



Consolidated Claim No: **CR-2025-BHM-000450**  
[2026] EWHC 686 (Ch)

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM  
BIRMINGHAM DISTRICT REGISTRY  
INSOLVENCY AND COMPANIES LIST (ChD)**

CR-2025-BHM-000450

**BEFORE: HIS HONOUR JUDGE RAWLINGS**

**B E T W E E N :**

**(1) NICHOLAS WILLIAM NICHOLSON**

(in his capacity as sole liquidator of F.W. Mason & Sons Limited (in liquidation))

**(2) NICHOLAS WILLIAM NICHOLSON AND RUSSELL D PARKIN**

(in their capacity as joint liquidators of Ugo Stores Limited and William Sessions Limited  
(both in liquidation))

Claimants

- and -

**(1) INSOLVENCY PRACTITIONERS ASSOCIATION**

**(2) INTACT INSURANCE UK LIMITED**

**(3) MR GARETH RUSLING**

Defendants

Counsel for the Claimants Ian Wilson KC, Ben Strong KC and Ryan Ferro instructed by Gateley plc t/a Gateley Legal

Counsel for the First Defendant Siward Atkins KC instructed by Weightmans LLP

Counsel for the Second Defendant Stephen Davies KC and Kavan Gunaratna instructed by FWJ Legal Limited t/a Francis, Wilks & Jones

Counsel for the Third Defendant Thomas Williams instructed by Pannone Corporate LLP

Hearing 2 and 3 December 2025

Judgment handed down on 24 March 2026

## **JUDGMENT**

### **INTRODUCTION**

1. The Claimants are the current liquidators of FW Mason & Sons limited (“Mason”), Ugo Stores Limited (“Ugo”) and William Sessions Limited (“Sessions”) (hereinafter referred to collectively as “the Companies”). The Claimants say that the four Insolvency Practitioners who between them were the previous Administrators and Liquidators (“Previous IPs”) of the Companies dishonestly claimed for time spent on the insolvencies of the Companies by them and their staff, when they did not in fact spend that time and in consequence of that charged far more for work done on the insolvencies of the Companies than they were legitimately entitled to charge (known as “Time Dumping”).

2. The First Defendant, the Insolvency Practitioners Association (“IPA”) is named as beneficiary of the right to claim, under insolvency practitioner bonds (“IP Bonds”) issued by the Second Defendant, Intact Insurance UK Limited (“Intact”) in relation to the insolvency appointments taken by the Previous IPs between 2010 and 2012 (“the Bonds”), including their appointments as Administrators and subsequently Liquidators of the Companies. The terms of the Bonds provide that Intact is jointly and severally liable with the Previous IPs for losses suffered by the Companies’ Insolvency Estates, by fraud or dishonesty of the Previous IPs (I will hereafter refer to these claims against Intact as “the Claim Rights”).

3. By Part 8 Claim Form, the Claimants claim a declaration that the Claim Rights are held by the IPA on trust for the Companies’ Insolvency Estates.

4. By Insolvency Application (“Insolvency Application”) the Claimants say that, on the basis that the IPA does hold the Claim Rights on trust for the Companies’ Insolvency Estates, those Claim Rights are property of the Companies and as such, the Claimants are entitled to an order under section 234(2) of the Insolvency Act 1986 (“IA 1986”) requiring the IPA to assign the Claim Rights against Intact, pursuant to the Claim Rights, to the Claimants, as the current liquidators of the Companies. The Third Defendant is one of the Previous IPs (he denies any dishonesty on his part).

5. All three Defendants say that the IPA does not hold the Claim Rights on trust for the Companies because: (a) the IPA is a public or quasi-public body and the functions that it performs in relation to IP Bonds (including the Bonds) fall within its public functions. As a consequence of that the IPA can only be challenged, in respect of their decisions in relation to the Bonds as a matter of public law and not by way of a private law claim that the IPA hold the Claim Rights on trust for the Companies; and (b) the Claimant’s cannot show that there is the necessary certainty of intention, objects or subject matter (particularly intention) for the creation of a trust.

## **BACKGROUND**

6. Under the IA 1986, one of the requirements for Insolvency Practitioners (“IP” or “IPs”) to take insolvency appointments is that they have in place security in the form of IP Bonds pursuant to which the surety (“the Surety”) (in this case Intact) agrees to be jointly and severally liable with the relevant IPs for fraud or dishonesty by the IP in the carrying out of their functions in connection with an insolvency (of an individual, partnership or company). The insolvency appointments that the IP Bonds provide cover for are notified by monthly Cover Schedule by the IP to the Surety which issued the IP Bond.

7. The Previous IPs were appointed initially as Administrators of the Companies between 2010 and 2012. Intact entered into the Bonds with the Previous IPs and the IPA. Intact was notified of the Previous IPs’ appointments as Administrators of the Companies by monthly Cover Schedule (copied to the IPA) as a consequence of which Intact became jointly and severally liable with the Previous IPs for any fraud or dishonesty by the Previous IPs in relation to their conduct of the Administrations of the Companies. The Administrations of the Companies were later converted to liquidations, with the Previous IPs taking office as liquidators and Intact remaining jointly and severally liable, with the Previous IPs, for any fraud or dishonesty by the Previous IPs, in relation to their conduct of the administrations and liquidations of the Companies.

8. Allegations were made that the Previous IPs had engaged in Time Dumping to a significant degree, in connection with their conduct of the administrations and subsequently the liquidations of the Companies. Partners in Grant Thornton LLP were appointed

liquidators of the Companies in 2013 and 2014 and were later replaced by the Claimants as liquidators of the Companies; the Claimants are also partners in Grant Thornton.

9. Proceedings were issued against two of the Previous IPs (not Mr Rusling) in September 2014. A compromise was entered into between the Claimants and one of the defendants and Morgan J directed that the trial against the other defendant should not proceed (the reasons for that decision are not relevant to the present proceedings).

10. The then liquidators of the Companies purported to notify Intact of claims for losses suffered as a result of Time Dumping by the Previous IPs in 2013 and 2016, however the named beneficiary of the Bonds is the IPA, which is the Regulated Professional Body ("RPB") which licensed the Previous IPs to practise as Insolvency Practitioners and take insolvency appointments, between 2010 and 2012.

11. It is common ground that the IPA may, under clause 8 of the Bonds assign the Claim Rights under the Bonds to the Claimants as Successor Insolvency Practitioners ("SIPs") to the Previous IPs, but the IPA has not done so. The IPA says that its practice is to encourage SIPs (in this case the Claimants) and the Surety (in this case Intact) to negotiate and agree a sum of money to be paid by the Surety to the SIPs for the benefit of the creditors claiming in the relevant insolvency estate. Once the sum is agreed a tripartite agreement is entered into between the Surety, the SIPs and the IPA ("Tripartite Agreement") providing for the agreed sum to be paid by the Surety to the SIPs, which is then distributed by the SIPs to the creditors of the relevant insolvency estate.

12. There have been negotiations between Intact and the Claimants over a number of years to try to agree a figure which Intact would pay to settle its liability under the Bonds, but these negotiations have not resulted in an agreement. The position of Intact is that settlement has proved impossible because the Claimants are making unreasonable demands for payment of their costs and expenses incurred in acting as Liquidators of the Companies and in particular in relation to the proceedings taken against two of the Previous IP's. The Claimants say their fees are reasonable, in relation to the work that they have had to undertake and they enjoy priority over unsecured creditors' claims under the IA 1986 and Insolvency Rules, for their fees and expenses. The Claimants also say that Intact, with the assistance of the IPA, has effectively blocked a claim being progressed against the Bonds for the benefit of the Companies' Insolvency Estates, by the IPA not assigning the benefit of the Claim Rights to the Claimants and Intact not being prepared to agree a reasonable settlement of the Claim Rights, which could become the subject matter of a Tripartite Agreement.

13. On 19 August 2025 the Claimants issued the Part 8 Claim and the Insolvency Application. Initially only the IPA was made a defendant to the Part 8 Claim and the Insolvency Application, but Intact applied to be joined as a Defendant and on 26 September 2025, I ordered that Intact be joined as Second Defendant. On 4 November 2025, District Judge Rich ordered that Mr Rusling be joined as Third Defendant.

## **EVIDENCE**

14. The Claimants rely on witness statements from:

- (a) the First Claimant, Nicholas William Nicholson ("Mr Nicholson") who has made two witness statements dated 13/8/25 and 14/11/25; and

(b) Ian Richardson (“Mr Richardson”) dated 14/11/25. Mr Richardson was a liquidator of the Companies until November 2024 (Mr Nicholson being one of the liquidators who replaced him).

15. The IPA rely on two witness statements from Lyn Marie Green (“Ms Green”) dated 3/11/25 and 21/11/25. Ms Green is currently Head of Regulation for the IPA.

16. Intact rely on witness statements from:

(a) Mark Edward Thomas (“Mr Thomas”). Mr Thomas is a Senior Claims Technician in the Risk Claims Department of Intact; and

(b) Roger Isaacs (“Mr Isaacs”) dated 21/10/25. Mr Isaacs is a director of Haslocks Limited, which is employed by Intact as loss adjuster in relation to the claims on the Bonds.

17. Mr Rusling relies on his own witness statement dated 3/11/25.

18. It is common ground that the vast majority of the evidence of the witnesses is of no real assistance to me in deciding the issues that I need to decide. The most relevant evidence is that which sets out the factual matrix relevant to the questions of whether the IPA performs its functions in relation to IP Bonds as public functions and whether the requirements to establish that the IPA holds the Claim Rights on trust for the Companies’ Insolvency Estates are met. In particular the evidence contained in the witness statements concerning alleged Time Dumping (and Mr Rusling’s response to that allegation so far as it concerns him), the litigation pursued against the other two Previous IPs and correspondence between the parties is largely irrelevant to the issues I need to determine. I will therefore refer to the relevant evidence when dealing with the issues that I need to determine.

## THE ISSUES

19. I asked counsel, during the final hearing, to seek to agree a list of the issues that I would need to resolve in order to determine the Part 8 Claim and the Insolvency Application. The following is that agreed list of issues:

**Issue (1):** Was and is the IPA exercising public powers or functions either (i) when it accepted the Bonds; (ii) when it holds the rights under the Bonds; or (iii) (if and insofar as it can or does exercise Claim Rights) when exercising Claim Rights under the Bonds?

**Issue (2):** Having regard to the answer to (1), does the IPA hold the Claim Rights on implied or constructive trust for the Companies’ Insolvency Estates?

**Issue (3):** If the answer to (2) is yes, are the Claimants entitled to: (a) declarations that the Claim Rights are so held on trust and/or, accordingly, that the Companies are absolutely entitled to bring claims under the respective Bonds subject to the addition of the IPA as a defendant; and/or (b) orders transferring the Claim Rights to the Claimants under IA 1986, s.234 and/or, accordingly, declarations that the Claimants are absolutely entitled to bring claims under the respective Bonds.

20. Although the Claimants seek a declaration that the IPA hold the Claim Rights on trust for the Claimants, in substance what they want is for the IPA to assign the Claim Rights to them, as the IPA is entitled to do under the terms of the Bonds. Whilst exercising the Claim Rights might be taken to include assigning or considering assigning the Claim Rights I consider that it is appropriate to expand Issue 1 by including a new (iii) “when considering assigning the Claim Rights (insofar as it does consider doing so)”, so that Issue 1 now reads: “ Was and is

the IPA exercising public powers or functions either (i) when it accepted the Bonds; (ii) when it holds the rights under the Bonds; (iii) when considering assigning the Claim Rights (insofar as it does consider doing so); or (iv) (if and insofar as it can or does exercise Claim Rights) when exercising Claim Rights under the Bonds?”

21. As I understand the Claimants’ case, on the existence of a private trust, it is that: (a) properly construed, the terms of the Bonds, considered against the relevant factual matrix, create a trust, by which the IPA hold the Claim Rights on trust for the Companies’ Insolvency Estates; alternatively (b) it is obvious and necessary to imply terms which have the effect of requiring the IPA to hold the Claim Rights on trust for the Companies’ Insolvency Estates, in order to give business efficacy to the Bonds. In light of that, I do not consider that issue 2 should be “Having regard to the answer to (1), does the IPA hold the Claim Rights on implied or constructive trust for the Companies’ Insolvency Estates?” but instead “Having regard to the answer to 1 properly construed: (a) do the Bonds create a trust, by which the IPA hold the Claim Rights on trust for the Companies’ Insolvency Estates; alternatively (b) is it obvious and necessary to imply terms which have the effect of requiring the IPA to hold the Claim Rights on trust for the Companies’ Insolvency Estates, in order to give business efficacy to the Bonds.”

22. As reformulated by me, the issues that I need to determine are:

**Issue (1): Was and is the IPA exercising public powers or functions either (i) when it accepted the Bonds; (ii) when it holds the rights under the Bonds; (iii) when considering assigning claim rights (insofar as it does consider doing so); or (iv) (if and insofar as it can or does exercise claim rights) when exercising claim rights under the Bonds?**

**Issue (2): Having regard to the answer to 1 properly construed: (a) do the Bonds create a trust, by which the IPA hold the Claim Rights on trust for the Companies’ Insolvency Estates; alternatively (b) is it obvious and necessary to imply terms which have the effect of requiring the IPA to hold the Claim Rights on trust for the Companies’ Insolvency Estates, in order to give business efficacy to the Bonds?**

**Issue (3): If the answer to (2) is yes, are the Claimants entitled to: (a) declarations that the Claim Rights are so held on trust and/or, accordingly, that the Companies are absolutely entitled to bring claims under the respective Bonds subject to the addition of the IPA as a defendant; and/or (b) orders transferring the Claim Rights to the Claimants under IA 1986?**

## **ISSUE 1: WAS/IS THE IPA EXERCISING PUBLIC POWERS?**

### **MY APPROACH TO ISSUE 1**

23. In dealing with Issue 1 I will first set out the arguments of the Claimants and the Defendants in the following order:

(a) the Defendants’ arguments in support of their contention that the IPA was and is exercising public powers and/or functions, at all four points identified by Issue 1;

(b) the Claimants’ reply to those arguments;

(c) the Claimants’ arguments in support of their contention that the IPA was not and is not exercising public powers or functions at any of the four points in time identified by Issue 1; and

(d) the Defendants' reply to those arguments;

24. The factual background to the issues is largely agreed between the parties, however there is disagreement, at least between the Claimants and Intact, about what powers or functions have actually been, at all relevant times, exercised by the IPA in relation to IP Bonds (including the Bonds). I will decide therefore, before answering Issue 1, what powers and functions have been, at all relevant times, exercised by the IPA in relation to IP Bonds. Having dealt with this factual issue, I will then answer Issue 1.

## **THE DEFENDANTS' CASE**

25. The Defendants' arguments on issue 1 were presented by Mr Davies. He started by setting out a relevant history of developments in insolvency legislation starting with the Bankruptcy Act 1883. For present purposes it is sufficient to start with the Cork Report of 1982.

### **Cork Report 1982**

26. The Cork Report recommended reforms to the management and administration of insolvency estates (individual and corporate). Mr Davies pointed to three key recommendations of the Cork Report, which were taken up in subsequent legislation:

(a) those authorised to act as IPs should be restricted to individuals having minimum qualifications and experience and being members of a RPB approved by the Department of Trade;

(b) to be approved by the Department of Trade the RPB must:

(i) impose an ethical code on its members, the breach of which would attract sanctions;

(ii) require its members to account for third-party funds passing through their hands;

(iii) confine its membership to those who have passed relevant exams;

(iv) establish an effective disciplinary body with powers to deprive members of their ability to practise;

(v) provide for annual renewal of practising certificates; and

(c) as a condition precedent to being allowed to practise, an IP should be required to take out a bond against all types of fraud and dishonesty in connection with any of the appointments taken by them. The bond should be renewed annually and the wording of the bond should be agreed with the Department of Trade. The premium for the bond would be an overhead expense for the IP, not charged to any of their appointments.

### **Insolvency Act 1986 ("IA 1986")**

27. The recommendations were substantially taken up, initially in the provisions of the Insolvency Act 1985, but those provisions were soon consolidated and replaced by the IA 1986. The relevant provisions of the IA 1986, in summary are (or were):

(a) S389 unqualified persons cannot act as IPs;

(b) S390 (1) only individuals may act as IPs;

(c) S390 (2) a person is not qualified to act as an IP at any time unless:

he is authorised so to act by virtue of membership of an RPB recognised under section 391, being permitted to act under the rules of the RPB...

(d) S390 (3) a person is not qualified to act as IP unless:

- (i) there is in force security for the proper performance of his functions; and
- (ii) that security meets the prescribed requirements;

(e) S391 (1) the Secretary of State (“SOS”) may declare a body to be an RPB if satisfied it meets the requirements;

(f) S391 (4) the requirements are:

- (i) it regulates the practice of the profession; and
- (ii) it has rules for securing that:
  - the person is fit and proper to act as an IP;
  - the person meets acceptable requirements as to education, training and experience; and
  - its rules and practices are designed to ensure that regulatory objectives are met; and

(g) S390 A (2) a person is authorised under this section to act as an IP: (a) by virtue of being a member of an RPB recognised under S 391(1) and being permitted to act as an IP under the rules of that RPB...

### **1 October 2015 Amendments to IA 1986**

28. Section 137 of the Small Business, Enterprise and Employment Act 2015 amended S391 IA 1986 with effect from 1 October 2015, by introducing sections 391 A - T which are a set of regulatory objectives. S 391 C sets out the regulatory functions and objectives of RPBs.

29. The RPBs are subject to direct statutory oversight by the SOS under sections 319D and K which provide wide ranging mechanisms for the RPBs to be accountable to the SOS and enables the SOS to impose financial penalties under S391F on RPBs and to publish reprimands under S391I.

### **Memorandum of Understanding (“MOU”)**

30. A Memorandum of Understanding (“MOU”) was entered into between the SOS and the RPBs in 2008 (amended in 2011). The foreword to the MOU says: *“Pursuant to the Insolvency Act 1986 the [SOS] is empowered to recognise certain professional bodies (known as the Recognised Professional Bodies) for the purpose of authorising suitable individuals to act as insolvency practitioners. To underpin the insolvency regime the [SOS] has agreed a set of principles with those bodies for the purposes of achieving consistency in the authorisation and regulation of insolvency practitioners. The [SOS] when exercising authorisation functions as the Competent Authority will abide by these principles. Each body is monitored by the [SOS] for adherence to these principles ...”*. The MOU sets out the regulatory activities of RPBs which include:

- (a) providing education and practical training to its members;
- (b) inspecting and monitoring its member IPs;
- (c) enforcing ethical standards;
- (d) considering and investigating complaints against its IP members;

(e) operating a fair and transparent procedure for dealing with complaints against its IP members; and

(f) dealing with statutory bonding requirements for their IP members under S 390(3) and operating mechanisms to ensure that potential claims arising from the fraud or dishonesty of their members are appropriately identified and made.

### **Insolvency Practitioner Regulations (“IPR”)**

31. Mr Davies referred to four versions of the IPR (a statutory instrument issued by the SOS under powers conferred on him by the IA 1986). Versions 2 (in force from 28 December 2009 to 30 September 2015) and version 3 (in force from 1 October 2015 to 30 November 2024) are the relevant versions, for present purposes. The following regulations concerning IP Bonds are set out in Schedule 2 of the IPR:

(a) 2A - there must be in force an IP Bond in a form approved by the SOS (Mr Davies says that, given this provision, in order for there to be a private trust, this would have to be the intention not only of the RPB, but of the SOS as well);

(b) 3(1) - the IP Bond must provide for the Surety to undertake to be jointly and severally liable for losses caused by fraud or dishonesty by the IP or anyone acting in connivance with the IP and contain in a schedule details of each insolvency and the value of its assets which must be submitted to the Surety within the period specified by the IP Bond; and

(c) Mr Davies points out that paragraph 4(b) refers to trusts and therefore it is clear, he says, that the draftsman of the IPR had trusts in mind and yet they did not provide for the benefit of IP Bonds to be held on trust for the Insolvency Estates, which must have been intentional.

### **The IPA Rules**

32. The IPA’s Rules say that an IP must satisfy the bonding requirements as a precondition to authorisation. Mr Davies says that the bonding arrangements are integral to the functions and duties of the IPA, of authorising and regulating its members.

### **Insolvency Service Call for Evidence**

33. On 15 September 2016 the Insolvency Service called for evidence concerning bonding arrangements noting concerns about IP Bond payments being treated as part of insolvency estates, with little control being exercised over the SIP’s fees and little contact between the IP Bond Surety and SIPs. Mr Davies says that the majority of the responses favoured regulatory action to improve the claims process and that amendments have been introduced with effect from 1 January 2026.

### **Authorities on public powers and functions**

34. Mr Davies referred to three cases as supporting his proposition that, where a body is exercising a public function, the exercise of that function is not susceptible to a private law challenge.

35. The first case to which Mr Davies referred was ***The Skinners’ Company v The Irish Society and others [1845] 12 Cl & F 425***. In this case the King granted land in Ireland to the Irish Society. Various London Corporations, including the claimant, contributed funds towards the improvement of the land. The claimant challenged the way in which the officers of the Irish Society chose to use the income from the land. The claimant argued that the income from the land was held on trust for them and other London Corporations which had

contributed towards the improvement of the land. The House of Lords said that extensive powers had been given to the Irish Society by the King to carry into effect the objects of the Crown and in those circumstances, the officers of the Irish Society were public officers invested with a public trust and were not accountable to the claimant or anyone else as if they were trustees of a trust for private purposes.

36. The second case is ***James Swain and Alan McLaren v The Law Society [1983] AC 598***. The Law Society was given power by section 37 of the Solicitors Act 1974 to enter into a Master Insurance Policy ("MIP") which provided professional indemnity insurance for all solicitors. Solicitors paid premiums to an insurance broker and the Law Society entered into an arrangement with the chosen insurance broker pursuant to which the insurance broker shared their 15% commission with the Law Society. The claimants, who obtained professional indemnity insurance through the arrangements, argued that the Law Society should account for their share of the commission earned on the premiums that they paid for their professional indemnity policies. At first instance, Slade J found that the Law Society were not liable to account for the commission that they earned, but on appeal, the Court of Appeal decided that the Law Society had constituted itself as a trustee in relation to the commission that they earned. The House of Lords overturned the decision of the Court of Appeal, finding that the Section 37 scheme was not only for the benefit of solicitors but also to protect the public who sued solicitors from losses caused by the negligence of the solicitor that they used. The Law Society had two functions, a private function, as the representative body of solicitors in England and Wales and a public function conferred on it by Section 37 to arrange a MIP to provide insurance against losses caused by the negligent acts or omissions of solicitors. The Law Society had negotiated for itself a share of the insurance broker's commission, but this separate agreement was still part of the statutory scheme and there was no room for imputing an intention on the part of the Law Society to constitute itself as a trustee of the share of the commissions that it received from the insurance broker.

37. Two reasons were given by the House of Lords for its decision:

(a) Lord Diplock (at **608 H**) said that both contracts were undoubtedly entered into by the Law Society in its public capacity, under the powers conferred on it under Section 37, the entire activity was a public activity which could not give rise to a private law trust arrangement; and

(b) Lord Brightman (at **620 G – H** and **621 D – E**) said that there was nothing in the MIP indicating that there was a trust arrangement and nothing to show that the Law Society intended to constitute itself as a trustee.

38. Mr Davies says that here there is even less reason to conclude that there is a trust, because:

(a) in entering into the commission agreement the Law Society was acting for its own benefit, but here the IP Bonds are integral to the statutory scheme, intended to benefit insolvency estates suffering loss as a result of the fraud or dishonesty of their office-holder;

(b) the IP Bonds facilitate the statutory compensation scheme, whereas the commission agreement was not necessary, in order to implement the statutory professional indemnity insurance scheme; and

(c) the commission agreement did not benefit the public whereas the IP Bond arrangements do.

39. The third case is ***Louis Williams v Central Bank of Nigeria [2013] EWCA Civ 785***. In that case Dr Williams applied for permission to amend his claim against the Central Bank of

Nigeria (“CBN”) to plead breach of contract/breach of trust on the part of CBN, in that it had failed to pay to him money that the President of Nigeria had directed CBN to pay to him by a document titled a “fidelity guarantee”. Permission to amend the claim was refused at first instance and on appeal, by the Court of Appeal, on the basis that there was no serious issue to be tried about whether Dr Williams had a private law trust or contract claim against CBN. Aikens LJ said that the “fidelity guarantee” was an executive order from the President of Nigeria directed to CBN and in giving that order the President was acting in a public capacity. It was not therefore reasonably arguable that it was intended that Dr Williams would have any private law rights against CBN.

