



Neutral Citation Number: [2025] EWHC 385 (TCC)

Case No: HT-2023-000306

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

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

Date: 24th February 2025

Before:

JONATHAN ACTON DAVIS KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

MR BENJAMIN GOLDKORN

Claimant

- and -

(1) MPA (CONSTRUCTION CONSULTANTS) LTD
(2) KAZU RESTAURANTS 1 LTD (in liquidation)

Defendants

John Brisby KC and Karl Anderson (instructed by Stokoe Partnership) for the Claimant
Will Cook (instructed by DAC Beachcroft) for the Defendant

Hearing date: 4 February 2025

JUDGMENT

Judgment available to the Parties: 18th February 2025

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 24 February 2025 at 10:30am.

Jonathan Acton Davis KC:

1. This Judgment follows the trial of the Preliminary Issues ordered to be determined by Eyre J at paragraph 2 of his Order dated 22 August 2024:

“Does the Claimant have title to bring any of the claims set out in the Particulars of Claim against the First Defendant either:

- (i) as assignee of the Second Defendant’s rights pursuant to the Deed of Assignment dated 22 December 2020; or*
- (ii) as beneficiary of rights held on Trust for him by the Second Defendant pursuant to the Declaration of Trust dated 14 February 2022 either (a) in his own name or (b) in order to compel the Second Defendant to enforce those rights on his behalf”*

2. These proceedings (which were issued on 22 August 2023) arise out of a contract entered into between the First Defendant (hereinafter referred to as “MPA”) and the Second Defendant (hereinafter referred to as “Kazu 1”) on 10 November 2016 (the “PM Appointment”), pursuant to which MPA agreed to provide Kazu 1 with project management services in connection with the development of a restaurant at 61-63 Beak Street, London W1F 9SL (the “Premises”). Kazu 1 was a special purpose vehicle incorporated for the purposes of the development. Its parent company was Kazu Restaurants Ltd (“Kazu”).

3. The PM Appointment consisted of a proposal letter dated 10 November 2016 and MPA’s Terms and Conditions of Appointment (the “T&Cs”).

4. The proposal letter was sent in respect of “Endo, 61-63 Beak Street, London W1” and provided:

“As requested, please find detailed below our service and fee proposal to undertake project management services for your consideration in relation to the above project: ...

We would propose our fee for the above services to be £29,500 (plus VAT)

...

The above service and fee proposal is offered in accordance with our standard terms and conditions as attached (ref MPA/T&C 2008)."

5. The following were defined terms in the T&Cs:
- (a) "the Client" was defined as the "person or organisation to whom the Proposal has been addressed and/or by whom the Proposal has been accepted". It is common ground that this was a reference to Kazu 1;
 - (b) "the Consultant" was defined as MPA;
 - (c) "the Project" was defined as "the construction works at the site as identified in the Proposal";
 - (d) "the Proposal" was defined as "the service and fee proposal offered by the Consultant"; and
 - (e) "the Services" was defined as "the services as set out in the Proposal".
6. Clause 1.1 of the T&Cs (under the heading "Appointment") provided:

"The Client appoints the Consultant to provide the Services and the Consultant accepts such appointment upon and subject to these Conditions (the "Appointment"). The Appointment takes effect on the date when the Consultant first commenced performance of the Services irrespective of the date of this Appointment."

7. Clause 16.2 of the T&Cs (under the heading "Assignment and Sub-Contracting") provided:

"The benefit of this Appointment may be assigned by the Client by way of an absolute legal assignment to any person providing finance or refinance to the Client in connection with the Project or to any person (A1) acquiring the Client's interest in the Project and by (A1) to another person (A2) acquiring A1's interest in the Project. No further or other assignment is permitted and, in particular, A2 is not entitled to assign this Appointment."

8. Clause 18.2 of the T&Cs (under the heading “General”) provided:

“Nothing in this Appointment confers or purports to confer any right to enforce any of its terms on any person who is not a party to it. Only the Client (and the Client’s permitted assignees) and the Consultant can take action to enforce the terms of this Appointment.”

