IN THE COURT OF APPEAL **CA-2025-002967**
ON APPEAL FROM
CR-2021-001548 AND CR-2022-000144
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
THE HONOURABLE MR JUSTICE THOMPSELL

IN THE MATTER OF CORE VCT PLC (IN LIQUIDATION)
IN THE MATTER OF CORE VCT IV PLC (IN LIQUIDATION)
IN THE MATTER OF CORE VCT V PLC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

1. LAURENCE PAGDEN
(as Liquidator of Core VCT IV plc and CORE VCT V plc)
3. DAVID ROBERT BAXENDALE
4. STEVEN ANTHONY SHERRY

Applicants/Respondents

- and -

1. MARK ROBERT FRY
2. NEIL JOHN MATHER
(as former Joint Liquidators of Core VCT plc, Core VCT IV plc, and Core VCT V plc)

Respondents/Appellants

A N D B E T W E E N:

1. CORE VCT PLC (in liquidation)
2. CORE VCT IV PLC (in liquidation)
3. CORE VCT V PLC (in liquidation)

Claimants/Respondents

- and -

4. MARK ROBERT FRY
5. NEIL JOHN MATHER
6. BEGBIES TRAYNOR (CENTRAL) LLP
7. BTG ADVISORY LLP
(formerly BTG Financial Consulting LLP)

Defendants/Appellants

APPELLANTS' APPEAL SKELETON ARGUMENT

30th March 2026

Updated in respect of revised bundle references: 22 October 2026

INTRODUCTION

1. This is the Appellants' ("**Begbies Defendants**") skeleton argument for the hearing of their appeal against the order of Thompsell J ("**Judge**") dated 10 September 2025 by which he decided, as a preliminary issue, that the 4th and 5th Defendants ("**Former Liquidators**") were not entitled to rely on contractual provisions contained in the Begbies Defendants' letters of engagement which limited the liability of the former liquidators in respect of their conduct as liquidators.[1] The appeal raises the question of whether the Judge was correct to conclude that such limitation of liability agreements are, in effect, prohibited as a matter of law. Therefore, this is an issue of significant importance to liquidators.

2. The Claimants' claim relates to the alleged sale at an undervalue of the assets of the Claimant companies by the Former Liquidators in the Claimants' members' voluntary liquidations ("**MVL**").

3. The Judge decided that clause 7 of the Begbies Defendants' letters of engagement dated 5 and 6 March 2015 [**CB1/16/181, 196, 212**] (the "**LoEs**") and clause 13.2.3 of the 6th Defendant's ("**Begbies**") Standard Terms of Business [**CB1/16/193**] ("**Terms**") (together, "**Limitation Clauses**") cannot and do not limit any liability of the Former Liquidators to the Claimants in respect of that conduct as liquidators, whether to an aggregate sum of £1 million in respect of each Claimant or at all. In short, the Judge decided that a liquidator's liability for breach of duty cannot be limited by the company as a matter of law.

4. The central submission of the Begbies Defendants on this appeal is that there is no rule of law preventing a company from contracting to limit the liability of a liquidator (certainly in a MVL). This submission is based on the following propositions which represent orthodox statements of insolvency law, statutory interpretation and the law of obligations more generally:

    4.1. A liquidator, like a director, is appointed by the company (at least in a MVL) and is an agent of the company. Liquidators owe their duties to the company.

[1] Pursuant to the permission granted by Asplin L.J. on grounds 1 and 2 of the Grounds of Appeal by order dated 12 February 2026 [**CB1/13/177**].

4.2. The source of those duties of a liquidator as agent of the company is the general law as a result of their office and functions. The relevant duties of liquidators as agent of the company are not created or even codified by legislation.

4.3. The Judge's references to the "*statutory trust*" in liquidation do not change or affect the orthodox legal position with respect to liquidators' duties summarised at paragraphs 4.1 - 4.2 above.

4.3.1. The trust in respect of the company's assets is not the source of the legal duties to which liquidators are subject.

4.3.2. The existence of the trust in respect of the company's assets does not justify or explain the proposition that liquidators owe duties to a company's shareholders. The members do not acquire any beneficial interest in the company's assets. It is the company that acts as trustee of the company's assets and, as stated above, the liquidator acts as the company's agent.

4.4. The propositions described above are supported by the procedural mechanisms available to enforce a liquidator's duties. Such claims vest in the company – either via a Part 7 Claim, as in these proceedings, or via s. 212 of the Insolvency Act 1986 ("**IA 1986**"), also used in these proceedings, and the latter is widely accepted to create only a convenient procedural gateway to enforce the company's rights. The company is, therefore, the person which can choose whether to pursue those claims and/or whether to compromise them. Logically, it follows that the company should also have the ability to limit liability in respect of breaches of the liquidators' legal duties in advance by agreement, subject to the application of the Unfair Contract Terms Act 1977 ("**UCTA**"), as explained further below.

