company was to keep the Apartments separate from the Trustee's other assets was not pleaded as relevant factual matrix background, as it should have been.
 - (c) I have decided later in this Judgment that there is no proper basis for a finding that, as a matter of construction, BBCB was a nominee company, holding the Apartments in trust for FNTC.
 - (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.
- (ix) As to the Claimants' submission that a failure to accept their construction would lead to uncommercial results, I accept that 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. I do not accept that I should reject that meaning simply because it may appear to have been an imprudent or uncommercial term for the parties to have agreed. Indeed, there is nothing imprudent about the terms of clause 14 itself which (notwithstanding submissions from the Claimants to contrary effect) plainly has a commercial purpose, as the Claimants' claim to recover the Grant Thornton fees shows.
- (x) The Claimants' complaint is really that the Deed of Trust omits to include a provision that entitles the Trustee to be "*put in funds*" for liabilities incurred by another entity in connection with the Trust Property. However, I note that there is no attempt on the part of the Claimant to assert the existence of an implied term to remedy this omission or, indeed, an entitlement to rectification in this regard.

82. Accordingly, I accept the submissions of Mr Gourgey QC on behalf of the Defendants that on the clear words of clause 14 there is no scope for FNTC to recover BBCB's liability to pay the Spanish Taxes from BBL or the Club; the Spanish Taxes are not a liability which FNTC has incurred or in respect of which it is entitled to recover an indemnity.

Issue 1(b): Is FNTC entitled to an indemnity because a claim or demand has been made on FNTC by BBCB?

83. This argument was addressed in only one paragraph of the Claimants' closing submissions by reference to a letter sent by BBCB to FNTC dated 26 February 2019 (after the PTR and the round of amendments to the Claimants' pleaded case that took place before the trial). That letter records that BBCB makes a formal demand that FNTC, as Trustee, pay to it €2,675,281.66 plus interest since 21 March 2017 to enable it to discharge the Spanish Taxes. The second paragraph of the letter reads as follows:

"As you know, we have always looked to you as trustee to put us in funds to pay our liability to the Spanish tax authorities, and thus have made an informal claim that you do so. In those circumstances, we do not think that this formal demand is necessary, but we make it out of an abundance of caution."

84. The Claimants' case is that even if the word "*indemnified*" in clause 14 carries what they refer to as the "*narrow construction*" proposed by the Defendants, the obligation on BLL and the Club Members to pay FNTC is nonetheless engaged by BBCB's claim; in essence, they say, the indemnity (which includes specific reference to a "*claim*") comes into operation in response to the claim.

85. I reject the suggestion that the construction for which the Defendants argued, and which I have accepted, is a "*narrow construction*" as the Claimants maintain. Further, I reject the suggestion that, on that construction, there is any obligation on the part of BLL and the Club Members to indemnify FNTC in connection with a claim in respect of which, on FNTC's own case, it has no liability. The Defendants point out that the Claimants have pursued this issue by reference only to the concept of a "*claim*" and they say they are unclear as to the distinction between a claim and a demand. For these purposes, I do not understand there to be any real distinction and note that in the letter of 26 February 2019, BBCB uses both the term "*demand*" and the term "*claim*".

86. Both terms appear in the list of "*all losses, claims, demands, expenses and other liabilities*" in clause 14, the obvious intention being to identify liabilities in respect of which FNTC is obliged to pay. The ordinary meaning of the term "*indemnify*" is "*to hold harmless*". If the words "*claim*" and "*demand*" did not relate to a liability on the part of FNTC then there would be nothing to indemnify. In my judgment, the parties cannot possibly have intended that the Club and its Members would indemnify the Trustee in respect of claims made on the Trustee for which the Trustee has no liability itself. The wording of clause 14 lends no support to the existence of any such intention.

87. Mrs Talbot Rice suggested orally that the mere existence of a demand or claim, even if the Trustee has no liability, produces an entitlement to a payment under the provisions of clause 14, but that if the claim/demand “*comes to nothing*” (by which I understood her to mean that FNTC had no liability) then the funds can be returned. I agree with the Defendants that this is a surprising submission. It is not FNTC’s case in these proceedings that it in fact has a liability to pay the Spanish Taxes and, notwithstanding that BBCB suggests in its letter of 26 February 2019 that it has made informal claims, FNTC has never seen fit to accept liability in respect of those claims. At no time during the course of the trial was it suggested that FNTC intended to pay the Spanish Taxes itself; the furthest it went in its pleadings was to say in Further Information dated 19 July 2018 that in circumstances where HMRC’s pursuit of BBCB to pay the Spanish Taxes was on hold pending the outcome of these proceedings FNTC “*has not yet been required to pay them*”.

Issue 1(c): Is FNTC entitled to an indemnity because it is in fact liable to pay BBCB owing to the fact that it is “duty bound” to do so?

88. Regardless of my finding on the true construction of clause 14 of the Trust Deed, the Claimants submitted in closing that, as Trustee, FNTC is “*duty bound*” to preserve the trust assets, which include BBCB. Accordingly, they say that FNTC must be put in funds by BLL and the Club so as to enable BBCB to pay the Spanish Taxes.

89. The claim is further elaborated in the RRAPoC at paragraph 35.3 as follows:

“FNTC UK holds its membership rights in BBCB (and its assets (the apartments)) on trust for the benefit of the Members and, in accordance with its duties as trustee, is bound to take such action as is necessary, acting in the best interests of the Club and its Members to preserve BBCB as Trust Property: in accordance with that duty, FNTC UK was duty bound to ensure that BBCB was put in funds to enable it to pay its liabilities so that it was not wound up by creditors and thereby lost to the trust. That duty...was a claim or liability made or incurred in connection with the Trust Property (FNTC UK’s membership rights in BBCB) or in connection with the holding by FNTC UK of the office of custodian trustee under the Deed of Trust. BLL and the Club are therefore liable to indemnify FNTC UK in respect of that claim or liability pursuant to clause 14 of the Deed of Trust”.

90. The Defendants say in response that far from being in the interests of Members, it is manifestly a breach of trust to seek to recover the Spanish Taxes from the Club and BLL, because doing so is for an ulterior purpose, namely to protect Mr Kenny and Ms Scott from a potential personal liability as the directors of BBCB. They point out that a trustee is never duty bound to satisfy

a liability of a company whose shares are held on trust in circumstances where, as here, that would not be in the best interests of the Members and they deny that the winding up of BBCB would have any adverse effect on the Members. In circumstances where FNTC currently holds only 6 apartments at the Resort (the value of which is only a small fraction of the amount owed in Spanish Taxes) the Defendants deny that it is in the best interests of the Members to pay to preserve such an asset.

91. Further and in any event, the Defendants deny that a duty of the type relied on by the Claimants is capable of being a claim or liability “*incurred in connection with the Trust Property*” and say that in circumstances where FNTC has no liability to pay those taxes and has not resolved to do so, that duty could not possibly arise.
92. In answer to the Defendants’ arguments, the Claimants say that the Defendants are seeking to treat the payment of the debt as optional, which it is not. They point out that in the exercise of their administrative power, trustees are able to exercise choice, but that they have no such choice when it comes to paying a debt. To quote from the Claimants’ closing submissions “*Where a trustee is under a legal obligation to pay a debt, there is no such choice. He has to do it, like everyone else.*”
93. In my judgment, this extract from the Claimants’ written closing submissions exposes the fallacy in this aspect of their case. FNTC is not under a legal obligation to pay the Spanish Taxes. Furthermore, I do not see how the (uncontroversial) duty on the part of FNTC to act in the best interests of the Club and its Members is capable of falling within the wording of clause 14 (as is pleaded by the Claimants). In particular, I cannot see how that duty falls within the meaning of a “*claim or liability made or incurred in connection with the Trust Property...or in connection with the holding by FNTC UK of the office of custodian trustee under the Deed of Trust*”.
94. By reference to the precise way in which the Claimants plead this case, FNTC is not entitled to an indemnity:
 - (i) There is no obligation on the part of FNTC to pay the Spanish Taxes (a liability of around €2.675m).
 - (ii) BBCB no longer holds the Apartments (at best the evidence is that it holds no more than 6 apartments). Given the sum paid by BBL SL for the remainder of the Apartments in 2015 when it purchased them from the AEAT, I accept that the value of these 6 Apartments is plainly significantly less than the amount of the Spanish Taxes.

- (iii) In the circumstances I agree with the Defendants that it is difficult to see how FNTC can be duty bound to ensure that BBCB is able to pay the Spanish Taxes when the value of BBCB as an asset of the Trust is a mere fraction of such sum.
- (iv) Further, FNTC is expressly exempted by the provisions of clause 4 of the Deed of Trust from performing any act or acts which might involve it in any personal liability, or from taking any action “*in relation to any matter whatsoever unless fully and effectually secured or indemnified*” (clause 8), a provision on which the Claimants expressly rely in paragraph 38.3 of the RRAPoC to support the pleading that “*FNTC UK was therefore not required to pay the Spanish Taxes until it was put in funds by BBL and/or the Club to do so*”.
- (v) FNTC’s justification (at least in oral evidence) for asserting that payment of the Spanish Taxes via a call on the Club and its Members is in their best interests appears to be that the Club is unprotected following the 2015 sale of the Apartments and, in particular, that BBL SL is acting in its own interests, that it is not fit to be a trustee and, in Mr Kenny’s words in cross examination that BBL SL’s intentions are to “*take control of the property and longer term to do with the property as they wish*”. Whilst I accept that Mr Kenny holds this view, it is not supported by the 2016 Constitution (which provides that the Club shall continue in existence without limit as to time) that has been put in place for the Club, which document was sent to all Ordinary Members and approved by them at their 17 November 2016 AGM. I note also paragraph 7 of the Re Amended Defence which expressly confirms that the Defendants will 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, a point that Kevin Page confirmed under cross examination. Further and in any event, this justification does not appear to me to begin to explain how or why it would be in the best interests of the Club to require them now to settle the bill for the Spanish Taxes. The Members’ interests are now protected by the New Constitution and (for 50 years at least) by the Spanish Deed of Adaptation. BBCB, on the other hand, is a shell company which holds only 6 apartments.
- (vi) Asserting that FNTC is “duty bound” to preserve the trust assets (namely BBCB) is not, in my judgment, sufficient. Whilst I accept that the duty of a trustee towards his beneficiaries “*is paramount*” (see *Cowan v Scargill* [1985] 1 Ch 270 per Sir Robert Megarry VC at 287), the best interests of the beneficiaries are normally their best financial interests. It is difficult to see how it could be in the best interests of Members for BBCB to be put in funds to enable it to pay the Spanish Taxes and thereby avoid

the potential for it to be wound up. In this regard, I note the qualification placed on the pleading that FNTC is “duty bound” in the RRAPoC at paragraph 38.5: “*To the extent that it is in the Members’ best interests for BBCB not to be wound up, FNTC UK is duty bound to ensure that the Spanish Taxes are satisfied to prevent BBCB’s winding up and to take all necessary action to ensure the same*” (*emphasis added*). I do not believe that it is in the Members’ best interests for action to be taken to avoid BBCB from being wound up.

95. In all the circumstances, I reject the suggestion that FNTC is duty bound to put BBCB in funds so that it can pay the Spanish Taxes. Given my finding, I do not need to decide whether the claim for an indemnity in relation to the Spanish Taxes is motivated (in some small part at least) by the potential personal liability of the directors of BBCB (Mr Kenny and Ms Scott). Should it prove important. I accept that the contemporaneous documents do evidence a degree of concern around “*the risk*” to those directors (for example Ms Scott’s email of 17 February 2016) and that both Mr Kenny and Ms Scott were plainly aware of the potential for the directors of BBCB to be personally responsible for its affairs. I also note that Mr Kenny’s justification for this claim, referred to above, fell short of convincing me that the interests of the Members will not be served by the new structure. In this context I should also make the point that whilst I received detailed written closing submissions on this issue from the Defendants, I was not addressed on it at all by the Claimants, whether in their written closing submissions or in their oral submissions.

Summary on Issue 1

96. In all the circumstances set forth above, I find against the Claimants on Issue 1.

C2. Issue 7: Are the Members of the Club and/or BBL estopped from denying liability to pay to the Claimants all costs and expenses incurred in relation to the Apartments, including the Spanish Taxes?

97. I am going to take issue 7 next, because it represented a major focus of the submissions at the trial and because the issue of estoppel by convention also arises in respect of sub-issues 5(a)(ii) and 6(b) and it is therefore convenient to set out the law here, before applying it in relation to those issues later in this Judgment.

98. By way of introduction, I should make it clear that although the Claimants also sought to make out a case in their RRAPoC based on estoppel by representation, they did not seek to pursue that case at trial.

Estoppel By Convention: the law

99. In a general sense, there is some common ground between the parties as to the approach the court should take to estoppel by convention.
100. They agree that there must be a common assumption of fact or law which must be communicated by words or conduct so as to “*cross the line*” (*Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 at 931-4 per Lord Steyn). They agree that it must be unconscionable for one party now to go back on the assumption and that, if it is to bite, the alleged estoppel by convention must be used as a shield but not a sword.
101. However, importantly, they disagree on, amongst other things, (i) whether the long established principles of estoppel by convention have been augmented by the decision of Briggs J in *Revenue & Customs Commrs v Benchdollar Ltd* [2010] 1 ALL ER 174 and, if so, whether that decision applies only to non-contractual estoppel by convention; (ii) whether the mere passage of time is capable of giving rise to unconscionability; (iii) the circumstances in which an estoppel by convention is being used as a shield but not a sword; and (iv) whether an unincorporated association in the form of a club is an entity that is capable of being estopped.
102. In the context of argument on these issues, I was referred to numerous authorities, many of which I shall have to consider in more detail before addressing the specific areas of dispute between the parties.
103. The classic formulation of estoppel by convention is to be found in *Amalgamated Investment & Property Co Ltd v Texas Commercial International Bank Ltd* [1982] 1 QB 84. In this case, the Bank had dealt with the plaintiffs for years on the basis of a shared assumption as to a guarantee for its loan. This was an assumption as to the true effect of the underlying transaction between the parties. Lord Denning MR articulated the principle in the following way: “*When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands*” [124C-D]. A very similar formulation was subsequently advanced by the House of Lords in *Republic of India v India Steamship Co (No 2)* [1998] AC 878, per Lord Steyn at 913, who emphasised that “*It is not enough that each of the two parties acts on an assumption not communicated to the other*”, albeit that a concluded agreement was not necessary.

104. In *SmithKline Beecham plc v Apotex Europe Limited* [2007] Ch 71, the Court of Appeal emphasised that the common assumption had to be “*unambiguous and unequivocal. That is inherent in the very nature of an estoppel*” (per Jacob LJ at 103), whilst in *Durham v BAI (Run Off) Limited* [2008] EWHC (QB) [2692] Burton J, citing Bingham LJ in the *Captain Gregos (No 2)* [1992] Lloyd’s Law Rep 395 at 405 referred to the need for each party to be “*fully cognizant*” of the shared assumption and that “*an estoppel by convention requires communications to pass across the line between the parties*” [268]. The requirement for “*clarity over what comprises the common assumption*” was recently emphasised in *Aras v National Bank of Greece* [2018] EWHC 1389 (comm) per Picken J at [115].`
105. In *Revenue & Customs Commissioners v Benchdollar Ltd* [2010] 1 ALL ER 174, it was argued before Briggs J that there was a common understanding that written exchanges between the Revenue and the defendant employers were effective to postpone the running of the limitation period such that the defendant employers were estopped from suggesting otherwise. Having rejected contractual claims by the Revenue, Briggs J was left with an allegation of estoppel where the convention relied upon was neither contained in, nor supported by contract.
106. Having cited *Republic of India v India Steamship Co Ltd* for its concise summary of the relevant principles, Briggs J went on to say that “*The precise circumstances in which it will be regarded as unjust or unconscionable for a party to a common assumption subsequently to resile from it are...infinitely various*” [44] and he then carried out a detailed analysis of (amongst others) (i) the judgment of Oliver LJ in *Keen v Holland* [1984] 1 WLR 251 (which Briggs J made clear was a case about an estoppel alleged to have been created within a contract); and (ii) the judgment of Mr Simon Berry QC in *Wilson v Truelove* [2003] 2 EGLR 63, both of which cases were cited to me and relied upon by the Defendants in support of the proposition that the mere fact that a party has independently “*got the position wrong*” and has reached an individual understanding as to the meaning of an agreement will not be enough to give rise to an estoppel by convention.
107. Briggs J then went on to derive certain principles from the *Keen v Holland* line of authorities which he said were “*applicable to the assertion of an estoppel by convention arising out of non-contractual dealings*” as follows: “*(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” [52].

108. In *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustee Ltd* [2010] Pen LR 411, Briggs J made an adjustment to paragraph (i) of the above summary, saying that “*the crossing of the line between the parties may consist of either words or conduct from which the necessary sharing can properly be inferred*” [137].
109. Notwithstanding that Briggs J limited his propositions to estoppel by convention arising out of non-contractual dealings, those same propositions have since been relied upon in cases concerning contractual dealings.
110. In *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC), a case involving an alleged estoppel as to a particular basis for payment not recognised in the underlying repair and maintenance contract between the parties, Akenhead J set out the passage I have referred to above from *Benchdollar* and went on to conclude that the relevant law on estoppel by convention could be summarised by reference to 6 propositions. These included at [49] “(c) *At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably [be] the case that both parties will have relied upon it. There is nothing prescriptive in the use of “reliance” in this context: acting upon or being influenced by would do equally well*” and “(d) *A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that “detrimental reliance” represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention*”.
111. That “*material influence*” will be enough to give rise to unconscionability has been confirmed by the Court of Appeal in another recent case, again concerning contractual dealings: *Stevensdrake Ltd v Hunt* [2017] BCC 611 per Hamblen LJ at 96: “.....*the injustice or unconscionability requirement of estoppel by convention focuses on the reliance placed on the convention by the party asserting the estoppel. As stated in Chitty...this will typically be*

because that party has been “materially influenced” by it.” Hamblen LJ went on to say that on the facts of this case, there had been not merely material influence (which would itself have been sufficient) but also “*seriously detrimental reliance*”.

112. In *Blindley Heath Investments Limited v Bass* [2017] Ch 389, a case involving an underlying shareholder’s agreement, the Court of Appeal, referred with approval to the passage from Briggs J’s judgment in *Benchdollar*, noting that a feature of estoppel by convention causing difficulty in *Blindley*, owing to the fact that the parties had simply forgotten the true state of affairs, was the need to establish that “*the person sought to be estopped assumed some responsibility for [the adoption of the assumption]*” per Hildyard J at [89]. On the facts of that case, involving a share transfer of a small private company, the Court of Appeal was satisfied that “*all parties shared responsibility*” [94].

113. Insofar as I need to express my views in light of this lengthy analysis of the authorities on the areas where the parties are in dispute, it is in my judgment clear from the authorities that:

(i) the propositions in *Benchdollar* have been applied in cases involving contractual dealings and are of general relevance. They do not apply merely to cases of non-contractual dealings (see also *Briggs v Gleeds* [2015] Ch 212 per Newey J at [180]). Accordingly, I shall have regard to them in considering the arguments as to estoppel by convention in this case;

(ii) the concept of an assumption of responsibility articulated in *Benchdollar* has found favour in the Court of Appeal in *Blindley Heath Investments*;

(iii) there is a requirement for the party claiming the benefit of the convention to have relied upon it in the sense of being materially influenced by it or having acted upon it;

(iv) but it is not necessary in cases involving contractual dealings to establish detrimental reliance in order to prove unconscionability. Material influence such that it would be unconscionable to allow the other party to resile from the convention will be enough.

114. Insofar as the Claimants’ submissions on the law invited me to reject the approach taken by Briggs J in *Benchdollar* on the grounds that his approach was distinguishable owing to the fact he was dealing with a non-contractual situation, it is my view that they go too far. Whilst I accept that *Benchdollar* should not be regarded as a straitjacket and that Briggs J was not intending to set out a new or fundamentally different test from the test to be found in the earlier cases, nonetheless I disagree that the *Benchdollar* principles are to be applied only in a non-contractual situation. It seems to me that I should regard them as useful and applicable

guidance, always having regard to the way in which they have since been applied or explained in the later cases. In this regard, I draw particular comfort from *Mitchell v Watkinson* [2014] EWCA Civ 1472 per Barling J sitting in the Court of Appeal: “*Although there are superficial differences of formulation [between contractual and non-contractual cases] it seems to us that these are more apparent than real, and that in practice there is likely to be little if any material difference in the outcome whichever version of these principles is applied*” [52].

