

The Appellant sought an order that the Respondent should release and disclose to it all the documents which it asserted formerly formed part of the assets of one of its cells. The appeal was against the Bailiff's decision that the concept of the "assets" of the Fund, in the context of a cell company, did not include documents held by or on behalf of the Respondent relating to the operation of the Fund.

[2022]GCA101

**IN THE COURT OF APPEAL OF GUERNSEY
CIVIL DIVISION
APPEAL No. 562**

8 December 2022

Before: **Lord Anderson of Ipswich K.B.E. K.C.**
David Perry K.C.;
Helen Mountfield K.C.

Between: **Romanian Eagle Land 2 Ltd** **Appellant**

-and-

The LLP Property PCC Ltd **Respondent**

Advocate for the Appellant: **Advocate NJ Barnes**

The Defendant was represented by Robert Guest, director

MOUNTFIELD JA:

1. This is the judgment of the Court.

Introduction

2. The Appellant, Romanian Eagle Land 2 Ltd, which was the Plaintiff below ("the Appellant company") appeals against a decision of the Royal Court of 6 July 2022, in which the Court dismissed the claim against the Respondent LLP Property PCC Ltd ("the Respondent PCC"). The Appellant company sought an order that the Respondent PCC should release and disclose to it all the documents which it asserted formerly formed part of the assets of one of its cells,

the Romanian Eagle Land Fund (“the Fund”). The Appellant company asserted a contractual right against the Respondent PCC to have transferred to it a number of documents, described as “the funds documents”, which it believes to be under the control of the Respondent PCC. The Respondent PCC’s primary case was that there was no contract between the parties justifying such a transfer. The Bailiff held that a contract could be inferred from all the circumstances, which had required the Respondent PCC to transfer “remaining Fund assets” to the Appellant company. The Respondent PCC has not appealed against this finding. However, the Appellant company appeals against the Bailiff’s interpretation of what that contract required of the Respondent PCC. The Bailiff held that the concept of the “assets” of the Fund, in the context of a cell company, did not include documents held by or on behalf of the Respondent PCC relating to the operation of the Fund (such as accounting records and bank statements), and since all that remained in dispute was transfer of such documents from the Respondent PCC to the Appellant company, he awarded no relief.

3. The Appellant company has appealed on the basis that the Royal Court erred in failing to grant it the relief sought. The issue is whether the Royal Court erred by failing to include “documents” within the definition of assets in this context, and whether in any event such documents “belonged” to the Fund or the Respondent PCC. The Appellant company says that it did and that the expression should be given what it describes as “its ordinary natural meaning”.
4. The Appellant company is represented, as it was below, by Advocate Barnes, and the Respondent PCC by one of its directors, Mr Robert Guest.
5. The live issue in the appeal is a short one, and can be, and has been, shortly stated: the Appellant company’s written case runs to two sides of A4; and its reply to the Respondent PCC’s statement of case to another two sides of A4. Nonetheless, the appeal has generated more than 370 pages of documents. This is mainly because, although the point of law in this appeal is short, the background to it is factually complex, involving a transfer of assets from a cell company which formed part of the Respondent PCC to the Appellant company so as to simplify a complicated holding structure for what were ultimately land assets in Romania owned by Romanian companies. Those Romanian companies were held by a Cypriot intermediary holding company in which the Fund which – in circumstances described below - formed a cell of the Respondent PCC was the sole shareholder.
6. There is no appeal against the Bailiff’s factual findings, and both parties agree that the facts are fully and correctly set out and analysed in his judgment.
7. In the Court below neither party appears to have descended to analysis of the statutory structure. However, the Bailiff set out a clear summary of the legislative framework which governs protected cell companies (“PCCs”) at paragraphs 34-38 of his judgment. We consider he was right to do so. The issue on the appeal is what if anything ought to have been transferred to the Appellant company as “an asset of the Fund”, given that the Fund was not a separate legal entity. So an appreciation of the legal framework governing cell companies in Guernsey is required in order to understand the issue in this appeal namely the meaning to be attributed to an “asset”, and indeed “an asset of [a cell]” in the context of the structure of a cell company.