9. On 5 December 2016, MPA entered into a separate contract with Kazu 1 to act as quantity surveyor on the same Project. No claims are advanced by the Claimant in respect of the second appointment, and it is not therefore relevant to the determination of the Preliminary Issue.
10. Construction works at the Premises began in May 2017. However, between late 2017 and 17 January 2018, Kazu 1 terminated the Project. Kazu 1 subsequently disclaimed its lease of the Premises.
11. On 19 June 2020, Kazu 1 entered into Creditors Voluntary Liquidation. Kazu also entered into Creditors Voluntary Liquidation on 19 June 2020, and was subsequently dissolved on 18 August 2022.
12. On 22 December 2020, Kazu 1 and Kazu (acting by their Liquidator, Mr Yerrill, and defined as “the Companies”) entered into a Deed of Assignment in favour of the Claimant (defined as “the Assignee”) (the “Deed of Assignment”). The Claimant was formerly a director of Kazu 1 between 1 March 2017 and 11 April 2019.
13. Recital C to the Deed of Assignment recorded that, prior to their liquidation, Kazu 1 and Kazu had *“identified a potential claim they wished to pursue against [MPA] arising out of or in connection with their performance as project manager, quantity*

surveyor and contract administrator in relation to the design and fit-out by MPA of the premises at 61-63 Beak Street, London W1F 9SL”.

14. The “MPA Claim” was defined in clause 1.1 of the Deed of Assignment as:

“(1) Any and all claims, causes of action and/or chose(s) in action which the Companies had, have or may have against MPA; and/or

(2) Insofar as not included in (1) above any and all other claims, causes of action and/or chose(s) in action of whatever description, whether in law and/or in equity the Companies had, have or may have against MPA and/or any other party (other than the Directors of the Companies)

arising out of or in connection with their performance as project manager, quantity surveyor and contract administrator in relation to the design and fit-out of the Premises at 61-63 Beak Street, London W1F 9SL.”

15. Pursuant to clause 2.1 of the Deed of Assignment, the Companies purported to assign “*such rights, title and interest each Company had, has or may have in the MPA Claim*”, together with:

(a) “any and all remedies and/or entitlements, whether at law, in equity or otherwise, that the Companies had, have or may have had arising out of or in connection with the MPA Claim.”

(Clause 2.1.1); and

(b) “the power to bring in the name of the Assignees only and not in the name of the Companies or the Liquidator legal claims and/or legal proceedings arising out of or in connection with the MPA Claim.”

(Clause 2.1.2)

16. The consideration paid by the Claimant under the Deed of Assignment was £1250.00 plus Value Added Tax.

17. Notice of the Assignment was given by the Claimant to MPA on 1 April 2022 (in the form of it Letter of Claim in these proceedings).

18. On 14 February 2022, Kazu 1 and Kazu (again, acting by their Liquidator, Mr Yerrill, and again defined as “the Companies”) entered into a Declaration of Trust in favour of the Claimant (here defined as “the Beneficiary”) (the “Declaration of Trust”).

19. The Recitals to the Declaration of Trust recorded:

(a) “the Companies acting by the Liquidator determined and intended that they should assign all their rights to any and all claims the Companies had, have or may have against MPA. The Companies acting by the Liquidator therefore entered into a Deed of Assignment with the Beneficiary on 22 December 2020 in relation to their rights to such claims.”

(Recital (D));

(b) “the Companies acting by the Liquidator and the Beneficiary have agreed that for the avoidance of doubt the Companies shall execute this Declaration of Trust in favour of the Beneficiary declaring themselves trustees of all such rights, title and interest.”

(Recital (E)); and

(c) “the Companies acting by the Liquidator have declined to bring the MPA Claim (as defined herein) in their own names on behalf of the Beneficiary and/or to lend their names to the Beneficiary so that he can bring the MPA Claim in their names. The Companies acting by the Liquidator and the Beneficiary have therefore agreed that the Beneficiary shall be entitled to bring the MPA Claim in their own name.”