4.5. There is no statutory basis or justification for any prohibition or rendering void an agreement between a liquidator and company to limit the liquidator's liability:

4.5.1. Where Parliament does intend to prohibit or prevent a class of persons from excluding liability, it does so expressly; for example, in the

Companies Act 2006 ("**CA 2006**"), agreements to exclude directors' and auditors' liability to their companies are rendered void.[2]

4.5.2. There is an express statutory restriction of the ability of any person to rely on an agreement to limit or exclude their legal liability for negligence or breach of contract under UCTA unless such clauses satisfy the statutory reasonableness test.

4.5.3. There is nothing in the insolvency legislation which limits the powers of the company in MVL subject to the need to carry out the statutory scheme.

4.5.4. There is no provision in or feature of IA 1986, its predecessor legislation, or any other legislation which provides any basis from which to imply or infer that liquidators' liability in respect of their legal duties which arise in relation the statutory insolvency scheme may not be limited.

4.5.5. There is no general principle that the provisions of a statute or rights granted under a statute cannot be waived or varied.[3]

4.6. There is no principled reason why, if a company does so limit a liquidator's liability, shareholders should not be bound by that limitation after the entry into liquidation. The shareholders have all agreed to participate in the company in question on the basis that its affairs will be managed by its directors.

5. The Begbies Defendants are not seeking to vary their duties, but simply to limit any liability for breach of the common law and equitable duties arising in respect of the performance of their statutory role, as agreed with the Claimants prior to their appointment. The Judge was wrong to hold that this was impossible.

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[2] See also the examples in ***Chitty on Contracts***, (36th ed., 2025), Vol. 1, at paras. 18-168 to 18-174.

[3] For the reasons given above, in this case no provisions of a statute or rights granted under a statute are required to be waived or varied.

Pre-hearing Reading

6. In addition to the parties' skeleton arguments, the Court is invited to read the following documents prior to the hearing: (1) the judgment below ("**Judgment**") [**CB1/11/144**]; (2) the Grounds of Appeal [**CB1/2/15**]; (3) the LoEs, in particular clause 7 [**CB1/16/185, 200, 216**]; the Terms, in particular clause 13.2.3 [**CB1/16/193**]; (4) the Re-Amended Particulars of Claim ("**PoC**"), in particular paragraphs 79 - 81 [**CB2/19/281-283**] and 155 - 158A [**CB2/19/313-317**]; and (5) the Schedule of Assumed Facts and Matters for the preliminary issue [**SB/11/130**].

FACTUAL BACKGROUND

7. The Judge determined a preliminary issue in a claim against the Begbies Defendants which alleged that the Former Liquidators sold the Claimants' assets at an undervalue in breach of duty. The alleged breaches of duty are set out at paragraphs 155 - 158A PoC [**CB2/19/313-317**]: the Claimants allege breach of fiduciary, tortious and contractual duties. It is highly significant that the Claimants do not allege breach of any statutory duty.

8. It is common ground that:

    8.1. Begbies was retained by the Claimants in relation to placing them into MVL and for the Former Liquidators to act as joint liquidators; and

    8.2. Begbies' retainer with respect to each Claimant was subject to the LoEs and the Terms.

9. The Claimants acknowledge the presence of the limitation of liability contained in the Limitation Clauses but sought to argue that it did not apply or was ineffective on the basis that (see paragraph 80 PoC [**CB2/19/282**]):

    9.1. It applied as a matter of construction only to "*the period before the [Former Liquidators'] appointment as liquidators and not in relation to their appointment as liquidators*"; and

    9.2. It was not possible as a matter of law to limit the Former Liquidators' liability for the performance of their statutory function (the "**Impossibility Issue**").

10. The Begbies Defendants sought the determination of those two questions as a preliminary issue. This was agreed and the parties agreed a schedule of assumed facts and matters for the purpose of their determination [**SB/11/130**].

11. The Judge determined the Impossibility Issue against the Begbies Defendants. In essence, the Judge determined the issues of construction in the Begbies Defendants' favour, holding that, in principle, the services provided under the LoEs extended to the post-appointment period and to the acts of the Former Liquidators, and could extend to vicarious liability, but the precise scope of the determination on construction has not yet been resolved because (in view of the decision on the Impossibility Issue) the Court declined to determine the points of construction as regards the liability of the Former Liquidators themselves.

SUBMISSIONS

I. Appointment of liquidators, source, and to whom their duties are owed

12. A liquidator in a MVL is appointed by the company:

    12.1. It is the company which resolves that it be wound up: IA 1986, s. 84(1)(b).

    12.2. It is the company in general meeting which appoints "*one of more liquidators for the purpose of winding up the company's affairs and distributing its assets*": IA 1986, s. 91(1).

