Neutral Citation Number: [2020] EWHC 3187 (Ch)

No: CR-2018-006093

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

IN THE MATTER OF FORCE INDIA FORMULA ONE TEAM LIMITED (IN (LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 23 November 2020

Before:
Deputy ICC Judge Baister

Between :

BWT AKTIENGESELLSCHAFT	**Applicant**
- and –	
(1) FORCE INDIA FORMULA ONE TEAM LIMITED (IN LIQUIDATION) **(2) GEOFFREY PAUL ROWLEY (AS LIQUIDATOR OF THE ABOVE-NAMED COMPANY)**	**Respondents**

Mr Adam Al-Attar (instructed by **Onside Law Ltd**) for the **applicant**
Mr James Segan QC (instructed by **Eversheds Sutherland (International) LLP**) for the **respondents**

Hearing date: 22 October 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives. The date and time for hand-down will be deemed to be 10.00 am on 23 November 2020. A copy of the judgment in final form as handed down can be made available after that time on request.

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Deputy Insolvency and Companies Court Judge

Deputy ICC Judge Baister:

The application

1. This is an application by BWT Aktiengesellschaft appealing under r. 14.8 Insolvency (England and Wales) Rules 2016 the office-holder's rejection of part of its proof of debt in the liquidation of Force India Formula One Team Limited. It is supported by witness statements of Stevie Loughrey and Adam Leadercramer, the applicant's solicitors, the latter made in reply to that of Leslie Ross, a Canadian lawyer who, like Mr Leadercramer, was involved in negotiations which took place in May 2018.

The background

2. Force India Formula One Team Limited, which I shall now refer to as the company, carried on business as a Formula One racing team. The applicant is a supplier of water treatment products. It wanted to promote its brand through sponsorship. To that end it entered into a sponsorship agreement with the company, the terms of which are set out in a Contribution and Rights Agreement ("C&RA") dated 10 March 2017. It became the company's principal sponsor, providing the company with about €15m per annum in tranches. The sponsorship payments were "front-loaded" (i.e. not spread evenly over the season) because the majority of the expenditure of running the team was incurred during the first quarter of the year. The C&RA made provisions which reflected the timing of payments and provided for how they should be treated in the event of a termination of the relationship.

3. By February 2018 the company had begun to experience financial difficulties and was failing to provide promised financial information to the applicant as it was obliged to do. In spite of this the applicant continued to provide support, including additional funding in the form of loans in March and May. On 7 May 2018 the applicant sent the company a draft Deed of Variation, saying it had to be signed "latest today." In fact it was only executed on 8 May. This and the C&RA are the important documents for the purpose of this application. The Deed provided for the company to enter into a security agreement, but that never happened, which is of some importance. A second deed was drafted but that never came into effect and is not relevant to the issue to be decided.

4. The applicant terminated the C&RA with effect from 1 July 2018 by notice given pursuant to clause 18.2. (Mr Segan QC refers to this as "termination for convenience" to distinguish it from other circumstances that could have given rise to termination.) There was initially argument about the date of termination, but now none as to either its validity or effective date.

5. A creditor of the company, Brockstone Limited, applied for an administration order which was made by Barling J on 27 July 2018. The company, with support from the applicant, traded in administration for a time before its assets were sold on 16 August 2018 to Racing Point which continued to provide the sponsorship benefits. Thereafter the company went into liquidation.

6. The applicant submitted a proof of debt dated 5 June 2019 in the administration. The particulars were amended on 28 August 2019. The amended proof stands as the applicant's proof in the liquidation.

7. On 28 November 2019 the liquidator admitted the applicant's claim as to £1.264 m odd but rejected it as to the balance of €5.65m odd.

8. The foregoing is a brief summary of the facts set out in greater detail in the applicant's witness statements. They are, by and large, uncontroversial, as Ms Ross accepts, but in any event much of the background is not relevant to the issue before the court which is one of construction of the terms of the C&RA and the Deed of Variation. Other documents I have mentioned (and some I have not) do not bear directly on the issue. The issue itself involves answering two questions: does the applicant have a claim in the liquidation on the basis contended for in its proof of debt; and if so for how much (i.e. must it give credit for certain sums that the liquidator says are irrecoverable, irrespective of the answer to question one)?