(Recital (F))

20. The “MPA Claim” had the same definition in the Declaration of Trust as in the Deed of Assignment.

21. Pursuant to clause 2.1 of the Declaration of Trust, the Companies purported irrevocably to declare that, as from the date of the Declaration of Trust, they held “*all rights, title and interest (if any) that each Company had, has or may have in the*

MPA Claim together with all and any remedies and/or entitlements, whether at law, in equity or otherwise, that the Companies had, have or may have had arising out of in connection with the MPA Claim on Trust for the Beneficiary absolutely.”

22. Clause 3.1 of the Declaration of Trust provided:

“The Companies and the Beneficiary agree that the Beneficiary shall bring claims and/or legal proceedings arising out of or in connection with the MPA Claim in the name of the Beneficiary only and not in the name of the Companies or the Liquidator.”

23. The Claimant subsequently issued these proceedings against both MPA and Kazu 1. He alleges that MPA acted in breach of its duties owed to Kazu 1 under the PM Appointment and brings a claim for damages for losses allegedly suffered by Kazu 1 as a result.

24. It is accepted by the Claimant that he has no claim in his own right. Therefore, he purports to bring this claim either as the Assignee of Kazu 1’s claims against MPA, pursuant to the Deed of Assignment, or alternatively, as the Beneficiary of Kazu 1’s claims against MPA, pursuant to the Declaration of Trust.

25. In short, Mr Goldkorn alleges that:

(i) “MPA acted negligently in rendering its services under the PM Appointment, and that it thereby acted in breach of the terms of the PM Appointment and/or in breach of its duty to exercise reasonable care and skill at common law”; and

(ii) “had MPA not acted in breach of contract and/or negligently, Kazu 1 would have terminated the Project sooner than it did and would thereby have avoided incurring significant expenses, which are now claimed as damages against MPA” (paragraph 4 of his Skeleton Argument).

26. The Parties have prepared, and the Court has approved, a statement of agreed facts for the purpose of this trial.
27. The issues which are of the subject of this trial are foreshadowed at paragraphs 7-10 of the Defence. The Parties then agreed to the listing of the Preliminary Issue which was reflected in the Consent Order made by Eyre J mentioned at paragraph 1 above. Directions were given for the trial of the Preliminary Issue following a CCMS before HHJ Keyser KC (sitting as a Judge of the High Court) on 20 September 2024.

Preliminary Issue 1: Does the Claimant have title to bring any of the claims set out in the Particulars of Claim against the First Defendant as Assignee of the Second Defendant's rights pursuant to the Deed of Assignment dated 22 December 2020

28. Under s.136(1) of the Law of Property Act 1925, there are three requirements for a valid legal or statutory assignment:
- (i) Assignment by writing;
 - (ii) Absolute assignment; and
 - (iii) Notice in writing.
29. It is not argued on behalf of Kazu 1 that those three conditions have not been met. The only question for the Court is whether, on its proper construction, clause 16.2 of the PM Appointment precludes the assignment of the MPA Claim to the Claimant.
30. The Claimant relies upon three arguments:
- (a) he says that he was a “*person ... acquiring the Client's interest in the Project*” and is therefore a permitted assignee under clause 16.2; and
 - (b) alternatively, he argues that the restriction in clause 16.2 only applies to “*the benefit of this Appointment*”, which refers to Kazu 1's right to MPA's

performance of its services but not to Kazu 1's right to the fruits of performance (including accrued rights of action in respect of MPA's breaches of its past obligations). Accordingly, it is said that the purported assignment falls outside the ambit of the restriction in clause 16.2 in any event.

(c) Claims in tort fall outside the scope of clause 16.2.