The legal structure governing Protected Cell Companies

8. The Respondent PCC was incorporated as a protected cell company in 2007. PCCs are a type of holding structure which is a creature of Guernsey statute. They are governed by provisions of Part XXVII of the Companies (Guernsey) Law 2008 as amended (“the Law”).
9. The relevant provisions may be summarised as follows:

1. Only certain types of company can be incorporated as a PCC, and the consent of the Guernsey Financial Services Commission is required for such incorporation.
2. Section 441 of the Law provides that a PCC is a single legal person, and the creation by a PCC of a cell does not create, in respect of that cell, a legal person with capacity separate from the company. This means that only the PCC can contract; a cell has no separate legal capacity. It is the company itself which has a duty to file statutory accounts and so on.
3. Where a cell is created by a PCC, the purpose of doing so is to protect “cellular” and “core” assets (section 442 of the Law);
4. The core is the PCC excluding its cells (section 443 of the Law).
5. In respect of any cell, a PCC can create and issue “cell shares”, and the proceeds of the issue of such cell shares becomes “cell share capital”. Section 444(1) of the Law defines “cell share capital” as constituting the cellular assets attributable to the cell in which respect of which the cell shares were issued. A “cellular share dividend” may be paid in respect of cell shares (section 444(3)).
6. The directors of a PCC have a duty to keep cellular assets both separate and separately identifiable from core assets and where the PCC has created more than one cell, it must keep each collection of cellular assets separate and separately identifiable from one another (section 445(2)).
7. The assets attributable to a cell of a protected company are defined by s445(4) of the Law as comprising:

*“(a) assets represented by the proceeds of cell share capital and reserves attributable to the cell, and
(b) all other assets attributable to the cell”.*

“Reserves” are defined in s445(7) as including *retained earnings, capital reserves and share premiums*.

8. “Protected assets” are defined in s446 of the Law, which defines these as *any cellular assets attributable to any cell of the protected cell company in respect of a liability not attributable to that cell*. (There is provision for “recourse agreements” as between cells in s447 of the Law, but that is not material here).
9. Section 451 is the provision which deals with liabilities and creditors of a PCC and/or its cells and describes how liabilities of a cell are addressed. It provides:
 - (1) *Subject to the provisions of subsection (2) and to the terms of any recourse agreement, where any liability arises which is attributable to a particular cell of a protected cell company –*
 - (a) *The cellular assets attributable to that cell are liable; and*
 - (b) *The liability is not a liability of any protected assets.*
 - (2) *In the case of loss or damage which is suffered by a particular cell of a protected cell company and which is caused by fraud perpetrated by or upon the core or another cell, the loss or damage is the liability solely of the company’s core assets or (as the case may be) that other cell’s assets, without prejudice to any liability of any person other than the company.*

(3) *Any liability not attributable to a particular cell of a protected cell company is the liability of the company's core assets.*

(4) *Notwithstanding the above provision of this section, liabilities under subsection (1)(a) of the cellular assets attributable to a particular cell of a protected cell company shall abate rateably until the value of the aggregate liabilities equals the value of those assets: but the provisions of this subsection do not apply in any situation where there is a recourse agreement or where any of the liabilities of the company's cellular assets arises from fraud as is referred to in subsection (2).*

(5) *This section has extraterritorial application.*

10. If there is a dispute as to rights or liabilities of a particular cell, section 453(1) of the Law provides that the PCC may apply to the court for a declaration in respect of the matter in dispute.

11. Section 454(2) of the Law is also important in this context. It provides that

Income, receipts and other property or rights of or acquired by a protected cell company not otherwise attributable to any cell shall be applied to and comprised in the company's core assets.

12. Finally, section 457 of the Law provides for the making of cell transfer orders. Section 457(1) is set out in full in paragraph 38 of the Bailiff's judgment.

13. Section 457(1) provides for the cellular assets attributable to any cell of a PCC, but not the core assets of a PCC, to be transferred to another person, wherever resident or incorporated and whether or not a protected cell company.

14. Subsection (2) provides that a transfer pursuant to subsection (1) of cellular assets attributable to a cell of a PCC does not of itself entitle creditors of that company to have recourse to the assets of the person to whom the cellular assets were transferred.

15. However, by virtue of section 457(3), no transfer of the cellular assets attributable to a cell of a PCC may be made except under the authority of, and in accordance with the terms and conditions of, an order of the Court known as a "cell transfer order".

16. Section 457(4) sets out the matters as to which a Court must be satisfied before making a cell transfer order, which include ensuring that creditors of the company consent to the transfer and would not be unfairly prejudiced by it. Section 457(6) enables the court to attach such conditions as it thinks fit to a cell transfer order, including conditions as to the discharging of claims of creditors entitled to have recourse to the cellular assets attributable to the cell in relation to which the order is sought.

17. However, section 457(8) provides that the provisions of the section are without prejudice to any power of a PCC lawfully to make payments or transfers from the cellular assets attributable to any cell in the company to a person entitled, in conformity with the provisions of Part XXVII of the Law, to have recourse to those cellular assets; and section 457(9) provides, for the avoidance of doubt, that a PCC does not require a cell transfer order in order to invest and change investment of cellular assets or otherwise to make payments or transfers from cellular assets in the ordinary course of the company's business.