The contractual provisions

9. The C&RA contains the following relevant provisions:

> "**1. Interpretation** The definitions and general provisions in Schedule 1 apply to this agreement."
>
> […]
>
> Fees are defined in the schedule as: "The fees to be paid by BWT to Force India as a contribution towards the racing, trackside and hospitality costs incurred by the Team in respect of each year of the Term in accordance with clause 17.1."
>
> "**4.5** In the event that Force India ceases to operate a Formula One team competing in the World Championship, this agreement shall be terminated with immediate effect and (subject to clause 18.5) without penalty to any party."
>
> "**17. Fees and Payments**
>
> 17.1 In consideration of Force India's obligations BWT will pay to Force India the Fees, to be received by Force India, subject to BWT having received an invoice from Force India at least thirty (30) days in advance (other than in relation to the instalment referred to in clause 17.1.1.1) as follows:
>
> 17.1.1 In 2017, twelve million five hundred thousand Euros (€12,500,000) to be received as follows:
>
> 17.1.1.1 ten million Euros (€10,000,000) on or before 17 March 2017; and
>
> 17.1.1.2 two million five hundred thousand Euros (€2,500,000) on or before 1 July 2017.
>
> 17.1.2 In 2018, fifteen million Euros (€15,000,000) to be received as follows:

17.1.2.1 seven million five hundred thousand Euros (€7,500,000) on or before 1 December 2017;

17.1.2.2. three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 February 2018; and

17.1.2.3 three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 July 2018.

17.1.3 In 2019, fifteen million Euros (€15,000,000) to be received as follows:

17.1.3.1 seven million five hundred thousand Euros (€7,500,000) on or before 1 December 2018;

17.1.3.2 three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 February 2019; and

17.1.3.3 three million seven hundred and fifty thousand Euros, (€3,750,000) on or before 1 July 2019.

17.1.4 In 2020, fifteen million Euros (€15,000,000) to be received as follows:

17.1.4.1 seven million five hundred thousand Euros (€7,500,000) on or before 1 December 2019;

17.1.4.2 three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 February 2020; and

17.1.4.3 three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 July 2020.

17.1.5 In 2021, fifteen million Euros (€15,000,000) to be received as follows:

17.1.5.1 seven million five hundred thousand Euros (€7,500,000) on or before 1 December 2020;

17.1.5.2 three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 February 202; and

17.1.5.3 three million seven hundred and fifty thousand Euros (€3,750,000) on or before 1 July 2021.

17.2 In consideration of Force India procuring the application of the BWT Logo to the Drivers Race helmets, as referenced in clause 7.1.3, BWT will pay to Force India the Helmet Logo Fees, to be received by Force India subject to BWT having received an invoice from Force India at least thirty (30) days in advance (other than in relation to the instalment referred to in clause 17.2.1) as follows:

17.2.1 In 2017, three hundred and twenty-five thousand Euros (€325,000) to be received on or before 17 March 2017;

17.2.2 In 2018, three hundred and twenty-five thousand Euros (€325,000) to be received on or before 1 December 2017;

17.2.3 In 2019, three hundred and twenty-five thousand Euros (€325,000) to be received on or before 1 December 2018;

17.2.4 In 2020, three hundred and twenty-five thousand Euros (€325,000) to be received on or before 1 December 2019; and

17.2.5 In 2021, three hundred and twenty-five thousand Euros (€325,000) to be received on or before 1 December 2020.

[17.3-17.7]"

"**18.1 Termination**

18.1 Either party (**Initiating Party**) may terminate this agreement with immediate effect on the giving of written notice to the other party (**Defaulting Party**) at any time on the happening of the following events by or in relation to the other party:

18.1.1 An Insolvency Event;

18.1.2 Default; or

18.1.3 The Defaulting Party failing to pay any sum due under this agreement within ten (10) Business Days after the due date and subject to the Initiating Party having provided to the Defaulting Party a written reminder notice between one (1) and five (5) Business Days after the relevant due date."

"**18.2** Notwithstanding any other provision of this agreement, it may be terminated by either party with effect from 1 July 2018 upon the provision of written notice to be received by the non-terminating party at any time during the period commencing on 15 May 2018 and ending on 31 May 2018 (both dates inclusive). For the avoidance of doubt: (a) the instalments of the Fees referred to in clauses 17.1.2.3 - 17.1.5 and the payments referred to in 17.2.3 - 17.2.5 and 17.3.1.3 - 17.3.4 shall not be payable where a party terminates pursuant to this clause 18.2; and (b) in the event BWT terminates pursuant to this clause 18.2, the payments referred to in clause 17.1.2.1, 17.1.2.2, 17.2.2 and 17.3.1.1-17.3.1.2 shall be retained by Force India and no pro rata reimbursement of such Fees and payments, whether in accordance with clause 18.5 or otherwise, shall apply."

"**18.5** In the event of any termination of this Agreement pursuant to clause 4.5, or by BWT pursuant to clause 18.1, the total

> aggregate Fees, Helmet Logo Fees and Driver Drink Bottle Branding Fees payable by BWT to Force India over the entire Term shall be deemed to accrue on a daily basis during the Term and shall be pro-rated to the Termination Date. Any such pro-rated sums paid in relation to any period after the Termination Date shall be reimbursed by Force India to BWT within thirty (30) days after the Termination Date."