40. Mr Davies makes the following submissions:

(a) the SOS has declared the IPA to be an RPB for the purposes of securing that its members are fit and proper persons to act as IPs;

(b) the SOS approves the terms of the IP Bonds;

(c) every aspect of the IPA’s involvement with IP Bonds engages its public duties and functions, within the statutory framework. Mr Gunaratna, for Intact further submitted that the authorisation and regulation of its members are two of the IPA’s statutory functions, and the requirements on the IPA to take, oversee, monitor and (where appropriate) enforce IP Bonds are part of the process of such authorisation and regulation;

(d) the IPA has no commercial interest in IP Bonds (in spite of being named as payee) it accepts them in fulfilment of its statutory functions of:

(i) regulating IPs;

(ii) ensuring its members are fit and proper persons to hold office as IPs;

(iii) authorising persons to act as IPs; and

(iv) protecting and promoting the public interest from the dishonesty of its members and public confidence and respect for the insolvency system;

(e) compulsory bonding and annual renewal of licences was designed to facilitate the expeditious taking of appointments and more efficient operation of the insolvency system. The IPA accepts the IP Bonds as payee pursuant to that system;

(f) no part of the IPA’s role, in accepting IP Bonds and controlling the security, involves acting in any private capacity;

(g) the IPA is an RPB and as such is subject to government oversight and sanctions;

(h) since 1 October 2015, the IPA has been subject to codified regulatory functions and objectives and statutory duties under s391B IA 1986 including dealing with dishonesty claims, achieving restoration and ensuring a fair process. The IPA has a discretion as to how to handle claims including whether to assign the benefit of them; and

(i) the SOS has agreed a set of principles with the RPBs in the MOU.

41. There are at least six remedies available to the victims of dishonest IPs:

(a) victims can report the IP to their RPB and ask the RPB to investigate. The RPB can disclose its investigation to the Surety of the relevant IP Bond and lodge a claim, all at no cost to the victim;

- (b) the SIP can apply to the IPA to assign the IP Bond to them in whole or in part;
- (c) victims can ask the SOS to assign the IP Bond. In Prodis PLC (In Liquidation) the SOS assigned the IP Bond, subject to conditions concerning where the proceeds would be paid;
- (d) the victim could ask that the benefit of the IP Bond is assigned to someone other than the SIP with the consent of the SOS;
- (e) commence Judicial Review proceedings against the IPA; and
- (f) ask the SOS to issue a direction to the IPA under section 391D IA 1986 (as amended).

## **CLAIMANTS' RESPONSE TO THE DEFENDANTS' CASE**

42. Mr Strong responded to Mr Davies's points, on behalf of the Claimants. Mr Strong's principal point (which I deal with in more detail below when dealing with the Claimants' case) is that the IP Bonds are not entered into by the IPA pursuant to any power given to it or function imposed on it by either primary or secondary legislation and that alone means that the powers and functions exercised by the IPA in relation to the IP Bonds are not public powers or functions.

43. Mr Strong says that the RPB's public law role is to regulate its IP members, it does not perform the roles suggested by Mr Davies of supervising, managing and distributing funds to the victims of dishonest IPs. The RPBs are just the named party to whom the proceeds of the IP Bonds are payable, for the benefit of the Insolvency Estates. No one else could be named when the IP Bonds were entered into and naming the RPB is therefore simply done for administrative convenience. On Mr Davies' case, the IPA could impose conditions on the assignment of the Claim Rights, but there is no guidance anywhere as to what matters RPBs should take into account, in deciding whether to assign Claim Rights and if so on what terms. If the assignment of the Claim Rights were a public function then such guidance would be expected to be provided, to the IPA and other RPBs. The IP Bonds only determine what the Surety pays not how anything that the Surety pays is distributed. The proceeds must be distributed in accordance with the insolvency waterfall mandated by the IA 1986 and the Insolvency Rules.

44. The changes implemented from 1 October 2015 are not relevant to the intention when the Bonds were incepted, and those changes are not part of the circumstances from which the objective intention of the IPA could be determined when it entered into the Bonds. If, as the Claimants assert, the Bonds were held on trust when incepted, it would not be anticipated at that time, that any future changes in legislation would affect that trust.

45. Future conduct is not a relevant factor in determining what the intention was when the Bonds were incepted (see ***Underhill & Hayton: Law of Trusts and Trustees (20<sup>th</sup> edition) para 10.13***).

46. The IPR contains nothing which touches on the question of how an RPB is to exercise their rights under the IP Bonds. The terms of the IP Bonds have to be approved by the SOS, but the IPR and IP Bonds have no effect on the public at large.

47. The fact that the IPA Rules include a requirement for IP Bonds does not make that requirement a statutory requirement. It is a professional disciplinary point. Under s391 IA 1986, the terms of the IP Bonds have to be approved by the SOS, but nothing is said about

RPBs holding funds and whilst the SOS could revoke recognition, there is no suggestion that this would be anything to do with IP Bonds.

48. There is a public interest in there being an IP Bond regime but the new provisions, in force from 1 October 2015 have nothing to say about bringing claims under IP Bonds.

49. The MOU does not amount to either primary or secondary legislation. The SOS has no power to impose obligations, save where the power to do so arises from statute and the MOU was not entered into by the SOS pursuant to any such statutory power. The MOU is a statement of principle only, which the IPA entered into voluntarily. The MOU anticipates that the claims process will be undertaken by the SIP, not by the IPA.

50. In **Swain v The Law Society** the Court of Appeal found that there was a trust, in order to give solicitors the ability to claim against the insurers under the MIP. The House of Lords found that the MIP was part of the Law Society's public functions. Here, the IPA has a private law right to bring claims under the Bonds. The IPA does not investigate IP Bond claims and has no funds to do so. It only carries out investigations for disciplinary purposes and whilst it can obtain documents from its members it has no powers to obtain them from the insolvent company or insolvent individual, only the SIP has that power. Lord Devlin found (**613A – B**) that the second contract entered into by the Law Society, to share commissions with the insurance broker, formed part of the statutory power or permission which the Law Society had been given, to enter into the MIP. Here there is no statutory provision giving power or permission for RPBs to enter into IP Bonds or anything else, of which the IP Bonds form part.

51. As for the six remedies that Mr Davies suggests a victim of fraud or dishonesty by an IP has:

(a) a disciplinary investigation may result in a sanction being applied to the dishonest IP, but this will not produce any compensation for the victims. Under the IPA Rules, the IPA may disclose the results of its disciplinary investigation to a professional indemnity insurer, but not to the Surety under an IP Bond. It cannot be right that, if the IPA concludes that an IP has not acted fraudulently, everybody is bound by that finding ;

(b) the IPA can assign the benefit of IP Bonds to an SIP but it has not done so here and it says that its practice is only to do so if the SIP/Surety agree a figure for the loss caused by the dishonesty of an IP, to be paid by the Surety. No such agreement has been reached here and there is therefore an impasse;

(d) Prodis PLC is a very old case, under the Bonds there is no provision which allows the SOS to assign the benefit of the Bonds, as he did in Prodis;

(e) the SOS could not assign an IP Bond, for example to a solicitor, only the RPB could do this with the consent of the SOS;

(f) Judicial Review is only available if the powers and functions carried out by the IPA are public powers and functions; and

(g) under S 391B IA 1986 the SOS can give directions to RPBs, but the SOS could only require an RPB to assign the benefit of an IP Bond if a statutory provision allowed the SOS to require it to do so and there is no statutory provision which allows that.

52. The Defendants say that the SOS approved the form of the IP Bonds which permits, by clause 8, the delegation of what they say are public functions by the RPBs. However:

(a) no statute grants power to the RPBs to perform any function in relation to IP Bonds or allows the delegation, on the Defendants' case, of any such functions; and

(b) if the RPB were carrying out a public function, then if that function was delegated to an SIP, the SIP would be carrying out a public function, but that cannot have been intended, as the SIP owes separate duties as office holders in relation to the Insolvent Estate to which they are appointed.

## THE CLAIMANTS' CASE

53. The Claimants rely on **De Smith on Judicial Review (9<sup>th</sup> Edition)** paragraph **3-031 - 3-049** as setting out the test for deciding whether a decision is susceptible to Judicial Review (on the basis that it is made in exercise of a public function). In summary the source of the power is the most important factor. If the source of the power is a statute or subordinate legislation then the exercise of the power will normally be subject to judicial review. If the "source of power" approach does not yield a clear satisfactory outcome the court may consider the characteristics of the function which is being performed to determine if the characteristics of the function indicate that the power/function is a public one.

54. In **Ames v The Lord Chancellor [2028] EWHC 2250 (Admin)** at paragraph 55 Holroyde LJ said that the following principles derived from the authorities that he had reviewed:

*"First there is no universal test of when a decision will have a sufficient public law element to make it amenable to judicial review. It is a question of degree. Secondly, in deciding whether a particular impugned decision is amenable to judicial review, the court must have regard not only to the nature, context and consequences of the decision, but also to the grounds on which the decision is challenged..... Thirdly the fact that the decision is made by a public body exercising a statutory power will not in itself be a conclusive indication that there is a sufficient public law element; a government body may negotiate commercial contracts without inevitably becoming subject to judicial review. Fourthly, and conversely, the fact that the challenged decision relates to payments to be made by a public authority pursuant to a contract will not in itself be a conclusive indication that there is no sufficient public law element. Fifthly, it will be necessary to consider whether the challenged decision is one which is necessarily involved in the performance of a public function, or is merely incidental or supplementary to a public function. Sixthly, if the decision does not have a sufficient public law element to make it amenable to judicial review, the fact that the aggrieved party has no other avenue of appeal is not a reason for treating the decision as if it were a public law decision."*

55. The functions which Intact says the IPA performs in relation to IP Bonds are: (a) accepting the IP Bonds; (b) holding the Claim Rights under IP Bonds; (c) bringing IP Bond claims; (d) holding the proceeds of IP Bond claims; and (e) assigning IP Bond claims. However the IPA says that it does not hold the proceeds of IP Bond claims, does not pursue IP Bond claims and does not assign IP Bond claims. Instead in the latter case, it encourages agreement of the IP Bond claim, between the SIPs and the Surety and enters into Tripartite Agreements with the SIPs and Surety to confirm the settlement that they have agreed.

56. The IPA is not exercising any public function because:

(a) the source of the IPA's power is the IP Bonds which are private law contractual documents. This is evidenced by the fact that, any claim that the IPA did bring against Intact would have to be pleaded in contract;

(b) the IPA enters into IP Bonds voluntarily, not pursuant to any statutory power or obligation;

(c) the RPB's functions, as bondholder, are very limited and exercising those functions does not require any decision in the public sphere, the RPB merely decides whether to exercise a private right or not, it does not form part of its regulatory role;

(d) the RPB which enters into an IP Bond does not have to be the RPB which authorises the relevant IP;

(e) there is no statutory requirement for the named beneficiary to be an RPB;

(f) the exercise, by RPBs of their functions in relation to IP Bonds does not affect the public at large; and

(f) the IPA is a company limited by guarantee, not a public body.

57. Prior to 1 October 2015, the IA 1986 does not refer to any regulatory functions of an RPB. Even post 1 October 2015 there is no requirement for an IP Bond holder to be an RPB.

58. Schedule 2 of the IPR sets out the requirements for security but does not require the bondholder to be an RPB. It does require a copy of the IP Bond to be sent to the RPB, but this is just an administrative function. If the RPB's functions, in relation to IP Bonds were public functions, then primary or secondary legislation would require RPB's to be the bondholder and would specify how the RPB should decide: (a) whether to pursue a claim; and (b) whether to assign the benefit of IP Bonds and to whom.

59. The IPA accepts that it does not decide whether to bring a claim. If the IPA had a public duty it would have to carry out reasonable enquiries and gather evidence, but not only does the IPA not do this, it could not do it, because it does not have access to the necessary records, has no powers to investigate, and no funds available to it to investigate. In contrast the SIP does investigate, does have access to the necessary records and the costs of doing so are specifically provided for in the IP Bond and those costs rank in priority to unsecured creditors in the Insolvency Estate.

60. As for the IPA Rules, paragraph 11 sets out the responsibilities of the IPA committee, but does not refer to IP Bonds. The IPA accepts that the SIP does all the investigation work and it just acts as a neutral facilitator with no power to adjudicate claims. If Intact's case (that RPB's do investigate claims) were right then all RPB's would be in breach of their statutory duty to investigate the merits of claims, because, just like the IPA, none of them does so.

61. Whilst responses to the Insolvency Services Call for Evidence may have favoured regulatory intervention, Parliament has not provided for IP Bond payments to be ring fenced from the Insolvency Estate to which the payments relate and the insolvency waterfall, provided for by the IA 1986 and Insolvency Rules, which gives priority to SIP fees and expenses, over unsecured creditor claims still applies.

62. In its defence, Intact says: (a) at paragraph 23 that the IPA receives, investigates and/or determines claims against its dishonest members as part of its regulatory functions; and (b) at paragraph 26 and 27, that SIPs do not act in the public interest, but instead pursue their own commercial interest in pursuing IP Bond claim. However the IPA can assign the Claim Rights without Intact's consent, to an SIP, even though Intact asserts that SIPs carry out no public function and so could not be subject to any public law challenge. If the IPA were carrying out public functions, it could not delegate those functions, unless allowed to do so by statute (see *Birkdale Electric Supply Company Limited v Corporation of Southport [1926] AC 355 at page 66*).

63. As for the cases relied on by Mr Davies:

(a) in ***The Skinnners' Company v The Irish Society***, the objects of the Irish Society were established by a grant from the Crown. Here there is no statute setting out the rights and obligations of the IPA and the IPA accepts that it does not investigate or make claims and never holds any IP Bond funds;

(b) in ***Swain v The Law Society*** the effect of section 37 of the Solicitors Act 1974 was to give rights to individual solicitors to bring claims against the insurer. The Law Society had no insurable interest and instead the solicitors had a direct remedy against the insurers. Lord Diplock confirmed that: the Law Society acted in two capacities, one public and one private (**607 G**); the Law Society was not the insurer (**610 C**); solicitors could sue the insurer direct (**610 G- H**); and it was understandable that the Law Society had agreed to share the insurance brokers commission with the broker. In ***Swain***, the MIP was part of the public scheme set out in Section 37 of the Solicitors Act 1974. Here, in contrast, the imputation of a private trust is necessary to give effect to the clear and accepted intention, that the IPA which has a claim in contract under the IP Bonds, has no interest in the proceeds of the Claim Rights itself, but instead holds those Claim Rights for the benefit of the relevant Insolvency Estate(s);

(c) ***Williams v Central Bank of Nigeria*** concerned a document which was described as a fidelity guarantee, but which was a presidential instrument directed to CBN, requiring it to pay Dr Williams. (paragraph **16**). The Court of Appeal found that, in substance it was an executive order which arguably created a legislative right (paragraph 40). In the present case there is no legislative document creating any rights in relation to IP Bonds.

## THE DEFENDANTS' RESPONSE TO THE CLAIMANTS' CASE

64. Mr Davies said that, whilst for corporate insolvencies there is an Insolvency Estate, for bankruptcies there is no separate Bankruptcy Estate and therefore there could not be a private trust holding the benefit of the Claim Rights on trust for a Bankruptcy Estate.

65. In characterising a contract, the court can and should look at post contractual events (see for example ***Street v Mountford***). I should therefore look at the amendments to the IA 1986, which were introduced from 1 October 2015, to see if they are consistent or inconsistent with the existence of a trust.

66. The source of the IPA's powers in relation to IP Bonds is: the IA 1986; the IPR; and the MOU. All of which strongly indicate that the powers and functions exercised by the IPA in relation to IP Bonds are public powers and functions.

67. The RPBs are responsible for supervising, managing, collecting and distributing funds realised from IP Bonds. The IPA deals with fraud and dishonesty by its members and it is obvious that it should take on the responsibilities that it has taken on in relation to IP Bonds, no one else could be substituted for it.

68. The SOS approved the form of the IP Bond which provides that the benefit of an IP Bond can be assigned to SIPs, and with the consent of the SOS to others, so delegation of the IPAs public duties under IP Bonds is authorised.

69. As to the factors that the Claimants relied on as indicating that the powers and functions exercised by the IPA, in respect of IP Bonds, are not public powers and functions:

- (a) there was no power granted to the Law Society by statute to enter into the commission contract with the insurance broker, but that contract was still found by the House of Lords, in **Swain**, to fall within the Law Society's public duties;
- (b) the RPB's functions under IP Bonds are not limited, they have a duty to investigate fraud and dishonesty and can make a claim under IP Bonds themselves;
- (c) the SOS approved the form of the IP Bond, with the RPB as a party to it, and in practice, the RPBs are required to be parties to IP Bonds. Even if the functions performed by the RPBs under IP Bonds are performed for administrative convenience, this is still a public law reason and function;
- (d) in **Swain** the purpose of the MIP was to protect the public (members of the public dealing with solicitors) from losses caused by the negligent acts or omissions of their solicitors. The purpose of the IP Bond scheme is to protect members of the public (creditors of insolvent individuals and companies) from the fraud or dishonesty of IPs who deal with the insolvency of the company or individual of which they are a creditor;
- (e) whilst RPB's are not public bodies, the question is whether they are acting pursuant to public powers and functions, not whether they themselves are public bodies; and
- (f) Intact accepts that not all remedies available to the victims of dishonesty by IPs are public remedies, but it says that the exercise by the IPA of its power to assign the Claim Rights under IP Bonds is.

## FUTHER SUBMISSIONS MADE IN RESPONSE TO MY REQUEST

70. When I started to write my judgment in relation to Issue 1, I noted that, although I had been provided with a copy of paragraphs **3-031 - 3-049** of **De Smith** (which set out the two tests for deciding if the exercise of a function/power was a public function/power susceptible to Judicial Review and commentary on the first test (source of power)) I had not been provided with a copy of paragraphs **3-050 - 3-066**, which provides commentary on the second test (characteristics of the function performed). I sent an email to counsel on 30 December 2025 asking for their submissions on whether I should take paragraphs 30-050 - 30-066 into account and for their submissions in relation to those paragraphs. Mr Strong/Mr Wilson/Mr Ferro provided written submissions on behalf of the Claimants and Mr Davies/Mr Gunaratna provided written submissions on behalf of all the Defendants on 7 January 2026.

71. The Claimants, in their note, say that they did not bring paragraphs **3-031 - 3-049** to my attention, because they do not provide any detailed guidance on the question of whether the functions exercised by the IPA, in entering into the IP Bonds, holding them and making claims (insofar as it does so in practice) are public functions. The Claimants say however that the general thrust of those paragraphs support their case:

- (a) at paragraph **3-055 De Smith** says that the court should focus on the functions that the body is performing, consistent with the Claimant's case;
- (b) **De Smith** lists, at paragraph **3-051** and **3-054** bodies that have and have not, respectively, been held to be susceptible to Judicial Review. RPBs, including the IPA, are not mentioned in either of those paragraphs;
- (c) **De Smith** recognises, at paragraph **3-055** that not all functions of public bodies are necessarily public functions. This applies equally to a non-public body such as the RPBs, insofar as they may have regulatory functions, which could be regarded as public functions;

(d) at **3-057**, **De Smith** identifies “statutory underpinning” of a function as an indication that the function is a public function:

(i) here the government has not provided any “statutory underpinning” for anything the IPA does or might do in relation to IP Bonds (save that the SOS can approve an assignment of an IP Bond to someone other than to an SIP);

(ii) the phrase “*woven into the fabric of public regulation*” is taken from the judgment of Sir Thomas Bingham MR in ***R v Jockey Club ex parte Aga Khan [1993] 1WLR 909 (“the Jockey Club”)*** at paragraph **921 C** when he used it to describe the role of the City Panel on Takeovers and Mergers in the Court of Appeal case of ***R v Panel on Take-overs and Mergers, Ex parte Datafin PLC [1987] AC 185 (“Datafin”)***. The IPA’s role in relation to IP Bonds is not analogous to that of the Panel on Takeovers and Mergers;

(iii) the phrase “*body [...] established under the authority of government*” is taken from ***R v Criminal Injuries Compensation Board ex parte Lain (1967) 2 QB 864*** at paragraph **884D** where Lord Diplock referred to “*persons who under the authority of the government have exercised quasi-judicial functions*”. The IPA’s role in relation to IP Bonds is not quasi-judicial;

(f) the fact that the existence of IP Bonds is recognised in legislation is insufficient to make functions in relation to IP Bonds public functions (paragraph **3-057**);

(g) from 1 October 2015, the SOS is given power to apply sanctions to RPBs (including the IPA). Those sanctions apply however to acts or omissions of an RPB “*in the discharge of one or more of its regulatory functions*”, the holding and exercise of rights under IP Bonds are not within the IPAs “*regulatory functions*”. **De Smith** confirms, in any event, that supervision by a public regulator is not necessarily indicative that the functions are of a public nature (**3-057**);

(h) there is no statutory obligation on the IPA to accept or hold rights under IP Bonds, which suggests that these functions are not public functions;

(i) the IPA’s functions in relation to IP Bonds are not “*preparatory to and a necessary gateway for the exercise of a statutory power*” (paragraph **3-057**);

(j) paragraphs **3-056** and **3-058 - 3-063** are generally not relevant to the present case, because, as holder of the IP Bonds, the IPA holds private law rights in a private law instrument, however:

(i) the “but for test” (namely whether, but for the existence of RPBs, the government would almost inevitably intervene to regulate the activity in question itself) is not a suitable criterion here for determining if the IPA’s functions in relation to IP Bonds are public functions (**3-056**);

(ii) the IPA has no monopolistic powers (**3-058**);

(iii) here the surety (Intact), the principal (Previous IPs) and the beneficiary (the IPA) all submitted voluntarily to their respective roles, in relation to IP Bonds, rather than being required by statute or regulation to do so (**3-060**);

(iv) the IPA is not publicly funded (**3-061**);

(v) if the IPA holds on trust the Claim Rights, then alternative remedies to Judicial Review are available, but **De Smith** makes it clear that the absence of

alternative remedies is not relevant to the question of whether the function is a public function (**3-062**); and

(vi) there is no reason to think that the question of whether the functions performed by the IPA, in relation to IP Bonds, are public functions which would have any impact on the court's caseload (**3-063**).

72. The Claimants complained that, not only did the Defendant's submissions not address the question of whether I should take into account paragraphs **3-050 - 3-066** of *De Smith*, nor make any submissions in respect of those paragraphs, but the Defendants referred to paragraph **3-073** of *De Smith* which was not mentioned in my email to counsel inviting submissions on paragraphs **3-050 - 3-066**. I declined the Claimants request for permission to respond to the Defendants' submissions in relation to paragraph **3-073** which are very brief.

73. The Defendants' points were as follows:

(a) I am not being asked to set aside or quash any decision of the IPA and so the amenability to Judicial Review of the IPA, in respect of the IP Bonds does not arise directly in this case. The question in this case, as identified in *Swain*, is whether there is room for the private law trust of contractual rights, for which the Claimants contend. Chapter 3 of *De Smith* is of indirect relevance because the first stage of the amenability test involves a search for the source of the power, identification of the source of the power was at the heart of the reasoning in *Swain* and is here;

(b) it is accepted that the authorities establish a two stage test:

(i) Stage 1: if the source of the power is statutory (primary or secondary legislation) the assumption is that any decision resulting from the exercise of that power is amenable to Judicial Review; and

(ii) Stage 2: where Stage 1 "*does not yield a clear or satisfactory outcome*" the court will consider the nature of the power and function to be exercised to see if the decision had a sufficient public element, flavour or character to bring it within the purview of public law;

(c) In *Swain* the House of Lords focused on the rights and obligations created by the Solicitors Act 1974. It is clear and obvious here that the source of the IPA's rights and obligations is statute, as it was for the Law Society's powers and duties in *Swain*;

(d) there is no "decision" to analyse for the purposes of stage 2, but hypothetical decisions can be analysed (four examples are given):

(i) the SOS investigates whether the IPA is contravening the principles set out in the MOU, in the way it acts in connection with IP Bonds and requests the IPA to suspend assignments of IP Bonds pending the outcome of their investigation;

(ii) SIP's allege fraud and dishonesty by previous IPs and the IPA rejects a request by the SIPs to assign the relevant IP Bond to the SIPs, pending the outcome of the IPA's disciplinary proceedings against the previous IPs;

(iii) the IPA receives a request from both the SIPs and from a creditor victim (with the consent of the SOS) to assign an IP Bond to them and decides to assign the IP Bond to the creditor victim; and

(iv) the IPA receives a request from an SIP against whom disciplinary proceedings are pending before the IPA, to assign IP Bond to them.

74. The Defendants say that in the case of each of the four examples it is clear that the decision would be one made under the statutory functions of the IPA, under section 391 IA 1986 (as codified in the regulatory objectives at section 391B from 1 October 2015). No additional public element of the nature referred to in paragraph **3-073** of *De Smith* would be necessary, because there is no commercial element to the decisions, they are all referable to the IPA's powers and functions as an RPB under sections 388-391 IA 1986.

### **WHAT FUNCTIONS HAS/DOES THE IPA PERFORM IN RELATION TO IP BONDS?**

75. Mr Davies suggested that RPBs, including the IPA, perform the functions of authorising and regulating their IP member (in connection with which they accept, oversee and monitor IP Bonds) and also have the functions of supervising, managing, collecting and distributing funds realised from IP Bonds and investigating fraud and dishonesty and that they have the power to make claims under IP Bonds themselves. Issue 1, as amended by me asks: " Was and is the IPA exercising public powers or functions either (i) when it accepted the Bonds; (ii) when it holds the rights under the Bonds; (iii) when considering assigning the Claim Rights (insofar as it does consider doing so), or (iv) (if and insofar as it can or does exercise Claim Rights) when exercising Claim Rights under the Bonds?"