13. A liquidator in a MVL is an office created by statute. The purpose of the appointment of a voluntary liquidator is to collect, realise and distribute the company's property in accordance with IA 1986, s. 107. IA 1986 sets out various tasks, functions and powers of liquidators only. [4] IA 1986 does not state (either *de novo* or by way of codification (as in the case of directors' duties under the CA 2006)) the legal duties which govern how the liquidator's tasks, functions and powers are performed or exercised. Instead, the duties of a liquidator in dealing with the company's assets are governed by the general law. That is apparent from the Claimants' pleaded case that the Former Liquidators owed duties to the Claimants, in particular a duty to exercise reasonable

[4] IA 1986, Part IV, Chapters III and V; and Schedule 4.

skill and care and a fiduciary duty, in tort, contract and equity.[5] The Claimants do not allege any breach of statutory duty by the Former Liquidators. The gravamen of the Claimants' complaint is that the Former Liquidators failed to take reasonable care in the sale of the company's assets and is, therefore, a complaint of professional negligence. It follows that the well-established duties applicable to professionals, such as a liquidator who is a fiduciary, regulate the liquidator's dealings with the company's assets: ***Re Charnley Davies Ltd. (No 2)*** [1990] B.C.L.C. 760, at p. 775 (Millett J., as he then was).

14. The liquidator's duties in issue in this case arise under the general law, and not statute, because the liquidator in dealing with the company's assets not as principal but as the company's agent in order to give effect to the statutory scheme: ***In re Southern Pacific Personal Loans Ltd. v. Information Commissioner*** [2014] Ch. 426 ("***Southern Pacific Personal Loans***"), at [32]-[33] (David Richards J., as he then was). As a result, the relevant duties in this case owed by the liquidator to the company are duties in contract, tort and equity that an agent owes to its principal, i.e., the company, in the circumstances of the case.

15. It cannot be deduced merely from the fact that a statute provides that a person is empowered with specified functions (e.g., the power to sell the company's assets) to be exercised for a specified purpose (e.g., realisation and distribution of the company's assets to specified recipients) that the effect of the statute is that it governs whether the person must be liable, and if so to what extent, for any want of care when exercising their statutory power, especially when the existence and content of the duty of care is to be found under the general law and not in the statute: ***Re City Equitable Fire Insurance Company*** [1925] Ch. 407 ("***City Equitable***"),[6] at p. 525 (Warrington LJ) (when considering the effect of an article which exempted directors and auditors (*inter alios*) from liability for "*neglects or defaults*"):

> *"… But then it is said that if the article has that effect, and if, as I think it does, it modifies the prima facie obligation of the auditors, it is contrary to the provisions of s. 113 [setting out the rights and duties of auditors] and s. 215 [setting out the power of the court to assess damages against delinquent directors] of the Companies*

[5] PoC, at paragraphs. 79-83 [**CB2/19/281-283**].
[6] The report includes the first instance decision from p. 424 (Romer J.) and the Court of Appeal's decision from p. 501 (Pollock MR, Warrington and Sargant LJJ.).

(Consolidation) Act, 1908. With all respect I cannot agree. Sect. 113 does not lay down any rule at all as to the amount of care, or skill, or investigation, or anything of that kind, which is to be brought to bear by the auditors in performing the duties which are imposed upon them … It says nothing as to what they are to do in order to form [their] opinion, or to ascertain the truth of the facts to which they are to certify. That is left to be determined by the general rules which, in point of law, are held to govern the duties of the auditors, whether those rules are to be derived from the ordinary law, or from the terms under which the auditors are to be employed. …"

16. The fact that shareholders vote at a meeting of the company does not mean that the shareholders themselves are appointing the liquidator any more than they are when they vote to appoint a director. A liquidator generally does not owe duties to creditors/members but owes duties to the company, just as a director owes duties to the members: ***Oldham v. Kyrris*** [2004] B.C.C. 111 ("***Oldham***"), at [142] - [149], [163]). No duty owed by the liquidators to the shareholders is alleged by the Claimants to have existed or been breached.[7]

II. How the duties of liquidators are enforced

17. The procedure by which a liquidator's duties are enforced does not affect the content of liquidator's duties or their liability for professional negligence in dealing with the company's assets. Any claim for professional negligence by a liquidator vests in the company:

17.1. The company can bring a Part 7 Claim; and/or

17.2. The claim can also be brought under s. 212 IA 1986.

S.212 is procedural in nature and merely provides an alternative means, in terms of procedure, for enforcing a claim which would otherwise be brought by the company: ***Re Eurocircuit Europe Ltd (In Liquidation)*** [2007] 2 B.C.L.C. 598, at [24] (Blackburne J.). It follows from the procedural nature of s. 212 that it does not create new or additional obligations or duties for liquidators: ***Top Brands v. Sharma*** [2015] 2 All E.R. 581, at [38] (Judge Simon Barker Q.C.). In the present case, claims are made under Part 7 and s. 212; however, the claims against the Former Liquidators in the s. 212 proceedings [**CB2/18/238**] are entirely duplicative of the claims against them in

[7] In exceptional circumstances duties may be owed to creditors/members but they do not arise in this case.

the Part 7 claim [**CB2/17/227**]. Indeed, there is one PoC [**CB2/19/242**], raising, by reference to alleged breaches of duty to the Claimants, all claims without distinction between s.212 and Part 7.