Sword v Shield

115. In *Amalgamated Investment & Property Co Ltd v Texas Commercial International Bank Ltd* the plaintiff company argued that the Bank was seeking to use estoppel not as a shield, but as a sword, to found a cause of action. However, the Court of Appeal rejected this submission. Brandon LJ said that in his view much of the language used in connection with these concepts is “*no more than a matter of semantics*” [131E-F] and he went on to say that it was a true proposition of law that “*while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed.*” [131H-132A].
116. The Court of Appeal revisited the sword/shield debate in 2007 in *SmithKline Beecham plc v Apotex Europe Limited*, a case in which there was no legal relationship between the parties who, on the matters pleaded, had never even communicated with each other. Jacob LJ said that “*...the proposed estoppel...would have the effect of creating a legal relationship between parties who had never, on the matter pleaded, even communicated with each other. That would be an astonishing result – and not one which I think the law would countenance*”. He went on to point out that the plea of estoppel was not a mere anticipation of a reply to a defence; on the contrary it was being used in a “*naked attempt to create a legally binding agreement when there never was one and never any intention to create one. That an estoppel cannot do*” [109-112].
117. In *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC), Aikenhead J pointed out (at [49(e)]) that analysis is required to ascertain whether estoppel is being used as a sword; the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative and does not raise a presumption one way or the other.
118. I shall return to these principles (which I shall bear firmly in mind) in examining the estoppel for which the Claimants contend in this case.

Unconscionability: The Passage of Time

119. The Claimants rely on two authorities for the proposition that the mere passage of time is sufficient to give rise to unconscionability: *Reel v Holder* [1979] 1 WLR 1252 and *Icarus (Hertford) Ltd v Driscoll* [1990] 1 Pensions Law Reports 1.
120. In *Reel v Holder* Forbes J held that after some 22 years of members of the International Amateur Athletic Federation (IAAF) treating the Republic of China Track and Field Association (ROCTFA) as a member, with ROCTFA having paid its subscriptions regularly and engaged in international competitions throughout that period, it was “too late” for the Members of the IAAF to seek to say that ROCTFA’s election in 1956 was invalid under the rules, not least because dissenting members had represented over that period (by their failure to challenge the election) that ROCTFA was a duly elected member.
121. In *Icarus v (Hertford) Ltd v Driscoll*, a pension scheme had, from January 1976, reduced benefits to staff members to 1/270th of final pensionable salary and thereafter the scheme was run on that basis, notwithstanding that under the rules the basic pension was 1/80th and 1/60th for special members. No endorsement of the Policy was made to incorporate the changes. In a short judgment with very little detail, Aldous J held that the parties to the scheme were estopped from contending that it provided for any rate other than 1/270th of the final pensionable salary: “*they cannot now go back on that...In fact it would be odd for me to decide that the rate was 1/60th or 1/80th when all the parties had accepted and worked on the basis that it was 1/270th*” [15].
122. I agree with the Defendants that I must exercise caution in considering these cases. There has been some development in the law of estoppel since they were decided, as I have identified above, and the reasoning in both cases is very short. There is little, if anything, in the way of analysis as to why it would be unconscionable in each case for the parties not to be held to the assumed convention. However, on my understanding of the respective facts, neither case was concerned with the mere passage of time alone.
123. I have already set out in some detail above the approach that has been taken in some more recent cases to unconscionability and, in particular, the need for the person relying upon the convention to have been “materially influenced” by it.
124. In addition, I refer again to *Benchdollar* in which Briggs J made it clear that in his judgment “*questions of injustice and unconscionability must be addressed in the round, and due weight given to all relevant factors*”. In that context, he referred to the following observations of Neuberger J in *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 at [222]: “*In almost all cases, such unconscionability must be based on the prejudice which would be caused to*

the claimant if the strict legal position applied. As I see it, the claimant must also establish that that prejudice arises from its reliance upon the convention. In other words, the court generally must be satisfied that (a) the claimant will suffer real prejudice and (b) the prejudice arises from its reliance [upon] the convention. It should be emphasised that, even if the claimant satisfies these criteria, there may be no estoppel because there may be other, more powerful, factors pointing the other way” [64].

125. In my judgment, having regard to this guidance, it is unlikely that the mere passage of time will ever be enough on its own to give rise to the required element of unconscionability. This is because of the need for the party seeking to rely on the convention to show that he has been materially influenced by it over the course of that period.

Can a Club be estopped?

126. The estoppels pleaded are all sought against both BBL and against the Club as an unincorporated association. Given that the Club and its committee have no separate legal personality, the effect of such an estoppel would be to bind all of the individual Members of the Club. Thus, the Claimants’ claim in estoppel against the Club involves it not merely in establishing that the individual Defendants are estopped, but that each of the current Ordinary Members (whether or not they were Ordinary Members at the time of the relevant representations) is also estopped from asserting his/her rights.
127. I understand from the parties that the issue of estoppel in relation to unincorporated associations is not one for which there is significant authority. However, the Defendants assert that the position of the Club (being a large multi-member group with the benefit of a trust arrangement) is materially similar to that of the members of an occupational pensions scheme, where the issue of estoppel has frequently arisen.
128. The Defendants submit that it is clear from a number of pension cases that estoppels will seldom operate in this type of situation. In this regard they rely on *Briggs v Gleeds* [2014] EWHC 1178 (Ch) in which Newey J cited the statement in *Redrow plc v Pedley* [2002] EWHC 983 (Ch) by Morritt VC that estoppel by convention has to be “*applied with caution when seeking to establish an estoppel between the trustees and the general body of members so as to bind them all to an interpretation of the trust deed which it does not bear*”. Morritt VC went on to say this:

“62. *First, the pension scheme embodies not only the terms of a contract between individual members and the trustees but also a trust applicable to the fund comprising the contributions of members and surpluses derived from the past in which present and*

future members may be interested. Such trusts cannot be altered by estoppel because there can be not such estoppel binding future members.

63. *Second, it is necessary to show that the principle is applicable to all existing members. I agree with Laddie J in ITN v Ward [1997] PLR 131 that it is not necessary for that purpose to call evidence relating to each and every member's intention. But that will not absolve a claimant from adducing evidence to show that the principle must be applicable to the general body of members as such.*
64. *Third, as the formulation of the principle shows, what must be proved is that each and every member has by his 'course of dealing put a particular interpretation on the terms of the Rules' or 'acted upon the agreed assumption that a given state of facts is to be accepted between them as true'. This involves more than merely passive acceptance...I suggest that it requires clear evidence of intention or positive conduct to bind the general body of members to such an assumption. I doubt whether receipt of the benefit or payment of the contribution without more, can be enough...".*
129. The Claimants say that the difference between this case and cases involving pension schemes is that, in the ordinary pensions case, the members of the scheme will not have a representative who is authorised to bind them. They say that the Club, on the other hand, is at all times represented by its Committee which is authorised to act on its behalf.
130. The Claimants drew my attention to:
- (i) *ITN v Ward* [1997] Pens LR 131 in which Laddie J held that an estoppel by convention did arise between the trustees and members of a pension scheme on the basis of materials circulated by the trustees that there would be an annual increase of 4% in the size of the pension.
 - (ii) *Reel v Holder* [1979] 1 WLR 1252 in which an argument to the effect that the IAAF was an unincorporated association and so could not be estopped was rejected at page 1268A-B.
 - (iii) The Law of Unincorporated Associations – Stewart et al at paragraph 7.06: to the effect that Members of an unincorporated association “*will be held liable as principals on contracts made on behalf of the association where they have authorised such contracts*” and that “*Authorisation may be derived from the rules of association*” and
 - (iv) *Briggs v Gleeds* at [50] where Newey J accepted that the law of agency applies to estoppel and that, for estoppel purposes “*an estoppel is to be treated as made by 'any*

person by whose express, implied or ostensible authority the representation was made”.

131. I draw the following principles from the cases to which I have been taken:

- (i) An unincorporated association may be estopped by the conduct of its members;
- (ii) However, to found an estoppel (absent a binding agency situation), the conduct of the members in acting upon, or relying upon the agreed assumption, will have to be the conduct of the general body of members.
- (iii) Evidence of a mere passive acceptance on the part of the general body of members is insufficient evidence of acting upon or reliance on the agreed assumption. Evidence of positive conduct to bind the general body is required. This will often make it difficult to establish an estoppel in the case of unincorporated associations absent an authorised representative acting as agent.
- (iv) It is possible for an unincorporated association to be bound by the conduct of its agent(s) as long as the members have authorised that conduct.
- (v) Authorisation may be derived from the rules of the Association.

132. I shall consider how these principles apply to the facts of this case in due course.

133. Finally, as to the situation of “future members” postulated by Morritt VC, the Claimants argue that assignees of weeks at the Resort are bound as assignees and they rely in support of this proposition on *Hopgood v Brown* [1955] 1 WLR per Evershed MR at 225:

“Exclusive of all dicta, it would be a very odd thing in the law of any country, if A could take, by any form of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle. But it does not rest merely on general principle; for if you look into all the books upon estoppel, you find it laid down, that parties and privies are estopped, and he who takes an estate under a deed, is privy in estate, and therefore never can be in a better situation than he from whom he takes it”.

134. A similar conclusion was arrived at by Neuberger J in *PW&Co v Milton Gate Investments Ltd* [[2004] Ch 142 at [196]-[197] and by Andrew Henshaw QC in *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC [314], albeit by operation of statute.

135. I shall consider this further when I come to look at the circumstances in which new members join the Club.

Analysis of the facts and the application of the principles referred to above

136. The estoppel for which the Claimants contend (namely that BBL and the Club are now estopped from contending that they are not liable to pay the Spanish Taxes) must be considered by reference to BBL and the Club separately – certainly insofar as there is an argument that it is not possible for the Club, as an unincorporated association – to be estopped. I return to this point of distinction at the end of my analysis. The Claimants treated the positions of BBL and the Club as being entirely aligned in their closing submissions, setting out tables of evidence on which they relied for the purposes of establishing the existence of a common assumption on the part of each of them. However, I do not accept that they can be treated in this way, without proper analysis of their individual positions.
137. Further, it is to be remembered that both Claimants rely upon estoppel and that their positions are also different. Thus, in the case of BBCB, there is no contractual relationship of any kind between it and BBL/the Club. Indeed, the plea of estoppel on the part of BBCB seeks to enforce a form of gratuitous promise to pay the Spanish Taxes in circumstances where there is no legal relationship between BBCB and BBL/the Club and no intention that there should be any such legal relationship. In my judgment, BBCB is plainly seeking to use the doctrine of estoppel as a sword to found a cause of action and this is not permitted on the authorities to which I have referred. Even if I am wrong about that, I note that the Claimants have not suggested that BBCB was involved in any communications which could have given rise to a common assumption or which can be said to have crossed the line; the Claimants' written closing submissions expressly refer only to (i) FNTC having a shared understanding and (ii) to the Club's assumption that its members were liable to pay the Spanish Taxes having been communicated to FNTC. In the circumstances, I reject BBCB's case on estoppel in relation to Issue 7.

The claim by FNTC

138. I now turn to consider the various elements that must be established for FNTC to succeed in its plea of estoppel by convention. I return to the sword/shield argument later in this judgment.

A Clear and Unambiguous Common Assumption

(i) on the part of BBL/the Club

139. The Claimants say there is ample evidence to establish both that the Club and/or BBL assumed that they were liable for the Spanish Taxes and that this liability arose pursuant to the indemnities in the Trust Deed (in other words that it was assumed that the Club would be

liable to indemnify FNTC). They submit that in considering this evidence, I should have regard to “*the overall effect of the conduct and communications rather than to the finer points of interpretation of any particular document*” (Stevensdrake at [75]).

140. I accept that I should look at the overall effect of the conduct and communications but having done so I can see no basis on which to find that BBL, as a separate and independent entity, ever clearly or unambiguously assumed that it would be liable for the Spanish Taxes, or indeed that it ever communicated any such assumption to FNTC. Equally, the focus insofar as FNTC’s position is concerned is plainly on its understanding and assumptions in relation to the Club (and not in relation to BBL). Indeed, the evidence on which the Claimants rely appears to me to focus solely on the Club’s understanding and assumption as to its liability for the Spanish Taxes, which it is alleged was an understanding and assumption that was shared by FNTC. No attempt was made by the Claimants to rely on a convention between BBL and FNTC. In the circumstances, I reject the Claimants’ case that BBL is estopped from contending that it is not now liable for the Spanish Taxes.

141. The position of the Club, however, requires a more detailed analysis. In this regard, I begin by considering the understanding of the Club’s Committee before coming back later to the position of the Ordinary Members more generally.

142. In my judgment the Committee of the Club did assume for a long period of time that it would be liable for the Spanish Taxes if the appeals failed and that this liability arose by reason of the contractual arrangements which set up the Club. I rely upon the following:

- (i) At all material times, the Committee of the Club and Kevin Page understood that the Members were obliged to fund the costs of running the Club. This was accepted by Kevin Page in cross examination and is evidenced by the Bahia Blanca Holiday Club Information Document which dates from about mid 1999 and which describes Communal Services provided to Members and paid for from the Annual Management Charge as including “*all Water and Electricity charges, Laundry, Insurance Premiums, Courtesy Bus, Pest Control, all English and Spanish Office administration costs, the wages, salaries and all employment on-costs of all staff employed at the Bahia Blanca Resort and the full costs [of] all apartment supplied and replacements, repairs, upkeep and refurbishment.*”
- (ii) Ray Bostock’s note on the notional rent tax dated 30.10.2000 confirms that the Members of the Club “*together fund every single peseta of expense at Bahia Blanca. The owning company pays nothing*” and “*The owning company has no responsibility*

for the apartments whatsoever except to hold the escritura on behalf of the Members of the Club. Indeed the owning company has a full indemnity from the Club so that no items of expenditure whatsoever relating to the apartments can ever be the responsibility of the owning company". Kevin Page accepted that this Report reflected "more or less" his understanding at the time.

- (iii) Consistent with this understanding, the Committee assumed in the early 2000s that the Club would (to quote Kevin Page's first witness statement) "*eventually be liable for the taxes if they had to be paid*". Ray Bostock gave advice to the Committee to this effect and in or around May 2000, Mr Diaz-Saavedra informed Kevin Page that in his opinion if an embargo were to be placed on the Apartments, the Club and not FNTC would be liable to pay the debt. Under cross examination, Mr Diaz-Saavedra said that he knew "*that there was a club and there were club members under a private constitution document, and that they, at the end, are the ones who pay the expenses*".
- (iv) In the circumstances, the Committee decided to appeal against the Spanish Taxes but at the same time to build up a reserve fund to cover possible tax liabilities. The Report of the Chairman to the 2002 AGM noted that the outcome of the appeals might not be known for some years but that "*the Committee are resolute that the Club must have in place or strive to have in place sufficient funds should the appeals be lost. Not to do so would be reckless and against the best interests of the Club. On the positive side, if the case is won, then the Club will have a large reserve to tackle any major project*". At a meeting of the Committee on 19 July 2003, it set the taxation/reserve fund levy at €20.000 and confirmed the need to raise reserve funds to a level whereby the possible tax liability could be met in 1 or 2 years. In cross examination, Kevin Page agreed that the reserve fund was put in place "*on the basis that the club was liable to pay if the appeals were lost*".
- (v) Paul Page (who was not on the Committee but attended many of its meetings) was asked in cross-examination about his understanding of the tax position and his response was that he was "*very uncertain*", he had little to do with running the club but that he understood from his brother or "*our financial people*" that "*we could be liable for the tax and we should make provision for it in case we were*".
- (vi) Although Kevin Page gave evidence in cross examination that at this time he personally thought that there was a possibility that the Club would not have to pay the Spanish Taxes and that he was "*hopeful*" it would not have to do so, he nevertheless accepted

(as was reflected in his witness statement) that the Committee's understanding of the position was based on the advice from Ray Bostock, whilst he remained a member.

(vii) When Ray Bostock was replaced by Richard Pennington at the end of 2003, the advice to the Committee as to the Club's liability to pay the Spanish Taxes if the appeals were lost did not change. In a letter to FNTC dated 25 June 2004, Richard Pennington (who was authorised to act on behalf of the Club) said this: "*Of course, the liability to pay any additional tax is that of the club and that is the view held*".

(viii) Kevin Page's evidence was that he could not remember what he thought in 2004, although he said in cross examination that he had a "*general feeling*" and was "*hopeful*" that the Club would not be liable to pay the Spanish Taxes, albeit that this was not a deeply considered position. However, in light of the contemporaneous evidence, I believe Kevin Page to be mistaken about this. It is clear that by 2004 the Club Committee (including Kevin Page) had been operating for some time (on the advice of Mr Diaz-Saavedra, Ray Bostock and then Mr Pennington) on the assumption that they would have to pay the Spanish Taxes if the appeals were lost. It had set up a reserve fund specifically to cater for this eventuality and, instead of obtaining advice as to whether the Club could ever be liable, it had simply continued to fund the appeals in the hope that if these were successful, the Club would escape liability. Kevin Page's report as Chairman of the Club in 2004 refers to "*the Tax Case brought against us*" and notes that the current reserves represent "*approximately 80% of the potential tax bill should we eventually lose the case*". Kevin Page accepted in cross examination that he was not reporting in this document that if the appeals were lost there was any question over whether the Club would have to pay; the clear implication being that in the event the appeals were lost, the Club would be liable.

(ix) The Committee's assumption (and Kevin Page's assumption) as to the Club's liability appears to have continued well beyond 2004 and there is clear evidence that it continued through to at least 2010. There is no evidence that anything was said or done by Richard Pennington or anyone else in this period which would have altered the existing assumption. A May 2005 Notice addressed "*To All Members*" dealt specifically with the dispute over the Spanish Taxes, informing Members that "*Our tax advisors are confident that we will be successful in this appeal, but as members will know, we have made a reserve in our accounts to cover the costs of the case in the event that we are unsuccessful*". This Notice invited Members to contact Kevin Page if they had any queries. At the AGM in 2006, a similar statement was made and at the AGM on 6 November 2008, the Members were told that "*The tax cases are in respect of a*

period in which some of the current owners of the resort have not been around, yet the liability has to be faced by the current club members". I do not read the reference in the Minute of this AGM to the potential for there to be "*difficulty in enforcement*" as undermining this clear statement as to liability. Further, and as an aside, I note that the Defendants relied upon the Minutes of a Committee meeting on 2 August 2008 at which it was decided that the Committee should seek independent legal advice. The Minutes record that the Committee discussed the possibility of "*doing nothing [and]...letting the tax authorities do their worst, and using the tax reserve for refurbishment. That would depend on the advice being given that could protect the members from anything the tax authorities could do against the members via Bahia Blanca Club B Limited*". The Defendants make the point that this "suggests" that the Committee felt there was a possibility that the Club would not have to pay the Spanish Taxes; however, I do not read it in this way and I note the unequivocal statement made to the Members at the AGM later in the year, to which I have already referred.

- (x) In 2008, the Committee began to seek advice on what options they would have if the appeals were unsuccessful. Kevin Page's evidence in cross examination was that there was the option of paying tax and the option of not paying tax and the question of what would happen if the tax was not paid. On 30 July 2008, Richard Pennington acting for BBL and BBCB sought "a second opinion" from a Spanish lawyer in London, Señor Lopez "*as to our prospects of success, whether and to what extent we are likely to succeed and to what extent we can hide our assets from any possible judgment from the Court*". Richard Pennington pointed out to Señor Lopez that BBCB had no rights to the Apartments which lay with the Club or the individual Members. I accept Kevin Page's evidence that he did not discuss with Richard Pennington the potential of hiding assets from the court (and he was not pushed on this point in cross examination), but what is clear from this letter is that the Club's legal adviser, Richard Pennington, was continuing to operate on the assumption (on which he wanted a second opinion) that the Club (or perhaps BBL – and I note in passing that this is the only piece of evidence on which the Claimants relied in closing as to BBL's position) would be liable for the Spanish Taxes. Indeed, he said as much in a letter to Mr Diaz-Saavedra on 23 January 2009 when expressing his disappointment at the latest court decision: "*...you will appreciate that very substantial sums of money are involved here for the Club and they want to ensure that matters are properly dealt with*".
- (xi) At a Committee Meeting on 8 August 2009, Richard Pennington reported on Señor Lopez's view and went on to say that "*Overall he was convinced that if we did lose and*

offered a substantial down payment with a plan for payment of the balance, there would be no difficulty with the tax authorities". Kevin Page accepted that the advice at this meeting was that the Members had to be in a position to pay (and I reject the Defendants' submission that this Minute supports the view that liability was only a possibility). This is reflected in the Minutes of the AGM for the same year (held on 12 November 2009) which record that *"It was hoped that if we did indeed lose, we would be able to negotiate some sort of instalment package and the tax accountants had indicated that we could do this"*. There is no suggestion in these minutes that, if the appeals were unsuccessful, there would still be scope for the Spanish Taxes to be disputed. Kevin Page accepted in cross examination that Members raised queries about the tax position at this AGM because they were concerned that the bill would eventually land at their feet.

