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Case No: CR-2021-002312 / CR-2024-000415

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

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

Date: 21 January 2025

Before :

Andrew Twigger K.C. sitting as a Deputy Judge of the High Court

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Between :

CONTRACT NATURAL GAS LIMITED (IN LIQUIDATION)	**Applicant/ Respondent**
- and -	
ZOG ENERGY LIMITED (IN LIQUIDATION)	**Respondent/ Applicant**

- -
- -

ANDREW BROWN (instructed by **Addleshaw Goddard LLP**) for **CONTRACT NATURAL GAS Ltd.**
GIDEON SHIRAZI (instructed by **Prettys Solicitors LLP**) for **ZOG ENERGY Ltd.**

Hearing date: 14 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Andrew Twigger K.C. :

A. Introduction

1. This is my judgment following the hearing of two preliminary issues relating to competing claims by two companies which are now both in liquidation. Each company has made an application challenging the rejection of its proof of debt by the liquidators of the other, pursuant to Rule 14.8 of the Insolvency (England and Wales) Rules 2016 (**2016 Rules**). The two applications were consolidated, and the preliminary issues ordered, because each application turns, to a substantial degree, on the interpretation of an agreement between the two companies dated 24 May 2013, known as the Master Sales Agreement (**MSA**).

2. Since each of the companies is both an applicant and a respondent, it is convenient simply to refer to them by their names. Contract Natural Gas Ltd. (**CNG**) was incorporated in 1994 and was an energy utility company operating in the UK. It purchased gas wholesale from other entities and then sold it on to a number of gas operators. ZOG Energy Ltd. (**ZOG**) was incorporated in 2012 and was a retail energy utility company operating in the UK, supplying gas and electricity to end customers. It purchased gas from CNG. CNG and ZOG were represented at the hearing by Mr Andrew Brown and Mr Gideon Shirazi respectively.

3. The MSA was a key element in the contractual framework pursuant to which gas was supplied by CNG to ZOG. Where I refer below to numbered clauses, I am referring to the clauses of the MSA, unless otherwise stated.

4. I will need to consider some of the terms of the MSA in detail below, but it is helpful to explain at the outset that the MSA contemplates gas being supplied pursuant to "**Transactions**", each of which the MSA expressly states to be a separate contract. The precise relationship between each of these separate contracts and the MSA itself is a matter to which I will return. Each Transaction relates to the supply of gas at an agreed price per therm for a specified period which (as I understand it) was normally either twelve or twenty-four months.

5. By way of further introduction, the MSA refers in places to a document called the "Short Term Flat NBP (National Balancing Point) Trading Terms and Conditions 1997" (**NBP 1997**). I understand those terms were developed to enable buyers and sellers to carry out over-the-counter trades through the National Balancing Point virtual marketplace. The precise interrelationship between the MSA and the NBP 1997 is unclear on the evidence before me, but ultimately does not matter for the resolution of the preliminary issues.

6. As is well known, having been reasonably steady for some years, gas prices began to rise towards the end of 2021, creating problems for participants in the gas market. Between September and October 2021, four of CNG's major customers entered insolvency processes. These customers accounted for approximately 80% of CNG's customer book and the consequent bad debts and loss of revenue created significant cash flow pressures for CNG. During October 2021 CNG notified ZOG that it intended

to exit the UK energy market and would cease supplies on 30 November 2021. As a result, ZOG also became insolvent.

7. ZOG entered administration by director appointment on 9 December 2021. Mr David Scrivner and Mr Mark Upton of Ensors Accountants LLP were appointed joint administrators. ZOG moved to Creditors' Voluntary Liquidation (**CVL**) on 7 December 2022 and the administrators were appointed liquidators.

8. CNG submitted a proof of debt in ZOG's administration on 14 February 2022 in the sum of £1,403,340.25. This is the total of the amounts shown as due from ZOG on sixteen invoices issued by CNG in respect of gas supplied up to the end of November 2021. The invoices are dated between 21 September 2021 and 7 January 2022 and, as I understand it, they were not disputed. Nevertheless, on 14 November 2023 ZOG's liquidators rejected CNG's proof on the basis that CNG's claim was time barred by clause 13.5 of the MSA. The correct meaning and effect of that clause is in dispute and is one of the two preliminary issues which I must decide.

9. CNG entered administration by director appointment on 17 December 2021. Ms Claire Winder and Mr William Wright of Interpath Advisory were appointed joint administrators. CNG moved to CVL on 28 September 2023. The administrators were appointed liquidators, although Mr Joshua Dwyer (also of Interpath Advisory) replaced Ms Winder as liquidator on 24 October 2023.

10. ZOG's administrators wrote to CNG's administrators in September 2022 requesting permission to commence proceedings against CNG for damages for breach of contract. Consent was required because of the moratorium on claims which would otherwise apply to a company in administration. Proceedings were said to be necessary because the claim might otherwise become time barred pursuant to clause 13.5 of the MSA. Thereafter, there were negotiations between the parties, during which ZOG commenced proceedings by a claim form issued on 12 October 2022. Ultimately, CNG's administrators granted retrospective consent for those proceedings and the parties agreed that the proceedings would be stayed indefinitely, with ZOG proving in CNG's administration.

11. Accordingly, ZOG submitted a proof of debt in CNG's administration on 10 August 2023 in the sum of £13,029,415.04, alternatively £12,558,925.98. I understand that these figures have subsequently been revised down to £10,645,381, alternatively £10,258,041. In very brief outline, ZOG alleges that when CNG ceased supplying gas on 30 November 2021 there were 11,799 ongoing Transactions for which the period of supply had not yet expired, which ZOG describes as "Unperformed Transactions". ZOG claims that CNG's failure to continue its supply in relation to these Unperformed Transactions amounts to a breach of contract on various grounds. It claims either an entitlement to damages of an unquantified amount (to be calculated as the difference in value between the contract price and the market price of the gas pursuant to section 51 of the Sale of Goods Act 1979), or else liquidated damages pursuant to clause 4.2 of the NBP 1997. That clause prescribes two alternative formulae for calculation of the liquidated damages, described as "SMBP" and "SAP", the detail of which does not matter for present purposes. The two alternative quantifications of ZOG's claim mentioned at the start of this paragraph arise because one uses the SMBP formula to calculate the liquidated damages and the other uses the SAP formula. Also included within both alternative sums claimed are the amounts of £150,000 in respect of the costs

of ZOG's administration and liquidation and £161,333 in respect of certain debts which have been written off in alleged mitigation of loss.

12. On 18 October 2023 CNG's liquidators admitted ZOG's proof in the sum of £250,000 only and otherwise rejected it (although they also claim that the sum of £250,000 should be set off against the sum claimed by CNG in ZOG's administration, thereby effectively reducing ZOG's claim to zero). As I understand it, there are numerous detailed grounds on which ZOG's claim is disputed by CNG including, in particular, the calculation of the quantum. None of those matters fall within the scope of the preliminary issues before me. This is because CNG's liquidators took the preliminary point that, properly interpreted, clause 13.3 of the MSA limits CNG's liability in respect of ZOG's claim to £250,000, which explains why they admitted ZOG's proof in that amount only. The dispute concerning the correct meaning and effect of clause 13.3 is the other preliminary issue which I must decide.

13. The resolution of the preliminary issues depends principally on the meaning and effect of the MSA and, in certain respects, on the law relating to the effect of administration or liquidation on the running of time for limitation purposes (for reasons I will explain below). It is not, therefore, necessary to consider the factual background in further detail. The structure of the remainder of this judgment is as follows:

    i) I set out the relevant provisions of the MSA in section B;

    ii) I refer to the relevant law on interpretation in section C;

    iii) I address the effect of clause 13.3 on ZOG's claim in section D;

    iv) I address the effect of clause 13.5 on CNG's claim in section E; and

    v) I set out my conclusions in section H.

B. The provisions of the MSA

14. The MSA must, of course, be read and interpreted as a whole, but I shall set out here only the clauses with a significant bearing on the preliminary issues. Pursuant to clause 1.2.7, the headings in the MSA are for convenience and are not to affect its interpretation. I shall nevertheless refer to some of the headings of the clauses below, to simplify explanation.

15. The recitals to the MSA recorded, amongst other things, that CNG and ZOG might enter into Transactions and that they wished to set out "*the general terms and conditions*" upon which sales of gas were to take place.

16. Clause 1.1 contains numerous definitions, including the definition of "*Transaction*" as "*each separate contract between the Parties for the sale and purchase of Natural Gas and Gas Transportation Services evidenced and constituted by this Agreement, and a Trade Confirmation and Quote Request duly executed for and on behalf of the Parties.*" A "*Trade Confirmation*" is defined as "*the summary of the Transaction to be sent by CNG to ZOG ENERGY substantially in the form set out in Schedule 1 to this Agreement.*" The definition of "*Quote Request*" is not to be found in clause 1.1 but

appears in clause 5.2.1, being a notification by ZOG of the proposed volume of gas to be supplied by CNG with a request that CNG provide a Contract Price for such gas. The "*Contract Price*" is defined in clause 1.1 as the "*sum agreed as such for the Transaction, exclusive of VAT and other applicable taxes.*"

17. As these definitions contemplate, the "*trading procedure*" prescribed by clause 5 envisaged that ZOG would request a quotation for a proposed volume of gas in a Quote Request, CNG would then propose a Contract Price to ZOG, ZOG could accept that Contract Price, and if accepted CNG would provide a Trade Confirmation, recording the details of the Transaction. Clause 5.7 made clear that there was no obligation on ZOG under the MSA to purchase gas, or on CNG to sell it, but once a Transaction had been entered into, CNG was obliged by clause 6 to deliver the relevant gas and ZOG was obliged to pay for it.

18. Clauses 5.3 and 5.8 provide as follows:

> "*5.3 Each Transaction will be governed by and subject to this Agreement, including NBP 1997 and the relevant Trade Confirmation. All Transactions are entered into in reliance on the fact that this agreement, NBP 1997 and all Trade Confirmations form a single agreement between the parties (collectively referred to as this 'Agreement'), and the parties would not otherwise enter into any Transactions…*
>
> *…5.8 Each Transaction entered into by the Parties shall be treated and regarded as a separate contract for the sale and purchase of Gas and Gas Transportation Services.*"

19. Clause 2 provides for the MSA to run from 1 June 2013 for an Initial Term of three years unless and until terminated by either party giving not less than six months' notice of termination, to expire at the end of the Initial Term or any time thereafter. By a Deed of Variation dated 31 March 2016, the Initial Term was amended, so that it would expire on 1 May 2021.

20. Clause 3 contains "*exclusivity*" provisions, obliging ZOG not to enter into wholesale gas transactions with any other supplier during the currency of the MSA.

21. Clause 10 deals with "*payment*". In summary, it provides for CNG to send "*Pre-payment Invoices*" to ZOG on a monthly basis, estimating the gas to be supplied the following month. Those invoices were to be paid by ZOG by the end of the month in which they were sent. CNG was then to provide a "*Reconciliation Statement*" and "*Reconciliation Invoice*" in the month following the relevant supply. The Reconciliation Statement would detail "*all Gas delivered*" to ZOG in the relevant month, and the Reconciliation Invoice would be for the difference between the Pre-Payment Invoice and the value of the gas supplied. The Reconciliation Invoice was to be paid by ZOG later in the month in which the invoice was delivered. In the event of non-payment, CNG could charge ZOG interest at 4% above Barclays' base rate. Clause 10 does not expressly cater for a situation in which ZOG ultimately uses <u>less</u> gas in the relevant month than previously estimated and paid for. Clause 10.8, however, contains provisions concerned with a dispute about "*any payment due to* [ZOG] *or CNG,*" which envisages that sums may become due <u>to</u> ZOG, as well as <u>from</u> ZOG.