18. Section 527 includes a solvency test for a PCC, and one element of that is that the value of the company's assets is greater than the value of its liabilities. When that is translated into a receivership order in respect of a cell of a protected cell company, section 459(1)(a) refers to "the cellular assets attributable to a particular cell of the company ... are or are likely to be insufficient to discharge the claims of creditors in respect of that cell".
10. It is also worth noting that under section 239(3) of the Law, the directors of a PCC are required to keep accounting records and, where returns are sent, returns, for a period of six years after the date on which they are made. Under section 240, the directors and officers of the PCC may inspect the accounting records and returns in normal working hours at the place where they are kept. Section 255 of the Law required the PCC's records to be audited and section 264 gives an auditor a right to access to its books, accounts and vouchers.
11. Standing back, the purpose of the PCC structure is to create a single company for compliance and administration purposes which has separate and distinct "cells", with each cell effectively operating on a day-to-day basis as if it were a stand-alone company, but with the "core" of the PCC conducting the administrative and accounting functions for the whole group. The income, assets and liabilities of each cell are kept separate from all other cells. Each cell has its own separate portion of the PCC's overall share capital, allowing shareholders to maintain sole ownership of an entire cell while owning only a small proportion of the PCC as a whole, whilst minimising overheads and relying on the corporate governance structures of the core. It is within this context that we have to interpret the proper definition of an "asset".

The factual background to this appeal

12. The Respondent PCC was incorporated as a PCC in 2007. One of its cells was the Fund. The Fund owned all the shares in Rivatec Limited ("Rivatec"), a holding company registered in Cyprus in early 2008, which itself held shares in certain Romanian subsidiaries consisting of special purchase vehicles for Romanian Properties. The background to this case was a desire to simplify the holding structure, by transferring the assets of the Fund, Rivatec and its Romanian subsidiaries to the Appellant company.
13. However, since, by virtue of section 241 of the Law, the Fund had no separate legal personality, this involved a number of complex transactions to transfer the value of the Fund out of the cell of the PCC and into the Appellant company.
14. In order to achieve this purpose, the Appellant company was incorporated on 2 September 2013, with four directors, and one single shareholder with a sole share of one euro. The next day, 3 September 2013, the four directors of the Appellant company held a board meeting by phone to consider a proposal from the Respondent PCC, set out in a Circular.
15. This Circular proposed that:
 19. One ordinary share in the Appellant company, consisting of the entire share capital of the Appellant company, should be transferred to the Fund in consideration for the costs incurred by the Fund in incorporating the Appellant company.
 20. The entire issued share capital of Rivatec, then directly owned by the Fund, would be transferred to the Appellant company, and the loan agreement between the Fund and Rivatec would be novated to the Appellant company. This would mean that the benefit of a loan made by the Fund to Rivatec would be transferred to the Appellant company.

21. **The remaining assets of the Fund, including but not limited to any cash, would be transferred to the Appellant company after provision for any liabilities of the Fund (emphasis added).**
 22. In consideration of the transfer of the assets of the Fund to it, the Appellant company would issue 5,365,875 ordinary shares of one euro each to the Fund;
 23. The ordinary shares of the Appellant company would be transferred by the Fund to the shareholders of the Fund on a pro rata basis in proportion to their existing holdings in the Fund;
 24. The shares of the Fund should be redeemed for no consideration by the Appellant Company and the cell [consisting of the Fund] would be wound up;
 25. The assets of Rivatec would be transferred to the Appellant company and Rivatec would be wound up.
 26. The assets of the Romanian subsidiaries of Rivatec would be transferred to the Appellant company and those subsidiary companies would be wound up.
16. The effect of the complex arrangements proposed in the Circular was that, in exchange for a share issue to the shareholders in the Fund, all the Fund's remaining assets after provision for its liabilities, including the assets of its wholly owned subsidiary Rivatec and Rivatec's wholly owned Romanian subsidiaries, would be transferred to the Appellant company. The cell of the Respondent PCC which consisted of the Fund, and which had been intended as a medium-term investment vehicle for various overseas property assets, would then be wound up.
 17. The Proposal set out in the Circular was due to be considered at a meeting of shareholders in the Fund on 27 September 2013. The rationale was to reduce annual running costs, to conserve cash resources, to enable the directors of the Appellant company to sell the property assets in an orderly manner and to manage them with a view to paying back shareholders in the Fund the amount invested and possibly a profit. At the shareholders' meeting on 27 September, it was resolved to accept the Proposal and the directors were authorised and instructed to take all necessary steps to implement and give effect to it. Thereafter, steps were taken by Intertrust Fund Service (Guernsey) Ltd ("Intertrust" – a regulated trust company administrator, which was originally the second defendant in these proceedings, but which had been removed from the proceedings by the time the matter came to hearing) to de-list shares in the Fund from the Channel Islands Stock Exchange in October 2013.
 18. As noted above, while the purposes of the Proposal set out in the Circular and adopted by the Fund's shareholders' meeting on 27 September 2013 were relatively simple, the arrangements for implementing them were not. There seems to have been very little transparency about who owned what, or who had paid what to whom, when. The various directors and shareholders in the entities involved in these arrangements changed relatively frequently. (Mr Guest, who is now a director of the Respondent PCC, and represented it before us, was a founder director of the Appellant company too). Many purported arrangements appeared to be oral, or poorly recorded, or in dispute, and so the extent of assets and liabilities as between the various entities involved also became unclear. Nor was there any very clear evidence before the Bailiff as to precisely what happened, when, in relation to the various transfers of assets which formed parts of the Proposal as adopted.
 19. The Bailiff's judgment sets out, between paragraphs 14 and 27, as well as he could ascertain from the evidence before him, the various discussions, transfers, and consultations which took place in this context, and some of the disagreements which took place as to what property belonged to each relevant legal entity involved in the arrangements. At paragraph 18, he describes a "heated" board meeting of the directors of the Appellant company, who then

