



Neutral Citation Number: [2022] EWCA Civ 1349

Case No: CA-2022-000161

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Sir Ross Cranston (sitting as a Judge of the High Court)
[2021] EWHC 2609 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 20 October 2022

Before :

LORD JUSTICE PHILLIPS
LADY JUSTICE CARR
and
LORD JUSTICE SNOWDEN

Between :

(1) **ABDULRAHMAN BIN ABDULLAH BIN IBRAHIM** **Claimants/**
AL-SUBAIHI **Respondents**
(2) **JAMAL ABDULLAH AL-MUZEIN**

- and -

MISHAL MAAN AL-SANEA **Defendant/**
Appellant

Richard Gillis KC and Duncan McCombe (instructed by Harbottle & Lewis LLP) for the
Defendant/Appellant

Thomas Robinson (instructed by Teacher Stern LLP) for the First Claimant/Respondent
The Second Claimant/Respondent did not appear and was not represented

Hearing date: 11 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 20 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Carr :

Introduction

1. This appeal arises out of claims made by the two Respondent lawyers against the Appellant (“Mr Al-Sanea”) for payment of very significant legal fees said to be due and owing to them under a Final Clearance Agreement entered into by Mr Al-Sanea on 29 November 2017 (“the FCA”).
2. The fees related not to services provided to Mr Al-Sanea, but rather to his father, Maan Abdulwahed Al-Sanea (“Mr Al-Sanea senior”) and various companies connected with him. Mr Al-Sanea senior was the owner and/or controller of the Saad Group of companies (“the Saad Group”) which, until its collapse, operated a number of businesses in the Kingdom of Saudi Arabia (“KSA”), including in the construction and financial service sectors.
3. Mr Al-Sanea denied any liability to the Respondents on the basis that, as a matter of proper construction of the FCA, he had no liability under the FCA. Further or alternatively, he contended that the FCA (and eight earlier promissory notes (“the PNs”)) were unenforceable against him, having been procured by duress and/or undue influence and/or breach of fiduciary duty on the part of the Respondents and/or as unconscionable transactions.
4. Following trial, Sir Ross Cranston (sitting as a Judge of the High Court) (“the Judge”) rejected all defences and granted judgment in favour of the First Respondent (“Dr Al-Subaihi”) in the sum of US\$13,734,400 (plus interest), and in favour of the Second Respondent (“Mr Al-Muzein”) in the sum of US\$2,265,600 (plus interest).
5. Mr Al-Sanea was granted unconditional permission to appeal by Males LJ on a single ground, namely that the Judge erred in his construction of the FCA (“the construction issue”). He was granted conditional permission on a number of further grounds, including challenges to the Judge’s findings on duress, undue influence and breach of fiduciary duty. The requirement imposed on him as a condition of proceeding on those additional grounds, namely payment into court of the sum of £1.5 million, was met.
6. Success for Mr Al-Sanea on the construction issue would be dispositive of the outcome of the appeal as a whole. In those circumstances, the parties were invited to address it first in their oral submissions. At the conclusion of those submissions, the court indicated that the appeal would be allowed on that ground, with reasons to follow. This judgment therefore addresses only the construction issue.
7. Mr Al-Muzein has been in detention in the KSA since July 2020 on anti-bribery charges, and has played no active part in the hearing on appeal. However, he was fully represented in the proceedings below, although he did not give evidence at trial. He was released from detention in July 2022, with all charges against him dropped.

The relevant facts in summary

8. In a full and clear judgment, the Judge helpfully set out the factual narrative (at [10] to [150]). That narrative included various findings, both as to credibility and substance.

Given the course that this appeal has taken, it is necessary only to identify the following limited matters.

