IN THE COURT OF APPEAL FOR GIBRALTAR

Neutral Citation Number 2024/GCA/011

2024/CACIV/001

BETWEEN:

PETER KABEL

Appellant

-and-

THE HIDEAWAYS CLUB LIMITED

Respondent

Mr Nicholas Cruz with **Ms Arcelia Hernandez Cordero** (instructed by **Ellul & Cruz)** appeared for the **Appellant**

Mr John de Waal KC with **Mr Sebastian Triay** (instructed by **Triay and Triay**) appeared for the **Respondent**

Judgment date: 7 November 2024

JUDGEMENT

SIR NIGEL DAVIS JA:

Introduction

1. This appeal raises issues of interpretation of contractual arrangements concerning what has been called a fractional ownership scheme, in the context of holiday villas. The issues had, along with others, been directed to be heard as preliminary issues in the proceedings. By a reserved judgment

dated 20 December 2023 Restano J, sitting in the Supreme Court, decided all the issues arising substantially in favour of the claimant. The defendant challenges on this appeal the correctness of the Judge's decision on three particular issues.

2. The appellant defendant ("Professor Kabel") was represented before us, as below, by Mr Nicholas Cruz, with Ms Arcelia Hernandez Cordero. The respondent claimant ("the Club": which, for present purposes, can also where appropriate be taken to extend to its club operations) was represented before us by Mr John de Waal KC, who had not appeared below, with Mr Sebastian Triay. The case was well argued on both sides.

The background

3. The Club is a company incorporated in Gibraltar. It is a company associated with another company incorporated in Gibraltar called The Hideaways Property Company Limited ("the Property Company"). The very broad scheme in establishing such companies was to the effect that the Property Company was to own holiday homes, intended thereafter to be used by participants for specified periods, and the Club was to maintain and run such properties: in effect as an operating company.

4. Professor Kabel, whether by himself or by a company controlled by him called Lakshmi Gmbh (it matters not for present purposes), elected in 2008 to participate in the scheme. He did so under the Experienced Investor arrangements applicable in Gibraltar. However, as the years have gone by Professor Kabel, along with a number of other participants, became increasingly dissatisfied with the way in which matters were being run by the Club; and indeed from 2020 he stopped paying any contributions to the Club. For its part, the Club in consequence denied Professor Kabel access to any of the properties, although without terminating his membership.

5. The general nature of the scheme at the time Professor Kabel invested in it was this. Investors were permitted to purchase a share in the Property

Company. Further, such investors were also permitted to participate in the Club, thereby (on payment of the required Annual Contributions) giving them the prospective right to use selected holiday villas at a specified time or times in the year. Thus, as the Judge identified, there were two potential benefits. First, there was the possibility that shares in the Property Company would increase in value over time, if the value of the property portfolio increased; second, there was the prospect of use of the holiday villas for defined periods in any year.

6. The actual contractual arrangements were complex. The documentation in question was professionally drafted by lawyers. It has throughout been common ground that the relevant contract was enshrined in five documents, which together constituted the agreement ("the Agreement") between the parties. These were:

    (1) Private Information Memorandum ("PIM") dated 19 December 2007;
    (2) Subscription Agreement dated 1 July 2008;
    (3) Club Membership Form dated 1 July 2008;
    (4) Club Constitution dated 12 February 2008; and
    (5) Articles of Association of the Property Company dated 20 September 2007.

    It is necessary to refer to some of the provisions of the documents.

(1) PIM

7. The PIM was in effect a form of prospectus, providing details of the scheme to potential investors and of how to invest in it.

8. At the forefront of the PIM there was set out a Notice. Amongst other things, this stated that investment in the Property Company was suitable only for those falling within the definition of "*Experienced Investor*" under the relevant Gibraltar Regulations. It was further stated that the value of the

relevant shares in the Property Company may be subject to volatile movements and may fall as well as rise. Certain other Risk Factors were also identified.

9. Thereafter, in the Introduction to the PIM it was indicated that in addition to subscribing for a share in the Property Company shareholders also had the "*exclusive right*" to apply (whether by themselves or by a nominee) for membership of the Club. That was confirmed by paragraph 9 of the PIM. Thus, at this time there was no positive requirement to be both a shareholder in the Property Company and a member of the Club: a position then confirmed by paragraphs 2 and 9 of the PIM. We were told that in 2015 the position was changed, so that it became a requirement, if becoming a shareholder in the Property Company, also to become a member of the Club. But that was not the position in 2008.

