



Neutral Citation Number: [2019] EWHC 2344 (Comm)

Case No: CL-2018-000575

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/09/2019

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

Between :

FLOWGROUP PLC
- and -
CO-OPERATIVE ENERGY LIMITED

Claimant

Defendant

Jonathan Cohen QC (instructed by **Memery Crystal LLP**) for the **Claimant**
Thomas Plewman QC (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Hearing dates: 11 July 2019

Approved Judgment
.....

Christopher Hancock QC :

Introduction.

1. I have to deal with a number of applications, as follows:
 - (1) The Claimant's application for summary judgment;
 - (2) As an alternative to (1), the Claimant's application for an interim payment;
 - (3) If (1) is not granted, the Defendant's application for security for costs;
 - (4) The Defendant's application, if summary judgment is granted, for a stay of execution.
2. I deal with each in turn, beginning with the summary judgment application.

Summary judgment.

The facts.

3. The relevant facts were as follows:
 - (1) The parties entered into a share sale agreement ("SPA"), dated 10 April 2018, pursuant to which the Claimant agreed to sell to the Defendant the shares in its wholly owned subsidiary Flow Energy Limited ("FEL").
 - (2) FEL was an energy company, which supplied gas to customers, which was in turn supplied to it by Shell Energy Europe Limited ("Shell"). Monies were paid by customers into an account or accounts termed the "Shell Collateral Account", which was, as its name suggests, to be available as security for monies owed to Shell. Monies were then payable by FEL to settle its liabilities out of a distribution account, which was in turn funded by payments from the Shell Collateral Account. Such payments from the Shell Collateral Account to the distribution account had to be approved by Shell.
 - (3) The relevant terms of the original SPA, which was dated 10 April 2018, were as follows:

“Claim” means any claim, action, proceeding or demand under or in connection with this Agreement and/or any Transaction Document;

“Completion” means completion of the sale and purchase of the Sale Shares in accordance with this Agreement;

“Completion Date” means 30 April 2018;

“Completion Statement” means the statement in respect of the Target Company [sc. Flow Energy Limited] as at the Completion Date showing the Completion Working Capital, prepared in accordance with Schedule 9;

“Completion Working Capital” means the Working Capital as shown by the Final Completion Statement...

“Final Completion Statement” means the Completion Statement which becomes final and binding in accordance with Part A of Schedule 9¹;

“Final Completion Statement Date” means the date on which the Completion Statement becomes final and binding in accordance with part A of Schedule 9...

“Retention Amount” means £1,000,000...

“Shell Cash Collateral” means the amount held in cash in the Shell Collateral Account pursuant to the security arrangements agreed between the Target Company and SEEL;

“Shell Collateral Account” means the bank accounts with HSBC with:

- (a) account number 62625261 and sort code 40-17-14; and
- (b) account number 12625288 and sort code 40-17-14;...

“W&I Insurance Policy” means a warranty and indemnity insurance policy to be issued by the Underwriter to the Buyer by the date which is no later than two Business Days prior to the Completion Date;...

“Warranty claim” means a claim by the Buyer under clause 9.1; and

“Working Capital” means for the period ended on the Completion Date:

- (a) current assets (including trade debtors and prepayments but excluding cash, cash equivalents, deposits, credit facilities, the Cash Collateral and the Shell Cash

¹ Schedule 9 contained a procedure, in relatively standard form, for an expert determination procedure pursuant to which an expert accountant would resolve any disputes as to the completion accounts and render a binding decision. This happened here, as I relate later on when I come to deal with the Buyer’s counterclaims.

Collateral and excluding, for the avoidance of doubt, capitalised customer acquisition costs in relation to switching site commissions and other third party direct sales channels), as recorded in the monthly management accounts of the Target Company under the headings “Debtors” and “Current Assets”, less

(b) current liabilities, (including trade creditors, accruals (accruals including trade, rent, salaries, monthly operating expenses, interest payable to trade creditors, and ROCS) but excluding debt and interest on financial instrument debt, as recorded in the monthly management accounts of the Target Company under the heading “Current Liabilities” (which, for the avoidance of doubt, will include, but not be limited to, a payment of £208,333 due to SEEL in April 2018 (to the extent that such payment has not already been made by the Completion Date) and which, for the avoidance of doubt, will include, but not be limited to, a payment of £208,333 due to SEEL in May 2018); and

(c) excluding any and all intercompany receivables, payables, intercompany debt or debt like instruments and any director or related party balances....

3. PURCHASE PRICE.

3.1 Amount

(a) The aggregate purchase price for the Sale Shares is:

- (i) £9,250,000² less the deductions referred to in paragraph 2.2 of Schedule 4³; plus*
- (ii) the amount by which Completion Working Capital exceeds Target Working Capital; or minus*
- (iii) The amount by which Completion Working Capital is below Target Working Capital,*

Subject to adjustment in accordance with clauses 3.2 and 3.5.

(b) After Completion the Purchase Price may be treated as having been reduced in the manner described in paragraph 3.5, but an adjustment of this kind does not affect the amount that the Buyer must pay on Completion.

3.2 Working Capital Adjustment

If the Completion Working Capital is:

² The Purchase price was later amended, but I was told that this did not matter for the purposes of this judgment.

³ Again, my understanding was that nothing turned on these deductions.

