IN THE COURT OF APPEAL **CA-2025-002967 and CA-2025-002967-A**
ON APPEAL FROM **CR-2021-001548, CR-2022-000144**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
AND IN THE MATTER OF CORE VCT PLC (IN LIQUIDATION)
AND IN THE MATTER OF CORE VCT IV PLC (IN LIQUIDATION)
AND 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)
~~**2. SIMON JAMES UNDERWOOD**~~
~~**(as Former Liquidator of Core VCT IV plc and Core VCT V plc)**~~
3. DAVID ROBERT BAXENDALE
4. STEVEN ANTHONY SHERRY
(as Joint Liquidators of Core VCT plc)

Applicants

- 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

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

- and –

1. SOHO SQUARE CAPITAL LLP
(formerly Eso Capital Advisors LLP and, before that, Core Capital Partners LLP)
2. Mr WALID KHALIL FAKHRY
3. STEPHEN PETER EDWARDS
4. MARK ROBERT FRY
5. NEIL JOHN MATHER
6. BEGBIES TRAYNOR (CENTRAL) LLP
7. BTG ADVISORY LLP (formerly BTG Financial Consulting LLP)
~~**8. BEGBIES TRAYNOR GROUP PLC**~~
~~**9. SOHO SQUARE CAPITAL I LP (formerly Core Capital I LP)**~~
~~**10. SOHO SQUARE CAPITAL II LP (formerly Core Capital Partners II LP)**~~
11. RHONDA NICOLL
12. DAVID JOHN ALEXANDER STEEL
~~**13. PETER MENZIES SMAILL**~~

Defendants

RESPONDENTS' REPLACEMENT APPEAL AND PERMISSION TO APPEAL SKELETON ARGUMENT

Dated 2 June 2026 - updated in respect of revised bundle references: 22 October 2026

Bundles and cross-references: References to the Core Bundle take the form [**CB1/tab/page**] (vol. 1) and [**CB2/tab/page**] (vol. 2); references to the Supplementary Bundle take the form [**SB/tab/page**]. All references in the form **J¶** and **O§** are to the numbered paragraphs of the Judgment and Order below.

Suggested reading: For the Respondents' application for permission to appeal, the Court is invited to read (in the order stated): (i) the Respondent's Notice [**CB1/5/64**]; (ii) this Skeleton Argument; (iii) the Order [**CB1/10/133**] and the Judgment [**CB1/11/144**] in full; (iv) *Insolvency Practitioners, Appointments, Duties, Powers and Liability*, 2nd edn, at 8-43 to 8-45 (to be included in the Authorities Bundle) ; and (v) the short Witness Statements of Mr Sherry [**SB/14/281**], Mr Baxendale [**SB/15/286**], and Mr Pagden dated 19/06/25 [**SB/16/292**].

A. INTRODUCTION AND PARTIES

1. This skeleton argument is filed on behalf of the Respondents (the "**Claimants/Applicants**" in the proceedings), in response to the Appellants' Appeal Skeleton Argument dated 30/3/26 (the "**ASA**") [**CB1/4/43**] and further to the Respondent's Notice dated 26/2/2026 (the "**RN**") [**CB1/5/64**], in accordance with the bespoke timetable approved by the Court (Master Meacher) on 5/3/2026.

2. The Appellants were granted permission to appeal by Asplin LJ, partly on the basis that the issues which the grounds raise are of some importance [**CB1/13/177**]. The appeal concerns the decision of Thompsell J dated 10/9/2025 ([2025] EWHC 2316 (Ch)) (the "**Judgment**") [**CB1/11/144**], reflected in an order dated 11/11/2025 and drawn/sealed 16/12/2025 (the "**Order**") [**CB1/10/133**], which arose from a trial, in June 2025, of the following "**Preliminary Issue**" (the "**PI Trial**"):

   *"Whether clause 13.2.3 of the Sixth Defendant's Standard Terms of Business ("**the Terms**") and Clause 7 of their letters of engagement dated 5 and 6 March 2015 ("**the letters of engagement**") limits the liability of the Fourth to ~~Eighth~~Seventh Defendants ("**the Begbies Defendants**") and each of them to an aggregate sum of £1 million in respect of the breaches of duty alleged in paragraphs 155-158 of the Particulars of Claim (in their original form or as amended by the Amended Particulars of Claim) or any of them"*[1]

3. The parties to the PI Trial were only: (1) the Claimants/Applicants (being the 3 corporate claimants and their respective current liquidators); and (2) the Fourth and Fifth Defendants – Mr Fry and Mr Mather – being the former liquidators of the Claimants (the "**FLs**"), Begbies

[1] Order of HH Judge Davis-White KC dated 4/12/24, cited at **J¶3**. The claims against D8 having been dismissed by consent by the time of PI Trial; **J¶4**.

Traynor (Central) LLP ("**D6**") and BTG Advisory LLP (formerly BTG Financial Consulting LLP) ("**D7**") (collectively, the "**Begbies Defendants**" and the "**Appellants**").

4. At the hearing below, the Claimants/Applicants argued that the Preliminary Issue should be determined in the negative on two[2] broad bases:

   (1) That, in the relevant legislative context, the letters of engagement (the **"LOEs**") and/or the Terms could not operate to limit or exclude liability for the FLs' conduct as appointed liquidators (the "**Liquidators' Liability Issue**"); and/or

   (2) That, in any event, as a matter of construction (in the relevant legislative context and/or having regard to their terms) the LOEs and/or the Terms did not limit or exclude liability for the FLs' conduct as appointed liquidators (the "**Construction Issue**").

5. In essence, the Judge determined the Liquidators' Liability Issue in favour of the Respondents (**O§1** - which the Begbies Defendants appeal) and the Construction Issue (in part only – **O§§2-5**) in favour of D6/D7. As recorded in the Order at Recital (e), the Judge did not determine the Construction Issue (either way) in respect of the FLs. Accordingly, the Construction Issue (at least in part) arises for consideration in the context of the Appellants' appeal against **O§1** in any event, the Judge having declared: *"The Limitation Clauses cannot and do not limit any liability of the Former Liquidators to the Claimants in respect of their conduct as liquidators, whether to an aggregate sum of £1 million in respect of each Claimant or at all."*

6. As indicated in the RN, the Respondents ask the Court to (i) uphold **O§1** on the grounds identified in the Judgment and/or on different or additional grounds; and (ii) grant the Respondents permission to appeal **O§2-5** (and the corresponding costs orders at **O§§6-8**) (and in due course allow such an appeal). In brief outline, the Respondents' position is that:

   (1) The Judge's view that the duties of the liquidator are not owed purely to the company to which they are appointed (and so cannot be waived) is correct and supported by authority. It follows from the statutory trust on which the company's assets are held (in liquidation) and/or the statutory scheme generally that there is no basis for any effective limitation of a liquidator's liability to the company for their conduct as liquidator.

[2] The Respondents also identified in their skeleton argument for the hearing below a third alternative basis, namely that the relevant terms would not satisfy the requirement of reasonableness within the meaning of the Unfair Contract Terms Act 1977 ("**UCTA**") (the "**UCTA Issue**"). By the time of the PI Trial, the parties had agreed – and the Court approved – that the Preliminary Issue be determined subject to reservation of the UCTA Issue; **J¶11** and 9th recital to the Order.