10. In paragraph 16 of the PIM, under the heading of Transfer of Shares, it was among other things provided that a shareholder of the Property Company who was also a member of the Club may use the resignation system operated by the Club. Paragraph 16 of the PIM provides as follows:

> ***"Transfer of Shares****:*
> *(a) "A Shareholder may at any time during his lifetime or by will, subject to the following paragraphs, transfer his Share to an adult who meets the current Admission Criteria of the Club and, (if he wishes to join the Club), has completed the Club Application Form. This is important as the transferee will have the right to become a Member. If the transfer is to a Family Member, (meaning for this purpose the Shareholder's spouse, partner, (but not business partner), child, grandchild or remoter lineal descendant and including adoptive lineal descendants), who is accepted for membership by the Club such transferee need not pay an Appreciation Payment but such transfer will be deemed to have been made at the original Entry Cost of the transferor for the purposes of any future Appreciation Payment.*
>
> *(b) A Shareholder who is also a Member may use the resignation system operated by the Club. A person taking*

over his Club Membership through this system would also acquire his Share.

(c) If a Shareholder wishes to sell his Share, he may advise the Club which will then include the Shareholder on a resignation list. The Club maintains separate lists for Full Members (A Shares) and Non-Peak Members (C Shares). The Club operates a "three in one out" policy. When a Shareholder reaches the top of the relevant list, the Club will allocate the third appropriate membership application to purchase such Shareholder's Share and, (if applicable), Membership of the Club. Once all the Shares of a particular class have been sold by the Property Company, Shareholders wishing to transfer their Shares of that class and resign their Membership of the Club will be replaced on "a one in one out" basis. A Shareholder may not sell or otherwise transfer his Share through this system within three years of joining.

(d) In the event of a Shareholder's death, his personal representative, or a person whom the personal representative may nominate, may take over the Share as long as he complies with the Admission Criteria.

The Directors of the Property Company reserve the right at all times not to accept an intended transfer of a Share."

11. In the Additional Information incorporated into the PIM various Risk Factors were identified in paragraph 4. By paragraph 4 (s) it was provided that Shareholders may not sell their shares for 3 years after joining. It was then said:

> *"Thereafter, if they wish the Property Company to assist in the sale of a Membership and A Share or C Share it will only do so on the basis of its "three in one out policy [identified in paragraph 16]... the ability to realise the investment depends upon someone acceptable to the Property Company being willing to purchase the A Shares or C Shares."*

(2) Subscription Agreement

12. The Subscription Agreement relating to the Property Company contained a number of Terms and Conditions.

13. By paragraph 8 it was indicated that it was felt that the service offered was "*unique*": nevertheless, it had been considered appropriate to seek to comply with the timeshare regulations applicable in the UK and Gibraltar. By paragraph 9 Professor Kabel confirmed his status as an Experienced Investor under the relevant Gibraltar Regulations. By paragraph 9.6 an acknowledgement of risk was made. By paragraph 10.1 it was provided that the Subscription Agreement, as read with the PIM, the Club Constitution and the Articles of Association of the Property Company formed the entire agreement between the parties. By paragraph 11.1 the laws of Gibraltar were specified as the governing law.

(3) Club Membership Form

14. The Club Membership Form, which was appended to the Subscription Agreement, dealt (as its title suggests) with membership of the Club in the event that a shareholder elected to apply to become a member. It too contains a number of Terms and Conditions.

15. By paragraph 2 it was among other things provided that the application process for Club Membership was set out in the Club Constitution, by which the applicant agreed and undertook to be bound. By paragraph 3.1 it was provided that Applicants recognised that Membership of the Club was restricted to persons holding a relevant share in the Property Company. By paragraph 9.1 it was provided that the Club Membership Form as read with the PIM, the Club Constitution, the PIM [presumably a slip for the Subscription Agreement] and the Articles of Association of the Property Company formed the entirety of the agreement between the parties.

(4) Club Constitution

16. This was accepted before us, as before the judge, to be a central document for present purposes. It extends to 21 paragraphs over 23 pages. The document evidently was designed to set out the rights and obligations of the members of the Club.

17. By paragraph 1 it is stated that it is assumed that persons admitted to the Club will be issued a share in the Property Company, either by themselves or their nominees.

18. Detailed terms are then included as to membership benefits and reservations of periods for occupying holiday villas and as to the provision of services. Paragraph 13 provides for payment of an appropriate Annual Contribution (as defined) in each year, with a review of such Annual Contribution in each year. By paragraph 13.5 it was provided:

> *"If the Annual Contribution has not been paid within four weeks of its due date the provisions of 17.3 shall apply."*

19. Section D of the Club Constitution is headed "*Cessation of Membership*". Thereafter in paragraph 15, itself headed "*Membership Transfer or Surrender and Upgrade*", there are included (among other provisions) the following:

> *"15.1 Membership may only be transferred, resigned or otherwise terminated in accordance with rule **15.2** (Membership Transfer); rule **15.8** (Change of Nominated Member); rule **16** (Resignation of Membership; or rule **18** (Involuntary Termination of Membership).*
>
> *15.2 A Member (the **"Transferor"**) may during their lifetime (but not before the third anniversary of becoming a Member) or by their will (or application of intestacy rules) transfer their Membership to another person (the **"Transferee"**) if the Transferee meets the Club's then applicable Admission Criteria, has completed the current Membership Application Form and been accepted for Membership by the Club Company and the Club Company does not exercise its discretion to decline to accept the Transferee as a Member. If the Transferee is a member of the Transferor's family (their **"Family Member"** meaning for this purpose the Member's spouse, partner, child, grandchild or remoter lineal descendant and including adoptive lineal descendants) no Entry Cost will be payable by the Transferee, but the transfer will be deemed to have been made at the original Entry Cost of the transferor for the purposes of the payment of any future Appreciation*

Payment. If the Transferee is not a Family Member of the Transferor, he or the Transferor must pay to the Property Company (on behalf of the Club Company) the Appreciation Payment and the Administration Contribution which would have been payable if the Membership were transferred at the then prevailing Entry Cost set by the Property Company (irrespective of the price at which it was transferred).

*15.3 A Member who transfers his Membership in accordance with **15.2** shall transfer his A Share or C Share (as the case may be) to the same transferee(s), and a person who transfers his Share in the Property Company shall also transfer his Membership to the same Transferee."*

20. Paragraph 16 is headed "Resignation of Membership". In the relevant respects, it provides as follows:

*"16.1 A Member will be entitled to offer their Membership and Share for sale (**"Resign"**) by notice in writing and sent by registered post to the Club Company at any time after the third anniversary of their admission to full Membership under the following procedure:*

*(a) The Member should ask that his name be placed on a list of Members who wish to resign from the Club and sell their Share (**"the Resignation List"**) with the date on which the written request to Resign was received by the Club Company. Separate Resignation Lists shall be kept for Full Members (**"Full Resignation List"**) and Non Peak Members (**"Non Peak Resignation List"**);*

(b) Resignations shall take effect in accordance with 15 in date order save that:

(i) before the then applicable Full Membership Quota has been reached, Resignation of a Full Membership shall only take effect after two new Full Members have been admitted to the Club after the Full Member's name has reached the top of the Full Resignation List. Thereafter, the next applicant to join the Club shall be directed to acquire the A Share from the resigning Full Member at the Full Entry Cost then payable…"

21. Paragraph 17 is headed "Involuntary Termination of Membership." In the relevant respects it provides, under the heading Forfeiture and termination of Membership rights, as follows:

> *"17.3 Where the whole or any part of the relevant Annual Contribution of any Membership is unpaid more than four weeks after the making of the demand for such contribution, the Member shall for that year lose his rights of to [sic] use the Properties, and, the Member will not be able to make any further reservations or use any further services of the Club until payment has been received (and until paid any outstanding booking will be deemed cancelled in accordance with Rule **11**).*
>
> *17.4 If the relevant Annual Contribution shall remain unpaid for more than 26 weeks the Club shall be entitled to terminate the rights of Membership of the defaulting Member in accordance with the following procedure:*
>
> *(a) the Club shall give written notice of the amounts unpaid to the Member (and the holder of the share if the Member is a Nominated Member) and that the Member may accordingly have his Membership terminated;*
>
> *(b) at the expiration of 28 days after service of such notice if any money is still unpaid the Club shall be entitled to expel the Member and forfeit the relevant Share (which they shall hold and transfer to an incoming new Member when required) and any rights;*
>
> *(c) the Club may authorise some person to execute the instrument effecting the surrender or transfer of Membership; and*
>
> *(d) the Club shall be entitled to deduct its costs of enforcing this right (including the Appreciation Payment, the Administration Contribution and any professional costs) from the sale proceeds of the Share."*

(5) Articles of Association

22. These form part of the Agreement. However, this court was not referred to any provision in them suggested to have any bearing on the issues of interpretation here arising.

Other documents

23. As I have said, the documentation makes clear that, and as was agreed, the Agreement comprises the above five documents. However, Mr Cruz sought

to refer to and rely on, for the purposes of his argument, certain statements in a document styled "*the Club Guide*", as issued in March 2008. He necessarily had to accept, and did accept, that such document could form no part of the actual Agreement. But he argued that it was part of the overall factual matrix or context in which the Agreement was made and could properly be taken into account in interpreting the Agreement (an argument to which I will come).