76. Mr Strong says that the RPBs are just the named party to whom the proceeds of the IP Bonds are payable for the benefit of the Insolvency Estates. No one else could be named when the IP Bonds were entered into and naming the RPB is therefore simply done for administrative convenience. RPBs, including the IPA, have nothing to do with investigating claims of dishonesty by IPs, for the purposes of making a claim under an IP Bond and they have nothing to do with presenting a claim to the Surety or collecting or distributing the proceeds of an IP Bond claim, these are all functions undertaken by SIPs.

77. Issue 1 does not refer to the IPA supervising, managing, collecting or distributing funds realised from IP Bonds, which Mr Davies said are functions performed by the IPA. I find that the role of the IPA, in relation to IP Bonds is limited to the following matters:

- (a) it is named as the beneficiary of the rights (including the Claim Rights) under the IP Bonds and enters into IP Bonds in that capacity;
- (b) its member IPs provide it with evidence that they have entered into an IP Bond for each year and it is provided with copies of the monthly Cover Schedules containing lists of insolvency appointments and the value of the relevant insolvency estates, which are sent to the Surety;
- (c) it holds rights under IP Bonds as named beneficiary; and
- (d) it enters into Tripartite Agreements with SIPs/Sureties once the SIPs/Surety have agreed a settlement amount for an IP Bond claim. It does not assign IP Bond claims (although its policy of entering into Tripartite Agreements, rather than assigning IP Bond Claims may be regarded as a general decision not to assign IP Bond claims).

78. The IPA has the right to assign the Claim Rights to an SIP, without consent and to another party, with the consent of the SOS, but the IPA says, in its defence, that it is not its practice to assign IP Bonds or any rights under them to SIPs (or anyone else) but rather it enters into Tripartite Agreements with SIPs and Sureties confirming the amount which the Surety agrees to pay and the SIP agrees to accept (on behalf of the relevant Insolvency Estate) in settlement of a claim against an IP Bond. The negotiations, as to that amount, take place between the Surety and the SIP and do not involve the IPA. I am satisfied that

that is the practice of the IPA and was its practice in 2010 - 2012, there is no evidence to the contrary, it is a bare assertion by Mr Davies.

79. For the following reasons, I am not satisfied that the IPA has anything to do with: investigating, supervising or managing claims made against IP Bonds or collecting or distributing funds realised from claims against IP Bonds, nor does it exercise claim rights under IP Bonds:

(a) the MOU (see paragraphs 30 above) contains a foreword that the SOS had agreed the principles set out in the MOU with the RPBs. Provisions as to what the RPBs agree to do in relation to IP Bonds, are contained in Section 5 of the MOU and they are to: (i) monitor the performance of its IPs in relation to the bonding requirements of the IA 1986; (ii) have in place a system to record the receipt of bonds and renewals of them and take steps to identify non-compliance by IPs in relation to Cover Schedule returns; and (iii) if the RPB has reasonable grounds to believe that a claim may be made against a bond of one of its authorised IPs, take such steps as are necessary to ensure that an investigation is carried out and where appropriate will process or arrange for an IP (or by agreement with the SOS, another suitably qualified person) by assignment, to process any claim arising under a bond or bonds. The MOU does not require the RPBs to carry out investigations themselves, just to take steps to ensure that an investigation is carried out and provides that either the RPB or an IP (or with the consent of the SOS another suitably qualified person) by assignment processes the claim;

(b) the IPA's defence does not assert that it performs any of these roles and specifically denies having any power to hold or distribute funds or adjudicate claims. The IPA asserts that, if it were to receive any IP Bond monies it would immediately return them to the Surety pending entry into a Tripartite Agreement (paragraph 11 of the IPA defence and Ms Green's witness statement). Against that, Mr Davies' assertions that the IPA does perform these roles is an unproved assertion, not supported by any witness evidence;

(c) provision is made in the IP Bonds (clause 1(c)) for the costs incurred by SIPs in proving IP Claims, there is no similar provision for any costs incurred by the IPA in proving IP Bond claims (see paragraph 194 below);

(d) Intact pleads that it is part of the IPA's regulatory functions to receive, investigate and/or determine (as appropriate and as it considers fit) any dishonesty claims against its IP Members. However the IPA performs this role in the context of its function of regulating and taking disciplinary action against its IP members, not for the purpose of investigating or making a claim under an IP Bond; and

(e) in its defence (paragraph 8 (3)), the IPA says that it does not assign IP Bonds to an SIP, its practice is to enter into a Tripartite Agreement with the Surety and the SIP, by which the IPA directs the Surety to pay to the SIP a sum which the Surety and the SIP have negotiated and agreed directly between them, without involvement from the IPA.

## SUMMARY OF RELEVANT LEGAL PRINCIPLES

80. The authorities to which I have been referred are:

(a) *De Smith* paragraphs **3-031 - 3-066** and **3-073** (I will deal with *R v Jockey Club* and *R v Criminal Injuries Compensation Board*, referred to in paragraph **3-057** of De Smith, as part of my review of these paragraphs);

- (b) **The Skinners' Company**;
- (c) **Swain**;
- (d) **Williams**;
- (e) **Ames**; and
- (f) **Birkdale**.

81. Mr Davies points out, on behalf of the Defendants, in his post-trial submissions of 7 January 2026 (see paragraph 73 (a) above) that I am not being asked to set aside or quash any decision made by the IPA and therefore the question of whether Judicial Review would be available as a means of challenging any decision of the IPA, in relation to IP Bonds, is not directly relevant to the questions raised by Issue 1. Mr Davies suggests that the question (which he says was identified in **Swain**) is whether there is room for a private law trust of contractual rights (as the Claimants contend). Mr Davies concedes however that Chapter 3 of **De Smith** is indirectly relevant to Issue 1, because the first stage of the amenability (to Judicial Review) test involves a search for the source of the IPA's powers in relation to IP Bonds which search, he says, was at the heart of the reasoning in **Swain**.

82. I consider that the question of whether the IPA was and is exercising public functions, in accepting the Bonds, holding the Bonds and exercising Claim Rights in relation to the Bonds (insofar as it does so) is synonymous with the question of whether any decision that the IPA made in connection with any of those functions or powers would be amenable to Judicial Review. Mr Davies appears to accept that this is so, because, having made the point that the question of whether such decisions would be susceptible to Judicial Review is only of indirect relevance to Issue 1, Mr Davies goes on to describe hypothetical decisions that the IPA might make in connection with its power to assign the Claim Rights under IP Bonds. In addition Mr Davies accepts that the authorities establish a two stage test for deciding if a decision is susceptible to Judicial Review and Mr Davies relies primarily on Stage 1 in asserting that the functions of the IPA, in relation to IP Bonds are public functions, leaving no room, he says, for the implication of a private law trust (see paragraphs 73 (b) - (d) above).

83. I will refer to paragraphs from **De Smith** first, because they provide what the authors consider to be a summary of principles relevant to the question of whether a decision is susceptible to Judicial Review (which, as I have just said is synonymous with the questions raised by issue 1). Having set out those principles I will then supplement them with the cases to which I have been specifically referred by counsel.

### **De Smith**

84. It is common ground that there are two approaches to the question of whether the carrying out of a function, or use of a power is amenable to Judicial Review. At paragraph 3-031 **De Smith** says, about those two approaches: "*The courts have adopted two complementary approaches to determining whether a function falls within the ambit of the supervisory jurisdiction. First, the court considers the legal source of power exercised by the impugned decision maker. In identifying the classes of case in which judicial review is available, the courts place considerable importance on the source of legal authority exercised by the defendant public authority. Second, and additionally, where the "source of power" approach does not yield a clear or satisfactory outcome, the court may consider the characteristics of the function being performed. This enables the courts to extend the reach of the supervisory jurisdiction to some activities of non-statutory bodies (such as self-regulatory organisations)...*". At paragraph 30-032 "*The court now operates on the assumption that if the source of power is a statute, or subordinate legislation under statute, then clearly the body in question will be subject to judicial review. There must be some*

*compelling reason to infer that such a presumption is excluded. In the large proportion of claims commenced, there is no doubt that the decision in question is susceptible to review because the source of power exercised is statutory”.*

85. I accept that paragraphs **3-050 - 3-064** of **De Smith** provide general guidance on the operation of the second approach (the characteristics of the function being performed). Nonetheless, it is the only comprehensive guide that I have as to whether or not the application of the second approach should result in powers and functions being determined to be public functions and powers. I consider the following guidance from those paragraphs to be relevant to Issue 1:

(a) the court should focus on the function which is under consideration. At paragraph **3-055** **De Smith** refers to paragraph 66 of the judgment in **R (on the application of Tortoise Media Ltd) v Conservative and Unionist Party [2023] EWHC 3088 (Admin)** where it was said that *“Public law focuses on substance and not form. Context is everything the question whether there is a JR public function ... [does] not turn on generalisations about the entity’s functions across the board. What is needed is a careful focus on the specific function which is under consideration. And what is needed is a clear focus on the substance – the practical realities- of what the entity is doing”;*

(b) even if an entity is a public body and/or has some public functions this does not mean that all its functions are public functions (**3-066**);

(c) if the powers or functions derived from an agreement voluntarily entered into this would point away from the powers or functions being public powers and functions (**3-060**) and **The Jockey Club**;

(d) if there has been statutory underpinning of the relevant function of the entity, or the body has been established under the authority of the government this is an indication that the function is a public function (**3-057**), **Datafin** and **R v Criminal Injuries Compensation Scheme [1967] 2 QB 864**;

(e) the absence of a direct statutory obligation suggests that the function is not public (**3-057**) and **R v Liberal Democrats v ITV Broadcasting [2020] 4 WLR 4 (“Lib Dems v ITV”)**;

(f) if, “but for” the existence of the non-statutory body, the government would itself inevitably have intervened to regulate the activity in question then this points towards the activity being a public one;

(g) if the party seeking Judicial Review voluntarily submitted themselves to be bound by the decision maker, then this points against the decision being amenable to Judicial Review (**3-060**);

(h) a decision should not be determined to be amenable to Judicial Review because of concerns about the adequacy of alternative remedies (**3-062**);

(i) the fact that the service is for the public benefit does not mean that providing the service is a public function (**3-055**);

(j) functions of a public character are essentially functions which are governmental in nature (**3-055**); and

(k) undue reliance on any one of the criteria should be avoided. The test of public function should be overriding and the criteria weighed and balanced in the context of each specific case (**3-064**).

86. **The Skinners' Company** and **Williams** are authority for the general proposition that if a power or function which is exercised is a public power or function, then it is not susceptible to a private law challenge (in those cases challenge by way of private law contract/trust claim). This is common ground between the Claimants and Defendants and neither case is particularly helpful in determining, on the facts of this case, whether the IPA was exercising public powers or functions in respect of the Bonds, at the four points in time identified in Issue 1.

87. **Ames** concerned the decision of the Legal Aid Agency ("LAA") as to how much it offered to counsel to represent the claimant in a complex fraud trial. The grounds for Judicial Review were that the failure to make a higher offer was irrational, "Wednesbury unreasonable" and infringed the claimant's Article 6 rights. The defendant asserted that only the Article 6 argument was amenable to Judicial Review, the other grounds were not amenable to Judicial Review, because the challenged decision was part of a commercial negotiation about fees, lacking any public law element.

88. The claimant argued that it was not right to describe the process of the LAA making an offer to counsel and counsel deciding whether or not to accept that offer, as a "commercial negotiation". What in fact was happening was that the LAA made an offer of a fee which it said took into account all the factors which it was required to take into account under the relevant regulation, there was no opportunity for counsel to vary the LAA's approach or the rates offered for remuneration, by way of "negotiation".

89. The defendant said that, on a correct analysis, it was nothing more than a commercial negotiation about the amount to be paid to counsel for their services, with no public law element making the LAA offer susceptible to Judicial Review. The defendant accepted that, if it could be said that the level of fees offered was so low that the LAA could be said to be failing in its duty to provide legal representation to the claimant, then the offer it made could be susceptible to Judicial Review, but there was no evidence to suggest that that was the effect of the offer made.

90. It was in that context that Holroyde LJ set out the six principles set out by me in paragraph 54 above. The third and sixth principles are those set out by me in paragraph 85 (b) and (h) above respectively; of the remaining four principles, two are also of potential relevance to Issue 1, namely:

(a) there is no universal test of when a decision has a sufficient public law element to make it amenable to Judicial Review, it is a question of degree; and

(b) it is necessary to consider whether the challenged decision is one which is necessarily involved in the performance of a public function, not merely incidental or supplemental to that public function.

91. In deciding that all aspects of the offer were susceptible to Judicial Review, Holroyde LJ regarded the following factors as important:

(a) the Lord Chancellor had a duty to ensure that legal aid is available, in accordance with the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Lord Chancellor had made a regulation, under the 2012 Act, to deal with very high costs cases, such as that of the claimant. The offer made was a decision in relation to the disbursement of public funds, made under a regulation which had been made by the Lord Chancellor in order to comply with his duty under the 2012 Act;

(b) the decision as to what to offer was not merely incidental to the provision of legal aid in accordance with the Lord Chancellor's statutory duty, it was a core part of the discharge of that duty; and

(c) it was not analogous to cases where a public body invited tenders for a contract. In those cases, the party submitting the tender indicated what they were willing to accept, here the LAA determined the fee, which counsel could accept or make representations about, it was unrealistic to describe it as a commercial negotiation.

92. **Birkdale** is simply a case in which the House of Lords referred to and confirmed a long line of cases, which established that a person or body which is entrusted with public functions/powers cannot divest themselves of those functions or powers or enter into a contract which is inconsistent with the exercise of those powers or functions, without lawful authority (see page **364** of the judgment of the Earl of Birkenhead).

93. Mr Davies places significant reliance on the House of Lords decision in **Swain** and I will spend some time analysing the judgments in **Swain**, with a view to setting out the principles from those judgments of the members of the House of Lords, which are applicable to Issue 1. I have set out in paragraph 36 above the relevant background in **Swain** and I will not repeat it here.

94. Mr Davies says that the real question, which was identified in **Swain**, is whether there is room for a private law trust of contractual rights to be implied, in respect of the IPA's powers and functions in relation to IP Bonds, which he says is different from the question of whether any decision made by the IPA in respect of IP Bonds would be susceptible to Judicial Review (I have concluded (see paragraph 82 above) that the question of whether the IPA is exercising public functions/powers, in accepting and holding the Bonds and exercising Claim Rights is the same as the question of whether any decision taken by the IPA in the exercise of those functions/powers would be susceptible to Judicial Review). Mr Davies also says that the source of the IPA's rights and obligations in relation to IP Bonds is statutory, just as it was in **Swain** and so applying the Stage 1 test (see paragraph 84 above) decisions by the IPA in relation to IP Bonds would be susceptible to Judicial Review. There is no room therefore for a private law trust just as there was no room for one in **Swain**.

95. Lord Diplock and Lord Brightman gave the judgments of the House of Lords in **Swain**, the other members agreed with them and they agreed with each other. Mr Davies says that Lord Diplock and Lord Brightman gave different reasons for allowing the appeal: (a) Lord Diplock (at **608 H**) said that both contracts were entered into by the Law Society in its public capacity, under the powers conferred on it under Section 37, the entire activity was a public activity which could not give rise to a private law trust arrangement; and (b) Lord Brightman (at **620 G - H** and **621 D - E**) said that there was nothing in the MIP indicating that there was a trust arrangement and nothing to show that the Law Society intended to constitute itself as a trustee.

96. The Claimants say that Lord Diplock found that the contract entered into by the Law Society with the insurance broker formed part of the statutory power or permission given to the Law Society to enter into the MIP, but here there is no statutory provision giving power or permission for RPBs (including the IPA) to enter into IP Bonds and therefore the Stage 1 test is not met.

97. Lord Diplock, in his judgment, started with the statement at page **607G** "*My Lords, this appeal is about the way in which the Law Society... has exercised its powers under section 37 of the [1974 Act] in relation to the compulsory insurance of solicitors against liability to third parties arising out of the conduct by them of private practices...*". He went on to say, at page **608** that, when the Law Society acted in its private capacity, it was subject to private law alone, but when it acted in its public capacity, under the statutory duties imposed on it by the 1974 Act, or by making rules and regulations under the 1974 Act (the Solicitors Indemnity Rules 1975) which had the status of subordinate legislation, the Law Society had

a duty to act in what it believed to be the best interests of that section of the public that may need legal advice, assistance and representation from its members, even if their interests conflicted with those of its members.

98. Lord Diplock concluded that the acts done by the Law Society which resulted in it receiving a share of the broker's commission were done by the Law Society in its public capacity. "It was exercising statutory powers, conferred on it by section 37 of the 1974 Act and rules made by its council under that section..." (**608H - 609A**).

99. Lord Diplock recited the provisions of section 37 which in summary gave the council of the Law Society power to make rules concerning the obtaining of indemnity insurance against losses caused to clients by a solicitor, former solicitor or their employees or former employees. Pursuant to section 37 the Law Society had a range of schemes it could use to secure an indemnity against such losses. It had chosen a scheme by which it would be named in an MIP, but would have no insurable interest in the policy of insurance, the parties with the insurable interest would be the solicitors whose professional liability was to be indemnified by the insurance company. It must have been intended, said Lord Diplock, that each solicitor would have the rights and duties of an assured under the policy, even though the policy itself was taken out in Law Society's name and so individual solicitors would have rights against and owe obligations to the insurer without the Law Society having to intervene, as intermediary, to give effect to those rights and obligations.

100. The rights and obligations under the MIP were enforceable as a matter of public law not (as the Court of Appeal had found) by a private law trust. The Court of Appeal had been driven to conclude that the Law Society was acting either as agent for solicitors or as a trustee holding the insurance companies promise for their benefit, in order for solicitors to have the benefit of the indemnity provided by the insurer. Had the Law Society been acting in either of those capacities then it could have persuasively been argued that the Law Society's ability to negotiate and enter into an agreement with the broker for a share of the broker's 15% Commission arose from the Law Society's position as agent or constructive trustee and therefore the Law Society was accountable to solicitors for the profit that it made from that contract (**612 C**). The Court of Appeal had rightly found that there was no agency but was wrong to find that there was a constructive trust.

101. At **618 B-D** Lord Brightman said that "*My Lords the insurance scheme is statutory. It flows from section 37 and the rules made thereunder, of which the form of [MIP] and form of insurance certificate are an integral part. In exercising its power under section 37 the Law Society is performing a public duty, a duty which is designed to benefit, not only solicitor principals and their staff, but also solicitors clients.... I think it is clear that the principal purpose of section 37 was to confer on the Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves.... So there is no doubt at all in my mind that the power given to the Law Society by section 37 is a power to be exercised not only in the interests of the solicitors' profession but also, and more importantly in the interests of those members of the public who resort to solicitors for legal advice....*".

102. Lord Brightman (at **620 F - H** and **621 E - H**) examined the terms of the MIP which provided that the insurers agreed its terms with the Law Society "on behalf" of all solicitors required to be insured under the indemnity rules. The broker was authorised by the insurer to issue certificates to those solicitors who paid the appropriate premium. Section 37 did not, Lord Brightman said, oblige the Law Society to assume the role of trustee, that was a question of whether the Law Society intended to assume the role of trustee which was to be ascertained from the wording of the MIP and such surrounding circumstances as were admissible in evidence. The wording of the MIP, that the Law Society agreed its terms "on

behalf" of all solicitors required to be insured under the indemnity rules did not create either an express or implied trust (there were many authorities, Lord Brightman said, to that effect). The plaintiffs had said that if there were no trust then a solicitor or former solicitor who was insured under the MIP would have no remedy against the insurers if they refused to indemnify him, however the scheme was a statutory scheme and the MIP and certificates of insurance had statutory authority just as much as if they were in a schedule to an act. In those circumstances the parties insured would have a direct public law remedy against the insurers. This avoided the need which the Court of Appeal thought there was to imply a trust.

103. Lord Brightman noted that, on 11 May 1976 the Law Society entered into a commission sharing agreement with the brokers. The argument of the plaintiffs was that the Law Society was accountable to them and other premium paying solicitors for the share of the commission it received, because the Law Society entered into the MIP in a fiduciary capacity and was accountable for the profit it made from that position in the form of its share of the broker's commissions derived from the premiums paid by solicitors. However, as the Court of Appeal was wrong to conclude that the Law Society had constituted itself a trustee of the benefit of the MIP, it was not a fiduciary and therefore had no obligation to account, for its share of the commission.

104. I agree that Lord Diplock and Lord Brightman gave different reasons for allowing the appeal in **Swain**. Lord Diplock referred to the Law Society exercising statutory public law powers enforceable only by public law remedies. Lord Brightman, having said that the indemnity insurance scheme was statutory and that the MIP formed part of it, referred to the absence of any wording in the MIP or evidence from the admissible surrounding circumstances, of an express trust or intention on the part of the Law Society to constitute itself as a trustee of the rights and obligations under the MIP. Each of Lord Diplock and Lord Brightman agreed with the judgment of the other (and the other members of the House of Lords agreed with both of them) and it follows that the reasons given by Lord Diplock and Lord Brightman were the unanimous reasons of the House of Lords, for allowing the appeal.

105. For the purposes of Issue 1 (which asks whether the IPA was and is exercising public functions when it accepted the Bonds/holds the rights under the Bonds/assigns or considers assigning the Bonds/when exercising Claim Rights) Lord Diplock's judgment is relevant, whereas Lord Brightman's judgment (which addresses the question of whether there was an intention to create a trust) is more relevant to Issue 2.

106. Mr Davies says (see paragraph 38 above) that there is even less reason to conclude that there is a trust here, in relation to the Bonds, than there was in **Swain**. He makes three points, about the nature of the commission sharing agreement between the Law Society and the broker in **Swain**, compared to the Bonds entered into by the IPA and Intact. Mr Davies also says that Lord Diplock, at **608 H** said that both contracts were entered into by the claimants in its public capacity under section 37. In fact what Lord Diplock said at paragraph **608 H** was that the acts of the Law Society which resulted in it receiving a share of the broker's Commission were done by the Law Society in its public capacity pursuant to Section 37, not that both contracts were entered into in the Law Society's public capacity. At **612 C** Lord Diplock said that the contract which the Law Society entered into under Section 37 and/or the Solicitors Indemnity Rules 1975 (which he said had the status of subordinate legislation) was the MIP and not the commission sharing agreement between the Law Society and the broker. He went on to say that, if the Law Society had been, as the Court of Appeal found it to be, a trustee, in relation to the MIP, then it would have had an obligation to account for the money it received under its commission sharing agreement with the insurance broker, to the solicitors who paid the premiums. I regard Lord Diplock's judgment in **Swain** as a straightforward example of the application of the Stage 1 test identified in **De Smith** namely identifying the source of the power used by the Law Society to enter into the

MIP which was primary legislation (section 37 of the 1974 Act) and/or subordinate legislation (the Solicitors Indemnity Rules 1975) which creates an assumption that, in exercising those powers, by entering into the MIP, the Law Society was exercising a public law power. Mr Davies's comparison of the commission sharing agreement in **Swain** and IP Bonds in this case (and his suggestion that there is even less reason to conclude that there is a trust here in relation to the Bonds) is not therefore relevant to my determination of Issue 1.

## **DECISION - WAS AND IS THE IPA EXERCISING PUBLIC POWERS OR FUNCTIONS?**

107. Issue 1 asks whether the IPA was and is exercising public powers or functions at four separate points in time: (a) when the IPA entered into the Bonds (between 2010 and 2012); (b) when it has held the rights under the Bonds; (c) when considering whether to assign the Claim Rights (if it does so); and (d) when exercising Claim Rights under the Bonds (if it does so). I have found that the IPA does not exercise Claim Rights under the Bonds and in consequence that is not a power or function of the IPA which falls to be considered. It seems to me that (b) and (c) would both cover the period from 2010 to the date of issue of the Part 8 Claim/Insolvency Application (19 August 2025). For reasons I will explain shortly, in deciding whether the IPA was and is exercising public functions/powers, for the purposes of issue 1, it makes no difference at which of the points of time (a) – (c) that question is answered.

108. I will first apply the Stage 1 source of power test. Mr Davies says (see paragraph 73 (d) above) that, at least in making a decision in relation to the Claim Rights (whether to assign them and if so to whom), the IPA would be exercising a statutory function under Section 391 IA 1986 (Section 391B to which Mr Davies also refers, not coming into force until 1 October 2015).