22. Clause 13 is headed "*limitation and exclusion of liability.*" Given its central importance to the preliminary issues, I shall set it out in full:

"*13.1 The following clause 13 sets out the entire financial liability of either (including any liability for the acts or omissions of its employees, agents or subcontractors) to the other ('the non-defaulting party') in respect of: -*

13.1.1 any breach by a party ('the defaulting party') of this Agreement, even if such losses result from the defaulting party's deliberate personal repudiatory breach of this Agreement

13.1.2 non or incomplete performance or contemplated performance the defaulting party of this Agreement;

13.1.3 negligence for which the defaulting party is liable; and

13.1.4 any representation or statement arising under or in connection with this Agreement or by or on behalf of the defaulting party.

13.2 All warranties, conditions or other terms, whether express or implied by statute, common law, trade usage or otherwise are excluded to the fullest extent permitted by law but this exclusion does not apply to any implied condition that CNG has or will have the right to sell Gas when the property is to pass.

13.3 Subject to clause 13.9 the total liability of each party to the other and in respect of all claims arising under the matters set out in clause 13.1 shall not exceed the sum of £250,000."

13.4 The defaulting party shall in no circumstances be liable to the other for any loss of profits, loss of business or production, depletion of goodwill, loss of or corruption to data whether direct or indirect.

13.5 The non-defaulting party shall only be entitled to bring a claim against the defaulting party where the non-defaulting party issues legal proceedings against CNG within the period of 12 months commencing on the date upon which ZOG ENERGY ought reasonably to have known of its entitlement to bring such a claim.

13.6 Notwithstanding anything to the contrary, the defaulting party's liability to the other for:-

13.6.1 death or personal injury resulting from the negligence of the defaulting party, its employees, agents or sub-contractors;

13.6.2 damage suffered by the non-defaulting party as a result of a breach by the defaulting party of the condition as to title or the warranty as to quiet possession implied by section

12 Sale of Goods Act 1979, or section 2 of the Supply of Goods and Services Act 1982; and

13.6.3 fraud, fraudulent misrepresentation

shall not be excluded or limited.

13.7 The exclusions from and limitations of liability set out in this clause 13 shall be considered severally. The invalidity or unenforceability of any one part of this clause 13 and shall not affect the validity or enforceability of any other part of this clause 13.

13.8 The provisions of this clause 13 shall survive the termination of the whole or a part of this Agreement.

13.9 The limitation of liability set out in clause 13.3 shall not apply to any breach of ZOG ENERGY's obligations under clauses 3 (exclusivity) or 10 (payment)."

23. Clause 15 permits the non-defaulting party to terminate the MSA with immediate effect if (in brief summary) the defaulting party either commits a material breach which is incapable of remedy, or commits a breach which is capable of remedy, but which has not been remedied within 30 days of notice being given requiring it to be remedied. Immediate termination can also occur if the defaulting party commits more than one breach which the non-defaulting party considers justifies the inference that a substandard performance would be provided for a reasonable part of the remaining term of the MSA.

24. Clause 17 contains provisions concerned with copyright and confidentiality.

25. Clause 18 contains various general provisions, including clause 18.4, which provides that:

> "*This Agreement, Sales Trade Confirmation* [sic; an obvious slip for Trade Confirmation] *and the Quote Request constitutes the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes and extinguishes any representations and understandings previously given or made, other than those contained herein PROVIDED ALWAYS that nothing in this Agreement shall operate to limit or exclude liability for fraud.*"

C. The law on interpretation

26. I did not detect any disagreement between the parties concerning the law as to interpretation, apart from some minor matters of emphasis. The dispute between them concerns the application of the principles to the facts of this case. Given the common ground, I do not propose to refer at length to the authorities I was shown, most of which are well known and which I have re-read in the course of preparing this judgment. I will instead focus on some of the passages to which my attention was drawn which appear to me pertinent to the issues I have to decide.

27. The parties referred to the trilogy of Supreme Court cases encapsulating the law on interpretation: *Rainy Sky v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita* [2017] UKSC 24. Mr Brown referred me to the following convenient summary of the key principles given by Lord Hamblen in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, at [29]:

> "*(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
>
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
>
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.*"

28. Mr Shirazi reminded me that, when considering the commercial consequences of a particular interpretation as part of this iterative process, Lord Neuberger emphasised in *Arnold v Britton*, at [19], that commercial common sense is not to be invoked retrospectively. The fact that the contractual venture works out badly for one of the parties is not a reason for departing from the natural language. Likewise, Mr Shirazi is correct to say that evidence of conduct subsequent to the making of a contract is inadmissible for the purpose of interpreting the contract (see Chitty, on Contracts, 35th edition, para 16-061).

29. Mr Brown also relied on the words of Lord Hope in *Multi-Link Leisure Developments Ltd v Lanarkshire Council* [2010] UKSC 47 at [11], that:

> "*Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise.*"

30. The parties were agreed that situations sometimes occur in which the court concludes that the words of an agreement cannot reflect what the parties objectively intended, and the court can sometimes correct such wording as a matter of interpretation. This is a different process from rectification, which is not sought in this case. In this context, Mr Shirazi referred to *DnaNudge v Ventura Capital* [2023] EWCA Civ 1142 at [46]-47]:

> "*In a rare case, even where there is no ambiguity in the language, the iterative process may lead the court to conclude that something has gone*

> *wrong and that there has been a mistake in the drafting of the document. That may either be because there is an obvious error on the face of the document…; or because when the other terms of the contract and the context is taken into account, it becomes apparent that the ordinary and natural meaning of the words used cannot have been what the drafter meant, because the outcome makes no rational sense.*
>
> *In such a case, the court may engage in a process of "corrective construction" of the document. However, in order to do so, it must be clear both (i) that there has been a mistake and (ii) what the correction required to cure the mistake ought to be…*"

31. Mr Shirazi relied on the principles applicable to exclusion or limitation clauses. He referred to the judgment of Lord Leggatt (with whom Lord Burrows agreed) in *Triple Point Technology v PTT Public Co* [2021] UKSC 29, [2021] AC 1148, in which he said, at [108]:

> "*The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and now often codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from the normal rights and obligations which would be expected at common law in any particular type of contract.*"

32. Mr Shirazi also referred me to the judgment of Coulson LJ (with whom Phillips LJ and Zacaroli J agreed) in *Soteira Insurance v IBM* [2022] EWCA Civ. 440. In particular, Coulson LJ referred, at [37], to the words of Evans LJ in *BHP Petroleum Limited v British Steel PLC* [2000] 2 Lloyd's Rep 277, endorsing "*… a general rule that the more extreme the consequences are, in terms of excluding or modifying the liability that would otherwise arise, then the more stringent the court's approach should be in requiring that the exclusion or limit should be clearly and unambiguously expressed.*"

33. As noted above, there was no dispute about these principles.

D. The effect of clause 13.3 on ZOG's claim

34. I understood it to be common ground that, on an application pursuant to Rule 14.8 of the 2016 Rules, the burden of proving a claim lies on the creditor making the application. It was also common ground that the court's role on such an application is

to decide whether, on the balance of probabilities, the claim is established. The application is in the nature of a "*rehearing*" of the proof, rather than a review of the liquidators' reasons for their decision.

35. In relation to ZOG's claim, however, I am concerned only with the preliminary issue as to "*The effect of the £250,000 limitation on liability imposed pursuant to clause 13.3 of the* [MSA]."

The Parties' Submissions

36. Mr Shirazi, for ZOG, submits that there is a separate £250,000 cap applicable to each Transaction and there is no £250,000 overall limit to ZOG's claims. Alternatively, he says that the limitation of liability in clause 13.3 of the MSA does not apply to ZOG's claim, because it falls within the exception for breaches relating to "*payment*" in clause 13.9.

37. In relation to the first of these points, Mr Shirazi argues that it follows from clauses 5.3 and 5.8 of the MSA that each Transaction is a separate contract and that each such contract separately incorporates clause 13.3 which, therefore, imposes a separate £250,000 limitation of liability in relation to each Transaction. He says that clause 13.3 is a limitation clause, applying even to "*deliberate personal repudiatory breach*", so it should be read in the way which involves each party giving up the least rights, which would be the case if the £250,000 cap applies to each Transaction. If there were a single cap, applied across all Transactions, a large claim towards the start of the parties' relationship would exhaust the cap. That would leave CNG free to breach the contract for the remaining years of the Initial Term with impunity which, Mr Shirazi argues, is an uncommercial result which the parties are unlikely to have intended.

38. So far as clause 13.9 is concerned, Mr Shirazi says that ZOG's obligations to make payment under clause 10 involve calculation of a net sum, which must take account of any sums due from CNG to ZOG pursuant to the liquidated damages calculation provided for by the NBP 1997. Clause 10.8 of the MSA expressly contemplates that the calculation of the net sum might result in a balance being due from CNG to ZOG. Clause 13.9 exempts payments pursuant to clause 10 from the limitation of liability in clause 13.3 and Mr Shirazi says that this exemption is, therefore, broad enough to capture ZOG's claim for liquidated damages (although not its claim for an unquantified sum).

39. Mr Brown, for CNG, submitted that clause 13.3 unambiguously limits each party's "*total*" liability in respect of "*all claims*" (plural) arising under clause 13.1, which in turn refers to the "*entire financial liability*" of the parties. The £250,000 cap must, therefore, be intended to apply across all Transactions in the aggregate. ZOG's interpretation involves impermissibly re-writing the clause, despite there being no ambiguity. From a commercial perspective, if the £250,000 cap applies to each Transaction, then across the 11,799 Transactions which are the subject of ZOG's claim, the aggregate cap would amount to nearly £3 trillion. Given that the aggregate contractual price for the 11,799 Transactions was £5,561,258, a cap at that level makes no commercial sense.

40. In relation to clause 13.9, Mr Brown submits that the exception for payments is clearly worded and was intended to produce the commercially sensible result that the £250,000 cap does not apply to ZOG's liability to pay for gas which has been supplied. A provision that the cap does not apply to ZOG's payment obligations cannot be read as enabling ZOG to bring a claim for payment of liquidated damages.

(i) Does the £250,000 cap apply separately to each Transaction?

41. There is no doubt that a separate contract arises in respect of each Transaction. That is what clause 5.8 provides and I understood it to be common ground. It is also self-evident that the MSA is itself a separate contract with an existence independent of any particular Transaction. The MSA exists even if no Transaction is ever entered into and it contains provisions which do not depend on there being any such Transactions. The obvious example is clause 3, requiring ZOG not to enter into Transactions with any other person. Mr Shirazi accepted this.

42. In my judgment, the first question must logically be whether Mr Shirazi is right to say that, despite the MSA's existence as a contract independent from each of the contracts arising in respect of Transactions, clause 13 is to be regarded as incorporated verbatim into each and every Transaction, so that the clause becomes a term of each Transaction. His argument that the £250,000 limit applies separately to each Transaction depends upon such incorporation, since there is nothing in the express words of clause 13 to indicate that the limit should be applied in that way.