- (a) *less than the Target Working Capital:*
 - (i) *the Purchase Price will be reduced by an amount equal to the shortfall; and*
 - (ii) *the Seller must repay to the Buyer (in accordance with clause 3.4) an amount equal to such shortfall; or*
- (b) *more than the Target Working Capital:*
 - (i) *the Purchase Price will be increased by an amount equal to the excess; and*
 - (ii) *the Buyer must pay into the account of the Seller's Solicitors (in accordance with clause 3.4) an amount equal to such excess; or*
 - (iii) *equal to the Target Working Capital, there will be no adjustment to the Purchase Price under this clause 3.2.*

3.3 Retention Amount

The Buyer shall be entitled to set-off, against the Retention Amount, any amount due to it under clause 3.2(a) and the balance, if any, shall be paid into the account of the Seller's Solicitors as set out in clause 3.4...

10. LIMITATION ON SELLER'S LIABILITY.

The provisions of Schedule 7 apply to impose limitation on the Seller's liability under this Agreement....

12. POST COMPLETION OBLIGATIONS AND SEPARATION ISSUES...

12.2 Release of Cash Collateral

- (a) *The Buyer must, as soon as reasonably practicable following Completion:*
 - (i) *Procure the Target Company's request's from each Supplier a statement of collateral confirming the amount of Cash Collateral held by that Supplier as at the Completion Date (together, the "**Completion Cash Collateral Amounts**") and promptly provide a copy of each statement to the Seller;*
 - (ii) *procure the release of the Completion Cash Collateral Amounts to the Target Company, it being agreed that the Buyer shall agree to replace any Cash Collateral with cash or by providing a parent company guarantee required by the Sellers to remain in place following Completion; and*

(iii) *pay into the account of the Seller's Solicitors the Completion Cash Collateral Amounts within 2 Business Days of the earlier of receipt by the Target Company (or the Buyer):*

(1) *of such amounts released by the relevant Supplier; and*

(2) *confirmation by the relevant Supplier of any Completion Cash Collateral Amounts having to remain in place following Completion.*

(b) *After Completion, the Buyer shall provide, and must ensure the Target Company shall provide to the Seller all material communication between the Seller, the Target Company and the Suppliers relating to the Completion Cash Collateral Amounts.*

(c) *The Buyer shall pay into the account of the Seller's Solicitors any Completion Cash Collateral Amounts not already paid under this clause 12.2 on the three month anniversary of the Completion Date.*

(d) *The maximum amount to be paid by the Buyer into the account of the Seller's Solicitors under this clause 12.2 shall not exceed the Completion Cash Collateral Amounts.*

12.3 Payment of Shell Cash Collateral

The Buyer must, as soon as reasonably practicable following Completion, pay into the account of the Seller's Solicitors an amount equal to the value of the Shell Cash Collateral (such amount to be calculated at 5pm on the Completion Date).

SCHEDULE 7

Limitations on Seller's Liability

1. MAXIMUM TOTAL LIABILITY OF SELLER

1.1 *Subject to paragraph 1.2 below, the maximum aggregate liability of the Seller under or in respect of any and all Claims (including, for the avoidance of doubt, any and all Warranty Claims and Claims under the Tax Covenant, together with any and all elements relating to interest and costs) shall be limited to, and shall not exceed in any way whatsoever, the sum of £1.00 in aggregate. The parties have entered into this Agreement with the expectation that the Buyer's sole recourse in connection with recovering any such amount will be pursuant to the W&I Insurance Policy to be entered into by the Buyer following the date hereof.*

1.2 *The Buyer acknowledges and agrees that the cap contained in paragraph 1.1 above will apply notwithstanding any subsequent non-payment under the W&I Insurance Policy or any vitiation or expiry or termination of the W&I Insurance*

Policy or insolvency of the Underwriter or for any other reason whatsoever, including any failure by the Buyer to enter into the W&I Insurance Policy.”

- (4) Also on 10 April 2018, a further agreement was entered into, involving Flowgroup, Flow Energy, Coop and SEEL (“the Side Agreement”). That agreement contained the following further terms:

“6 Coop will, on Completion, pay to PLC the amount calculated under paragraph 2.2 of Schedule 4 of the SPA, being currently estimated to be £388,578 calculated as follows:

(a) Purchase Price: £9,250,000

LESS

(b) Retention Amount: £1,000,000

(c) SEEL Contribution: £5,978,422

(d) W&I Insurance Policy Premium: £83,000 (provided such W&I Insurance Policy has been incepted);

(e) SEEL Fee Adjustment: £1,800,000

7 Coop and PLC acknowledge that it will be necessary to make a payment of £3,062,000 to Shell on 30 April 2018 (the “Shell April Payment”). It is intended that the Shell April Payment will be funded from the proceeds received under paragraph 6 above and that any shortfall in funds available will be collected by Shell from the Shell Collateral Account (as defined in the SPA) immediately prior to Completion following a notification by PLC to Shell of the amount of any such shortfall available for payment no later than two Business Days (as defined in the SPA) prior to Completion. If the Shell April payment has been recovered in full, Shell shall provide PLC and Coop with written confirmation of the same. PLC agrees that if following such payment by PLC and the removal of any shortfall by Shell from the Shell Collateral Account there remains any outstanding deficit in relation to the Shell April Payment:

(a) Shell will defer any such deficit following Completion and provide to FEL, PLC and Coop notice of such deferral and the amount of such deficit within two Business Days after Completion; and

(b) any such deficit will be settled by PLC out of the sums due to PLC pursuant to paragraphs 14 and 16 below and any funds due to PLC

from Coop following the final determination of the Completion Statement (as defined in the SPA); and

- (c) *PLC agrees that, following receipt of such notice as per paragraph 7(a), it will direct Coop to pay such sums referred to in 7(b) above to Shell as may be required in order to satisfy the deficit in full prior to any payments to PLC.*

Shell acknowledges that it shall have no right of recourse against FEL in respect of any outstanding deficit in relation to the Shell April Payment and that Shell's sole rights of recourse in respect of such shall be those outlined against PLC at paragraphs 7(b)-7(c) above.

8. *Coop will pay PLC an amount equal to the Shell Cash Collateral calculated as at 5.00pm London time on 30 April 2018 (and, for the avoidance of doubt, excluding any sums paid to or withdrawn by Shell pursuant to paragraph 7 above) as soon as reasonably practicable following Completion....*

...22. *To secure obligations owed to Shell under this letter, PLC and FEL undertake that (i) all Cash Collateral retrieved by or on behalf of FEL between the date hereof and Completion shall, promptly upon receipt, be deposited in the Shell Collateral Account and (ii) by no later than close of business on 27 April 2018, all cash funds held by PLC and FEL, as at that time (and with the exception of sums to the value of £200,000, which may be retained by PLC in separate accounts) shall be transferred into the Shell Collateral Account."*

- (5) In fact, however, it proved impossible to complete the transaction, as had been contemplated, on 30 April 2018. It is the Defendant's case that this was due to a breach of contract on the part of the Claimant. At a meeting on 27 April 2018, it was clearly agreed that a delay of the completion date would have to occur, and an amending agreement was reached, resulting in amendments to both the SPA and the Side Agreement. The relevant terms of that agreement ("the Amendment Side Letter") were as follows:

"1. The Parties agree that with effect from the date of this letter, the Flow Side Letter is amended as follows:

1.1 all references to "30 April 2018" shall be replaced with "1 May 2018";...

1.3 In paragraph 6, the reference to "£388,578" shall be replaced with "£3,288,578" and the reference to "£1,800,000" shall be replaced with "£1,400,000";

1.4 in paragraph 22, the reference to “27 April 2018” shall be replaced with “30 April 2018”.

(6) The discussions at this meeting are potentially in dispute. The Defendant maintain that there were conversations which gave rise to an estoppel, either by way of convention or representation; or which give rise to a right to rectification. The exact terms of that estoppel have become important, and I set out the pleadings and the supporting evidence as a result.

(7) Starting with the pleadings, these stated as follows, in paragraphs 14.3 to 14.5:

“14.3 Mr Bird spoke to Peter Dubois (CFO of the Defendant’s group) by telephone about the proposal [sc to change the completion date]. Mr Dubois indicated that direct debits might change the amount in the Shell Collateral Account and that the Defendant should not be passing any additional money to the Claimant as a result of a change in completion date.

14.4 Mr Bird then spoke again to Mr Lovell and David Harrison (an associate at Hogan Lovells). He indicated that neither party should benefit from any change to the completion date, and Mr Lovell represented that this would be the case. Mr Bird specifically drew attention to the direct debit issue which Mr Dubois had raised in relation to the Shell Collateral Account, and said that the Defendant would be prepared to move the completion date only on that basis. Mr Lovell agreed this proposal.

14.5 The effect of that discussion was that Mr Lovell represented to Mr Bird that a change in completion date would not operate to the financial detriment of the Defendant and, specifically, that it would not require the Defendant to pay out to the Claimant the proceeds of any direct debits which were in the Shell Collateral Account as a result of the proposed delay in completion.”

(8) The evidence was in paragraph 12 of the witness statement of Mr Bird, and was as follows:

“12 As explained in paragraph 14 of the Defence and Counterclaim, representations were made to Co-op Energy in reliance on which it agreed to the delayed completion, which give rise to an estoppel and/or an entitlement to rectification.

12.1 *I confirm that the representations alleged were made. In particular, I confirm that:*

- (a) *I raised concerns during a meeting at about 4pm on 27 April 2018 about the implications of a delay to completion of the transaction for working capital and the Shell Collateral Account (as defined in the SPA) and that Mr Lovell (then Chairman of Flowgroup) told me that a change to the completion date would be a purely administrative issue).*
 - (b) *I spoke to Mr Dubois, who is CFO of the group which includes Co-op Energy, about the proposed delay to completion, and that Mr Dubois raised the issue that direct debits might change the amount in the Shell Collateral Account. His concern was that those direct debit movements resulting from the change in completion date should not result in Flowgroup receiving any additional money.*
 - (c) *I then had a further discussion with Mr Lovell and Mr Harrison (of Hogan Lovells, Flowgroup's solicitors at the time), making clear that neither party should benefit from any change in completion date. I specifically drew attention to the direct debit issue which Mr Dubois had raised with me in relation to the Shell Collateral Account, and said that Co-op Energy would only agree to the change of completion date on that basis. Mr Lovell agreed to that proposal and I therefore agreed to delay completion by one day.*
 - (d) *When draft copies of the Amendment Side Letter and SPA Amendment (as defined in the Particulars of Claim and the Defence and Counterclaim respectively) were drafted by Mr Harrison (in a meeting room, in my presence, on 27 April 2018), Mr Harrison informed me that the revised wording he had prepared addressed the direct debit issue that I had raised.*
 - (e) *When draft copies of the Amendment Side Letter and SPA Amendment (as defined in the Particulars of Claim and the Defence and Counterclaim respectively) were circulated, there was no indication from Mr Lovell or Flowgroup's solicitors that the agreement we had reached was not reflected. I agreed the drafts on that basis."*
- (9) I turn to the financial position, as demonstrated by the Bank statements to which I was taken. Those reveal the following.