10. The deed of variation provides, *inter alia*, as follows:

> "2.1 With effect from the Effective Date, the Parties agree that the C&R Agreement shall be varied as follows:
>
> 2.1.1 Subject to paragraph 2.4 below, Clause 18.2 of the C&R Agreement shall be deleted and replaced with the following:
>
> *'18.2 Notwithstanding any other provision of this agreement, this agreement may be terminated by either party with effect from 30 November 2018 upon the provision* of *written notice to be received by the non-terminating party at any time prior to 30 November 2018. For the avoidance of doubt the instalments of the Fees referred to in clauses 17.1.3, 17.1.4 and 17.1.5 and the payments referred to in 17.2.3, 17.2.4, 17.2.5, 17.3.1.3,17.3.2, 17.3.3 and 17.3.4 shall not be payable where* a *party terminates pursuant* to *this clause 18.2'.*
>
> 2.1.2 Force India hereby agrees that the Fees set out in Clause 17.1.2 of the C&R Agreement shall be deemed to be apportioned between each World Championship Race in 2018 for rights in relation to the relevant World Championship Race, as set out in the table below. Unless and until the Team completes the relevant World Championship Race and BWT receives the rights for the relevant World Championship Race, the apportioned Fee for that World Championship Race (once paid or set-off by BWT) shall be deemed to be an advance payment and not income for Force India, and shall be secured under the Security Agreement and/or any additional security agreements that BWT may require Force India to enter into In [*sic*] relation to the subject matter of this deed (collectively the **Security Agreements).** The advance payments made by BWT for which rights have not yet been received by BWT shall be repayable by Force India to BWT:
>
> (a) in full without delay upon written notice from BWT to Force India, if Force India files for insolvency, takes any steps to file for insolvency or in the event that a liquidator, receiver, administrative receiver, administrator, compulsory manager or other similar officer is appointed with respect to Force India or any of its assets;

(b) in full without delay upon written notice from BWT to Force India, if Force India starts negotiations with any of its creditors with respect to a general readjustment of its obligations for reasons of actual or anticipated financial difficulties which BWT reasonably believes would have a material adverse effect on Force India's ability to meet Its [*sic*] obligations under this deed, the C&R Agreement, the Facility Agreement, the Security Agreement and/or any bridge loan provided by BWT to Force India; or

(c) without delay (without notice from BWT being required) in the amount allocated to the relevant World Championship Race below if: (i) Force India has not commenced that Race with at least one Car; or (ii) Force India has not commenced that Race and the previous Race with two Cars in each Race, provided that: (A) BWT's rights under this sub-paragraph (c) shall not apply to the extent that a Car has not commenced a Race due to a genuine and bona fide mechanical breakdown or Driver illness/injury; and (8) [*sic*] Force India will use Its [*sic*] best endeavours to replace any ill/injured Driver and resolve any mechanical breakdown."

[Table follows setting out columns detailing race, amount and status as at the date of the deed and clauses 2.1.3, 2.1.4 2.2 and 2.3.]

2.4 BWT's obligations under paragraphs 2.1.1, 2.2 and 2.3 above (including its agreement to amend Clause 18.2 of the C&R Agreement as set out in paragraph 2.1.1, provide the bridge loan pursuant to the Second Bridge Loan Agreement as set out in paragraph 2.2 and enter into the Facility Agreement as set out in paragraph 2.3), are conditional on the Parties entering into the Security Agreements by no later than the Longstop Date. For the avoidance of doubt, the Security Agreements must be in a form acceptable to BWT and will secure Force India's obligations under this deed, the First Bridge Loan Agreement, the Second Bridge Loan Agreement, any further bridge loan agreements agreed between the Parties, the Facility Agreement and the C&R Agreement. If the Security Agreements are not entered into by the Parties by the Longstop Date, BWT's obligations under paragraphs 2.1.1, 2.2 and 2.3 above shall be void and have no legal effect, but the provisions of paragraphs 2.1.2, 2.1.3 and 2.1.4 (and all other provisions of this deed) shall continue to remain In full force and have legal effect.

2.5 Save to the extent expressly amended herein, all terms and conditions of the C&R Agreement and the First Bridge Loan Agreement shall remain in full force and effect."

11. It will not be necessary to go into the detail of every clause and sub-clause set out above. The argument between the parties is tightly focused. Certain clauses do, however, need to be appreciated in their context.