(2) In any event, the shareholders (in whom the power to appoint a liquidator is vested by the legislation) did not agree to any such limitation of liability and the directors lacked authority to enter into any binding contractual agreement on behalf of the company limiting the liability of potential future liquidators. Any such purported agreement is therefore void and of no effect.

(3) Any limitation of liability would oust the Court's wide-ranging jurisdiction under the insolvency legislation, which *inter alia* affords multiple stakeholders the ability to bring proceedings for relief and the Court a discretion as to the relief to be ordered.

(4) In any event, properly construed, the LOEs and/or the Terms did not limit or exclude liability for the FLs' conduct as appointed liquidators.

7. The remainder of this Skeleton Argument is addressed under the following principal headings:

(B) Background (and relevant terms of the LOEs and Terms)

(C) The relevant legislative context

(D) The Liquidators' Liability Issue - Why O§1 should be upheld

(E) The Construction Issue – and Respondents' application for permission to appeal

B. BACKGROUND (and relevant terms of the LOEs and Terms)

8. The Claimants'/Applicants' claims are now set out in Re-Amended Combined Particulars of Claim dated 17 December 2025 at [**CB2/19/242**] (the "**APOC**") and at the time of the PI Trial, the Begbies Defendants had not yet served a Defence. In brief overview, so far as material to the appeal and as pleaded/relied on below (all § references being to the APOC):

(1) The Part 7 Claimants (the "**Companies**") were venture capital trusts, established to raise funds (c.£66m) from retail investors, for investing in small and medium sized enterprises, with their shares listed on the LSE [§4**CB2/19/245**]. From late November 2014, the then manager began preparing to place the Companies into MVL [§29**CB2/19/257**].

(2) Letters of engagement ("**LOEs**"), accompanied by a document headed *"Standard Terms of Business"* (the "**Terms**"), were provided by D6 to the boards of directors of the Second and Third Claimants on 5 March 2015 and to the board of directors of the First Claimant on 6 March 2015 [§34**CB2/19/257**].

(3) Save for their dates, the LOEs and the Terms were identical in respect of each of the Companies [**CB1/16/181-226**]. They were on D6's letterhead, signed by Mr Fry in his

capacity as "*Partner*" (of D6), addressed to "*The Board of Directors*" and countersigned (in each case) by a director of the relevant Companies[3]. The accompanying Terms were D6's "*Standard Terms of Business*". The LOEs confirmed to the relevant boards D6 was "*pleased to accept your instructions to act for you in relation to placing the Company into members' voluntary liquidation and for Mark Robert Fry and Neil John Mather to act as Joint Liquidators of the Company pursuant to the provisions of the Insolvency Act 1986*". Thereafter, the LOEs set out "*the nature and scope of the work which we* [meaning D6[4]] *will undertake on your behalf*" (underline added).

(4) Paragraph 7.1 of the LOEs and (so far as material) clause 13.2.2 – 13.2.3 of the Terms stated the following (referred to for convenience as the "**Limitation Clauses**"):

(a) "*For the purposes of clause 13 of our Terms of Business, we limit the aggregate liability of Begbies Traynor and Begbies Traynor Persons (as defined in our Terms of Business) in any circumstances whatsoever, whether in contract, tort, statute or otherwise and howsoever caused (including our negligence) for loss or damage in connection with provision of the Services (as defined in our Terms of Business) to the sum of £1 million excluding costs and interest*"; and

(b) *"13.2.2 Nothing in the terms or Engagement Letter will limit any liability that we may have to you in respect of any loss caused by our fraud, fraudulent misrepresentation or reckless disregard of our professional obligations or in any other situation where the law prohibits us from excluding or limiting our liability to you, […]*

13.2.3 Subject to clause 13.2.2 the aggregate liability of Begbies Traynor and Begbies Traynor Persons in any circumstances whatsoever, and however caused (including as a result of our negligence) for loss or damage arising from or in connection with the provision of the Services shall be limited to the sum specified in the Engagement Letter […]".

The "*Services*" defined in clause 1.2 of the Terms, meant "*the services to be provided by Begbies Traynor* [ie D6] *in accordance with the Services Contract";* **J¶107**.

(5) On 10 March 2015, a combined Notice of General Meetings was issued to the Companies' shareholders proposing they be placed into MVL and that Mr Fry and Mr Mather (both then members of D6) be appointed as joint liquidators. It did not mention any £1m limits on the FLs' liability.

(6) On 16 April 2015, by resolutions passed by their respective shareholders acting in general meeting (attended by Mr Fry), each of the Companies was placed into MVL and the FLs

[3] The director of the First Claimant did not date the LOE but the others were dated 9 March 2015.
[4] "*Begbies Traynor*", "*we*" and "*us*" were defined in clause 1.2 of the Terms to mean D6; recited at **J¶107.**

were appointed as joint liquidators [**SB/5/56-58**]. The respective shareholders passed only the following 5 resolutions:

1. The Companies *"be wound up voluntarily"*;
2. The FLs be appointed as joint liquidators and that any relevant act could be undertaken by them jointly or alone;
3. The FLs be authorised to make distributions;
4. The FLs be authorised under s.165(2) of the Insolvency Act 1986 (the "**IA 1986**") to exercise the powers laid down in Schedule 4, Part 1 of the IA 1986; and
5. The FLs be entitled to receive remuneration for their services on a time costs basis.

(7) In July 2015, D7 prepared a written review of the valuation of the Companies' investments (the "**BTG Valuation Review**") [§45**CB2/19/262**] (although, in their recent Defence, they appear now to contend this was produced by D6 on the instruction of D4).

(8) Thereafter, in circumstances (and at a value) about which complaint is made (against the Begbies Defendants and others), on 25 August 2015, the Companies' assets were transferred to an entity referred to in the APOC as "**New Core 2**" [§50**CB2/19/264**].

(9) Final general meetings of the Companies' shareholders were held on 10 August 2016 (at which the FLs' final report and accounts and release as liquidators were approved), and the Companies were deemed dissolved on 18/11/16 [§§59, 61**CB2/19/269**].

(10) The Companies were later restored to the register (with Mr Pagden and Mr Underwood appointed liquidators) on 20/07/2018, on the application of a shareholder – considered by the Court of Appeal in *Fakhry and ors v Pagden and ors* [2020] EWCA Civ 1207. Following a protracted subsequent litigation history (details of which are not material to the appeal), the Companies remain restored, Mr Baxendale and Mr Sherry have been appointed as replacement joint liquidators of the First Claimant, and Mr Pagden (following Mr Underwood's retirement) continues as sole liquidator of the others.

(11) In broad summary, in so far as they concern the Begbies Defendants, the proceedings seek relief in respect of the FLs' alleged failings as officeholders during their conduct of the MVLs, including in relation to the transfer of the Companies' assets on 25 August 2015 and/or the BTG Valuation Review.

9. Pursuant to the terms of earlier orders (and as no Defences had then been filed), a Schedule of Assumed Facts and Matters was agreed for the purposes of the PI Trial [**SB/11/130**].

Accordingly, the Court was asked to determine the Preliminary Issue on the assumed (but not otherwise agreed or admitted) basis that there were relevant duties owed by the Begbies Defendants, breaches of which occasioned loss and damage to the Companies and for which they would otherwise be liable in sums exceeding £1m to each of the Companies.