- (a) On 30 April 2018, there was a sum of £599,020.01 in the Shell Collateral Account and the sum of £1,372,920 in the Distribution Account, totalling £1,971,940.01.
 - (b) On 1 May 2018, there was the sum of £1,547,626.81 in the Shell Collateral Account and the sum of £417,823.66 in the Distribution Account, totalling £1,965,450.47.
- (10) The differences were accounted for by the following cash movements:
- (a) Starting with the Distribution account:
 - (i) This had a balance on 30 April of £1,372,920.07;
 - (ii) That account received £342 from 4 customers on 1 May;
 - (iii) Payments to creditors totalling £955,438.41 were made from that account;
 - (iv) A payment to the Claimant of £405,000 was made on that day from that account;
 - (v) The remaining cash balance on that account was therefore £12,823.66.
 - (b) Turning to the Shell Collateral Account:
 - (i) On 30 April, as noted, that account had a closing balance of £599,020.01;
 - (ii) On 1 May, receipts came in totalling £948,606.80;
 - (iii) The closing balance on that account was thus £1,547,626.81.
- (11) The Defendant has paid the sum of £599,020.01 to the Claimant. However, it has not paid the further sum of £948,606.80. It is this latter sum for which summary judgment is sought.

The parties' respective submissions.

4. As I have noted, the claim was for summary judgment for amounts equal to the sums standing in the Shell Collateral Account on the completion date, which, after amendment, was 1 May 2018.
5. The defences relied on were threefold:
 - (1) First, the Defendant claimed that the delay in completion was due to a breach of contract on the part of the Claimant and that had that delay not taken place, they would have paid out less.
 - (2) Secondly, the Defendant relied on a plea of estoppel, either by representation or convention. I have set out above the terms of the pleadings and the witness evidence in this regard. The Defendant said that had the representations pleaded not been made, then they would not have agreed the extended completion date; and that it would be inequitable for the Claimant to resile from those representations.
 - (3) Thirdly, the Defendant pleaded rectification, to the effect that the amendment agreement should have included a term similar to that relied on by way of estoppel.
6. I will deal with these defences in this order.

Breach of contract.

7. Starting with the breach of contract plea, I will assume for present purposes that the delay in completion was indeed due to a breach on the part of the Claimant. The question then would be whether this, arguably, gives rise to a defence to the claim for summary judgment. In turn, this would depend on whether the delay, which was caused by the breach, caused loss to the Defendant, a question the answer to which would depend on a comparison between the position as it would have stood had there been no delay and the position as it in fact stood after the delay.
8. I have set out above the contractual provisions which establish the scheme for events leading up to completion as they relate to the cash element of the transaction. Looking at matters as they would have taken place had it not been for the delay, which for present purposes I am assuming was due to a breach:

- (1) In the period leading up to completion, all amounts received by the Claimant were to be paid into the Shell Collateral Account: see clause 22 of the Side Agreement. The only limitation is that the Claimant was to be entitled (but not obliged) to hold back £200,000 in other accounts.
 - (2) On the basis of the bank statements that I have seen, the amount in the Shell Collateral Account should have been £1,971,940.01, assuming that all monies received before 30 April 2018 were paid into that account (including therefore the monies in the distribution account).
 - (3) Completion would then have taken place on 30 April 2018.
 - (4) Following completion, an amount equal to the amount in the Collection Account (ie £1,971,940.01) would have to have been paid by the Defendant to the Claimant: see clause 8 of the Side Agreement.
9. Turning to the actual position, then, in fact, by reason of the one day's delay in completion:
- (1) The Shell Collateral Account was increased from £599,020.01 to £1,547,626.81 because of enhanced receipts.
 - (2) Conversely, the amount in the Distribution Account was reduced (because of the payment of creditors) to £417,823.66.
 - (3) The total amount that should have been paid into the Shell Collateral account as at completion was the sum of these two amounts, or £1,965,450.07.
 - (4) The Defendant would then have had to pay this sum on or immediately after completion.
10. The comparison between the actual and the hypothetical shows, therefore, that, rather than making a loss because of the delay, the Defendant received a slight benefit (in the amount of about £6,500).
11. It follows, in my judgment, that the suggested defence based on the assertion that the delay was due to the Claimant's breach of contract does not hold water. That suggested defence does not provide an arguable defence to the claim for summary judgment.

Estoppel by convention or representation.