109. Section 391(1) IA 1986 (prior to 1 October 2015) provided that the SOS could declare a body to be an RPB, provided that the requirements of subsection (2) were met by that body. None of the requirements in subsection (2) places an obligation on RPBs to enter into an IP Bond, hold IP Bonds or consider the assignment of IP Bonds or even more generally to make arrangements for a scheme by which its members provide security for the assets which come into their possession or under their control in the exercise of their functions as IPs. From 1 October 2015 Section 391 was amended to provide that the SOS could declare a body to be an RPB, if satisfied that it met the requirements of subsection (4). The requirements of subsection (4) included that its rules and practices are designed to ensure that the regulatory objectives set out in Section 391C were met. Section 391B provides that, in discharging its regulatory functions an RPB must, so far as is reasonably practicable act in a way which is compatible with the regulatory objectives and which the RPB considers most appropriate to meet those objectives. None of the “regulatory objectives” or “regulatory principles” require RPBs to enter into IP Bonds. I conclude that the source of the power for the IPA to enter into the Bonds, hold the Bonds and exercise the power to assign the Bonds, before and after 1 October 2015, was not primary or subordinate legislation and there is therefore no assumption or presumption, under the Stage 1 test, that in entering into the Bonds, the IPA was exercising a public power or function.

110. I turn to the much less straight forward question of whether the Stage 2 test is met in relation to any of the relevant powers or functions of the IPA. The first point is that **De Smith** says that, if the Stage 1, “source of power” test “*does not yield a clear satisfactory outcome*”, the court may consider the Stage 2 test, namely the characteristics of the function that is being performed. It is not clear what “a clear satisfactory outcome” means. The outcome

under the Stage 1 test is clear, but how do I assess whether it is satisfactory and do I need carry out that assessment? In my judgment if, having reviewed the authorities to which I refer below (all of which are referred to in the relevant paragraphs of **De Smith**) by applying the Stage 2 test, the conclusion is that any relevant power or duty is a public power or duty, there is no other hurdle that needs to be surmounted, before the Stage 2 test is applied.

111. Of the authorities I was referred to by counsel, summarised in paragraph 80 above, only **De Smith (3-051-3-066 and 3-073)** **Ames** and **Birkdale** are relevant to the Stage 2 test. I have set out at paragraph 85 above, the guidance provided by paragraphs **3-050-3-066** of **De Smith**, I will now consider each element of that guidance in turn.

### **Focus on the Powers and Functions which are in issue**

112. The first guidance given by **De Smith (3-055)** is that I should focus on the functions that are actually in issue. The second guidance is that even if the entity is a public body and/or has some public functions (**3-066**) this does not mean that all its functions are public functions. It is the powers and functions identified by Issue 1, so far as I have found that the IPA actually exercises those powers and performs those functions, which are directly in issue. As for other powers and functions of the IPA, for example, the publishing of the IPA's own rules to regulate its members and the disciplinary proceedings it takes against its own members, because those functions and powers have nothing to do with IP Bonds, they are not relevant to the question of whether the powers the IPA has and the functions that it performs in relation to IP Bonds are public powers and functions.

113. Issue 1 asks: “*Was and is the IPA exercising public powers or functions either (i) when it accepted the Bonds; (ii) when it holds the rights under the Bonds; (iii) when considering assigning the Claim Rights (insofar as it does consider doing so), or (iv) (if and insofar as it can or does exercise Claim Rights) when exercising Claim Rights under the Bonds?*” This mirrors the functions that I have found the IPA actually performs (see paragraph 78 above) save that I have found that, whilst the IPA has the power to assign IP Bonds and to exercise Claim Rights, as a matter of practice it does not do so and did not do so when the Bonds were entered into, but I have also concluded that the IPA's practice of not assigning Claim Rights, but instead entering into Tripartite Agreements was (and is so far as it is continuing) a decision not to assign Claim Rights. I do not consider that the same can be said about exercising Claim Rights. The IPA's position is that it never has exercised Claim Rights and never would, something that appears to date back before 2010, when the Bonds were entered into. I do not therefore regard the exercise of Claim Rights as being part of the functions of the IPA. The specific powers and functions which the IPA performs and which are relevant to Issue 1 are therefore: (a) accepting IP Bonds (that is entering into them as contracting party with the Surety); (b) holding the rights under IP Bonds which it has as contracting party; (c) the power to assign Claim Rights; and (d) the IPA's practice of entering into Tripartite Agreements, rather than assigning its rights under IP Bonds. I will refer to these collectively hereafter when appropriate as “the Issue 1 Functions and Powers”.

114. In **Ames** (see paragraphs 87 - 91 above) the Court of Appeal concluded that deciding what fee to offer to counsel in a complex fraud trial, was not merely incidental to the Lord Chancellor's statutory duty to provide legal aid for such trials, but a core part of discharging that duty. In the same way, in **Swain**, the Law Society's entry into the MIP was a core part of fulfilment of its statutory powers, conferred on it by section 37 of the 1974 Act to arrange indemnity insurance for solicitors in England and Wales. In those cases the duty or power identified as the relevant one, to consider whether it was a public duty/power or not, was a statutory one, meaning that the Stage 1 test was passed and there was no doubt, in those cases, that what was identified as the relevant duty/power was a public one. Mr Davies, in his submissions, says that every aspect of the IPA's involvement with IP Bonds engages its

public functions within the statutory framework. I must be careful therefore to identify correctly at what level of generality to identify the powers/functions of the IPA which I am analysing.

115. Mr Davies referred to various statutory and non-statutory instruments which are, he said, part of the “framework” within which the IP Bond regime operates (see paragraphs 27 – 32 above):

(a) Section 390(3) IA 1986 (see paragraph 27 above) provides that a person is not qualified to act as an IP unless at the time they do so, there is in force security for the proper performance of their functions. This provision creates a requirement for security but does not specify what that security must be, let alone requiring RPBs to undertake any functions or exercise any powers in relation to that security. In my judgment, the Issue 1 Functions and Powers do not form any part of a duty, power or statutory scheme imposed on or granted to the IPA by Section 390(3);

(b) prior to 1 October 2015, section 391 IA 1986 (see paragraph 27 above) set out the requirements that must be met in order for the SOS to recognise an RPB, but IP Bonds are not mentioned;

(c) from 1 October 2015 section 391B IA 1986 provides that an RPB, in discharging its regulatory functions, must, so far as reasonably practical, act in a way: (a) which is compatible with the regulatory objectives; and (b) which the body considers most appropriate for the purpose of meeting those objectives. Section 391C defines “regulatory functions” as: any functions the body has under or in relation to its arrangements for or in connection with authorising persons to act as IPs or regulating persons acting as IPs. “Regulatory objectives” are all listed, but are general objectives, none of which identify IP Bonds or even their function (of providing security for dishonest acts of IPs in connection with their insolvency appointments) as regulatory objectives. In my judgment, the Issue 1 Functions and Powers do not form any part of a duty, power or statutory scheme imposed on the IPA by Section 391 or Section 391B/C (as amended);

(d) the MOU (see paragraph 30 above) is not primary or secondary legislation, and therefore not public regulation, at least by applying the Stage 1 test. The RPBs agree, by the MOU that one of their regulatory functions is: “*dealing with statutory bonding requirements for their IP members under S 390(3) and operating mechanisms to ensure that potential claims arising from the fraud or dishonesty of their members are appropriately identified and made*”. There is no requirement in the MOU for RPBs to enter into IP Bonds as contracting party with the Surety nor does it specify what mechanisms they should operate to ensure that: “*potential claims arising from the fraud or dishonesty of their members are appropriately identified and made*”. At most it may be argued, applying **Ames** (where deciding on the fee to offer to counsel in a complex fraud trial was found to be a core part of the Chancellor's compliance with his duty to provide legal aid for criminal trials) that the Issue 1 Functions and Powers are a core part of and not merely incidental to the regulatory activities of IPA identified in the MOU. Although importantly, as I have already noted, in **Ames**, the Chancellor had a clear statutory duty to provide legal aid for criminal trials and the MOU does not create a statutory duty for RPBs; and

(e) the IPR (see paragraph 31 above) is a statutory instrument (secondary legislation) issued by the SOS. The IPR requires an IP Bond, in the form approved by the SOS, to be in force, in relation to IPs and requires the IP Bonds to provide for the surety to be jointly and severally liable with the IP for losses caused by the fraud or dishonesty of

that IP or anyone acting in connivance with them. The IPR does not however impose any duties upon RPBs or grant them any powers in relation to security more generally, or IP Bonds in particular. The IPR (where relevant) sets out regulations relating to the form of security that an IP must provide in order to satisfy the requirements of section 390(3)(b) IA 1986. I conclude that the Issue 1 Functions and Powers do not form any part of a duty, power or statutory scheme imposed on the IPA the IPR.

116. I conclude that the functions and powers which are in issue and which I should focus on are the Issue 1 Functions and Powers, but that at least arguably, in dealing with the remaining factors, I should also look at the MOU, by which the IPA agreed that its regulatory functions included those general functions identified in paragraph 115 (d) above, because the MOU forms part of the bonding scheme.

### **Do the Relevant Powers/Functions Derive From a Voluntary Agreement?**

117. In *R v Jockey Club*, the Jockey Club was incorporated by Royal Charter with the objects of controlling and regulating horse racing in Great Britain and Northern Ireland (“GB and NI”). Stewards issued licences to racecourses, jockeys, trainers, owners and others. They also issued rules and could disqualify anyone who breached those rules from participating in horse racing in GB and NI. The rules published by the stewards applied because contracts were entered into by those to whom the stewards issued licences which required the other party to the contract to abide by the rules. The applicant racehorse owner entered into a contract with the Jockey Club and was issued with a licence allowing his horses to race in GB and NI. The applicant’s filly was disqualified after finishing first in a major race as a result of being found to have a banned substance in a sample of her urine. The owner issued a claim for Judicial Review claiming that the functions of the Jockey Club were essentially public and if not performed by the Jockey Club, then the government would need to have created a body to perform them. His agreement to the rules, said the applicant, was not in reality voluntary because anyone wishing to participate in racing in GB and NI had no alternative other than to sign a contract with the Jockey Club.

118. The applicant argued that *Datafin* had extended the boundaries of Judicial Review, so that bodies similar to the Panel on Takeovers and Mergers (“the Panel”), which exercised powers that were public in nature were susceptible to Judicial Review, even though the source of their powers was not primary or secondary legislation, and the Jockey Club was such a body. The Respondent said that it was a private body independent of government, that was not susceptible to Judicial Review.

119. The Court of Appeal found that the Jockey Club regulated a significant national activity and exercised powers that affected the public; that anyone wanting to take part in horse racing in GB and NI had no alternative but to contract with the Jockey Club; and that if the Jockey Club had not taken on that role, then the government would probably have been driven to do so itself, but the decisions of the Jockey Club were not subject to Judicial Review because:

- (a) the Jockey Club was not a public body;
- (b) the Jockey Club’s functions were not “woven into” any system of government control (unlike the Panel in *Datafin*);
- (c) whilst the Jockey Club’s powers could be described in many ways as public, they were not governmental in nature; and
- (d) the Jockey Club’s powers derived from an agreement between the parties giving rise to private rights.

120. The Issue 1 Functions and Powers of the IPA are, as I have already said: (i) accepting IP Bonds; (ii) holding the rights under IP Bonds; (iii) deciding whether to assign the Claim Rights under IP Bonds (although its practice is never to do so); and (iv) entering into Tripartite Agreements. The Claimants say that the source of the Issue 1 Functions and Powers is the IP Bonds themselves, which the IPA enters into with the Surety voluntarily, giving rise to private law contractual rights (as between the IPA and the Surety). Intact refers to: (a) the SOS approving the terms of IP Bonds; (b) bonding and the annual renewal of IP licences being designed to facilitate the expeditious taking of appointments and more efficient operation of the insolvency system; (c) the IPA accepting IP Bonds as part of the bonding scheme; (d) the IPA being subject to government oversight and sanctions; (e) that since 1 October 2015, the IPA has been subject to codified regulatory functions and objectives under Section 391B of the IA 1986; and (e) the SOS agreed a set of principles with RPB's in the MOU.

121. The circumstances in this case are very different from those in *The Jockey Club*. In that case it was the owner who was subjected to the exercise by the Jockey Club of its powers who was the focus of the question of whether he had voluntarily agreed to those powers being exercised in respect of him. It was found that he had voluntarily submitted to them because he had signed a contract with the Jockey Club, by which he agreed to be bound by its rules. In this case, the Claimant's say that the Issue 1 Functions and Powers are functions and powers that the IPA has accepted voluntarily because it is a party to the IP Bonds, the other contracting parties being the Surety (in the case of the Bonds, Intact) and the Previous IPs.

122. Mr Davies, for the Defendants says that:

- (a) the SOS approved the form of the IP Bonds which the IPA has entered into;
- (b) the IPA has no commercial interest in IP Bonds, it enters into them in fulfilment of its statutory functions to regulate IPs, to ensure its members are fit and proper persons to act as IPs, authorising its members to act as IPs and protecting and promoting the public interest from the dishonesty of its members and thereby increases public confidence in the insolvency system;
- (c) as an RPB, the IPA is subject to government oversight and sanctions;
- (d) decisions in relation to IP Bonds are made by the IPA under its statutory functions under Section 391 IA 1986 (as codified in the regulatory objectives set out in Section 391B IA 1986 from 1 October 2015); and
- (e) the SOS has agreed a set of principles with the RPB's in the form of the MOU.

123. For the reasons I have already explained (see paragraph 115 (a) and (c) above) I am satisfied that neither section 391, nor section 391B IA 1986 imposes or establishes any duty upon the IPA, grant any power to the IPA, or establish a scheme of which the Issue 1 Functions and Powers form part.

124. I am also not satisfied that: (a) the approval by the SOS of the form of IP Bond; (b) the fact that the IPA is subject to government oversight and sanctions; or (c) the IPA's motive for entering into IP Bonds (even if what Mr Davies says about that motive is true) impose any duty upon or grant any power to the IPA or establish a scheme of which the Issue 1 Functions and Powers form part (although the approval by the SOS of the form of the IP Bond may form part of such a scheme). I am not satisfied because:

(a) the SOS may well have approved the form of IP Bonds which includes RPBs as a party, but this does not mean that the SOS thereby required that an RPB should be the other contracting party;

(b) I accept that the IPA has no commercial interest in the IP Bonds which it has entered into and that its motive for doing so may well be to help facilitate a process for securing compensation for those suffering loss as a result of the dishonesty of its member IPs in connection with their appointment to Insolvency offices. That motive (however commendable) does not however impose on the IPA a duty or grant it a power or establish a bonding scheme;

(c) the IPA is subject to government oversight and sanctions, but there is no evidence that the IPA could be subjected to sanctions if it failed to perform or use the Issue 1 Functions and Powers (I note that the IPA has never, on its evidence, used its power to assign Claim Rights and it appears that it has never been subject to any sanction for operating a practice by which it never does so and there is no evidence that the SOS has ever even questioned this policy). In any event, even if the IPA is subject to oversight and could be subject to sanction in connection with what it does in relation to bonding, such oversight and sanctions are not the source of the Issue 1 Functions and Powers; and

(d) as I have already found (see paragraph 109 above) the IPA is not and never has been required by any primary or secondary legislation to take on the Issue 1 Functions and Powers.

125. I have found (see paragraph 115 (d) above) that, by the MOU, the RPBs (including the IPA) agreed that their regulatory functions included: *“dealing with statutory bonding requirements for their IP members under S 390(3) and operating mechanisms to ensure that potential claims arising from the fraud or dishonesty of their members are appropriately identified and made”*. I have said that it is at least arguable that the Issue 1 Functions and Powers form a core part of what the IPA agreed, by the MOU, and was included in its regulatory functions. I find it unnecessary however, for present purposes to decide whether or not the IPA was compelled to enter into IP Bonds because of what it agreed to, by the MOU, or whether the Issue 1 Functions and Powers imposed and conferred on it by the IP Bonds formed a core part of the regulatory functions that it accepted it had, by the MOU, for two reasons:

(a) the mere acceptance, by the IPA that its regulatory functions include these matters does not, in my judgment make them public functions; and

(b) more importantly, even if, in order to perform what the RPBs (including the IPA) accepted, by the MOU to be included in their regulatory functions, the IPA was compelled to enter into IP Bonds or they formed a core part of the regulatory functions that it agreed it had, nonetheless I have no evidence that there is anything which compelled the IPA to enter into the MOU. It seems to me that, just as in ***The Jockey Club*** (where in practice, in order to be involved in horse racing in GB and NI as a racecourse, trainer or owner, they had to sign a contract with the Jockey Club (but the Court of Appeal still found that they did so voluntarily)) the IPA, in order to be an RPB may have had no choice other than to enter into the MOU, but it still entered into it voluntarily. If by doing so, it then had to enter into IP Bonds, in order to perform what it had accepted to be one of its regulatory functions, or it did so as a core part of the bonding scheme, which it agreed, by the MOU, formed part of its regulatory functions, the underlying basis upon which the Issue1 Functions and Powers are carried out and

exercised by the IPA is nonetheless, the voluntary assumption by it of those functions and powers.

### **Statutory underpinning of the relevant function**

126. In *Datafin* the applicants were bidding to take over a company and complained to the Panel that a competing bidder had acted in concert with others in breach of the city code on takeovers and mergers (“the Code”). The Panel dismissed the complaint. The applicants applied for permission to bring a claim for judicial review of the Panel's decision. At first instance permission was refused on the grounds that the Panel decision was not amenable to Judicial Review. On appeal, the Court of Appeal granted leave to bring the claim, holding that the Judicial Review jurisdiction extended to anybody operating as an integral part of a system which performed public law duties, supported by public law sanctions and which had an obligation to act judicially, but whose source of power was not simply the consent of those over whom it exercised its power. The Panel operated as part of a governmental framework for regulating financial activity in the City of London and was supported by statutory powers and penalties and was under a duty, in exercising what amounted to public powers, to act judicially.

127. At page 834G, Sir John Donaldson MR said that the Panel was a truly remarkable body operating without any direct means of applying sanctions to enforce its decisions. However, in practice, if the Panel found that a party had breached the Code then, if the breach were by a member of the Stock Exchange, it would amount to misconduct by that member. In relation to the rules of their professional body and the admission of shares to the Official List on the Stock Exchange could also be withheld. The listing of securities by the Stock Exchange was a statutory function pursuant to the Stock Exchange (Listing) Regulations 1984. The DTI also, in explaining why the Licensed Dealers (Conduct of Business) Rules 1983 contained no provisions relating to take overs, said that it was much better to rely on the effectiveness and flexibility of the Code, noting that the Code could be enforced against security dealers and that the government expected those making bids for public companies to use the services of such a dealer, authorised under the Prevention of Fraud (Investments) Act 1958. Sir John Donaldson MR said that: *“The picture which emerges is clear. As an act of government it was decided that, in relation to takeovers, there should be a central self-regulatory body which will be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions”*.

128. Sir John Donaldson went on to say that it would have been no surprise if the Panel had been instituted and operated under statute because it operated wholly in the public domain throughout the UK. Its jurisdiction extended to all those who wish to make takeover bids or promote mergers whether or not they were members of bodies represented on the Panel. Its lack of statutory base was a complete anomaly based on “happenstance”. As the government saw the need for intervention to prevent fraud, it built on city institutions supplementing and reinforcing them as it saw necessary. Central government had incorporated the Panel into its regulatory network built under statute. In *R v Jockey Club*, at page 921, Sir Thomas Bingham MR said that the effect of the *Datafin* case “...was to extend judicial review to a body whose birth and constitution owed nothing to any exercise of government power but which had been woven into the fabric of public regulation in the field of takeovers and mergers.”

129. There are many differences between the functions and powers of the Panel in *Datafin* and the Issue 1 Functions and Powers, principally that the Panel acts in a quasi-judicial capacity in determining whether the Code has been breached or not, whereas the Issue 1 Functions and Powers are not judicial or quasi-judicial functions. Nonetheless, if the relevant

powers/functions of the IPA are (as Sir Thomas Bingham put it) “woven into the fabric of public regulation” this may be a factor in favour of finding that they are public powers/functions.

130. In my judgment the Issue 1 Functions and Powers are not “woven into the fabric of public regulation” whether before or after 1 October 2015, by virtue of those statutory and non-statutory instruments to which Mr Davies refers (see paragraph 27 above):

(a) the Court of Appeal found, in **Datafin** that the government had deliberately chosen to leave the Panel and the Code in place as the best means of regulating takeovers and mergers but had enacted primary and secondary legislation to supplement the regulation for which the Code and the Panel provided. The Panel’s functions and powers were thereby, as Sir Thomas Bingham MR put it in **The Jockey Club** case, “woven into the fabric of public regulation”.

(b) for the reasons set out in paragraph 115 (a) – (c) and (e) above. I have concluded that none of those statutory provisions that Mr Davies referred me to impose any function on the IPA, grant it any power or establish any bonding scheme of which the Issue 1 Functions and Powers form a core part of; and

(c) although I have found (see paragraph 115 (d)) above that the Issue 1 Functions and powers, at least arguably form a core part of what the IPA agreed by the MOU, to be part of its regulatory functions, the MOU is not primary or secondary legislation, but an agreement that the IPA entered into voluntarily.

#### **The absence of a direct statutory obligation suggests the function is not public**

131. In **Lib Dems v ITV**, ITV decided to schedule a debate between the leaders of the Conservative and the Labour Parties, shortly before the 2019 election. The Lib Dems sought Judicial Review of the decision of ITV not to invite the leader of the Lib Dems to the televised debate. The Lib Dems argued that the decision was “unfair and lacked impartiality” contrary to section 320 of the **Communications Act 2003** and the **Broadcasting Code** promulgated by Ofcom (pursuant to section 319) and was therefore unlawful. Section 319 established Ofcom to secure that the objectives of section 320 were met which included that: “*in matters of political controversy, that every television programme provided due impartiality*”. The Broadcasting Code explained what due impartiality meant, in relation to coverage of elections. The Divisional Court found that, whilst Ofcom was potentially amenable to Judicial Review, as its powers and duties derived from statute, it did not follow that those whom Ofcom regulated (including ITV) were. ITV’s obligation to comply with the Broadcasting Code was stipulated in the licence issued to it. Applying the House of Lords decision in **YL v Birmingham City Council 2007 UK HL 27** and in particular (on this point) the judgment of Lord Mance, the Divisional Court said that merely because an organisation is subject to regulation by the state did not mean that that organisation was amenable to Judicial Review. At paragraph 83 the Divisional Court said: “*The first point to note is that ITV is under no direct statutory obligations under the terms of the 2003 Act.... The way in which the 2003 Act works is to require Ofcom itself to set the standards for securing the defined statutory objectives*”.

132. The RPB’s (including the IPA) are regulated by the SOS and the RPB’s regulate their members, including in relation to IP Bonds, however, as I have already noted, there is no direct statutory obligation on RPBs to enter into IP Bonds as a contracting party, to hold the rights under IP Bonds or to assign or consider assigning them to SIPs, or anyone approved by the SOS.

### **But for the existence of the non-statutory body would the government itself inevitably have intervened to regulate the activity in question**

133. In **Datafin** the decision under challenge was a quasi-judicial decision that a bidder had not breached the Code. In his judgment (at **835**) Sir John Donaldson MR said that “... *No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain..... Its lack of direct statutory base is a complete anomaly, judged by the experience of other compatible markets worldwide*”. Just as not every function of a public body is necessarily a public function, also, even if the government would inevitably intervene to regulate activities of IPs, if the RPBs did not do so, it does not follow that the government would inevitably intervene to regulate every function of RPBs if they were not performing them. Here it may well be that, if the RPBs did not regulate their IP members, by rules and take disciplinary action against them, if it considered that they had breached its rules, then the government would inevitably step in to provide its own rules and means of enforcement. However here I am not concerned with what the IPA does to regulate its IP members, but those functions and responsibilities that the IPA has voluntarily taken on in relation to IP Bonds and I do not consider that those functions are of a nature that the government would inevitably regulate directly had they not been taken on by the RPBs.

134. I observe in any event that, in the case of **The Jockey Club** the Court of Appeal did not consider that the fact that, in other countries, horse racing was regulated by the government was significant to the question of whether the Jockey Club’s functions were public functions.

### **Voluntary submission**

135. **De Smith** considers this issue in the context of voluntary submission to the decision of a decision maker carrying out a quasi-judicial role. At **3-060 De Smith** says that voluntary submission should not be merged with the question of whether a contract entirely regulates the relationship between the parties, in respect of which it says that it has always been the case that private or domestic tribunals are performing no public law function where their authority “*is derived solely from the contract, that is the agreement of the parties concerned*”. In **R v Criminal Injuries Compensation Scheme ex parte Lain [1967] 2 QB 864**, Diplock LJ at 884 said that: “*The jurisdiction of the High Court... to supervise the exercise of their jurisdiction by inferior tribunals has not in the past been dependent upon the source of the tribunals authority to decide issues submitted to its determination, except where such authority is derived solely from agreement of parties to the determination. The latter case falls within the field of private contract and thus within the ordinary civil jurisdiction of the High Court...*”. Finally, in **Datafin**, Sir John Donaldson MR said, at page **838**: “*In all the reports it is possible to find enumerations of factors giving rise to the [Judicial Review] Jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction*”.

136. I am not concerned here with voluntary submission to the decision of a decision maker and I do not consider that this factor is relevant to the question of whether the Issue 1 Functions and Powers are public functions and powers.