C. THE RELEVANT LEGISLATIVE CONTEXT

10. Voluntary liquidation is a process now provided for and governed by the IA 1986 and the corresponding Insolvency Rules, which at the time of the FLs' appointments (by the passage of the relevant shareholders resolutions (the "**Resolution Date**")) were *The Insolvency Rules 1986* (SI 1986/1925) ("**IR 1986**").[5] As the legislative scheme is the foundation of the Respondents' arguments, key features are addressed below.

C(1). Nature of appointment

11. Under the IA 1986, only licensed insolvency practitioners may be appointed as liquidators – and only individuals (not firms) may be insolvency practitioners; ss.230(3), 388, 389, 390[6]. Accordingly, under the legislative framework, the appointment of the liquidator is necessarily personal, notwithstanding that it may be *"the work comes to the firm rather than to the individual"* and it is the *"the collective expertise of the firm which attracts the appointment"* (*Re Sankey Furniture Ltd* [1995] 2 BCLC 594, Chadwick J, at 600f-601e[7]).

12. Unlike directors (and auditors[8]), liquidators are not "*officers*" of the company. They do not "*hold an office within the constitutional structure of the body corporate*"; *R (Palmer) v Northern Derbyshire Magistrates Court and another* [2023] UKSC 38, [20]-[42], [55]-[56]. Whilst a director and/or an auditor accepts office under the terms of the company's constitution (subject to such additional requirements as may be superimposed by applicable legislation), liquidators are *sui generis* creatures of the IA 1986, appointed pursuant to the statutory scheme and with the functions and powers bestowed upon them by such legislation.

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[5] There have been various amendments made to the IA 1986 and the Insolvency Rules since the Former Liquidators held office in respect of the Companies. Reference here and below is made to the provisions of the IA 1986 and the IR as in force at the Resolution Date and where there have been any material amendments since, these are noted.

[6] These provisions being in some respects in slightly different terms at the Resolution Date and now; and see now s. 390A IA 1986.

[7] "*The effect is that, in law, appointment as a liquidator […] is an appointment which is personal to the individual who accepts it. It is not an appointment to the firm of which he or she happens, for the time being, to be a member.*"

[8] Whilst it is recognised there may now be some debate whether auditors are "*officers*" of a company, in the authorities relied upon by the Appellants they have long been treated as such for the purposes of s.212 (and its predecessors).

C(2). Entry into MVL and appointment of the liquidator

13. Pursuant to the statutory scheme, it is only the shareholders who are competent to effect the company's entry into voluntary liquidation; s.84. A board of directors has no such power.

14. S.84(1)(b) at the Resolution Date (as now) materially provided that a company may be wound up voluntarily "*if the company resolves by special resolution that it be wound up voluntarily*". A special resolution must be passed by not less than a three-quarters majority of those voting (s.283 Companies Act 2006 (the "**CA 2006**")). Pursuant to s.86, a voluntary winding up is then *"deemed to commence at the time of the passing of the resolution for voluntary winding up"*.

15. The directors are not competent to appoint (or remove) any liquidator:

    (1) Pursuant to s.91(1), *"In a members' voluntary winding up, the company in general meeting shall appoint one or more liquidators for the purpose of winding up the company's affairs and distributing its assets"* (underline added);

    (2) S.92(1) further provides that, *"If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy"* (underline added).

    (3) S.108 provides that in any voluntary winding up, if "*from any cause whatever there is no liquidator acting, the court may appoint a liquidator"* (emphasis added) and the court may also *"on cause shown, remove a liquidator and appoint another."*

16. After appointment, a liquidator in an MVL cannot be removed from office other than by the court or the company in general meeting and may only resign in the limited circumstances specified in the Insolvency Rules (then r. 4.108 and now r.5.6)[9]; s.108(2), s.171(2) and (5).

C(3). The statutory role of the liquidator: functions, powers and the statutory trust

17. Once appointed, whatever their (or their firm's or employer's) previous business relationship with the company, the insolvency practitioner's role is that of a statutory office-holder under the legislation and, upon their appointment, all the powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance; s.91(2).

18. S.107 provides for the company's property in a voluntary winding up to be applied, subject to the provisions of the IA 1986 as to preferential payments, in satisfaction of the company's liabilities pari passu and, subject to that application and unless the articles otherwise provide, to be distributed among the members according to their rights and interests in the company.

[9] Notably these do not include departure from the insolvency practitioner's present firm or employer.

19. As explained by David Richards LJ (as he then was) in *Fakhry v Pagden* [2020] EWCA Civ 1207; [2021] B.C.C. 46 at [26], an MVL is one of three types of liquidation pursuant to the IA 1986, which *"share the fundamental purpose of collecting and realising the assets of the company, including any claims whether under the general law or under insolvency legislation, and distributing the net proceeds after the costs and expenses of the liquidation among the persons entitled, with creditors ranking in priority to members"* and (at [28]), *"In all types of liquidation, the beneficial interest in the assets is suspended and they are held on a statutory trust to be dealt with in accordance with the statutory scheme: see Ayerst (Inspector of Taxes) v C&K Construction Ltd [1976] A.C. 167; [1975] 3 W.L.R. 16."*

20. As at the Resolution Date, s.165(2) IA 1986 provided that a liquidator in an MVL could, with the sanction of a special resolution of the company, exercise any of the powers specified in Part I of Schedule 4 to the IA 1986; and, without sanction, exercise either of the powers in Part II and any of the general powers in Part III of Schedule 4. (By the reforms made by s.120 and s.164 of the Small Business Enterprise and Employment Act 2015, s.165(2) IA 1986 now allows exercise (without sanction) of any of the powers in Parts I to III of Schedule 4.)

21. Schedule 4[10] includes a number of specific powers and also, at paragraph 13, the incidental *"Power to do all such other things as may be necessary for winding up the company's affairs and distributing its assets"*. S. 165(4)[11] sets out further specific powers. A liquidator also has a limited ability to do other things which do not adversely affect the assets or liabilities of the company so as to bind creditors or contributories that are merely incidental to the custody of the company's property, but otherwise they do not have powers beyond those conferred by the legislation; *Re ACLI Metals (London) Ltd* (1989) 5 BCC 749 at 753G-754A and (by analogy) *Hutton v West Cork Railway Co.* (1883) 23 Ch D. 654.

22. It is uncontentious that, by reason of their statutory functions and powers, liquidators are fiduciaries and owe duties to act with reasonable care and skill, particularly in seeking to obtain the best price for the company's assets that the circumstances, as they reasonably perceive them to be, permit; *Re Charnley Davies Ltd (No.2)* [1990] BCC 605.

23. As fiduciaries, liquidators may only receive such remuneration as is permitted under the legislation (meaning, in an MVL and as addressed further below, that which is approved under the Insolvency Rules by members and/or the court); *Re Gertzenstein Limited* [1937] Ch 115.

[10] Subject only to limited amendments since the Resolution Date.
[11] Unamended since the Resolution Date.