The law and the submissions

12. In a nutshell, the difference between the parties is whether the effect of the foregoing contractual provisions is that certain payments made by the applicant to the company were refundable, giving rise to a debt entitling the applicant to prove in the liquidation, or whether, to use Mr Al-Attar's phrase, the tree lies where it fell, as the liquidator maintains. The answer involves consideration of the provisions in accordance with established principles of construction.

13. There is no real difference between the parties as to those principles. Mr Segan relies on the approach taken by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173 and the summary of those authorities by the Court of Appeal in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 which he reproduces in his skeleton argument with his own emphasis added and which I retain:

> "i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;
>
> ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;
>
> iii) **In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties** because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;
>
> iv) **Where the parties have used unambiguous language, the court must apply it** – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

> v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;
>
> vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;
>
> vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. **Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent**– see Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13; and
>
> viii) **A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain** - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11."

14. In the course of his submissions Mr Al-Attar took me to *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) paragraph 62 ff:

> "62. The general principles of construction were not in dispute. The court must ascertain what a reasonable person, that is, a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the contracting parties to have meant by the language

used: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [14]. This means disregarding evidence about the subjective intentions of the parties: *Rainy Sky* at [19]; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15].

63. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, Lord Hodge set out the applicable principles following *Rainy Sky* and Arnold v *Britton* as follows:

'10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, *"A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision"* (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in *Gan*

Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

> 64. The unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, but as Lord Neuberger said in Arnold v Britton at [19]-[20], commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it: Rainy Sky at [23].
>
> 65. There may be certain cases, however, where the background and context drive a court to the conclusion that "something must have gone wrong with the language": *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [14] (Lord Hoffmann); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913 (Lord Hoffmann). A "strong case" is required because courts do not easily accept that people have made linguistic mistakes in formal documents (*Chartbrook* at [15]). But if it is clear that something has gone wrong with the language, the court can interpret the agreement in context to "get as close as possible" to the meaning which the parties intended: *Chartbrook* at [23], citing *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus LR 1336 at 1351 (Carnwath LJ). This is part of the construction exercise, as opposed to a separate process of correcting mistakes, or a summary version of rectification: *Chartbrook* at [23]. Nonetheless, there are certain limits to the exercise. First, there must be a clear mistake in the language or syntax in the contract, as distinct from the bargain itself: *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437 at [37] (Lewison LJ). Second, the court can only adopt this approach if it is clear what correction should be made: *Arnold v Britton* at [78] (Lord Hodge).
>
> 66. Arguments which rely on what is absent from the drafting of the contract are to be treated with caution and in many cases provide little assistance: *Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771 at [59]. In the context of an insurance policy, if one cover is subject to an exclusion whereas another is not, the absence of that exclusion in respect of the latter cover is not decisive as to its scope: *Burger v Indemnity Mutual Marine Assurance Co* [1900] 2 QB 348 at 351.

I have set out in full the passage to which Mr Al-Attar invited my attention because of his emphasis on its importance in particular as regards the unitary exercise and iterative process described in the authority, the need for a textual/contextual approach to construction, which is an important plank of the case he puts forward.

15. I shall begin the exercise I must undertake with the liquidator's case, since it is the subject of the challenge. It is also more straightforward to analyse, although in saying that I do not mean that the simpler argument is necessarily the more compelling by

reason of that quality. The argument is neatly summarised in paragraphs 1 and 2 of Mr Segan's skeleton argument:

> "1.1 It is common ground that the monies in issue form part of the sponsorship fees paid by BWT pursuant to clauses 17.1.2.1 and 17.1.2.2 of the C&R Agreement. BWT accepts that those monies, having been paid to Force India, were the property of Force India for it to use as it wished (see e.g. Leadercramer ¶7).
>
> 1.2 It is common ground that the C&R Agreement was validly terminated by BWT with effect from 1 July 2018, pursuant to a notice served by BWT under clause 18.2 of the C&R Agreement on 28 May 2018. (BWT initially disputed this but has now accepted it.)
>
> 1.3 The only question, therefore, is whether there was any provision creating a contractual obligation upon Force India to repay the relevant monies to BWT (i.e. a debt) upon a termination for convenience by BWT under clause 18.2. There is no such provision. On the contrary, clause 18.2 specifically provides for the opposite, i.e. that if the C&R Agreement is terminated by BWT under that clause then:
>
> > *'…the payments referred to in clause 17.1.2.1, 17.1.2.2 …* ***shall be retained by Force India and no pro rata reimbursement of such Fees and payments, whether in accordance with clause 18.5 or otherwise, shall apply'***.
>
> 1.4 The Deed of Variation executed between BWT and Force India on 8 May 2018 ("**First Deed of Variation**") does not alter this analysis. On the contrary, as is explained below:
>
> > 1.4.1 the First Deed of Variation, despite creating new repayment obligations in respect of certain eventualities (see clause 2.1.2), did <u>not</u> do so in respect of a termination for convenience under clause 18.2;
> >
> > 1.4.2 the amendments to clause 18.2 of the C&R Agreement that *would* have been made by clause 2.1.1 of the First Deed of Variation were never, as is common ground, brought into effect; and
> >
> > 1.4.3 the First Deed of Variation explicitly confirmed that save to the extent expressly amended, the *"terms and conditions of the C&R Agreement … shall remain in full force and effect"* (clause 2.5).
>
> 2. In short, having elected to terminate the C&R Agreement in accordance with the termination for convenience right in clause 18.2, BWT is now seeking to avoid the clear and specific consequence expressly provided for in that clause, i.e. that Force