43. Mr Shirazi contends that the MSA is incorporated in its entirety into each and every Transaction. That submission recognises that it would be difficult to contend that clause 13 alone was incorporated into each Transaction, without the other clauses of the MSA also being incorporated. Overcoming that difficulty in that way, however, creates a different problem, namely that some important clauses of the MSA make little sense as terms incorporated into each Transaction. Take, for example, the "*trading procedure*" provisions of clause 5. Those are the provisions which prescribe the process for entering into individual Transactions. They can hardly have been intended to become terms of the Transactions themselves, with each Transaction enabling the parties to enter into further Transactions. The exclusivity provisions in clause 3 are another example. ZOG did not need to promise not to enter into Transactions with other parties as part of each separate Transaction with CNG into which it did enter. If ZOG were to transact with a third party, that would be a breach of clause 3 of the MSA, not a breach of numerous (and possibly thousands of) separate Transactions. These considerations point away from the parties' intention being to incorporate the MSA into each Transaction, as if it were simply a set of standard terms.

44. More importantly, there is nothing in the MSA which expressly incorporates the MSA as a whole, or clause 13 in particular, into each and every Transaction. Clause 5.8 is uninformative in this respect, because it simply provides that each Transaction is to be regarded as a separate contract. The first sentence of clause 5.3 provides that each Transaction is to be "*governed by and subject to*" the MSA. Similarly, the definition of "*Transaction*" in clause 1.1 refers to each separate contract being "*evidenced and constituted by this Agreement, and a Trade Confirmation and Quote Request...*". The wording of both of those provisions is, in my judgment, consistent with the MSA being

the source of rights and obligations in respect of each Transaction, but without every term of the MSA itself becoming a term of the Transaction.

45. So, for example, payment is to be made in respect of each Transaction in the manner contemplated by clause 10 of the MSA. Clause 10 does not envisage a separate "*Reconciliation Statement*" and "*Reconciliation Invoice*" being delivered each month for each individual Transaction. On the contrary, its purpose is self-evidently to enable a single invoice to be delivered in respect of all outstanding Transactions, with payment accordingly. It would not make sense, therefore, for the express wording of clause 10 to be treated as separately incorporated into each Transaction, but that wording nevertheless generates rights and obligations regarding payment for each Transaction. In that sense, each Transaction is "*governed by and subject to*" the MSA, and "*evidenced and constituted by*" it (amongst other documents), but verbatim incorporation of every term of the MSA into each Transaction is not contemplated. That interpretation gives the words "*governed by and subject to*" and "*evidenced and constituted by*" a coherent meaning but does not require the terms of the MSA to be incorporated wholesale into each individual Transaction. Those terms do not need to be incorporated, because the MSA is a separate "umbrella" contract which, on its own terms, applies to each and every Transaction (and applies even if there are no Transactions).

46. It is necessary next to consider the second sentence of clause 5.3. It will be recalled that it provides that "*All Transactions are entered into in reliance on the fact that this agreement, NBP 1997 and all Trade Confirmations form a single agreement between the parties (collectively referred to as this "Agreement"), and the parties would not otherwise enter into any Transactions.*" This is a confusing provision which does not fit well with the other clauses of the MSA. For one thing, it is expressed as a statement about reliance, as if it were intended to form the basis for a possible misrepresentation claim, but it is unclear if it has a contractual function beyond that. Moreover, on a first reading, it appears to be saying that there is, in fact, only one single contract, constituted by the MSA, NBP 1997 and <u>all</u> Trade Confirmations together. That would, however, contradict clause 5.8 and the definition of "*Transaction*", which plainly contemplate that each Transaction is to be regarded as a <u>separate</u> contract.

47. I do not understand Mr Shirazi positively to rely on the second sentence of clause 5.3. His written arguments about that sentence were focussed on explaining why CNG's liquidators had been wrong to rely on it in support of their contention that clause 13.3 imposes a single cap. Mr Shirazi's explanation of the sentence is that it means that the MSA, NBP 1997 and the relevant Trade Confirmation are to be the documents which together form a Transaction.

48. In my judgment, Mr Shirazi is right about this. The opening words "*<u>All</u> Transactions are*" should be read as if they said, "*<u>Each</u> Transaction is*", and the words "*…this agreement, NBP 1997 and <u>all</u> Trade Confirmations form a single agreement…*" mean "*…this agreement, NBP 1997 and <u>each</u> Trade Confirmation form a single agreement…*" Whilst this interpretation does not give the words their literal meaning, it is in my view an available meaning of the words as a matter of ordinary speech, which best accords with commercial good sense and is consistent with the interpretation of the words "*governed by and subject to*" and "*evidenced and constituted by*" explained above. The reasonable reader would understand that the MSA was intended to contribute to the content of each separate contract arising in relation to each

Transaction, but that its terms were not intended to be incorporated verbatim as separate terms of each Transaction. The MSA was an "umbrella" agreement applying across all the separate Transactions (and independently).

49. Similar considerations apply to clause 18.4, which was not expressly relied upon by either party but may be thought to have some bearing on this issue. It provides that "*This Agreement, Sales Trade Confirmation* [sic] *and the Quote Request constitutes the entire agreement between the parties with respect of the subject matter of this Agreement…*" This appears to be a poorly drafted attempt to craft a form of entire agreement clause which could apply to the arrangements between the parties. The difficulty is that the MSA contemplates numerous separate contracts for different Transactions, as well as the MSA existing independently, so it is difficult to see how there could be a single, entire agreement. A reasonable reader would consider that the purpose of clause 18.4 was to preclude the parties from relying on any alleged agreements between the parties, other than the MSA, the Trade Confirmations and the Quote Requests. The clause does not, in my judgment, support the notion that the MSA as whole (or the words of clause 13 in particular) are to be regarded as incorporated into each individual Transaction.

50. Even if I am wrong, however, and the MSA in its entirety (or clause 13 in particular) is to be regarded as incorporated verbatim into each Transaction, it does not follow that the £250,000 cap in clause 13.3 was necessarily intended to apply to each Transaction individually, rather than globally. I understood Mr Shirazi to accept that whether the clause has this effect or not must depend on the proper interpretation of clause 13. If, for example, clause 13 had expressly said that there was to be a £250,000 limit of liability for all claims, "*which will apply as a single limit between the parties regardless of the number of separate Transactions entered into,*" it would be obvious that there could only have been a global cap, even if the clause was incorporated into each Transaction. For Mr Shirazi's argument to succeed, therefore, he needs to show both that clause 13 was incorporated separately into each Transaction, and that it is to be interpreted as imposing a separate £250,000 cap for each of those Transactions.

51. I agree with Mr Brown that the language of clause 13 most naturally refers to a global cap being intended, regardless of the number of Transactions. The opening words of clause 13.1 refer to the "*entire financial liability*" of one party to the other. Found in an agreement such as the MSA, which contains clauses applicable to multiple Transactions (e.g. clause 10 regarding payment) or to situations which do not involve a Transaction at all (e.g. clause 3 regarding exclusivity), a reference to a party's "*entire financial liability*" suggests provisions applying across the board, rather than only to an individual Transaction. If that is the meaning of those words within the MSA in its role as a free-standing contract (separate from each Transaction), the reasonable reader is unlikely to understand that the same words were intended to have a different meaning when incorporated into individual Transactions (if they were so incorporated).

52. The same can be said about the words "*total liability … in respect of all claims arising under the matters set out in clause 13.1*", in clause 13.3. Those words refer back to the opening of clause 13.1 and must be contemplating not only the kind of claims which might relate to individual Transactions, but also to claims which have nothing to do with Transactions, such as (for example) claims for breaches of the confidentiality provisions of clause 17.3. The reasonable reader would, in my judgment, understand those words as contemplating one simple cap for all claims (subject to the exceptions

in clause 13.9), regardless of how many Transactions had been entered into. Put another way, the reasonable reader would not understand these words to contemplate one cap under the MSA for the claims having nothing to do with individual Transactions (such as breaches of confidentiality) and then additional, separate caps for each and every Transaction.

53. The court, of course, starts from an assumption that, in the absence of clear words, the parties do not intend to give up valuable rights and remedies. Here, however, there are clear words showing that the parties intended there to be a limit of liability of £250,000. That was a cap which (with certain clear and commercially reasonable exceptions) applied equally to both parties and formed part of a sophisticated regime of limitations and exclusions negotiated between experienced businesses with the benefit of legal advice. The parties plainly did intend to give up the right to make claims for more than an agreed cap and the simple question is whether that cap should be understood as applying to each separate Transaction. In my judgment, there is nothing in the terms of the MSA to justify reading it in that way.

54. Mr Shirazi's argument that a single cap of £250,000 produces an uncommercial result in the context of an agreement operating for many years initially gave me pause for thought. It appears superficially strange that, if ZOG successfully made a claim for £250,000 at the beginning of the relationship, it might then have no recourse for any further breaches during the remainder of the term. On reflection, however, this is a point which risks invoking commercial common sense retrospectively to escape a limitation which, with hindsight, appears unfavourable to ZOG.

55. One difficulty is that there is no evidence to allow a realistic assessment to be made about what the parties might have contemplated would be the level of losses flowing from a failure to supply gas at the time the MSA was entered into (or at the time of the Deed of Variation). Certainly, the losses now claimed are substantially more than the £250,000 cap, but that might be because of the exceptional rise in the price of gas in recent years, which might not have been anticipated in 2013 or 2016. Moreover, clause 13.4 contains an absolute exclusion of liability for loss of profits and suchlike, which might be expected to be the kinds of loss producing the largest damages awards. In light of that exclusion, the parties may have regarded £250,000 as a commercially reasonable overall cap for the kinds of claim which might be made throughout the entire term of the MSA. Ultimately, there is no evidence to enable me to make findings about what a reasonable reader in the position of the parties would have understood about these matters in 2013 or 2016, so ZOG has failed to discharge the burden of proof in this respect.

56. Furthermore, if there had been a breach by CNG leading to a substantial claim at an early stage in the relationship, one would have thought that ZOG would have terminated the MSA, either pursuant to clause 15, or on the basis of a repudiatory breach. ZOG could then have found a new supplier. Alternatively, the threat of termination in such circumstances might have led to a renegotiation of the £250,000 cap. Ultimately, it is not possible to say on the basis of submissions alone that a global cap of £250,000 was not commercially realistic at the time it was agreed.

57. Moreover, Mr Brown's counterargument has some force. Whilst, again, there is no evidence to enable an assessment to be made about precisely how many Transactions the parties contemplated might occur or how much gas might be supplied pursuant to

each one at the time the MSA was entered into, the MSA certainly contemplates that there will be multiple Transactions. Where the breach consists of failure to supply any gas, a cap of £250,000 for each Transaction rapidly ceases to be much of a cap at all. The reasonable reader of clause 13 at the time it was entered into would, in my judgment, consider that it was intended to provide a fixed limit on the total amount recoverable, not one which varied depending on the number of Transactions.

58. For all these reasons, I consider that the £250,000 limitation in clause 13.3 applies to all claims made by either party regardless of the number of Transactions, rather than a separate £250,000 limitation applying to each and every Transaction.

(ii) Does the exception for payment in clause 13.9 extend to ZOG's claim?

59. If he is wrong about the £250,000 cap applying separately to each Transaction, Mr Shirazi relies on clause 13.9, which excepts from the £250,000 cap on liability "*any breach of* [ZOG's] *obligations under clauses 3 (exclusivity) or 10 (payment).*" He argues that ZOG's claim for liquidated damages is a claim for payment pursuant to clause 10 which is, therefore, exempt from the £250,000 cap.