9. Mr Al-Sanea is a Saudi businessman currently living in London. His father founded the Saad Group and, until the global financial crisis of 2008, he was one of the richest men in the world. Mr Al-Sanea senior has been subject to a travel ban and a freezing order in the KSA since 2009, and was imprisoned in October 2017 in relation to unpaid debts.
10. One of the Saad Group companies was Saad Trading Contracting & Financial Services Co (“Saad Trading”), of which Mr Al-Sanea was manager. Mr Al-Sanea was also manager and director general of Saad Specialist Hospital Co (“Saad Hospital”) which he owned alongside others, including his mother and siblings. As of 2015 Mr Al-Sanea had authority to bind both Saad Trading and Saad Hospital.
11. The Respondents were both lawyers practising in the KSA. Mr Al-Muzein had worked for Mr Al-Sanea, his family and Saad Group companies, since 1994 (when he was in-house counsel for Saad Trading), Dr Al-Subaihi since 2009. Amongst other things, the Respondents acted for Mr Al-Sanea senior and Saad Group companies in considerable litigation in the KSA, including before the Joint Directorate of Enforcement at the General Court in Al-Khobar (“the JDEK”), a court established specifically for the purpose of dealing with claims against Mr Al-Sanea senior and Saad Group companies. Its aim was to ensure that as many creditors as possible were paid as part of a liquidation process.
12. In October 2016 the Respondents entered into an “attorney fee agreement” with Mr Al-Sanea senior, Saad Trading and other Saad companies (“the attorney fee agreement”), entitling them to fees of SAR 30million (“the October 2016 fee agreement”), and promissory notes in support. Neither Saad Hospital nor Mr Al-Sanea were privy to the agreement, but Mr Al-Sanea was a designated point of contact.
13. On 3 October 2016 Mr Al-Sanea senior signed promissory notes on behalf of Saad Trading and the Saad Hospital, but using a false signature. Between October 2016 and April 2017 the Respondents pressed for payment of their fees, without success.
14. The irregularities in the promissory notes signed by Mr Al-Sanea senior were raised with Mr Al-Sanea who agreed to arrange for enforceable replacement notes. In these circumstances, on 5 April 2017 in the Al Faisaliah Hotel, Riyadh, Mr Al-Sanea signed the PNs on behalf of Saad Trading and Saad Hospital. By the PNs i) Saad Trading undertook to pay the sum of SAR 91million in respect of the Respondents’ fees for services provided to Mr Al-Sanea senior and various Saad Group companies and ii) Saad Hospital guaranteed such payments. Mr Al-Sanea “finger-printed” each of the PNs on 27 April 2017 (three of which had contained typographical errors which were corrected at that stage). None of these fees were owed by Saad Hospital, and only a proportion by Saad Trading. Nor was Mr Al-Sanea in any way responsible for them.
15. The detail of the PNs is as follows:

Date Issued	‘Payable On’ Date	Sum	From	To
01/10/2016	30/01/2017	SAR 3,000,000	Saad Trading	Messrs Jamal Bin Abdullah

				Al-Muzein Advocates
01/10/2016	30/03/2018	SAR 5,000,000	Saad Trading	Messrs Jamal Bin Abdullah Al-Muzein Advocates
01/10/2016	30/06/2017	SAR 5,000,000	Saad Trading	Messrs Jamal Bin Abdullah Al-Muzein Advocates
01/10/2016	30/09/2017	SAR 5,000,000	Saad Trading	Messrs Jamal Bin Abdullah Al-Muzein Advocates
01/10/2016	30/12/2017	SAR 5,000,000	Saad Trading	Messrs Jamal Bin Abdullah Al-Muzein Advocates
01/10/2016	30/03/2017	SAR 4,000,000	Saad Trading	Messrs Jamal Bin Abdullah Al-Muzein Advocates
01/10/2016	05/02/2017	SAR 14,000,000	Saad Trading	Dr Al-Subaihi
01/10/2016	05/02/2017	SAR 50,000,000	Saad Trading	Dr Al-Subaihi

16. The total payable under the PNs was therefore SAR 91,000,000, with SAR 27,000,000 due to Mr Al-Muzein/his firm and SAR 64,000,000 due to Dr Al-Subaihi. An obvious oddity, albeit not relevant for present purposes, is the fact that some of the PNs were already in default at the time that Mr Al-Sanea signed them, with payment overdue in the sum of SAR 76 million.
17. The Respondents continued to press for payment of their fees. On occasion Mr Al-Sanea would indicate that he would seek to procure payment of those fees. The Respondents ceased formally to act for Mr Al-Sanea personally, his family or any Saad Group companies in July 2017. On 18 October 2017 Mr Al-Sanea senior was arrested and detained (as was Mr Al-Sanea's brother for a time).
18. The negotiations that culminated in the FCA commenced in around November 2017. On 1 November 2017 Mr Al-Sanea was told that Dr Al-Subaihi would agree to a 15% discount on his own fees if Mr Al-Sanea signed an agreement. The Respondents shared a draft agreement between themselves on 20 November 2017. On 22 November 2017 Mr Al-Sanea suggested a 30/40% discount with 30 days to pay. A 34% discount was subsequently agreed upon, with 60 days to pay.
19. Dr Al-Subaihi sent a draft of the FCA to Mr Al-Sanea (by Whatsapp) for the first time on 23 November 2017. On 28 November 2017 he flew to London to meet with Mr Al-Sanea at the Dorchester Hotel in the evening. On that occasion the FCA was discussed

but not signed. However, Mr Al-Sanea did sign it on the following day, again at an evening meeting between the two men in the Dorchester Hotel.