> India was entitled to retain monies that had been paid under (inter alia) clauses 17.1.2.1 and 17.1.2.2 and no pro rata reimbursement would apply. There is no contractual debt."

16. I pause there, noting for the moment only the phrase "or otherwise" in clause 18.2 which already enjoys the emphasis that appears from the bold type reproduced above but was emphasised yet further by Mr Segan in the course of his oral submissions. His analysis founded on the plain meaning of clause 18.2 is forceful in itself in so far as it applies to payments made under the provisions of clause 17 as mentioned; the phrase "or otherwise" must be taken to mean just what it says, is, I think, Mr Segan's point. I note here also the use of the word "expressly" in clause 2.5 of the Deed of Variation.

17. As will be apparent from the foregoing, the basis on which arrangements between the parties came to an end is of some importance since, as Mr Segan says, the C&RA provided for consequences which differed according to the mode of termination. If the company ceased operating a team, the C&RA would be "terminated with immediate effect and (subject to clause 18.5) without penalty to any party" (clause 4.5). According to clause 18.5, if that occurred the fees payable by the applicant over the entire term of the agreement were to be "pro-rated to the Termination Date" and "[a]ny such pro-rated sums paid in relation to any period after the Termination Date [were to] be reimbursed by Force India to BWT". In the event of termination for cause (insolvency, default or non-payment as defined) and the other party exercising its right under clause 18.1 to terminate, clause 18.5 pro-rating would again apply. If, however, either party elected to terminate for convenience under clause 18.2, then payments already made were preserved: "…shall be retained by Force India and no pro rata reimbursement of such Fees and payments, whether in accordance with clause 18.5 or otherwise, shall apply". Thus, there was a distinction as to what was to happen depending on the basis of termination, pro-rating in some circumstances but not in others.

18. Even though the Deed of Variation was designed to make changes, Mr Segan says that certain provisions never took effect. Clause 2.1.2, he concedes, made provision for certain sums already paid under the C&RA to be deemed "advance payment" rather than "income" and for repayment in certain circumstances, but not, he says, in the event of termination for convenience. Clause 2.2.1, which would have varied clause 18.2, did not have that effect because it was subject to a condition that was never fulfilled, the provision of a satisfactory security agreement (clause 2.4).

19. Mr Segan also relies on the absence of any specific contractual provision giving rise to a debt.

20. Finally, I should note Mr Segan's reliance on the *contra proferentem* principle. He accepts that is a rule of last resort but points out that it can be invoked where all the other canons of construction have been considered and applied. It requires ambiguity in a provision to be resolved against the *proferens*, the party who put the clause forward and who relies on it (see, for example, *Nobahar-Cookson v Hut Group Ltd* [2016] 1 CLC 573 paragraphs 12-14). The parties agreed at the hearing that in this case that was the applicant, the party who held the purse strings and was in the more powerful position of the two at the material time.

21. If Mr Segan's approach is largely textual, Mr Al-Attar's is both textual and contextual.

22. Mr Al-Attar says that the applicant has a claim in debt. By "debt" he means a debt under the general law; he does not use that term as one defined or set out in the contractual material but to describe an obligation that arises from his construction of it.

23. The applicant's case, he says, rests on the distinction between "advance payments" and "income" made in the Deed of Variation, the effect of which, he says, was this: the applicant made sponsorship payments which took the form of prepayments which were to be repaid until they became redesignated as income as a result of the company's performance of its obligations by providing the sponsorship services for the races in respect of which any advance was made (clause 21.2.1(c)). Before performance, or failing performance, any payment made by way of prepayment was refundable and thus a debt: performance was required to convert prepayments into income.