12. Turning to estoppel by convention, the Defendant relied on the requirements for an estoppel as set out by Briggs J (as he then was) in *HM Revenue and Customs v Bencdollar Limited* [2010] 1 All ER 174, at paragraph 52 and *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] Pens LR 411 at paragraphs 136-7, (as subsequently approved by the Court of Appeal in *Mitchell v Watkinson* [2015] L&TR 22 at paragraph 49) where he said:

“... the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, to be derived from Keen v Holland, and the cases which comment upon it, are as follows:

- i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.*
- ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.*
- iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.*
- iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.*
- v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”*

13. As regards estoppel by representation, I was referred to the following passage in Wilken and Ghaly on The Law of Waiver, Variation and Estoppel:

“First, A makes a false representation of fact to B... Second, in making the representation, A intended or knew that it was likely to be acted upon. B, believing the representation, acts to its detriment in reliance on the representation. Fourth, A subsequently seeks to deny the truth of the representation. Fifth, no defence to the estoppel can be raised by A.”

14. I am content to take these as accurate statements of the law, particularly since the Claimant did not raise any real argument to the contrary.

15. In response to the plea of estoppel, the Claimant instead argued that there was here no detriment, since, looking at the counterfactual, the position that the Defendant was in fact in was no different from that which it would have been in had completion taken place, as originally intended, on 30 April 2018. In my judgment, this argument could in fact be put in a number of different ways.
 - (1) First, it could be argued, as it is, that the representations have occasioned no detriment, since the actual position occupied by the Defendant is the same as it would have been had completion place when it was originally intended it should.
 - (2) Secondly, it may be said that the Claimant is not resiling from the representations, but is living up to them. This is another way of putting the same argument.
16. In both instances, the central question is whether the Defendant is worse off as a result of the delay.
17. Prior to turning to this question, however, I need to deal with one point that arose during the course of the hearing. This is as to the precise terms of the representation. I have noted already the pleaded case and also the evidence as to the representation. Prior to the hearing, it appeared to be common ground that the representation was that the day's delay in completion would not prejudice either party. However, during the hearing (and, in fairness to Mr Plewman QC, in his skeleton argument), the suggestion was made that it was in fact a representation that the payments into the Shell Collateral Account would not be taken into account in determining how much the Defendant should pay, but that payments which were made out from the various accounts should, putting the Defendant into a better position by reason of the delay.
18. No formal application for permission to amend was made by the Defendant. Mr Plewman QC attempted valiantly to persuade me that the pleading could and should be construed in this way, and that the witness evidence also supported this interpretation of his case. In my judgment, the representation pleaded is clearly that there should be no prejudice caused to either party by the delay. In this regard, I would refer in particular to paragraph 14.4 of the pleaded case, where it is pleaded that ***“Mr Bird then spoke again to Mr Lovell and David Harrison (an associate at Hogan Lovells). He indicated***

that neither party should benefit from any change to the completion date, and Mr Lovell represented that this would be the case.”

19. That is also the nature of the witness evidence, and in particular paragraph 12.1(c) of the statement of Mr Bird, where he states that *“I then had a further discussion with Mr Lovell and Mr Harrison (of Hogan Lovells, Flowgroup’s solicitors at the time), making clear that neither party should benefit from any change in completion date. I specifically drew attention to the direct debit issue which Mr Dubois had raised with me in relation to the Shell Collateral Account, and said that Co-op Energy would only agree to the change of completion date on that basis. Mr Lovell agreed to that proposal and I therefore agreed to delay completion by one day.”*
20. True it is that the reason for the concern was that certain payments would be coming in on the first of the month. However, this does not affect what the overall representation was that was made (or is to be treated as having been made for the purposes of this application). Accordingly, I hold that if there was a representation, which both parties are assuming for the purposes of this application to be the case, that representation was that neither party should be prejudiced by the delay, and I proceed to consider each party’s argument on this basis.
21. Turning to the Claimant’s case in more detail:
 - (1) The side agreement required that all monies received prior to 30 April 2018 should be transferred into the Shell Collateral Account: see clause 22. Had this been done, the sums in that account as at close of business on that day would have been £3,062,000 plus £1,971,940.01;
 - (2) A payment of £3,062,000 would have then to have been made to Shell: see clause 7 of the Side Agreement⁴;
 - (3) The amount remaining in the Shell Collateral Account would then have been £1,971,940.01;

⁴ As was in fact done on 1 May 2018.

- (4) The Defendant would then have had to pay an amount equal to the amount remaining in the Shell Collateral Account to the Claimant: clause 8 of the Side Agreement.
 - (5) Thus, had the date of completion remained at 30 April 2018, the sum paid by Defendant to Claimant would have been £1,971,940.01;
 - (6) The amount actually paid was £599,020.01;
 - (7) The amount now claimed is £948,606.80, which is the balance between what has been paid and what should have been paid. Thus, the overall position of the Defendant is no worse than it would have been had completion taken place on 30 April 2018, as originally programmed.
22. The Defendant put forward a number of arguments in response, as follows:
- (1) First, there was no linkage between the Shell Collateral Account and the Distribution Account; and, indeed, the Claimant would have needed Shell's consent to transfer monies from the Shell Collateral Account to the Distribution Account;
 - (2) Secondly, the Claimant had to operate the Distribution Account in the normal and usual way;
 - (3) Thirdly, the Claimant might not in fact have taken monies from the Distribution Account even if it was entitled to;
 - (4) Fourthly, various amounts were paid from the Distribution Account to other third parties, including related parties. This, so it is contended, reduced the value of the company.
 - (5) Overall, it is necessary for these issues to be examined in detail, with the benefit of accounting evidence, rather than determined summarily.
23. I will deal with each of these arguments in turn.
- (1) There clearly was a linkage between the Shell Collateral Account and the Distribution Account, since the terms of the Side Agreement required that all cash

coming into the company prior to completion should be paid into the Shell Collateral Account. Although Shell would have to consent to the payment of monies from the Shell Collateral Account to the distribution account, since this had a bearing on the security available to it, there was no requirement for consent for transfers to the Shell Collateral Account from the Distribution Account.