(xii) At a Committee meeting held in Cornwall on 7 August 2010 and attended by, amongst others, both the Pages, Richard Pennington gave a detailed explanation as to the Tax cases. The Minutes record the following: *"The accountants were fully briefed and were advising us to appeal. When we had asked frankly whether we should just give up and pay, they were aghast and were clear that we should appeal; we fight on, we fight to win!...We had some money as figures showed in the reserve fund but we certainly could not spend it and would in those circumstances have to keep additional monies available in order that we could sort matters if we had to pay a lump and then by way of additional payments to pay the rest. This came from a decision and the way the Club was set up which was nothing to do with Kevin Page or Bahia Blanca Leisure Limited and was part of the club as it had been bought by them and was a function of how the Trust Deeds and the Club had been set up originally."*

(xiii) Kevin Page's cross-examination on this was clear:

"Q: So again that's still thinking in 2010, isn't it, that if the appeals are lost what you needed to do was liaise with the taxman and work out a payment plan?"

A: Yes".

(xiv) At the AGM held on 18 November 2010, the Minutes record that similar issues were discussed: *"An attempt was made to explain how the Club was owned and why it was that Club Members might be called upon to pay this liability. The reason being that the Trustees are entitled to insist on an indemnity from Members in relation to sums which they paid out"*. In cross-examination, Kevin Page confirmed that this was

the explanation given by Richard Pennington to Members. It was also explained at this AGM that the question of the reserve was “*a matter for the Committee under the Club Constitution*”. I do not read the word “*might*” as indicating that payment by the Club was not certain (as the Defendants suggest) but rather as referring to the fact that there was still a prospect that a payment need not be made if the appeals were successful.

143. The Defendants argue that the evidence is insufficient to establish a clear and unambiguous assumption on the part of the Committee of the Club. They say that it is not sufficient for the court to find that the Club (through the Committee) plainly assumed that it was liable for the Spanish Taxes; in addition, they say, it must be established that the Club had a clear and unambiguous understanding as to how and why the Club was liable. They argue that it is necessary to identify whether the basis for the understanding was that the Club had a liability to indemnify FNTC under the Deed of Trust (in which case they accept that estoppel is here acting as a shield) or whether the Club understood that the liability to pay the Spanish Taxes arose in some different way (in which case they say that estoppel would be being used as a sword). Furthermore, they say that clarity as to the basis of the assumption is highly relevant when it comes to determining whether the Club is seeking to resile from any assumption: thus they say that if the assumption proceeds on the basis that the Club is liable because FNTC is itself liable, then in circumstances where FNTC is not liable to AEAT, the Club would not be resiling from the assumption; equally that if the assumption is made on the basis that a payment is necessary to preserve the Apartments (outside the confines of the Deed of Trust), then in circumstances where in fact there is now no danger to the Apartments by reason of their transfer to BBL SL, a refusal to pay would again not involve any resiling from the assumption.
144. I reject these arguments, which appear to me to be overly technical and designed to put estoppel by convention into an unyielding straitjacket. I agree with Mrs Talbot Rice’s submission that, if the Defendants’ arguments are correct, it would render the burden of establishing an unambiguous understanding in factually complex circumstances such as these so onerous that it is hard to imagine any ordinary individual could meet it. I remind myself that in *Amalgamated Property Co v Texas* Lord Denning MR at page 122 described the doctrine of estoppel as “*one of the most flexible and useful in the armoury of the law*”.
145. In my judgment there was a clear and unambiguous assumption on the part of the Committee (which continued until around May 2012) that the Club was liable to pay the Spanish Taxes and that such liability arose by reason of the underlying contractual arrangements which put the Club structure in place, including that there was an obligation to indemnify FNTC. I do not regard the fact that FNTC itself has no liability in respect of the Spanish Taxes to

undermine this general understanding and nor do I think the precise structure of the Resort is a bar to the operation of estoppel.

(ii) *on the part of FNTC*

146. In my judgment, FNTC also assumed that the Club would be liable to pay the Spanish Taxes in the event that the appeals were lost. This assumption was clear from the following evidence (which I accept):

(i) Mr Kenny's clear evidence in his witness statement and under cross examination was that the Members of the Club are responsible for any payments associated with the Apartments and that this included any taxes that might arise in respect of the Apartments. Under cross examination he said

"...as trustee we always assumed the club would pay. That has always been our assumption, the club has been responsible for [the Spanish Taxes]. The assets are only owned for and on behalf of the members. You know, from the club's perspective it is when you pay that. It has to be...Some clubs have paid these right at the moment they've made the decision. Other clubs have fought them and won. Other clubs have fought them and lost, but they have actually fallen away because they were statute barred. And other clubs...went through and then settled when it went to auction".

Mr Kenny was not challenged on this evidence. In re-examination he said that: *"...it is quite clear in the documentation that all costs and taxes in relation to that property are the responsibility of the club."*

(ii) Ms Scott's evidence was to similar effect. In her witness statement she said that *"ultimately the Club was responsible for the tax debt"* and *"The club had taken responsibility for the tax assessments and had arranged and paid for the legal representatives they appointed to deal with the tax appeals, they had acknowledged in correspondence that the liability was theirs and that the Club had provided indemnities to the Trustee under the club documentation and we were comforted by all of these points..."*. Under cross examination, Ms Scott reiterated her belief that the Club was liable to pay the Spanish Taxes, saying *"I always believed and still believe it is a club liability"* and *"that is how all clubs operate. Without even analysing the deed of trust and the indemnities within that, it is how all time-share clubs operate. The club itself covers all the costs incurred by the owning company. It's not a cost for the Trustee."* She went on to confirm that it was her understanding that the Club was under a liability to indemnify FNTC in respect of the tax liabilities, clarifying in re-examination that

her reference to FNTC included the owning company (i.e. BBCB) “*because that’s always the party that’s assessed*”. She said that if bids for the Apartments at auction were successful at a low price that would leave BBCB with a hefty tax liability “*and hence the club would still have a tax liability*”.

147. I did not understand the Defendants to suggest in closing submissions that this evidence was not a true reflection of FNTC’s understanding or assumption (through its directors). Instead, they sought to rely on its ambiguous nature for similar reasons to those identified in relation to the Club’s assumption. Again, I reject the argument that FNTC’s assumption was not clear or unambiguous. Like the Club, FNTC operated on the basis that the Spanish Taxes would have to be paid by the Club in the event of the appeals failing.

Were the assumptions of the Club and FNTC shared between them (did they cross the line) and did the Club assume responsibility for the adoption of the assumption?

148. In the RRAPoC at paragraph 37, the Claimants identify four events on which they rely in this context (albeit as I understood it, the letter referred to in paragraph 37.1 was no longer relied upon in closing and, instead, a further letter dated 30 June 2000 was drawn to my attention). Dealing with each of these in chronological order:

(i) First, a letter from the Club (Wade Bostock) to FNTC on 30 June 2000. In particular, the Claimants rely on the statement that the assessment of tax based on a notional rent income would “*be catastrophic as far as Bahia Blanca is concerned...If, for example, a rent without services were assessed at the equivalent of £4,000 per annum for each of our 106 apartments the total assessment would be £424,000 per annum and we would be expected to pay 25% of that sum (£106,000) by way of withholding tax*”. As an aside I note also the letter of 16 May 2000 from Ray Bostock (albeit on BBL headed paper) to Mr Kenny in which he said that if the final appeal fails “*the cost to the Club will exceed £50,000...*”.

(ii) Second, the letter from Mr Pennington to Ms Scott dated 25 June 2004 (referred to above) in which he said in unequivocal terms, “*of course the liability to pay any additional tax is that of the club and that is the view held*”. Ms Scott’s evidence in her statement was that this letter “*acknowledges that the Spanish Taxes are a Club Liability*” and I agree that it does; in particular I reject the Defendants’ submission that this communication is “*somewhat unclear*”. Seen in context, it seems to me that this was a clear acceptance by the Club that it was of the view that it was liable for the Spanish Taxes.

(iii) Third, a letter from Mr Pennington to Ms Scott dated 25 November 2010 which seeks a reaction from FNTC as to the tax position and says “*Obviously if Club B has no assets then it may be difficult if we find the money from the holiday club to then persuade the tax authorities that as a matter of fact there are not other monies in other cases and it may therefore have a prejudicial effect if payment is made*” (**emphasis added**) (this is a reference to the potential for a payment by the Club to the tax authorities to have a prejudicial effect on the position of other clubs). Mr Kenny accepted in cross-examination that this letter appeared to be trying to persuade FNTC not to require the Club to pay because of the potentially prejudicial effect that would have on FNTC’s own business. I reject the Defendants’ contention that a later email from Mr Pennington to Ms Scott on 2 December 2010 “overtook” the position referring, as it did, to the likely difficulties of enforcement against BBCB owing to the fact that it has no assets. This seems to me to be a different point which does not affect the continuing assumption on both sides that the Club would ultimately be liable to pay.

(iv) Fourth, a telephone conversation between Mr Diaz-Saavedra and Ms Gonzalez on or about 18 May 2012 (which is recorded in an email from Ms Gonzalez to Ms Scott of that date) as follows: “*Adrian said the situation is very serious and beyond the control of Kevin Page and Mr Pennington, as they do not have enough money to pay all the claimed amounts, irrespective of whether the Tax Office admits any of the appeals*” (**emphasis added**). As to this email, I accept the Defendants’ contention that looking at the full context of this email, it is inconsistent with the Defendants’ continuing assumption that they would be liable for the taxes if the appeals failed. In my judgment, as I discuss in more detail later, it instead marks a sea change in the Defendants’ approach in circumstances where they now intended to find a way of avoiding the possibility that the Club would be required to pay the Spanish Taxes; this email signals that sea change to FNTC.

149. On balance, I accept that the letters of 30 June 2000, 25 June 2004 and 25 November 2010, taken together, evidence that the Club shared its assumption with FNTC – the letter of 25 June 2004 being the high point. However, it is difficult to see how this limited correspondence is sufficient to evidence an assumption of responsibility for FNTC’s understanding (in the sense of showing that the Club expected FNTC to rely upon its understanding) insofar as an assumption of responsibility provides helpful guidance. Whilst I accept that the Club and FNTC both conducted themselves (to each other’s knowledge) on the basis of this common assumption for many years (thus the Club (to FNTC’s knowledge) had financial responsibility for and conduct of the tax appeals, the underlying assumption on both sides being that the

Members of the Club would be liable if the appeals failed), there is in my judgment no real evidence that the Club assumed responsibility for that assumption (or indeed, as I deal with below) that FNTC was materially influenced by any such convention (as opposed to its own independent assessment of the situation).

150. Indeed, the available evidence suggests that the Club was under the impression (in my judgment rightly) that FNTC had its own advisers and formed its own views. By way of example I note the letter sent by Mr Pennington to Ms Scott on or about 23 November 2010 asking for FNTC's reaction to the decision of the Supreme Court to reject the appeal and saying "*I am not sure if you have had to face these sorts of Judgments in relation to other Clubs for which you are the Trustees and I would be very grateful to discuss this matter with you and to receive your help and assistance*". In an email dated 28 February 2012, Kevin Page said to Mr Pennington that it was his feeling that they should meet with FNTC "*to see what their opinion is and whether they have any experience of something similar*".
151. For the sake of completeness, I should say that for the first time at trial, the Claimants sought to rely on the (accepted) fact that IBI bills (IBI standing for *Impeusto sobre Bienes Inmuebles*, namely bills for property tax) had been levied on BBCB, were routinely paid by the Club from its bank account and then recharged to the Members on a proportionate basis. Kevin Page was frank in accepting that so far as the Members and the Committee are concerned, the Club Members are responsible for the payment of these bills. Accordingly, the Claimants say that this is evidence of the Club conducting itself on the basis that it is responsible for taxes on the Apartments (conduct which was known to FNTC by reason of the fact that BBL sent receipts for the IBI to FNTC). The Defendants respond, and I agree, that there is no evidence that this formed the basis of, or contributed to, any assumption by FNTC, that it is not pleaded and therefore that at best it is uncertain as to whether the liability for the IBI bills is a liability that can be compared with the Spanish Taxes. In my judgment, therefore, the payment of the IBI bills does not add anything further to the analysis I have set out above.

Reliance by FNTC

152. Given my analysis of the law, I must now turn to consider the question of reliance (albeit reminding myself that I do not need to find detrimental reliance, material influence such that it would be unconscionable to allow the Defendants to resile from the convention is enough).
153. In short, I cannot identify on the evidence that FNTC was in fact materially influenced by, or acted upon, the common assumption to a sufficient extent, as opposed to relying on its own independent view of the matter. Furthermore, it seems to me that the alleged common

assumption came to an end on any view in May 2012 when, far from continuing to maintain that it would be liable for the Spanish Taxes, the Club informed FNTC in clear terms that it intended to take steps to avoid liability.

154. In this regard:

- (i) I accept the Defendants' submissions that, with the exception of Ms Scott's evidence that FNTC was "*comforted*" by the Club's acknowledgement in correspondence that it was liable for the Spanish Taxes, none of the Claimants' witnesses gave any evidence that they specifically relied upon what was said to them by the Club (in the sense of being particularly influenced by it), or indeed upon any assumption of responsibility by the Defendants for the accuracy of their statements in correspondence as to the Club's liability for the Spanish Taxes.
- (ii) Indeed, Mr Kenny's evidence in cross-examination was that his understanding of the indemnities and liabilities under the Club structure was based on his understanding of those indemnities as set out in the documents and the operation of the timeshare business over the last 30 years. He accepted that the indemnities were "*standard*" and so he would have treated them "*the way I treated every other club...based on what we had been advised in the past*". His evidence as to his understanding in cross-examination was clear: it had been gained from an analysis conducted internally by FNTC:

"A. ...We as trustee, only hold the custodian of the underlying property for and on behalf of the club.

Q. Was that a view that you formed with the benefit of legal advice?...

A. It was informed in lots of other tax cases, where the club documentation, where the developer understood his responsibility, the club understood their responsibility and the matters were dealt with. We assumed this was running on correctly. What we didn't understand, that there was a slightly different agenda.

Q. But your understanding as to the club's liability was the result of your internal assessments of the liability for the tax based on your knowledge of the way that these schemes worked, is that correct?

A. We have lots of clients.

Q. Have I got that correct, yes or no?

A. It is based on what other clubs have done, our understanding which was always confirmed by how our other clubs dealt with this.”

(iii) Ms Scott’s evidence was to similar effect (although it was clear that she was not the decision maker on tax issues at FNTC); it was her view that the Club was liable because that was “*how all clubs operate*”.

(iv) I do not regard Ms Scott’s expression of “*comfort*” as sufficient to indicate that FNTC was materially influenced by the convention in the sense that without these statements it would have taken a different view. Furthermore, Ms Scott’s evidence that FNTC was “*comforted*” appears chronologically in her witness statement in the context of a discussion around the sending of an email on 24 May 2012. This was after she had received on 18 May 2012 the email from Ms Gonzalez in which Ms Gonzalez informed Ms Scott that Mr Diaz-Saavedra had told her that “*the situation is very serious and beyond the control of Kevin Page and Mr Pennington, as they do not have enough money to pay all the claimed amounts, irrespective on whether the Tax Office admits any of the appeals*”. Against that background, Ms Gonzalez went on to tell Ms Scott in terms that “*What Kevin Page is intending to do is to acquire for around 300,000 € the bare ownership of the apartments when the auction takes place...With this they intend to ‘clean’ the bare ownership embargos. To acquire this should the Tax Office allow them to, they are thinking on either doing it in the name of Kevin as an individual or creating a Spanish S.L to acquire them*”.

(v) In my judgment, from this date, FNTC was put on notice that the Club had identified a specific course of action with a view to avoiding paying the Spanish Taxes and I cannot see how earlier statements to the effect that the Club was liable for those taxes could have continued to comfort FNTC (even assuming that they had done so before). At the very least, it was now clear that Kevin Page was being non-committal about the possible liability of others for those taxes. Thus, Ms Gonzalez also told Ms Scott that “*...on the question of whether the Tax Office is likely to pursue the board of directors of Club Bahia Blanca B Ltd, he couldn’t confirm anything, he suggests that we check with a tax specialist*”. I note as an aside that this final point is the very opposite of an assumption of responsibility for the approach of FNTC.

(vi) I reject (i) Ms Scott’s evidence as to this email that she and Mr Kenny were of the opinion that “*the Club was **exploring all options** available to them to avoid the tax in a legitimate way*” (***emphasis added***), and (ii) Mr Kenny’s evidence that he merely assumed that the Club were going through a general thought process as to their options.

That is not what the email of 18 May 2012 says (it concentrates on Kevin Page's intention to acquire ownership of the Apartments and to "clean" the titles of their embargoes). In the circumstances I cannot in any event see how FNTC could have taken comfort from the Club's earlier statements that they would pay the Spanish Taxes. From this date onwards, it is clear that the Club's approach had changed and that they intended to take steps to seek to avoid the need to pay those taxes (or at the very least that there was a risk that this was their intended approach). Whilst I accept that FNTC itself continued to hold the view that the Club would be liable for the Spanish Taxes, there was no longer a common assumption to that effect and no basis on which FNTC could rely on any continuing common assumption. None of the subsequent communications from the Club was capable of providing any comfort to FNTC as to a continuing understanding that the Club would ultimately be liable for the Spanish Taxes. In this regard I note the extract from the speech of Lord Donaldson in *Hiscox v Outhwaite (No 1)* [1991] 3 ALL ER 124 at 134-135, referred to by Briggs J in *Benchdollar* at [43]: "*Once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings*".

- (vii) The fact that the Claimants gave evidence to the effect that they would have taken different steps had they known of the Defendants' intentions to purchase the Apartments (in particular that they would have applied for an injunction) is not, in my judgment, positive evidence that they were materially influenced by the convention. Further and in any event the Claimants' evidence in this regard is in my judgment seriously undermined by the fact that when the Claimants first discovered in May 2012 that the Defendants were intending to make a bid for the Apartments at auction, they took no active steps to prevent such a course of action and did not even insist on having a meeting to discuss it: Ms Scott's response to the 18 May 2012 email from Ms Gonzalez referred to above, sent to (amongst others) Mr Kenny on the same day, was "*The Club has been considering a number of options in the event an auction takes place. Their suggested proposal (for Kevin Page to purchase the property in his own name at a price lower than the tax debt) is not something we could approve given the risk to the directors of Bahia Blanca B Limited nor the lack of security for the members of the Club. I think we need to decide what action we would be comfortable with and then let make (sic) Kevin Page aware...*". Thereafter, however, there was no attempt on the part of FNTC to step in or to take control of matters and nor was there any attempt on the part of FNTC to make its disapproval of Kevin Page's intended course of action known. Ms Scott's email to Kevin Page of 18 May 2012 (following a conversation with Mr Kenny) says merely this: "*I understand that in the event that the*

tax authorities set a date for the auction of the property, you are considering, dependent upon the interest shown to acquire the bare ownership of the property. I've spoken to Declan and he's suggested it may be worthwhile organising a meeting between ourselves to discuss this and explore what other options may be available". Ms Scott offered a meeting and asked Kevin Page to let her know "*if this is of interest*". In the event no meeting took place and although Mr Pennington had agreed to get back to FNTC, he did not do so. FNTC took no further action apparently because, as Mr Kenny said in his statement, the file had gone quiet again. Indeed, as far as Mr Kenny was concerned a "*perfectly normal situation*" was playing out, a view he took upon sight of an email from Mr Diaz-Saavedra sent to him in translation by Ms Gonzalez on 22 January 2014. However, that email updated FNTC on the status of the tax appeals, it said nothing further about the Club's intentions one way or the other and certainly did not inform FNTC that the Club had thought better of the plan outlined in the email of 18 May 2012.

(viii) It is true that the contemporaneous documents show that the Club did not keep FNTC positively informed of its intention to make a bid for the Apartments when they were finally auctioned in 2015 (and in light of the documents, I reject Kevin Page's evidence that he thought he had told Ms Scott about the bid during a telephone conversation on or 10 April 2015). Equally, however, the Club never informed FNTC that it had decided not to pursue the option identified in the 18 May 2012 email, instead telling FNTC via Mr Diaz-Saavedra in the Spring of 2015 that the Club had yet to make a decision on its next course of action. I reject Ms Scott's evidence that during the telephone conversation with Kevin Page on or around 10 April 2015 he had said that he was considering whether to stop the auction by payment of the tax debt – this was not recorded in her email to Mr Kenny of the same date and Ms Scott admitted that she did not recall the exact detail of the conversation. In an email to Ms Gonzalez of 10 September 2015, Mr Diaz-Saavedra (providing a requested update on the situation) said this: "*...there is not an answer from the Tax Office regarding the offer made for the Titles*". FNTC made no attempt to discover what "*offer*" he might be referring to or by whom it had been made.

(ix) From May 2012 onwards, it certainly could not be said that the Club had assumed any responsibility towards FNTC for its understanding and indeed it is clear that the Club was now taking a different view in any event.