60. With the exception of the reference in clause 10.8 of the MSA to disputes about payments, which are expressed as potentially due to ZOG as well as to CNG, clause 10 only expressly contemplates payments by ZOG to CNG. Clause 6 of NBP 1997 does appear to contemplate the payment of a net sum, taking into account both sums due to CNG for gas supplied and sums due to ZOG by way of liquidated damages. That could result in a net sum being due to ZOG. It is not obvious, however, that these NBP 1997 provisions are applicable at all, given that clause 1.2.1 of the MSA provides that in the event of conflict between clauses 1 to 18 of the MSA and NBP 1997, the clauses of the MSA are to prevail. The MSA does appear to conflict with the payment provisions of NBP 1997 in various respects. Clause 6 of NBP 1997, for example, contains a billing and payment regime which is similar to, but materially different from, the regime in clause 10 of the MSA, and it is not obvious whether, or how, they are supposed to work in tandem. Nevertheless, I am prepared to assume, for the sake of argument, that Mr Shirazi is right to say that a claim for liquidated damages under NBP 1997 could give rise to a debt owed by CNG to ZOG, which might in some sense be described as a payment to be made under clause 10 of the MSA.

61. Even making these assumptions, however, clause 13.9 does not, in my judgment, make an exception from the £250,000 cap for a payment due from CNG to ZOG in respect of liquidated damages. The relevant exception in clause 13.9 is for a liability arising from a "*breach of* [ZOG's] *obligations*" under clause 10. So ZOG cannot rely on the £250,000 limitation in respect of money it has failed to pay to CNG for gas which has been supplied. It is, however, impossible to describe CNG's failure to pay ZOG liquidated damages (assuming any are due) as a "*breach of* [ZOG's] *obligations*" under clause 10, or at all. The exception simply does not apply to the claim on its face.

62. At one point Mr Shirazi argued that the reference to ZOG in clause 13.9 should be read as a reference to either party. There is, in my judgment, no justification for re-writing the clause in that way. There is no room for any corrective construction, because there is no obvious mistake. On the contrary, there is an obvious commercial reason for the

exception relating only to ZOG's obligations under clause 10. If there were no such exception, ZOG could simply fail to pay for gas and, once it owed at least £250,000, no claim could be brought by CNG for any further gas supplied. Payment for gas supplied is the principal performance required of ZOG pursuant to the MSA and it would have made no sense to limit ZOG's liability for breach of that obligation. A liability for liquidated damages is, by contrast, the kind of claim to which a cap might be expected to be applied.

63. At another stage, I understood Mr Shirazi to contend that clause 13.9 should be read as follows:

> "*The limitation of liability set out in clause 13.3 shall not apply to:*
>
> *(i) any breach of* [ZOG's] *obligations under clauses 3 (exclusivity); or*
>
> *(ii) 10 (payment).*"

64. This is also an impermissible re-writing of the clause. The link to ZOG's obligations obviously cannot be restricted to clause 3 in this way, not least because the word "*clauses*" is plural and obviously applies both to "*3*" and "*10*".

Conclusion in relation to clause 13.3

65. For these reasons:

    i) The effect of clause 13.3 is that there is an overall limit on all ZOG's claims of £250,000 and there is no separate limit applicable to each Transaction; and

    ii) ZOG's claim does not fall within the exception to the £250,000 limit in clause 13.9 relating to payment.

E. The effect of clause 13.5 on CNG's claim

CNG's case

66. In relation to CNG's claim, I am concerned with the preliminary issue as to "*the effect of the contractual time bar pursuant to clause 13.5 of the MSA.*"

67. Mr Brown, for CNG, submits that the twelve-month time limit in clause 13.5 does not apply to CNG's claim for three alternative reasons. First, he says that, as a matter of law, if a claim is not time barred at the date on which a company enters administration, time stops running at that moment. None of the debts claimed by CNG had become due more than twelve months prior to ZOG's entry into administration on 9 December 2021, so none of them is now time barred. As an alternative, Mr Brown's fall-back position is that, if time does not stop running when a company enters administration, nevertheless it stops running when a company enters liquidation. Thus, when ZOG moved to a CVL on 7 December 2022, there were six invoices totalling £481,814.86

which had been issued less than twelve months previously, and so the contractual time bar did not apply to that sum.

68. Secondly, Mr Brown says that, if time did not stop running on entry into administration, nevertheless ZOG acknowledged the debts due to CNG in the statement of affairs produced on 27 January 2022 and that restarted the clock, so that none of the debts claimed by CNG were time barred at the commencement of the CVL on 7 December 2022.

69. Thirdly, Mr Brown says that, as a matter of interpretation, clause 13.5 only limits claims against CNG and not claims by CNG. As a subsidiary point, Mr Brown argues that, if clause 13.5 does limit claims by CNG, its effect is merely to limit CNG's ability to bring a claim, but it does not extinguish ZOG's liability altogether.

70. Although Mr Brown put the argument about interpretation third, it seems to me that logically it must be addressed first. I therefore propose to deal with the issues in the following order:

   i) Does clause 13.5 limit claims by CNG?

   ii) Does clause 13.5 have the effect of extinguishing liability altogether?

   iii) Does time stop running when a company enters administration?

   iv) Does time stop running when a company enters a creditors' voluntary liquidation?

   v) Did ZOG's statement of affairs amount to an acknowledgement of the debt due to CNG which had the effect of restarting the clock?

(i) Does clause 13.5 limit claims by CNG?

71. Clause 13.5 provides as follows:

> "*The non-defaulting party shall only be entitled to bring a claim against the defaulting party where the non-defaulting party issues legal proceedings against CNG within the period of 12 months commencing on the date upon which* [ZOG] *ought reasonably to have known of its entitlement to bring such a claim.*"

72. Mr Brown submits that this clause unambiguously applies only to claims brought against CNG and not to claims brought by CNG. Although it begins by referring to the "*non-defaulting*" and "*defaulting*" parties, those general references must yield to the specific references to CNG and ZOG later in the clause, in accordance with the maxim "*generalia non specialibus derogant*": the specific provision overwrites, or prevails over, the generic one. There is nothing surprising about a time limit on claims by one party, but not the other: clause 13.9 also contemplates an imbalance between the parties' rights.

73. Mr Shirazi submits that something has gone wrong with the language of this clause and that, by a process of corrective construction, it should be read as if the references to

CNG and ZOG were replaced with the words "*defaulting party*" and "*non-defaulting party*" respectively. Clause 13 as a whole contains a set of bilateral limitations on liability, intended to apply to both parties, except where clearly stated. The references to "*non-defaulting*" and "*defaulting*" parties at the start of clause 13.5 shows that this clause was also intended to be one of the bilateral clauses. Even if no correction is made to the clause, it is not limited only to claims against CNG: a claim by CNG becomes time-barred unless ZOG seeks a negative declaration within twelve months.

74. In my judgment, Mr Shirazi is right that something has plainly gone wrong with the language of clause 13.5. On a literal reading, the clause potentially produces absurd results. If ZOG is a defaulting party, CNG may only bring a claim against it where CNG, as the non-defaulting party, "*issues legal proceedings against CNG*" within twelve months. In other words, the clause envisages CNG bringing a claim against itself. That is obvious nonsense. Moreover, the twelve-month period runs from the date on which <u>ZOG</u> "*ought reasonably to have known of its entitlement to bring such a claim.*" It makes little sense for the time period within which CNG must bring a claim to be calculated by reference to the date when ZOG ought to have known of "*its*" entitlement to claim (whether "*its*" here means ZOG's <u>own</u> entitlement to claim or <u>CNG's</u> entitlement to claim).

75. For these reasons, it is clear that there has been a mistake. There are only two logically possible corrections: either the references to "*non-defaulting*" and "*defaulting*" parties should be replaced by ZOG and CNG respectively (so that the clause applies only to claims brought by ZOG), or the references to CNG and ZOG should be replaced by "*the defaulting party*" and "*the non-defaulting party*" respectively (so that the clause applies to claims brought by either party). In my judgment, it is clear that it is the latter which was intended.

76. The MSA could be breached by either party and clause 13 is, as Mr Shirazi says, largely bilateral, imposing exclusions and restrictions on claims by either party. Clause 13.9 is, of course, an exception, but it is an exception which proves the rule. It expressly relates to breaches of specific clauses which place obligations entirely (or almost entirely, in the case of clause 10) on ZOG and it is expressed as a limited exception to an otherwise bilateral provision. There is an obvious commercial reason why there should be no limitation on ZOG's liability to pay for gas under clause 10, which I have explained above. There is an equally obvious commercial reason why there should be no limit on ZOG's liability for breach of the exclusivity provisions in clause 3. If the limit applied to those liabilities, ZOG would be able to ignore its exclusivity obligations altogether and obtain gas from another supplier at the cost of a one-off payment to CNG of £250,000, which would be its maximum liability. That would deprive the exclusivity obligation of any teeth.

77. By contrast, I can see no commercial reason for limiting claims brought by ZOG to a twelve-month period but permitting claims by CNG to be brought within the much longer limitation period prescribed by statute. That would generate a significant imbalance between the rights of the parties which could cause real unfairness if, for example, the parties had mutual claims but for some reason ZOG failed to commence its claims in time. In the absence of any explanation for an imbalance of that kind, it is obvious that the parties intended the twelve-month period to apply to claims by either party. That is consistent with the use of the expressions "*the defaulting party*" and "*the*

non-defaulting party" at the beginning of the clause and the specific references to CNG and ZOG are, in my judgment, obviously a drafting error.

78. The principle that specific provisions prevail over generic ones is a useful guideline, which can assist in resolving apparently conflicting provisions of an agreement. But it does not, in my judgment, compel the court to arrive at an interpretation of a clause which makes no commercial sense in preference to an obviously sensible one. Likewise, the general approach of interpreting time-bar clauses, like exclusion clauses, in a way which is favourable to a claimant does not compel the court to reach an interpretation which makes no commercial sense. Such an approach cannot, in my judgment, require clause 13.5 to be interpreted in a way which is favourable to CNG, merely because it happens to be the claimant in this case, but would be unfavourable to ZOG if it were the claimant. In the absence of a clear reason, such a clause ought to operate in a fair and balanced way in relation to each party to the MSA.

79. For these reasons, clause 13.5 should, in my judgment, be read as if it said:

> "*The non-defaulting party shall only be entitled to bring a claim against the defaulting party where the non-defaulting party issues legal proceedings against* [the defaulting party] *within the period of 12 months commencing on the date upon which* [the non-defaulting party] *ought reasonably to have known of its entitlement to bring such a claim.*"

<u>(ii) Does clause 13.5 have the effect of extinguishing liability altogether?</u>

80. As explained above, Mr Brown argued as a subsidiary point that, if the interpretation of clause 13.5 in the preceding paragraph is the correct one, the effect of the clause is merely to limit the non-defaulting party's ability to bring a claim, but it does not extinguish the liability. This argument was not developed in great detail, but I understood it to be based on an analogy with the position under the Limitation Act 1980, where the effect of expiry of the limitation period is generally to bar the remedy, but not (except in certain circumstances) to extinguish the claim altogether.