24. That liquidators are to be held accountable for their conduct in such capacity has long been made clear by the legislation: ss.173 and 174 IA 1986[12] contain provision for the formal "*release*" of liquidators (in voluntary liquidation under s. 173 from "*all liability both in respect of acts or omissions in the winding up and otherwise in relation to his conduct as liquidator*"), expressly without preventing (subject to permission from the court pursuant to s.212(4)) the exercise of the court's powers to examine into their conduct under s.212 (addressed further below)[13]. S.212(2) notably specifies: "*any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company*" (underline added).

C(4). The Court's jurisdiction in respect of a liquidator in an MVL

25. In carrying out their statutory role, whilst (unlike liquidators in compulsory liquidations) liquidators in MVLs are not officers of the court, under the legislative scheme they are nevertheless ultimately subject to the jurisdiction of the court:

    (1) Section 112 IA 1986 (which applies in a voluntary winding up) provides that a liquidator or contributory or creditor "*may apply to the court to determine any question arising in the winding up of a company, or to exercise, […] all or any of the powers which the court might exercise if the company were being wound up by the court"* and that *"[t]he court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just."*

    (2) In turn, s.168(5) (which applies in the case of a company being wound up by the court), provides that "*If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just*".

    (3) In addition, in *Re Novalpina Capital LLP* [2025] EWHC 54 (Ch) at [40]-[41] and [47], then Deputy ICC Judge Raquel Agnello KC, held that s.112 is not restricted to the exercise of statutory powers but extends to the court's inherent jurisdiction.

[12] Subject to some amendment since the Resolution Date. Earlier release provisions were Companies (Winding-up) Act 1890, s.22; Companies (Consolidation) Act 1908, s.157; Companies Act 1929, s.197 (and Ninth Schedule); Companies Act 1948, s.251 (and Eleventh Schedule); s.545 of the Companies Act 1985. (Insolvency Act 1985, s.80 and s.87 never came into force.)

[13] Statutory predecessors to s.212: Companies Act 1862, s.165; Companies (Consolidation) Act 1908, s.215; Companies Act 1929, s.276; Companies Act 1948, s.333; s.631 of the Companies Act 1985. (Insolvency Act 1985, s.19 never came into force.)

(4) As noted above, under s.171 and/or s.108, the court has the power to remove any liquidator and under s.108(2) to appoint a replacement liquidator.

(5) Pursuant to r4.149 IR 1986 (now r5.15 IR 2016) and - whilst they do not prejudice the operation of any rule of law/equity with respect to a liquidator's dealings with trust property or the fiduciary obligations of any person - if, in the administration of the estate, the liquidator enters a transaction with an associate, the court may set it aside and order the liquidator to compensate the company (subject to certain exceptions);

(6) The members[14] determine the liquidator's remuneration (directors having no power to do so), which is likewise ultimately subject to the jurisdiction of the court:

(a) Rule 4.148A (at the Resolution Date)[15] specified bases on which remuneration was to be fixed; providing for certain matters to be had regard to (including complexity, responsibility of an exceptional kind or degree, effectiveness, and value and nature of the property the office-holder has had to deal with). In the first instance it was for "*the company in general meeting*" to determine the basis for remuneration (r4.148A(2C)[16]); where no remuneration was so fixed, r4.148A(4) provided for the court to fix it on application by the liquidator[17].

(b) The IR 1986 also made provision for a liquidator to apply to court where the basis of their remuneration was insufficient or inappropriate (r4.148A(6) IR 1986)[18]; and for members (subject to conditions) to apply to court for relief on grounds the remuneration charged, or the basis fixed for it or the expenses incurred by the liquidator were excessive or inappropriate (r4.148C IR 1986)[19].

(c) The court has further powers to control remuneration: e.g. the rules give the court power to order that remuneration be disallowed where a liquidator (or someone on their behalf) has used improper solicitation in obtaining proxies or procuring appointment (r4.150(1) IR 1986 and now r5.16 IR 2016). Under sub-rule (2) such order *"overrides any resolution of the liquidation committee or the creditors, or any other provision of the Rules relating to the liquidator's remuneration"* (IR 1986) or *"any resolution of the*

[14] Or in a CVL, the creditors: r18.20 IR 2016; r4.127 IR 1986 (as at the Resolution Date).
[15] Now r18.16 of the IR 2016.
[16] So too now under r18.19 IR 2016.
[17] Now reflected in r18.23(1) of the IR 2016.
[18] See now similarly r18.24 and 18.28(3)(d) of the IR 2016.
[19] The equivalent of which in the IR 2016 is r18.34.

members, or any other provision of these Rules relating to the liquidator's remuneration" (IR 2016).

(7) Moreover, s.212 IA 1986 materially confers upon the court jurisdiction (upon the application of "*the official receiver or the liquidator, or of any creditor or* [with the leave of the court pursuant to s.212(5)] *contributor*y") – and which may be exercised even after the liquidator has had their release pursuant to s.173[20] – to compel a liquidator who has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company –

"(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just"

(and note, as set out in paragraph 24 above, the specific terms of s.212(2) in relation to liquidators).

C(5). Possibility of conversion into insolvent liquidation

26. Finally, s.95 IA 1986 requires a liquidator to keep the solvency of the company under review and notify creditors within 7 days of forming the opinion that the company will be unable to pay its debts in full within 12 months from the directors' statutory declaration of solvency under s.89 - it will then convert to a creditors' voluntary liquidation ("**CVL**").

C(6). Distinction between pre- and post- appointment roles

27. Accordingly, there is a fundamental difference between an insolvency practitioner's roles before and after formal appointment under the IA 1986. It is not uncommon for firms and/or individuals to be engaged by companies (acting by directors) in anticipation of the company entering formal insolvency proceedings. Such services, provided to the company and/or directors before the commencement of insolvency proceedings and pursuant to contractual retainers, may be the subject of properly drafted limitation clauses. However, once appointed under the IA 1986, the individual's role as officeholder is different and is governed by the legislation. (In respect of the material distinction between roles, reference is made to *Pitt v Mond* [2001 BPIR 624 at 633 to 634 and *Prosser v Castle Sanderson and Geoffrey Martin & Co* [2002] EWCA

[20] Such permission having been given in the present case by ICC Judge Burton: [2022] EWHC 632 (Ch).

Civ 1140 at [60] to [68] (concerning IVAs under Part VIII IA 1986) and *Statement of Insolvency Practice 16* (SIP 16) at paragraph 7 (concerning Administrators).[21])

D. THE LIABILITY ISSUE – WHY O§1 SHOULD BE UPHELD

28. At the outset, the Respondents note the Judge's decision on this issue is consonant with both (i) the almost 100-year-old comments of Maugham J in *Re Home & Colonial Insurance Co Ltd* [1930] 1 Ch. 102 at 126-127 (addressed further below); and (ii) the position set out prior to the PI Trial in the practitioners' textbook, *Insolvency Practitioners: Appointments, Duties, Powers and Liability* (2nd ed) at 8-45. Further, it has been treated as orthodox after hand down:

    (1) It was followed in *Cedar Securities Ltd (In Liquidation) v Phillips* [2025] EWHC 2760 (Ch). Master Marsh relevantly described the Judgment as providing *"an authoritative ruling on the question of whether it is open to a liquidator to limit liability […]"* (at [81]); disagreed with a submission that it broke new ground, considering it to be *"based upon well-established principles and, indeed chimes with the case put forward […] at the hearing before the decision in Pagden v Fry was known about"*; and concluded that it *"cannot be said to be obviously wrong"* and was *"carefully and thoroughly reasoned and reflects the current state of the law"* (both at [94]);

    (2) The editors of *Totty, Moss & Segal: Insolvency* (Release 113: January 2026) at D1-07, footnote 4 say that the decision *"confirms the restriction on liquidators which prevents them from contractually limiting or excluding their personal liability for breach of duty […]"* (underline added).