The terms of the FCA

20. It is necessary to set out the terms of the FCA in full (and references in this judgment to clauses are references to clauses in the FCA, unless otherwise stated). The original was in Arabic, with an agreed translation as follows:

“Final Clearance Agreement

On 11/03/1439 H, corresponding to 29/11/2017, with Allah’s assistance, the following Parties reach an agreement in London:

- 1- Attorney Dr. Abdul Rahman Bin Abdullah Bin Ibrahim Al-Subaihi, in his personal capacity and on behalf of Jamal Al-Muzein Advocates and Legal Consultants Office, headquartered in Khobar (“First Party”).
- 2- Mishal Maan Al-Sanea, in his personal capacity and in his capacity as Director of Saad Specialist Hospital in Khobar pursuant to the Articles of Association and the Commercial Register, and on behalf of his father, Maan Abdul Wahed Al-Sanea (“Second Party”).

Whereas the First Party is a creditor of the Second Party’s father pursuant to the legal services contract concluded between them and that the First Party has fully executed for the benefit of the Second Party’s father; However, the Second Party’s father has failed to pay [for the services provided under that contract]. Whereas the Second Party has pledged to pay these debts on behalf of his father, and has prepared a number of promissory notes for the First Party, which are now payable. Whereas the Second Party wishes to settle these debts, both Parties have agreed, being fully competent from a Sharia and legal perspective, to conclude this agreement in order to govern the settlement arising between them as per the following terms and conditions:

First:

The preceding preamble to this contract shall constitute an integral part thereof.

[signature]

[signature]

Second:

The Second Party has prepared promissory notes at the amount of ninety-one million [Saudi Riyals] for the First Party as detailed below:

[handwritten text indicated in italics]

- 1- Notes at the amount of 27 million Saudi Riyals for Jamal Al-Muzein Advocates and Legal Consultants Office.
- 2- Notes at the amount of 64 (sixty-four) million [Saudi Riyals] for Dr. Abdul Rahman Bin Abdullah Al-Subaihi.

Third:

In cooperation with the Second Party, the debt has been settled so as to consist of the following amounts:

- 1- An amount of 8,500,000 Saudi Riyals (eight million five hundred thousand Saudi Riyals), due to Jamal Al-Muzein Advocates, Legal Consultants and International Arbitrators Office as payment and full settlement of the Joint Implementation Department Follow-Up Agreement pursuant to the Retainer Agreement dated 30/12/1437 H, corresponding to 01/10/2016.
- 2- An amount of 51,500,000 Saudi Riyals (fifty-one million five hundred thousand Saudi Riyals) due to Dr. Abdul Rahman Bin Abdullah Al-Subaihi.

Fourth:

This settlement shall be considered as full payment of the debt within a maximum period of sixty days from the date of the signing of this Agreement. If the Second Party fails to adhere to the timetable agreed upon, the payable amount shall be the full amount without any deductions, and this settlement shall be deemed null and void.

[signature]

[signature]

Fifth:

The Second Party attests that these notes are intended to settle payment for the legal services and legal consulting contracts that the First Party has fully executed.

Sixth:

The Second Party pledges to pay these amounts pursuant to the following timetable:

- 1- An amount of 5,000,000 US Dollars (five million US Dollars) within one week from the date of signing this Agreement.
- 2- An amount of 3,000,000 US Dollars (three million US Dollars) within two weeks from the date of signing this Agreement.
- 3- An amount of 8,000,000 US Dollars (eight million US Dollars) within eight weeks from the date of signing this Agreement.

Seventh:

Once the settlement amount of 60,000,000 Saudi Riyals (sixty million Saudi Riyals), or the equivalent of 16 million US Dollars, has been paid in full, the notes shall be handed over to the Second Party, and the First Party shall send a clearance document to the Second Party, thus terminating all obligations between both Parties.

[signature]

[signature]

Eighth:

The First Party pledges to hand over to the Second Party the notes corresponding to his payments, provided that all notes are handed over upon full payment of the amount agreed upon.

Ninth:

The Second Party attests that Jamal Bin Abdullah Al-Muzein Office is owed financial entitlements for other legal consulting services that have been provided to his father, and that this Agreement does not forfeit any of the Office's rights towards his father. Rather, this Agreement terminates the obligations covered by the notes and that pertain to the Joint Implementation Department.

Tenth:

This Agreement hereby terminates any contractual relationship between the Second Party and Dr. Abdul Rahman Bin Abdullah Al-Subaihi. Moreover, in the event of payment, Dr. Abdul Rahman Bin Abdullah Al-Subaihi shall not be entitled to make any claims against the Second Party, his father, or any of their affiliate companies, including Saad Specialist Hospital in Khobar.

Eleventh:

Upon the signature of this Agreement and payment of the amount in full, both Parties, namely Dr. Abdul Rahman Bin Abdullah Al-Subaihi, and Mishal, on his own behalf and on behalf of his father and of Saad Specialist Hospital, hereby decide to irrevocably terminate all contractual relationships between them, release each other from liability, consider every document or contract between them null and void and terminate any financial relationship between them. This complete release shall be proved by the final clearance statement sent by Dr. Abdul Rahman Bin Abdullah Al-Subaihi once the latter has received all of his rights agreed upon in this Agreement.