Is the Claimant a permitted assignee under clause 16.2

31. The Claimant's first argument is that because the Project had been abandoned by the date of execution of the Deed of Assignment, the only interest which Kazu 1 had in the Project was the right to claim damages. Having taken the assignment, Mr Goldkorn became a "*person...acquiring the Claimant's interest in the Project*", within the meaning of clause 16.2. Hence the assignment was not caught by the prohibition.
32. The difficulty with that argument, as MPA points out, is that it ignores the meaning of "the Project". "The Project" is defined in the PM Appointment (clause 1.1) as "*the construction works at the site as identified in the Proposal*". The Proposal Letter is headed "Endo, 61-63 Beak Street, London W1", thus the Project is defined as the construction works at the Premises. It is only a person who acquires Kazu 1's interest in the construction works themselves who is a permitted assignee under clause 16.2.
33. The Claimant says that what is contemplated by this aspect of clause 16.2 is a situation where a third party "takes over" as the beneficiary of MPA's Services in connection with the Project (or whatever might be left of it). The Claimant has effectively taken over the Project, because all that remains of it is the MPA Claim.

However, the reality is that the Claimant has not acquired any interest in the construction works at the Premises. Indeed, the lease of the Premises was disclaimed by Kazu 1, following which any such interest which remained would have reverted to the Landlord.

34. The Deed of Assignment defines the “MPA Claim” as:

“all other claims, causes of action and/or choses in action ... against MPA and/or any other party ... arising out of or in connection with their performance as project manager, quantity surveyor and contract administrator in relation to the design and fit-out of the Premises at 61-63 Beak Street, London W1F 9SL”

But the definition of the “MPA Claim” only extends to cover claims against other parties insofar as they arise out of, or in connection with MPA’s performance as project manager, quantity surveyor and contract administrator. It would not cover such claims which had no connection with MPA’s performance, such as an unrelated final account dispute with the Main Contractor, or any dispute with the Landlord. Such claims would, even on the Claimant’s own case, constitute at least part of Kazu 1’s remaining “interest in the Project”.

Does an assignment of the right to the fruits of performance fall outside the ambit of clause 16.2

35. The Claimant’s second argument is based on the wording of clause 16.2 which prohibits assignment of the “benefit of this Appointment”. He relies upon the definition of the “Appointment” in clause 1.1 of the PM Appointment which reads:

“The Client appoints the Consultant to provide the Services and the Consultant accepts such appointment upon and subject to these Conditions.”

36. It is said that the “benefit of this Appointment” refers to Kazu 1’s right to MPA’s performance of the Services, but not to Kazu 1’s right to the fruits of performance, including the accrued rights of action in respect of MPA’s breaches of its past obligations (which were the subject of the Deed of Assignment). Thus, the Claimant alleges that the purported assignment falls outside the prohibition in clause 16.2 in any event.

37. As the Claimant points out, it is in principle open to parties to a contract to agree to prohibit a creditor from assigning the benefit of the contract to another person. In **Linden Gardens Trusts Ltd v Lenesta Sludge Disposal Ltd** [1994] 1 AC 85, the House of Lords was asked to determine the proper construction of a clause in a Standard Form Building Contract which provided that:

“(1) The employer shall not without the written consent of the contractor assign this contract

(2) The contractor shall not without the written consent of the employer assign this contract ...”

38. Lord Browne-Wilkinson held that, on its proper construction, that clause prohibited the assignment of the benefit of the contract in question, including the assignment of accrued rights of action. Importantly, for the purposes of this dispute, Lord Browne-Wilkinson recognised:

(i) At [104D], that where a contract between A and B purports to prohibit assignment of contractual rights by A, the effect of such prohibition is a question of the construction of the contract;

(ii) At [105C], that “... *there might be a case in which the contractual prohibitory term is so expressed to render invalid the assignment of rights to future performance but not so as to render invalid assignment of the fruits of*

performance. The question in each case must turn on the terms of the contract in question.”