24. The Club Guide was stated at the outset to be designed to "*give you all the information you need to make the most of your membership.*" Thereafter, the provisions asserted to be of relevance to the issues of interpretation arising include the following. In paragraph 4 (headed "Membership"), it was provided in paragraph 4.3

> *"**4.3 Commencement of membership***
> *New memberships commence when all membership documentation, the share subscription and the Annual Cost Contribution has been received and the share has been allocated. Membership will subsequently run for 12 calendar months from this date."*

In paragraph 4.5 it was provided:

> *"**4.5 Annual Cost Contribution***
> *Members pay an Annual Cost Contribution (ACC) which is set by the Club. The ACC covers all the operational costs of running the properties, the Inclusive Services, the Club (including the UK and Local Concierge services), cleaning, Welcome Grocery Basket, general repairs, the replacement and renewal of fittings, furniture and decoration, pool and garden maintenance, utility bills, insurance and local taxation charges.*
>
> *There are no other additional costs to use the properties; however, Members may choose to purchase Additional Concierge Services and these will be charged for separately.*
>
> ***Notification of Annual Cost Contribution increases***
> *The Club will review the Annual Cost Contribution in November each year and Members will be advised of any increase. The new Annual Cost Contribution will be*

> *introduced on the 1st of January of the following year, and the increase will take effect on the Member's renewal date."*

In paragraph 4.8 it was provided:

> *"**4.8 Membership resignation***
> *Membership of The Hideaways Club is for a minimum period of three years. After three years, The Hideaways Club has a 'three in, one out' resignation policy.*
>
> *Each resigned Member is placed on a resignation list. When the resigned Member reaches the top of the list, the Club allocates the sale price of the third membership sold to purchase the resigning Member's share. Once the Club is fully subscribed, resigned Member will be replaced on a 'one in, one out' basis.*
>
> *A Member who resigns during their membership year will be entitled to use the remainder of the Destination Points and book holidays accordingly.*
>
> *No refund of unused Destination Points will be made by the Club."*

In paragraph 6.6 it was provided:

> *"**6.6 Share price adjustment***
> *As the Club develops, the share price will be adjusted every six months, taking into account property portfolio valuation and membership demands."*

The Proceedings

25. In 2020 Professor Kabel, being dissatisfied with the way in which the Club was being run and with the services provided and increases in Annual Contributions, stopped paying any Annual Contributions to the Club.

26. On 13 September 2022 the Club, having previously invoked the provisions of paragraph 17.3 of the Club Constitution, issued proceedings against him in the Supreme Court. The sum claimed was £17,725, together with interest and costs. The amount claimed represented unpaid invoices for Annual Contributions dating back to 28 September 2020.

27. An extremely detailed Defence and Counterclaim, subsequently amended, was put in. This raises a significant number of allegations. These include allegations of breach of contract, misrepresentation, unfair prejudice and breach of an implied duty of good faith. The Agreement is further alleged to have been repudiated by the Club, by its conduct, which repudiation Professor Kabel is stated to have accepted. It is also, among other things, stated that membership of the Club runs for 12 months (albeit renewably by the member); and that in the event that membership is frozen pursuant to paragraph 17.3 of the Club Constitution the Annual Contributions are no longer payable. A lengthy Amended Reply and Defence to Counterclaim has since been put in.

28. Clearly the pleaded cases raise substantial issues of fact and law which can only be resolved at a full trial.

The Preliminary Issues

29. Nevertheless, certain points of law, entirely concerning the true interpretation of the Agreement, were identified by the parties as being capable of being resolved by way of preliminary issues. The Judge accepted this. By Order of 9 June 2023 the following was directed:

> *"7. The parties agree without prejudice to other assertions contained in the Statements of Case (which are reserved until trial) that the following issues as to the correct and proper construction of the Agreement (as defined in paragraph 5 of the Defence and Counterclaim and without prejudice to the Defendant's assertions contained at paragraph 37 of the Defence and Counterclaim that there existed terms that should be implied into the Agreement) the determination of which requires no further evidence and which are common to all the Claims be decided by the Court as preliminary issues ("the Preliminary Issues"):*
>
> *a. Is the Defendant correct in his assertion that membership of the Claimant runs for 12 calendar months as asserted at paragraph 36.6 of the Defence and Counterclaim and that as a result Annual Cost Contributions (hereinafter "the ACC fees") are no longer payable in the event that a member's membership is frozen pursuant*

to [clause]17.3 of the February 2008 Club Constitution, as pleaded at paragraphs 36.1 of 38.1 of the Defence and Counterclaim?