24. Mr Al-Attar says that the distinction between the two different terms applied to payments outlined in the preceding paragraph represented a change to the earlier provisions governing payment. The original payment clause was clause 17 of the C&RA. It provided for payments to be made on specified dates against the presentation of an invoice, not in advance of a scheduled race. There was no distinction then between prepayments and income. Clauses 17.1.2.1, 17.1.2.2, 17.2.2, 17.3.1.1 and 17.3.1.2 were all pre-1 July obligations payable on the presentation of an invoice. The remaining obligations were post-1 July obligations. Clause 18.2 allowed voluntary termination "with effect from 1 July 2018." The date was important: it was the reason for the "avoidance of doubt" provision. Post-1 July payments did not become payable and pre-1 July payments did not have to be repaid, even pro rata, precisely because termination could take place on 1 July 2018, part of the way through the schedule of instalments provided for by clause 17. "In other words," as he puts it, "the Break Clause under the CRA dealt with the problem of *part performance* in respect of a given instalment," an issue that arose by reason of the advance payment against invoice term and the possibility of effective termination outside the termination window.

25. The Deed of Variation, he submits, replaced the old payment regime and introduced a new one in the form of what he calls the revised payment clause, 2.1.2 of the Deed of Variation. He says that this did the following (see paragraph 28.2 of his skeleton argument):

> "28.2.1 It varied the instalments in Clause 17.1.2 of the CRA and thereby varied the payment terms for the 2018 season only. The payments which had *already* by this time been made for the 2018 season pursuant were deemed apportioned, as specified in the schedule, to particular Grand Prix.
>
> 28.2.2 "*Unless and until the Team completes the relevant World Championship Race*" the amounts scheduled were "*deemed to be an advance payment and not income of Force India*".
>
> 28.2.3 The amounts scheduled, for so long as they remained advance payments, were also deemed secured under the Security Agreement to be granted ("*…shall be secured under the security agreement…*"). As this agreement was not executed however, and the amounts owed as advance payments were (and are) unsecured debts.

> 28.2.4 The advance payments shall be repayable upon written notice by BWT upon Force India entering into insolvency, including upon administration, or a composition with its creditors or, with respect to a given Grand Prix, a race is not commenced with at least one car save for certain exceptions (such as mechanical failure or driver illness). See Clause 2.1.2(a)-(c), which sub-clauses are central to the Liquidators' case."

26. Thus, he says, advance payments that had not become "income" were repayable as debts. The fact that security was never given is irrelevant. He says the revised payment clause was "carved out of the conditionality in Clause 2.4 and was immediately effective".

27. The positive case put forward by Mr Al-Attar (see paragraphs 31 ff of his skeleton argument) is largely a reformulation of the foregoing but directed at Mr Segan's arguments. The main point which I think I need to note is his contention that the advance payments in the meaning of the revised payment clause are not, he says, "the payments" referred to in the break clause. He says they relate to specific Grands Prix which would either happen or not, "i.e. performance is *binary* and there is no question of '*pro rata reimbursement*´" which must refer to "a notional division of one of the three larger thrice-annual instalments."

28. He deals with Mr Segan's absence of express provision (he calls it the "why not say it argument") thus:

> "34. […]The short point is that those clauses are said to demonstrate the specific circumstances in which repayment was contemplated and *a contrario* that no repayment was contemplated in any other circumstances. This argument is as flawed in language as it is in logic. Those clauses provide:
>
> *"The advance payments made by BWT for which rights have not yet been received by BWT shall be repayable by Force India to BWT:*
>
> *(a) in full without delay upon written notice from BWT to Force India, If Force India files for insolvency, administrator, compulsory manager or other similar officer is appointed with respect to Force India or administrator, compulsory manager or other similar officer is appointed with respect to Force India or any of its assets;*
>
> *(b) in full without delay upon written notice from BWT to Force India, If Force India starts negotiations with any of its creditors with respect to a general readjustment of its obligations for reasons of actual or any of its creditors with respect to a general readjustment of its obligations for reasons of actual or anticipated financial difficulties which BWT reasonably believes would have a material adverse effect Force India's ability to meet its obligations under this deed, the C&R*

Agreement, the Facility Agreement, the Security Agreement and/or any bridge loan provided by BWT lo Force India;

(c) without delay (without notice from BWT being required) in the amount allocated to the relevant World Championship Race below if: (i) Force India has not commenced that Race with at least one Car; or (ii) Force India has nor commenced that Race and the previous Race with two Cars in each Race".

35. The above clauses do not state that the above circumstances are the *only* circumstances in which the debts owed in respect of the advanced payments are to be repaid. Absent express provision to that effect, the Liquidators have to imply a term to that effect to bar repayment. They have set out no such case. This is the first flaw in the Liquidators' case on this point. It is simply illogical to treat the above sub-clauses as exhaustive of the right to be repaid a debt.