39. On the matter of contractual interpretation, the Claimant reminded me of the now well-settled principles of contractual construction which include:
- (i) Regard must be had by the Court to the purpose of the particular contractual provision and the circumstances in which it was agreed: **Bank of Credit and Commerce International SA v Ali** [2002] 1 AC 251 at [26];
 - (ii) In cases of ambiguity, the Court is entitled to prefer the construction which is most consistent with business common-sense: **Rainy Sky SA v Kookmin Bank** [2011] UKSC 50;
 - (iii) The Court, in construing a contractual term, is engaged in an iterative process in which it performs a “*unitary exercise; where there are rival meanings, the Court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense*”: **Wood v Capita Insurance Services Ltd** [2017] UKSC 24.
40. The Claimant argues that it is clear that the Deed of Assignment does not contravene clause 16.2 of the PM Appointment for 3 reasons.
41. First, as summarised at paragraph 19 of his skeleton argument, the assignment of the MPA claim for damages after the determination of the PM Appointment cannot be said to amount to an assignment of the “benefit of this Appointment” within the meaning of clause 16.2. Lord Browne Wilkinson expressly contemplated a scenario whereby a contractual term might render invalid the assignment of rights to future performance under a contract, but not the fruits of performance. On the facts of **Linden Gardens**, the clause in question has prohibited the assignment of “the

Contract”, and it was clear that the parties intended to prevent the assignment of both the right to future performance and the fruits of performance.

42. However, clause 16.2 of the T&Cs purports to restrict assignment of the “benefit of this Appointment”. “Appointment” is defined in clause 1.1 as “*the Client appoints the Consultant to provide the Services and the Consultant accepts such appointment upon and subject to these conditions*”. Thus, what is contemplated by the use of the phrase “benefit of this Appointment” is that there shall be no assignment of the benefits of the provision of the “Services”, being the primary obligations to render future performance by MPA, not the secondary obligations, to pay damages in respect of past obligations, which fall outside the scope of clause 16.2.
43. In **Linden Gardens**, the Court of Appeal (by a majority) drew a distinction between an assignment of the right to require future performance of a contract by the other party, on the one hand, and an assignment of the benefits arising under the contract (including to enforce accrued rights of action for breach of the building contract), on the other. It held that only assignment of the former, and not the latter, was prohibited by clause 17(1) of the contract in that case.
44. That distinction was rejected by the House of Lords. Lord Browne-Wilkinson held at [105B-C] that while it is “*at least hypothetically possible that there might be a case in which the contractual prohibitory term is so express as to render invalid the assignment of rights to future performance but no so as to render invalid assignments of the fruits of performance*”, the question in each case must turn on the terms of the contract in question.

45. In Linden Gardens, Lord Browne-Wilkinson found it “*impossible to construe clause 17 as prohibiting only the assignment of rights to future performance, leaving each party free to assign the fruits of the contract*”. He said, at [105D-G]:

“The reason for including the contractual prohibition viewed from the contractor’s point of view must be that the contractor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract. Building contracts are pregnant with disputes: some employers are much more reasonable than others in dealing with such disputes. ... I cannot believe that the parties every intended to permit such a confused position to arise.”

46. At [106A-C], Lord Browne-Wilkinson said:

“... parties who have specifically contracted to prohibit the assignment of the contract cannot have intended to draw a distinction between the right to performance of the contract and the right to the fruits of the contract. In my view they cannot have contemplated a position in which the right to future performance and the right to benefits accrued under the contract should become vested in two separate people. I say again that that result could have been achieved by careful and intricate drafting, spelling out the parties’ intention if they had them. But in the absence of such a clearly expressed intention, it would be wrong to attribute such a perverse intention to the parties ...”

47. As MPA argues, the critical question is whether the reference in clause 16.2 to the “benefit of this Appointment” is sufficient to establish the parties’ clearly expressed intention to distinguish the right to future performance from the right to benefits accrued under the PM Appointment.