b. *In the event that a member is more than 26 weeks in arrears in paying the ACC fees, is the Claimant obliged contractually to terminate that membership, expel the member in question and attempt to forfeit that member's share under clause 17.4 of the February 2008 Club Constitution, as pleaded at paragraph 4. 36.3 and 37.6 of the Defence and Counterclaim?*

c. *Does the Claimant's failure to attempt to exercise any rights it may have as set out above extinguish a member's indebtedness for outstanding ACC Fees as pleaded at paragraph 4 of the Defence and Counterclaim?*

d. *Subject to a-c above and the proper exercise of any rights the Claimant may have, is a member's obligation to pay the ACC an enduring and accumulating obligation throughout the subsistence of the membership, and does such obligation endure until such time as membership is terminated?*

e. *Is the express consent of the members required before the Claimant can amend the terms of the February 2008 Club Constitution as it deems necessary or expedient from time to time for the better and more effective running of the Club under paragraph 2.4 of the 2008 Club Membership Form and [clauses] 14.1 and 18.3 of the February 2008 Club Constitution as asserted by the Defendant at paragraph 9 of the Defence and Counterclaim inter alia?*

f. *Does the Gibraltar Time Shares and Related Contracts Act 1997 ("the Act") apply to the totality of the Agreement or just to an Applicant's cancellation rights under paragraph 8.1 of the 2008 Club Membership Form and paragraph 7 of the 2007 Private Information memorandum?*

g. *If the answer to questions e to f is yes, can the Claimant rely on paragraph 2.4 of the 2008 Club Membership Form as the Defendant's consent to future amendments of the February 2008 Club Constitution without express consent approval in appropriate circumstances on each occasion or does this contravene S.5(5) of the Act?"*

30. However, as the Judge was to put it, in overview the critical issue running through a number of the preliminary issues boiled down to this: whether investors could cease to be members of the scheme that allows them to make use of the properties and thus stop being liable for annual charges whilst remaining as shareholders in the Property Company. Professor Kabel (and

others) have taken the stance that it is so possible; and they have stopped paying Annual Contributions on that basis. The Club, on the other hand, has taken a contrary stance.

31. As contemplated by the Order of 9 June 2023, I might add, no evidence was filed for the purposes of the hearing in which the preliminary issues were to be determined.

The Judgment

32. The judgment of Restano J is both thorough and lucid. He dealt with each of the preliminary issues. Since no challenge is raised to his determination on issues (b) (c) (e) and (g) I need say nothing more about those issues. As to issue (a), the judge held that Professor Kabel was not correct in his assertion that Club membership runs for 12 calendar months and that Annual Contributions were no longer payable in the event of membership being frozen pursuant to paragraph 17.3 of the Club Constitution; the Judge upheld the Club's arguments on this. As to issue (d), the Judge held that a member's obligation to pay the Annual Contributions was an enduring and accumulating obligation throughout the subsistence of the membership and that such obligation endured until such time as membership was terminated: thereby again rejecting Professor Kabel's arguments. As to (f), the Judge held that the 1997 Act applied to the totality of the Agreement, although it was only relevant to certain parts of it. On that point, in fact, a concession had been made to that effect by leading counsel (not Mr de Waal) then appearing for the Club.

33. The preliminary issues as so framed and answered do not seem to me entirely explicit in formulating the above-mentioned point described by the Judge as, in overview, the critical issue running through the preliminary issues. But the Judge did explicitly deal with that critical issue in the course of his judgment. Perhaps the core passage of his reasoning on this, in the course of his dealing with issue (a), is in this respect found in paragraph 56 of his judgment. There, the Judge said this:

> *"In my view, the centrally relevant text of the Club Constitution is clear in treating membership and shareholding as indivisible. A textual examination of the terms of the Agreement shows that the ACC is payable if an investor remains a shareholder, and that resignation from the membership can only take place in the circumstances set out in the Club Constitution. This clarity makes it more difficult to justify a departure from this natural meaning."*

The Judge went on to deal with issue (d) correspondingly: he noting, correctly, that this preliminary issue largely raised the same points as preliminary issue (a).

Legal principles of contractual interpretation

34. There was no dispute, either before the Judge or before us, as to the applicable common law principles of interpretation. The dispute was as to how these legal principles were to be applied to the wording of the Agreement in this case.

35. In such circumstances, I consider it neither necessary nor helpful to set out in any detail in this judgment the principles behind the correct approach to contractual interpretation.

36. In many ways, a convenient starting point can still be found in the concise and clear statements set out in the House of Lords decision in *Prenn v Simmons* [1971] 1 WLR 1381. Since then, of course, there have been numerous decisions, some at the highest level, on the correct approach to contractual interpretation. But it is unnecessary for me to trawl through them, as it was accepted that a convenient and accurate summary can be found in paragraph 8 of the judgment of Popplewell J in *Lukoil Asia Pacific (Pte) Limited v Ocean Tankers (Pte) Limited* [2018] EWHC 163 (Comm): a case to which Restano J himself referred at some length.

37. However, in view of some of the submissions advanced to us on behalf of Professor Kabel I would also refer to some of the points made by Lord Neuberger in his judgment in the case of *Arnold v Britton* [2015] UKSC 36,

[2015] AC 1619 and as repeated in *Lukoil*. These include the following (without my purporting to set out here all the points made by Lord Neuberger):

(1) Reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The meaning ordinarily is most obviously to be gleaned from the language used (paragraph 17).