81. If the position pursuant to clause 13.5 is similar, then although CNG would be unable to prove in ZOG's liquidation because the debt is time-barred (see *Re Art Reproduction Co Ltd* [1952] Ch 89), Mr Brown says that it would nevertheless be able to set off its time-barred claim against ZOG's proof in CNG's liquidation, by simply deducting the amount of the time-barred debt from any sum ultimately paid to ZOG. I understood Mr Shirazi to concede that, if clause 13.5 does not have the effect of extinguishing the time-barred debt, CNG would be entitled to set off that debt against ZOG's proof in CNG's liquidation. His argument was that the effect of clause 13.5 is to extinguish CNG's debt altogether, once the twelve-month period has expired.

82. Mr Shirazi relied on *Aries Tanker Corporation v Total Transport Ltd.* [1977] 1 WLR 185, in which the House of Lords held that an article of the Hague Rules operated not merely to bar any remedy, but to extinguish the claim, after expiry of twelve months. It is important to consider the wording of the article from the Hague Rules under consideration in that case. It said, "*...In any event the carrier and the ship shall be*

discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods…" Lord Wilberforce plainly attached importance to the words "*shall be discharged*" when explaining that the effect of the clause was that the relevant claim ceased to exist on the expiry of the relevant period. The *Aries Tanker* case demonstrates that the parties can, if they wish, agree that a claim shall cease to exist in this way, but it does not establish that every contractual time bar has the effect of extinguishing claims. In my judgment, whether a contractually agreed time bar has that effect or not depends on the proper interpretation of the language used by the parties.

83. Clause 13.5 is expressed in terms of the non-defaulting party being "*only entitled to bring a claim*" within the twelve-month period, and it then refers to the issue of legal proceedings. The language of note being entitled to "*bring*" a claim after a certain time bears some similarity to the wording of, for example, section 5 of the Limitation Act 1980, which provides that "*An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.*" As explained above, that language has been held to bar the remedy, but not to extinguish the claim. In my judgment, a reasonable reader of clause 13.5 would understand the parties to have intended the expiry of the twelve-month period to have the effect of barring legal proceedings, but not to extinguish debts altogether.

84. It follows that I agree with Mr Brown's submissions on this issue. Properly interpreted, clause 13.5 disentitles CNG from asserting a claim against ZOG in any proceedings after expiry of the defined period (and likewise precludes CNG from proving in respect of such a claim in ZOG's administration or liquidation). It does not, however, prevent CNG from deducting the amount of its time-barred claim from any sums paid to ZOG in respect of ZOG's proof in CNG's liquidation.

(iii) Does time stop running when a company enters administration?

85. Mr Brown submitted that, although it has been held that time continues to run for limitation purposes when a company enters administration, the authorities which reached that conclusion are all concerned with administrations under the statutory regime which applied prior to the Enterprise Act 2002. Mr Brown argues that administrations under the new regime introduced by that Act differ in important respects, particularly when they contemplate a distributive process from the outset of the administration. The position in relation to such administrations should, he says, be the same as that when a company enters liquidation, so that time stops running from the date on which an administration order is made.

86. Mr Shirazi says that if Parliament had intended the Enterprise Act 2002 to change the law as to the running of time in an administration, it would expressly have said so. There is no basis for implying such a fundamental change and it is most unlikely that Parliament intended a change in relation to some administrations, if they involve a distributive process from the outset, but not in others.

87. In order to resolve this dispute, I will consider first the authorities which bear on the issue and will then review the changes between the pre- and post-Enterprise Act

administration regimes to determine whether it is implicit in the later statutory scheme that time stops running for limitation purposes.

The authorities

88. When a company enters compulsory liquidation, time ceases to run for limitation purposes from the making of the winding up order. The authority generally cited for this proposition is *In re General Rolling Stock Co* (1871 – 72) L.R. 7 Ch. App. 646. It concerned a company which had been ordered to be wound up in February 1865. In January 1871 a dividend had been paid on debts which had been established. In March 1871 a creditor first gave notice of a claim which had accrued more than six years earlier and applied for leave to prove, not disturbing previous dividends. The Court of Appeal held that the creditor was entitled to prove on that basis.

89. James LJ analysed the relevant provisions of the Companies Act 1862, which then governed liquidation. He said:

> "*A duty and a trust are thus imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section. After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations.*"

90. Mellish LJ considered that:

> *"…the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim…"*

91. As I understand it, the logic underlying the judgments of both James LJ and Mellish LJ is that the effect of the winding up order was to create a trust of the company's property for the benefit of its creditors at the date of the order. Once such a trust came into existence, each creditor became entitled to claim as a beneficiary against a trustee, so that the Statute of Limitations (which I understand to be a reference to the Act of 1623) would not apply. James LJ also placed some weight on the moratorium on proceedings as indicating the intention of the legislature to create a statutory trust, but Mellish LJ did not refer to that.

92. The potential time bar to CNG's claim is, of course, a contractual one, rather than one arising as a result of statutory limitation. Nevertheless, the statutory trust produced by

the winding up order must have the effect of stopping time running for the purpose of a contractual time bar, as much as a statutory one. If a creditor has a valid claim at the date the trust comes into existence, it becomes a beneficiary of that trust and entitled to share in the company's assets. I do not see how a difference in the legal basis on which the claim might subsequently have ceased to be viable if there had been no trust, can affect the creditor's rights when there is such a trust.

93. The statutory trust arising on liquidation was analysed by Lord Diplock in *Ayerst (Inspector of Taxes) v C. & K. (Construction) Ltd.* [1976] AC 167. Lord Diplock pointed out that, on a winding up, the legal title to the company's assets remains vested in the company but "*the company itself as a legal person, distinct from its members, can never be entitled to any part of the proceeds.*" Although not all the conditions for the existence of a "trust" in the strict sense are satisfied, nevertheless the property of the company ceases to belong beneficially to the company. He described that proposition as having stood unchallenged for a hundred years. He referred to various authorities (including *In re General Rolling Stock Co*) and said that:

> "*All that was intended to be conveyed by the use of the expression 'trust property' and 'trust' in these and subsequent cases ... was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons.*"

94. Administration was introduced as a new corporate insolvency procedure by the Insolvency Act 1986. The question whether time ceased running for limitation purposes when a company entered administration was addressed by Mr Jules Sher KC, sitting as a Deputy High Court Judge, in *In re Maxwell Fleet and Facilities Management Ltd.* [2001] 1 WLR 323. The company in that case entered administration in February 1992 and the administrators had dismissed twelve employees in April 1992. When the administration had continued for more than six years after their dismissal, the administrator sought directions as to whether their claims were statute-barred. Ultimately, Mr Sher KC decided that the twelve employees could still assert their claims on the basis of the statutory charge which arises in respect of debts incurred under contracts of employment adopted by the administrator. In the course of his reasoning, however, he addressed the issue as to the effect of the administration on the running of time for limitation purposes.

95. Mr Sher KC pointed out that there was no express provision in the Insolvency Act 1986 dealing with limitation, despite the administration moratorium on proceedings. He referred to *In re General Rolling Stock Co* and pointed out that the moratorium on proceedings referred to by James LJ was common to liquidation and administration. He then said:

> "*The fact that winding up involves the imposition on the available assets at the commencement of the winding up of a statutory scheme of rateable division amongst the creditors at that time provides, as it seems to me, an immensely strong context for the laying down of a principle of law that the limitation periods stop running. An administration has none of this: it is not involved with the collection and realisation of all of the*

> *assets of the company and the distribution thereof to the creditors. Of course, an administrator must take into his custody and control all the assets of the company: see section 17(1) of the Act of 1986. But he has no power to distribute assets realised, not even to preferential creditors, as does an administrative receiver. The nature of the administration is governed by the purposes for which it was granted, generally a purpose inconsistent with liquidation (at least an immediate one). What seems to me to have been the major feature that led to the decision in In re General Rolling Stock Co is absent here. In my judgment, the moratorium on proceedings, strong though it is, is not nearly enough to enable a court to read into a comprehensive modern statute like the Insolvency Act 1986 an implied disapplication of the limitation periods during the tenure of the administrator."*

96. Mr Sher KC concluded that the granting of an administration order did not stop time running and said that, if there were a gap in the law in this respect, it could not be filled by the courts, but was a matter for Parliament. He did not expressly link his reasoning to the existence or otherwise of a statutory trust, but he plainly regarded the critical factor as the imposition on the assets of a scheme of rateable distribution amongst the creditors from the moment the winding up order was made.

97. That is how the law stood when the Enterprise Act 2002 introduced the new process of administration by inserting schedule B1 into the Insolvency Act 1986 (**Schedule B1**). The question is whether that new process has changed the law so that time stops running for limitation purposes when a company enters administration.

98. There has been no case since the Enterprise Act 2002 which has addressed precisely this question. *Re Leyland Printing Co Ltd. (In Admin.)* [2011] BCC 358 was decided well after 2002, but was concerned with two companies which had entered administration in May 2002 so that the old administration process applied (the Enterprise Act 2002 having come into force on 20 June 2002). Accordingly, HHJ Hodge KC (sitting as a Judge of the High Court) applied Mr Sher KC's decision in *Re Maxwell*. He also referred to *dicta* in *Re Cases of Taffs Well Ltd.* [1992] Ch. 179 and *Re Cosslett (Contractors) Ltd.* [2004] EWHC 658 (Ch) to the effect that an administration, unlike a liquidation, did not stop time running. Based on reasoning from the *Taffs Well* case, HHJ Hodge KC made the link between time stopping running and the existence of the statutory trust, saying that "*an 'old-style' administration gives rise to no trust in favour of the company's creditors...*" Mr Brown submitted that it was implicit in the reasoning in *Leyland Printing* that the position in relation to the new administration process was different. I consider, however, that HHJ Hodge KC's various statements stressing that he was dealing with a pre-Enterprise Act administration were made to emphasise that he was expressing no view about the "*new style*" administration, rather than to suggest that a statutory trust does arise in the latter (and, in any case, such a view would be *obiter*).

99. Mr Brown also relies on Goode, On Principles of Corporate Insolvency Law, at paragraph 11-30, where it is explained that the Enterprise Act 2002 introduced a power to make a distribution to ordinary unsecured creditors with the permission of the court, bringing administration closer to liquidation than it used to be. Goode comments that "*it would seem that the statutory trust arising in a winding-up arises equally in an administration (at least from the time of notice of a distribution) although this is a*

matter of some controversy." There are three footnotes to this sentence, each of which is important.

100. The first footnote relates to the text concerning a statutory trust arising in an administration and refers to *Harms Offshore AHT Taurus GmbH v Bloom* [2010] Ch 187. The footnote continues by saying, "*This suggests that another difference between administration and liquidation highlighted in previous editions, namely that the commencement of pre-Enterprise Act administration did not stop time running under the Limitation Act ... has also fallen away.*" *Harms Offshore* was not a case about limitation. It was concerned with whether administrators of an English company were entitled to a mandatory injunction requiring two creditors to use their best endeavours to procure a release of certain enforcement orders they had obtained against the company from the United States District Court for the Southern District of New York.