18. The Judge accepted that s.212 was a mere jurisdictional gateway when rejecting the Claimants' argument that any limitation of liability would amount to an ouster of the jurisdiction of the court and accepting that the Former Liquidator's alleged liabilities were not created by statute: Judgment, [75] - [81] [**CB1/11/160-161**].

19. It follows from the fact that the company can bring a claim for breach of a liquidator's duties that those duties are owed to the company. This fact is reconcilable with the interests of members/creditors by virtue of the fact that the company itself is a trustee holding assets subject to the statutory scheme and for the statutory purpose described in s. 107 IA 1986. The liquidator's role is to manage the company's assets on its behalf having regard to the trusts on which the company holds those assets. Nevertheless, given that the company in liquidation as trustee can enforce the duties that the liquidators owe the company, the company can also waive or limit those duties, just as a trustee could do in relation to an agent employed by the trustee.

20. These points are supported by the fact that the creditors do not have a beneficial interest in the liquidating company's assets but an interest to see that the assets are duly administered and distributed (akin to residuary legatees under a will pending execution): ***Goode on Principles of Corporate Insolvency Law*** (5th ed., 2018), at [3-10].[8] This proposition emphasises that the liquidator only owes duties to the company; it does not support any conclusion that the company has no functions, duties or powers as legal owner of the assets.

21. There are some tentative *dicta* which suggest that a liquidator might owe duties to the body of creditors (or here shareholders) as a whole as well as to the company.[9] That tentative view is subject to the qualification that any such duty can only be enforced by creditors under s. 212 IA 1986. It is difficult to see how the liquidator's duty could be owed to the general body of creditors or shareholders as such because: (1) s. 212 is

[8] See ***Buchler v Talbot*** [2004] 2 A.C. 298 ("***Buchler***"), at [28] (Lord Hoffman); and, for the analogy with residuary legatees, ***Calgary and Edmonton Land Co. Ltd. v. Dobinson*** [1974] Ch. 102, at p. 108G-H (Megarry J.).
[9] See e.g., ***MacDonald v Carnbroe Estates Ltd*** [2020] B.C.C. 294, at [38] (Lord Hodge).

merely procedural in nature and does not confer any substantive rights on creditors/shareholders or impose any substantive duties on liquidators; (2) the fact that duties with the same content are owed by liquidators to the company, which is itself a trustee for the creditors/shareholders; and (3) the members/creditors may need to apply to Court in a case where the officeholder is unwilling to apply. Any recovery from a liquidator under s. 212 at the suit of a member/creditor would be payable to the Company subject to the trusts and would not be directly payable to the members/creditors.

22. Given the established principle that the creditors/members have no beneficial interest in the company's assets, but only a right to enforce the trust for the statutory purposes, any statement that a liquidator's duties are owed to the general body of creditors/members would be an imprecise statement of those limited rights. Members/creditors have a right to enforce said trust and there is no need or proprietary justification for a liquidator owing precisely the same duty as is owed to the company in addition to members/creditors. In any event, the existence of a duty owed by liquidators to creditors/members, as well as the company, with the same content, cannot avoid the fact that the company can enforce, and therefore compromise or waive a claim for breach of, the liquidator's duty owed to the company. It follows that there is no reason why a liquidator should not be able to limit liability for breach of duty in advance.

23. If a company limits the liability of a liquidator for breach of duty owed to the company in advance of appointment, the company would not be seeking to vary the trust for the statutory scheme itself in any way, but merely to vary the remedial consequences of liability for breach of duty by the liquidator in relation to their conduct concerning property that is subject to that trust. As the Judge accepted at Judgment, [60], [**CB1/11/157**], citing ***City Equitable***, there is a difference between clauses which modify duties required by statute and clauses which seek to limit liability for aspects of performance of the role.

III. The role of Parliament in regulating agreements to exclude and limit liability

24. It is submitted that, as a matter of general principle, a liquidator (in particular in a MVL) and a company are free to agree to exclude or limit the liability of a liquidator to the

company for breach of duty in dealing with the company's assets to the extent that Parliament has not expressed an intention that prohibits or regulates such agreements.

25. The starting point is that there is no general principle that duties arising under a statute cannot be excluded (cf. the well-known doctrine that a party cannot exclude liability for his own fraud). It was, for example, possible, prior to any legislative intervention, to exclude all statutory implied terms in contracts for the sale of goods: see e.g., ***L'Estrange v F. Graucob, Limited*** [1934] 2 K.B. 394. In fact, the general rule is that liability for such duties can be excluded by contract – see ***Bennion, Bailey and Norbury on Statutory Interpretation*** (8th ed., 2020), at [9.6] – subject to contrary legislative intention or statutory intervention (see e.g., ss. 6 and 7 UCTA, which prevent parties from contracting out of particular statutory duties).