(2) Commercial common sense is not to be invoked retrospectively; and the mere fact that a contractual arrangement, naturally interpreted, has worked out badly for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant as to how the position would reasonably have been perceived at the time the contract was made (paragraphs 19 and 20).

(3) The court cannot invent a lack of clarity in the provision to be construed as an excuse for departing from its natural meaning in the light of subsequent developments (paragraph 29).

38. Mr Cruz cited to us the case of *Wickman Machine Tools Limited v L. Schuler AG* [1974] AC 235 and the well-known statement of Lord Reed (at p. 251):

> *"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear."*

One need have no quarrel with that statement, so far as it goes. But, as Lord Neuberger observed in *Arnold v Britton* (cited above), that statement has to be read and applied bearing in mind the points there made by him in paragraph 19.

39. Mr Cruz in fact, in both his written and oral submissions, advanced at the outset an elaborate argument to the effect that the Agreement was to be interpreted "*through the prism of both statutory and common law consumer protection*", in his words. He went on to invoke the statutory provisions relating to timeshares applicable in the UK and Gibraltar - noting that, on issue (f), it had been decided in these proceedings that the 1997 Act was applicable to the totality of the Agreement, albeit only relevant to certain parts of it. He also made reference to the Unfair Terms in Consumer Contracts Act 1998 - an Act which among other things, I observe, if its salient provisions are to apply, requires a term to be contrary to a requirement of good faith - and further asserted that there was implicitly owed by the Club (and by the Property Company) a fiduciary duty of utmost good faith.

40. The sub-text of all these arguments appeared to be - although it was not actually articulated in this way - that the Agreement should be interpreted in a way that gave rise to a fair (in consumer terms) and lawful result.

41. At all events, Mr Cruz sought to bolster his argument on this aspect by reference to the decision of Collins Rice J in the case of *R (Shawbrook Bank Limited) v Financial Ombudsman Service Limited)* [2023] EWHC 1069 (Admin): a case not, in fact, cited to Restano J. That case concerned numerous complaints to the Ombudsman about fractional ownership time-share selling. A challenge was raised to the Ombudsman's approach in dealing with such cases, it being said that the Ombudsman had misdirected himself as to what the law was under the applicable UK legislation and regulations. Thus whilst in general terms there was some broad contextual correspondence to the present case, in that fractional ownership schemes were involved, the matters actually to be decided in that case were very different from the present case. However, Mr Cruz placed particular reliance on what Collins Rice J said at paragraph 155 of her judgment. There, having referred to the "*classical*" common law principles of interpretation as summarised in *Lukoil* (cited above), Collins Rice J said:

> *"Overlying the classical foundations of contractual interpretation are statutory provisions which may modify the correct approach to construing contracts in circumstances such as the present."*

So here, it was submitted.

42. I am bemused by this. We were referred to no provision of the 1997 Act, or any other Act, which sets out the required approach under the law of Gibraltar to interpretation of a fractional ownership agreement such as the Agreement in the present case. Further, to the extent that the argument depended on the asserted existence of an implied duty of good faith and breach of such asserted duty, demonstrably that sort of consideration was, under the terms of the Order dated 9 June 2023, never contemplated as being capable of forming part of the directed preliminary issues hearing. Yet further, to the extent that it was argued that the Agreement was, in consumer protection or other terms, "*unfair*" if construed as the Club would construe it, that, in my view, involves an assertion which simply cannot be taken as obviously correct at this preliminary stage. On the contrary, it is a tendentious point. It was, for example, asserted on behalf of Professor Kabel that the Agreement should have contained, among other things, a "*simple risk warning*", identifying the risk of being unable to resign one's membership without sale of one's share and of otherwise being liable to pay the Annual Contributions whilst membership continued. But this, on its face, was a bespoke Agreement, aimed at those prepared to be designated as Experienced Investors; and there is no warrant, for present purposes, in departing from the applicable principles of interpretation by reason of (as yet unsubstantiated) allegations of unfairness or unreasonableness. Indeed, on one view one cannot determine whether an agreement is, in consumer terms, unfair until one first has assessed its meaning and effect. If the consequence of such interpretation is indeed as Professor Kabel asserts then that may or may not give rise to remedies: but that is a different point.

43. For similar reasons, the decision in *J. Spurling Limited v Bradshaw* [1956] 1WLR 461, on which some faint reliance was also placed, leads nowhere for present purposes.