- (2) Secondly, there is no real evidence to support the suggestion that the Distribution Account was not being operated in the normal way. Indeed, the only manner in which it might be said that what happened was not what was contemplated is that monies were taken directly from the distribution account rather than being transferred to the Shell Collateral Account, thus increasing the liabilities of the Defendant. This has not operated to prejudice the Defendant at all.
- (3) Next is the argument that the Claimant would not have exercised its contractual right to take money from the Distribution Account. This argument is, in my judgment, misconceived. The question must be what the parties' respective rights would have been had there not been the alleged representations. Whether those rights would have been exercised does not affect the issue of detriment. In any event, I accept the Claimant's contention that a commercial party such as the Claimant would have exercised its rights, and any suggestion to the contrary is not sufficient to give the Defendant any defence with a real prospect of success.
- (4) The next argument is a more complex one. It is asserted that various payments out were made after 1 May 2018 which should have been made before, and that this has operated to reduce the value of the company, thus influencing the amount of the Defendant's claim for a price reduction and consequent repayment of sums paid to the Claimant. The Claimant makes a number of points in answer to this.
 - (a) First, the Claimant does not accept that the sums paid after 1 May were properly payable before this date. I have seen no invoices in this regard and do not think that I can determine who is right on this.
 - (b) Secondly, the Claimant contends that the Defendant's argument ignores the impact of these payments upon the price adjustment claim. The Claimant argues as follows:

- (i) The purchase price required the addition of “*the amount by which Completion Working Capital exceeds Target Working Capital*” or the subtraction of “*the amount by which Completion Working Capital is below Target Working Capital*”;
- (ii) “*Target Working Capital*” was a fixed sum of minus £2.4 million;
- (iii) “*Completion Working Capital*” was the “*Working Capital shown by the Final Completion Statement*”;
- (iv) “*Working Capital*” required the deduction from “*current assets*” of “*current liabilities (including trade creditors, accruals, (accruals including trade, rent, salaries, monthly operating expenses, interest payable to trade creditors, and ROCS...*”
- (v) The impact of these definitions was that, if FEL owed money at the date of completion to any trade creditors, the Defendant paid less for FEL’s shares. If FEL had owed less, because of a prior payment, then the Defendant would have paid more.
- (vi) Hence, the overall position of the Defendant is again unaffected by these payments. If they had been paid prior to the Completion Date, the Defendant would have to have paid more for the company. As the Claimant put it, if money in the Distribution Account had been used to pay FEL’s trade creditors, then there would indeed have been less in the Distribution Account to be paid out to the Claimant, but the Defendant would have paid a greater purchase price. The argument is absolutely circular.
- (vii) Overall, I accept the Claimant’s argument. Again, I find that the Defendant’s contention has no real prospect of success.

Rectification.

24. In this regard, I was referred to the well known passage in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71,74, as approved in *Chartbrook v Persimmon Homes Ltd* [2009] 1 AC 1101, which states as follows:

“33.. The party seeking rectification must show that:
(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
(2) there was an outward expression of accord;
(3) the intention continued at the time of the execution of the instrument sought to be rectified;
(4) by mistake the instrument did not reflect that common intention.”

25. Again, there was no dispute about this test.
26. Here, the position is more complex, but in my view the end result is the same, for the following reasons:
- (1) In circumstances in which the Claimant is prepared to accept that the alleged representations were made, then, in my judgment, the first three of the above requirements are satisfied.
 - (2) I must also, in my judgment, accept that, since the Amendment Side Agreement did not include specific reference to the agreement relied on, this may have been by mistake. Accordingly, for the purposes of summary judgment, I should treat the requirements for rectification as satisfied.
 - (3) It follows that the Amendment agreement must be treated as including a term that the delay provided for by the agreement would not cause prejudice to either party.
 - (4) The next question is whether there has been a breach of that agreement.
 - (5) For the reasons I have already given, then in my judgment, there has been no such breach (since the delay has not occasioned any prejudice to the Defendant). Accordingly, if the agreement does fall to be rectified, then this in turn will not give the Defendant a defence to the Claimant’s claim.
 - (6) For the above reasons, I take the view that this last defence also has no chance of success.
27. It follows from what I have said above that all of the defences put forward by the Defendant, in my judgment, have no reasonable prospect of success.

Some other reason for refusing summary judgment?

Set-off and insolvency.