(x) Insofar as the Claimants place heavy reliance upon the fact that FNTC wanted to replace Mr Diaz-Saavedra as Fiscal Representative with PwC in 2004, but did not do

so, this does not assist them. I find that on balance it would not have been possible (after FNTC was reinstated as trustee in 2004) to appoint PwC as Fiscal Representative; Mr Kenny's evidence was that he allowed the matter of the Fiscal Representative to drop as a pragmatic course and that PwC would not have taken the appointment in any event because of the reputational risk and their potential liability (as Fiscal Representative) for the liabilities of BBCB. This evidence does not support the Claimants' contention that their position on the identity of the Fiscal Representative was effectively influenced by the ongoing convention.

155. In her Reply submissions at the close of the trial, Mrs Talbot Rice argued that the fact that FNTC had left the Club (over many years) to pursue the appeals against the Spanish Taxes on the basis that the Club would be liable if the appeals proved unsuccessful and had not sought to take control of the situation at an early stage and to "*do things differently*" was evidence of reliance, insofar as that was needed. She pointed to the fact that substantial penalties and interest had been incurred during that period (the implication being, as I understood it that this would otherwise have been avoided). In particular, she submitted that the facts of this case are analogous to those in *Reel v Holder*, where the IAAF had represented to the Taiwan association over many years that it was a member of the IAAF and it was "too late" for the IAAF to say that the Taiwan Association was not a member under its rules. Similarly, in this case, she argued, FNTC had been deprived of the opportunity to deal with this matter differently until it was too late "*because the die was cast*".

156. I reject these submissions. It was Mr Kenny's evidence in his first statement that FNTC was not in the habit of taking a proactive approach to tax assessments, not least because of the hope that the four year limitation period that applied in Spain would result in the claim for tax becoming time barred. However, when it came to appeals, it was also his evidence that "*From FNTC's perspective, generally, having an embargo on title to property has never been an issue because FNTC has no intention of selling or mortgaging the property as it is trust property held for the long term for the benefit of members. FNTC's greater concern would be to ensure that the club fought the imposition of taxes where appropriate, as it was in the best interests of the members to minimise taxes because they are ultimately responsible for their payment ...Further in most cases our advisors believed the tax assessment was incorrect and there were good grounds to appeal it*". In light of this evidence (which finds support in emails from Ms Scott to Mr Pennington of 13 December 2010 and 8 March 2012, both of which refer to another club being in a similar situation to the Club in terms of appeals and to the commencement of enforcement procedures in relation to that other club), I fail to see that, absent the convention, FNTC would have done anything different. In circumstances where

FNTC held its own view (on advice) that the Members were ultimately responsible for payment and where it took the general view that tax assessments should be appealed, the appeals in this case would always have been pursued and penalties and interest would have been accrued in any event – it was Ms Marin’s evidence that save for in very limited cases, there was an immediate obligation to pay tax upon the issue of an assessment and this obligation was not suspended pending an appeal. In the circumstances, the mere fact that FNTC did not “step in” and take control of the appeal process does not appear to me to evidence material influence by reason of the convention. This was FNTC’s normal approach, based on legal advice and on years of experience in dealing with tax assessments in Spain. As I have already said, FNTC did not even step in when it was expressly informed of Kevin Page’s intention to bid for the Apartments at auction in May 2012 and thereafter, it had no basis to rely on any common assumption.

157. As for *Reel v Holder*, I have already said that this is a relatively old case and must be approached with some degree of caution. However, it seems to me that in *Reel v Holder* the position taken by the IAAF resulted in the Taiwan association paying regular subscriptions to the IAAF and engaging in international competitions with other members. The passage of time does not seem to have been the key factor in the finding of estoppel by representation – on the contrary, I agree with Mr Gourgey that Forbes J appears to have decided the case on the basis that the Taiwan association conducted itself in a particular way (in other words was materially influenced) by reason of the IAAF’s representation that it was a member.
158. In my judgment, the points on which the Claimants rely are entirely consistent with FNTC’s individually held understanding as to the true position, based on many years of experience in the business (including experience which had involved many different clubs taking very different stances in dealing with the tax authorities, but apparently being left to get on with matters themselves), and do not evidence that FNTC was materially influenced by communications from the Club as to its assumption, much less that it would now be unconscionable to permit the Defendants to resile from that assumption.

Unconscionability

159. Given my finding on reliance (which overlaps with the question of unconscionability), I can see no basis for holding that it would now be unconscionable to permit the Defendants to resile from their assumption. In circumstances where I can find no evidence in support of the proposition that FNTC was materially influenced by the convention, and where the convention came to an end in May 2012, it would be neither unfair nor unjust to permit the Defendants to resile from it.

160. In all the circumstances, I do not need to make detailed findings on the sword/shield issue or on whether the Club, as an unincorporated association, is capable of being estopped. However, should it become important, I address these two issues briefly below:

Sword/Shield

161. In my judgment the use of estoppel in this context by FNTC is not an impermissible use; it is premised upon an understanding of the underlying structure of the Club documents in circumstances where FNTC's primary case is that it is entitled to an indemnity by reason of the true construction of those documents. I have rejected that primary case, but the attempt to establish an estoppel by way of alternative is not an attempt to use the estoppel doctrine as a sword. I would not have rejected FNTC's case on Issue 7 on this ground.

Estoppel of the Club as an Unincorporated Association

162. Whilst I accept that, as the Claimants point out, (i) the Members received reports for the purposes of their AGMs which made it clear that they would be liable for the Spanish Taxes if the appeals against the assessment were lost, and (ii) the Members would have been aware of the build-up of the reserve, in my judgment I cannot find that the general body of Members of the Club had a particular understanding as to the liability for the Spanish Taxes, still less assumed responsibility to FNTC for payment. There is certainly no evidence of something more than merely "*passive acceptance*" which, as Morritt VC made clear in *Redrow plc v Pedley* is not enough. Not every Member attended AGMs and I do not have the evidence on which I could make a finding of intention or positive conduct in respect of the general body of Members.

163. In the circumstances, the only basis on which the Claimants could establish an estoppel against the Club would be on grounds of agency on the part of the Committee. For this to operate, it seems to me that I must be satisfied on two issues: first that the understandings and assumptions of members of the Committee were capable of binding all Members and second that this includes Members who may have joined after the event, referred to at the trial as "*subsequent joiners*".

164. As to the first issue, the Defendants argue that clause 19 of the Deed of Trust makes it clear that the Committee has no power to amend the Deed of Trust without the approval of the Members (which had not been obtained) or the certification of the Trustee (which had also not been obtained). Therefore, they say that the estoppel for which the Claimants contend purports to effect a variation of the Deed of Trust which the Committee could not possibly have effected. They go on to say in their closing submissions, without citing any authority,

that “*It is doubtful therefore whether the Committee could bring about by estoppel a result which they would be unable to bring about by contract or by deed*”.

165. Clause 19 of the Deed of Trust provides as follows:

“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 modifications, 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.”

166. Whilst I agree with the Defendants as to the circumstances in which the Deed of Trust may be modified under this provision, I disagree that the very existence of this provision precludes a finding of estoppel. The Claimants do not advance their case on the basis that there was a variation to the Deed of Trust.

167. Clause 11 of the Constitution deals with the appointment of the Committee and its powers, and, so far as relevant provides as follows:

“11.(a) The business and affairs of the club shall (save insofar as the same may have been delegated to a Management Company as hereinafter provided) be managed by a Committee of not more than five persons.”

(e) ...The Committee shall have power to do all things that may be necessary for the carrying out of the objects of the club and for its general management ...

(f) Without prejudice to the generality of the foregoing the Committee shall have the following specific powers:

(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”.

168. Clause 12 of the Constitution requires the Members to contribute to “*all reasonable costs incurred by the Club including... (v) All outgoings incurred in respect of the Apartments including...any taxes...*”.
169. In my judgment, the Committee is plainly authorised by the Constitution to enter into agreements insofar as may be necessary or desirable. I accept the Claimants’ submission that the Committee could have entered into an agreement with FNTEC or with BBCB to facilitate payment of the Spanish Taxes by the Club and I see no reason why the same could not be achieved by an estoppel. Further and in any event, the estoppel for which FNTEC contends is concerned with an understanding as to the true effect of the Deed of Trust and has nothing whatever to do with variation.
170. In circumstances where the Defendants do not seek to raise any other point as to the authority of the Committee beyond reliance on clause 19 of the Deed of Trust, I find that the understandings and assumptions of members of the Committee were capable of binding all Members who were Members at the time of those understandings and assumptions.
171. As to the second issue, the Defendants say that in the case of subsequent joiners, they could not be said to have assumed responsibility for a convention about which they did not know and, in the circumstances, an estoppel would operate extremely unjustly insofar as they are concerned. The Claimants respond that, pursuant to the Constitution, a new Member receives a Membership Certificate from an outgoing Member and that Membership Certificate is already impressed with the estoppel. The Claimants also argue that as assignees of weeks at the Resort, subsequent joiners are bound by the estoppel as assignees and they rely on a number of authorities in support of this proposition.
172. Clause 10 of the Constitution (Membership) includes the following provisions:
- “(a) *Any person (not being a minor) may apply for and be admitted to membership of the Club.*
- (d) *In the first instance the Company as initial holder of all Membership Certificates shall issue to Members Membership Certificates and such other evidence of membership as shall from time to time be determined by the Committee. Thereafter Membership Certificates may be transferred from current Members or the representatives of deceased Members in accordance with the relevant provisions of this Constitution.*
- (e) *Membership of the Ordinary Members of the Club shall cease on the occurrence of any of the following events:*

(i) the transfer of all Membership Certificates owned by a Member, subject to a transferee being admitted to membership of the club;...

173. Clause 15 of the Constitution (Transfer of Membership Certificates) provides that:

“(a) Any Member, his personal representative, trustee in bankruptcy or liquidator, (as the case may be) may sell, bequeath or otherwise transfer the rights conferred by a Membership Certificate, provided that the transferee applies for and becomes a Member of the Club and all liabilities of the transferor in respect of such Membership Certificate are paid or provided for.

(b) In the event of a sale or transfer the Membership Certificate shall be delivered to the Committee or the Management Company with the Form of Surrender and Request properly endorsed by the transferor and transferee. A reasonable fee may be charged for the registration of the transfer and issue of a new Membership Certificate, which fee may be revised by the Management Company from time to time. Upon payment of the required fee and the discharge of any liabilities in respect of such Membership Certificate, the Committee of the Management Company shall promptly issue a new Membership Certificate and register the same in the name of the new Member.”

174. Mr Gourgey argues that the concepts of becoming a Member and receiving a Membership Certificate are different and distinct and that while a new Member receives a Membership Certificate, his or her membership in fact arises because of his or her admission as a new Member. He submits that, in the circumstances, any understanding or convention with which an outgoing Member was fixed cannot bind a new Member.

175. I reject these arguments and I agree with the Claimants that the mere existence of subsequent joiners would not have been enough to preclude a finding of estoppel. I accept that the intention of the Constitution, objectively construed, is that the rights and liabilities conferred on a Member by reason of his or her Membership Certificate should be transferred to a transferee and that this would also include any convention to which the transferee had agreed (acting through the agency of the Committee). As the Claimants rightly point out, there is nothing unusual in the concept of an assignee being bound by a pre-existing convention on the basis that it would be contrary to principle for the assignee to take a greater and better right than the assignor. I draw comfort from the decision of the Court of Appeal in *Hopgood v Brown* [1955] 1 WLR 213, per Evershed MR at 224-225 and *PW&Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch) per Neuberger J at [196] and I note that the

Defendants did not suggest that these decisions were not relevant or should be distinguished in the circumstances of this case.

Summary on Issue 7

176. For the reasons set out above, I reject the Claimants' case on issue 7.

C3. Issues 2 and 3: Does FNTC and/or BBCB have a right of indemnity out of the trust property in respect of the Spanish Taxes pursuant to the Trustee Act 2000, section 31 and/or the common law? Alternatively, are FNTC and/or BBCB entitled to seek reimbursement in respect of the Spanish Taxes from the beneficiaries of the trust pursuant to the equitable principle in *Hardoon v Belilios* [1901] AC 118?

177. I take these issues together because the Claimants accept that if they are to succeed on either issue it must be established that the Apartments are trust property. Analysis of these issues will also require me to answer issues 4, 5 and 6.

178. Paragraph 37A of the RRAPoC sets out the Claimants' case as follows:

"...the Spanish Taxes are an expense of the trusts on which BBCB and FNTC hold the Apartments for the benefit of the Club, and the Claimants are therefore entitled, as trustees, pursuant to section 31(1) of the Trustee Act 2000 and/or at common law to be reimbursed in relation thereto out of the Trust Property, namely the bare title to the Apartments, in support of which entitlement the Claimants have a non-possessory lien, or first equitable charge, over the bare title to the Apartments."

This leads to a plea in paragraph 79C to the effect that

"...BBCB is entitled as trustee of the bare legal title to the Apartments to indemnify itself in relation to the Spanish Taxes out of that Trust Property as set out in paragraph 37A above, for which purpose legal title to the Apartments should remain vested in BBCB and not registered in BBL SL's name, and BBCB should be free to sell such title if BBL and/or the Members of the Club continue to fail to indemnify it in relation to the Spanish Taxes".

I note that this plea does not include FNTC, although paragraph 37A is pleaded on the basis that both Claimants are entitled, as trustees to an indemnity.

179. Section 31 of the Trustee Act 2000 provides that:

"31(1) A trustee

(a) *Is entitled to be reimbursed from the trust funds, or*

(b) *May pay out of the trust funds,*

expenses properly incurred by him when acting on behalf of the trust.”

180. This provision gives statutory force to the trustee’s ancient common law right of indemnity from the trust fund, which right is not lost (say the Claimants) when the trust assets are transferred to a new trustee (see *Investec v Glenalla* [2018] UKPC 7 per Lord Hodge at [59(v)]). The Claimants argue that, on the assumption that the Apartments are trust property, the trustee’s right of indemnity is preserved notwithstanding that BBL SL (which says that it holds the Apartments on trust for the Club Members) has purchased the Apartments.

181. If the Claimants succeed on section 31 of the Trustee Act 2000, then there is no need for them to rely on the equitable principle in *Hardoon v Belilios* [1901] AC 118, which, as I understand it, is a fall-back position. Pursuant to that principle, a trustee’s right of indemnification out of the trust fund is equivalent to a right of indemnity from the beneficiaries of the trust:

“The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself. The obligation is equitable and not legal...where the only cestui que trust is a person sui juris, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves” per Lord Lindley at 123-124.

Again, the Claimants argue that, on the assumption that the Apartments are trust property, there is a clear right of indemnity from the Club Members.

182. I did not understand the Defendants to argue against the basic principles reflected in section 31 of the Trustee Act 2000 and *Hardoon v Belilios*. Their submission, however, is that these principles do not operate on the facts of this case (regardless of the numerous different ways in which the Claimants seek to make out their claim). Aside from anything else, they point out that the rule in *Hardoon v Belilios* does not appear to apply in the case of unincorporated associations (see *Wise v Perpetual Trustee* [1903] AC 139 and Lewin on Trusts [19th Edition] at 21-058). As to this latter point (on which I was not addressed by the Claimants), I need make no decision, for reasons which will become obvious.

183. As to 79C of the RRAPoC (referred to above), the Re-Amended Defence denies that BBCB is a trustee, that title to the Apartments remains vested in BBCB and that it has any right to indemnify itself out of the legal title to the Apartments. The Defendants go on to say that Spanish law governs the purchase and vesting of title and that BBCB is not entitled under Spanish law to deal with the Apartments or otherwise encumber the Apartments. Alternatively, the Defendants assert that BBCB's right of indemnification has been overreached and extinguished through the payment of the purchase monies for the title to the Apartments. I return to the question of the application of Spanish law later in this Judgment.

C4. Issues 4(a) and 5: Are the Apartments trust property because they fall within the definition of Trust Property in the Deed of Trust?

Trust Property – the Claimants' first argument

184. The first ground on which the Claimants argue that the Apartments are Trust Property is on the basis that they fall within the definition of Trust Property in Recital C to the Deed of Trust. This provides that:

“C. The Trustee has agreed to accept and hold on the trust terms and provisions hereinafter stated ownership and control of the Owing Company and its assets (by becoming the sole and exclusive members thereof) together with any other property which may from time to time be transferred to it or otherwise be held by it for the benefit of the Club and its Members from time to time on the trust terms and provisions set out in this Deed, all of which shall be hereinafter referred to as “the Trust Property”.

185. The Claimants put their case on this in two different ways. First, they say that the Apartments are held by FNTC by virtue of BBCB being simply a bare nominee company, itself holding the Apartments on bare trust for FNTC (Issue 5(a)(i)). If they are right on this argument, they made the point at trial that FNTC is itself liable for the Spanish Taxes to BBCB because it is holding the Apartments as Trust Property and this liability is preserved even after FNTC ceases to be trustee. Alternatively (and in the event that they fail on this argument) they submit that the Club is nevertheless estopped from denying that the Apartments are Trust Property as defined in Recital C (Issue 5(a)(ii)).

(i) Apartments held by FNTC by virtue of BBCB being a nominee and holding Apartments on bare trust for FNTC

186. The Claimants seek to make out this claim by reference to the true construction of Recital C, from which they say it is plain that the parties to the Trust Deed intended that BBCB would

be a bare nominee company, holding the Apartments on a bare trust for FNTC. The agreed list of issues in App 1 at paragraph 5 suggests that the Claimants also say that BBCB is a bare nominee for FNTC by virtue of a common intention constructive trust (Issue 5(a)(i)(B)) and that this forms an alternative argument as to why the Apartments fall within the definition of Trust Property. My understanding of the RRAPoC is that the Claimants in fact plead the existence of a common intention constructive trust (at paragraph 19C) only on the assumption that title to the Apartments is not Trust Property (and this understanding was reflected in the Claimants' closing submissions at paragraph 6). I shall determine the issue of the existence of a common intention constructive trust when considering Issue 6 in the agreed List of Issues at App 1.

187. I am sorry to say that I found the Claimants' case on the true construction of Recital C somewhat confusing. Notwithstanding that the Claimants pleaded this issue by reference to the existence of a bare trust (RRPoC at paragraph 19A.2.2), their submissions in closing as to construction were confined to only one paragraph and did not make any reference to the existence of the pleaded bare trust or to the allegation that FNTC was effectively a beneficiary under that trust. They said this:

“The Apartments are held by the trustee for the benefit of the Club and its Members because BBCB is a nominee only: it has to be a nominee on a true construction of the constitutional documents because otherwise the trustee cannot require it to make the Apartments available for the occupation of the members of the Club. As a nominee the trustee can direct it to make the Apartments available for the beneficiaries of the trust, the Club Members”.

188. In their opening submissions, the Claimants asserted that the beneficial interest on which they relied was captured by the words “*or property which was...held by [the trustee] for the benefit of the Club...*” in Recital C and that the enjoyment by Members of their rights to the Apartments under the Trust Deed could not be given effect to unless the Apartments were held on trust by BBCB for FNTC.

189. In her oral submissions, Mrs Talbot Rice drew my attention to various documents which referred to BBCB as a nominee company, including a Constitution Summary from around 1992, although I remind myself that documents entered into after the date of the Deed of Trust are inadmissible as to its true construction.

190. Further, Mrs Talbot Rice identified the following passage from Mr Kenny's cross-examination, during which he referred to BBCB as a “*vehicle*”:

“Q. Now it was not your understanding was it, Mr Kenny, in 1997 that BBCB was a trustee, was it?”

A. No

Q. Your understanding was that it was FNTC that was a trustee.

A. FNTC was the trustee, and the trust property were the apartments.

Q. Yes. So when did you come to the view that, in fact, it was BBCB that was the trustee?

A. I was never of the view that BBCB was the trustee. My view has always been, in all structures, that the trustee is FNTC, and BBCB is the vehicle that owns the property on behalf of the trustee.

Q. Yes. To be accurate, BBCB is the company that holds the property. Yes?

A. It is the vehicle that holds the trust assets, yes.

Q. And the trustee controls those trust assets through its ownership of BBCB.

A. Through its ownership, correct.”

Once again, however, I cannot see that this is admissible to an issue of pure construction (although it is relevant to the additional estoppel arguments to which I shall come in due course).

191. Mr Gourgey points out that the bare trust on which the Claimants appear to rely is effectively a trust which sits alongside the Deed of Trust and has (apparently) been overlooked for some 30 years; it was not mentioned by the Claimants’ witnesses. It was first pleaded in November 2018. Further, BBCB is not itself a party to the Deed of Trust setting up the trust structure for the resort in the first place. Mr Gourgey goes on to say that BBCB does not need to be FNTC’s nominee under the Deed of Trust; FNTC can give effect to the rights of the Members in the manner anticipated by the suite of documents setting up the Resort by exercising its sole membership rights in BBCB.
192. By way of response, Mrs Talbot Rice submits that it is wrong to equate membership rights with control of the company. Emphasising that BBCB’s affairs are managed and controlled by its directors and not its sole member, she submits that if BBCB was not a nominee, then its directors would be required to act in the best interests of the company and that would

involve selling or letting the Apartments for a profit; it would not involve permitting the Members to occupy the Apartments for free. In such circumstances the rights of Club Members would not be protected. Thus, she says, BBCB must be a nominee because it does what it is told by FNTC; only then can Members be assured that they will be allowed to occupy the Apartments without charge.