26. Further, the fact that a statutory office holder is entrusted with a task, power or function does not itself provide any reason why liability for breach of duty (such as a duty of care) in the performance of that task or exercise of that power cannot be agreed in advance to be excluded or limited in amount.

27. This was the principle highlighted in ***City Equitable***, where Romer J. dismissed a liquidator's misfeasance summons against company directors and auditors issued under s. 215 of the Companies (Consolidation) Act 1908 (i.e., the power which is now set out in s. 212 IA 1986) alleging negligence in the performance of their duties with respect to company assets on the ground that the directors were afforded immunity from their negligence by article 150 of the company's articles which excluded liability unless they were guilty of wilful neglect. Romer J. and the Court of Appeal (dismissing the appeal) held that the directors and auditors were entitled to rely on the exclusion of liability provision in the articles and that s. 215 of the Companies Act 1908 or any other statutory provision which entrusted the directors and auditors with duties did not prevent that conclusion: ***City Equitable***, at pp. 515 - 516 (Pollock M.R.) and pp. 525 - 526, where Warrington L.J. rejected the argument that the exclusion of liability provision in the articles was contrary to ss. 113 and 215 of the Companies (Consolidation (Act 1908) because the articles modified the prima facie obligations of the auditors and said as regards s. 215 (after rejecting the argument based on s. 113 in the quotation from the judgment at paragraph 13 above):

"… Then with regard to s. 215, if I am right in what I have already said, it is quite plain that nothing is referred to in that section as a misfeasance, except an act or default which would, having regard to the relations between the auditors and the company, be a misfeasance or a breach of trust, causing a loss to the assets of the company, and if therefore there is some act or omission on the part of the auditors which, having regard to the provisions of [the article] in the present case, or to a similar article in any other case, does not give rise to any liability to the company, then in my opinion it gives rise to no liability under s. 215. … It seems to me, therefore, that [the article] has such effect as, according to its true construction, it ought to have on the obligations and liabilities of the auditors…"

and p. 528 (Sargant L.J.):

… The article does not limit the nature or extent of the auditor's duties under s. 113. It is in no way contrary to the scheme of the Act … The article merely operates to limit the liability of the officers of the company by relieving them from the consequences of certain kinds of neglect or default. …

28. The law as stated in ***City Equitable***, that directors and auditors of a company were able to agree to exclude their liability for breach of duty, continued to be the case until the intervention of Parliament via s. 152 of the Companies Act 1929. This legislation was a specific "*knee-jerk*" reaction to the ***City Equitable*** decision: ***Palmer's Company Law*** (Release 189, 2026), [8.3407]. The successors to s. 152 of the Companies Act 1929 are:

    28.1. CA 2006, s. 232, which provides that, "*Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void*"; and

    28.2. CA 2006, s. 532, which stipulates that any provision "*(a) For exempting an auditor of a company (to any extent from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company occurring in the course of the audit of accounts … is void, except as permitted by … (b) sections 534 to 536 (liability limitation agreements)*".

29. What is now ss. 232 and 532 CA 2006 is highly significant because they demonstrate that Parliament where it sees fit will expressly prohibit (by rendering void) a specific class of exclusion or limitation of liability provisions between companies and their statutory officeholder agents and thereby expressly derogate from the general freedom

of a company to agree exclusion or limitation of liability provisions with its agents established in ***City Equitable.*** Moreover, ss. 232 and 532 CA 2006 and their predecessors demonstrate that, since 1929, Parliament has been well aware of the language it must use to derogate from the City Equitable principle, namely, to render a specific class of provision between the company and the officeholder agent "*void*". The fact that Parliament has not enacted any similar provision to ss. 232 or 532 CA 2006 in the case of provisions limiting liability between companies and their liquidators is a telling indication that there is no legislative intention to render such provisions void.

30. Another telling indication against any legislative intention to render exclusion or limitation of liability agreements between a company and its liquidator void or of no effect is the fact that limitation of liability agreements have already been subject of statutory regulation in the form of UCTA. In short, exclusion or limitation of liability agreements are generally subject to s. 2 UCTA, which prevents such agreements from excluding or restricting liability for: (1) death or personal injury resulting from negligence; and (2) negligence except insofar as the agreement satisfies the statutory test of reasonableness contained in s. 11 UCTA, and s. 3 UCTA, which applies to dealings on written standard terms, and again subjects exclusion or limitation of liability for breach of contract to the s. 11 UCTA reasonableness test. As stated above, ss. 6 and 7 UCTA apply a specific regime to exclusion or limitation of liability provisions in the fields of sale of goods and hire purchase. Whilst there are exclusions for specific groups of persons (e.g., consumers (s. 2(4) UCTA)), liquidators are not expressly excluded from UCTA.