28. I turn to the next ground on which the Defendant relies to resist an order for summary judgment, which is that there is some other reason why summary judgment should not be granted. This is because the Defendant has cross claims which give rise to a set off, and the Claimant is in administration.
29. Although two cross claims are identified by the Defendant, only one was relied on before me as justifying the refusal of summary judgment. This was the claim for a Price Adjustment, on the basis that the Final Completion Statement shows that there has been an overpayment by the Defendant for the shares. I was told that the amount of this overpayment, as determined by the expert appointed by the parties, was £3,059,593.
30. The Defendant summarised the position in relation to the administration or insolvency of the Claimant as follows:
- (1) The Claimant is massively insolvent;
 - (2) If the Administrators resolve to pay a dividend and give notice of that intention, the statutory set-off will operate;
 - (3) If the company is wound up the statutory set-off will operate;
 - (4) In either case, the set off would operate so as to reduce the amount of the Defendant's claim by the amount of the summary judgment amount, since, as it was put by Lord Hoffman in *Stein v Blake* [1996] AC 243, 251:

“Bankruptcy set-off... affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance.”
 - (5) If, therefore, no summary judgment was ordered (or a stay was ordered pending the administration proceeding) then, the Defendant argued, it would get the benefit of this set-off and would thus be £1m better off.

31. In relation to this, two issues were put forward.
- (1) The first was whether any claim by the Defendant in respect of such overpayment was limited to £1, by virtue of the provisions of clause 10 and Schedule 7. The Claimant argued that if the Defendant's only claim was for £1, then the set-off was essentially valueless.
 - (2) The second was whether the appropriate remedy would be a stay of execution or the refusal of summary judgment.
32. By the end of the hearing, as I understood the position, it was as follows:
- (1) The Claimant was content that I should order a stay of execution if I was of the view that the limitation clause did not apply to the Price Adjustment Claim;
 - (2) The Defendant was content that, if I found that the limitation clause did apply to the Price Adjustment Claim, I should grant summary judgment;
 - (3) The Defendant argued that, if I did find that the limitation clause did not apply to the Price Adjustment Claim, I should refuse summary judgment rather than ordering a stay;
 - (4) Both parties regarded the question of the application of the limitation clause as one which was suitable for summary determination, involving as it did a question of pure construction.
33. It will be seen from what I have said above that the remaining issues that I have to determine, as set out at the beginning of this judgment, are all interlinked. I propose, therefore, to determine, first, the question of whether the limitation clause applies to the Price Adjustment Claim.
34. For ease of reference, I set out again the provisions of this clause:

“SCHEDULE 7

Limitations on Seller's Liability

1. MAXIMUM TOTAL LIABILITY OF SELLER

1.1 Subject to paragraph 1.2 below, the maximum aggregate liability of the Seller under or in respect of any and all Claims (including, for the avoidance of doubt, any and all Warranty Claims and Claims under the Tax Covenant, together with any and all elements relating to interest and costs) shall be limited to, and shall not exceed in any way whatsoever, the sum of £1.00 in aggregate. The parties have entered into this Agreement with the expectation that the Buyer's sole recourse in connection with recovering any such amount will be pursuant to the W&I Insurance Policy to be entered into by the Buyer following the date hereof.

1.2 The Buyer acknowledges and agrees that the cap contained in paragraph 1.1 above will apply notwithstanding any subsequent non-payment under the W&I Insurance Policy or any vitiation or expiry or termination of the W&I Insurance Policy or insolvency of the Underwriter or for any other reason whatsoever, including any failure by the Buyer to enter into the W&I Insurance Policy."

35. The submissions of the Claimant on this point were simple.

- (1) The literal wording of the clause, taking into account the definitions, could not be clearer.
- (2) The clause makes clear that it relates to "any and all Claims" and "Claim" is defined as meaning "any claim, action, proceeding or demand under or in connection with this Agreement and/or any Transaction Document";
- (3) This is clearly a Claim, since (subject to the point made in (4) below) it involves the necessity of the Buyer making a claim for monies due pursuant to the determination of the expert appointed under Schedule 9;
- (4) The limit on what is said in (3) is that, if the claim is for £1,000,000 or less, then the Buyer can exercise the remedy of self-help provided for in clause 3.3, and deduct (by way of set off) the retention amount from the amount which the Seller would otherwise have to repay;
- (5) Accordingly, reading all of the contract as a whole, the contract effectively provides for a limit of £1,000,001 in relation to Payment Adjustment Claims. This was a fair allocation of risk between commercial parties;
- (6) This is particularly so because the Buyer had had the chance to perform due diligence before the purchase and thus inform itself as to the appropriate price to be paid for the shares;

- (7) As recent cases in the Supreme Court such as *Arnold v Britton* [2015] AC 1619 and *Wood v Capita* [2017] AC 1173 had made clear, the Court should not strive to rewrite bargains reached between commercial parties;
 - (8) Finally, in response to suggestions made by the Defendant that allowing the Seller to rely on this limitation defence might lead to unfair and uncommercial results if, for example, the Claimant were to organise its business so as to increase the amount of the repayment payable and then seek to resist repayment by reference to this limitation of liability, the Claimant pointed out that such more extreme situations would be catered for by other provisions of the contract, such as the warranty obligations imposed on the Claimant, and the obligation to conduct its business in the normal way.
36. The Defendant, for its part, argued that the limitation of liability clause should not be construed, despite its broad wording, as extending to those provisions of the contract which determined the contract price, since this would produce unreasonable and uncommercial results, and would render other clauses of the contract redundant. In more detail:
- (1) Clause 3 provides for the possibility of a price adjustment either way, on its face;
 - (2) If the Seller were right, then the price adjustment mechanism set out above would work in one direction and not the other. If there was a need for a greater payment, then the Seller could claim such; whereas if there was a need for a repayment, then the buyer's claim would be limited to the retention amount plus £1;
 - (3) This would be a commercially nonsensical result;
 - (4) It would also mean that the Seller could manufacture higher claims under this clause (which would be limited under clause 10) by artificially inflating the company's cash position (dealt with under the other terms of the contract);
 - (5) Finally, the buyer relied on the factual matrix, since the contract required the provision of insurance to protect the buyer against some types of claim, (excluding any other remedy). However, that insurance did not, it was common ground, cover a claim for payment of this part of the purchase price.