29. Contrary to the above, the Begbies Defendants contend the Judge erred in law in holding the Limitation Clauses cannot and do not limit any liability of the FLs in respect of the breaches of duty alleged or at all and that the learned Judge should have held that any such liability of the Begbies Defendants or any of them was so limited, or alternatively could have been limited, by those provisions (subject to the UCTA Issue). In the ASA, the Begbies Defendants' "*central submission"* is said to be that there is "*no rule of law preventing* [the directors of] *a company from contracting to limit the liability of a* [future] *liquidator (certainly in an MVL)"*; ASA §4. (For their appeal to succeed, in the factual circumstances of the present case, the words in square brackets must be imported.)

[21] Statements of Insolvency Practice (SIPs) are issued to insolvency practitioners under procedures agreed between the regulatory authorities, acting through the Joint Insolvency Committee, applying to practitioners authorised by a number of bodies and authorities. They set principles and key compliance standards with which insolvency practitioners are required to comply. They apply in parallel to the prevailing statutory framework (see SIP 1, paragraphs 1, 6, and 9).

30. The Respondents' position is that the appeal against **O§1** should be dismissed because the Judge was right for amongst the reasons he gave and/or for the different and/or additional reasons identified in Section 6 of the RN and this Skeleton Argument.

D(1). The arguments based on the statutory trust - J¶¶ 63 - 74

31. The foundation of the Judge's reasoning as to why the Limitation Clauses could not modify the liability of liquidators is set out at J¶73: liquidators' duties are not owed purely to the company in question, and therefore the company could not modify their liability.

32. The Begbies Defendants' argument appears to be that a liquidator is only an agent of the company like a director, accordingly owes their duties only to the company like a director, and neither the legislative framework nor the statutory trust alters that position (ASA §§4, 46).

33. Contrary to this, however, the Judge's conclusion is supported by authority and follows from the statutory scheme. Whilst earlier decisions may put the point in various different ways, the authorities relied on by the Begbies Defendants do not establish that the duties are owed "purely" to the company, but rather the liquidator occupies a *sui generis* statutory position, consistent with **J¶73**:

    (1) In *Re Southern Pacific Personal Loans Ltd* [2014] Ch. 426, David Richards J stated at [33]: *"Unlike directors, [liquidators] are not acting in the interests of the company as a separate entity or in the interests of its members. In an insolvent winding up they are primarily acting in the interests of creditors. […] [T]he commencement of a liquidation brings into effect a scheme as regards the company and its property which is fundamentally different from that which existed prior to its liquidation. The beneficial ownership of the assets of the company is suspended pending the implementation of the statutory scheme: see Ayerst […] [the liquidator acts] as agent for the company, in whose ownership the property remains vested, albeit not for the benefit of the company but in order to give effect to the statutory scheme"* (underline added).

    (2) In *Knowles v Scott* [1891] 1 Ch. 717, Romer J at 723 did not equate the liquidator exactly with an agent of the company who owes duties only to that company, but stated that a voluntary liquidator *"is more rightly described as the agent of the company-an agent who has, no doubt, cast upon him by statute and otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders*" (underline added).

    (3) In *Ayerst (Inspector of Taxes) v C. & K. (Construction) Ltd* [1976] A.C. 167, Lord Diplock stated that upon a winding-up order *"All powers of dealing with the company's assets […] are exercisable*

by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme. The company itself as a legal person, distinct from its members, can never be entitled to any part of the proceeds" (at 177C) (underline added).

34. There are further dicta which seek to capture in various ways the particular nature of the liquidator's role and the duties consequently owed:

(1) In *Re Esal (Commodities) Ltd* [1993] BCLC 872, Lindsay J at 884 said: *"in my view in an insolvent liquidation a liquidator, whilst acting on behalf of the company, does indeed act in a 'trustee-like way' on behalf of creditors. That that is so is not disproved by his not being a trustee 'in the strict sense', nor is it a useful debate to determine whether or not he can properly be called an agent. Rather he is a fiduciary of the kind called 'liquidator'"* (emphasis original; see on appeal [1997] 1 BCLC 705 at 717h-718b).

(2) In *Re Corbenstoke Ltd (No 2)* [1990] BCLC 60 at 62d, Harman J said: *"[…] it is plain that a liquidator, although not strictly speaking a trustee, is nonetheless a fiduciary holding an office with statutory duties analogous to the duties of a trustee to his beneficiaries being the duties of a liquidator to his creditors".*

(3) In *Hague v Nam Tai Electronics Inc* [2008] UKPC 13; [2008] BCC 295, Lord Scott at [13] considered that it was *"well arguable that the duties owed by a liquidator in an insolvent liquidation are owed also to the creditors as a class […] A culpable failure by a liquidator to collect in or preserve or take control of the assets of a company in liquidation may diminish the value of the fund available for distribution pro rata among the creditors but is not, in their Lordships' opinion, a breach of a duty owed to each creditor as an individual."*

(4) In *MacDonald v Carnbroe Estates Ltd* [2019] UKSC 57, Lord Hodge stated at [38]: *"A liquidator is under a fiduciary duty to the company, and possibly its creditors as a class, to exercise the professional care and skill of an insolvency practitioner in realising the assets of an insolvent company: Hague v Nam Tai Electronics Inc [2008] UKPC 13, [2008] BPIR 363, [2008] BCC 295; Kyrris v Oldham [2003] EWCA Civ 506, [2004] 1 BCLC 305, [2004] BCC 111; see by analogy Lightman & Moss, Law of Administrators and Receivers of Companies (6th edn, 2017) para 12-042."*

35. In support of their argument that a liquidator does not generally owe duties to creditors/members, the Appellants rely on *Oldham v Kyrris* [2003] EWCA Civ 1506; [2004] B.C.C. 111. However, the point addressed in *Oldham* was whether an administrator owed a separate or additional duty to creditors; [142] citing [31] to [34] in *Peskin v Anderson* ([2001] 1 BCLC 372). It was in *this* context that Jonathan Parker LJ at [146] concluded that the relevant duties were *"owed exclusively to the company."* This is a different point to that on which the learned Judge relied, which was not whether there was a separate duty owed to anyone beyond the company, but concerned

the particular content and multilateral nature of the duties owed by the liquidator to the company and other stakeholders as a whole. That *Oldham* was cited in both *MacDonald* (as above, at [38]) and *Hague* (at [14]) demonstrates the distinction.