193. I reject the Claimants' arguments for the following reasons:

- (i) My understanding of the Claimants' pleaded case is that Recital C to the Trust Deed should be construed as follows: that BBCB (as a mere nominee) holds the Apartments on trust for FNTC, which in turn holds the Apartments on trust for the benefit of the Members. Thus, it is said that BBCB can look to its beneficiary, FNTC, for an indemnity in respect of the Spanish Taxes and that FNTC can in turn look on to its beneficiaries, namely the Club Members, for an indemnity. In this sense, though in no other, the Claimants contend that FNTC is liable for the Spanish Taxes to its trustee, BBCB.
- (ii) Applying the principles of construction already set forth earlier in this judgment, there is nothing in the wording of Recital C which would lead me to conclude that this was what the parties intended. Indeed, in my judgment, if the parties had intended to create a second trust by the terms of the Deed of Trust, they would have said so in clear terms and the overwhelming likelihood must be that they would have made BBCB a party to the Deed itself and that they would have set out BBCB's own rights and duties. The fact that there is no reference to this alleged bare trust in the Deed of Trust and that BBCB is not even a party to the Deed, appears to me to be a significant impediment to the Claimants' argument. I agree with the Defendants that the construction of a Deed of Trust between BBCB's sole member and the Founder Member can not govern the legal or beneficial ownership of the Apartments held by BBCB.
- (iii) Ordinarily, the owner and controller of a company has no beneficial interest in its property, having an entitlement only to a share in its profits (*Macaura v Northern Assurance Co Ltd* [1925] AC 619, per Lord Buckmaster at 626-627). I agree with the Defendants that this is supportive of the proposition that the court would require clear words in the Trust Deed if a different relationship was intended.
- (iv) "The Apartments" are not mentioned in Recital C but they are defined in Clause 1(g) of the Deed of Trust as "*the fully constructed and furnished Apartments described in the fourth schedule of the Constitution and any additional apartments title to which is*

vested in the Owning Company...". If it had been intended that the Apartments were to be held on trust by BBCB for FNTC, this definition would have said so.

(v) The Constitution at clause 7 provides that:

"(a) The Founder Member shall cause the Apartments enumerated in the Appendix to be transferred either directly to the Owning Company or to a Company which is a wholly owned subsidiary of the Owning Company, together with such further Apartments as the Founder Member shall determine....

(b) The Founder Member shall arrange for the membership of the Owning Company to be limited to an independent custodian trustee or joint trustees...who will 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..."

Thus the Constitution clearly envisages that ownership of the Apartments (making no distinction between legal and beneficial) would be vested in the Owning Company. There is no mention whatever of the alleged bare trust. Clause 8, dealing with Rights of Occupation also makes no mention of the alleged bare trust.

(vi) The Claimants' arguments as to the need for BBCB to be a nominee if proper protection is to be afforded to Members are inconsistent with the terms of BBCB's Memorandum of Association (both in its original form at paragraphs 3A, 3B and 3D and as it was amended in 2005). Amongst other things, this expressly provides that BBCB's objects include *"(A) the holding of [the apartments]...and the running of an incorporated members club...for the exclusive enjoyment, use and occupation by the Members of the Club from time to time...and to sell, lease, hire out, timeshare, grant rights in or over, improve, manage or develop all or any part of such property to the advantage of the Company, provided always the Company shall not carry on any other business or trade whatsoever..."* and *"(D) To distribute among the members in specie any property of the Company or proceeds of sale or disposal of any property of the Company, and for such purposes to distinguish and separate capital from profits provided always and so that no such sale or disposal of capital be made except with the sanction of not less than one hundred per cent of the members and any other sanction which may for the time being be required by law"*. In the circumstances, I fail to see how BBCB's directors could do anything other than ensure compliance with its objects and I cannot see how the Claimants' argument (that unless it is a nominee, BBCB's directors would be obliged to sell or let the Apartments for a profit) can possibly be correct.

(ii) the Club is estopped from denying that the Apartments are Trust Property

194. The Claimants allege that BBL and the Club are each estopped from denying (i) that the Apartments owned by BBCB are Trust Property within the meaning of the Deed of Trust (para 19C.2.1 of the RRAPoC) and (ii) that BBCB holds the Apartments on trust for the benefit of the Club (para 19C.2.2 of the RRAPoC). The Claimants plead that this estoppel arises because “*all parties...believed that BBCB was an Owing Company and held the Apartments on trust for the benefit of the Club (whether indirectly through the Trustee or directly) and dealt with each other on such basis throughout the existence of the Club until the Defendants procured the transfer of the Apartments to BBL SL*”. The parties have agreed that there is no reason why I should not address both of these estoppel arguments (arising pursuant to issue 5(a)(ii) and issue 6(b) in App 1) at the same time. The only distinction between the two issues is the distinction between Trust Property as defined in the Deed of Trust and trust property as an independent concept.

195. In this regard I bear in mind that the Defendants contend that (for the purposes of the first estoppel argument) an asset may come within the definition of Trust Property in the Deed of Trust but that that does not necessarily mean that it is itself held on trust by BBCB – it may simply be held within the trust structure. This is because it is their contention that a finding in favour of the Claimants on the first estoppel would effectively involve an acceptance that BBCB must be an Owing Company such that its assets, the Apartments, come within the definition of Trust Property. FNTC holds those assets through the membership interest it has in BBCB, hence the words in parenthesis in Recital C: “*(by becoming the sole and exclusive members thereof)*”. If the Defendants are right on this point, then a finding in favour of the Claimants in relation to the first estoppel would not assist the Claimants’ case. For reasons which will become clear, I shall deal with this point when considering the question of whether BBCB is properly to be regarded as an Owing Company.

196. Once again it will be necessary to consider the positions of the various parties to the alleged estoppels separately. Insofar as the Defendants are concerned, I have already decided that the mere fact that the Club is an unincorporated association will not preclude a finding of estoppel.

197. Both Claimants rely upon these estoppels but again, their positions are different (although on this occasion, the Claimants seek to include BBCB in the relevant understanding by reason of FNTC’s understanding and its position as controller of BBCB). However, in common with the position in relation to the alleged estoppel in Issue 7, in the case of BBCB, there is no contractual relationship of any kind between it and BBL/the Club and no intention that there should be any such legal relationship. In my judgment, therefore, these alleged estoppels are

being used as a sword by BBCB to found a cause of action. In the circumstances, I reject BBCB's case on estoppel in relation to Issues 5(a)(ii) and 6(b). Insofar as the Claimants' rather confusing pleading claims indemnification for BBCB only in paragraph 79C, I therefore reject BBCB's entitlement to such indemnity on grounds of estoppel.

198. In the case of FNTC, the estoppel for which FNTC contends is capable of arising by reason of a common assumption as to the true effect of the Deed of Trust. In such circumstances the doctrine is being used as a shield and not as a sword. In my view, however, the Claimants' case as pleaded does not appear to make out a claim by FNTC to an entitlement to indemnify itself in relation to the Spanish Taxes out of Trust Property (paragraph 79C refers only to BBCB). On this ground alone, it is difficult to see what the purpose of FNTC's estoppel claim might be. However, as this is not a point that was raised by the Defendants and as the case has been fully argued before me, I intend to consider that claim on its merits.
199. Applying the legal framework identified earlier in this judgment, I must consider (i) whether there was an unambiguous common assumption or understanding on the part of the Club/BLL on the one hand and FNTC on the other (ii) whether that assumption or understanding crossed the line; (iii) whether the Club/BLL assumed responsibility for the adoption of the assumption (on the basis that this may provide useful guidance); (iv) whether FNTC relied on the assumption in the sense that they acted upon it or were materially influenced by it; and (v) whether it would now be unconscionable to permit the Club/BLL to resile from any such assumption.
200. At the outset I note that no particulars are pleaded of any form of reliance on the alleged shared assumption (in the form of acting upon or being influenced by, the assumption) and no submissions were made in the Claimants' written or oral closings as to this element of the required legal framework, save for the broad brush point (which I have already rejected as being sufficient on its own) that in circumstances where the common assumption "*has been in existence for 30 years and has repeatedly been referred to it is much too late for the Club to assert that the Apartments are not Trust Property (in order to try to escape liabilities incurred in connection with them) now*". In my judgment, the Claimants have not shown that the mere passage of time has rendered it unconscionable for the Defendants to resile from the alleged common assumption and, accordingly, I reject these two estoppel arguments on this point alone. Further and in any event, as will become clear from my analysis of the evidence below, the Claimants have not established that there was any such common assumption lasting for a period of 30 years.

Common Assumption

201. Kevin Page's evidence on this issue was somewhat confused. In Kevin Page's third statement he said that he had always understood that "*BBCB was not a trustee and simply held the bare titles...and that FNTC owned BBCB. The bare titles were therefore in trust because they were within the trust structure with FNTC at the head of it*". He said that he did not recall anyone suggesting to him that BBCB was a trustee of the Apartments. However, under cross examination, he said that his understanding was that the Apartments were "*held in trust*" and he confirmed that this was an understanding that was shared by the Committee. When he was further questioned as to the basis for his understanding and it was put to him that he understood that the Apartments themselves were held in trust, he agreed.

202. Mr Kenny's evidence was as follows:

"Q. So the trustee, through its ownership its holding in the owning company, holds the property.

A. That is how it holds the property for the members, yes.

Q. Yes, and that was your understanding throughout?

A. Correct"

Mr Kenny expressly rejected the suggestion that he had ever been of the view that BBCB was the trustee.

203. The available documentary evidence does not support the proposition that the parties shared a clear and unambiguous understanding over many years either that the Apartments were Trust Property within the definition of the Trust Deed or that BBCB held them on trust for the benefit of the Club and its Members (as opposed to the understanding that the Apartments were held within a trust structure). Furthermore, insofar as the Claimants sought to extend the remit of this common understanding in their written closing submissions to include the common assumption that BBCB is a "*mere nominee*", they did so without any pleaded or evidential basis.

204. The communications internal to the parties and crossing the line between the parties make reference not to the definition of Trust Property in the Deed of Trust, but rather to the Apartments being "*in trust*", and in some cases being held "*in trust*" by FNTC. In order to establish that the parties operated on the basis that the Apartments were Trust Property under the Deed, the Claimants rely on documents which they submit evidence a common understanding that BBCB was an Owing Company (in which case its assets would be Trust Property). It would appear from their closing submissions that they also rely on these

documents in support of the proposition that all parties operated on the shared assumption that the Apartments were trust property in a more general sense.

205. However, in my judgment, the available documents create a confusing picture with no clear and unambiguous understanding being evident, other than perhaps that the Apartments were held within a trust structure; how they were held and (importantly) whether they were in fact trust property is wholly unclear. In circumstances where the Claimants' two estoppel claims are entirely dependent upon establishing a clear understanding and assumption that the Apartments were Trust Property under the terms of the Deed or trust property in the sense that BBCB held them on trust for the benefit of the Club, this seems to me to be fatal.
206. Looking at some examples of the documents on which the Claimants rely as evidencing the alleged common assumption and as crossing the line, some documents refer only to the fact that the Apartments (i) are "*in trust*" (for example a letter from the original Trustee to Mr Paul Nolan, company secretary of the Founder Member, dated 23 May 1992, which also refers to the Resort "*we have in trust*", a letter from the original Trustee to the Founder Member dated 13 November 1992, a letter from the original Founder Member to FNTC dated 9 January 1998 and a fax from FNTC to Ray Bostock dated 9 February 1999) or that they would be placed "*in trust*"; or (ii) transferred "*into trust*" (for example a letter from the original Founder Member to the then Trustee dated 12 November 1990, a fax from Mr Bostock to FNTC dated 9 January 1998 and a reply from FNTC dated 28 January 1998).
207. I accept the Defendants' submissions that these words are insufficient to determine how the Apartments were intended to be held within the trust structure. Indeed, as I mention above, the phrases "*in trust*" and "*transferred into trust*" could quite sensibly mean simply that the Apartments were "*in the trust structure*" or to be transferred into the trust structure, a meaning which fits with the likelihood that the authors of the various documents on which the Claimants rely were aware that there was indeed a trustee but that it was not BBCB. Indeed in a letter dated 6 November 1997 from Ray Bostock to FNTC a reference to the Apartments being held "in trust" for Members was made in the same sentence as a reference to Apartments being "owned" by BBCB, highlighting the ambiguity as to how the trust operated (similar points might be made about his earlier letter to a Member dated 25 February 1997).
208. Given that there is no appreciable practical difference between BBCB holding the Apartments subject to the Members' occupation rights with FNTC being its sole owner and therefore being obliged to respect those rights and (b) BBCB holding the titles on an undocumented sub-trust for its sole shareholder, or alternatively for the Members, it is perhaps unsurprising that the phrase "in trust" was used as a convenient short hand. On any view, however, it is unclear

precisely what was meant by the words “in trust” or “transferred into trust” in any particular document and it is certainly not clear that it was intended to mean that BBCB held the Apartments (as Trust Property within the definition in the Deed of Trust, or as trust assets more generally) irrespective of what the Deed of Trust said.

209. Some documents on which the Claimants rely refer to the Apartments being held in trust by FNTC, for example a letter from the original trustee to Mr Nolan dated 26 April 1991 referring to an apartment “*we hold in trust*” (but also expressly referring to a number of Apartments at the Resort being “vested” in BBKA) and a letter from BBL to FNTC dated 15 February 1999: “*Legal numbers 23 and 24 have already been conveyed to Bahia Blanca Club “B” Limited and are **held in trust by your good-selves***” (*emphasis added*). These documents say nothing of how BBCB held the Apartments and nor do they support the proposition that it was understood that BBCB held the Apartments on trust for FNTC which then held the beneficial title on trust for Members.
210. Some documents plainly point away from the estoppel for which the Claimants contend. In a letter from Ray Bostock to a Member dated 1 April 1997 he writes “*The fact of the matter is that [BBKA] and [BBCB] are non-trading companies whose sole purpose is to hold the deeds of the apartments safe for all the members. The shares in those two companies are held by First American as Trustees for all the members...*” In a fax from Elaine Higgins of FNTC to Ray Bostock dated 2 February 2000, Ms Higgins writes that “*...FNTC holds the shares in the owning companies as trustee*”. Neither of these letters refers to the Apartments being held on trust by BBKA or BBCB. In a letter dated 11 April 2000 to FNTC, Ray Bostock set forth his understanding that “*the whole ethos of the trust arrangement is that the Trustee owns and controls the company which itself owns the apartments*”. His view, however, was plainly that BBCB was not an Owing Company, a view he expressed both internally and in correspondence with Mr Kenny (notably in letters dated 20 July 2000, 25 August 2000 and 22 September 2000).
211. Mr Kenny accepted in cross examination that between 2000 and 2004 BBL considered BBCB not to be an Owing Company, a point which itself undermines the submission that the alleged common assumption (certainly that the Apartments were Trust Property under the Deed of Trust) had been in existence for 30 years. Kevin Page’s evidence was that he had never considered whether BBCB was an Owing Company prior to the matter being drawn to his attention in the context of this dispute: “*It was certainly never a matter that was raised by FNTC UK with me, nor was it one that I was aware of*”. This evidence was not challenged and there is no documentary evidence to suggest otherwise.

212. After about 2004, there is very little in the way of communications on which the Claimants rely as crossing the line between the parties and in my judgment, none of these presents a clear and unambiguous picture:

(i) The Claimants allege that FNTC invoices for its fees from 2001 to 2005 “*expressly name BBCB as the Owing Company*”. This is not entirely accurate. The invoices are all in similar form. Taking by way of example the 31 January 2001 invoice, it includes a heading which says “*Owing Company Fees for the year commencing 1 January 2001*”. Under that heading it refers to Midmark, BBKA and BBCB, apparently charging £550 in respect of each company. Whilst the inference might be that the intention was to refer to BBCB as an Owing Company, that is not, to my mind entirely clear. Further and in any event, between 2000 and 2004, any such understanding or assumption on the part of FNTC was certainly not shared by the Club (which is also why the Claimants’ reliance upon the updated versions of Schedule 4 to the Constitution which referred to BBCB as the Owing Company and which Mr Kenny asserted were sent to BBL does not assist them – evidence of this taking place is prior to 2000. The same point may be made about another key document on which the Claimants relied as establishing an understanding about BBCB’s role as “*nominee Owing Company*” – a letter from the Trustee to Mr Nolan dated 23 November 1992). From 2006 to 2012 FNTC’s invoices made no reference to BBCB, let alone to it being an Owing Company. Thereafter it is referred to, but not as an Owing Company. In any event, I agree with the Defendants that it would be a major leap to suggest that these invoices permit me to draw an inference as to an understanding of the meaning of Trust Property under the Deed of Trust or indeed as to any understanding that the Apartments were trust property in any event.

(ii) The Claimants rely on an email dated 13 December 2010 in which Ms Scott stated that “*As trustee we would not be able to endorse any action that jeopardised the trust assets*”. This email was sent to Richard Pennington and copied to Kevin Page. In paragraph 19C.2.2.3(n) of their RRAPoC the Claimants assert that “*The reference to the “trust assets” in this email can only be a reference to the apartments, as they are the only assets that could be jeopardised*”. Whilst I accept that Ms Scott might have been referring to the Apartments, this might equally have been a more general comment on the potential for the loss of the Apartments to jeopardise the trust assets in the sense that it would substantially reduce the value of BBCB. Further, there is no evidence that as at this date any assumption as to the Apartments being trust property was shared by the Club (through its Committee), or by BBL.

(iii) The high point of the Claimants' case would appear to be a letter from Richard Pennington to Ms Scott dated 6 March 2012 in which he said that it seemed to him and to Kevin Page that "...the Company itself [BBCB] has no assets other than it holds the title deeds on trust for the members". This reflects a similar point made by Richard Pennington in an "internal" email of 14 February 2012 sent to Mr Diaz-Saavedra. However, even assuming that this email, taken together with Ms Scott's email of 13 December 2010, is capable of evidencing a common assumption as to the fact that the Apartments are trust property, I find it very difficult to see how the Defendants can properly be said to have assumed a responsibility for FNTC's understanding. Indeed the email of 6 March 2012 is careful to ask for information from FNTC whilst at the same time expressing the Club's views: "*We would be very grateful for any information you can provide*". Far from advising FNTC of the true position, the Club, through Richard Pennington, was (perhaps rather tentatively) expressing its own opinions and asking for help at the same time.

Reliance/Unconscionability

213. I have already said that the Claimants have failed to plead or prove reliance. However, I would add that I rely upon all the points made in relation to the Issue 7 estoppel on reliance – FNTC took its own professional advice and formed its own views based on its many years of experience in the timeshare industry. I note in this context a letter dated 19 November 2001 from Cains, a firm of Isle of Man Advocates, which appears to have been instructed by FNTC to respond to the various points being made in correspondence at around that time by Ray Bostock. This letter sets out Cains' understanding of the Deed of Trust, including that the Apartments are Trust Property.

214. As to unconscionability, where FNTC is not itself liable for the Spanish Taxes, it is difficult to see how, even if it could establish the necessary common assumption and reliance, it could nevertheless maintain the position that it would be unconscionable to allow the Club and BBLL now to resile from that assumption.

Trust Property – the Claimants' second argument

215. The second ground on which the Claimants argue that the Apartments are Trust Property within the definition in the Deed of Trust (such that they are held on trust by BBCB for FNTC) is that the Apartments are properly to be regarded as assets of an Owning Company as defined in Recital A to the Deed of Trust, whether (i) because of the true construction of the Deed of

Trust, or (ii) because of an implied term to such effect, or (iii) by virtue of rectification to include BBCB as an Owing Company (Issue 5(b)(i)-(iii)). Taking these arguments in turn:

(i) *True construction of the Deed of Trust*

216. It is common ground that the membership rights in BBCB are Trust Property. The Claimants submit that the Apartments are themselves Trust Property because BBCB is an Owing Company on the true construction of the Deed of Trust (RRAPoC at 19A.1).

217. Before I consider this point in any detail, I must decide a related point as to which of the (three) versions of the Deed of Trust available to the parties and included in the trial bundle is the relevant Deed of Trust (this issue being the only one affected by the answer to this point).