37. I have concluded that, once again, the submissions of the Claimant are to be preferred, for the following reasons:

- (1) The wording of the clause is both broad and clear. In a contract between commercial parties, such as this one, the words that the parties have chosen should be given their literal meaning: see, in particular, the comments in *Arnold v Britton*, *ref supra*, paragraphs 17-20.
- (2) When given that literal meaning then, in my judgment, it is clear that in order to recover more than the retention amount (which the buyer has as security for a repayment claim and may simply set off) the buyer must make a claim. Such a claim is, on the natural interpretation of the clause, within the literal wording.
- (3) I do not think that there is any ambiguity in this wording.
- (4) However, in my judgment, reading the contract as a whole, then, even having regards to commercial common sense, the contract represents a perfectly fair allocation of risk.
 - (a) Although Schedule 7 provides for a limitation of £1, when read together with clause 3.3, the limit on a repayment claim is in fact £1,000,001 (including the set off of the retention amount).
 - (b) The limit applies to breaches of other provisions of the contract, such as claims for breach of warranty and claims under the Tax Covenant, on the footing that other security is given for such breaches. This in turn militates in favour of certainty. Likewise, limiting liability for repayment claims by reference to the specific remedy provided in the contract – ie the retention amount – seems to me to make commercial sense.
 - (c) I also agree with the Claimant that the examples given by the Defendant of instances where the value of the company might be engineered to ensure that larger repayment claims would come into being, which would in turn be caught by the limitation, are in fact unlikely to be realistic, for two reasons. First, I have little doubt that if there was some deliberate manipulation of the figures by the sellers, then this would be caught by an implied limitation of

the clause by reference to fraud; secondly, it is likely that this would amount to a breach of the express warranties in the contract.

38. Overall, I have concluded that the limitation clause is apt to capture the repayment claim, which is therefore limited to £1 (over and above the retention amount, which the buyer is entitled to retain).
39. That being my conclusion then, as I have already noted, I understood that the Defendant was content that I should grant summary judgment in favour of the Claimant if, as I have already concluded I am, I was otherwise persuaded that this was an appropriate case for summary judgment.

Security for costs.

40. In the light of my conclusions, as set out above, the application for security for costs does not arise for decision.

Overall conclusions.

41. I can summarise my conclusions as follows:
- (1) If the delay in completion was due to a breach of contract on the part of the Claimant, this did not cause any loss to the Defendant.
 - (2) Even on the hypothesis that the statement as pleaded by the Defendant and evidenced in the witness statement of Mr Bird was made, then that does not give rise to a defence of estoppel with an arguable prospect of success. That is because:
 - (a) The statement was that the delay in completion by a day was not to prejudice either party;
 - (b) The delay did not in fact prejudice either party;
 - (c) Accordingly, either:
 - (i) The Claimant does not need to resile from the representation in order to succeed; or
 - (ii) There was no detriment so as to found an estoppel;

- (d) On either basis, the defence of estoppel must fail.
- (3) The plea of rectification, for similar reasons, does not assist the Defendant.
- (4) The various other matters put forward by the Defendant as justifying the suggestion that the matter should go forward to trial were also ill founded, for the reasons set out above.
- (5) Accordingly, the Claimant is entitled to summary judgment on its claim, subject to the Defendant's plea of set off. As to this:
- (a) The entitlement to rely on set off, either as a ground for refusing summary judgment or ordering a stay of execution is established in cases such as *Bouyges v Dahl-Jensen* [2001] CLC 927, at paragraphs 33-36 and *Rainford House Ltd v Cadogan Ltd* (QBD 19 Feb 2001).
- (b) The Defendant would be entitled to rely on a defence by way of set off under the Insolvency Act. The particular section which would be appropriate would depend on whether the company was in administration or in winding up. At present, as I understand the position, the company is in administration and thus the relevant Rule is Rule 14.24(1).
- (c) Whether the Defendant has a claim which would give rise to a right of set-off (or more accurately a right of any real value) however depends on whether that claim is subject to the limitation clause in the contract between the parties, ie clause 10 and Schedule 7.
- (6) In my judgment, the Defendant's claim is caught by the limitation clause in Schedule 7, and is thus limited to £1.
- (7) In these circumstances, the Defendant does not seek a stay based upon a right of set off, and I would not have granted one.
- (8) Instead, the appropriate order, in my judgment, is for summary judgment in the amount claimed.
- (9) In these circumstances, the application for security for costs made by the Defendant does not arise.

42. I would be grateful if the parties would produce an Order to give effect to this judgment.