36. The foundation of the Judge's reasoning was therefore correct. Creditors and contributories have rights under the statutory scheme, and therefore a company (acting solely by its directors) cannot waive the liquidator's duties or modify or limit liability (in advance, and without consent) for breach. The Begbies Defendants' Ground 2.2, that "*performance of the statutory trust or any particular part of it or duty derived from it may be waived either by the Company or by the persons interested in its performance"* illustrates the point: it is clearly wrong that the Company (acting only by its directors) could waive performance thereby prejudicing the persons interested in it. As the learned Judge noted at **J¶82**: *"[i]t is established that that trust is a trust to fulfil the statutory purposes, not a trust of assets on behalf of particular persons. There is, therefore, no person who is able to waive performance of the statutory trust".*

37. That the liquidator's fiduciary duties and duties to exercise reasonable care and skill in the performance of their functions are not expressed in the legislation but arise as a matter of law by virtue of such statutory role is irrelevant if the company (in this case acting by its directors in advance of the appointment) does not have power to waive them (or any liability arising from their breach). Furthermore, the Appellants' argument that *"given that the Company in liquidation as trustee can enforce those duties, it can still waive them, just as a trustee could do in relation to an agent employed by the trustee"* (ASA, §19), ignores the fact that the company only becomes such *"trustee"* on the commencement of the winding up. Thereupon, insofar as the powers given to directors are concerned, the company can *only* act by the liquidator (or pursuant to relevant authority granted by the liquidator or sanctioned by the company in general meeting (s.91)).

38. Likewise, the Appellants' reliance (at ASA §33) upon the validity of trustee exemption clauses ignores the fact that they owe their existence and efficacy to the *settlor* of the trust. In the context of liquidation and/or the corresponding statutory trust, it is the legislation which must be equated with the settlor and/or settlement deed (not the directors of the subject company) and the legislation does not contain (or even permit the appointing shareholders to agree to) any such provision. In the circumstances, that there is no provision equivalent to s.232 or s.532 CA 2006 (nor any express exclusion of liquidators under UCTA) is unsurprising: whilst (subject to any contrary legislative intervention) the bilateral relationship between the company and its officers is governed by the company's constitution and/or contractual arrangements made thereunder[22], the relationship between the company and a liquidator is governed

[22] *In Re Brazilian Rubber Plantations and Estates Limited* [1911] 1 Ch 425 at 440.

(comprehensively) by the legislation. The company, as trustee or under the legislation, cannot create powers for itself.

D(2). Other grounds for upholding O§1

39. Whilst the Judge's decision was primarily founded on the implications of the statutory trust (J¶**70**), the same result follows from the legislative scheme without reasoning from such trust:

(1) As identified above, liquidators are *"creatures of statute"* in the true sense, their position not being the subject of any separate or contractual relationship: they *"can only do what they are empowered to do by the statute. They do not, therefore, have a choice to do something that they are not empowered to do by the statute"* (*Kirkpatrick v Snoozebox Ltd* [2014] B.C.C. 477).

(2) They are not officers of the company but statutory office-holders, whose appointment and role is governed by the IA 1986 and the Insolvency Rules rather than by and/or pursuant to the company's constitution.

(3) As identified above, the insolvency legislation makes comprehensive provision as to what liquidators are empowered to do and the remuneration they are permitted to receive. It makes no provision in respect of any agreement being reached with (or approval given by) the company (acting either by its directors or the company in general meeting) to a limitation of their potential liability for their conduct in office.

(4) Under the IA 1986, only the members (and not the directors) are competent to effect the company's entry into MVL, appoint the first liquidator and approve the liquidator's remuneration (and, as at the Resolution Date, authorise the exercise by the liquidator of any of the powers specified in Part I of Schedule 4 to the IA 1986).

(5) Since it is only the company in general meeting that has power and authority under the IA 1986 to appoint a liquidator, even *if* the shareholders themselves could have agreed to an effective limitation of potential liability upon making such appointment (and it is common ground that they did not do so), it follows that *the directors* were not competent to make any agreement on behalf of the company to that effect. As *Shackleton on the Law and Practice of Meetings* (16th Ed.) states at 12-01:

"Directors are the managers of the company, but, at its simplest, are only the instrument of the members or shareholders. The general meeting of members represents the source of ultimate authority within the company structure, in that it elects the directors, receives the annual accounts, and passes as special resolutions those matters which most significantly affect the constitution of the company. The general meeting is the repository of any powers that have not been delegated to the directors. The general meeting remains

an important sanction for the members, despite the very extensive powers of management which are invariably conferred on the board by the company's articles."

(6) As the power to appoint a liquidator is vested by the legislation in "*the company in general meeting*", the directors lacked – and could not be considered by the Begbies Defendants to have had – any authority to act on behalf of the Companies to enter into any binding contractual agreement either for the appointment of any person as liquidator or for the limitation of their liability as future officeholder if appointed under the statute. The entry into such an agreement was not within their delegated management powers and thus was void and of no effect; *Kerr v. Marine Products Limited* [1928] TLR 292, *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246 at 304A-B. (As the limitation on the powers of the directors to bind the Companies arises under statute, and not the company's constitution, s.40(1) CA 2006 cannot be applied.)

40. Whilst heavy reliance is placed by the Appellants on *Re City Equitable Fire Insurance Company* [1925] Ch. 407, there are material differences between directors/auditors and liquidators (in addition to the statutory trust) which mean that the Judge was right to conclude (at **J¶71**) that the reasoning cannot be read across to liquidators:

(1) A person may act as a director of a company regardless of whether they have been appointed as such: by s. 250 CA 2006, a "*director*" includes any person occupying the position of director, by whatever name called. Whereas a liquidator must be a licensed insolvency practitioner; has a sui generis role that exists and can be terminated only under statute; their powers are specifically set out and circumscribed by statute; and liability for their conduct is subject to specified "release" provisions and the jurisdiction of the court.

(2) In contrast to liquidators, directors and auditors[23] are appointed pursuant to the terms of and/or hold an office within the constitutional structure of the company and it is unsurprising that, pursuant to such constitution and accordingly as assented to by the members, they may have a contractual relationship with the company. Sections 227 to 230 CA 2006 expressly address directors' service contracts. Similarly, whilst certain duties are imposed on auditors by statute, the relationship is essentially contractual: *Jackson & Powell on Professional Liability* (9th ed.) at 17-036 to 17-041.

(3) In *City Equitable*, the articles of association themselves contained the relevant exclusion clause (Art. 150) which applied to the "*directors, auditors, secretary and other officers for the time*

[23] Whilst, as noted above, there may now be some doubt about whether auditors are "*officers of the company*", *City Equitable* was decided on the basis of it being settled that they were – see Romer J (at 499), Warrington LJ (at 520-521) and Sargant LJ (at 528).

being of the company". It was thus held to apply to directors and auditors, who had been appointed pursuant to the constitution that was binding upon the shareholders.

(4) By contrast, in *Re Home & Colonial Insurance Co Ltd* [1930] 1 Ch. 102, where a *liquidator* in a voluntary winding up sought to rely on a similar provision in the articles, Maugham J held (at 126-127) there was *"no evidence whatever that the respondent was appointed to be liquidator on the condition that art. 157 should apply"* and that *"it seems hardly possible that art. 157 can afford any protection to a liquidator in proceedings for the benefit of creditors of the company, since the liquidator has a statutory duty towards them which the Article cannot affect; and this forms an additional reason for not extending the Article to the acts of a liquidator"*. As noted above, in the circumstances it is unsurprising (and supports the Respondents' not the Appellants' case) that there is no provision in the IA 1986 equivalent to s.232 or s.532 CA 2006.

(5) In the context of the statutory scheme, the directors could not be competent under the company's constitution to enter into any binding contractual agreement on behalf of the company either to appoint liquidators or to limit their prospective liability as officeholders.