48. I bear in mind the principles of contractual construction, summarised at paragraph 39 above, however, in my judgment it is plain that the language used in clause 16.2 comes nowhere near the “careful and intricate drafting” referred to by Lord Browne-Wilkinson.

49. In **Linden Gardens**, clause 17(1) referred to the assignment of the “Contract”. Lord Browne-Wilkinson pointed out at [103A] that the clause was in this respect “*unhappily drafted*” as it was in any event impossible to assign “*the contract*” as a whole, i.e. including both burden and benefit.” That is because the burden of a contract can never be assigned without the consent of the other party to the contract. He decided that what the parties had meant was that clause 17(1) “*prohibited the assignment by the employer of the benefit of the contract*”, thus Lord Browne-Wilkinson concluded that the phrase “assign this contract” was in fact to be read as equivalent to “assign the benefit of this contract”. That latter phrase was found wide enough to encompass both the right to future performance and the right to fruits of performance with no distinction intended to be drawn between the two.
50. I accept, as argued by MPA, that the use of the phrase “the benefit of this Appointment” in clause 16.2 is intended to draw an appropriate contrast with the burden of the Appointment (which is not assignable). It does no more than that, and certainly does not provide for an express distinction between the right to future performance, and the right to the fruits of performance.
51. Thus, the first argument summarised at paragraph 19 of the Claimant’s skeleton argument fails.
52. The second argument (see paragraph 20 of the Claimant’s skeleton argument) is that if the restriction on assignments of the “benefit of this Appointment” prevents Kazu 1 from assigning the fruits of the PM Appointment to Mr Goldkorn, Kazu 1 has a separate and independent claim against MPA in the tort of negligence. That falls outside the scope of clause 16.2 entirely.

53. To counter that argument, the Defendant refers to **Burleigh House (PTC) v Irwin Mitchell LLP** [2021] EWHC 834 (QB) at [33-36].
54. The Claimant says that that decision of the Deputy Master in that case has not been followed in this jurisdiction and, further, that it has been disapproved in the High Court of Singapore, **Re Ocean Tankers (Pte) Ltd** (in liquidation) [2023] SGHC 330.
55. I do not need to engage in that debate.
56. Paragraph 18 of the Particulars of Claim pleads:

“Further or alternatively, in circumstances where MPA owed a contractual duty to exercise reasonable skill and care, Kazu relied upon MPA to perform that duty properly and MPA was or should have been aware that Kazu would so rely, MPA owed Kazu a concurrent duty of care in tort, such duty extended to protection Kazu from pure economic loss.”

57. As Mr Cook, for MPA, pointed out, the tortious duties are identical therefore to the contractual duties. They form part of the “benefit of this Appointment”, and thus are barred by clause 16.2 unless within the express permission. In my judgment, the prohibition encompasses all claims advanced by the Claimant in these proceedings.
58. The third argument maintained by the Claimant, at paragraph 21 of its skeleton argument is that Mr Goldkorn, through the Deed of Assignment, has acquired Kazu 1’s interest in the Project. But, the Project is defined as the construction works at the Premises. It is only a person who acquires Kazu 1’s interest in the construction works themselves who would fall within clause 16.2.

59. I, therefore, decide that the Claimant has no title to bring this claim as Assignee of Kazu 1's rights pursuant to the Deed of Assignment, and that the prohibition in clause 16.2 extends to all claims advanced by the Claimant be in contract or in tort.

Does the Claimant have title to bring any of the claims set out in the Particulars of Claim against the First Defendant as beneficiary of rights held on trust for him by the Second Defendant pursuant to the Declaration of Trust dated 14 February 2022, either (a) in his own name or (b) in order to compel the Second Defendant to enforce those rights on his behalf.

60. The second limb of the Preliminary Issue arises because of the conclusion that the assignment of the MPA Claim was ineffective by virtue of clause 16.2 of the PM Appointment.