### **Adequacy of other remedies**

137. In relation to this factor, **De Smith** gives guidance that a decision should not be determined to be amenable to Judicial Review because of concerns about the adequacy of alternative remedies (**3-062**). Whilst Mr Davies referred to six remedies being available to a

victim of a dishonest IP (see paragraph 41 above) including Judicial Review proceedings, and the Claimants answered those points (see paragraph 51 above) apparently on the basis that this was relevant to the question of whether the Issue 1 Functions and Powers are susceptible to Judicial Review, I am satisfied that it is not relevant and will discount this from my consideration of Issue 1.

**The fact that the service is for the public benefit does not mean that providing the service is a public function**

138. This factor is mentioned in the judgment of the Divisional Court in *Lib Dems v ITV* at 72 (taken from the House of Lords Judgment in *YL v Birmingham City Council*) and I have added it to the factors that appear to be relevant to the question of whether the Issue 1 Functions and Powers are public functions and powers. The IPA might be said to provide a service which is for the public benefit in regulating and disciplining its member IPs. I am however less convinced that the Issue 1 Functions and Powers could be said to be for the public benefit. The parties who benefit or potentially benefit from those functions and powers are the very narrow category of creditors of an insolvency estate, where loss is caused to the insolvency estate through the dishonesty of the IP office holder, cases of which are mercifully small in number. In any event, even if I am wrong about that, the guidance is in negative form, that is that, even if a service is for the public benefit this does not mean that the provision of the service is a public function.

**Functions of a public character are essentially functions which are governmental in nature**

139. In many of the cases that I have reviewed above, the decision which it was sought to challenge, by way of Judicial Review, was a quasi-judicial decision (see for example *Criminal Injuries Compensation Board ex parte Lain*, *The Jockey Club* and *Datafin*). It is easy to see, in such cases, that the quasi-judicial function is “governmental in nature”. It is after all a key function of government to provide the public with access to a system of courts and tribunals to determine disputes, rights and liabilities. I do not consider however that the Issue 1 Functions and Powers (entering into IP Bonds, holding the benefit of the rights under IP Bonds, entering into Tripartite Agreements and the power to assign Claim Rights) are “governmental in nature”. Government may decide to provide compensation for certain losses (as it did with the Criminal Injuries Compensation Scheme) or it may require a party to obtain insurance or security against the risk of loss arising from that party’s activities (as it does in relation to drivers of motor cars and by providing that an IP is not qualified to act unless they have in place security for the performance of their functions). It is however not, in my judgment, a normal function of government to: be a party to a contract of indemnity; to hold the benefit of such a contract or to assign or consider assigning the rights under such a contract or to enter into Tripartite Agreements (nor to more generally operate mechanisms to ensure that claims arising from fraud or dishonesty are made).

***Birkdale***

140. In paragraph 80 above I identified the authorities that I would take into account in deciding Issue 1. I have dealt with all of them (including *Ames* in paragraph 114 above) except for *Birkdale* which I will deal with briefly now. *Birkdale* is authority for the proposition that a public duty cannot be delegated without proper authority to do so. The Claimants say that if the Issue 1 Functions and Powers are public functions and powers, as the Defendants (and in particular Intact) assert they are, then they could not be delegated without statutory authority to do so. However, the IP Bonds allow the IPA to assign the Claim Rights to SIPs without the consent of the SOS or Intact. This, the Claimants say strongly indicates that none of the Issue 1 Functions and Powers are public functions and powers. Mr Davies

responded that the form of the IP Bonds has been approved by the SOS and the SOS therefore authorised the provision that allows the IPA to assign the Claim Rights to SIPs without SOS consent and any other assignment requires the SOS's specific consent.

141. I accept that the Claimants are right, that a public duty cannot be delegated without proper authority to do so. The question of whether a public function/power can legally be delegated without statutory or other authority would be highly relevant to a challenge to the IPA assigning rights under an IP Bond to a SIP, however the fact (if it is a fact) that the IPA has not been given the necessary authority to assign rights under the IP Bonds to SIPs, is not, in my judgment, a material indication that holding, assigning or considering assigning those rights is not a public function/power. The reason I come to this conclusion is that, if the function/power was imposed/provided by primary or secondary legislation it would clearly be a public function/power and the primary or secondary legislation which imposed the function or granted the power could be expected to provide an authority to delegate the function/power if that were what was intended. Here however I have found that there is no primary or secondary legislation which imposes/grants the Issue 1 Functions and Powers. Instead, I am left to decide whether the characteristics of the Issue 1 Functions and Powers are such that they should be regarded as public functions or powers, notwithstanding that the source of those functions and powers is not primary or secondary legislation. If I decide that the characteristics of the Issue 1 Functions and Powers are such that they are public functions and powers, I do not find it surprising that no one has considered it necessary to provide an authority (in whatever form it is required) for RPBs to assign rights under IP Bonds. It is not surprising because it would require someone, in an appropriate position, to recognise that the Issue 1 Functions and Powers are or may be public functions or powers and who was sufficiently concerned to ensure that appropriate authority to delegate the functions and powers was provided (whatever that may be). I do not consider that the Birkdale point is relevant here, if I am wrong, it is a factor in favour of finding that the Issue 1 Functions and Powers are not public functions and powers.

**Undue reliance on any one of the criteria should be avoided. The test of public function should be overriding and the criteria weighed and balanced in the context of each case.**

142. The approach which I propose to adopt, in light of this guidance is to divide the factors that I have identified above as relevant into three categories: (a) those that favour a finding that the Issue 1 Functions and Powers are public functions and powers; (b) those that favour a finding that the Issue 1 Functions and Powers are not public functions and powers; and (c) those that are neutral favouring neither conclusion. In doing so I will attribute the weight that I consider appropriate to the importance of each factor. Finally I will balance the factors for and against finding that the Issue 1 Functions and Powers are public functions and powers and decide whether or not they are. I will start with those factors which are neutral.

**Neutral points**

143. I have identified that the Issue 1 Functions and Powers are the functions and powers that I need to focus on. I have however also identified the MOU as a relevant, or potentially relevant, document in that, by the MOU, the IPA accepted that its regulatory functions included *“dealing with statutory bonding requirements for their IP members under S 390(3) and operating mechanisms to ensure that potential claims arising from the fraud or dishonesty of their members are appropriately identified and made”*. This is potentially relevant because it may be said that the IPA was compelled to enter into IP Bonds, as contracting party, in order to fulfil, what it accepted by the MOU was one of its regulatory functions, or that doing so was a core part of carrying out that regulatory function imposed by

the MOU (but see paragraph 146 below). These findings are neutral in that they simply identify what I need to focus on in considering the other factors.

144. I have found (see paragraphs 126 – 130 above) that there is no statutory underpinning of the Issue 1 Functions and Powers as there was of the Code and Panel in **Datafin**. This is a neutral point in that, if there were such statutory underpinning, it would be a point in favour of finding that the Issue 1 Functions and Powers are public functions and powers conversely, the absence of such statutory underpinning is not a point against such a finding.

145. I have found (see paragraph 138 above) that the Issue 1 Functions and Powers could not be regarded as being provided for the public benefit, but that, even if I am wrong about that, the guidance is in negative terms (that even if a service is for the public benefit, this does not mean that providing it is a public function). This is therefore either an irrelevant or a neutral factor.

#### In favour of finding they are not public functions and powers

146. I have found (see paragraph 125 above) that the Issue 1 Functions and Powers do form part of a voluntary agreement entered into by the IPA (either by it entering into the MOU or entering into the IP Bonds, or both). As to the weight to be attributed to this finding, in considering whether the Issue 1 Functions and Powers are public functions and powers, I consider that this point weighs heavily in favour (and in my view, potentially decisively so) of finding that the Issue 1 Functions and Powers are not public functions and powers. I come to this conclusion because many of the authorities to which I have been referred (or which are cited by **De Smith** to which I have been referred) treat this point as being of decisive importance:

(a) in **The Jockey Club**, Sir Thomas Bingham MR said, at page 597 that “*I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It seems likely to me that if, instead of Rules of Racing administered by the Jockey Club there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.*” Whilst **The Jockey Club** was a challenge to the decision of the Jockey Club to disqualify the owner’s filly from a race, a quasi-judicial decision, nothing in the judgment of Sir Thomas Bingham MR suggests that the result would have been any different if the challenged decision related to any other provision of the Rules of Racing;

(b) in asserting that voluntary submission to jurisdiction should not be merged with the question of whether a contract regulates the relationship between the parties, **DeSmith**, at paragraph 3-060 says that it has always been the case that private or domestic tribunals are performing no public law function where their authority is derived solely from agreement of the parties (see paragraph 135 above); and

(c) in **Datafin**, Sir John Donaldson MR at page 838, referred to a body whose sole source of power was consensual submission to its jurisdiction being excluded from the Judicial Review jurisdiction and in **R v Criminal Injuries Compensation Board ex parte Lain** Diplock LJ at page 884 made comments to similar effect (see paragraph 135

above). I see no reason to distinguish (Sir Thomas Bingham MR did not in *The Jockey Club*) between an agreement to submit to the quasi-judicial jurisdiction of a body and what I have found to be the voluntary agreement of the IPA to perform and exercise the Issue 1 Functions and Powers (either indirectly by agreeing to the MOU, or directly by entering into IP Bonds, or both).

147. I have found that there is no direct statutory obligation falling on the IPA to carry out or exercise the Issue 1 Functions and Powers and nor does the MOU impose such an obligation on the IPA. I attribute little additional weight to this factor, because I have already attributed significant and possibly decisive weight to my finding that the IPA voluntarily agreed to carry out and exercise the Issue 1 Functions and Powers. It would, I consider, be wrong to “double count” this source of function/power factor alongside the last.

148. I have found that, if the RPBs had not taken on the role of performing and exercising the Issue 1 Functions and Powers, the government would not inevitably have done so. If I had found otherwise, then this would be a strong point in favour of finding that the Issue 1 Functions and Powers are public functions and powers, because it would suggest that they are public in character. Whilst my finding is, I consider a point in favour of finding that the Issue 1 Functions and Powers are not public functions and powers, I do not consider that it is a strong point in favour.

149. I have found (see paragraph 139 above) that the Issue 1 Functions and Powers are not governmental in nature, this is a material factor against a finding that they are public functions and powers.

#### In favour of finding they are public functions and powers

150. There are no factors in favour of finding that the Issue 1 Functions and Powers are public functions and powers.

#### Balancing the factors

151. I have found that there are three factors which are neutral, four factors against and no factors in favour of finding that the Issue 1 Functions and Powers are public functions and powers. It follows that the balance comes down in favour of finding that they are not public functions and powers.

## **ISSUE 2 - HAVING REGARD TO THE ANSWER TO ISSUE 1 PROPERLY CONSTRUED: (A) DO THE BONDS CREATE A TRUST, BY WHICH THE IPA HOLD THE CLAIM RIGHTS ON TRUST FOR THE COMPANIES’ INSOLVENCY ESTATES; ALTERNATIVELY (B) IS IT OBVIOUS AND NECESSARY TO IMPLY TERMS WHICH HAVE THE EFFECT OF REQUIRING THE IPA TO HOLD THE CLAIM RIGHTS ON TRUST FOR THE COMPANIES’ INSOLVENCY ESTATES?**

### **THE PARTIES’ ARGUMENTS**

152. I will set out the arguments of the Claimants and the Defendants on Issue 2 in the following order:

- (a) the Claimants’ arguments in support of their contention that the Claim Rights are held on trust for the Companies’ Insolvency Estates;

- (b) the Defendants' reply to those arguments;
- (c) the Defendants' arguments in support of their contention that the Claim Rights are not held on trust for the Companies Insolvency Estates; and
- (b) the Claimants' reply to those arguments.

### **The Claimants' case**

153. The Claimants arguments were presented by Mr Wilson and Mr Ferro. The Claimants say that: (a) properly construed, the terms of the Bonds, considered against the factual matrix which existed when they were executed (2010-2012) create a trust, by which the IPA hold the Claim Rights on trust for the Companies' Insolvency Estates; alternatively (b) it is obvious and necessary to imply terms which have the effect of requiring the IPA to hold the Claim Rights on trust for the Companies' Insolvency Estates, in order to give business efficacy to the Bonds. The Claimants' primary case is that the trust arose on inception of the Bonds, alternatively that a trust arose when the Claim Rights accrued.

#### **The terms of the Bonds create an express trust**

The proper approach to construing the terms of the Bonds

154. In order for a trust to be created there must be certainty as to: (a) intention to create a trust; (b) the subject matter of the trust (the property held on trust); and (c) the object (beneficiary) of the trust. The basic principles for establishing if there is sufficient certainty are set out in ***Underhill & Hayton*** at Article **10.1 (1)** "*...It is not necessary for the settlor to be aware of the legal consequences of their actions so long as the settlor manifests an intention to create a state of affairs that can only be accommodated if it creates a trust. It is sufficient if the settlor indicates with reasonable certainty (a) an intention to create a trust forthwith, involving the trust property being intended to be kept separate from other property of the trustee and not being at his free disposal; (b) the trust property; (c) the persons (individual or corporate) intended to be beneficiaries; and (d) the purpose of the trust so that the trust is administratively workable and not capricious..*".

#### **Certainty of Intention**

155. The question is whether, objectively, the wording of the Bonds construed against the relevant factual matrix at the time the Bonds were entered into evidences an intention on the part of the settlor to create a trust. At Article **10.1(2) *Underhill & Hayton*** says that the court answers this question by: "*... Identifying the meaning of the relevant words (a) in the light of (i) the natural and ordinary meaning of those words (ii) the overall purpose of the document (iii) any other provision of the document (iv) the facts known and assumed by the party or parties at the time of execution of the document; (v) common sense; but (b) ignoring subjective evidence of any parties' intention. There is a well-established rule of construction that where an instrument is capable of two interpretations, one of which would give effect to the purpose of the person who drew it up, and the other of which would frustrate that purpose, one should prefer the former interpretation to the latter. Whether or not there is an intention to create a trust may crucially depend upon the context...*".

156. Here, the Claimants say, the IPA should be regarded as the settlor of a trust because it is the payee under the Bonds and holds the Claim Rights for the benefit of the Companies' Insolvency Estates. According to ***Underhill & Hayton 20<sup>th</sup> Edition 10.13*** certainty of intention is "*... established by reference to whatever materials- eg documents, words or conduct - are relied on as creating the trust - and so subsequent statements about the*

*settlor's intention are irrelevant. Usually only facts which were known or assumed at the date the trust instrument was created may be taken into account as part of the factual matrix against which a trust instrument must be interpreted. Therefore matters such as how the alleged trust assets were subsequently treated by the settlor do usually not form part of the matrix".*

157. No particular form of words is necessary to create a trust (***Snell's Equity (35<sup>th</sup> edn 2025 at 2-013***). Factors pointing towards an intention to create a trust include (***Chitty at 21-080-21-085***: (a) evidence that the promisee did not take the promise for their own benefit; (b) evidence that the intention to benefit the third party is irrevocable; (c) the absence (or irrelevance) of a right to vary the contract; and (d) the contract in favour of a third party is made in pursuance of some contractual or fiduciary obligation.

158. Here, says Mr Wilson:

- (a) the IPA was not taking the promise of Intact for its own benefit;
- (b) the intention was to benefit a third party (namely the Companies' Insolvency Estates suffering loss as a result of dishonesty of the Previous IPs);
- (c) the parties had no right to vary the Bonds; and
- (d) the IPA entered into the Bonds pursuant to a contractual or fiduciary obligation to act in the best interests of the insolvency estates to which the Bonds related.

159. Mr Wilson says that the following context or factual matrix is relevant to the question of whether, objectively viewed, the IPA intended to hold the Claim Rights on trust for the Companies' Insolvency Estates:

- (a) section 390 and 391 IA 1986 make it clear that the purpose of IP Bonds is to protect the insolvency estates from fraud and dishonesty by the RPBs member IPs. The IPA admits this, pleading that "*the purpose of the bonds issued under s390(3) is to protect the estate from losses caused by the fraud or dishonesty of the insolvency practitioner*";
- (b) the MOU, the SOS guidance published on 7 April 2014, the stated position of the ACCA and the IPR also make it clear that this is the purpose of IP Bonds; and
- (c) Intact pay any settlement monies, pursuant to a Tripartite Agreements, to SIPs for the benefit of the insolvency estates to which they are appointed which have suffered loss as a result of the fraud or dishonesty of the Previous IPs.

160. If the Bonds are not held on trust then they would not comply with the bonding regime because the IPA could, in those circumstances, decide for itself whether to pursue a bond claim or not and could retain the proceeds of any bond claim for itself. This would not provide security for the proper performance of the office holder's functions, as required by section 390 IA 1986. Further, on the IPA's case it does not pursue claims under bonds or transfer the proceeds of Claim Rights to insolvent estates, instead entering into Tripartite Agreements, if and when liability and quantum are agreed between the Surety and the SIPs. In this case no agreement has been reached between the SIPs and Intact despite many years of negotiations, frustrating the ability of the Claimants to recover anything from Intact for the benefit of the Companies' Insolvency Estates. The terms of the Bonds anticipate that SIPs will investigate and pursue bond claims. A trust is therefore a practical necessity in order to ensure that the true beneficiary of the Bonds (the Companies' Insolvency Estates) can enforce the Claim Rights which the IPA is unable to do.

161. The wording of the Bonds supports the conclusion that there was such an intention, because it makes it clear that the IPA is not entering into the Bonds for its own benefit, but for the benefit of the insolvency estates that the Previous IPs were appointed as office holder of:

(a) the recital to the Bonds provides that the IPA accepts the Bonds as security to be available for any company or estate that the Previous IP is appointed to act as IP of;

(b) Intact's liability is limited by reference to losses caused to the insolvency estate (including costs and expenses the estate will incur as a result of the fraud/dishonesty of the *Previous* IPs). There is no provision for the recovery of the IPA's costs and expenses from Intact;

(c) the Specific Penalty (which together with the General Penalty Sum acts as a limit on Intact's liability as Surety for each insolvency estate) is the estimated value of the insolvency estate as identified in the Cover Schedule submitted by the relevant *Previous* IP to Intact and the IPA each month, which specifies the insolvency estates over which the IP has been appointed that month and the estimated value of each of those insolvency estates' assets. The point of this is to identify the extent of the estate which the relevant IP Bond is to act as security for and that is clearly done because such estates are intended to receive compensation for losses caused to those estates by the fraud or dishonesty of their *Previous* IPs;

(d) by providing that the IPA may assign the Bonds to SIPs, without the consent of the SOS, the Bonds anticipate that the SIPs will investigate bond claims, pursue bond claims and receive the proceeds of bond claims, all on behalf of the insolvency estates to which they are appointed as SIPs; and

(e) provided that proof of fraud or dishonesty is found, the reasonable costs of the SIPs of proving the claim, taking steps to prevent fraud or dishonesty or recovering the proceeds of it, or compensation for it, can be recovered from Intact.

162. The IPA accepts, that it holds the Bonds for the benefit of insolvency estates notified by the *Previous* IPs to Intact and the IPA in monthly Cover Schedules, including, in this case, the Companies' Insolvency Estates. By its defence, the IPA also pleads that the purpose of IP Bonds is to protect the insolvency estates. It is irrelevant that the IPA now expresses the view that it does not hold the benefit of the Bonds on trust for the Companies' Insolvency Estates, this is merely subjective evidence of the IPA's current view and is irrelevant to the task of determining whether the Bonds create a trust. In any event, the IPA's own published guide, issued to its members in October 2016 says that it holds the proceeds of IP Bonds on trust.

163. The actions and practice of the IPA in relation to IP Bonds is only consistent with it holding the benefit of them on trust for the insolvency estates:

(a) it entered into the MOU with the SOS which provides that it will take such steps as are necessary to ensure that an investigation is carried out and where appropriate it will arrange for an authorised practitioner, by assignment, to process any claim;

(b) the IPA pleads, in its defence, that it holds the Bonds to protect the insolvency estates and does not investigate or adjudicate bond claims or hold or distribute bond funds. It has no resources or powers that would enable it to do so. Its investigations are limited to investigating and taking disciplinary proceedings against those of its IP members who breach its rules; and

(c) clause 1(c) of the Bonds anticipates that it is SIPs who will investigate and prove bond claims because it provides that the limit on Intact's liability is increased by the SIP's costs for proving bond claims. There is no provision for the IPA or anyone else's costs to increase the limit on Intact's liability under the Bonds.

164. Naming the IPA as party to the Bonds is done as a matter of administrative convenience because there was no other suitable party who could be named when the Bonds were entered into (the *Previous* IPs could not be named because it is their fraud and dishonesty which the Bonds provide security for the insolvency estates against and the SIPs could not be identified at that time, only the IPA was identifiable and available to act as trustee).

Certainty of subject matter

165. The subject matter of the relevant trusts are the Claim Rights against Intact.

Certainty of object

166. The Claimants have to show that it is possible to ascertain the beneficiaries (that is the objects) of the trust but the beneficiaries may be a class which changes over time and the court will lean against holding a trust to be void for uncertainty of objects (***Snell's Equity* at 22-023**). A trust may also fail for administrative unworkability, for example where the meaning of the words is clear but the definition of beneficiaries is so hopelessly wide as not to form anything like a workable class (***McPhail v Doulton [1971] AC 424*** at 457 per Lord Wilberforce).

167. If a contract is relied upon to create an express trust, then uncertainty of object will not be an obstacle to the creation of a valid trust where certainty of the object can be provided by construing the contract (***In the Matter of Lehman Brothers International (Europe) (in administration) [2012] EWHC 2997 (Ch)***) at 193 – 201 per Briggs J (as he then was).

168. Here there is certainty of objects both on inception of the Bonds and on the Claim Rights accruing. On inception, the insolvency estates for which the Bonds act as security were identified in the monthly Cover Schedules and on the Claim Rights accruing the rights of the Companies' Insolvency Estates crystallised.

Implied terms

169. The Claimants say that it is unnecessary to resort to implying terms because, when properly construed, the Bonds, within the statutory context, show that the IPA cannot be beneficially entitled to the Claim Rights and they hold them on trust for the Companies' Insolvency Estates. If however implied terms are necessary for the creation of a trust, then, for reasons of necessity, business efficacy and obviousness, it should be implied that, in the event that a claim was made under an IP Bond:

(a) the IPA would segregate any sum paid to it from the IPA's general funds or alternatively would not draw on those funds;

(b) the IPA would remit any sum received to the person or persons suffering the loss which the payment was made in respect of; and

(c) the IPA would not use the sum received by it for any reason other than satisfying the claims in respect of which the payment was made.

170. In ***Yoo Design Services Ltd v Iliv Realty Pte Ltd [2021] EWCA Civ 560*** [51] the Court of Appeal set out the principles to be applied in deciding whether terms should be implied:

*“(i) a term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;*

*(ii) the business efficacy and obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;*

*(iii) the business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;*

*(iv) the obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;*

*(v) a term will not be implied if it is inconsistent with an express term of the contract;*

*(vi) the implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;*

*(vii) the question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;*

*(viii) the equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the party would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. This is a stringent test.”*

171. Intact, in its defence, simply denies that there are any implied terms without saying why. The IPA denies the implied terms because, it says, none of the contingencies set out in paragraph 169 above ever arise in practice, the IPA never receives any bond monies and so never comes under an obligation to deal with them in any particular way. This does not, says Mr Wilson, address what should happen, as a matter of law, if the proceeds were paid to the IPA as the wording of the Bonds envisages or what would happen if there was deadlock between the SIPs and the Surety as has happened here. The IPA's own published guidance states that the proceeds are held on trust for the insolvency estate. It should be implied that the IPA would, if it did receive the proceeds of the Bonds, keep them separate from its own property and such a provision is “a powerful indicator of the presence or absence of a relationship of trustee and beneficiary” (***In the matter of Lehman Brothers (Europe)***).

### **Defendants' response to Claimants' case**

172. Mr Atkins took the lead role in responding to the Claimants' case on this issue, but Mr Davies for Intact and Mr Williams for Mr Rusling supplemented his submissions with points of their own.

## Proper approach to interpreting the Bonds/ Certainty of intention

173. Mr Atkins and Mr Davies put forward no authorities of their own, which they said set out the proper approach to interpreting documents alleged to be trust documents or the principles to be applied in determining whether there was sufficient certainty of intention to establish a trust. The only respects in which they disputed the principles set out in paragraphs 155 - 157 above are that Mr Atkins submitted that I could and should take into account the conduct of the parties to the Bonds after they were executed, in construing them and Mr Davies said that, because the SOS approved the form of IP Bonds, I should determine not only whether the IPA intended to create a trust, but also whether the SOS intended to create one. For his part, Williams referred to the decision of Deemster Murray Rosen KC, sitting in the Isle of Man High Court in ***Cruz City 1 Mauritius Holdings v Unitech Ltd (unrep., 21 August 2023)*** ("***Cruz City***"). Mr Williams referred to paragraph 65 of ***Cruz City***, where the Deemster described the three requirements of certainty of intention, subject and object as "important" when inferring an express trust. Mr Williams submitted that the Deemster was thereby emphasising that, in a situation where, as in the instant case, a claimant has to establish those three requirements by inference from the surrounding facts, the court's task of drawing such an inference requires all the greater care because the enquiry is based on inference, rather than from the written terms of an express declaration of trust. Mr Williams also relied on paragraph 64 of ***Cruz City***, where the Deemster stated that "[a] bare trustee... is a passive repository for the beneficial owner, having no duties other than a duty to transfer the property to the beneficial owner or at their direction...". Mr Williams submitted that the Claimants therefore had to satisfy me that the Claim Rights are held by the IPA on a bare trust for the Companies, because only then would the Claim Rights be held to the order or direction of the Claimants on behalf of the Companies, so that an order could be made under s.234 of IA 1986 for the transfer of them to the Claimants.