(6) Furthermore, there is a well-established *"general principle that parties cannot contract out of the insolvency legislation"* (*Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 A.C. 383 at [1] (Lord Collins)) and in *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855 Patten LJ expressed the view (at [74]) that the members of a company cannot, whether by contract or otherwise, in advance of liquidation override the exercise of the liquidator's powers under s.238 to s.239 of the IA 1986.

(7) In *Re Rhino Enterprises Properties Ltd* [2020] EWHC 2370 (Ch); [2021] BCC 18 at 101 to 109, it was argued that a claim by contributories under para.75 of Schedule B1 of the IA 1986 against former joint administrators was barred by a term within a CVA (the exit route from the administration) to which the company had agreed, which purported to release the former administrators from liability. HH Judge Simon Barker QC held that the release, having been formulated by the administrators for their own benefit, was in breach of the rule that powers must be exercised for the purpose for which they are granted and in breach of the administrators' fiduciary obligations (at [109]). As such, it was ineffective and unenforceable. However, submissions accepted by the court included "[i]*t would be inconsistent with the scheme of Sch.B1 to allow an office-holder to exclude liability or the risk of liability expressly provided for and preserved after release by the statute itself*"[24] and that it was "*improper for an*

[24] Akin to s.212, Sch.B1 to the IA 1986 expressly provides a procedure for misfeasance proceedings against administrators and, at para.98(4)(b) of Sch.B1, that an administrator's discharge does not prevent the exercise of the power under para.75.

administrator to use the machinery of a CVA to exclude a liability after the event which could not be excluded before or during the event".

41. Further, at **¶¶75-81** the Judge wrongly considered that any effective agreement to limit the liabilities of the liquidators for their conduct in office would not oust the jurisdiction of the court, reasoning that s.212 "*is a jurisdictional provision providing a particular way of accessing the court, rather than a section that provides any particular powers of the court*" and that it was no different to s.215 of the Companies (Consolidation) Act 1908 (such that *City Equitable* could not be distinguished and had to be followed over *Aribisala v St James Homes (Grosvenor Dock) Ltd* [2007] EWHC 1694). This reasoning ignores and/or was flawed for amongst the following reasons:

(1) As identified in Section C above, in relation to liquidators the statutory scheme bestows upon the court a much wider range of jurisdiction than just s.212 (including powers as to their control, remuneration and removal).

(2) As regards liquidators, s.173(4) expressly states that nothing in that section (which governs their "*release*") "*prevents the exercise, … of the court's* ***powers*** *under section 212"* (emphasis added).

(3) In *City Equitable* the scope of the relevant duties of the directors (to whom powers of management were delegated by members) and auditors (who were appointed by members to make a report to the members[25]) and their corresponding liabilities to the company could be, and were, delineated by the company's constitution – such that the jurisdiction under the former incarnation of s. 212(1) was not being excluded or cut down by the limitation assented to by the members through the constitution. In that respect, it is correct to say that s.212(1) is procedural in nature and creates no new duties or *liabilities*. However, it does provide new *remedies* – both by providing for multiple different stakeholders to bring an application for relief and, as the Appellants concede at ASA §32.4, in affording the Court a discretion as to the relief to be ordered (s. 212(3)).

(4) Furthermore, s.212(2) expressly encompasses "*in the case of a person who has acted as liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company*". As the fiduciary and other duties owed by liquidators are necessary incidents of their statutory role which the company is not competent to curtail, any otherwise enforceable agreement that operated to limit the quantum of liability for a liquidator's breach of such duties would necessarily oust the

[25] S.112 and 113 Companies (Consolidation) Act 1908 (now s.495 CA 2006).

jurisdiction and/or fetter the power of the court to exercise its discretion to order such relief as it thinks just.

E. THE CONSTRUCTION ISSUE – and Respondents' application for permission to appeal

42. **The Judge did not determine the Construction Issue in so far as it concerned the FLs; see recital (e) to the Order** [**CB1/10/138**]. Put simply, it was (and is, as regards the FLs in opposition to their appeal) the Respondents' case that, having regard to the legislative scheme:

    (1) By the LOE/Terms addressed in Section B above, it was D6 that was contracting with the Company (acting by its directors) to provide "*the Services"* – and D6 could not be appointed to be, or act as, liquidator under the IA 1986;

    (2) Necessarily, D6 could only commit to providing (and receiving remuneration for) pre-liquidation services (including providing persons to be put forward for appointment);

43. By their terms the Limitation Clauses only applied to liability for "*loss or damage in connection with provision of the Services"* – and "*the Services"* meant "*the Services to be provided by [D6] under the Services Contract"*, with "*the Services Contract"* meaning "*the contract between [the Company] and [D6]".*

44. As would have been understood, if (and when) the FLs were appointed as liquidators (by the Companies in general meeting), their role would be governed by the legislation and they could not then be said to be carrying out Services provided to the Companies by D6.

45. The Construction Issue in so far as it concerns D6-D7 was addressed at **J¶¶101-128** (subject to clarification at the consequentials hearing) and was eventually reflected in the various recitals and at **O§2-5.** By such provisions of the Order, the Judge held (underline added):

    "*2. Subject to the UCTA Issue and to the declaration in paragraph 1 above, properly construed the Limitation Clauses are effective to limit any separate liability which the Sixth Defendant and any "Begbies Traynor Persons" (as defined in the Terms) may have to any of the Claimants for loss or damage in connection with provision of the Services (as defined in the letters of engagement and the Terms), to an aggregate sum of £1 million (excluding costs and interest) in respect of each claimant company.*

    3. By the letters of engagement the Sixth Defendant was committing itself to put forward members or employees that were suitable to be appointed as liquidators and able to accept the appointment, and, if those liquidators were appointed, to provide their services (in the sense at least of allowing their services to be provided and taking responsibility for ensuring that the Former Liquidators continued in the appointment) and undertaking to make staff available during the liquidation.

4. *The Services (as defined in the letters of engagement and the Terms),*

   a. *extend to the period after appointment of the Former Liquidators as liquidators of the Claimants; and*

   b. *include the matters set out in paragraphs 1.1 to 1.7.7 (inclusive) of the letters of engagement.*

5. *Without prejudice to recitals d. and e. above, the Limitation Clauses apply to any separate liability of the Sixth Defendant for the acts of the Former Liquidators in so far as the Sixth Defendant was providing their services.*"

46. Read together with **O§1,** the Respondents would not take issue with **O§2** on its own terms, but they contend (having regard to the words underlined and for the reasons identified in the RN) that the Judge was wrong in his interpretation of "*the Services*". Accordingly, and as the Construction Issue (as regards the FLs) - and the relevant documents - will be before the Court in any event, the Respondents seek permission to appeal **O§2-5** (and, to the extent such appeal is allowed, the costs orders in **O§§6-8**). For the reasons identified herein, (a) such appeal would have a real prospect of success and/or (b) there are compelling reasons for it to be heard in circumstances where (i) the relevant factual and legal issues will largely be before the court in any event and/or (ii) as per Asplin LJ, the issues raised may be of some importance[26].