36. The second flaw in the Liquidators' case on this point is a lack of attention to what the language does say:

36.1 Clause 2.1.2(a) confers a right to accelerate ("in full") on written demand ("written notice") if an insolvency filing is made or steps are taken by BWT to that end. Insolvency is not a repudiation of a contract in English law, nor is the opening of insolvency proceedings, especially an administration: [authorities are cited]. As happened in this case for a time, a company in administration can trade. The position of creditors can however be profoundly affected: for instance, by a moratorium, or by a disclaimer in the case of liquidation. There are, as such, manifold good reasons for agreeing Clause 2.1.2(a), and none of those imply an intention to give up the right to a debt. Indeed, the suggestion that a debt is not recoverable because of a lack of express specification that it should be repaid is absurd. A debt needs no such specification.

36.2 Clause 2.1.2(b) confers a right to accelerate ("in full") on written demand ("written notice") if negotiations for a compromise are commenced that might prejudice performance of any of the mentioned agreements, including the contemplated facility and security agreements (i.e. not limited to the CRA). It is obvious that BWT would want such a right in that event, which would allow it to maximise its power as a creditor.

36.3 Clause 2.1.2(c) is a race-specific repayment provision. It is not in fact set out in full above because it is detailed and concerns the terms of permitted mechanical failure, driver illness, etc, under which an advance payment need *not* be repaid. It therefore accounts for race-specific matters which required additional drafting. It provides no basis for the implied term the Liquidators require to bar payment of a debt.

> 37. Finally, the Liquidators have failed to step back and ask how unreasonable and uncommercial is the construction for which they contend:
>
> 37.1 It is common ground that BWT held all the cards in the negotiation: see Ross 1/10 ("…the Company was in a very weak position to negotiate the terms of further support from BWT, and BWT made it clear that it was not prepared to negotiate…").
>
> 37.2 It is obvious that the advance payment / income distinction was intended to create a debt in respect of each advance payment apportioned to each Grand Prix. The express intention that there should be security for the advance payments (whether or not that was granted) makes a nonsense of any suggestion that the parties did not intend to create debts by the Revised Payment Clause in the Variation Deed.
>
> 37.3 There is no reason whatsoever for BWT or Force India, which did not push back in the negotiations, to create a disincentive to termination on notice, specifically by requiring BWT *to gift* to Force India the debts which had just been created by the Variation Deed. The Liquidators' construction however requires the Court to conclude that this was the objective intention of the parties. It is an absurd construction. Cf. *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724, in which the court held that if the contract permitted the prepayment by the buyer (who had repudiated) to be retained by the seller it would be permitting the retention of a penalty".

29. Mr Al-Attar relies on the fact that that the company was to provide security in relation to the unearned prepayments. As I have already noted, it is accepted that security was never in fact given, but I agree with Mr Al-Attar that that does not deprive the fact of agreement to provide it of its evidential weight: as Mr Al-Attar puts it, it is not a reason to ignore it as a factor bolstering the applicant's argument that a debt or debts must have been in contemplation, since it is only a debt that can be the subject of security, at least in this context.

30. I have touched above on matters of timing. Mr Al-Attar also relies on a timing point arising out of the table at the end of clause 2.1.2 of the Deed which I have, for reasons of brevity, not reproduced above. The "status" column, the third in the table of the Deed, distinguishes between "Fees paid by BWT for rights received" and other payments designated as "advance payment[s] made by BWT for rights not yet received"; and for certain others "to be deemed an advance payment made by BWT for rights not yet received…to be secured…[and] repayable as set out in paragraph 2.2.2 above and not deemed Force India income until rights are received". The textual and contextual significance of this is plain.

31. Mr Al-Attar said more than once in his oral submissions that the negotiations that gave rise to the deed of variation "smashed up" or "blew apart" the initial contractual payment structure and replaced it by something new. Mr Segan rejected that colourful

description, inviting adherence to what the contractual terms actually said rather than what the applicant would like them to say.

32. A number of other propositions were advanced by Mr Al-Attar and Mr Segan. I shall deal with some of them in my conclusions to the extent that I think they assist, but not where I think I do not need to have recourse to them to reach a decision. (I can, for example, leave to one side any argument about trust or proprietary rights. Both sides accepted that those were not engaged.)