31. The fact that there existed legislative interventions prior to IA 1986 which either prohibited a specific class of exclusion/limitation of liability clauses for directors and auditors in the Companies Act 1929 onwards or regulated all other such clauses (subject to certain exceptions) in UCTA, combined with the fact that the IA 1986 contains no express prohibition or regulation of such clauses between liquidators and companies, are powerful indicators that Parliament did not intend by IA 1986 to prohibit or render void any such exclusion or limitation of liability agreements between liquidators and companies. The Claimants' case is that the Limitation Clauses are rendered invalid by UCTA: Judgment, [10(iv)] [**CB1/11/147**]. If the Claimants are correct, Parliament must have intended that Liquidators could rely on such clauses so long as they satisfy

UCTA's test of reasonableness. If UCTA does not restrict the Former Liquidators from relying on the Limitation Clauses – either because it does not apply or because its provisions are satisfied – then it must be assumed that Parliament did not intend to restrict (or further restrict their ability to rely on such clauses; that would be a powerful reason not to interpret Parliament as having intended to do so in IA 1986 (or anywhere else) in the absence of an express prohibition.

32. The Claimants contended below that any attempt to limit or exclude liability of liquidators to companies would be to oust the jurisdiction of the Court or alter the legislative scheme or be contrary to the intention of Parliament. The Claimants' contention is misconceived. An agreement between a company and its liquidator to limit the latter's liability for professional negligence to the former would be "*in no way contrary to the scheme of*" IA 1986: see Sargant L.J. in ***City Equitable*** quoted at paragraph 27 above.

32.1. As submitted above, Parliament has not enacted any legislation so as to impose any statutory legal duty on liquidators as regards their dealings and decision in relation to the realisation of the company's assets. If there were any such statutory duty, then it would be a matter of statutory interpretation as to whether that duty could be partially or wholly waived.

32.2. The existence of the s. 212 IA 1986 gateway provision is a procedural provision in nature, which does not add or impose any substantive obligations on liquidators, and merely amounts to a specific statutory procedure for ordinary claims at general law to be brought summarily. As the Judge held, an agreement between a company and its liquidator to limit the latter's liability in contract, tort, and equity does not amount to any ouster of the jurisdiction of the Court under s. 212.[10] Taken to its logical conclusion, the Claimants' argument amounts to contending that the agreement of any limitation clause between any party would inevitably result in the ouster of the jurisdiction of the Court in all cases where the jurisdiction of the Court is statutory.[11] That is an absurd

[10] Judgment at [81].
[11] See Senior Courts Act 1981 s. 19(2).

argument and cannot be correct given the widespread use of limitation of liability clauses in professional practice.

32.3. There is no warrant or justification for the Court to conclude that liability for breach of a liquidator's duties imposed by the general law and owed to a company was excluded, prevented or prohibited by IA 1986 because there is no express language to that effect, nor is there any basis to imply or infer such a legislative intention.

32.4. The provisions of s. 212 IA 1986 indicate that Parliament actually intended for it to be possible for liquidators' liability for breaches of duty to be limited by agreement with the company – for the Court has a jurisdiction under s. 212(3) which is "*a discretion as to amount only once liability has been established*": ***Revenue and Customs Commissioners v Holland*** [2010] 1 W.L.R. 2793, at [51] (Lord Hope)).

33. Whilst the liquidator is the company's agent, and the company is the trustee of its assets for the statutory purpose, even if the liquidator were regarded as akin to a trustee for the company, that provides no reason why the liquidator's liability to the company cannot be limited by agreement. There is no general principle that the liability of a trustee is not capable of being varied, either by provisions which enlarge trustees' powers or abridge their duties (which have the effect of authorising an otherwise unauthorised act or breach of duty), or by clauses which exclude or limit liability for a breach: ***Barnsley v Noble*** [2017] Ch. 191, at [28] - [30] (Sales L.J.); ***Lewin on Trusts*** (20th ed., 2020), at [41-131] et seq.). This can extend to authorising or excluding liability for what would otherwise be breaches of the fiduciary no-conflict and no-profit rules: ***Space Investments Ltd. v Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.*** [1986] 1 W.L.R. 1072, at p. 1075 (Lord Templeman). It is settled law that an exemption clause can in principle operate to exclude liability for all breaches which arise except out of the trustee's own fraud: ***Armitage v Nurse*** [1998] Ch. 241, at pp. 250 - 256 (Millett LJ).

IV. The Judge relied on an incorrect understanding of a "*statutory trust*" and its implications

34. The central element of the Judge's conclusion that the Former Liquidators were not entitled to rely on the limitation of liability agreements is that, as a result of a "*statutory trust*" over the company's assets, the duties of a liquidator were in fact not owed to the company (or not only to the company) and therefore those duties could not be modified by the Company, nor could liability for breach of those duties be limited by the company.