included Mr Guest. At that meeting, concern was expressed about the absence of information relating to the assets held by the Appellant company. One of the directors, Mr Rawicz-Szczerbo, repeatedly stated that he and others were not managing the Fund because Intertrust carried out the administration, so they did not have any management accounts or Bank statements. Mr Guest threatened to sue Mr Russell for breach of fiduciary duty. It appears that Mr Guest resigned as a director of the Appellant company in or around August 2015.

20. He prepared several handover notes for Ms Walker (who at the time of the Royal Court proceedings was one of the three directors of the Appellant company), one of which was before the Royal Court. The Bailiff quoted at paragraph 19 of the judgment a passage of Mr Guest's conclusion to that hand-over note which stated that

“John Rawicz-Szerbo and I failed as directors of [the Appellant company] to arrange for a comprehensive register of the fixed assets of [and subsidiaries of the Appellant company] to be complied [sic]”.

Mr Guest's note also observed that they had cold feet about the fixed assets of the Fund as at 30 September 2013 and considered that information had been deliberately withheld from the Board of [the Appellant company] by two of its directors, Edward Russell and Simon Pearce-Hughes. The final two sentences of this note were that:

“The evidence deficit applied equally to the closing accounts of [the Fund] and to the opening accounts of [the Appellant company]. I strongly recommend that the board [of the Appellant company] seeks advice from an independent chartered accountant.”

Mr Guest handed some boxes of information over to Ms Walker, but it appeared that she understood there was more to come including bank statements relating to the Fund.

21. In July 2018, another director of the Appellant company (who was also a shareholder), Nicola Blount, contacted Intertrust asking for bank statements of the Respondent PCC for 2008-2013 and any supporting documents to enable them to put together an audit trail of payments made on behalf of the Appellant company or by the Respondent LLP, to Rivatec or various of its subsidiaries. Intertrust informed her that it had not made payments on behalf of the Appellant company, but lots of records had been passed to Mr Guest when it had been incorporated so it may be able to help.
22. Following a further request from Ms Blount to Intertrust on 7 August 2018, Ms Melanie Duquemin, a director of Intertrust, responded that:

“As you are no doubt aware, the Romanian Eagle Land Fund [the Fund], a cell of [the Respondent PCC] ceased to exist and shares of an intermediate holding company in Cyprus [Rivatec Ltd] (holding in turn shares in Romanian property companies) were transferred to [the Appellant company]. Under the Memorandum and Articles of the [the Respondent PCC], former shareholders of a former cell are not entitled to bank statements of the PCC. I regret we cannot help you further”

She went on to suggest that the Appellant company might receive the information it required from Edward Russell and Simon Pearce-Hughes who had organised all of the transactions in relation to which Ms Blount was enquiring, the lawyers who handled the purchase of assets in Romania and the auditor of the relevant Romanian companies. There were further exchanges, but Intertrust continued to point to the restrictions of the terms by which a member of the Fund was entitled to information.

23. It was at this stage, in an email of 19 September 2018, to which Advocate Barnes took us during the appeal hearing, that Ms Blount, as a director of the Appellant company, first made reference

to the terms of the Circular. She expressed her view (which can properly be attributed to the Appellant company, given her role as a director of it) that the phrase “the remaining assets of the fund” in paragraph 3 of the Circular covered “any bank statements of the [Respondent PCC] relating to [the Fund]/[the Appellant Company]”. She said that the directors of the Appellant company “had reached the conclusion that Intertrust, as administrator of the Cell, retained those documents, which in fact, legally belonged to [the Appellant] company”. She then explained that the Appellant company’s particular interest was how the investments were made using the resources of the Fund and set out a number of transactions which had been conducted by or on behalf of the Fund and information which the Directors wanted in relation to this.