33. I turn then to my conclusions.

Conclusions

34. The task of the court is to construe the relevant words of a contract in their documentary, factual and commercial context in the light of the various factors outlined by Vos C in *Lamesa v Cynergy* and enunciated in *FCA v Arch*. I asked Mr Segan whether the matters enumerated by the Chancellor in the former case and the order in which he took them implied a hierarchy of some kind, but he confirmed that that was not the case. That must be right because the Chancellor himself speaks of the need to achieve a "balance between the indications given by the language and those arising contextually." That reflects and reinforces Mr Al-Attar's submission that construction is more than a literalist exercise but involves the unitary approach described in *FCA v Arch* and/or the cases cited in that judgment and requiring, as stated, both textual and contextual paradigms, the one not to exclude the other, so as "to ascertain the objective meaning of the language which the parties have chosen to express their agreement" with a view to the court's trying to "put[…] itself in the shoes of the contracting parties." The task is to ascertain what a reasonable person with all the relevant background knowledge of the parties at the material time would have understood the words they used to have meant. In looking at the words they used the aim is to ascertain the objective meaning of the language they chose to express what they agreed. That does not mean conducting an exercise that focusses solely on the wording of individual clauses but on the contract as a whole and in its wider context. This gives rise to the unitary exercise and iterative approach described in the case law.

35. The first step in the iterative process (but not in any hierarchical sense) is, I think, to look at the contractual provisions themselves, since "the departure point in most cases [is] the language used by the parties," who must be presumed to have intended what they actually said.

36. The language used in this case cannot be said to have been unambiguous. There is much to be said for Mr Al-Attar's proposition that the initial dispensation governing financial obligations was replaced by something new. It was not, however, totally new, in that for the reasons given by Mr Segan certain aspects of the old dispensation do appear to have been retained, which sit uneasily in the revised scheme. In spite of the tension between the two payment regimes I conclude that Mr Segan's analysis of the interaction between the C&RA and the Deed of Variation is the correct one for the reasons he gives. I take that view on the textual basis for which he contends to which I give significant weight in the light of the fact that the documents are complex, sophisticated agreements drafted by skilled professionals such that their natural meaning should not be rejected simply because of an unfortunate effect to which that might give rise.

37. The second step (but again not in a hierarchical way) is to go to the context, which I take to be the documentary context beyond the clauses directly in issue as well as the background and the commercial implications of where a purely textual analysis takes one.

38. It is common ground that the company was in financial difficulty by the time the Deed of Variation was entered into and had been for some months. The applicant was bailing out the company, and in doing so was anxious to preserve its position as best it could, ensuring the continued sponsorship on the one hand, but securing a possible claw back of money spent for which it received nothing on the other. There is internal evidence of that in the documents themselves by reason of the very distinction that Mr Al-Attar draws between prepayments and income as well as in the intended provision of security and from Mr Loughrey's evidence:

> "[T]he Applicant sought to support the team by providing it with additional finance to help keep it afloat (while sensibly and reasonably seeking to protect itself against by requiring security to protect the sums advanced)."

The assistance the applicant provided must have been given with that in mind. Ms Ross says nothing to contradict that but paints a different picture. She says there were minor variations made by the Deed, which she accepts, but otherwise that, "we simply accepted the wording proposed by BWT." She also says that in practice nothing really changed in that the sponsorship moneys were treated by the company as ordinary working capital: there was no segregation or ringfencing of funds. She says she did not recall the status of the advance payments as being "an issue of very much interest to me or the Company; our focus was simply on keeping the Team going."

39. I tread carefully here, because subjective intentions are not the question, and I have heard no oral evidence. Doing the best I can, however, I conclude:

> (a) The company was in serious financial difficulties in 2018 (which is common ground).
>
> (b) The applicant wanted to and did help the company by providing additional finance and renegotiating terms, not least because it, no doubt, wanted the continued benefit of the sponsorship in which it had invested to the extent that that was possible and (indeed it did continue to enjoy it even after the asset sale).
>
> (c) But it was not willing to do so on an open ended basis: it was concerned to recover as much as it could of money expended for which it received no benefit.
>
> (d) The attention of the company was directed at survival and little else.

That leaves unexplained the company's failure or refusal to execute the security (and loan documents) the applicants were asking for, which, for whatever reason, left it with the benefit of old contractual provisions which favoured it over the applicant and which

appears to have been reflected in its treatment, even after entering in to the Deed of Variation, of the funds it received.

40. I think that means that the parties must be taken to have had competing rather than complementary concerns or intentions at the time the Deed of Variation was executed. If that is the case, I am driven to conclude that I cannot ascribe to them anything that can be described as the objective intention of the parties (plural) within the meaning of the case law as opposed to the particular intentions of each. Faced with that I am thrown back on the textual analysis which, for the reasons I have given, means that the liquidator's case prevails over the applicant's.

41. If I am wrong in my primary conclusion, it seems to me, in the alternative to what I have held above, that recourse must be had to the *contra proferentem* rule which again operates in favour of the liquidator.

42. For the foregoing reasons I shall dismiss this application. The subsidiary issue on quantum no longer needs to be decided.