35. This reasoning was mainly set out in the Judgment at [68], [69], [73] and [82] [**CB1/11/159-161**]. The Judge's view was, in the light of ***Ayerst (Inspector of Taxes) v C. & K. (Construction) Ltd*** [1976] A.C. 167 ("***Ayerst***"), that:

35.1. The established authorities that a liquidator is an agent of the company[12] and owes duties only to the company[13] are no longer correct;

35.2. The liquidator must instead be regarded as a trustee or fiduciary holding assets themselves on a "*statutory trust*";[14] and

35.3. That "*statutory trust*" was incapable of being modified such that:

35.3.1. the liquidator's duties arising as a result of the "*statutory trust*" could not be modified; and

35.3.2. nor could any liability of the liquidator for breach of those duties arising as a result of the "*statutory trust*" be excluded or limited.[15]

36. The Judge's conclusion and the reasoning summarised above were entirely wrong and the decision and reasoning of the House of Lords in ***Ayerst*** provides no support for it or the Judge's view that it requires the (implicit) overruling or radical rethinking of the existing case law on the duties of liquidators.

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[12] Ground 2.3 [**CB1/2/17**].
[13] Ground 2.1.1 [**CB1/2/16**].
[14] Grounds 2.1.2 and 2.3 [**CB1/2/16-17**].
[15] Grounds 2.1.2 and 2.4 [**CB1/2/16-17**].

37. ***Ayerst*** was not the subject of detailed submissions at the hearing, it was not in the authorities bundle before the Judge, and it is not considered in any detail in the Judgment. The Claimants referred in their submissions to the Judge to the existence of the "*statutory trust*" to bolster their general argument that the liabilities for breach of duties arising out of statutory functions and so could not be varied. The Begbies Defendants' submission below was that the trust added nothing to the Claimants' argument that the duties were statutory in origin and therefore could not be varied; in fact, the duties of a liquidator were only owed to the company, as with those duties owed by directors and auditors. The Judge did not explain precisely what he meant by the "*the point regarding the statutory trust*", how that lead to implying or inferring a prohibition on limiting the liability of the Former Liquidators.

38. The decision in ***Ayerst*** was that when a company was wound up the effect was to divest it of the beneficial ownership of its assets within the meaning of the Finance Act. A careful reading of ***Ayerst*** reveals that Lord Diplock:

    38.1. Affirmed the long line of authorities from ***In re Oriental Inland Steam Co*** (1874) 9 Ch. App. 557 ("***Oriental Inland Steam Co***"), which establishes that the property of the company ceases upon the winding up to belong beneficially to the company "*has now stood unchallenged for a hundred years*";

    38.2. Explained that the statutory scheme for dealing with the assets of a company in the course of liquidation differed in several aspects from a trust of specific property created by the voluntary act of the settlor;

    38.3. Held that the status of the liquidator (as held by Romer J in ***Knowles v Scott*** [1891] 1 Ch. 717 ("***Knowles***")) differs from a trustee "*in the strict sense*" for the individual creditors and members of the company who are entitled to share in the proceeds of realisation; the liquidator does not owe to creditors and members all the duties that a trustee in equity owes to his cestui que trust; and

    38.4. The effect of the statute was to give the property of a company in liquidation the essential characteristic which distinguished trust property from other property, i.e., it could not be used or disposed of by the legal owner (i.e., the company) for its own benefit but must be used or disposed of for the benefit of other persons: ***Ayerst***, at pp. 179 - 181.

39. There is nothing in the conclusion or reasoning in ***Ayerst*** which leads to or which support the Judge's conclusion that a liquidator is prevented from relying on an agreement with the company to limit the liquidator's liability. Lord Hoffman in ***Buchler***, at [28], did not interpret ***Ayerst*** as establishing anything other than that the winding-up order divests the company of the beneficial interest in its assets which then become a fund which the company thereafter holds in a special kind of trust to discharge its liabilities; the special feature of the trust being that neither creditors or others have any beneficial interest in the fund, they only have a right to have the assets administered by the liquidator in accordance with the statutory scheme under the IA 1986.

40. David Richards J. (as he then was) in ***Southern Pacific Personal Loans***, at [32] - [33], cited ***Ayerst*** for the proposition that beneficial ownership of the assets of a company is suspended pending the implementation of the statutory scheme. But David Richards J. did not consider that it followed from the fact that the liquidator was exercising his powers and fulfilling his duties in respect of the property of the company that the liquidator was acting as principal; he stated that the authorities show that the liquidator was acting as agent for the company in whose ownership the property remains vested, albeit for the benefit of the statutory scheme. That conclusion and reasoning of David Richards J. is not reconcilable with the Judge's conclusion, his view that the liquidator was somehow a trustee of the company's assets, or his view of the effect of ***Ayerst***.

41. The Judge did not appreciate that, as submitted above, ***Ayerst*** affirmed a line of authority which has existed for over a century, going back to ***Oriental Inland Steam Co.***. As submitted above, ***Ayerst*** did not establish a novel principle or (impliedly) overturn the effect of the established caselaw cited to the Court in ***Ayerst*** about the duties and status of liquidators, which were all developed in full knowledge of the special trust on which the company holds its assets.