24. On 21 September 2018, Ms Duquemin responded on behalf of Intertrust as follows:

“Dear Nicola,

I am afraid that I am not able to provide any further information and as previously confirmed under the Articles of [the Respondent PCC], shareholders were not entitled to bank statements.

I can only suggest you contact Simon Pearce-Hughes and Edward Russell who may be able to provide further information”.

25. The Appellant company then commenced proceedings, initially against both the Respondent PCC and Intertrust. The Appellant settled with Intertrust in 2019. On 4 June 2020, without admitting liability, the Respondent PCC made an open offer of full and final settlement to the Appellant company. This offer referred to documents held by Intertrust in respect of the Fund and appears to have offered copies of these documents in return for a modest contribution towards the Respondent PCC’s expenses. However, that offer was not accepted.

26. On behalf of the Appellant company, on 10 June 2020, Ms Blount had asked Mr Guest (acting for the Respondent PCC) to provide a list of documents to which he was referring in sufficient detail to enable the Appellant company to know what it would be receiving. She suggested that nothing would be paid for these because the Appellant company was entitled to them. The next day, Mr Guest had replied that when he had been a director of the Appellant company, he had felt that many documents were missing, but he had been told by Intertrust that it relied on the administrators and auditors of the intermediate holding company in Cyprus [Rivatec] and so did not have documents. He said that he was disappointed that the Respondent’s open offer had not been accepted, because it covered all the documents that Intertrust retained, even though the Respondent’s contract with Intertrust had ended some years earlier. It was the best the Respondent could do and there was nothing more that could be provided whatever the Court decided.

The parties’ cases before the Royal Court

27. Before the Royal Court, the Appellant company submitted:

27. That there was a contract in 2013 between the Appellant company and the Respondent PCC, formed partly in writing and partly through conduct in 2013 concerning various linked transfers of assets, and evidenced by the Circular (the terms of which are summarised at paragraph 14 above);

28. The Circular offered evidence of what must have been agreed and the steps subsequently taken to give effect to the proposal showed that the parties understood what the obligations being accepted were. Once the shareholders of the Fund had agreed the proposal in the Circular, the parties then gave effect to that decision through the steps they took.

29. A company cannot function without information, and consequently the agreement to transfer the “assets” of the Fund to the Appellant company which was set out in the Circular must have included all information which related to it.

Advocate Barnes did not cite legal authority as to the definition of “assets” in this context. Instead, he submitted (as he has submitted before the Court of Appeal) that “the ordinary natural meaning of assets include anything which may have some value, see the OED definition”.

28. The Respondent, represented by Mr Guest:

30. Denied that there was any contractual obligation between the parties, because the Circular was not capable of being viewed as an offer by the Fund to the Appellant company and there was no other evidence of agreement; and

31. Alternatively, said that in any event there was no breach capable of being enforced.

29. As to the second limb of the Respondent’s argument before the Royal Court, it appears that Mr Guest argued both that there were serious practical difficulties in getting documents, but that in any event, items such as board minutes and bank statements are personal to the entity to which they relate and do not fall within the definition of what can be regarded as “assets” of a Fund which is administered by the entity as part of a statutory holding structure.

The Royal Court’s Decision

30. As a matter of law, the Fund, as a cell of the Respondent PCC, did not have its own legal personality, although, as a result of the PCC structure, there were people who were shareholders only of the Fund cell’s assets and not of the PCC overall.

31. After an impressive analysis of the somewhat sketchy evidence before him, the Bailiff decided (in paragraph 45 of his judgment) that there was a contract between the Appellant company and the Respondent, and the terms of what was agreed between them before the Circular was sent to the Fund’s shareholders.

32. The real question, as the Bailiff noted, was what the terms of that contract meant. The relevant dispute between the parties was as to the correct interpretation of the agreement, referred to in the Circular that

“the remaining assets of the Fund including but not limited to any cash be transferred to [the Appellant company] after due provision for any liabilities of the Fund.”

33. The Bailiff concluded that having regard to the various provisions in Part XXVII of the 2008 Law, the information and documents which were Appellant company sought to obtain from the Respondent PPC fell outside what would properly be regarded as part of the assets of the Fund. While the documents sought may well be property, they were not part of the contract between the parties relating to assets. The Bailiff observed:

“I would expect the Fund’s assets to be capable of appearing on the balance sheet of what the cellular assets of the Fund were”.