44. I repeat that no evidence has been filed on these preliminary issues. I also repeat that one has to bear in mind the circumstances in which these preliminary issues of interpretation of the Agreement were directed to be heard and the actual terms of the Order dated 9 June 2023. In such circumstances, the Judge, in my opinion, was fully justified in declining to entertain considerations of this sort, as advanced by Mr Cruz, in determining the preliminary issues: see paragraphs 62 and 63 of the judgment. As indicated by him, if such points are to be pursued then they should be pursued at trial. Mr de Waal's blunt submission that the arguments based on the consumer protection legislation and want of good faith and so on were not relevant to the present appeal on these preliminary issues was, in my view, therefore correct.

45. Accordingly, in my judgment the meaning and effect of the Agreement are to be determined in accordance with the conventional principles of construction as laid down in the authorities, without further gloss.

Discussion and Disposal

(i) Preliminary Issues (a) and (d)

46. These issues can substantially be taken together, as the Judge himself indicated.

47. Mr Cruz pressed the initial point that at the time when the Agreement was made in 2008 (albeit the position thereafter changed from 2015) it was made clear that there was no obligation on a person acquiring a share in the Property Company also to become a member of the Club. That is a valid point. But it remains a question of interpretation of the Agreement as to (a) how such shareholders who have elected to become members of the Club

may cease to be members of the Club and (b) whether they can do so whilst retaining their shareholding in the Property Company.

48. In my opinion, the documents comprising the Agreement are clear and unambiguous on these matters.

49. If it be right that membership (after the initial three year period) is effectively renewable on an annual basis then that would seem to a considerable extent to render effectively otiose the detailed provisions set out in paragraphs 15 to 17 of the Club Constitution. In truth, those provisions, as I read them, provide a comprehensive code as to how membership may be terminated. Paragraph 15.1 is unambiguously specific on this: membership may *only* (emphasis added) be transferred, resigned or otherwise terminated in accordance with paragraphs 15.2 (Membership Transfer), 15.8 (Change of Nominated Member), 16 (Resignation of Membership) and 17 (Involuntary Termination of Membership - the reference to rule 18 is to be taken as a slip). In particular, the express provisions of paragraph 16 are wholly inconsistent with a right to cease membership simply by not renewing payment of the Annual Contributions. Moreover, paragraph 16.1(b)(i) and 16.1(c) are specific that the member will (only) be relieved of all future liability for Annual Contributions when a Member's Resignation "*takes effect*".

50. There is nothing in the other contractual documentation to displace this clear outcome or to suggest that membership is, at the election of the member, renewed on an annual basis. We were referred to paragraph 13.1 of the Club Constitution, which stipulates that each Full Member shall be required to pay a full Annual Contribution in each year. That in fact is entirely consistent with the scheme of paragraphs 15 to 17 and lends no support to the proposition that membership is renewable, at the election of a member, on an annual basis. Rather, it is consistent with an ongoing obligation to pay the required contributions on an annual basis.

51. As to paragraph 17.3 of the Club Constitution, that is all of a piece with the code laid down for cessation of membership. I in fact incline to agree with Mr de Waal that it is something of a misdescription to style membership as being "*frozen*" (the word used on behalf of Professor Kabel, as well as in issue (a)) when those provisions of paragraph 17.3 come into effect. That sub-paragraph makes clear that what is taken away, in the event of non-payment, is the right to use any of the properties or to use the services of the Club; but what plainly is preserved is membership and the ongoing obligation to pay Annual Contributions. That is further confirmed by the provisions of paragraph 17.4: which, I note, confers on the Club a right (not obligation) of termination.

52. In order to counter the ostensibly clear meaning and effect of the Agreement on all this Mr Cruz sought to invoke certain statements set out in the Club Guide as outlined above. I do not, however, think that open to him. There is express provision in the Agreement as to what its constituent elements are, as representing the entire agreement. The Club Guide is not one of them. It is of course appropriate, in construing a commercial contract, to have regard to the context, viewed objectively, in which it is made. But here in reality the Club Guide was being sought to be advanced by Mr Cruz not as context but as, in effect, a further contractual document justifying departure from the wording of the Club Constitution.

53. In any event, I regard the identified statements in the Club Guide as at best equivocal. It is true that the Club Guide states in paragraph 4 that "*Membership will subsequently run for 12 calendar months from this date*" and that increased Annual Contributions "*will take effect on the Member's renewal date*". But, as Restano J observed, and I agree, the Club Guide was aimed at the practical side of membership rather than setting out the parties' rights and obligations. The reference, for instance, to "*Member's renewal date*" was thus to be regarded as loose and inaccurate drafting. In any event, paragraph 4.8 of the Club Guide makes clear that the Club operates a "*three in, one out*" resignation policy. That is consistent with the Agreement. It is

not readily consistent with the notion that a member can effectively resign by simply not renewing membership at the end of a year.