174. Mr Atkins said that:

(a) the Claimants have to show that the facts and circumstances are only consistent with there being a bare trust. The Claimants have not, for example, pleaded that, the Companies' Insolvency Estates, are sole beneficiaries of the alleged trust acting by the Claimants and that they would be entitled to call for the Claim Rights to be transferred to them by the IPA. If the alleged trust were bare trust, then they would be entitled to do this but the wording of clause 8 of the Bonds is inconsistent with the Claimants having any such a right;

(b) the Claimants rely on an article published by the IPA in October 2016, which states that the IPA holds any proceeds of IP Bonds on trust for the benefit of the insolvency estate that suffers the losses. The publication does not however mean that the proceeds are held on trust in any legal sense, just that the IPA holds IP Bonds for the benefit of the relevant insolvency estate which suffers the loss;

(c) contrary to what ***Underhill & Hayton*** say at paragraph **10.1 (2)** and **10.13** (see paragraphs 155 and 156 above) conduct of the parties after the Bonds were entered into can be taken into account;

(d) the IPA says that it did not intend to create a trust; and

(e) the IPA (and RPB's more generally) are subject to legislation and regulation which changes from time to time. The IPA would be obliged to comply with such regulations even if they effected its actions in relation to the Bonds, which is inconsistent with the Claim Rights being held on trust, by the IPA.

175. Mr Davies made three points which are relevant to Issue 2 and which, as he made them orally, I will treat as responsive to the Claimants' case on Issue 2:

(a) the IPR, at paragraph 4 (b) refers to trusts and if it had been the intention of the draughtsman of the IPR, that IP Bonds which are dealt with in the IPR, should be held on trust by RPBs for the insolvency estates which suffered the loss, then the draughtsman could be expected to require the RPBs to hold the IP Bonds (or the Claim Rights under them) on trust for the insolvency estates that suffered the loss which was covered by the relevant IP Bond or IP Bonds but the IPR does not do so;

(b) the SOS approved the form of the IP Bonds and so the Claimants have to show, not only that it was the intention of the IPA to constitute itself as trustee of the Claim Rights but also that this was the intention of the SOS; and

(c) whilst there is a separate corporate insolvency estate, there is no separate insolvency estate in a bankruptcy. A bankrupt's insolvency estate vests in their Trustee in Bankruptcy and the bankrupt retains a right to claim any surplus realised in their bankruptcy. So the Claimants' argument that Claim Rights are held on trust for the insolvency estates that have suffered the loss could not apply to a Bankruptcy estate which suffers a loss covered by an IP Bond.

176. Mr Williams contended that the Claimants have not shown that there was any intention to create a trust. He emphasised three points that had already been made by Mr Atkins: (a) that clause 8 of the Bonds gave the IPA the right to assign Claim Rights without the consent of the Companies; (b) it was a key feature of a bare trust that the beneficiary could assume control of the trust (see **Cruz City**), but that was inconsistent with the terms of the Bonds and what happens in practice; and (c) the IPA would not agree to bind itself into a trust arrangement, knowing that it was subject to significant regulatory control, which may change, over time.

#### Certainty of objects

177. Mr Atkins accepted in oral submissions that there is sufficient certainty of objects, in the sense that it is accepted that the IPA hold the Bonds for the benefit of the Companies' Insolvency Estates. Neither Mr Davies, nor Mr Williams demurred from that concession.

#### Certainty of subject matter

178. None of the Defendants' suggested that there was uncertainty about the subject matter of the alleged trust, namely the Claim Rights.

#### Implied terms

179. Mr Atkins made no points in oral response to the Claimants' case on implying terms.

### **The Defendants' case**

#### Certainty of Intention

180. As I have already noted (see paragraphs 75 and 78 above) there is a difference between the IPA's position and Intact's position as to what functions the IPA actually performs in relation to IP Bonds. I have found (see paragraph 79 above) that the IPA does not investigate supervise or manage claims made against IP Bonds or collect or distribute funds realised from claims against IP Bonds. It is instead the practice of the IPA (see paragraph 78 above) not to assign any rights in IP Bonds to a SIP, so that they can pursue a bond claim on behalf of the insolvency estate to which they have been appointed, but instead to enter into a Tripartite Agreement with the Surety and the SIP by which the IPA

directs the Surety to pay to the SIP the sum of money which has been agreed between the SIP and the Surety.

181. When Mr Atkins presented arguments on behalf of all three defendants in relation to Issue 2, he did so on the basis of the IPA's case as to the functions it actually performs. Neither Mr Davies, nor Mr Williams added anything to the case presented by Mr Atkins on Issue 2 (other than as highlighted by me in paragraph 175 and 176 above).

182. Mr Atkins said that the key question was whether the IPA holds the Claim Rights, for the benefit of the insolvency estate (which it accepts it does) as private trustee or in exercise of public functions/powers. The IPA, he said, is a public body whose function is to maintain the professional standards of its members and it holds the Bonds (and IP Bonds in general) in that capacity.

183. The Claimants have to show that, even if there is a trust of the Claim Rights, it is a bare trust under which they control and can call for the Claim Rights, held by the IPA as trustee to be transferred to them. They have to show this because, only in those circumstances, could the Claim Rights be regarded as property "to which the company appears to be entitled" for the purposes of section 234 of the IA 1986, on which the Claimants seek to rely in seeking an order that the IPA transfer the Claim Rights to them. The Claimants cannot show that it is a bare trust, even if it is a trust because:

(a) although this does not happen in practice, it is conceivable that the IPA could bring its own claim against one of its members or conduct its own investigation into a member's conduct and call upon a bond to provide a fund from which the estate concerned could be compensated. The IPA could not do this if the Claim Rights are held on bare trust for the estate, so that those rights must be held to the order of the SIP who is the office holder of that estate. The IPA has more control over the Bonds than that;

(b) clause 8 of the Bonds provides that the IPA can assign the Claim Rights to an SIP and to another party, with the consent of the SOS. This is inconsistent with a bare trust in two ways:

(i) giving the IPA the power to assign the Claim Rights under the Bonds, rather than requiring it to do so, is inconsistent with the IPA holding the Claim Rights on a bare trust, giving control of them to the SIP office holder of the relevant estate. There is no recognition that the SIP has an immediate right to call for an assignment of the Claim Rights;

(ii) providing that the IPA may assign the Claim Rights to someone other than the SIP would make no sense if it was a bare trust, because, if it was a bare trust, then it is the SIP that would need to consent to an assignment to someone else. This is more consistent with the IPA performing public functions under the supervision of the SOS (who has to be satisfied that assignment is appropriate and of the identity of any assignee) than the existence of a bare trust in favour of the insolvency estate;

(c) the IPA's practice for many years has been not to assign the benefit of IP Bonds to SIPs, so that they can pursue a claim against the Surety, but instead to enter into Tripartite Agreements, as the party beneficially entitled to the benefit of the IP Bonds, agreeing that the Surety can pay the SIP instead of it. The Tripartite Agreements contain a recital that the IPA is the beneficiary under the relevant IP Bond and it has agreed that the Surety should pay the SIP in their capacity as office holder of the relevant insolvency estate. This is again inconsistent with the IPA holding the Bonds

on bare trust for the Companies' Insolvency Estates. An example of a Tripartite Agreement, entered into by the IPA in July 2019 is produced which identifies the IPA as the beneficiary of the relevant IP Bond; and

(d) there is nothing to suggest that the Companies have an immediate right to control the Claim Rights. If any trust were a bare trust, then the Companies (acting by their liquidators) could call for assignment of the Claim Rights to them, but the terms of the Bonds make it clear that they cannot do this.

#### Certainty of Objects

184. In his skeleton argument, Mr Atkins said that it was difficult to discern from the Claimants' Points of Claim who they said was the object (beneficiary) of the alleged trust. Referring to the beneficiaries variously as: (a) those suffering the loss and incurring the costs falling within the scope of Clause 1 of the Bonds; (b) the Companies; and (c) the Companies' estates. However, as already indicated, in oral reply (see paragraph 177), Mr Atkins accepted that the objects (beneficiaries) of the alleged trusts were sufficiently certain.

#### Certainty of subject matter

185. Mr Atkins made no submissions in relation to certainty of subject matter.

### **Claimants' response to Defendants' case**

186. Mr Wilson said that:

(a) the IPA is the Settlor because it is the payee under the Bonds and holds the Claim Rights and so only the IPA can hold the Claim Rights on trust; and

(b) the functions of an RPB under IP Bonds (and of the IPA under the Bonds) is: to hold the Bonds; notify the Surety (Intact) of a claim; and assign the Claim Rights to an SIP so that they can investigate and prove claims.

## **DECISION ON ISSUE 2**

### **Do the Bonds create an express trust?**

#### Summary of relevant legal principles

187. For present purposes, I am satisfied that, in order to establish that there is an express trust, the Claimants have to prove that the settlor manifested an intention to create a state of affairs which amounts in law to a trust (whether or not the settlor believed they were creating or intended to create a trust) indicating with sufficient certainty:

(a) "*an intention to create a trust forthwith, involving the trust property being intended to be kept separate from other property of the trustee and not being at his free disposal*";

(b) the identity of the beneficiaries of the trust;

(c) the identity of the property which is subject to the trust; and

(d) that the trust is not administratively unworkable or capricious (**Underhill & Hayton 20<sup>th</sup> Edition 10.1 (1)**).

188. I am satisfied that the proper approach to determining the meaning of the words of the Bonds is to construe their meaning according to:

- (a) their natural and ordinary meaning;
- (b) the overall purpose of the Bonds;
- (c) the other provisions of the Bonds;
- (d) the facts known and assumed by the parties at the time;
- (e) common sense; but
- (f) ignoring subjective evidence of the parties' intentions (**Underhill & Hayton 20<sup>th</sup> Edition 10.1 (2)**).

189. The following more specific principles apply to determining whether there is the necessary intention to create a trust:

(a) *certainty of intention is "... established by reference to whatever materials - eg documents, words or conduct - are relied on as creating the trust - and so subsequent statements about the settlor's intention are irrelevant. Usually only facts which were known or assumed at the date the trust instrument was created may be taken into account as part of the factual matrix against which a trust instrument must be interpreted. Therefore matters such as how the alleged trust assets were subsequently treated by the settlor do usually not form part of the matrix"* (**Underhill & Hayton 20<sup>th</sup> Edition 10.13**);

(b) no particular form of words is necessary to create a trust (**Snell's Equity (35<sup>th</sup> edn 2025 at 2-013**); and

(c) Factors pointing towards an intention to create a trust include:

- (i) evidence that the promisee did not take the promise for their own benefit;
- (ii) evidence that the intention to benefit the third party is irrevocable;
- (iii) the absence (or irrelevance) of a right to vary the contract; and
- (iv) the contract in favour of a third party is made in pursuance of some contractual or fiduciary obligation (**Chitty 21-080 – 21-085**).

#### Reasons for rejecting the Defendants challenges of the above principles

190. None of the Defendants' counsel challenged the above principles which are in Mr Wilson/Mr Ferro's skeleton argument save that:

(a) Mr Atkins asserted that I can take into account the conduct of the parties after the Bonds were entered into, in construing them; and

(b) Mr Davies asserted that, because the SOS approved the form of the IP Bonds (the Bonds being in that approved form) the Claimants have to prove that it was the intention not only of the IPA to create a trust but the intention of the SOS as well.

191. I do not accept that I should take into account the conduct of the parties after the Bonds were entered into, for the following reasons:

(a) **Underhill & Hayton's** view (**10.1(2)**) is that, in interpreting a trust document, only facts known and assumed by the parties when the relevant document is executed may be taken into account and subjective evidence of intention should be ignored (see

paragraph 155 above). It would be inconsistent with those principles (none of which were challenged by Mr Atkins) for conduct of the parties after the Bonds were executed to be taken into account, when only facts known or assumed at the date of the relevant documents were entered into (here the Bonds, between 2010 and 2012) are to be taken into account;

(b) more specifically it is **Underhill & Hayton's** view at **10.13** that certainty of intention is "... established by reference to whatever materials - eg documents, words or conduct - are relied on as creating the trust and so subsequent statements about the settlor's intention are irrelevant. Usually only facts which were known or assumed at the date the trust instrument was created may be taken into account as part of the factual matrix against which a trust instrument must be interpreted. Therefore matters such as how the alleged trust assets were subsequently treated by the settlor do usually not form part of the matrix". Mr Atkins submission therefore conflicts more directly with **Underhill & Hayton's** view expressed at Article **10.13**, that in establishing certainty of intention, conduct (and other matters) relied on as creating the trust should be focussed upon and matters such as how the settlor later treats the trust assets (ie the settlor's subsequent conduct) are usually to be disregarded;

(c) for reasons I will explain shortly, in dealing with Mr Davies' point it is only the intention of the settlor (the IPA) which is relevant to the issue of certainty of intention, not that of any other party to the Bonds (the parties other than the IPA being Intact and the Previous IPs); and

(d) Mr Atkins did not refer to any authority for his proposition that conduct of the parties subsequent to the execution of the Bonds can be taken into account.

192. I do not accept that it is appropriate to ask, even on an objective basis, whether the SOS intended there to be a trust of the Claim Rights, as Mr Davies suggests, for the following reasons:

(a) **Underhill & Hayton**, at article **10.1 (1)** (see paragraph 155 above) clearly refers to the settlor's intention as being the relevant intention;

(b) whilst the SOS may have approved the form of the IP Bonds, the SOS is not a party to the Bonds and does not hold the Claim Rights which are the subject matter of the trust asserted by the Claimants. It is difficult to see therefore how any intention of the SOS could be relevant to the question of whether the IPA holds the Claim Rights on trust for the Companies' Insolvency Estates;

(c) the SOS can only have had an intention (if any) as to whether the Claim Rights should be held on trust by RPBs, when approving the form of the IP Bonds which appears to have been a number of years before the Bonds were entered into. There are at least two problems with this: (i) the factual matrix at that point would be different to that pertaining when the Bonds were entered into (when the IPA's intention as settlor is to be objectively determined); and (ii) I have no evidence about what the relevant factual matrix at whatever point in time that was, was;

(d) Mr Davies did not draw my attention to any authority to support his proposition which as already noted runs contrary to the view of **Underhill & Hayton**; and

(e) it is not at all clear how considering the intention of the SOS, objectively, which, in my judgment would have to be considered when the SOS approved the form of the IP Bonds, would add to my analysis of whether the Claimants have proved the necessary certainty of intention and beyond asserting that it was necessary to consider the

intention of the SOS, Mr Davies did not indicate how doing so would change my analysis.

### **My approach to determining whether the Bonds create an express trust**

193. I will take the following approach to determining this issue:

- (a) I will set out the relevant provisions of the Bonds to be construed;
- (b) I will determine what relevant facts should be taken into account as part of the factual matrix, known and assumed by the IPA when the Bonds were entered into (2010 – 2012);
- (c) I will apply the approach set out in paragraph 188 above in order to construe the meaning of the Bonds, so far as necessary, to answer the question of whether the Claimants have proved that there is sufficient certainty, objectively viewed, that the IPA intended to hold the Claim Rights on trust for the Companies' Insolvency Estates;
- (d) as Mr Atkins has conceded that there is sufficient certainty of the objects of the alleged trust (the Companies' Insolvency Estates) I will deal with this issue relatively briefly; and
- (e) I will determine whether there is sufficient certainty of the subject matter of the alleged trust (namely, on the Claimants' case, the Claim Rights).

### **The Relevant terms of the bonds**

194. The relevant terms of the Bonds are as follows:

- the recitals include the following:

(i) *"Under the .... Insolvency Act 1986...."*

(ii) *"Whereas the [IPA] without prejudice to its power at any time to require further or better security.... has consented to accept this Bond as security ... to be available generally for any company or estate in respect of which the [Previous IP] may be appointed to act as an Insolvency Practitioner under the (IA 1986] and the Rules or Regulations made thereunder" and*

(iii) *"... [Intact] at the request of the [Previous IP] has agreed to become Surety for the [Previous IP]"*

- *"By this Bond executed as a deed the [Previous IP] and [Intact] hereby jointly and severally respectively undertake to the [IPA] to pay to the [IPA] an amount calculated in accordance with Provisions 1 and 2 below but not exceeding the Penalty Sum...";*

- *"1. [Intact's] liability under this Bond shall not exceed the aggregate of:*

*(a) a sum equivalent to the losses caused by fraud or dishonesty together with interest ....;*

*(b) reasonable and necessary additional cost to which the estate is liable consequent upon the appointment of a [SIP] to act in relation to any matter in place of the [Previous IP] due to fraud or dishonesty;*

*(c) (provided that proof of fraud or dishonesty is found) the reasonable costs in providing proof of claim, taking steps to prevent fraud or dishonesty, or recover the proceeds thereof or compensation in relation thereto and unavoidable parallel*

costs, incurred by the [SIP] with the written consent of [Intact] such consent not to be unreasonably withheld.”

- “2. ... (b) In respect of each calendar month the [Previous IP] shall supply to [Intact] by the 15th day of the following month, a Cover Schedule... in the form required by [Intact] containing particulars of:

(i) any Matter in respect of which during that calendar month he was appointed to act as an insolvency practitioner....

(ii) any Matter in respect of which during that calendar month he forms the opinion that the amount of the existing Specific Penalty Sum is inadequate and must be increased in accordance with Regulation 12 (1) and Schedule 2, Part, paragraph 3 (2) (d) of the [IPR] .....

- (d) [Intact’s] Liability in respect of any Matter shall not exceed the total of the Specific Penalty Sum notified in the Cover Schedule .... in relation to that Matter and the General Penalty Sum...”

- “3. The [IPA] shall notify [Intact] immediately of any claim or any Matter which may give rise to a claim here under such notice to be addressed to [Intact] in writing...”

- 8. “The rights under this Bond are assignable, in whole or in part, by the [IPA] to any or all persons appointed to act as an insolvency practitioner instead of the [Previous IP] and to any other person with the consent of the Secretary of State for Trade and Industry...”

195. The relevant definitions in the Bonds are as follows:

- “Cover Schedule - means the certification cover schedule... submitted by [the Previous IP] to [Intact] and the [IPA] listing the current Matters and the Specific Penalties required in relation thereto.”;

- “Fraud or dishonesty - means the fraud or dishonesty of the [Previous IP] when acting alone or in conclusion with one or more persons, or the fraud or dishonesty of any person or persons committed with the connivance of the [Previous IP]”;

- “General Penalty Sum – means the sum of £250,000 secured by this Bond pursuant to Regulation 12 (1) and Schedule 2, Part 1, paragraph 1 of the [IPR]”;

- “Matter - means the insolvency proceedings under the [IA 1986] in respect of which the [Previous IP] is appointed to act as an Insolvency Practitioner in relation to any person or company”;

- “Specific Penalty Sum - means the sum stated in the Cover Schedule ... in relation to a Matter secured by this Bond pursuant to Regulation 12 (1) and Schedule 2, Part 1, paragraph 1 and where applicable Schedule 2, Part 2, paragraph 2 (d) of the [IPR] ....”

- “Unavoidable parallel costs – means the costs necessarily incurred or charged by the [SIP] in administering the Matter and which duplicate costs previously incurred or charged by the [Previous IP], but not including those costs which are otherwise incurred or charged by the [SIP] in concluding the Matter.”

## **The Relevant factual matrix**

### **Claimants’ contentions**

196. I have set out at paragraph 159 above the facts that the Claimants say form part of the factual matrix against which the Bonds should be construed and in paragraph 163 above what the Claimants say is the practice of the IPA in relation to IP Bonds, which it also says should be taken into account in construing the Bonds.

#### Defendants' contentions

197. Mr Atkins said that I could and should take into account the conduct of the parties in relation to the Bonds, after they were executed, but I have already rejected that submission for the reasons set out in paragraph 191 above. Mr Atkins also refers to the evidence of the IPA that it did not intend to create a trust and places some reliance on that. This is not a relevant matter because my task is to construe the Bonds objectively and any parties' subjective understanding is inadmissible; (see paragraph 188 (f) above). I note, at this point, that Mr Wilson said, as part of the Claimants' alternate case (that terms should be implied into the Bonds) that the IPA's own published literature says that it holds the proceeds of IP Bonds on trust for the relevant insolvency estate (see paragraph 171 above). Whilst Mr Wilson did not say that this should be taken into account as part of the relevant factual matrix for construing the Bonds, for the avoidance of doubt, I will not take it into account because at best it is simply evidence of a subjective understanding of the IPA which is contrary to its case and inadmissible evidence for the purposes of construing the Bonds, for the same reason as the subjective understanding of the IPA expressed in its witness statements, that it does not hold the Claim Rights on trust, is inadmissible. Further it appears that the IPA published its literature in 2016, after the Bonds were executed and on that ground also it should be disregarded.

198. Mr Atkins also refers to:

(a) the IPA (and RPBs more generally) being subject to legislation and regulation which changes from time to time. He says that the IPA would be obliged to comply with such changes even if they affected its actions in relation to the Bonds, which is inconsistent with the Claim Rights being held on trust, by the IPA; and

(b) the IPA's practice of not to assigning Claim Rights, under IP Bonds, to SIPs, but instead entering into Tripartite Agreements, as the party beneficially entitled to the Claim Rights, and agreeing that the Surety can pay the SIP instead of it is also, Mr Atkins says, inconsistent with the IPA holding the Bonds on bare trust for the Companies' Insolvency Estates.

199. I have rejected Mr Davies's submission that the Claimant must show that it was the intention of the SOS, as well as the IPA, that the IPA should be trustee of the Claim Rights, for the reasons set out in paragraph 192 above. Mr Davies said that two other matters should be taken into account, which he said strongly indicate that the IPA did not intend to hold Claim Rights on trust for the Companies' Insolvency Estates:

(a) the IPR, at paragraph 4 (b) refers to trusts, in a different context and if it had been the intention of the draughtsman of the IPR, that IP Bonds, which are dealt with in the IPR, should be held on trust by RPBs for the insolvency estates which suffered the loss, then the draughtsman could be expected to say so; and

(b) whilst there is a separate corporate insolvency estate, there is no separate insolvency estate in a bankruptcy, so Claim Rights could not be held on trust for a Bankruptcy estate.

#### What is the relevant factual matrix?

200. I will set out first those facts and matters promulgated by counsel as relevant parts of the factual matrix which I accept should be taken into account and will explain briefly why. I will then say which facts and matters I do not accept should be taken into account and will explain why.

201. Those facts and matters which I accept should be taken into account (and my reasons for this) are:

(a) the provisions of section 390 and 391 IA 1986 and Schedule 2 of the IPR, both in force in 2010 - 2012 and the provisions of the IPR insofar as they relate to IP Bonds and were in force in 2010 - 2012 are relevant parts of the factual matrix. The Bonds themselves make reference to both the IA 1986 and the IPR (see paragraphs 194-195 above) and it is common ground and I agree, that those provisions form part of the statutory framework within which the Bonds were executed;

(b) the MOU is relevant, so far as it relates to IP Bonds. On the evidence before me an MOU substantially in the form included in the bundle was in force when the Bonds were entered into. What the IPA, as one of the PRB's who entered into the MOU with the SOS, agreed to in the MOU may be relevant to its intention, in entering into the Bonds between 2010 and 2012;

(c) the IPA's practice as to how it dealt with IP Bond claims, immediately before the Bonds were entered into may be relevant to the question of whether the IPA intended to hold the Claim Rights on trust for insolvency estates, when entering into the Bonds. Both Mr. Wilson and Mr Atkins refer to the IPA's practice (see paragraphs 159 (c) and 198 (b) above); and

(d) the fact that the IPA is subject to legislation and regulations which may change over time is potentially relevant and this was the position when the Bonds were entered into.

202. I am not satisfied (for the reasons given) that the following facts and matters form part of the relevant factual matrix:

(a) the SOS guidance published on 7 April 2014, because this guidance was published after the Bonds were entered into;

(b) the stated position of the ACCA, because the subjective view of the IPA is not relevant (see paragraph 197 above) and the subjective view of the ACCA is even less so; and

(c) the fact that a company in liquidation (or other insolvency procedure) continues to exist and retains title to its property (subject to the control of its officeholders) but a Bankrupt's estate is vested in their Trustee in Bankruptcy is not relevant because: (a) I see no reason why the IPA could hold the benefit of Claim Rights on trust for a companies' insolvency estate, but not for the benefit of a Bankrupt's estate, vested in their Trustee in Bankruptcy; (b) Mr Davies did not suggest and produced no authority to support the proposition that an asset or an asset such as the Claim Rights could not be held on trust for a Bankrupt's estate (bearing in mind that an IP Bond does not extend to cover a Bankruptcy estate until after it vests in their Trustee in Bankruptcy); (c) the IPA say that their practice is to enter into Tripartite Agreements with the Surety and SIPs by which it is agreed that the Surety should pay a sum of money (agreed between the Surety and the SIP to the SIP) and they did not suggest that there was any difficulty in entering into such a Tripartite Agreement for a Bankrupt's estate; and (d) even if I am wrong and there is some impediment to the IPA holding the Claim Rights on trust for a Bankruptcy Estate, none of the Companies' Insolvency Estates

are Bankruptcy Estates, so the IPA may still have intended to bring about a state of affairs which in law amounts to a trust of the Claim Rights, all of which relate to the insolvency estates of limited companies.