He was not satisfied by the Appellant company’s assertion that the documents, including the bank statements, could be said to have had a monetary value, in the same way that other things usually described as assets would have, because they could not be used to discharge liabilities. Having regard to the language of section 527 and 459(1)(a) of the Law (summarised at paragraph 9(r) above), he concluded that the documents which were sought were not the Fund’s assets.

34. The Bailiff's analysis as to whether these documents could be regarded as "assets" at all was carefully rooted in the context in which the issue arose. He noted that in both the Law and the Circular which evidenced the terms of the contract, the terms "assets" and "liabilities" were frequently used together, and that this was consistent with the way that provisions such as section 451 of the Law (cited at paragraph 9 (i) above) operates. Section 451 of the Law is punctilious in explaining which assets may be used to discharge which liabilities in the fund, by reference to the cells to which they can be attributed. Since a document would have no monetary value as such and could not be used as a means of making due provision for any liabilities of the Fund, he did not consider it could amount to an asset in this context. He also noted that even if documents such as bank statements did amount to assets, they might well have been regarded as core assets rather than cellular assets, in accordance with section 454(2) of the Law, though this was not a matter he needed to decide.

35. The Bailiff concluded at paragraph 52 that:

"For these reasons, I am not minded to construe the word "assets" as it features in the contract between the Plaintiff and the Defendant (that I am satisfied existed in September 2013) as broadly as Advocate Barnes submits that I should. I consider that the assets of a cell of a protected cell company are not to be viewed in the same way as, for example, if there were a transfer of a trusteeship, where the assets as well as the documents relevant to the trust, which might extend to bank statements, are provided to the incoming trustee. I wonder if that principle is being relied on more by the Plaintiff ... rather than concentrating on the statutory provisions under which cells and the core of a protected cell company operate. When set against that regime, I do not find that the documents, or information, if that is what some of it is, can be brought within the assets of the Fund to which the contract relates. It follows that I cannot grant the primary relief sought by the Plaintiff, and that also has an impact on the alternative relief sought by way of a declaration".

36. Whilst the Bailiff accepted that a company may need information in order to operate, that did not automatically mean that such information had to be supplied in this context by the Respondent PCC, if it fell outside the scope of what the Fund could agree to transfer. Accordingly, he held that seeking to obtain this information by reliance on the terms of a contract with the Respondent PCC requiring it to transfer assets was misconceived. He held that the information and information sought by Ms Blount (and listed in the Appendix to the Appellant company's Replique) were not the property of the Appellant company.

The hearing before the Court of Appeal

37. On appeal, Advocate Barnes essentially repeated his submission that an "asset" in the context of a business ought to be interpreted as anything of use to that business. He submitted that the idea behind the transactions by which the Fund's assets were transferred to the Appellant company was that "the whole business and everything needed to operate it in an efficient manner" should be transferred to the Appellant company as part of the process. He said that this should include all types of property tangible and intangible of use and benefit to the Appellant company, including documents, except that which was specifically excluded.

38. In relation to how this operated in the context of a PCC regime, he submitted that there was a distinction between core assets and cellular assets and that cellular assets would be those which the cell company was obliged to keep separate from the core assets, attributable to that cell alone, so that the shareholders in the cell could get the benefits of them, and so that they were protected from any other party. He submitted that "information and documents relating to that cell will be cellular assets".

39. On behalf of the Respondent PCC, Mr Guest submitted that the cardinal error in the Appellant company's case was to treat the Fund as if it were a separate legal person, which it was not; and in identifying any document as having been capable of a "record of the Fund" or one of "the Fund's documents", having regard to the fact that statutory accounting responsibilities fell on the directors of the Respondent PCC and not upon shareholders of any individual cell within it.
40. At the time when it was a cell of the Respondent PCC, the Fund was not a legal entity separate from it. Consequently, the accounts and other records which the Respondent PCC were required to keep were accounts/records of the Respondent PCC and not those of the cell company, even though they needed to set out the separate cellular assets and liabilities of different cells of the PCC within them. Indeed, for these documents to "belong" to the core of the PCC was a practical necessity because it was the directors of a PCC who were required to produce and retain appropriate minutes and accounting records, so if those parts of a document relating to a particular cell of the PCC were to be regarded as the assets of that cell, the directors of the PCC would be unable to perform their statutory duty.
41. It was to the documents themselves and not merely the information contained within them to which the Appellant made a proprietary claim. The Appendix to the Appellant company's Replique of 5 April 2019, which set out a long list of "documents/written verification/information required by the Plaintiff" expressly stated that "where information is sought, **the Plaintiff requires the document or documents containing that information**" (emphasis added). So, said Mr Guest, the Appellant company's case that the documents themselves amounted to assets which ought to have been transferred from the Fund to the Appellant company on the basis of the contract requiring transfer of assets would, if it were correct, cause real and insuperable practical difficulties.
42. Mr Guest also made submissions about the Respondent PCC's practical inability to provide much of the information sought in any event. Intertrust – which held information for the Respondent PCC administered only the PCC and not the underlying assets held by its cells - held no information about the assets or dealings of the Cypriot holding company (Rivatec) or the Romanian companies whose shares were held by Rivatec.
43. Finally, Mr Guest made the point that the only business conducted by the Fund was conduct of a property fund, not the operation of either the underlying Romanian property companies or its wholly owned subsidiary Finatec. The Circular which recorded the content of the contract between the Appellant company and the Respondent PCC specifically juxtaposed assets and liabilities, and this reflected the way fund managers generally analyse assets and liabilities.