54. Mr Cruz submitted, in somewhat doom-laden tones, that if the interpretation of the Agreement advanced on behalf of the Club prevailed a participant was effectively locked into membership in perpetuity. He suggested that this was a case of "*You can check out but you can't leave*", in the words taken from the well-known popular song "*Hotel California*" by the Eagles. That, however, is, in my opinion, incorrect. There are means of exit: but those are the restricted ones set out in the Club Constitution. As Mr de Waal crisply put it, there are ways in which Club membership may be terminated, it is just that unilateral resignation is not one of them.

55. Of course, as part of the "*unitary*" and "*iterative*" process of interpretation (in the language of some of the authorities) it is necessary to assess the commercial sense and reasonableness of the postulated outcome: always bearing in mind, however, the words of caution, on this aspect, of Lord Neuberger in *Arnold v Britton* (cited above). But that assessment cannot assist Professor Kabel here. First, I regard the language used here as clear and unambiguous. Second, and in any event, the consequences of such an interpretation make sense, commercially speaking. The upkeep of the property portfolio and provision of services depended on the Annual Contributions of the Club members. If members could simply cease membership of the Club by not renewing at the end of the relevant year that no doubt might be very nice and convenient for them; but it could have serious implications for the Club in terms of liquidity and serious implications in terms of increased contributions for remaining members.

56. I also disregard suggestions advanced on behalf of Professor Kabel that the position here could and should be aligned to membership of sports clubs such as golf clubs. For one thing, such clubs will have their own individual constitutions and rules. For another, the position regarding this bespoke scheme concerning fractional ownership in the context of holiday villas offers no valid analogy with the position regarding golf clubs.

57. This leads on to consideration of what the judge described as "*the critical issue*": that is, whether participants could cease to be members of the Club (and stop being liable for Annual Contributions) whilst remaining shareholders in the Property Company.

58. The commercial sense considerations outlined above would tell against such an outcome. But more importantly, the express wording of the Agreement is flat against such an outcome.

59. Paragraph 16.1 of the Club Constitution is specific in this regard. In the context of membership resignation, members may offer their Membership *and* (emphasis added) Share for sale. In other words, resignation as a member of the Club also involves sale of the share. That is then replicated in the following provisions of paragraph 16.1(a) and 16.1(b)(i). The same outcome is contemplated in the context of transfer of membership under paragraph 15.3 and in the context of involuntary termination, in the event of elected termination by the Club under the provisions of paragraph 17.4(b). Such an interpretation is also entirely consistent with the other contractual documents, including paragraph 16(b) of the PIM and paragraph 4(s) of the Risk Factors appended to the PIM. In my opinion, the Judge's reasoning and conclusion on this aspect as recorded in paragraph 56 of his judgment (set out above) was plainly correct. Where a shareholder has become a Club member the shareholding and membership are to be treated as, in the Judge's word, indivisible.

60. Overall, therefore, I would dismiss the appeal against the Judge's orders with regard to preliminary issues (a) and (d).

(ii) Preliminary issue (f)

61. I can deal shortly with this, as Mr Cruz did not, independently of his arguments on the other issues, really pursue any challenge to the Judge's decision on this issue. Self-evidently, on the footing that the 1997 Act

applies to the totality of the Agreement there could be some aspects where it would have no relevance.

62. However, Mr de Waal sought to resile from the concession made by leading counsel appearing for the Club below that the 1997 Act did apply to the Agreement. Mr de Waal had so indicated in his written argument on this appeal dated 13 September 2024, shortly stating "*The Act either applies or it does not. The Respondent submits that it does not.*" The point was not further elaborated. No further written argument was put in on the point nor has any Respondent's Notice by way of cross-appeal been lodged. In consequence, Mr Cruz had not been required to address the point in advance of the hearing before this court.

63. Notwithstanding this, Mr de Waal at the hearing before us sought to pursue this point, whilst frankly acknowledging the absence of a cross-appeal or prior written argument on it. In such circumstances, this court at the hearing refused to allow him to argue this point on the present appeal. What the position hereafter may be, or may be permitted to be, on this aspect at trial is not a matter for us.

64. In such circumstances, I would dismiss the appeal against the Judge's order on preliminary issue (f).

Other matters

65. At one stage in his argument Mr Cruz invited this court to express views (presumably obiter) on the "*fairness*" of the Agreement so far as participants in the scheme were concerned. That, however, would be an unjustifiable encroachment on matters which prospectively will or may be within the province of the trial, in the light of full evidence and argument. This court has been concerned solely with the challenges as to the interpretation of the Agreement as identified in the preliminary issues.

Conclusion

66. In my opinion, Restano J reached the right conclusions and for essentially the right reasons. I would endorse his judgment. Consequently, I would dismiss this appeal.

Sir Colin Rimer JA

67. I agree.

Sir Maurice Kay P

68. I also agree.

Date: 7 November 2024