Is their sufficient certainty of intention?

203. Mr Wilson for the Claimants contends that properly construed, within their relevant factual matrix, the objective meaning of the Bonds is as follows:

- (a) the IPA did not intend to take the benefit of the promises made by Intact in the Bonds for its own benefit;
- (b) the IPA's intention was to hold the Bonds for the benefit of any insolvency estates covered by the Bonds, which suffered loss as a result of the dishonesty of their previous office holders;
- (c) there is no right for any party to vary the terms of the Bonds; and
- (d) the IPA entered into the Bonds pursuant to a contractual or fiduciary obligation.

204. In making those assertions, Mr. Wilson referred to:

- (a) the wording of the Bonds (see paragraph 161 above);
- (b) the factual matrix that he said was relevant to the construction of the Bonds (see paragraphs 159, 160 and 163 above);
- (c) the purpose of the Bonds (see paragraph 160 above); and
- (d) the IPA's acceptance (see paragraph 162 above) that it holds the Bonds for the benefit of the insolvency estates notified by the Previous IPs to Intact/the IPA, in monthly Cover Schedules.

205. Mr Atkins says that:

- (a) the IPA accepts that it holds the Claim Rights for the benefit of the Company's Insolvency Estates, but it does not hold them as a private trustee, but as part of its functions as a public body of maintaining the professional standards of its members (see paragraph 182 above);
- (b) even if the IPA holds the Claim Rights on trust, it does not hold them on a bare trust for the Companies' Insolvency Estates because:
  - (i) the IPA could bring its own claim under the Bonds against a Previous IP or call on Intact to pay compensation to the Companies' Insolvency Estates. It could not do that if it held the Bonds on bare trust for the Companies' Insolvency Estates;
  - (ii) clause 8 of the Bonds gives the IPA power to assign the Claim Rights to an SIP and (with the consent of the SOS) to another party but there is no right for an SIP to require the IPA to assign the Claim Rights to them. This is consistent with the IPA performing public duties under the supervision of the SOS, but not a bare trust;
  - (iii) the IPA's practice is to enter into Tripartite Agreements and this is also inconsistent with the IPA holding the Claim Rights on bare trust for the Company's Insolvency Estates; and

(iv) there is nothing to suggest that the Companies (acting by the Claimants) could call for an immediate assignment of the Claim Rights to them.

206. The only reason put forward by Mr Atkins as to why the Claimants cannot establish that there is sufficient certainty that the IPA intended to create a trust at all is that the IPA holds the Claim Rights as part of its functions as a public body to maintain the professional standards of its members. I have found that the Issue 1 Functions and Powers are not public functions or powers exercised by the IPA (see paragraph 151 above). It follows that I reject Mr Atkins' argument that the Claim Rights are held by the IPA as part of its functions as a public body.

207. As for Mr Atkins' argument that, if the Claim Rights are held by the IPA under a form of trust, then it is not a bare trust, on the face of it this really forms part of Issue 3 (where I consider whether the Companies' Insolvency Estates (represented by the Claimants) are absolutely entitled to the Claim Rights and/or to orders transferring the Claim Rights to the Claimants under section 234 IA 1986. It is convenient however to deal with the point now. A bare trust, as I understand it, is one under which the trustee must act in accordance with any directions given to him by the beneficiary (or if more than one all the beneficiaries, provided that all the beneficiaries are of full age and capacity). This does not however apply if the trust is not a bare trust. If therefore I were to find that the IPA is trustee of a bare trust of the Claim Rights, of which the Companies' Insolvency Estates are the beneficiaries, then the Claimants, as Liquidators of the Companies, could direct the IPA to take a particular step in relation to the Claim Rights (for example submit a claim to Intact) but could not do so if the trust is not a bare trust. However, it is also my understanding that all the beneficiaries of a trust, if they are all of full age and capacity can, whether the trust is a bare trust or not, call upon the trustee to transfer the trust property to them. If that is right then, even if I find that any trust of which the Companies' Insolvency Estates are the beneficiaries, is not a bare trust, the Claimants, in their capacity as Liquidators of the Companies, can call on the IPA, as trustee, to transfer to them the Claim Rights that relate to their particular insolvency estate (because, if there is a trust then there is no other beneficiary of those insolvency estates). In case I am wrong I will nonetheless consider Mr Atkins' points about why the alleged trust is not a bare trust when considering whether there is a trust at all, those points may also be relevant to the question of whether the IPA had the necessary intention, when entering into the Bonds, to hold the Claim Rights on trust for the Companies' Insolvency Estates at all.

208. I start with the acceptance by the IPA that it holds the Claim Rights for the benefit of the Companies' Insolvency Estates. Notwithstanding that this is common ground, as my task is to construe the Bonds (and the parties' subjective view of their meaning is not relevant) it is necessary for me to consider whether that concession is rightly made. In my judgment it is rightly made, I will say why, by reference to: the wording of the Bonds; the purpose of the Bonds; and the relevant factual matrix.

209. The recitals to the Bonds (see paragraphs 194 and 195 above):

(a) refer to the Bonds being made under or pursuant to the IA 1986. Section 390 of the IA 1986, to which I refer in greater detail below, provides that a person is not qualified to act as an IP unless there is in force security for the performance of their duties; and

(b) record that the IPA consents to accept the Bonds as security for the companies or their estates that the Previous IP is thereafter appointed IP of.

210. The operative parts of the Bonds provide (see paragraphs 194 and 195 above) that:

(a) Intact agree to be liable, with the Previous IP, jointly and severally, for losses caused by the fraud or dishonesty of the Previous IP, plus additional costs incurred by an SIP as a result of being appointed in place of the Previous IP and in dealing with the Bond claim and matters associated therewith;

(b) the limit of Intact's liability under the Bonds is the General Penalty Sum (usually £250,000) plus the Specific Penalty sum notified in a monthly Cover Schedule, sent by the Previous IP to Intact and copied to the IPA (that value being the Previous IP's estimated value of the insolvency estate to which they have been appointed); and

(c) in summary therefore:

(i) the recitals make it clear that the IPA is entering into the Bonds to accept the promises of Intact (and the Previous IP) as security for the insolvency estates of which the Previous IP is appointed office holder of; and

(ii) the operative parts of the Bonds:

- provide for Intact to be liable for the losses caused to the insolvency estates over which they have been appointed, by the fraud or dishonesty of the Previous IP; and

- Intact's liability under the Bonds is limited to the General Penalty Sum (normally £250,000) plus the value attributed to the relevant insolvency estate suffering the loss, by the Previous IP in a monthly Cover Sheet.

211. It is clear therefore, looking at the wording of the Bonds alone, that the losses for which the Bonds act as security are losses caused to the insolvency estates (which are included in monthly Cover Schedules sent to Intact by the Previous IPs) caused by the fraud or dishonesty of those Previous IP and it is common ground that the Companies' Insolvency Estates were notified to Intact/the IPA in one or more monthly Cover Schedules, by the Previous IPs. Without considering the relevant factual matrix it is abundantly clear, from the wording of the Bonds alone, that the purpose and intention of the Bonds is that the IPA will hold the Bonds and the promises of Intact under them for the benefit of those insolvency estates which are included in a monthly Cover Schedule which suffer loss as a result of the fraud or dishonesty of the Previous IP, who is party to the relevant IP.

212. The relevant factual matrix (identified by me in paragraph 201 above) also supports the conclusion that the IPA holds the Claim Rights for the benefit of the Companies' Insolvency Estates:

(a) section 390 (3) IA 1986 provides that a person is not qualified to act as an IP unless there is in force security for the proper performance of his functions meeting the "prescribed requirements". The prescribed requirements are set out in Schedule 2 of the IPR and these include that: (i) an IP bond in a form approved by the SOS must be in place; (ii) the IP bond must provide for the surety to be jointly and severally liable for losses caused by the fraud or dishonesty of the IP; and (iii) a schedule containing details of each insolvency estate to which they are appointed and the value of its assets must be submitted by the IP to the Surety. The Bonds are clearly designed to comply with the requirements of Schedule 2 of the IPR and it is clear that the purpose of these requirements is to compensate insolvency estates for losses caused to them by the fraud or dishonesty of IPs;

(b) by the MOU (see paragraph 30 above) the IPA agreed with the SOS to deal with statutory bonding requirements for its IP members and to operate mechanisms to ensure that potential claims arising from the fraud or dishonesty of its members are

identified and made. It is common ground that the IP Bonding scheme is the scheme adopted by the IPA to comply with the terms of the MOU; and

(c) the long standing practice of the IPA, which on the evidence was its practice in 2010 - 2012, is to enter into Tripartite Agreements directing the Surety to pay to the SIP the amount of money agreed between SIP and the Surety as compensation for loss suffered by the relevant insolvency estate, as a result of the fraud or dishonesty of the Previous IP.

213. Mr Wilson says that there is no right granted, in the Bonds, for any party to it to vary its terms. Mr Atkins did not suggest otherwise and I accept, having considered the terms of the Bonds that there is no such right.

214. Mr Wilson says that the IPA entered into the Bonds pursuant to a contractual or fiduciary obligation to do so. Mr Atkins did not respond directly to this submission, but I will assume that he does not accept Mr Wilson's submission.

215. I have already found that the IPA did not act pursuant to any public duty in entering into the Bonds or carrying out its functions in respect of them (see paragraph 151 above). It does not follow from that finding that the IPA necessarily entered into the Bonds pursuant to a contractual and/or fiduciary obligation to do so, however, for the following reasons I find that the IPA did enter into the Bonds pursuant to such a contractual and/or fiduciary duty: I have already noted that part of the relevant factual matrix, to the entry by the IPA into the Bonds, is that the IPA entered into the MOU with the SOS. The MOU provides that the RPB's (including the IPA) agree to deal with bonding arrangements for its IP members and to operate mechanisms to ensure that potential claims arising from the fraud or dishonesty of its members are identified and made. In my judgment, by agreeing to the MOU and accepting those obligations, the IPA came under a contractual and/or fiduciary duty to make arrangements for its IP members to enter into bonding arrangements and to ensure that potential claims for fraud or dishonesty by its IP members were identified and made. The SOS approved the form of the IP Bonds which the IPA (and other RPBs) entered into in order to fulfil those obligations and the IPA therefore entered into the Bond pursuant to the contractual and/or fiduciary duties that it accepted by entering into the MOU.

216. Mr Atkins says that the Claimants' case proceeds on the basis that the IPA holds the Claim Rights on bare trust for the Companies' Insolvency Estates and (for the reasons set out in paragraph 183 (a) - (d) above) the IPA cannot be holding the Claim Rights on bare trust for the Companies' Insolvency Estates. Mr Atkins has referred me to no authority setting out any principles that would assist me in determining whether or not a trust is a bare trust. I do not accept that the reasons put forward by Mr Atkins either separately or collectively mean that the IPA cannot be holding the Claim Rights on bare trust alternatively a trust which is not a bare trust, for the Companies' Insolvency Estates, for the reasons that follow.

217. Mr Atkins says that, although this does not happen in practice, it is conceivable that the IPA could bring its own claim against one of its members or conduct its own investigation into a member's conduct and call upon a bond Surety to provide a fund from which the estate concerned could be compensated. The IPA could not do this, he says, if the Claim Rights are held on bare trust for the Companies' Insolvency Estates.

218. I accept that there is nothing in the wording of the Bonds that prevents the IPA from doing any of the things that Mr Atkins says that they could conceivably do, but which, in practice he accepts that they do not do. In paragraph 79 above I concluded that the IPA, in practice, has nothing to do with: investigating, supervising or managing claims made against IP Bonds or collecting or distributing funds realised from claims against IP Bonds. In doing

so I took into account the MOU and the IPA's long standing practice of entering into Tripartite Agreements, both of which I have found to be part of the relevant factual matrix to construing the Bonds. Taking into account the MOU and the IPA's practice established at the time it entered into the Bonds, I have already found that the IPA did not intend, when it entered into the Bonds, to carry out any of the tasks that I refer to in paragraph 217. Insofar as the terms of the Bonds allow the IPA, as named beneficiary in the Bonds, to exercise powers in respect of the Bonds that go beyond the only functions that I have found the IPA performed, at the time it entered into the Bonds (and intended to perform in relation to the Bonds) this is not, in my judgment relevant to the question of whether the IPA intended to create a trust/a bare trust. The existence of powers which the IPA had no intention of using cannot, in my judgment, affect the question of whether the IPA manifested an intention to bring about a state of affairs, which in law amounts to a trust.

219. I do not, in any event see how the IPA having the powers that Mr Atkins says it has under the Bonds, even if it did intend to use those powers, means that any trust cannot be a bare trust. A trustee who is entrusted with trust assets under a bare trust exercises the powers that the trust instrument consigns to them for the benefit of the beneficiaries of the trust, those powers may be extensive. If it is a bare trust, then all the beneficiaries may give directions to the trustees as to how they should exercise the powers they have, but I see no reason why the extent of the trustees' powers should determine whether there is a bare trust or not. Mr Atkins could not say, because the IPA accepts that it holds the Claim Rights for the benefit of the Companies' Insolvency Estates, that the IPA can do anything other than use the powers that it has for the benefit of the Companies' Insolvency Estates.

220. As for clause 8 of the Bonds, both Mr Atkins and Mr Wilson each say that the wording of this clause favoured their case:

(a) Mr Atkins says (see paragraph 183 (b) above) that because clause 8 allows the IPA to assign the claim rights to a SIP (or another party with the consent of the SOS) but does not compel it to do so, this is inconsistent with the IPA holding the Claim Rights on bare trust for the Companies' Insolvency Estates and is more consistent with the IPA performing a public function under the supervision of the SOS; and

(b) Mr Wilson says that the Bonds recognise that in reality only SIPs can investigate IP Bond claims. The IPA cannot do it and does not do it. This is why clause 8 specifically allows the IPA to assign all or part of its rights under the Bonds to an SIP. The question of who, apart from an SIP the IPA could assign rights to (with the consent of the SOS) arises whether or not there is a trust.

221. I do not consider that clause 8 points against the existence of a trust or a bare trust:

(a) I have found that the IPA was not performing a public function in entering into the Bonds or holding the Claim Rights and I see no reason why the IPA should not exercise or choose to refrain from exercising the Claim Rights as trustee of a bare trust, unless and until all the beneficiaries of the relevant Claim Rights give directions to it as to how they require the IPA to exercise those rights;

(b) I have found that the IPA had no intention (in accordance with its then existing practice when it entered into the Bonds) of assigning any rights under the Bonds to an SIP or anyone else. It is difficult to see therefore how the fact that the IPA had power to do something that it had no intention of doing, can have any effect on whether it should be taken, objectively to have intended to create a trust, or a bare trust;

(c) if there are trusts, then the trust instruments are the Bonds. Trust instruments often give trustees the power to dispose of trust assets, which power the trustees would

have to use for the benefit of the beneficiaries. If there is a trust, then it is not surprising that the IPA should be given a specific power to assign the benefit of the Bonds to an SIP, given that:

(i) only the IPA could have been specified as the beneficiary at the time when the Bonds were entered into;

(ii) SIP's have powers, which the IPA does not have, to investigate IP Bond Claims and the Bonds make specific provision for the costs of an SIP (but not the IPA) of proving an IP Bond claim to be discharged by Intact. The assignment of the Claim Rights to the Claimants as SIPs would also be consistent with the IPA's agreement in the MOU to: "*Operate mechanisms to ensure that potential claims arising from the fraud or dishonesty of their members are appropriately identified and made*" (given that it does not do these things itself); and

(iii) SIPs owe statutory duties to the insolvency estates to which they are appointed aimed at ensuring that they act in the best interests of those estates;

(d) whilst clause 8 does allow the IPA to assign the benefit of the Bonds to some other person, with the consent of the SOS: (i) I was not provided with any evidence that any RPB has actually done this; and (ii) it is inconceivable that the IPA would propose, or the SOS would consent to, the IPA assigning rights under the Bonds to anyone who was not bound to act in the best interests of the relevant insolvency estate and was well placed to do so; and

(e) as for Mr Atkins' point that, if the Claim Rights were held on trust for the Companies' Insolvency Estates, then it should be the SIP who directs an assignment of IP Bond rights and not the IPA, I do not accept that that is so. If there is a trust, then unless and until the Claimants, as SIPs, require the IPA to assign the Claim Rights (or if it is a bare trust, give directions to the IPA) it is the IPA as trustee of the Claim Rights which must exercise the powers that they have under the trust for the benefit of the Companies' Insolvency Estates.

222. I do not consider that the IPA's practice of entering into Tripartite Agreements, rather than assigning rights pursuant to clause 8, militates against the existence of a trust or a bare trust. I have accepted that, as this practice existed before the Bonds were entered into, this forms part of the factual matrix against which I should construe the Bonds, however:

(a) I have no evidence before me of why the IPA adopted the practice of entering into Tripartite Agreements, rather than assigning the Claim Rights to the SIP (or another party with the consent of the SOS) and even if I had such evidence it is likely to be regarded as evidence of subjective intention or belief and inadmissible in construing the Bonds; and

(b) Mr Atkins did not say why the IPA practice is inconsistent with the existence of a bare trust (or a trust). The terms of the Tripartite Agreements provide for the agreed sum to be paid to the SIP for the benefit of the relevant insolvency estate and I cannot see how that would be inconsistent with the IPA holding the Claim Rights on trust or bare trust for the Companies' Insolvency Estates.

223. Mr Atkins says that there is nothing to suggest that the Companies (or the Claimants as their liquidators) could call on the IPA to assign the Claim Rights to them and that the terms of the Bonds make it clear that they cannot do this. I do not consider that the terms of the Bonds do make this clear. There is no clause that specifically addresses this point either way, which is perhaps not surprising as none of the insolvency estates for which the Bonds provide security are a party to the Bonds. They could not be for a number of reasons,

including that they were not covered by the protection or security provided by the Bonds, until they were included in a monthly Cover Schedule, after the Bonds were entered into. It is true that clause 8 of the Bonds gives the IPA the right to assign the benefit of the Bonds in whole or in part, but does not oblige it to do so, and it is also clear, for the reasons just given, that whoever the Claim Rights were assigned to by the IPA (the SIP or someone else with the consent of the SOS) they would not take the benefit of the Claim Rights for themselves but would have an obligation to use the Claim Rights for the benefit of the Companies' Insolvency Estates. There is, as I have already said, nothing to stop a trust instrument providing for the transfer or disposal of trust property expressly or by implication. In any event, as I understand it all the beneficiaries of a trust are entitled, whether or not it is a bare trust to call on the trustees to transfer the trust property to them. If that is right then, on the assumption that the IPA holds Claim Rights on some form of trust for the Companies, the Companies (acting by the Claimants) can call on the IPA to assign to them the Claim Rights relating to their insolvency estate, as sole beneficiary of those rights, regardless of what clause 8 provides.

224. The next task is for me to determine whether my construction of the relevant terms of the Bonds and my findings that the IPA entered into the Bonds pursuant to a contractual and/or fiduciary duty, means that I should determine that the Claimants have proved that there is sufficient certainty, objectively viewed, that the IPA intended to create a trust. I have set out a summary of the relevant principles at paragraphs 187 - 189 above, but I will now consider them in more detail.

225. I am not concerned with discerning the subjective intention of the IPA when it entered into the Bonds and so, as I have already said, evidence of the IPA's subjective intention to constitute itself trustee of the Claim Rights or not to do so is irrelevant to my task. Instead I need to determine whether the IPA manifested an intention to create a state of affairs which in law amounts to a trust including intending to keep the property separate from their own property (see paragraph 187 above, ignoring for the moment paragraph 187 (b) – (d)).

226. As to the later point, this is a necessary, but not a sufficient requirement, of establishing an intention to create a trust. In paragraph 212 above I said that the relevant factual matrix supported the conclusion that the IPA hold the Claim Rights for the benefit of the Companies' Insolvency Estates. In my judgment the same parts of the relevant factual matrix also support the conclusion that, when the Bonds were entered into, the IPA intended to keep the proceeds of any claims made under the Bonds separate from its own funds, pursuant to obligations it entered into under the MOU:

(a) the purpose of section 390 (3) and of the prescribed requirements set out in Schedule 2 of the IPR is to ensure that an insolvency estate which suffers loss as a result of the fraud or dishonesty of their IP office holder is compensated for that loss. It would be inconsistent with that purpose if the IPA were able to mix the proceeds of IP Bond claims with its own funds, thereby risking their dissipation, before they are paid over for the benefit of the relevant insolvency estate;

(b) the IPA agreed with the SOS, in the MOU, to deal with bonding requirements for its members and to ensure that potential claims arising from the fraud or dishonesty of its IP members are identified and made. I have found (see paragraph 212 (a) above) that the IPA enters into IP Bonds (including the Bonds) to comply with the first part of the obligations it agreed to perform under the MOU (dealing with bonding arrangements for its members). This creates the security for the proper performance of their duties that section 390 (3) IA 1986 requires to be in place in order for an IP to be qualified to act as an insolvency office holder. The second and third obligations that the IPA agreed to accept under the MOU are to ensure that potential claims arising from the

fraud or dishonesty of its IP members are identified and made (IP Bonds being the means that the IPA chose to ensure that security is in place, the obligation to ensure that potential claims are identified and made means that the IPA has agreed to ensure that IP Bond claims are identified and made). As for section 390 (3) and the prescribed requirements set out in Schedule 2 of the IPR the clear purpose of the obligations which the IPA agreed to perform under the MOU is also to ensure that an insolvency estate which suffers loss as a result of the fraud or dishonesty of their IP office holder is compensated for that loss and as I have already noted, it would be inconsistent with that purpose for the IPA to mix the proceeds of IP Bond claims with its own funds, thereby risking their dissipation before they are paid over for the benefit of the relevant insolvency estate; and

(c) whilst the subjective intent of the IPA, when entering into the Bonds, is not admissible to determine whether or not it intended to create a trust, the IPA's practice of entering into Tripartite Agreements (which practice predates the Bonds) by which it directs the Surety to pay the proceeds of IP bond claims to the SIP of the relevant insolvency estates, and its policy of ensuring that it never receives or holds the proceeds of IP Bond claims, demonstrates a very clear and strict intention on the part of the IPA to keep the proceeds of any claim under the Bonds separate from its own funds, by diverting those proceeds to the SIP of the relevant insolvency estate, or at least away from itself.

226. **Chitty on Contracts 36<sup>th</sup> Ed** at **21-081** says that it is possible to extract from the cases a number of principles which act as a guide to the question of whether there is sufficient evidence of an intention to create a trust. Where relevant those principles are as follows:

(a) no particular form of words is required (**21-081**):

(b) there must be an intention to benefit a third party, but such an intention is not of itself sufficient to establish an intention to create a trust (**21-082** and **21-084**);

(c) as a general rule the intention to benefit the third party must be irrevocable, so that a contract which allows the promisee to divert the benefit of the contract to themselves or another party will not normally give rise to a trust (**21-083**); and

(d) an intention to create a trust will readily be found where a contract in favour of the third party is made pursuant to some contractual or fiduciary obligation owed by the promisee to a third party (**21-084**)

227. For the reasons summarised below (and dealt with in more detail above) I am satisfied that factor 226 (b) is satisfied here and that factors 226 (c) and (d), which **Chitty** regards as factors in favour of a finding that there is sufficient certainty of intention to create a trust, are present in this case. I am satisfied that those factors are sufficient for me to conclude that the Claimants have proved that the IPA had the necessary intention, when entering into the Bonds of bringing about a state of affairs, which in law amounts to a trust.

228. I am satisfied that the intention of the IPA in entering into the Bonds was to benefit third parties, namely insolvency estates notified to Intact and the IPA in monthly Cover Schedules which suffered loss as a result of the fraud or dishonesty of the Previous IP party to the Bonds. This is accepted by the IPA and I have determined that to be the intention of the IPA when entering into the Bonds, construed within the relevant factual matrix (see paragraphs 208 - 211). This is, as noted, a necessary, but not sufficient factor for finding an intention to create a trust.

229. I have accepted that there is no right given to any party to the Bonds to vary their terms. I am also satisfied that the IPA cannot divert the benefit of the Claim Rights to themselves or

to anyone else, other than for the benefit of the Companies' Insolvency Estates. The IPA accepted that it had no right to benefit from the Bonds itself and would not handle the proceeds of IP Bonds and would return any monies mistakenly paid to them by the Surety, to the Surety. I have considered clause 8 of the Bonds but have concluded that whilst this clause entitles the IPA to assign rights under the Bonds in whole or in part to an SIP of the relevant insolvency estate or another party with the consent of the SOS, it is intended that any such assignee would themselves hold any rights assigned to them for the benefit of the insolvency estate that suffered loss as a result of the fraud or dishonesty of its Previous IP (see paragraphs 220 and 221 above).