Authority

44. Both parties submitted that we needed to determine the meaning of "an asset" in the context of this case. However, we did not have our attention drawn to any complete judicial authorities defining an asset, whether in this or any other jurisdiction. Advocate Barnes relied solely on what he described as the natural and ordinary meaning of the term "asset" in the context of the agreement recorded in the Circular, and the definition in the Oxford English Dictionary.
45. Mr Guest (who is a qualified solicitor in England, though not in this jurisdiction), drew our attention to extracts from a number of judicial dictionaries (Words & Phrases Legally Defined; Stroud's Judicial Dictionary of Words and Phrases and Jowitt's Dictionary of English Law). These contained various useful judicial dicta concerning the meaning of the word asset or assets, in various contexts though none from this jurisdiction and none which specifically related to a PCC. Since these were drawn to our attention, we set out some relevant extracts here.
46. Jowitt's Dictionary of English Law (5th edition) (pp184-185) defines assets as:

“Property available for the satisfaction of debts, or, in the case of a deceased person, bequests. More generally, all the property of any person or undertaking. In relation to the estate of a deceased person the assets for the payment of his debts consist of the property of which he could dispose by will (s32 of the Administration of Estates Act 1925 (23)). In accounting, for example in balance sheets, “assets” and “liabilities” are used in contradistinction, “net assets” and “net liabilities” being the one subtracted from the other. ...” (see for example Companies Act 2006 s386(3)).

47. Stroud’s Judicial Dictionary of Words and Phrases (10th edition) vol 1 p203 contains the following relevant extracts from authorities:

“... the meaning of the term “assets” in a freezing order account should be taken, as part of the background and context of such orders, of their purpose, in the way that anyone construing any document should take into account of the background to it ... (*JTC BTA Bank v Alyazov* [2013] EWCA Civ 928”.

“... The expression “assets” is capable of having a wide meaning. For example, it can include a chose in action. However, like any document, a freezing order must be construed in its context. That includes its historical context ... Mummery LJ said at 1709F that he started from the position that in its everyday usage the expression “his assets” refers to assets belonging to that person, not to assets belonging to another person. He then focused on the context in which the expression was used in the order. In doing so he identified the purpose of the freezing injunction in essentially the same terms as describe by Beatson LJ in this case and boy others in subsequent cases ... However, as stated above, context is of particular importance in construing orders such as the Freezing Order in this case ... in its historical context the word “asset” was prima facie part of a fund which would be available to a judgment creditor (*JTC BTA Bank v Alyazov* [2015] UKSC 64)”.

48. The 2018 edition of Words & Phrases Legally Defined contains the following definition at vol 1 p242-245:

“... Even such a well-established corporation as the Bank of England publishes a statement of its assets and liabilities. All property ... set together against the liabilities is assets and in that sense uncalled capital assets” (*Page v International Trust Agency v Industrial Trust Ltd* (1893) 62 LJ Ch 610 at 612-613 per Kekewich J).

Its 2021 supplement at pp9-10 contains the following extract from a more recent Canadian Supreme Court authority:

“The words in Assistance Application must be given their ordinary and grammatical meaning in light of the specific context in which they were used ... With this in mind, I would observe that the word “asset” is ordinarily used to denote valuable property that a person can use to discharge debts and other liabilities. One of the definitions in the Oxford English Dictionary (online) is “an item of value owned; spec. an item on a balance sheet representing the value of a resource, right, item of property etc placed under an appropriate heading. Frequently coupled with *liability*”. Similarly, Merriam-Webster (online) defines the plural word “assets” as “the entire property of a person, association corporation or estate applicable or subject to the payment of debts” and the single word “asset” as “an item of value owned”. The Chambers Judge referred to a similar definition from Black’s Law Dictionary (6th edition 1990) at p117 ...