47. In essence, the Respondents' overarching ground of appeal is set out at paragraph 2 of Section 6 of the RN [**CB1/5/66**], namely that the Judge erred in law by not holding that, properly construed, the Limitation Clauses are not effective to limit any liability which D6 and any "*Begbies Traynor Persons*" (as defined in the Terms) may have to any of the Companies for loss or damage *for the conduct of Mr Fry and/or Mr Mather in their role as appointed liquidators.* The Respondents submit that in respect of the conclusions in **O§§2-5** underlined above:

   (1) **In determining that "*the Services*" extended to the period after the appointment of the FLs and/or included the matters referred to in clause 1.7 of the LOE, the Judge failed to take into account (or to give sufficient weight to) the factual background of the IA 1986, which prescribes *inter alia* that only individuals (not firms) may be appointed liquidators and a legislative scheme governing their role that is inconsistent with the Judge's interpretation of the contract.**[27] The provisions of the LOE should be read and understood in that context. The "*nature and services to be provided*" listed in cl.1 of the LOEs (addressed to the board of directors by D6) all fell under the

[26] If the provisions have the effect the Appellants contend for, they are likely to be given close attention by others.
[27] RN, §2(ii).

heading "*to provide advice and assist you in all matters relating to placing the Company into members' voluntary liquidation"* (emphasis added) and concerned the necessary *preparatory* steps for that purpose: "*pre-appointment due-diligence work*" (cl. 1.1); advising "*the directors*" on matters "*prior to liquidation"* (cl 1.2); assistance with preparing the statutory declaration of solvency and statement of assets and liabilities (cl 1.3), both being responsibilities of the directors to be fulfilled prior to the relevant meetings of shareholders[28]; assistance with convening, holding and other formalities the relevant meetings (cl 1.4); providing persons "*who are able to accept an appointment as Joint Liquidators"* (cl 1.5) – noting that under the legislation it is the individual licensed insolvency practitioners themselves who must provide "*consent to act"* before they can be appointed and that D6 could not do it for them[29]; and providing the services of members of staff at an appropriate grade "*to undertake work on the assignment"* (again noting that the role of liquidator could not be assigned to D6 by the LOE, or at all). In so far as clause 1.7 then explained that "*[d]uring the course of the liquidation we shall deal with the following: …"* (emphasis added) it was indicative of the future: the Judge erred in not finding that the matters listed in cl 1.7 did not (because they could not) form part of the assignment and necessarily fell outside of the fixed fee agreed in clause 5, of £2,500 plus disbursements and VAT, which was to be paid "*prior to the appointment of Joint Liquidators*". As noted in clause 6, the future remuneration "*of the Joint Liquidators*" could be fixed on different bases and it was going to be proposed that it be fixed on a time costs basis. As explained above and as the reasonable person with all the relevant background knowledge would know, such remuneration (*of the liquidators* - which is to be distinguished from the remuneration of D6) could only be fixed by the members (or the court) under the provisions of the legislation.

(2) **Further or alternatively, the Judge erred in law and/or was wrong to conclude that a reasonable person having all the background knowledge that would have been available to D6 and the Companies would not have understood there to be a clear demarcation between pre and post appointment services, the former being provided by D6 and the latter only being capable of being carried out by the FLs under the insolvency legislation (for which liability could not be limited by agreement with the directors).** [30] In so concluding (at **J¶110**) the Judge failed to take into account or give sufficient weight to at least: (i) the fact that such demarcation is obvious under the legislation (and addressed in industry guidance - see e.g. SIP 16 at

[28] Section 89 IA 1986 required the statutory declaration of solvency (which embodied the statement of assets and liabilities) to be made by the directors prior to the passing of the shareholders' resolution.
[29] Rule 4.139 of the Insolvency Rules 1986 (and now IR 2016, rule 5.2(3)).
[30] RN, §2(v)

paragraph 7, concerning administrators[31]); (ii) that the distinction was necessarily appreciated by the parties as reflected in the terms of the LOEs addressing the differences in pre and post appointment remuneration (referred to above); (iii) the Companies' experienced liquidators' short witness statements[32] (to which no reference is made in the Judgment) in which each confirmed they have always understood there to be a fundamental difference between pre and post appointment work and have never sought or considered they could limit their liability to the company for their conduct as liquidator ; and/or (iv) the extract to similar effect from the practitioners' text, *Insolvency Practitioners, Appointments, Duties, Powers and Liability* (2nd ed) at 8-43 to 8-45, to which the Judge was referred. The Judge's reasoning at **J¶110** also appears to be grounded in (what he perceived to be) the subjective views of the Appellants, whereas the correct approach is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement: see e.g. *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC (Comm*)* at [8].

(3) **The Judge was wrong to determine that D6 had (or could have) *"taken responsibility for ensuring that the Former Liquidators continued in the appointment"* (J¶123 and O§3) as that was (and is) inconsistent with the legislative scheme[33]**. D6 had no ability to control their appointment: as identified in Section C above, in MVL liquidators are appointed and removed, and vacancies filled, by the company in general meeting and/or by the court – and may only resign in limited circumstances.

(4) **The Judge was wrong to determine that D6 had undertaken to make staff available to the Companies during the liquidation in circumstances where (as the Judge rightly recognised at J¶118) any employees of D6 subsequently engaged in the administration of the liquidation would be providing their services to the Companies not on behalf, or as staff of, D6 but pursuant to the legislation as the staff of the liquidators**.[34] In this regard, and in thus wrongly rejecting the argument that after the liquidators were appointed, the liquidation was undertaken by them and their staff leaving no room for D6 to undertake anything, the Judge erred in allowing his perception of "*commercial reality"* to override the true legal position; **J¶¶118-124**.

[31] And paragraph 3 of the version effective from 1 November 2013 to 31 October 2015.
[32] First Witness Statement of Steven Anthony Sherry dated 19 June 2025 [**SB/14/281**]; Third Witness Statement of David Robert Baxendale dated 19 June 2025 [**SB/15/286**]; and Seventh Witness Statement of Laurence Pagden dated 19 June 2025 [**SB/16/292**].
[33] RN, §2(iii)
[34] RN, §(iv)

(5) **The Judge failed to take into account and/or give sufficient weight to the principles that limitation of liability clauses should be read contra proferentem and must be clearly and unambiguously expressed.**[35] The Judge was referred to but did not apply the principles, regarding limitation and exclusion clauses, that *"The more valuable the right, the clearer the language of any exclusion clause will need to be; the more extreme the consequences, the more stringent the court must be before construing the clause in a way which allows the contract-breaker to avoid liability for what may be his catastrophic non-performance"* (*The Interpretation of Contracts* (8th ed) at 12.148; and *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd* [2022] EWCA Civ 440 at [60]). The Judge should have done so, and concluded they did not encompass the FLs' post-appointment conduct.

F. CONCLUSION

48. In the premises, the Respondents ask the Court to: dismiss the Begbies Defendants' appeal (upholding **O§1** for the reasons identified in the Judgment and/or on the different or additional grounds identified herein); grant the Respondents' application for permission to appeal the Judge's determinations in respect of the Construction Issue (**O§§2-5**) (and in due course allow such appeal); and, as appropriate, to vary the costs orders in **O§§6-8**.

CATHERINE ADDY KC
CHARLES KING

20 April 2026
~~(Updated with bundle references: 2 June 2026~~)
Updated in respect of revised bundle references: 22 October 2026

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[35] RN, §2(i)