218. Each of the three versions (separately numbered 623872, 623873 and 623874) is dated 31 November 1988 and each is signed by the Director and Secretary of TSI, the Director and Secretary of Landmark Title & Trust Limited and two authorised signatories of Midland Bank Trust Company Limited. They are exactly similar, save that only version 623874 includes the words in bold in Recital A below:

*“The Founder Member has formed a Club known as Bahia Blanca Holiday Club (“the Club”) whose object is to secure for its Members exclusive rights of occupation of certain fully constructed and furnished apartments at Puerto Rico de Morgan, Gran Canaria, Canary Islands, Spain, for specified periods each year in perpetuity, together with other ancillary rights of use, which apartments are or will be owned by Midmark 10 Limited, a company limited by guarantee and incorporated in Scotland with the number 114934 (“the Owing Company”). Some of the said apartments may be owned by Bahia Blanca Club Company A Limited, a company limited by guarantee and incorporated in the Isle of man with the number 36745, or by **Bahia Blanca Club B Limited, a company limited by guarantee and incorporated in Northern Ireland with the number NI 18484**, which shall be controlled by the trustees”.*

219. It will immediately be apparent that the question of whether or not these words are included is critical to the issue of whether BBCB is an Owing Company.

220. I can deal with this shortly. Neither the Claimants nor the Defendants have any direct knowledge as to the circumstances in which these various Deeds came to be executed or why the wording in version 623874 differed from that in the other two versions. However, the

Claimants contend that, in circumstances where all the Deeds carry the same date, there is no reason why I should not accept that 623874 is the correct Deed.

221. I did not understand the Defendants to contest this with any real force; they make no admission on the point in their Re-Amended Defence. Both parties made detailed submissions at trial on the assumption that 623874 was the correct Deed and I find that it was.
222. Therefore, the question for present purposes is whether BBCB, which is directly referred to in Recital A in 623874, falls within the definition of an Owing Company. If it does, then the Claimants say that the Apartments (as “assets” of the Owing Company) will fall within the definition of Trust Property in Recital C. As I have mentioned above, even if BBCB falls within the definition of Owing Company, the Defendants maintain that the Apartments are not held on trust for FNTC and are not Trust Property. I return to these arguments later.
223. The Claimants point out that the Defendants originally admitted that BBCB was an Owing Company, only resiling from that admission in their Amended Defence served in August 2018. They argue that, although the final sentence in Recital A comes after the definition of Owing Company, that does not here mean that the parties intended the Owing Company to be Midmark only. They point to the fact that Midmark never in fact owned any Apartments at the resort, that the first 10 Apartments were vested in BBCA and that thereafter the remaining Apartments were vested in BBCB. In particular they point out that, by reference to contemporaneous Deeds of Transfer, it is clear that 21 Apartments had already been transferred to BBCB as at the date of the Deed of Trust. They argue that it is clear from the wording in Recital A that the parties anticipated at the time of entry into the Deed of Trust that Apartments would be transferred to companies other than Midmark, including BBCA and BBCB. They say that if this were not so, then the final sentence of Recital A would be redundant. They acknowledge that the definition of Owing Company does not appear to provide for more than one such company, but they say that, taken as a whole, the parties plainly intended that there would be more than one Owing Company and that BBCB is “an Owing Company”.
224. The Defendants contend that the reference to a singular Owing Company is significant and is reflected in Recitals B and C to the Deed of Trust where reference is made to “the Owing Company”. The Constitution (which I accept is a relevant aid to construction) defines “the Owing Company” to mean:

“Midmark 10 Limited, a company limited by guarantee and incorporated in Scotland with the number 114934 being the company hereinafter defined, in trust for the Members of the Club

as provided in the Deed of Trust and the Constitution, the sole members of such company being the joint custodian trustees provided for by the Deed of Trust...”.

Throughout it refers only to “*the Owing Company*” (singular).

225. The Defendants also rely on the positioning of the words “(*the Owing Company*)” in Recital A, falling as they do immediately after the reference to Midmark and before the reference to BBKA and BBKB. They say that the only possible explanation for the phrase “*which shall be controlled by the trustees*” at the end of Recital A is that the draftsman was aware of BBKA and BBKB and positively chose not to include them within the definition of the Owing Company, providing instead that they would be “*controlled by the trustees*”. Finally they argue (i) that subsequent events (such as the discovery that Midmark never owned any of the Apartments) do not affect the construction of the Deed, (ii) the Fourth Schedule to the Constitution (as it was at the time of entry into the Deed of Trust) expressly certifies that Midmark “*is the Owing Company as defined by the Constitution which is entitled to exclusive and uninterrupted rights of use in perpetuity of the Apartments whose numbers are set out below...*” and (iii) that later evidence (such as a 1992 Report on Title which shows the Apartments listed in the Fourth Schedule to the Constitution as in fact within the ownership of BBKA) is inadmissible.

226. In circumstances where there is contemporaneous evidence that BBKB already owned 21 Apartments as at the date of the Deed of Trust, I have wavered on this point. I have sympathy with the Claimants’ submission that a finding in the Defendants’ favour on this point of construction would involve (as a matter of practical reality) a finding that the only companies which did own apartments at the Resort, namely BBKA and BBKB, were never in fact Owing Companies. I also note Mrs Talbot Rice’s submission that the definition of Apartments in the Constitution expressly envisages that title to the Apartments at the Resort “*may from time to time be vested in the Owing Company either directly or through the medium of a company which is a wholly owned subsidiary of the Owing Company*”.

227. However, on balance, in my judgment there is no proper legal basis on which I could find that BBKB falls within the definition of “*the Owing Company*”. My reasoning is as follows:

- (i) I agree with the Defendants that the consistent use of “*the Owing Company*” (in the singular) throughout the Deed of Trust and the Constitution, together with the unambiguous definition of “*the Owing Company*” in the Constitution itself (as meaning Midmark), militates strongly against the suggestion that the parties were intending to refer to more than one Owing Company. In my judgment, the inclusion

of BBCB within that definition would involve reading additional words into the Deed of Trust in circumstances where it is not at all obvious that something has gone manifestly wrong with the drafting.

- (ii) I do not agree with the Claimants' argument that the final sentence of Recital A is redundant on the Defendants' interpretation. On the contrary, it appears expressly to contemplate ownership by BBCA and BBCB but on the basis that those companies "*shall be controlled by the trustees*".
- (iii) Whilst it might have been possible for the Claimants to plead and prove factual matrix evidence as to the true ownership of the Apartments at the time of entry into the Deed of Trust, they did not do so. There is no reliance in the Claimants' pleadings on the fact that Midmark did not own any of the Apartments at the time of the Deed of Trust. Furthermore, the Claimants have not established that both parties to the Deed were aware of this factual state of affairs at the time of entry into the Deed – even assuming that the Founder Member was aware of the identity of the company with title to the Apartments, there is no evidence that the Trustee was aware of it. I am certainly not in a position to make a clear finding as to this, even if I were prepared to overlook the failure to plead the point.
- (iv) Furthermore, I agree with the Defendants that in this context it is potentially significant that Recital A refers to the fact that the Apartments "*are or will be owned*" by Midmark, apparently reflecting an intention at that time that any Apartments which were not then owned by Midmark would be transferred subsequently.
- (v) There is no obvious lack of commerciality in the idea that there is a single Owning Company. I accept the Defendants' submission that this construction of the Deed of Trust creates no exposure on the part of the Members or FNTPC because the membership interest in BBCB is still Trust Property under the terms of Recital C to the Deed of Trust. The membership interest in BBCB is "*any other property which may from time to time be transferred to it or otherwise be held by it for the benefit of the Club and its Members from time to time on the trust terms and provisions set out in this Deed*".
- (vi) The mere fact that after the date of the Deed of Trust, the parties have apparently acted in a manner that was not anticipated by the Deed of Trust does not assist with the exercise of construction.

(ii) Implied Term

228. Paragraph 19B.1 of the RRAPOC pleads that, if it is not possible to construe the Deed of Trust as including BBCB as an Owing Company without additional words then “*a term should be implied into the Deed of Trust that the Owing Company would be Midmark or “such other company controlled by the Trustee to which the Founder Member transferred apartments”. BBCB fulfils that implied term and was therefore an Owing Company*”.
229. It is common ground between the parties that I must follow the approach of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, per Lord Neuberger at [14]-[31] and, in the circumstances, there is no need for me to set it out. By way of summary (and without ignoring any of the more nuanced points made by Lord Neuberger, which I keep firmly in mind) I must be satisfied that the reasonable reader of the Deed of Trust at the time it was entered into would consider the proposed term to be so obvious as to go without saying or to be necessary for business efficacy. As to the concept of necessity, in the recent Privy Council case of *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, Lord Hughes said (at [5]): “*The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition...And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet [the required tests] since the parties have demonstrated that it is not their agreement*”.
230. Mrs Talbot Rice argues that an implied term is necessary to permit the Club structure to function as intended. The Defendants say otherwise. In particular, they point out (and I agree) that:
- (i) The definition of Trust Property is wide enough to encompass the membership interest in BBCB.
 - (ii) The terms of the Deed of Trust envisage that further property would be provided to the Trustee in addition to the ownership of the Owing Company (which would plainly include the ownership of BBCB).
 - (iii) Given that the Trustee is the sole member of BBCB, there is no need to imply such a term because FNTC retains control of the Apartments through its holding of the shares in BBCB as Trust Property.
 - (iv) Thus the exclusion of BBCB from the definition of Owing Company causes no prejudice to the Members (who are protected because the Trustee holds its membership interest in BBCB on trust for the Club) or to FNTC (who are in the same position as if

BBCB was the Owing Company, subject to the question of whether the assets of the Owing Company are Trust Property, a point I shall come to in due course).

- (v) In any event, the proposed implied term is inconsistent with the express terms of the Deed of Trust. The Deed of Trust and Constitution expressly exclude BBCB from the definition of Owing Company. Any implied term to the contrary would, in my judgment, involve rewriting the express terms of the Deed of Trust. The Claimants did not counter this point in their submissions.

(iii) *Rectification*

231. Paragraph 19B.2 of the RRAPoC suggests a yet further alternative, namely that “*The Deed of Trust should be rectified to reflect the common intention of the settlor and the trustee that BBCB was an Owing Company within the meaning of the Deed of Trust and its assets were Trust Property*”.

232. The approach to rectification is uncontroversial. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [48], Lord Hoffman approved the summary of the requirements for rectification by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 at [33]:

“*The party seeking rectification must show that (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intentions continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention*”.

233. Notwithstanding the Claimants’ arguments to the contrary, there is in my judgment no proper legal basis whatsoever for a finding of rectification in this case. My brief reasons are as follows:

- (i) Whilst a common intention on the part of the parties at the time of execution of the Deed of Trust is pleaded, it is not pleaded that there was an outward expression of accord, much less is there any evidence of the same.
- (ii) Mr Kenny frankly acknowledges in his third witness statement that there is no available evidence as to what the original parties to the Deed of Trust thought or intended: “*I have not spoken with any of these individuals, but I very much doubt that they will have any recollection of the circumstances of signing documents approximately 30 years ago*”.

- (iii) There is no evidence that, at the time of its execution, the parties intended the Deed of Trust to say one thing but, by mistake, it says something different.
- (iv) The mere fact of the transfer of 21 Apartments to BBCB under a deed of sale and purchase dated 18 May 1988 does not enable me to infer (as the Claimants contend) that Recital A was intended to record that BBCB was already fulfilling the role as Owing Company, much less to arrive at the conclusion that the failure to record that factual position was a mistake. I reject the suggestion that the final sentence of Recital A supports that inference on the grounds that it evidences an attempt to include BBCB within the definition of Owing Company. On the contrary, the way in which Recital A was drafted, on its true construction, excludes BBCB from that definition.
- (v) I reject the Claimants' suggestion that evidence of the parties' true intention is to be inferred from their immediately subsequent understanding and is relevant absent any evidence that their intentions changed. The Claimants' fundamental and insurmountable problem is that they have no evidence as to what the parties in fact thought and intended at the time. Evidence of sale agreements entered into shortly after the Deed of Trust whereby Apartments were transferred to BBCB, evidence that these transfers were regarded as vesting the Apartments in BBCB and evidence that BBCB was later referred to in correspondence as an Owing Company falls a long way short, in my judgment. One possible explanation for what has happened in this case is that the parties at the time did intend BBCB to be an Owing Company from the outset but that that intention was never adequately reflected in the drafting, but that is not the only possible explanation and I cannot order rectification without the necessary evidence.

234. Finally, I should add that, even if I am wrong as to the true interpretation of the Deed of Trust and BBCB is properly to be regarded as an Owing Company (whether as a matter of construction, by reason of an implied term to that effect or by rectification), I would nevertheless have agreed with the Defendants that BBCB's assets are not thereby to be regarded as Trust Property.

235. Recital C contains the important qualification that "*The Trustee has agreed to accept and hold on the trust terms and provisions hereinafter stated ownership and control of the Owing Company and its assets (by becoming the sole and exclusive members thereof)*" (emphasis added). The ownership and control of the assets of the Owing Company is thereby conferred on the Trustee by becoming the "*sole and exclusive member*" of the Owing Company. The words in parenthesis make this clear. There is no mention of a sub-trust and on the Claimants' construction there is no explanation for these words, which in my judgment give the lie to the

existence of any sub-trust. On the assumption that BBCB is an Owing Company then its Apartments fall into the trust structure by virtue of it being owned and controlled by FNTC, which membership and control FNTC holds for the benefit of Members. The Apartments would not themselves be Trust Property.

236. In this regard I have considered the various arguments relied upon by the Claimants by reference to clauses 4, 5 and 6 of the Deed of Trust and articles 4 and 8 of the Constitution, but am unpersuaded that any of those provisions make it clear that the Apartments (which I note have their own definition in the Deed of Trust which does not suggest that they are Trust Property) were intended to fall within the definition of Trust Property by virtue of the fact that they were assets of the Owing Company. Given my findings, there is no need for me to address these arguments in any more detail.

Summary on Issues 4(a) and 5

237. In my judgment the Apartments do not fall within the definition of Trust Property in the Deed of Trust.

C5. Issue 4(b) and 6: Are the Apartments trust property because they are properly to be regarded as being held on trust for Members of the Club?

238. As to whether the Apartments can be trust property, notwithstanding that they do not fall within the definition of Trust Property in the Deed of Trust, two issues arise:

- (a) does BBCB hold the Apartments on trust for the Members of the Club, (whether indirectly through FNTC – BBCB being a bare nominee for FNTC – or directly) by virtue of a common intention constructive trust (Issue 6(a))? Alternatively
- (b) Are the Club and/or BBLI estopped from denying that the Apartments are trust property (Issue 6(b))?

Common Intention Constructive Trust

239. The Claimants argued in closing that BBCB holds the Apartments on trust for the Members because the Apartments were transferred to it on the understanding that it would hold them for the benefit of the Members of the Club. Having received property on the basis of such understanding, the law will impose a constructive trust over the property to prevent the recipient (BBCB) from resiling from the understanding, taking the benefit of the property for itself and ignoring the party for whose benefit it received the property from the transferor. This submission was consistent with paragraph 19C.1 of the RRAPoC to the effect that if title

to the Apartments was not Trust Property on a true construction of the Deed of Trust then, “BBCB holds the Apartments on a common intention constructive trust for the benefit of the Club”.

240. Paragraph 17A of the RRAPoC pleads the trust relationship in what appear to be two inconsistent forms as follows:

“17A. It was the common intention of the Founder Member, the original trustee and BBCB that the Founder Member would arrange for legal title of the Apartments to be transferred to BBCB on the footing that BBCB would hold the Apartments it received:

17A.1 on bare trust for FNTC and FNTC would hold the beneficial interest in such Apartments on the terms of the Deed of Trust for the benefit of the Club; alternatively

17A.2 on trust for the benefit of the Club”.

241. On the fourth day of the trial, the Claimants sought to clarify this pleading by way of “*Further Information on the Claimants’ case in relation to the common intention constructive trust*”. This Further Information stated that

“The Claimants’ case is that

(i) TS International plc, the original Founder Member who created the Club, transferred Apartments to BBKA and BBCB from around 1988.

(ii) When TS International plc transferred Apartments to BBKA and BBCB, whether in 1988 or later, it did so on the basis of a common intention or understanding between it and BBKA and BBCB, and the original trustee, that the Apartments would be held for the benefit of the Members of the Club as set out in the Deed of Trust.

(iii) Legally analysed, that common intention was either that

(a) The company to which the Apartments were transferred was to act as a nominee for FNTC and thus hold the Apartments on trust for FNTC as the custodian trustee of the trust established by the Deed of Trust or

(b) The company to which the Apartments were transferred was itself to hold the Apartments for the benefit of the Members of the Club on the terms of the Deed of Trust.”

242. This new pleading, in my judgment, served only to perpetuate the pre-existing inconsistent plea in paragraph 17A of the RRAPoC. Whilst the Further Information then went on to particularise the alleged “common intention” that the Apartments should be held for the benefit of the Members of the Club by reference to the suite of documents that were put in place in order to create the Resort and also by reference to the parties’ later dealings, it did not explain how the court could begin to resolve this inconsistency. The essential problem appears to me to be that the Claimants’ general assertion that the Apartments would be “*held for the benefit of the Members*” is itself intended to encompass two inconsistent possibilities: first that they would be held for the benefit of FNTC (which in turn would hold them for the benefit of the Members) and second that they would be held directly for the benefit of the Members.
243. The Defendants drew my attention to a Note in the Supplement to Lewin on Trusts at 9-062: “*It has been said that a person claiming an interest under a common intention constructive trust cannot plead mutually inconsistent facts, each set of which would lead to a different beneficial ownership: Bhusate v Patel [2018] EWHC 2362 (Ch) at [65]*”. In *Bhusate*, Chief Master Marsh struck out two claims on the part of the claimant based on a common intention constructive trust on grounds, amongst others, that whilst the two claims relied on the same facts, those facts formed the basis from which different inferences could be drawn about the intentions of the parties. He said this at [65]: “*It is difficult to see, however, how those facts can support both a trust under which the claimant is the sole beneficial owner and a trust under which she holds a beneficial interest with the 1st to 5th defendants...It is impossible for the claimant to say, on the one hand, she subscribed to a common intention that she held the sole beneficial interest but on the other hand to say the common intention was entirely different. She has to put forward one case or the other*”.
244. In my judgment, a similar difficulty arises by reason of the Claimants’ pleading in this case, which also attempts to ride two inconsistent horses. Whilst here, the differing trust structures were put forward in the alternative, it is unclear to me how the particulars on which the Claimants rely can be advanced as capable of supporting two inconsistent trust structures. I do not believe it to be sufficient to assert an overarching understanding as to the ultimate result. The Claimants did not address this issue in their closing submissions. In dealing with her arguments as to the existence of a common intention constructive trust, Mrs Talbot Rice focussed solely on the common intention as at the date of transfer of the Apartments that they should be held on trust for the Members of the Club. However, this broad submission fails to acknowledge the potential for differing beneficial ownerships raised by the Claimants’ pleadings. I agree with the Defendants that it is no answer to allege that “*legally analysed*”

there were two possible common intentions. In my judgment this point alone is fatal to the Claimants' case on common intention constructive trust.

245. Further analysis is strictly unnecessary, but as I would also have rejected the existence of a common intention constructive trust on other grounds, I should explain my reasoning.

The Law on Constructive Trusts

246. The parties were at odds as to the applicable law. Having pointed out that common intention constructive trusts outside of situations involving co-habiting partners are unusual, the Defendants nevertheless sought (in their written submissions at least) to rely on the approach taken by the court in those cases (although to be fair to them, many of the authorities on which the Claimants relied were not produced until their Closing Submissions).

247. However, I accept the Claimants' submissions that cases involving co-habiting partners are not the only cases of constructive trust, which is not a closed category: "*English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court in technicalities in deciding what the justice of a particular case might demand*" (*Carl Zeiss Stiftung v Herbert Smith & Co* (No 2) [1969] 2 Ch 276 per Edmund Davies LJ at 300G).

248. The Court of Appeal has recently considered the approach to be taken to cases falling outside the "co-habiting" cases in *Tracey Ann De Bruyne v John Adrian De Bruyne & Others* [2010] EWCA Civ 519. The Court of Appeal identified the circumstances in which a common intention constructive trust will arise at [49]:

"The authorities dealing with common intention constructive trusts provide only one example of a situation in which equity will impose a trust upon the owner or transferee of property based on the circumstances in which the property is acquired or dealt with. For a trust to be created, the court has to be satisfied that it would be unconscionable for the legal owner to assert his legal interest in the property to the exclusion of the alleged beneficiaries. The fiduciary obligation which that involves arises most obviously in an express trust where the property is held under the terms of a trust instrument in which the interests of the beneficiaries are clearly identified. In such cases, the trustee either receives the property subject to the beneficial interests created by the instrument of transfer or, in the case of an express declaration of trust, subjects property already owned by him to those interests. In the case of a constructive trust, the obligation is imposed upon him as a result of his unconscionable conduct".