“Property of all kinds, real and personal, tangible and intangible, including inter alia, for certain purposes, patents and causes of action which belong to any person including a corporation and the estate of a descendent. The entire

property of a person, association, corporation or estate that is applicable or subject to the payment of his or her debts”,

SA v Metro Vancouver Housing Corp [2019] SCJ No 4, [2019] 1SCR 99 at paras 1, 40, 46, 56 per Coté J.

Discussion

49. The issue before us on appeal was a very narrow one. The Bailiff had decided that there was a contract between the parties, formed partly in writing and partly by conduct, and that its principal terms were those set out in the Circular (summarised at paragraph 14 above). The material phrase which fell to be construed was:

“The remaining assets of the Fund, including but not limited to any cash, be transferred to [the Appellant company] after provision for any liabilities of the Fund”

50. The only issue on appeal was whether the Learned Bailiff he had erred in interpreting the word “assets” in this context so as to exclude what were described in the Appellant’s written case as “the Fund’s documents”, by which the Appellant company apparently meant documents which contained information necessary to operate the Fund.

51. Nothing which has been said in argument before us persuades us that the Bailiff’s analysis of what amounted to an asset in this context was wrong. Indeed, we are fortified by reference to his analysis of Part XXVII of the Law (and especially the juxtaposition of assets and liabilities in s451 and s454), and the extracts from English and Canadian authorities cited before us.

52. We are entirely satisfied that in the context of a PCC structure which is intended to allow a number of separate investment vehicles to operate separately but under one corporate umbrella, constituting one legal person, the meaning attributed to “an asset” in an accounting context is the right one to use. Consequently, the meaning of “an asset” in this context must have been that identified by the Bailiff - that is, property with a monetary value of a type capable of appearing on a balance sheet, which could have been realised to meet liabilities.

53. Assets in that context are things, but they cannot, even on the widest possible meaning, include information necessary for the running of the cell’s business, or any documents which may be in existence simply because they include such information. (Indeed, Advocate Barnes had clarified in the Annex to his Replique setting out information required that what he meant was documents containing that information). So, records setting out what the assets and liabilities of the Fund were when it was administered as a cell of the Respondent PCC are not assets of the Fund in the context of a PCC. That is enough to dispose of this appeal.

54. But even if the documents themselves were capable of amounting to assets, in the context of a PCC structure, we consider that they would have been core assets and not cellular assets, because they would necessarily have been property attributable to the core of the Respondent PCC and not to any of its cells. Statutory responsibility for keeping corporate records and accounts rests with the core of the company which is registered with the Guernsey FSC. There are no separate “records of the Fund”, albeit that a PCC’s accounts must separately allocate assets and liabilities as between the core and the various cells of the PCC. The cells themselves have no separate legal personality and no obligation to keep separate statutory accounts.

55. If Advocate Barnes had been right that any record containing information concerning the running of the Fund should have been treated as an “Fund asset”, then by virtue of clause 3 of the Circular, any document held by or on behalf of the PCC (for example by Intertrust) which

referred to the Fund would, by virtue of its terms, have become the property of the Appellant company and not the Respondent PCC. Since a PCC is under a statutory duty to keep records for six years, this would have placed the Respondent PCC in an impossible position. The Appellant company's submission that ownership of accounting records relating to the Fund had been transferred to it by the Respondent PCC by an agreement to transfer "the remaining assets of the Fund .. after due provision for [its] liabilities" is consequently at odds with the duties imposed on the directors of a PCC by Guernsey company law.

56. The very purpose of a PCC is to enable various investment vehicles to be operated under the umbrella of one corporate "holding" structure, but with the funds of the various cells held in separate identifiable "cells". The cellular assets are held separately for the benefit of the owners of each "cell" and with the assets available to meet their liabilities. In that context, the only possible construction of the word "asset" is that advanced by the Respondent PCC, that is, part of a fund which would be available to set off against a liability.
57. We agree with Mr Guest that an error at the heart of the Appellant company's analysis was to consider that the Fund, when it had been a cell of the Respondent PCC, had ever owned what the Appellant company's written case described as "its documents".
58. The property attributable to the Fund by virtue of Part XXVII of the Law, and which the Respondent PCC's directors had a statutory and fiduciary duty to keep separate for the benefit of the shareholders of the Fund, was the assets owned by the shareholder in the "cell". But the Respondent PCC's accounts and records themselves were not assets; moreover, , if and to the extent that these documents amounted to property, this was property of the core of the Respondent PCC and not of any of its cells. The documents which formed the accounting records of the Respondent PCC could not have been lawfully transferred from the Respondent PCC to a separate corporate entity. However, if the Appellant company's submissions were right, that is what the contract would have required.
59. It follows that this appeal must fail.