42. The Judge at [68] of the Judgment stated that ***Knowles*** "*remain[ed] good authority for the proposition … that a liquidator is not a trustee for the creditors or contributories of the company in liquidation*", but it needed to be "*read in the context of the statutory trust found in Ayerst*". The Judge concluded that ***Knowles*** did not remain "*good authority for the proposition that the liquidator's role is best seen as that of an agent for the company*", as a liquidator "*now must be seen as being a fiduciary holding assets on a trust…*". Moreover, the special kind of trust on which the company held its assets

was well known to the Court in ***Knowles****;* it was specifically addressed in the Court's reasoning at pp. 722 - 723 (Romer J.) (emphasis added):

> *No doubt in a sense and for certain purposes a liquidator may fairly enough be described as a trustee; but he is not in my judgment, in the strict sense in which the Plaintiff must use the term to enable him to succeed in this action, a trustee. A director is not a trustee for the shareholders of the company, though he is often referred to in various cases as a trustee, and no doubt rightly enough for certain purposes… in my opinion the Judge who used [the phrase "trust property" in a case cited to the court] was using it in order to point out that the property of the company had ceased to belong beneficially to the company after it had been wound up.*

43. The Court in ***Knowles*** plainly considered that the special kind of trust was consistent with its conclusion that the liquidator was agent of the company. Indeed, the Court's reasoning in ***Knowles*** was that (see p. 723 (Romer J.)):

    43.1. In a liquidation, it is the company which is the trustee, not the liquidator; and

    43.2. The liquidator was no more a trustee than a director of a (non-liquidating) company is.

44. The Judge's view that ***Knowles*** was not consistent with the "*statutory trust*" is novel and is contrary to authority, including ***Ayerst*** itself, ***Oldham***. As submitted above, in ***Ayerst****,* Lord Diplock referred to ***Knowles*** with approval at p. 180E.

45. The proposition that a liquidator is agent of the company, like directors, and that it is the company, not the liquidator, which holds the company's assets on trust for the statutory purpose has been affirmed since ***Ayerst*** in ***Southern Pacific Personal Loans***, summarised at paragraph 40 above. David Richards J. (as he then was) was well aware of ***Ayerst***, having cited it in his judgment, and his conclusion demonstrates that the Judge's reasoning that the liquidator is the trustee and acting as principal, not agent, is fundamentally flawed and should be rejected.

46. Correctly understood, the decision in ***Knowles***, affirmed in ***Oldham***, is that since it is the company which is the trustee for the purposes of the special trust over the company's assets held for the statutory purpose, and the liquidator is only agent for the company (like a director), it follows that (like a director) the liquidator only owes duties to the company. This is clear from [141] - [146] (as the Judge cited at [66] - [67] of the Judgment) and [163] of ***Oldham***. Despite being bound by the Court of Appeal's

decision in ***Oldham***, the Judge wrongly concluded that ***Oldham*** was somehow invalidated or rendered per incuriam by the earlier and well-known decision in ***Ayerst***, and as having been about something other than the point that the officeholder's duties are only owed to the company.

47. The Judge's conclusion, that the existence of the "*statutory trust*" means that a company could not agree to limit any liability of its liquidators is wrong and unjustified:

47.1. The "*trust*" arises from the fact that the company is deprived of the beneficial interest in its assets on liquidation, which are held by the company in order to effect the statutory purpose for which the liquidation is conducted, namely the application of the proceeds of the company's assets in accordance with s. 107 IA 1986.

47.2. Whilst the trust in respect of the company's assets, and the statutory purpose it serves, provide part of the context against which a liquidator's duties to the company arise, it does not follow that a liquidator's duties arise *out of* that trust property of the company,[16] when in fact they arise under contract, common law and equity to regulate the liquidator's dealings with the company's property.

47.3. The duties of a liquidator are not duties arising under a trust but simply as duties owed to the company in respect of the liquidator's exercise of its power to deal with the company's assets as the company's agent.

47.4. As set out above, and in any event, the law accepts that the liability of a trustee for breach of trust and/or fiduciary duty may be restricted or varied.

47.5. The fact that a trustee (which in this context would mean the company) does not hold the beneficial interest in the trust assets does not prevent them from contracting with third parties (i.e. in this context the prospective liquidators) in a way which affects those assets.

[16] Cf. Judgment, at [69].

CONCLUSION

48. For the reasons set out above, this Honourable Court is respectfully requested to allow the appeal, to set aside the Judge's decision, and to declare that the Limitation Clauses are valid and apply to limit in accordance with their terms any liability of the Former Liquidators to the Claimants arising out of the breaches of duty alleged in the PoC.

JASBIR DHILLON K.C.

Brick Court Chambers

ADAM DEACOCK

DANIEL THORPE

Radcliffe Chambers

30 March 2026