249. The Court of Appeal then went on to make clear the distinction between the principles designed to resolve issues of beneficial ownership between adult co-habitees of property and other cases in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. Contrary to the Defendants' submissions (which asserted a requirement for detrimental reliance that, I agree, is an "essential feature" in cases involving co-habitees – see Lewison LJ in *Curran v Collins* [2015] EWCA Civ 404 at [77]), the Court of Appeal said that these other cases "*do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust...*" (*De Bruyne* at [51]).
250. Unconscionability, however, remains important: "*It is not necessary in such cases to show that the property was acquired by actual fraud....The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust*" (*De Bruyne* at [51]). This is entirely consistent with the statement of principle by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705D: "*Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes...which the law imposes on him by reason of his unconscionable conduct (constructive trust)*".
251. The relevant understanding is usually formed prior to the transfer of the property, but may, exceptionally, be formed at a later date: *Lloyds Bank plc v Rossett* [1991] 1 AC 107 per Lord Bridge at 132F.

The facts

252. Applying the principles referred to above, I must look at the circumstances in which BBCB acquired the Apartments in order to determine whether there is any justification for the imposition of a trust. I must also determine whether there is any unconscionable or inequitable conduct on the part of BBCB sufficient to create a fiduciary obligation and to require the imposition of a constructive trust.
253. As to the latter requirement, I note at once that the Claimants (including, of course, BBCB) have neither pleaded nor sought to establish at trial any unconscionable or inequitable conduct

and the Claimants have failed to address at any point in their written and oral submissions how they satisfy this requirement. The Defendants pointed out that the identity of the party that was said to have acted unconscionably in this case “*is somewhat opaque*”, but I would go further than that. The Claimants (who have to show that the unconscionable conduct is that of BBCB) have made no attempt to explain how their case satisfies this requirement. The paradigm case of constructive trust involves the beneficiary complaining that the trustee is denying his rights in the property. Here we have almost the opposite: here BBCB is asserting as a claimant that it is not the absolute owner and that it holds the Apartments on trust for FNTC or the Members. This does not, in my judgment, amount to unconscionable conduct such as to require the imposition of a constructive trust.

254. Furthermore, as the Defendants point out, there is no need for the beneficiaries to rely on a constructive trust because their interests are perfectly well protected by the terms of the express trust in the Deed of Trust under which FNTC, through its control of BBCB, can give effect to the rights under that trust.

255. In my judgment, these are yet further insuperable obstacles to the success of the Claimants’ case in this regard.

256. Dealing briefly with the submissions of the parties as to the circumstances in which BBCB acquired the Apartments:

(i) I agree with the Defendants that it is difficult to see why BBCB should be taken to have intended that it would hold the Apartments on trust in circumstances where it was not made a party to the Trust Deed and where it made no express declaration of trust. No explanation has been advanced as to why this alleged trust was not documented.

(ii) There is no available witness evidence as to what (i) the original Founder Member (ii) BBL from the date on which it took over as Founder Member and (iii) BBCB, thought about the ownership of the Apartments as at the various dates between 1988 and 2004 on which the Apartments were transferred (these dates being evident from the agreed schedule of transfers attached to the Claimants’ opening submissions). As I have already mentioned, Mr Kenny’s evidence was that the Claimants have not tried to contact any of the relevant individuals but have instead assumed that they would not remember.

(iii) Insofar as the Claimants rely upon clauses in the Deed of Trust to support the existence of the understanding for which they contend, that understanding appears largely to be that the Apartments were held by FNTC, which then held for the Members. This does

not support the pleaded common intention constructive trust for the Members themselves and illustrates the difficulty with the plea of inconsistent trusts.

(iv) Insofar as the Claimants rely on contemporaneous documentary evidence from which it is said that the intentions of the Founder Members and BBCB may be inferred, the documents to which my attention has been drawn are, in my judgment, ambiguous. Many of them refer to the Apartments being held “in trust”, but I accept the Defendants’ submissions that these words are insufficient to determine how the Apartments were intended to be held within the trust structure. The points I have already made as to the ambiguity of the phrase “in trust” apply equally here.

(v) Whilst I accept that, contrary to the Defendants’ submissions, the fact that BBCB’s accounts never showed any assets may well give rise to an appropriate inference, I do not regard this as sufficient evidence on its own to establish the necessary understanding as at the various transfer dates. Equally I do not regard the change to the wording of BBCB’s memorandum of association in 1995 to be conclusive.

257. In all the circumstances I reject the Claimants’ contention that there was a common intention constructive trust as pleaded.

Estoppel

258. I have dealt with Estoppel in relation to Issue 6 above.

Summary on Issues 4(b) and 6

259. In my judgment the Apartments are not trust property by reason of an estoppel, alternatively a common intention constructive trust.

Conclusion on the first main Issue

260. For all of the reasons set forth above, the Claimants have failed to satisfy me that they have a valid claim to an indemnity in relation to the Spanish Taxes, or that they are entitled to a lien over the Apartments. Their claim under the Trustee Act 2000 and under the rule in *Hardoon v Belilios* fails.

261. Further and in any event, I would also have accepted the Defendants’ argument that pursuant to Spanish law, which in my judgment is applicable, BBCB is not entitled to deal with the Apartments or otherwise encumber the Apartments. Given that the transfer of the Apartments is governed by Spanish law, any unregistered equitable lien would have been overreached

such that BBL SL took good title to the Apartments free from such unregistered interest. This latter point is addressed in more detail in relation to the claim of knowing receipt.

D. Knowing Receipt

262. I have found that title to the Apartments was not Trust Property and, in the circumstances, the claim for knowing receipt fails to get off the ground and there can be no entitlement on the part of the Claimants to a declaration that BBL SL holds its acquisition of bare title to the Apartments on constructive trust for the Claimants or that BBL SL should restore bare title to the Apartments to the Claimants or should pay equitable compensation for knowing receipt.

263. However, out of deference to the parties' arguments and should it prove important, I must nevertheless address those arguments in more detail.

264. Before I can do so, however, I must first decide whether the knowing receipt claim is governed by English law, as the Claimants contend, or by Spanish law as the Defendants contend. The Claimants say that the Defendants have not properly pleaded their case on this issue and so I must begin by considering the pleadings.

265. The Claimants' case on knowing receipt has gone through various amendments.

(i) In paragraph 62 to the RRAPoC, the Claimants plead that on 18 December 2015 and 22 December 2015, BBL SL was the successful bidder in respect of Type A Apartments in the amount of €61,809.52 and Type B Apartments in the amount of €48,190.48 and that as a result, the embargoes were removed from all of the Apartments. Therefore, for the sum of €110,000 BBL SL became the holder of the bare title in the Apartments. These are the background facts on which the Claimants base their claim of knowing receipt.

(ii) The breach of trust on which the Claimants rely is pleaded at paragraph 76.1 of the RRAPoC in a form that was only set out in the early days of the trial: in short, the Claimants allege that "*by allowing the situation to arise in which the Trust Property became encumbered and sold, BBCB and FNTC breached their fiduciary duties*".

(iii) In paragraphs 92-95, the Claimants refer back to paragraph 62 and plead the circumstances in which they say the Apartments were acquired by BBL SL, the knowledge of BBL SL (acquired through its directors, the Pages) that BBL SL was only able to purchase bare title to the Apartments from the AEAT as a result of the Claimants' breaches of trust, which it is said that the Pages, together with the Club, had brought about. Paragraph 94 therefore pleads that BBL SL is a "*knowing recipient of*

trust property as a result of a breach of trust and/or fiduciary duty such as to make it unconscionable for it to retain bare title in the Apartments”. Particulars of unconscionability are provided in paragraphs 95.1-95.5, culminating in the plea that the failure by the Pages and BBL SL “to inform the Claimants what they were doing and their misrepresentation of the position when asked by the Claimants what the position was...was such as to render BBL SL’s receipt of the bare title in the Apartments unconscionable”.

(iv) By way of relief, the Claimants seek (against all Defendants) a permanent injunction in the terms of the undertaking given by the Claimants in pre-action correspondence to the effect that they would not cause BBL SL to register itself as the new owner of the bare title to the Apartments and (against BBL SL) a declaration that it holds the title to the Apartments on constructive trust for the Claimants, that it must restore title to the Claimants, alternatively pay equitable compensation.

266. In Paragraph 65 of the Re-Amended Defence, the Defendants respond to the allegations in paragraph 62 of the Claimants’ pleading. In paragraph 66 they assert that the sale of the bare title in the Apartments by way of enforcement in respect of the Spanish Taxes was the independent act of a third party, namely the AEAT. At paragraph 67 they plead that “*Further, if and in so far as the bare title in the Apartments was Trust Property, title to the Apartments has passed to BBL SL*” and they then set out over six sub-paragraphs the particulars on which they rely including that “*under Spanish law BBL SL took (free from any trust or interest of BBCB or FNTC) the bare title in the Apartments when it acquired the same from the AEAT in December 2015*”. In paragraphs 97-99, the Defendants respond to the allegations of knowing receipt (as it was pleaded at the time of their Re-Amended Defence) in paragraph 92 of the Re-Amended Particulars of Claim. There is no reference in this section to the applicability of Spanish law.

267. In their Re-Re Amended Reply at paragraph 27.1 the Claimants respond to the Defendants’ pleading of Spanish law in paragraph 67 of their Re-Amended Defence as follows:

“The Defendants are required to prove that title to the Apartments has passed to BBL SL and/or that this issue is governed by Spanish law. In respect of the latter, the Claimants note that the Defendants failed to raise this issue during case management and that, insofar as expert evidence is required to address Spanish law...further directions may be required to be accommodated in the trial timetable, as to which the Claimants await the Defendants’ proposals and reserve their rights pending such proposals. For the avoidance of doubt, the

Claimants' claims concerning lien, trusts and equitable relief in respect of the Apartments are English law claims and are unaffected by Spanish law".

268. In paragraph 27.3 the Claimants assert that the new Spanish law pleaded is “*either wrong or inapplicable*” and in paragraph 27.4 the Claimants plead that “*BBL SL was not a purchaser in good faith. It therefore took the Apartments subject to the trusts on which the Apartments are held by the Claimants and/or holds them on constructive trust for the Claimants. Further, if Spanish law on the transfer of title is relevant, it is only a purchaser in good faith which takes title free of unregistered encumbrances. BBL SL was not a purchaser in good faith*”.
269. At the PTR on 18 February 2019, Nugee J gave permission to both parties to adduce expert evidence of Spanish law. Mr Falceto’s report was already available and provided to the court on this occasion. The Claimants chose not to rely upon any evidence of Spanish law.
270. In my judgment, the extracts from the pleadings referred to above make it clear that the Defendants were intending to advance a case that the knowing receipt claim was governed by Spanish law and that it failed under Spanish law; the Re-Amended Reply deals in broad terms with the pleading of Spanish law. I note from the Agreed Issues document provided to me after the trial (App 1 at paragraph 7) that the Claimants have simply asserted that the Defendants have not discharged the burden, which the Claimants say falls on them, of establishing that BBL SL was a purchaser in good faith as a matter of Spanish law.
271. Beyond the pleading point, the Claimants have not sought to address any of the Defendants’ detailed submissions to the effect that the law which governs the rights over the Apartments (including a trust arising on sale) is Spanish law. In circumstances where I have no arguments to the contrary from the Claimants, I accept the Defendants’ submission that the law which governs the rights over the Apartments is Spanish law and that this includes a trust arising on its sale (see Dicey Morris & Collins on Conflict of Laws 15th Edition. Rule 132, together with the rules in relation to the imposition of a constructive trust on a knowing recipient at Rule 172 and 257).

Spanish Law Requirements

272. As I have already said, the only evidence before the court of Spanish law came from Mr Falceto. The Claimants chose not to call evidence but instead simply to challenge Mr Falceto’s evidence by way of cross-examination. As I understand it, the Claimants now say (presumably by reference to this cross-examination) that the Defendants have not discharged the burden of establishing that BBL SL was a purchaser in good faith in circumstances where

the Spanish law evidence that a purchaser will take free of an unregistered interest in land is restricted to purchasers in good faith.

273. In his short and clear report, Mr Falceto expressed the opinion that, under Spanish law:

- (i) a trust, charge, lease, mortgage, lien or other interest in land (“*carga*”) may be registered at the Spanish land registry against real property.
- (ii) if a *carga* is registered it will bind a subsequent purchaser acting in good faith (i.e. not aware of a third parties’ rights to the property).
- (iii) if a *carga* is not registered it cannot bind a purchaser of real property and the purchaser will therefore take good title free from those interests.
- (iv) the fact that a property is purchased at a public auction does not affect the general position.
- (v) title to property vests in the purchaser immediately upon sale of the property. Registration of the transfer does not affect the ownership of property.

274. Under cross examination as to the scope of the good faith principle in Spanish law, Mr Falceto confirmed that even where a *carga* was not registered, it would be possible (although not easy) for a third party with an unregistered right over the property to contest a sale in court on the grounds that the purchaser was “*perfectly and duly aware*” of the third party’s right at the time of the sale, always subject to the third party having the burden of establishing the purchaser’s knowledge. However, when it came to a sale by the AEAT, this would not apply: “*you cannot contest that*”. He went on to confirm that “*...any purchaser of that property sold by the tax authority in a public auction could be never considered bad faith, in my opinion*” and that he didn’t see how such a sale “*could be challenged or nullified*”. The reason for this was that the tax authority was fully entitled to sell the property and was effectively “*like a new owner*”.

275. In light of Mr Falceto’s evidence, I reject the Claimants’ suggestion that the Defendants have not satisfied the burden of establishing that BBL SL was a purchaser in good faith. First, I did not understand Mr Falceto’s evidence to be that any such burden would fall on the purchaser, but in any event (and applying the Spanish law to the facts):

- (i) the unregistered *carga* with which we are concerned is the alleged trust by which BBCB is said to hold the Apartments for FNTC (a trust which I have in any event rejected);

(ii) there is no evidence that BBL SL (through its directors, the Pages) actually knew that BBCB was a trustee or that BBCB held the Apartments for FNTC;

(iii) as such, even if this was a private sale, the claim must fail.

(iv) however, even if BBCB held the Apartments on trust and BBL SL knew that they were held on trust, BBL SL would still take good title to the Apartments because the sale was by the AEAT and such a sale could never be challenged or nullified.

276. In case I am wrong as to the position on Spanish law, I should briefly say something about the position under English law.

Knowing Receipt: The Law

277. Save in one respect, I did not understand the law on knowing receipt to be controversial.

278. As Zacaroli J recorded in the recent case of *Brent London Borough Council v Alan Davies & Others* [2018] EWHC 2214 at [557], citing the well-known speech of Hoffman LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 ALL ER 685 at 700g: “*The elements of the claim are: (1) a disposal of assets in breach of fiduciary duty; (2) beneficial receipt of assets by the Defendant which are traceable as representing the assets of the Claimant; and (3) knowledge on the part of the Defendant that the assets are traceable to a breach of fiduciary duty*”.

279. It is not a pre-requisite of a finding of knowing receipt that the recipient should have acted dishonestly. The essential question in respect of “knowledge” is whether the particular Defendant’s state of mind is such as to make it unconscionable for him to retain the benefit of the receipt (see *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437, per Nourse LJ at pages 448H and 455E-F).

280. The Defendants submitted by reference to Lewin on Trusts [19th Edition] at 42-023 that the three elements identified by Hoffman LJ in *El Ajou* could in turn be sub-divided into six; a proposition that found favour with Peter Smith J in *Independent Trustee Service Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch) at [48]. These are as follows:

(i) There is property subject to a trust;

(ii) The property is transferred;

(iii) The transfer is in breach of trust;

(iv) The property (or its traceable proceeds) is received by the Defendant;

(v) The receipt is for the Defendant's own benefit; and

(vi) The Defendant receives the property with the knowledge that it is trust property and has been transferred in breach of trust.

281. The one area of dispute between the parties is as to whether it is necessary for the recipient of the trust property to know that it has been transferred in breach of trust (as the Defendants contend) or whether it is sufficient to know "*relevant facts*" (as the Claimants contend by reference to the decision of HHJ Pelling QC in *Latchworth Limited v Stephen Dryer & Others* [2016] EWHC 3424 (Ch) at [105]-[106]). I am a little reluctant to delve into this question in circumstances where the Court of Appeal made it clear in *Akindede* that the touchstone in relation to knowledge was "*unconscionability*" and that this was a general test to be applied.

282. However, I reject the suggestion that "*relevant facts*" must include knowledge of the transfer in breach of trust. In *Latchworth* HHJ Pelling QC held at [107] that one of the defendants knew or wilfully shut his eyes to the fact that the transfer "*was made in breach of the trust obligations*" imposed by an agreement, the relevant facts therefore being the existence of a transfer in breach of trust in that case. However, I note that in *Brent Borough Council v Davies*, Zacaroli J referred to the conclusions of Stephen Morris QC sitting as a Deputy High Court Judge in *Armstrong GmbH v Winnington Networks Ltd* [2013] Ch 156 at [132] as follows:

"In my judgment, the position, in a commercial context, can be summarised as follows: (1) Baden types (1) to (3) knowledge on the part of a Defendant render receipt of trust property unconscionable. It is not necessary to show that the Defendant realised that the transaction was obviously or probably in breach of trust or fraudulent; the possibility of impropriety or the Claimant's interest is sufficient. (2) Further Baden types (4) and (5) knowledge also render receipt 'unconscionable' but only if, on the facts actually known to this Defendant, a reasonable person would either have appreciated that the transfer was probably in breach of trust or would have made enquiries or sought advice which would have revealed the probability of the breach of trust" (emphasis added).

It was not suggested to me that these conclusions should be distinguished by reference to the particular facts of this case.

Knowing Receipt: The Facts

283. Taking the six elements referred to in paragraph 280 above in turn, I make the following findings:

Property Subject to a trust?

284. BBCB, as I have already found, does not hold the Apartments on trust and so has no claim for knowing receipt. FNTC does hold property subject to a trust but that is simply the membership interest in BBCB and not the Apartments.

Transfer of the Property?

285. If, contrary to my finding above, BBCB is a trustee with legal title to the Apartments, then its property was plainly transferred.
286. Again, if contrary to my finding above FNTC had a beneficial interest in the Apartments (which it held for Members) then this too was transferred.

The Transfer is in breach of trust?

287. The Claimants' case as to the relevant breach of trust has differed over time. Originally they relied upon the purchase of the Apartments by BBL SL as causing FNTC to be in breach of trust. They then amended to allege that the placement of embargoes by AEAT on the titles put both FNTC and BBCB in breach of fiduciary duty. By amendment at trial, the Claimants now allege that the breach of trust arose by reason of "*allowing the situation to arise in which the Trust Property became encumbered and sold*". This is said to be a breach of the trustee's fundamental duty to preserve and protect the trust property. In advancing this claim, the Claimants rely upon their own breach of trust, citing *Montrose Investment Ltd v Orion Nominees Ltd* [2004] EWCA Civ 1032 per Waller LJ at [24] in support of the proposition that they are entitled so to do.
288. Whilst the Defendants robustly deny the existence of a breach of trust, I did not understand them to suggest that the Claimants could not seek to rely on their own breach of trust for the purposes of establishing a claim in knowing receipt.
289. In my judgment, there was no breach of trust on which the Claimants can properly rely for the purposes of establishing a claim in knowing receipt. Looking at each of the breaches now pleaded:

290. *The Embargoes*

- (i) It is not entirely clear to me that the Claimants rely on this as a stand-alone breach. In her oral closing, Mrs Talbot Rice said that their case was that the trustee (she did not identify whether she was referring to BBCB or FNTC, but I must assume,

both) had failed to protect the trust property “*by failing to prevent the tax authorities transferring the property pursuant to the power that the tax authorities had as a result of the embargoes they had imposed*”. However, in circumstances where the Defendants treated this as a separate alleged breach of trust and out of an abundance of caution, I proceed on that basis.

- (ii) The reference to allowing the situation to arise in which the Trust Property became encumbered is a clear reference to the embargoes. No provision of the Deed of Trust has been identified from which it is claimed that this amounted to a breach of trust by FNTC. Instead the Claimants rely on the general duty to preserve trust property.
- (iii) However, if allowing the embargoes to be placed on the property is a breach of duty, then it must follow that FNTC and/or BBCB had a positive duty to take some action in order to prevent this from happening.
- (iv) The evidence is clear that the only action that could have been taken to prevent the embargoes was the payment of the Spanish Taxes. Because appeals rarely have a suspensory effect, this payment would have had to be made before the embargoes were placed on the property.
- (v) However, FNTC does not allege (and nor could it) that it was required to pay the Spanish Taxes or that its own failure so to do amounted to a breach of trust.
- (vi) Indeed, at all times, FNTC, as a professional trustee, appears to have been in receipt of legal advice that appeals should be pursued and, furthermore, that following tax assessments, no action should be taken in circumstances where the assessment might then fall foul of the Spanish limitation period.
- (vii) Furthermore, Clauses 4(a) and 8 of the Deed of Trust provide that the Trustee shall not be bound to perform any act which “*might involve it in personal liability*” and shall not “*be required to take any legal or other action in relation to any matter whatsoever, unless fully and effectually secured or indemnified by the Club or the Founder Member to the reasonable satisfaction of the Trustee in respect of all costs and liabilities which may be incurred or suffered by the Trustee*”. Given that paying the Spanish Taxes would have involved personal liability of the Trustee in circumstances where it was not fully secured or indemnified, there is no basis in my judgment for the proposition that allowing the Apartments to become encumbered was a breach of trust on the part of FNTC. The obligation to protect

and preserve trust assets is plainly subject to any express contrary provision in the relevant trust deed (as was made clear by Sir Denys Buckley in *The Parish Trustees of the Parish of Askerwell v Masefield* [1986] EWCA Civ J0520-6; 85 LGR 108, an authority on which the Claimants relied).