101. The administrators argued by analogy with anti-suit injunctions granted against creditors of companies in liquidation. They relied, in particular, on the case of *In re Oriental Inland Steam Co; Ex p Scinde Railway Co* (1874) LR 9 Ch App 557, a case decided relatively shortly after *In re General Rolling Stock Co* by the same two judges and based on similar reasoning concerning the statutory trust. An English creditor had obtained a substantial sum by means of execution against the company's property located in India. The court ordered the creditor to repay the money to the liquidator. James LJ noted that difficulties could arise when dealing with assets and creditors abroad, but said there was no problem in the case before him:

> "*There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor* [at first instance] *was of opinion that this was the same as that of one cestui que trust getting possession of the trust property after the property had been affected with notice of the trust. If so, that cestui que trust must bring it in for distribution among the other cestuis que trust. So I, too, am of opinion, that these creditors cannot get any priority over their fellow-creditors by reason of their having got possession of the assets in this way. The assets must be distributed in England upon the footing of equality.*"

102. Mellish LJ also said that the effect of winding-up was to constitute a trust for the benefit of all the creditors. He considered that followed from section 95 of the Companies Act 1862, which provided that from the time of the winding up order, all the powers of the directors of the company to carry on the trade or to deal with the assets of the company were wholly determined, and nobody had any power to deal with them except the official liquidator, who was to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It followed from the existence of the trust that, so far as the English court's jurisdiction enables it, no one creditor can be allowed to have a larger share of the assets than any other creditor.

103. In *Harms Offshore* Stanley Burnton LJ quoted extensively from the judgments of James and Mellish LJJ and pointed out that it was the finding of a trust which resulted in an effective extraterritorial jurisdiction. He went on to say that there was no difference in substance between the protection of the assets of a company in administration and those

of a company being wound up. The critical part of his reasoning is in paragraph 24, as follows:

> "*It seems to me that the trust the existence of which was established in In re Oriental Inland Steam Co was a legal construct created to achieve the equitable distribution of the proceeds of the realisation of the assets of the company wherever situated. As Millett LJ pointed out in Mitchell v Carter [1997] 1 BCLC 673, 689, it is a trust which confers no beneficial interest on the creditors, who are the beneficiaries. Their only right is to have the assets of the company dealt with in accordance with the statutory scheme applicable to a company that is the subject of a winding up order. Similarly, the creditors of a company in administration are entitled to have the company and its assets dealt with in accordance with the statutory scheme applicable to such companies. The lack of any material distinction between compulsory winding up and administration is demonstrated by the judgment of Mummery LJ in In re Polly Peck International plc (No 2) [1998] 3 All ER 812, 827. If the court has a jurisdiction to protect the assets of a company that is being wound up by the court from foreign attachments and executions, in my judgment it has a similar jurisdiction in the case of a company in administration.*

104. In my judgment, this cannot be read as a decision that a statutory trust arises on an administration which has the effect of stopping time running for limitation purposes. Although he recognised that the finding of a trust was critical to the result of the *Oriental Inland Steam* case, Stanley Burnton LJ described the trust as a "*legal fiction*" and focussed his analysis on the lack of any material distinction between liquidation and administration for the purposes of determining whether one creditor should be prevented from obtaining an advantage over other creditors by enforcing against assets abroad. The lack of material distinction to which he referred makes sense in that context, but it is less obvious that there is no material distinction where the debate is about whether time stops running for limitation purposes. None of the difficulties arising from the differences between liquidation and administration referred to in *Re Maxwell* appear to have been debated in *Harms Offshore*. Indeed, *Re Maxwell* was not cited, and nor were *Taffs Well* or *Re Cosslett*.

105. For completeness, I observe that the brief comments in the cases of *Mitchell v Carter* and *Polly Peck* to which Stanley Burnton LJ referred do not take the matter further. The former comments were concerned only with liquidation and the latter were explaining why, on the facts of that case, the statutory scheme applicable to administrations must be followed in the same way as the scheme applicable to liquidations. Sir John Chadwick delivered a short concurring judgment in *Harms Offshore*, but did not address the statutory trust issue. Ultimately, although the decision in *Harms Offshore* is binding on me, it did not address the effect of an administration on the running of time for limitation purposes and, in my judgment, is not determinative of the issue which I must decide.

106. The second footnote to the passage from Goode referred to above relates to the text about the statutory trust arising in an administration "*at least from the time of notice of a distribution*". The authority cited for this in the footnote is *Revenue and Customs Commissioners v Football League Ltd.* [2012] Bus. LR 1539. That case concerned a

financial arrangement prescribed under the articles of association of Football League Ltd. which had the effect of ensuring that, if one club became insolvent, a group of "*football creditors*" (such as other clubs, players and managers) were paid in full before other unsecured creditors received anything. It was argued that this was an unlawful attempt to contract out of the *pari passu* principle and the anti-deprivation rule. The claim was brought in relation to a particular club which was in administration. It was, therefore, necessary to consider whether the *pari passu* principle and the anti-deprivation rule apply to an administration.

107. David Richards J (as he then was) considered that, unless and until an administrator gives notice that a distribution is to be made (pursuant to the new administration regime in place following the Enterprise Act 2002), the *pari passu* principle has no part to play and, indeed, might even be damaging to the survival of the company, since it might result in contracts which were essential to the ongoing business becoming void. The *pari passu* principle would come into play when the administrator gives notice of a proposed distribution. The anti-deprivation principle, however, applied from the time the company went into administration. David Richards J then continued:

> "*I should add that I do not consider that the application of either the pari passu principle or the anti-deprivation rule depends on whether there is a 'statutory trust' of the assets of the company. I mention this because Mr Moss submitted that the pari passu principle, and the anti-deprivation rule, applied only once the assets of the company were held on the statutory trust, constituted by the insolvency legislation ... Mr Moss submitted that the earliest time at which it could arise in an administration was when notice of a proposed distribution was given.*
>
> *I think Mr Moss is probably right when he says that the statutory trust, as discussed in Ayerst's case, does not apply to the assets of a company in administration, at least before notice of a proposed distribution is given and even then difficulties may arise if only some of the assets are to be distributed.*
>
> *But I cannot see that this matters to the application of the pari passu principle, still less the anti-deprivation rule.*"

108. This is evidently not a concluded view that a statutory trust does not arise in an administration unless and until notice of a proposed distribution is given; David Richards J said only that Mr Moss was "*probably*" right. Nevertheless, it was a view expressed after a thorough examination of all the relevant statutory provisions. The report indicates that *Harms Offshore* case was mentioned in the skeleton arguments, but was not referred to in the judgment.

109. The third footnote to the passage from Goode referred to above relates to the text saying that it is a matter of some controversy whether a statutory trust arises in an administration. The authority cited in the footnote is *Re Lehman Bros Europe Ltd (in administration) (No.9)* [2018] Bus. L.R. 439. In that episode of the Lehman litigation, the court approved a proposal by the administrators to enable a distribution of a substantial surplus to the sole member of the company, despite the absence of any express provision in the insolvency legislation permitting such a distribution. One of the issues which Hildyard J considered was whether, in a distributing administration,

the assets were held on a statutory trust and, if so, whether that precluded the administrators from dealing with assets of the trust in the way proposed. He referred, amongst other authority, to *Harms Offshore*, commenting that the Court of Appeal had considered "*the trust which justifies anti-suit injunctions*", but that "*in the circumstances of that case, the Court of Appeal did not find it necessary to determine the wider question as to the existence of a statutory trust in an administration.*"

110. Ultimately, Hildyard J considered that he did not need to decide the point in the case before him, saying:

> "*In my view, the obvious distinctions between the position of a company in administration and a company in liquidation, illustrated by the retention by directors and the company of powers subject to the constraints of paragraph 64 of Schedule B1, make the description 'statutory trust' inapposite in the case of administration. However, neither Ms Toube nor Mr Beswetherick encouraged me to decide the point: and I am content not to do so, since I am also persuaded by the arguments they advanced that whatever 'trust' there is does not embrace or prevent the exercise of management powers in relation to a surplus with the permission of the Administrators (and it may well be without it).*"

111. Mr Brown frankly accepted that, apart from Goode, commentators generally suggest that an administration does not stop time running for limitation purposes, but he points out that those commentators frequently rely only upon the authorities dealing with the pre-Enterprise Act administration regime.

112. None of the authorities to which I have referred provides a conclusive answer as to whether a post-Enterprise Act administration stops time running. The authorities referred to in the three footnotes to Goode's book each considered whether a statutory trust arises in a post-Enterprise Act administration, but they were not concerned with limitation and (except, perhaps, for *Harms Offshore*) did not express a concluded view. For the reasons explained above, the *Harms Offshore* case is not determinative of the issue which I must decide, which was also the view of Hildyard J in the *Lehman* case.

Comparison of the pre- and post-Enterprise Act administration regimes

113. As explained above, the analysis as to why time stops running on the making of a winding up order is that the statutory trust enables creditors to claim as beneficiaries. Claims by beneficiaries to recover trust property from trustees once fell outside the limitation statutes altogether, but section 21(1)(b) of the Limitation Act 1980 now expressly provides that no limitation period applies to such claims. That being so, I must grasp the nettle and reach a conclusion about whether a statutory trust arises in a post-Enterprise Act administration in order to decide whether the effect of such an administration is to stop time running.

114. It is, perhaps, curious that it is necessary to carry out such an exercise in the context of a relatively recent, and apparently comprehensive, statute like the Insolvency Act 1986, as amended by the Enterprise Act 2002. An obvious point to make is that, given Mr Sher KC's comment, made just a couple of years before the Enterprise Act 2002 was passed, that it was for Parliament to fill any gap in the law, it might have been expected

that Parliament would have made express provision about limitation in the Enterprise Act 2002, particularly if it had intended to change the law so that an administration order would have the effect of stopping time running. Nevertheless, since the reason time stops running is the existence of a statutory trust, and since such a trust was always implied from the statutory language, the fact that Parliament has not made any express provision is not necessarily decisive.

115. Importantly, Mr Brown did not suggest that *Re Maxwell* was wrongly decided, so I start from the position that no statutory trust arose in relation to a pre-Enterprise Act administration. It is, therefore, necessary to identify the material differences between pre- and post-Enterprise Act administrations and to consider whether those differences justify a conclusion that a statutory trust arises in the latter despite not arising in the former.

116. In my judgment, the critical question is whether any of those differences has resulted in all the assets of a company in a post-Enterprise Act administration being required to be used or disposed of for the benefit of persons other than the company itself (to paraphrase Lord Diplock in the *Ayerst* case). Put another way (also based on Lord Diplock's speech), if the duty of the administrator is to collect the assets and divide them amongst the creditors, such that the company itself (as opposed to its members) can never be entitled to any part of the proceeds, then a statutory trust will have arisen.

117. As originally enacted, an administration required a court order. The court needed to be satisfied that the company was or was likely to become unable to pay its debts and that the administration would be likely to achieve one or more of the purposes set out in section 8(3) of the 1986 Act:

> "*(a) the survival of the company, and the whole or any part of its undertaking, as a going concern; (b) the approval of a voluntary arrangement under Part I; (c) the sanctioning under* [Part 26 of the Companies Act 2006] *of a compromise or arrangement between the company and its creditors or members; and (d) a more advantageous realisation of the company's assets than would be effected on a winding up.*"

118. In a post-Enterprise Act administration, an administrator can be appointed out of court by the holders of a floating charge or by the company or its directors as well as by the court. So far as an application to the court is concerned, the court must still be satisfied that the company is, or is likely to become, unable to pay its debts and that the administration is reasonably likely to achieve the purpose of the administration. The previous four purposes have, however, been replaced by a single purpose comprised of a hierarchy of three objectives listed in paragraph 3(1) of Schedule B1:

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

119. These purposes must be considered in sequence. Paragraph 3(3) of Schedule B1 provides that the administrator must pursue the objectives in sub-paragraph 1(a) unless he thinks either that it is not reasonably practicable to achieve it or that the objective in sub-paragraph 1(b) would achieve a better result for the creditors as a whole. Paragraph 3(4) provides that the objective in sub-paragraph 1(c) may be pursued only if achievement of the other objectives is not reasonably practicable and it does not unnecessarily harm the interests of the creditors as a whole.