61. It is helpful to set out again clauses 16.2 and 18.2 of the T&Cs.

62. Clause 16.2 provides:

“The benefit of this Appointment may be assigned by the Client by way of an absolute legal assignment to any person providing finance or refinance to the Client in connection with the Project or to any person (A1) acquiring the Client's interest in the Project and by (A1) to another person (A2) acquiring A1's interest in the Project. No further or other assignment is permitted and, in particular, A2 is not entitled to assign this Appointment.”

63. Clause 18.2 provides:

“Nothing in this Appointment confers or purports to confer any right to enforce any of its terms on any person who is not a party to it. Only the Client (and the Client's Permitted Assignees) and the Consultant can take action to enforce the terms of this Appointment.”

64. The Claimant says that the use of the Vandepitte procedure is appropriate for this claim. In essence, that procedure is a procedural mechanism which allows the

beneficiary under the trust to bring the claim himself, while joining the trustee as a party, where the trustee has refused to sue.

65. The procedure was explained by Lord Wright in Vandepitte v Preferred Accident Insurance Corp of New York [1933] AC 70(PC) at 79:

“No doubt at common law no-one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in Dunlop Pneumatic Tyre Co v Selfridges & Co: “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. In that case, as in Tweddle v Atkinson, only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases as, for instance, Robertson v Wait, Les Affréteurs Réunis v Société Anonyme v Leopold Walford (London) Ltd, Lloyds v Harper – namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract, and thus can confer such rights enforceable in equity on the third party. The trustee can then take steps to enforce performance to the beneficiary by the other contracting party, as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as defendant.

66. The Claimant says that given the express statement in Recital F to the Declaration of Trust that Kazu 1 has “declined to bring the MPA Claim”, Mr Goldkorn is entitled to utilise the Vandepitte procedure by bringing the MPA Claim himself.

67. In my judgment, before considering the applicability, or otherwise, of the Vandepitte procedure, it is necessary to start with the contract. Clause 16.2 prevents assignment of the claims for damages to Mr Goldkorn in the circumstances which have occurred. Further, clause 18.2 prevents anyone other than the Client, the Client’s permitted assignees and the Consultant from taking action to enforce the terms of the

Appointment. Mr Goldkorn is not the Client, nor is he the Client's permitted assignee, and he is not the Consultant.

68. In my judgement, therefore, the effect of clauses 16.2 and 18.2 is that Mr Goldkorn is prevented from taking action, as he has done by issuing proceedings to enforce the Appointment. His claim is for damages for breach, and that is indeed a claim to enforce the terms of the Appointment.
69. In my judgment, that is the complete answer to the claim brought as a Beneficiary.
70. Both Counsel addressed argument to me on whether the Vandepitte procedure was applicable by reference to **Don King Productions Inc v Warren** [2000] 291 Ch, and **Barbados Trust Co Ltd v Bank of Zambia** [2007] EWCA Civ 148. In my judgment, neither authority has any relevance in the circumstances of this case because the language of clauses 16.2 and 18.2 of the T&Cs prevents the Claimant from doing what he is attempting to do through these proceedings. In any event, although the **Barbados Trust** case contains conflicting guidance, it is common ground that the views expressed in the judgments of the Court of Appeal in respect of whether the Barbados Trust Company Ltd could avoid the non-assignment clause via the use of the Vandepitte procedure were *obiter*.
71. Accordingly, the Claimant does not have title to bring any of the claims set out in the Particulars of Claim against MPA as beneficiary of rights held on trust for him by Kazu 1 pursuant to the Declaration of Trust dated 14 February 2022 either (a) in his own name or (b) in order to compel Kazu 1 to enforce those rights on his behalf.

72. The answer to both Issues formulated through the Preliminary Issues ordered to be determined by Eyre J at paragraph 2 of his Order dated 22 August 2024 is: “No”.

73. I invite Counsel to draw up the Order to reflect this Judgment. I extend time for the hearing of any consequential applications for a period of 14 days after hand down with liberty to apply to both parties.