230. For the reasons set out in paragraph 215 above I have concluded that the IPA entered into the Bonds to benefit the insolvency estates which incurred losses as a result of the fraud or dishonesty of its IP members pursuant to a contractual or fiduciary obligation which it had as a result of entering into the MOU with the SOS. **Chitty** regards this factor as being of particular importance and one which readily leads courts to conclude that there is sufficient certainty of intention to create a trust.

231. I should add that, although not mentioned as a factor by **Chitty**, nor relied on by Mr Wilson, it seems to me that the IPA must also have an implied fiduciary or contractual obligation to act in the best interests of the insolvency estates to which the Bonds relate (including the Companies' Insolvency Estates) in exercising its rights under the Bonds. I come to this conclusion because, as I have already said (see paragraph 215 above) by the MOU the IPA agreed not only to deal with bonding arrangements for its IP members (which it did and does by entering into IP Bonds) but also to operate mechanisms to ensure that potential claims arising from the fraud or dishonesty of its members are identified and made. It seems to me that this places obligations on the IPA to take steps to ensure that potential claims are identified and made for the benefit of the relevant insolvency estates at least in the way that it uses its rights as named beneficiary of the Bonds. This also in my judgment points in favour of the IPA having intended, when entering into the Bonds to hold the rights that it obtained by doing so on trust for the relevant insolvency estates as part of its contractual and/or fiduciary duties to act in the best interests of those estates.

232. Finally I am satisfied that, because I have found that the IPA is not carrying out public functions or powers when: - entering into IP Bonds, holding the rights under IP Bonds; and when considering assigning the Claim Rights, a finding that the IPA holds the Claim Rights on trust for the Companies' Insolvency Estates is a practical necessity to ensure that the IPA has a legal obligation to comply with the purposes of section 390 (3) IA 1986, Schedule 2 of the IPR and the MOU and ensuring that the claims against Intact for losses alleged to have been suffered as a result of the fraud or dishonesty of the Previous IPs can be pursued and if successful, compensation received by the Companies' Insolvency Estates. Absent a public duty and a trust, the IPA would be lawfully entitled to decide for itself whether to pursue a bond claim or not and could retain the proceeds of any bond claim for itself. This would not provide security for the proper performance of the office holder's functions, as required by section 390 IA 1986. Further, the IPA's practice of not pursuing claims under bonds itself or transferring the proceeds of IP Bond claims to SIPs, for the benefit of insolvent estates (and instead entering into Tripartite Agreements, if liability is agreed between the Surety and the SIPs) can, and in this case has, led to an impasse preventing the pursuit of a claim against Intact for the benefit of the Companies' Insolvency Estates. This is because the Claimants and Intact have not agreed a figure for compensation to be paid by Intact to the Claimants on behalf of the Companies' Insolvency Estates and the IPA is unwilling to assign the Claim Rights to the Claimants. A trust is therefore, I do accept, a practical necessity in order to ensure that the true beneficiary of the Bonds (the Companies' Insolvency Estates) can

enforce the Claim Rights which the IPA, at least in this case is unwilling or considers itself unable to do so.

Is there sufficient certainty of subject matter?

233. Whilst I did not understand Mr Atkins to concede that there is sufficient certainty of the subject matter of the alleged trust, he made no submission that the subject matter of the trust was not certain enough.

234. Mr Wilson says that the subject matter of the trust is the Claim Rights, that is the claims against Intact, as Surety under the Bonds, for losses suffered by the Companies' Insolvency Estates as a result of the fraud or dishonesty of the Previous IPs.

235. I am satisfied that there is sufficient certainty as to the subject matter of the trust and that the subject matter of the trust is the Claim Rights. The Claim Rights are identified with sufficient certainty as follows:

(a) the Bonds require that monthly Cover Schedules are provided by the Previous IPs to Intact and copied to the IPA, setting out details of the insolvency estates of which the Previous IPs have been appointed insolvency office holders (see clause 2 (b) of the Bonds at paragraph 194 and the definitions of "Cover Schedule" and "Matter" at paragraph 195);

(b) it is common ground that the Companies' Insolvency Estates were included in one or more monthly Cover Schedules sent by the Previous IPs to Intact and the IPA and that therefore the Bonds act as security for loss caused to the Companies' Insolvency Estates by the fraud or dishonesty of the Previous IPs, whilst they were Administrators and/or Liquidators of the Companies;

(c) it is alleged that the Previous IPs have caused loss to the Companies' Insolvency Estates by the dishonest practice of Time Dumping (see paragraphs 1 and 8 above) and that Intact is jointly and severally liable with the Previous IPs to make good that loss (in the case of Intact up to the limit of its liability under the Bonds);

(d) the IPA is named in the Bonds as the beneficiary of Intact's promises under the Bonds; and

(e) the Claimants say that the IPA holds the Claim Rights on trust for the Companies' Insolvency Estates. The Claim Rights, as already noted, are the claims that the IPA has as named beneficiary under the Bonds against Intact as Surety under the Bonds for losses suffered by the Companies' Insolvency Estates as a result of the fraud or dishonesty of the Previous IPs.

Is there sufficient certainty of objects?

236. Mr Atkins conceded, in oral argument, that there is sufficient certainty of objects. In my judgment he was right to do so. The objects or beneficiaries of the alleged trust are the Companies Insolvency Estates. They are identified in similar manner to the Claim Rights:

(a) the Companies' Insolvency Estates were identified by monthly Cover Schedules sent to Intact and copied to the IPA, by the Previous IPs, as insolvency estates over which they had been appointed insolvency office holders, in the manner set out in paragraph 235 (a) and (b) above. The Companies' Insolvency Estates thereby became insolvency estates to which the promises of Intact and the Previous IPs, made under the Bonds to the IPA referred;

(b) by the Bonds, Intact and the Previous IPs promised the IPA that they would pay to it the value of any loss suffered by an insolvency estate notified in a monthly Cover Schedule by the Previous IPs to Intact and copied to the IPA; and

(c) the promise of Intact, while made to the IPA, is to make good losses suffered by the Companies' Insolvency Estates and they are, on the Claimants' case, the beneficiaries of the trust.

237. Finally, there is the question of whether the alleged trust is administratively unworkable. Mr Atkins did not suggest that it was administratively unworkable and I can see no reason why it would be, given that there is a single beneficiary for each claim that makes up the Claim Rights.

### **Should terms be implied?**

238. As I have found that, properly construed, the Bonds do create a trust, pursuant to which the IPA hold the Claim Rights on trust for the Companies' Insolvency Estates, it is not strictly necessary for me to consider whether or not the terms set out in paragraph 169 (a) - (c) above should be implied, as Mr Wilson says they should be (but only if necessary). I will however do so briefly.

239. I accept that the relevant principles to be applied in deciding whether terms should be implied are those set out in the Court of Appeal case of *Yoo Design Services* (see paragraph 170 above).

240. In paragraph 226 above I have concluded that, when the IPA entered into the Bonds, it intended to keep the proceeds of IP Bond claims separate from its own funds and that, in practice it did this by entering into Tripartite Agreements, pursuant to which it agreed that the proceeds of Bond claims should be paid direct to the SIP of the relevant insolvency estate, so that it never receives the proceeds of IP Bond claims. Ms Green also confirmed that, if for any reason the IPA did receive the proceeds of an IP Bond claim, it would immediately return them to the Surety. For those same reasons, I find that it is to be implied, that if, contrary to its practice, the IPA did receive the proceeds of IP Bond claims it would:

- (a) segregate those funds from its general funds, alternatively not draw on them;
- (b) remit any such sum received to the party that suffered the loss that the payment was made in respect of, or return them to the Surety; and
- (c) not use any such sum received, other than to satisfy the claims in respect of which the payment was made.

241. I find that the terms set out in paragraph 240 (a) – (c) are:

- (a) so obvious, that it goes without saying that the parties to the Bonds would agree that these terms represent what they intended when the Bonds were entered into;
- (b) not inconsistent with the terms of the Bonds; and
- (c) it would be equitable to imply them.

242. The implied terms really add nothing to the conclusions that I have already reached in paragraph 226 above, simply acting to reinforce those conclusions.

**ISSUE 3 : IF THE ANSWER TO (2) IS YES, ARE THE CLAIMANTS ENTITLED TO (A) DECLARATIONS THAT THE CLAIM RIGHTS ARE**

## **HELD ON TRUST AND/OR THAT THE COMPANIES ARE ENTITLED TO BRING CLAIMS UNDER THE BONDS AND/OR (B) ORDERS TRANSFERRING THE CLAIM RIGHTS TO THE CLAIMANTS UNDER IA 1986**

### **DECLARATIONS THAT THE CLAIM RIGHTS ARE HELD ON TRUST AND/OR THAT THE COMPANIES ARE ENTITLED TO BRING CLAIMS UNDER THE BONDS**

243. It follows from my findings, that the IPA holds the Claim Rights on trust for the Companies' Insolvency Estates and that the Claimants are entitled to a declaration to that effect. I also find that, subject to joining the IPA as trustee, the Companies (acting by the Claimants as their liquidators) are entitled to bring claims against Intact under the Bonds for the benefit of the Companies' Insolvency Estates. In addition, as sole beneficiaries of the Claim Rights that relate to their insolvency estates, it seems to me that, whether or not the trusts that I have found to exist are bare trusts, the Companies (acting by the Claimants) are entitled to call upon the IPA as trustee to transfer to them that the part of the Claim Rights that relate to their respective insolvency estates.

### **ORDERS TRANSFERRING THE CLAIM RIGHTS TO THE CLAIMANTS UNDER IA 1986**

244. Mr Wilson says that the Claimants are entitled to an order pursuant to section 234 IA 1986 requiring the IPA to transfer the Claim Rights to them, on the basis that they are "property" of the Companies.

245. Mr Davies says that: (a) even if the Claim Rights are held on trust for the Companies' Insolvency Estates, they are not "property" for the purposes of section 234, unless and until the IPA exercises its discretion under the Bonds to assign those rights to the Claimants (as SIPs) under clause 8 of the Bonds; and (b) section 234 does not provide a suitable procedure for determining complex disputes as to title, nor claims for relief by way of enforcement of underlying agreements (*Ezair v Conn & Avery-Gee (as Joint Administrators of Chalotte Srtreet Properties Ltd [2020] EWCA Civ 687*).

246. In closing oral argument, Mr Davies referred to the Court of Appeal case of *Welsh Development Agency v Export Finance Co Ltd [1992] BCC 270* in which, he said, Staughton LJ concluded that, whilst the definition of "property" in section 436 IA 1986 was wide and included things in action, section 234 was only concerned with tangible property.

247. Mr Davies sent me a copy of *Welsh Development Agency* after the hearing. With my permission, Mr Wilson made short written submissions in response, in which he made the following points:

(a) In *OBG Limited v Allan [2007] UKHL 21* [at 236] Lord Nicholls, having considered the judgment of Staughton LJ in *Welsh Development Agency*, concluded that Staughton LJ had adopted too restrictive an interpretation of "property", for the purposes of section 234 and found that it does include intangibles, such as contractual rights;

(b) *Welsh Development Agency* dealt with section 234 (3) and (4) which provide that an office holder is not liable if they seize or dispose of property which is not in fact property of the company, provided that they had reasonable grounds for seizing or disposing of the property and Staughton LJ's view, that intangible property could not be seized, was expressed in that context;

(c) here the Claimants rely on section 234 (2) which provides that the court may require a person who has in his possession or control property to which the company appears to be entitled to convey or transfer it to the office holder. Staughton LJ's judgment is therefore, in any event not relevant to the Claimants' claim under section 234(2);

(d) section 234(2) has been applied in respect of intangible property in ***Ezair v Conn; Kendall v Ball [2024] BCC 734*** and ***Cavill-Biggs v Reading [2025] EWCA Civ 619***; and

(e) it would not make sense if section 234(2) did not apply to intangible property because a liquidator has a duty to get in and realise the company's property and section 234 is, as Snowden LJ observed in ***Carvill-Biggs*** at **41**, a summary procedure to assist the office holder in carrying out his functions.

248. I will start by a short analysis of the cases to which I have been referred by counsel.

249. In ***Ezair v Conn & Avery-Gee*** the Administrators of Charlotte Street Properties Ltd sought an order that its director, Mr Ezair, transfer a property registered in his name, that they claimed belonged to the company, to them. Mr Ezair was the legal owner and claimed he was also the beneficial owner of the property, his case as to why he was the beneficial owner changed over time. Mr Ezair's counsel suggested that the section 234 procedure was a summary procedure which was not appropriate, other than in the most straight forward of cases, and he said that the claim against Mr Ezair was not a simple case. At first instance, HHJ Halliwell (siting as High Court Judge) said that there was substance in counsel's submission, but that the proceedings had been issued over a year and a half earlier and the court had made directions for disclosure, witness statements and determination of a preliminary issue, with the trial being given a time estimate of four days. If it was going to be asserted that the Administrators had used the wrong procedure, the point should have been raised earlier and on that basis he went on to grant the Administrators claim under section 234.

250. On appeal Patten LJ said that although the court could, on a section 234(2) application, decide whether or not a company was entitled to the property, as well as ordering its transfer, it may not be an appropriate procedure for determining complex issues about title. It was a summary procedure that the office holder could bring in their own name to obtain possession of property belonging to the company. He considered however that the question of the companies' beneficial title to the property was a pure point of law, suitable for determination using the section 234(2) procedure.

251. ***Welsh Development Agency*** was concerned with the question of who, as between the claimant and defendant, had the right to receive payment of debts created by Parrot Manufacturing Ltd ("Parrot") exporting goods abroad. The claimant appointed receivers over Parrot and argued that the overseas debts should be paid to it (or its receivers) under the terms of its debenture. The defendant said that the overseas debts should be paid to a collections account specified in an agreement entered into by Parrot with the defendant. The receivers wrote to overseas buyers requesting that they pay them, rather than paying the debt they owed into the collections account.

252. In the proceedings the defendant counter-claimed that, by demanding that the overseas buyers pay them, rather than paying into the collections account, the receivers had procured a breach of contract by the overseas buyers. The receivers claimed that they had a defence to this claim under section 234 IA 1986 which provides that where an office-holder seizes or disposes of any property which is not the property of the company, believing that they are entitled to seize or dispose of that property, they are not liable to any person in respect of any loss or damage resulting from the seizure or disposal.

253. At page 305, Staughton LJ said: “*The Insolvency Act has, in section 436, a wide definition of “property” which expressly includes things in action. Nevertheless it seems to me that section 234 must be dealing with tangible property only. I do not see how one can seize an intangible; nor do I see how one can dispose of an intangible in such a manner as to cause loss or damage to the owner.*” He went on to say that even if that were wrong he did not consider that the section provided the receivers with a defence because they did not seize or dispose of the debts but simply attempted to do so and the anomaly that a receiver may be liable for an attempt at seizure or disposal, but not actually doing so confirmed his view that the section does not deal with intangible property.

254. I accept Mr Wilson’s point that, although Staughton LJ in his judgment referred generally to section 234, his remarks are confined to 234(3) and (4) and do not extend to section 234(2). I find this for the following reasons:

(a) sub-paragraphs (3) and (4) provide that an office holder is not liable for any loss or damage any party suffers as a result of the office holder seizing or disposing of property (unless the loss is caused by the office holder’s own negligence) and it is these sub-paragraphs that the receivers in **Welsh Development Agency** claimed afforded them a defence to the counterclaim of the defendant (that they had caused it loss by demanding that the overseas debtors pay them, rather than paying into the collections account for the benefit of the defendant). Section 234 (3) and (4) are therefore concerned with circumstances where the office holder takes step themselves to seize or dispose of property which appears to be the property of the company and provides them with a defence to a claim by a third party claiming to have suffered loss as a result of them doing so;

(b) section 234 (2), which the Claimants seek to rely on, is concerned with the office holder seeking an order from the court that a person who has in his possession or control any property to which the company appears to be entitled: to deliver, surrender or transfer the property to the office holder. Section 234 (2) gives the office holder the right to apply to the court for the court to order that the property is delivered to them (in one way or another); and

(c) the wording that Staughton LJ relies on, in coming to his conclusion that the receivers could not rely on section 234 as a defence because, in his view, section 234 was not concerned with intangible property was “*where an office-holder seizes or dispose of any property*”. This wording does not appear in section 234(2) because under that sub-section the office-holder seeks an order from the court to obtain the benefit of property which appears to be property of the company, rather than taking steps to “seize” or dispose” of it themselves and seeking to rely on the defence in section 234(3) and (4) to a claim by a party to recover from them loss or damage that they have suffered as a result of such seizure or disposal. Notwithstanding that Staughton LJ referred generally to section 234, rather than specifically to sections 234 (3) and (4) it is clear that his conclusion that section 234 is not concerned with intangible property is confined to those sub-sections and does not apply to section 234(2), on which the Claimants rely in this case.

255. In **OBG Limited v Allan**, Lord Nicholls said, at paragraph 236 that: “*The receivers also drew attention to section 234(3) of the Insolvency Act 1986. This provision protects administrative receivers and liquidators, in the absence of negligence, from liability if they seize or dispose of property which is not the property of the company. “Property” includes things in action: section 436. In [Welsh Development Agency] the Court of Appeal held that “property” in section 234(3) does not include intangibles because they cannot be “seized”. So, the argument runs, this is a legislative recognition that protection was not needed in respect of intangibles. I do not agree. The difficulty I have with this submission lies in the Court of*

*Appeal's restrictive interpretation of "property". Contrary to the decision of the Court of Appeal, I see no reason to suppose parliament intended to exclude the wrongful disposal of contractual rights from the scope of this relieving provision. "*

256. In **OBG** the defendants were purportedly appointed as receivers of OBG, but it was accepted that their appointment was invalid. The receivers took control of OBG's assets, following their appointment, sold its assets and dealt with its contracts and book debts. It was accepted that this amounted to a trespass to OBG's land and conversion of its chattels, but the defendants denied that they were liable in the tort of unlawfully interfering with OBG's contractual relations or the tort of conversion in relation to their dealings with OBG's contracts and book debts.

257. Lord Nicholls was in the minority in concluding that the receivers were liable in the tort of conversion, Lady Hale agreed with him, but Lords Hoffman, Walker and Brown concluded that the tort of conversion did not extend to a chose in action or other intangible assets. Lord Nicholls, at paragraph **236** was responding to an argument that parliament had not thought it fit to provide any protection for intangible property rights, as illustrated by various statutory provisions. Section 234(3) IA 1986 was one of the statutory provisions and the Tort (Interference with Goods) Act 1977 (which excluded "things in action") from the scope of the definition of "conversion of goods" was another). The receivers argued that the protection afforded to office-holders by section 234(3) did not extend to intangibles, because office-holders could not be liable for converting intangibles and so the protection was not needed. Lord Nicholls indicated that he disagreed with the Court of Appeal decision in **Welsh Development Agency** that intangible property did not fall within section 234(3) because it could not be seized.

258. In **Kendall v Ball** Administrators applied for a declaration that property was held by Mr Ball on constructive trust for the company of which he was a director. The application was made by the Administrators under section 234 and for present purposes it is sufficient to note that ICJ Greenwood made the declaration sought.

259. In **Carville-Briggs v Reading** the company owned a property which was occupied by the sole director of the company and his family. The company granted a mortgage over the property and a floating charge over its other assets. The charge holder appointed a receiver over the property and then commenced possession proceedings in its own name in the County Court which were resisted by those in occupation of the property. The charge holder then appointed Administrators to the company.

260. The Administrators brought proceedings in their own name and in the name of the company. The judge granted an order pursuant to section 234 which required the occupants of the property to give up possession of it to the Administrators. The decision was appealed on the grounds that: (a) in circumstances where LPA Receivers had been appointed, the land should not be regarded as "property" to which the company appears to be entitled, for the purposes of section 234; (b) the judge was wrong to conclude that CPR 55 did not apply to the proceedings before him, any order for possession should have been made in the County Court proceedings; and (c) it was an abuse of process to seek to bypass the County Court proceedings by issuing the High Court proceedings under section 234.

261. In dealing with the question of whether the application fell within the scope of section 234, Snowden LJ said at paragraph 41: "*At the outset, it is important to appreciate that section 234 does not create new rights but is designed as a summary procedure to assist an insolvency office-holder to carry out his functions in the relevant insolvency process. The office-holder can obtain an order in his own name for transfer of the company's property to himself, but the section does not give the office-holder any better rights to the property than the company had*". At paragraph 42 Snowden LJ said that he agreed that "property" for the

purposes of section 234 included land and any interest in land, but the Administrators' case was not based on the defendants having any interest in the land that they could be required to transfer to the administrators, rather they were trespassers with no interest in the land at all and section 234 was not applicable to recovering possession from a trespasser (although he acknowledged that that point was not raised on the appeal). Snowden LJ went on to say that the effect of the commencement of the County Court proceedings by the charge holder was to terminate the company's right to take possession and the Administrators could have no better right to possession than the company to which they had been appointed had and therefore ground 1 of the appeal succeeded.

262. I start with Mr Davies's submission (relying on **Welsh Development Agency**) that section 234(2) does not apply to intangible property. I reject that submission for the following reasons:

(a) I have found (see paragraph 254 above) that Staughton LJ's conclusion in **Welsh Development Agency**, that section 234 does not apply to intangible property, is confined to section 234 (3) and (4) and does not apply to section 234(2);

(b) as Lord Nicholls was in the minority in **OBG** (see paragraph 257 above) and none of the other members of the House of Lords addressed his conclusion that Staughton LJ was wrong to conclude that section 234(3) and (4) do not apply to intangible property, I am not satisfied that Lord Nicholls' view is to be preferred to Staughton LJ's conclusion and had this case concerned section 234(3) and (4) I may well have been bound to follow Staughton LJ's judgment on this point, however, given that I have concluded that, in his judgment, Staughton LJ was only concerned with section 234(3) and (4), I am not bound to find that section 234(2) does not apply to intangible property; and

(c) as Lord Nichols rightly notes in **OBG**, Staughton LJ applied a very restrictive interpretation of "property" in coming to the conclusion that he did about section 234, notwithstanding that the definition of "property" in section 436 is very wide and expressly includes "*things in action*". Section 234 provides that: "*Where any person has in his possession or control any property.... to which the company appears to be entitled, the court may require that person forthwith.... to pay, deliver, convey, surrender or transfer that property.... to the office holder*". It was the use of the words "seizes" and "disposes" (of property) in section 234(3) and (4) which led Staughton LJ to conclude that these subsections could not apply to intangible property because he could not see how intangible property could be seized or disposed of. There are no similar words in section 234(2) and nothing else in that sub-section to detract from the very wide definition of "property" in section 436 (which as I have said includes "*things in action*") and therefore I conclude that section 234(2) does extend to "*things in action*", such as the Claim Rights in this case.

263. My conclusion in paragraph 262 above also effectively disposes of Mr Davies's submission that, even if the Claim Rights are held on trust for the Companies' Insolvency Estates, they are not "property" for the purposes of section 234, unless and until the IPA assigns those rights to the Claimants. I have found that the Companies' Insolvency Estates are the beneficial owners of the Claim Rights. Section 436 provides that property includes "... *every description of interest whether present or future or vested or contingent arising out of or incidental to property.*" That will certainly include a beneficial interest in property. Further, if I am right, that the Companies (acting by the Claimants) as sole beneficial owners of the Claim Rights are entitled, as a matter of trust law, to require the IPA to transfer the Claims Rights to them, then the Companies "appear to be entitled", to an absolute interest in the Claim Rights.

264. As for Mr Davies' final point, that section 234(2) is not a suitable procedure for determining complex disputes as to title or underlying agreements, I accept that that is true. However in this case the Claimants issued the Part 8 Claim in which they seek a declaration

that the Companies' Insolvency Estates held the beneficial interest in the Claim Rights (amongst other relief) and they separately issued the Insolvency Application, in which (amongst other relief) they seek an order under section 234. The complex issues that I accept arise in this case have been determined in relation to the relief sought in the Part 8 Claim. Once I determined, pursuant to the Part 8 Claim, that the IPA does hold the Claim Rights on trust for the Companies' Insolvency Estates, then it simply became a question, for the purposes of the section 234(2) application, of whether that meant that the Companies appeared to be entitled to the Claim Rights.

265. Although not a point made by counsel, I note that in ***Carvill-Biggs v Reading***, Snowden LJ said that the office-holder cannot have a better right than the company (see paragraph 261 above). Insofar as it may be said that this means that, if all that the Companies' Insolvency Estates have is a beneficial interest in the Claim Rights, the Claimants would not be entitled to an assignment of the legal rights, I have already found (see paragraph 242 above) that, as sole beneficial owners of the Claim Rights relating to their respective claims for losses, the Companies are entitled to call upon the IPA to transfer the legal title to those rights to them. The Claimants are not therefore asserting any greater rights than the Companies have.