120. Whilst a pre-Enterprise Act administration order was in force, its effect pursuant to section 8(2) of the 1986 Act was that the affairs, business and property of the company were to be managed by the administrator. The position is the same in a post-Enterprise Act administration by virtue of paragraph 1(1) of Schedule B1, although an administrator is now an officer of the court as well as an agent of the company. Both pre- and post-Enterprise Act, the directors' powers are not supplanted by an administration order, although they are curtailed, so that the exercise of a power in a way which could interfere with the administration requires the consent of the administrator (see section 14(4) of the 1986 as originally enacted and paragraph 64(1) of Schedule B1).

121. In relation to both pre- and post-Enterprise Act administrations, a broad moratorium is imposed on claims and enforcement action. In this regard, section 11 of the 1986 Act as originally enacted uses slightly different language from paragraphs 40 to 43 of Schedule B1, but none of the differences appear to me to be material for present purposes.

122. A pre-Enterprise Act administration ended either when its purposes had been achieved, or when they were no longer capable of achievement. In the latter case, the administration would be followed by liquidation. Importantly, an administrator in a pre-Enterprise Act administration had no power to make a distribution of assets amongst creditors. That would be undertaken in a subsequent liquidation, if the assets were sufficient.

123. In a post-Enterprise Act administration, a subsequent liquidation remains an available exit route, pursuant to paragraph 83 of Schedule B1. It is, however, now possible for an administrator to make distributions. Indeed, the third potential objective of an administration is to make a distribution to secured or preferential creditors. Moreover, an administrator may now make distributions to all or any creditors, subject to obtaining the permission of the court (unless the creditor is secured or preferential).

124. The detailed provisions regarding distributions and the ascertainment of provable debts are contained in rules, rather than in the Insolvency Act 1986. The original part 2 of the Insolvency Rules 1986 dealing with administrations did not contain rules of this kind (since no distribution was originally possible in an administration), but part 2 was entirely replaced in tandem with the enactment of the Enterprise Act 2002. The Insolvency Rules 1986 were subsequently replaced in their entirety by the Insolvency (England and Wales) Rules 2016. The rules relating to proof of debts and distributions are now found in part 14 of the 2016 Rules and they are common to various procedures, including both administration and liquidation. The assimilation of the rules relating to administration and liquidation was, however, an innovation of the 2016 Rules; part 2 of the rules previously in force contained provisions dealing solely with administration.

125. The ascertainment of provable debts is as at the date when the company entered administration (rule 14.1(3)) and a creditor wishing to recover a debt must submit a proof of debt (rule 14.3). All non-preferential debts rank *pari passu* (rule 14.12). The administrator must give notice to the creditors of his intention to declare and distribute a dividend (rule 14.29) and, amongst other information, the notice must contain a statement of the last date by which proofs may be delivered (rule 14.30). For the purpose of set-off of mutual debts, an account is taken at the date of the notice given by the administrator proposing to make a distribution (rule 14.24). In the *Football League* case, David Richards J considered this to be a significant indication that the *pari passu* regime was not to operate prior to the date of the notice.

126. The changes to the administration process made by the Enterprise Act 2002 outlined above, particularly the power to make distributions, contemplate that an administration may reach a point at which a company's assets will be divided amongst the creditors by the administrator. Thus, as and when an administrator gives notice of intention to make a distribution, and assuming it is a distribution of the proceeds derived from all the remaining assets, there would be good grounds for saying that the conditions for a statutory trust had arisen. That would be consistent with the date of such notice being the time at which the account of mutual debts is undertaken for set off purposes and at which the *pari passu* principle is engaged. At that point, the administration closely aligns with a liquidation.

127. That is of no assistance to CNG, however, because no notice of intention to distribute was given in the administration of ZOG. CNG requires there to have been a statutory trust in existence from the time the administration order was made.

128. Mr Brown did not argue that a statutory trust comes into existence at the commencement of every administration. He pointed out that an indication as to which of the three objectives of administration is likely to be achieved is given when an administration order is sought. It is not unusual for an order to be sought on the basis that the first objective (rescuing the company) is unlikely to be achieved, but that the second objective (a better result for creditors than a winding up) is reasonably likely to be achieved. In a case such as that, said Mr Brown, the administration would be what he described as a "*distributive process*" from the outset, with the result that time stops running for limitation purposes the moment the order is made.

129. There are several problems with this submission. First, it is inherent in the argument that a statutory trust arises at the outset in some administrations but not in others. Creditors with a claim for which the limitation period was about to expire would need to work out the effect of the administration order in their particular case on the running of time. It seems unlikely that Parliament intended such an inconsistency between the legal effect of different types of administration to arise at the very outset of an administration.

130. Secondly, achievement of a more advantageous realisation of the company's assets than on a winding up was always one of the purposes of an administration order. Yet a pre-Enterprise Act administration with that purpose was not a distributive process. Any distribution following such an administration would happen as part of a subsequent liquidation. As explained above, that is still an available exit from a post-Enterprise Act administration. Indeed, that is the route actually taken out of the administrations of both ZOG and CNG in this case. The fact that an administrator <u>can</u> now make a

distribution does not, therefore, mean that the administrator necessarily <u>will</u> make such a distribution, rather than proceeding to a voluntary liquidation. It is not, therefore, the administrator's <u>duty</u> to divide the company's assets amongst the creditors and that suggests that a statutory trust does not arise.

131. Thirdly, even if an administration order were made on the basis of evidence that the first objective (rescuing the company) is unlikely to be achieved, the administration does not thereafter proceed as if paragraph 3(1)(a) of Schedule B1 can be ignored. Whilst I accept that it rarely happens in practice, it is conceivable that a rescue subsequently and unexpectedly becomes possible. In a rescue scenario, as Mr Brown accepts, the company remains beneficially entitled to its assets and there can be no question of a statutory trust arising. The mere possibility of an outcome in which the company survives (no matter how unlikely) precludes a statutory trust, in my judgment. Indeed, the nub of the problem may be that, in an insolvency process like administration which can, at least in theory, result in survival, it is difficult to see how time can stop running for limitation purposes. If a claim would have become time barred during the administration, but was prevented from doing so by the making of the administration order, what would then happen if the administration order were subsequently discharged and the company continued in existence?

132. Fourthly, the reverse sequence of events to the third point considered above is also possible, in which an administration order is made on the footing that the first objective (rescuing the company) <u>is</u> likely to be achievable, but that subsequently turns out not to be possible. In such circumstances, the administrator might conclude that the second objective (a better result for creditors than a winding up) remains reasonably likely to be achieved. If Mr Brown is right, the administration would become a "*distributive process*" as a result. That would give rise to substantial uncertainty and difficulty in determining when a statutory trust had arisen, and so when time stopped running for limitation purposes. At the outset, there would be no statutory trust. Would it then arise, for example, when the administrators first had the unexpressed thought that a rescue was unlikely to be possible, or when they first expressed that conclusion to someone else, or when they first wrote about it to the creditors? And what if they changed their minds back again? Parliament is unlikely to have intended to introduce such uncertainty into the question of whether and when time stops running for limitation purposes.

133. Mr Brown also relied on the assimilation of the rules relating to administration and those relating to liquidation so far as they concern distributions and proof of debts, in part 14 of the 2016 Rules. I have considerable sympathy with creditors who submit a proof of debt in an administration and are subsequently taken by surprise by the discovery that their claims have become time barred. The process of submitting a formal proof of those debts which were due at the date on which the administration order was made might reasonably suggest to anyone not versed in the law of insolvency that their claim had thereby crystallised at that date. An awareness of the moratorium on claims would be likely to reinforce such a view: the restriction on issuing proceedings might reasonably appear consistent with any claim being sufficiently preserved by submitting the proof of debt. Furthermore, such creditors might reasonably feel aggrieved to be told that the identical process would have stopped time running in a liquidation, but did not do so in an administration. Administration is

supposed to produce a better outcome than liquidation for all creditors, not a better one for some at the expense of others whose claims have become time-barred.

134. Regrettably, however, the question of whether an administration has the effect of stopping time running for liquidation purposes does not depend on what creditors might reasonably understand from the proof of debt process; or even on an interpretation of the 2016 Rules. What matters is whether the provisions of Schedule B1 of the 1986 Act implicitly give rise to a statutory trust, with the effect that creditors become able to claim as beneficiaries to whom no limitation period applies. The process of proving debts is part of the mechanism which enables a distribution to be made by an administrator, where appropriate. For the reasons explained above, however, there is no inevitability under Schedule B1 that an administrator will make a distribution to creditors. Consequently, there can be no statutory trust. The assimilation of the proof of debt process in administration with that in liquidation was a product of the 2016 Rules which cannot have changed the meaning and effect of Schedule B1 enacted in 2002.

135. Mr Brown also placed some reliance on policy. He submitted that the policy purpose behind the proof of debt system is to provide an efficient process for determining debts owed by an insolvent entity, which seeks to avoid the high costs that litigation would create, and which would ultimately prejudice all creditors by the reduction in available funds for distribution. If time continues running for limitation purposes after the commencement of administration, a multitude of applications would, Mr Brown said, have to be issued seeking permission to issue claims protectively, with a consequent increase in legal costs. Taking CNG as an example, he said there were 159 trade creditors, each of which might need to issue a protective claim. Likewise, ZOG had 49 such creditors.

136. It is, no doubt, correct that the need to deal with the issue of claims which are about to become time barred potentially increases the costs of an administration. It seemed to me, though, that Mr Brown was overstating the scale of the problem. What matters is not that CNG has 159 trade creditors or that ZOG has 49, but how many of those creditors had claims which were approaching a time bar, as to which there is no evidence. It would, I suspect, be an unusual case in which more than a few claims were about to become statute barred at the start of the administration. Moreover, an administration is intended only to last for one year, although the period can be extended (see paragraph 76 of Schedule B1). In many cases, the number of claims which could reasonably be expected to become time barred during that period is unlikely to be very large (although it would, of course, be different in a business where twelve-month contractual time limits are regularly placed on claims). Moreover, it would only be necessary for permission to be given to issue and serve the claim form to stop time running, as occurred in *BAE Systems Pension Funds Trustees Ltd. v Bowmer and Kirkland Ltd.* [2017] EWHC 1200 (TCC). No further steps in the litigation would need to be taken whilst the administration remained ongoing.

137. More importantly, however, even if I had agreed with Mr Brown about these points, they do not demonstrate that Schedule B1 gives rise to a statutory trust. They have no bearing on whether the company's assets are required to be used or disposed of for the benefit of persons other than the company itself. Moreover, the policy considerations raised by Mr Brown are linked with those relating to the moratorium on proceedings. Mr Sher KC decided in *Re Maxwell* that the moratorium was not a sufficient reason for

disapplying any limitation periods in relation to a pre-Enterprise Act administration. Although the language and layout of the moratorium provisions has changed a little in Schedule B1, I do not discern any material difference of substance. Nothing has, therefore, changed in relation to these policy considerations as a result of the Enterprise Act 2002.