- (viii) Whilst BBCB is in a different position, in that it was the recipient of the tax assessments, nevertheless it was entirely controlled by FNTC, its directors were the same and it would be unrealistic to suppose that it was not also influenced by the legal advice obtained by FNTC.
- (ix) On the Claimants' own case, BBCB was a bare trustee/nominee with no administrative duties and it is difficult to see how or why it owed a duty to prevent the property from being embargoed. Further and in any event, the pleaded duty (in paragraph 75 of the RRAPoC) is a duty owed by BBCB to FNTC in circumstances where it is only through FNTC taking action that BBCB, as its nominee, can act. In my judgment this is circular and artificial. Indeed, I agree with the Defendants that this demonstrates the implausibility of BBCB holding the Apartments on trust for FNTC. As an aside, I note that if for some reason BBCB were to owe duties to Members, there is no pleaded breach of duty.
- (x) Finally, I note that this alleged breach of trust (even if established as against FNTC and/or BBCB) is in any event incapable of being sufficient for the purposes of a claim in knowing receipt because it does not involve “*a disposal of assets in breach of fiduciary duty*” (see *El Ajou* per Hoffmann LJ) and nor is the transfer “*a direct consequence*” of such breach (see *Brown v Bennett* [1999] BCC 525 per Morritt LJ at 530E-G).

291. *The Sale of the Apartments*

- (i) The only way for FNTC to prevent the sale would have been to pay the Spanish taxes, which it is not alleged that FNTC had an obligation to do.
- (ii) Whilst Mr Kenny gave evidence that, had he been aware of what the Club and BBLL was planning to do, he would have gone to the English Court to seek a “*suitable protective order*”, the Claimants have not pleaded or proved the legal basis for any such order or against whom it would have been obtained.

(iii) In any event, Clause 8 of the Deed of Trust makes it clear that there is no absolute obligation on FNTC to take legal proceedings of this type and so its failure to do so cannot amount to a breach of trust by FNTC.

(iv) Further and in any event, in light of the fact that the sale of the Apartments was a forced sale made by the AEAT, I cannot see how it put FNTC (or indeed BBCB) in breach of trust. I note that it is not alleged that BBCB acted in breach of trust in failing to pay the Spanish Taxes or in permitting the appeals in its name and, in the circumstances, I do not believe that the sale of the Apartments was a breach of trust by BBCB.

292. For the sake of completeness, I reject the Defendants' argument that the Club Members have waived any breach of trust such that the Claimants cannot now rely on it for the purposes of their claim of knowing receipt. In my judgment, whilst waiver operates in appropriate circumstances to preclude a beneficiary from suing a trustee (see for example *Re Pauling's Settlement Trust* [1962] 1 WLR 86 per Wilberforce J at page 108), I have not been referred to any authority for the proposition that it can be set up by a beneficiary as a defence to a claim of knowing assistance, particularly where, as here, BBL holds a majority of the weeks at the Resort.

The Property is received by the Defendants

293. If the Apartments were trust property then it is common ground that they were received by BBL SL. It has not been suggested that this would not have been for the Defendants' benefit.

Knowledge

294. I reject the Defendants' submissions that this element of the knowing receipt claim must fail because it was "*not put to either Kevin Page or Adrian Diaz-Saavedra that he knew that there was a breach of duty by either Claimants and there is no evidence of such knowledge being held*". As I have already said, this takes the legal requirements for a finding of knowing receipt too far. However, where I have found that the Apartments are not trust property and that there is no transfer in breach of trust, I reject the submission that BBL SL through its director Kevin Page and its lawyer Mr Diaz-Saavedra had the requisite knowledge. Given my findings, it would be entirely artificial for me to consider the evidence further (on the assumption that there was a transfer in breach of trust) and I shall not do so.

Conclusion on the Second Main Issue

295. For the reasons set out above, I reject the claim of knowing receipt.

E. Remuneration and Expenses

296. FNTC claims outstanding fees for its trustee services and outstanding out of pocket expenses incurred in the course of performing its duties as trustee. These claims taken together amount to £61,171.07, broken down as follows:

- (i) Trustee Remuneration at the rate of £14,961 per annum for the years 2015, 2016 and 2017 in the sum of £44,883. The Claimants say that they are entitled to this by reason of clause 13 of the Trust Deed which provides for the Club to pay FNTC remuneration for the performance of its duties as agreed with the Founder Member or the Club. The Claimants say that this annual figure was agreed (they rely on an implied agreement arising in circumstances where invoices at this level were paid in 2013/14 and 2014/15). It is common ground that the Club has not paid trustee remuneration for any of these years.
- (ii) Miscellaneous fees including Accountancy fees, company fees, compliance fees, Fiscal Rep fees, annual return fees incurred between November 2015 and November 2018 in the total sum of £12,738.28. The Claimants say that the principle of payment of these fees was agreed pursuant to an engagement letter dated 11 September 2001 by which BBKA, BBCB and Midmark retained FNTC to provide services of this type. The Claimants say that the level of these fees was varied in 2013 such that they were for each company: £133 for annual accounts, £592.48 for annual company fees, £60.46 for compliance together with £200 for BBCB's fiscal representation fee and £380 for BBKA's annual return fee. In a Schedule to their pleadings, the Claimants say that "*FNTC billed the Club directly for these fees as an administrative short cut and the Club paid them at these rates in 2013 and 2014*". The Club stopped paying these fees in 2015. The Claimants say that they are entitled to these fees under clause 13 of the Deed of Trust or as costs and expenses under clause 14. I note also the provisions of article 12(a)(x) of the Constitution.
- (iii) Grant Thornton Fees incurred in 2018 in the sum of £3,549.79. The Claimants assert that FNTC retained Grant Thornton to provide advice on the enforcement of the Spanish Taxes in the UK and that this is an expense incurred by FNTC in performance of its duties as Trustee and/or in connection with the Trust Property or the holding by FNTC of the office of custodian trustee. They say that the Club is liable to indemnify FNTC in respect of this expense pursuant to clause 14 of the Deed of Trust.

Trustee Remuneration

297. There is no doubt that FNTC is entitled to remuneration as agreed from time to time with BBLL, alternatively with the Club. Since 2004, the Club has paid an annual Trustee Fee, as evidenced in invoices sent to the Club generally in November or December for the following year. These have been subject to review from time to time, as Kevin Page confirmed in his evidence, but absent a review, the fees would remain at the same level as in the previous year. It was Mr Kenny's evidence in his first statement that "*FNTC's remuneration generally comprises an annual fixed trustee fee which is a responsibility fee*".
298. By a letter dated 28 October 2013, FNTC informed the Club that for the year 2013/14, FNTC would be increasing its trust and corporate fees by 5%, and by an invoice sent under cover of a letter dated 18 November 2013, the Trustee Fee was set at £14,961. The 18 November 2013 letter expressly drew the Club's attention to FNTC's standard terms and conditions to be found on its website (I was not provided with a copy of the terms and conditions). It is common ground that the Club paid the increased fee of £14,961 in both the years 2013/14 and 2014/15.
299. By an invoice dated 3 November 2015, FNTC sought payment for its Trustee Fee in the sum of £14,961 for the year 1 November 2015 to 31 October 2016. Invoices for the same amount of Trustee Fee were also raised by FNTC on 15 November 2016 (for the year 1 November 2016 to 31 October 2017) and on 12 December 2017 (for the year 1 November 2017 to 31 October 2018). None of these invoices has been paid, although the Defendants admit in their Re-Amended Defence that FNTC remains trustee of the Trust Property (albeit that it is denied that this includes the Apartments).
300. In their written closing submissions, the Defendants submitted that the Trustee Fee was governed by the terms of a letter dated 18 June 1996 from the original Trustee to Wade Bostock in which it was proposed that the Trustee Fee would be calculated by reference to an individual fee for each Apartment (Apartments 1-20 attracting a fee of £150 each; Apartments 21-40 attracting a fee of £125 each and Apartments 41 to 103 attracting a fee of £100 each). This approach of calculating the Trustee Fee by reference to the number of Apartments appears to have persisted at all times thereafter as is clear from the invoices which uniformly evidence a breakdown of the total Trustee Fee by reference to the number of Apartments. Thus, taking by way of example the invoice dated 18 November 2013, the sum of £14,961 is expressly divided up as follows:

"Annual Trustee Fee – 65 units at £124.60 each

Annual Trustee Fee – 20 units at £187.43 each

Annual Trustee Fee – 20 units at £155.67 each”.

301. In the circumstances it is the Defendants’ case that the Claimants are not entitled to a fixed Trustee Fee, but rather to a fee based on the number of Apartments being administered.
302. The Claimants failed adequately to grapple with this point in their submissions, notwithstanding that I was informed by the Defendants that the Claimants had been given the opportunity at the PTR to clarify their case as to the basis for the claim to the Trustee Fee but declined to do so. Whilst Kevin Page confirmed his understanding as to a fee being payable from year to year and always being subject to review, it was not put to him that the Club was thereby agreeing to a fixed fee which bore no relation to the number of Apartments held. Given the terms of the invoices, it is difficult to see how this point could have been made good and these invoices appear to be inconsistent with Mr Kenny’s evidence that FNTC’s remuneration generally comprised an annual fixed fee.
303. In light of the documents, I reject the suggestion that there was an implied agreement with the Club for the payment of a fixed fee in the annual sum of £14,961. The fact that the fee remained the same from one year to the next appears to have been a function of the fact that the number of Apartments remained the same.
304. The Defendants suggest that the Club retains the right to have the fees assessed, but, given the sums at stake, this seems to me to be unlikely to be proportionate or sensible. I have in any event heard no submissions on the point from the Claimants.
305. Accordingly, I intend to permit the parties to make further short submissions to me at the consequential hearing of this matter (insofar as may be necessary) as to how this claim for fees should be dealt with. Left to my own devices, I would have thought that, as the Apartments remained in the trust structure when the November 2015 invoice was raised, the Claimants have a good case for recovery of £14,961, but that once the Apartments were sold it is difficult to see on what basis the Trustee Fee is recoverable. However, I note that notwithstanding the Defendants’ closing submissions to the effect that nothing would be payable, the Re-Amended Defence accepts that 6 Apartments remained within the trust structure from early 2016. It seems to me that there would be an entitlement to charge for those Apartments.

Expenses

306. The Claimants rely on an engagement letter dated 11 September 2001 for the provision of administration services and the Defendants’ did not suggest that this letter did not govern the

payment of expenses. Indeed, by a letter dated 6 March 2019, the Defendants' solicitors admitted that expenses falling into the various categories claimed had been invoiced to and paid by the Club over many years.

307. However, the Defendants say that the fact that expenses have previously been paid unquestioningly by the Club does not now mean that expenses are due. They say that insufficient particularisation of the claimed expenses has been provided and they point to the fact that FNTC appears to be claiming a fee for acting as Fiscal Representative of BBCB in circumstances where the claim advanced in these proceedings is that FNTC left tax affairs to the Club. Furthermore, I note that FNTC has always claimed fees in relation to Midmark, notwithstanding that its case before me has been that Midmark never held any of the Apartments, and BBCA, notwithstanding that BBCA has not held any Apartments for many years. The Claimants have not sought to explain how or why they are entitled to fees in these respects.

308. Doing the best I can in circumstances, I accept that FNTC is entitled to recover some expenses in respect of BBCB pursuant to clause 13 of the Deed of Trust and I award its claimed expenses of £12,738.28, less the fees charged (i) for Midmark; (ii) for BBCA and (iii) for acting as Fiscal Representative between November 2015 and November 2018. I leave this simple calculation to be carried out by the parties.

Grant Thornton's Fees

309. The Claimants point to an engagement letter from Grant Thornton dated 20 November 2017 in which it is recorded that Grant Thornton is being engaged by FNTC to carry out tax investigation services more specifically identified as "*Engaging with HMRC to persuade them to desist in their pursuit of a debt on behalf of the Spanish tax authority*". Two invoices from Grant Thornton appear in the bundle dated 7 June 2018 (£2,696.95) and 26 June 2018 (£852.84) both of which refer to Tax Investigations and Dispute services and there is also evidence of correspondence between Grant Thornton and HMRC. There is no witness evidence addressing Grant Thornton's fees.

310. I reject the Defendants' submissions that there is no evidence as to the nature of Grant Thornton's work and on balance I accept that FNTC is entitled to recover the sum of £3,549.79 pursuant to the indemnity provisions in clause 14 of the Trust Deed.

Conclusion

311. I shall hear from the parties as to the Orders to be made in light of my Judgment, together with arguments on costs.

APPENDIX 1

AGREED ISSUES

1. Is BBLL and/or the Members of the Club obliged to indemnify FNTC or BBCB in respect of the Spanish Taxes pursuant to clause 14 of the Deed of Trust:
 - a. owing to the fact that the tax liability is a liability incurred in connection with the Trust Property (whether the Trust Property is BBCB and/or the Apartments) and the words “shall be kept fully indemnified” are to be given a broad meaning so as to apply whether or not FNTC itself is under the liability in question; alternatively
 - b. because a demand or claim has been made on FNTC by BBCB? Alternatively,
 - c. because FNTC has a liability to pay BBCB because it is duty bound (in the sense pleaded in paragraphs 35.3 and 35.5b of the RRAPoC) to do so?

[An answer in Cs favour on any of these points is said by Cs to be capable of being dispositive of the claim. That is not accepted by Ds in relation to (b), but is accepted in relation to (a) and (c)]

Alternatively,

2. Does FNTC and/or BBCB have a right of indemnity out of the trust property in respect of the Spanish Taxes pursuant to the Trustee Act 2000, section 31 and/or the common law?

Alternatively,

3. Are FNTC and/or BBCB entitled to seek reimbursement in respect of the Spanish Taxes from the beneficiaries of the trust pursuant to the equitable principle in *Hardoon v Belilios* [1901] AC 118?
4. As to 2 and 3 above, various issues arise, because it is accepted by the Claimants that to succeed on either of these issues they must establish that the Apartments are trust property, whether
 - a. because they fall within the definition of Trust Property in the Deed of Trust (a pure point of construction) and that if the Apartments are “Trust Property” under the Deed of Trust, they must be property held on trust by BBCB for FNTC, or
 - b. because they are properly to be regarded as being held on trust for Members of the Club (notwithstanding that they do not fall within the definition of Trust Property in the Deed of Trust).

5. As to whether the Apartments fall within the definition of Trust Property in the Deed of Trust (issue 4(a) above), two issues arise which each have further sub-issues:
 - a. are the Apartments “property which was held by the Trustee for the benefit of the Club and its Members”, whether
 - i. because the Apartments are held by FNTC by virtue of BBCB being simply a bare nominee company, itself holding the Apartments on bare trust for FNTC because either
 - (A) On a true construction of Recital C BBCB is a bare nominee; or
 - (B) By virtue of a common intention trust, BBCB is a bare nominee for FNTC
 - or
 - ii. because the Club is estopped from denying that the Apartments are Trust Property;
 - alternatively
 - b. are the Apartments assets of an Owing Company as defined in Recital A to the Deed of Trust, whether
 - i. because of the true construction of the Deed of Trust, or
 - ii. because of an implied term to such effect or
 - iii. by virtue of rectification to include BBCB as an Owing Company.

And are therefore both Trust Property and property held on trust by BBCB for FNTC.

6. As to whether the Apartments can be trust property, notwithstanding that they do not fall within the definition of Trust Property in the Deed of Trust (issue 4(b) above), two issues arise:
 - a. does BBCB hold the Apartments on trust for the Members of the Club (whether indirectly through FNTC (BBCB being a bare nominee for FNTC) or directly) by virtue of a constructive trust?

Alternatively

- b. are the Club and/or BBL estopped from denying that the Apartments are trust property?

7. Are the Members of the Club and/or BBL estopped from denying liability to pay Cs', all costs and expenses incurred in relation to the Apartments, including the Spanish Taxes? (See the heading to Cs' closing subs para 74).

[Note - for the sake of brevity the sub-issues arising in relation to the estoppel arguments are not set out]

NOTES

The only other additional issues which arise on the Defence are set out in the List of issues at 6 and 7. Ds take a number of objections within each issue (for example Ds do not accept that even if the Deed of Trust defines the Apartments to be Trust Property, it therefore follows that they are held on trust).

In respect of issue 1(d) above, it is not clear to Ds what distinction is being drawn between a demand and a claim and Ds note that the argument advanced in both opening and closing was on the footing of a "claim" having been made.

1. In respect of issue 6(a) above, the List of Issues asks whether BBCB held the Apartments on a common intention constructive trust for (a) FNTC as Trustee; OR (b) the benefit of the Club. The proposition that BBCB held the Apartments on constructive trust for FNTC is maintained by Cs (albeit that Ds take issue as to whether this was pleaded; with Cs contending that it is pleaded in paragraph 17A of the RRAPoC, supplemented by the Voluntary Information at A/18). As per 6(a) above, Cs' case is that the common understanding that the Apartments would be held for the benefit of the Club Members could be achieved in equity either by BBCB holding the Apartments on constructive trust for FNTC as custodian trustee under the Deed of Trust (and therefore for the Members of the Club), or by BBCB holding the Apartments on constructive trust directly for the benefit of the Members of the Club.
2. The difference between the issues at 5(a)(ii) and 6(b) above is the distinction between Trust Property as defined in the Deed of Trust and trust property as an independent concept. There is no reason why these issues should not be dealt with together. [Ds contend that the fact that an asset may come within the definition "Trust Property" does not necessarily mean that the asset is itself held on trust (it may simply be held within

the trust structure – for example through ownership by the trustee of the company holding the asset)].

3. Cs' position on the issue relating to estoppel by convention (7. above) remains as framed in the List of Issues at para 5, namely whether BBLL and/or the Club Members are estopped: Cs says that the possible outcomes are:
 - a. All Club members are estopped. That includes BBLL because it is an ordinary Club Member in relation to the weeks it holds;
 - b. If (contrary to Cs' primary case) not all Club members are estopped, BBLL is certainly estopped because of the acts/communications it took/made.
4. Cs do not rely on an estoppel by representation case (as pleaded in para 37 of the RRAPoC and raised in the List of Issues at 5.4 and 5.5?) separate from, and alternative to, their estoppel by convention case.
5. Issues 8-10 in the List of Issues (the issues arising in relation to the allegation of a non-possessory lien and/or first equitable charge in para 37A of the RRAPoC) are addressed
 - a. by Cs in Cs' closing note paras 37-39 and the authorities cited therein, together with *Meritus v Butterfield* (added at Cs supp auths tab 9A) and in oral closings on Day 7, pp.64-70 and 108 and Day 8 p.168-170. Cs' case, in summary, is that they are, as trustees, entitled to a right of indemnity out of the trust funds. This right is supported by a non-possessory lien over the trust property and both the right of indemnity and the non-possessory lien are not lost when the trust assets are transferred to a new trustee. Thus
 - (i) If BBCB is a (bare) trustee (nominee), it is entitled to look to the Apartments in order to indemnify itself in respect of the Spanish tax liability, which is a trust expense;
 - (ii) FNTC is entitled to look to the Apartments in order to indemnify its obligation to put BBCB in funds to pay the Spanish tax liabilities in accordance with its duty to preserve and protect the trust assets. That is an expense of the trust, and FNTC is accordingly entitled to look to the Apartments to indemnify itself in respect of that liability.

- b. And by Ds in para 312 of their written closing and in oral closings on Day 8 p.122 line 20 – p.127. Ds’ case in summary is that BBL SL took good title to the property free from any lien or right of indemnity in favour of BBCB and FNTC and that BBL SL is not a successor trustee but, insofar as it holds the Apartments on Trust, it is the trustee of a new trust in respect of which neither BBCB or FNTC would have any rights in any event. Cs’ response to Ds’ position is that BBL SL is, on its own case, successor trustee, holding the Apartments on trust for the Members of the Club and Cs’ right of indemnity is exercisable against the trust property (the Apartments) in its hands.
6. Cs do not advance the point in Para 80.1 of the RRAPoC that BBL is in breach of the Deed of Trust for failing to deposit a reserve fund.
7. The position on Spanish law is that Ds put forward a case on Spanish law, namely that any interest which Cs had in the Apartments were overreached on their transfer to BBL SL as a matter of Spanish law. Cs’ position on this is that Ds have not discharged the burden, which falls on them, to make this proposition good as they have not established that BBL SL was a purchaser in good faith as a matter of Spanish law, and the Spanish law evidence that a purchaser will take free of an unregistered *carga* is restricted to purchasers in good faith.