138. For these reasons, it does not follow from the changes made by the Enterprise Act 2002, including the changes to the statutory purposes of administration and the ability of an administrator to make a distribution, that a statutory trust arises when an administration order is made, even if it is made on the basis that it will result in a better outcome than a liquidation. In my judgment, despite Mr Brown's capable arguments, Schedule B1 cannot be read as contemplating that the property of the company ceases to belong beneficially to the company at any time before notice of intention to make a distribution is given. This accords with the provisional views of both David Richards J and Hildyard J in the *Football League* and *Lehman* cases respectively.

139. Consequently, I have concluded that the making of an administration order under the post-Enterprise Act regime does not stop time running so far as limitation is concerned. If there is a gap in the law in that regard, I echo Mr Sher KC's conclusion that the gap cannot be filled by the courts, but is a matter for Parliament.

(iv) Does time stop running when a company enters a creditors' voluntary liquidation?

140. As noted above, Mr Brown's fall-back argument is that clause 13.5 has no effect on those of CNG's claims which are based on invoices issued twelve months or less prior to ZOG's entry into CVL on 7 December 2022. As explained above, it is settled law that, when a company enters compulsory liquidation, time ceases to run for limitation purposes from the making of the winding up order. Mr Brown submits that the same applies when a company enters voluntary liquidation.

141. Mr Brown relied on *Re Art Reproduction Co Ltd* [1952] Ch 89. The decision in that case concerned whether debts which were statute barred at the date of the winding up order could be paid by the liquidator, against the wishes of the contributories. Wynn-Parry J held that such debts could not be paid. It made no difference that the case was concerned with a solvent voluntary liquidation, rather than an insolvent compulsory liquidation. In arriving at this conclusion, Wynn-Parry J relied on *In re General Rolling Stock Co.* and said it was illogical for there to be one rule in compulsory liquidation and another rule in a voluntary liquidation.

142. Although the point in issue in *Re Art Reproduction* was not whether time ceased to run upon the company entering into a CVL, I agree with Mr Brown that there is no reason in principle why there should be a different result in a CVL from a compulsory liquidation. The reasons why a statutory trust arises in the latter are equally applicable to the former. I note that Judge Paul Baker QC considered in the *Taffs Well* case that a statutory trust would arise at the moment a resolution was passed for a voluntary winding up, and that Lord Diplock said in the *Ayerst* case that the essential characteristics of the statutory scheme for dealing with the assets of the company do not differ, whether the winding up is voluntary or compulsory. Indeed, as I read his speech, Lord Diplock considered that a statutory trust arises in a voluntary winding up.

143. As I understood him, Mr Shirazi did not dissent from this. His argument was that there is a difference between a statutory time bar and a contractual time bar and that time would not stop running in relation to the latter when a company enters liquidation. For the reasons I have already indicated above, I disagree with this. The reason why time stops running when a company enters liquidation is that a statutory trust arises in favour of all those who have claims at the date on which that trust arises. Each such creditor then becomes entitled to claim a share in the company's assets as a beneficiary against a trustee. The reason why the creditor's claim might subsequently have expired in the absence of such a trust (whether as a result of a statutory time bar, or a contractual one) cannot make any difference to the existence and effect of the trust.

144. For these reasons, I consider Mr Brown's fall-back argument is correct. In so far as CNG had valid claims against ZOG on 7 December 2022 which had not yet become time barred as a result of clause 13.5, CNG remains entitled to prove for such claims in ZOG's liquidation. Mr Brown said that there are six invoices totalling £481,814.86 which fall into this category. I had understood this to be common ground at the hearing, but this appears not to be the case. I shall return to this issue further below.

(v) <u>Did ZOG's statement of affairs amount to an acknowledgement of the debt due to CNG which had the effect of restarting the clock?</u>

145. Mr Brown argued that ZOG had acknowledged the debt due to CNG in the statement of affairs produced on 27 January 2022 and that restarted the clock, either pursuant to section 29(5) of the Limitation Act 1980, or pursuant to the old common law principles applicable to acknowledgments. In that event, time had not expired in relation to any of CNG's claims before ZOG moved to a CVL on 7 December 2022, at which point time would have stopped running.

146. There is an issue as to whether listing a party as a creditor in a statement of affairs can constitute an acknowledgement of a debt for the purposes of section 29(5) of the 1980 Act. It is, however, unnecessary to consider this because, in my judgment, Mr Brown's argument faces a more fundamental hurdle. Section 29 of the 1980 Act is part of the statutory scheme of limitation of actions. It operates to restart the period which would otherwise apply by virtue of one of the other sections of the Act. There is no reason for thinking that section 29 has any impact on a contractual time bar. A contractual time bar derives its force from the parties' agreement and, in my judgment, the question whether the period referred to in a contractual time bar can be restarted is a matter of interpretation of the relevant contractual provision. The Limitation Act 1980 would only be relevant if the parties had agreed that it should be. There is nothing in clause 13 of the MSA to suggest that the parties intended section 29 to apply, or that an acknowledgment would restart the twelve-month period referred to in clause 13.5.

147. As mentioned above, Mr Brown had a second string to his bow. He said that, even if section 29 of the Limitation Act 1980 did not apply, nevertheless the old common law rule of acknowledgment of debts that predated the Limitation Act 1939 would continue to apply to restart the clock. He relied on *Swann v Sowell* (1819) 2 B. & Ald. 759. That case concerned a promissory note written by the defendant more than six years before the claim was brought. When the defendant had been shown the note before expiry of the limitation period, he had claimed that the plaintiff owed him a greater sum and that

he had a set off. The question was whether this was an acknowledgment; and the court held (by a majority) that it was not. In the course of his reasoning, Bayley J said:

> "*The question in these cases always is, whether the admission, where no express promise to pay is made, be sufficient for the law to raise from it an implied promise. If a party admits the debt, and does not say that it is satisfied; or refuses to pay it, alleging at the time an insufficient excuse for not paying it, the law will in these cases raise an implied promise to pay the debt then acknowledged to be due…*"

148. Mr Brown contends that an acknowledgment of a debt raises an implied promise to pay it, amounting to a fresh cause of action, and that such an implied promise arises independently of any statutory provision regarding acknowledgment. In my judgment, the implied promise referred to in *Swann v Sowell* does not assist Mr Brown. It was a legal fiction developed by the courts specifically to avoid the potential harshness caused by the operation of the Limitation Act 1623. As Bayley J said in S*wann v Sowell*, the issue in relation to an acknowledgment was whether it was "*sufficient to take the case out of the Statute of Limitations*", or as Lord Sumner more colourfully put it in *Spencer v Hemmerde* [1922] 2 AC 507 (at p. 519), the principles were developed as part of "*the task of decorously disregarding an Act of Parliament.*"

149. The history was explained by Kerr J in *Surrendra Overseas Ltd. v Government of Sri Lanka* [1977] 1 WLR 565, as follows (at p. 573):

> "*The Limitation Act 1623 contained nothing which would permit the recovery of simple contract debts after six years. The pleas of acknowledgment and part-payment were invented by the judges in mitigation of the injustices which this statute could work. The basis of the statute had been to free debtors from liability after the limitation period had expired … But where the debtor had acknowledged the debt or made a part-payment on account of it within the limitation period, it was held that in the interests of justice the debtor should then no longer be allowed to invoke the statute. However, in relation to simple contract debts, perhaps because these required consideration moving from the debtor, it was repeatedly held that an acknowledgment must also imply a promise to pay the debt in question. In a large number of decisions the courts accordingly considered, often on highly artificial grounds, whether or not a promise to pay could be implied…*"

150. It has long been settled that an implied promise to pay is no longer required for there to be an acknowledgement within the meaning of section 29 of the Limitation Act 1980, or its predecessor, section 23 of the Limitation Act 1939 (see e.g. Lord Denning's comments in *Good v Parry* [1963] 2 QB 418, at p. 423). As Kerr J put it in the *Surrendra* case, "*that artificiality has been swept away.*" In my judgment, any notion that an acknowledgment might involve an implied promise to pay which amounts to a new cause of action was swept away by the same broom. I doubt whether such principles were ever applied to extend contractual (as opposed to statutory) time bars, but in any event those principles no longer have any legal force. The parties in this case agreed to a contractual time bar. In my judgment, the question whether the relevant time period has expired is to be determined solely by an interpretation of the MSA, and not by reference to artificial rules about statutory limitation periods which have

themselves ceased to be relevant. As already explained, there is nothing in clause 13 of the MSA to suggest that the parties intended that an acknowledgment would restart the twelve-month period referred to in clause 13.5.

Conclusion in relation to clause 13.5

151. For the above reasons:

i) Clause 13.5 should be read as if it said:

> "*The non-defaulting party shall only be entitled to bring a claim against the defaulting party where the non-defaulting party issues legal proceedings against* [the defaulting party] *within the period of 12 months commencing on the date upon which* [the non-defaulting party] *ought reasonably to have known of its entitlement to bring such a claim.*"

ii) The effect of this clause is to limit CNG's ability to bring a claim against ZOG (or to prove in ZOG's administration) after the twelve month period has expired, but it does not extinguish ZOG's liability.

iii) Time does not stop running when a company enters administration, but it does stop running when a company moves from administration into CVL.

iv) Even if ZOG had acknowledged CNG's claim in the statement of affairs on 27 January 2022 (as to which I make no finding), that would not have started time running again under clause 13.5.

H. Conclusions

152. For these reasons, the answer to the first preliminary issue is that the effect of clause 13.3 of the MSA is to impose an overall limit on ZOG's claims of £250,000. The CNG liquidators' rejection of ZOG's proof in so far as it exceeded this sum was, therefore, correct.

153. The answer to the second preliminary issue is that the effect of the contractual time bar in clause 13.5 of the MSA is to bar CNG from obtaining a judicial remedy in respect of its claims after twelve months from the date on which CNG ought reasonably to have known of its entitlement to bring such claims. However:

i) The contractual time bar in clause 13.5 does not extinguish CNG's claims; and

ii) CNG is not precluded from claiming debts in respect of which the twelve-month period had not expired when ZOG entered into CVL on 7 December 2022.

154. In paragraph 31.3 of his skeleton argument, Mr Brown submitted that, if the court reached the conclusions summarised in the preceding paragraph, it should order ZOG's liquidators to admit CNG's proof in the sum of £481,814.86, which I understand to be

the total of six invoices which became due and payable less than twelve months prior to 7 December 2022. As mentioned above, I was under the impression at the hearing that ZOG agreed to an order in those terms if I reached the conclusions I have reached. Following circulation of my judgment in draft, however, ZOG said that this is not agreed, that determination of "*this question*" is not within the scope of the preliminary issues and that "*there may be further issues whether e.g. CNG's claim is a good one, or whether CNG is right that these claims arose less than one year before the entry of ZOG into liquidation.*"

155. I am currently doubtful whether it is open to ZOG to make these arguments at this stage. I have no note of Mr Shirazi raising them at the hearing. Moreover, I am not currently aware of any reasons for considering that CNG's claim might not be a good one, or that the sums claimed in the relevant six invoices arose more than one year before ZOG entered into CVL. I am, in any event, concerned about the costs of any lengthy argument concerning these issues, which could easily become disproportionate to the amount at stake and potentially contrary to the interests of the creditors of both companies.

156. Nevertheless, I had already decided to hear submissions as to the terms of the order to be made consequential on my decision and I will hear further argument at that time about whether ZOG's liquidators should be ordered to admit CNG's proof in the sum of £481,814.86 and whether it is open to ZOG to oppose such an order now. If ZOG maintains that there are "*further issues*" about CNG's claim, or the relevant dates, or any other matters, those contentions will need to be supported by suitably concise evidence and explanation at that hearing.