[signature]

[signature]

Twelfth:

Mishal Maan Al-Sanea hereby attests that his powers of attorney for his father, Maan Al-Sanea, and for Saad Specialist Hospital are valid and in effect at the time of signature of this Agreement, and that he has shown this contract and its content to his principals and all partners at Saad Specialist Hospital.

Thirteenth:

This Agreement was made of three copies to act in accordance therewith.

Faith and Trust in Allah

First Party

Name: *Abdul Rahman Bin Abdullah Al-Subaihi,*

Second Party

Name: *Mishal Maan Al-Sanea*

London 29/11/2017

Signature: [signature]
[signature]”

Signature:

21. The FCA therefore offered roughly a 33% discount (reduction SAR 31,000,000) on the total due under the PNs. The total due to Mr Al-Muzein was SAR 8,500,000, a reduction of SAR 18,500,000; the total due to Dr Al-Subaihi was SAR 51,500,00, a reduction of SAR 12,500,000. Payment of the full reduced amount was to be made within eight weeks (or 60 days).

22. The Respondents chased Mr Al-Sanea for payment in the months that followed, but still no payments were made. In February 2019 Mr Al-Sanea senior and Saad Trading were placed into bankruptcy by the Commercial Court in Dammam, the Saad Hospital following suit in December 2019.
23. The present proceedings were commenced on 29 October 2018. By the time of trial, it was common ground that the applicable law was English law.

The Judgment

24. On the construction issue, the Judge held as follows:

“201. In my view clause 4 cannot be read as giving the defendant the option of choosing whether to pay under the FCA or not. The clause is not expressed that way, nor is clause 6 under which the defendant pledged to pay the amounts in accordance with the timetable set out there. Rather, as the claimants submitted, clause 4 must be construed in accordance with what Lord Diplock said in *Cheall v Association of Professional, Executive, Clerical Staff* [1983] 2 AC 180 was the well-known rule of construction that “it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end”: at 189.

202. In this case the defendant undertook to pay at a one third discount the amount owed [to] the claimants in settlement, in accordance with the schedule set out in clause 6. In breach of that he failed to pay so cannot rely on his own breach to terminate the FCA and extinguish his own liability. Rather, the claimants had the option to terminate the FCA if they wanted but have chosen not to do so. The agreement is not “null and void”. Clauses which provide that a contract is void upon the occurrence of an event have been construed to mean that they are voidable at the option of the innocent party, so that the party in breach cannot take advantage of their own wrongdoing: *Davenport v The Queen* [2877] 3 App Cas 115, 129 (PC); *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] AC 222, 226-7 (PC); *Python (Monty) Pictures Ltd v Paragon Entertainment Corp* [1998] EMLR 640, 683. As to what Mr Mishal Al-Sanea claims he was told or understood before signing the FCA (which I have rejected), or how he interpreted Dr Al-Subaihi’s message of 18 February 2018, this can have no bearing on the construction of clause 4. The issue is how the FCA is interpreted objectively as it would be understood by a reasonable person, disregarding subjective evidence of any party’s intentions: *Arnold v Britton* [p2015] UKSC 36, [2015] AC 1619, [15(vi)].”

The parties' competing positions in summary

25. Mr Al-Sanea's position is that the FCA did not oblige him to make the fees payments there identified; it merely permitted him to do so. If he chose not to make the payment, the FCA would lapse. The effect of clause 4 was clear: in the event that Mr Al-Sanea did not pay in accordance with the timetable under the FCA, the FCA became automatically null and void and the Respondents were entitled to pursue Saad Trading and Saad Hospital for the full amounts under the PNs. This is the only way in which the FCA begins to become commercially explicable.
26. The Judge is said to have misapplied the well-known presumptive rule of construction identified in *Cheall v Association of Professional, Executive, Clerical and Computer Staff* [1983] 2 AC 180 at 189 ("*Cheall*"). He assumed that there had been a breach of primary obligation when, in fact, reading clauses 4 and 6 together, there had been none. Further, he elevated the authorities upon which he relied to an immutable rule of law, when in fact those cases turned on the interpretation of particular contracts very different to the FCA. Where, as here, the wording of the contract is clear, that wording takes precedence over the canon of construction relied upon by the Judge. Reliance is placed on *Gyllenhammar & Partners International Ltd v SOUR Brodogradevna Industrija* [1989] 2 Lloyd's Rep 403 ("*Gyllenhammar*"), an authority to which the Judge was referred but which he failed to address. By analogy with the reasoning *Gyllenhammar*, since clause 4 can only come into effect when the payment schedule in clause 6 has not been met, it is hopeless to argue that Mr Al-Sanea could not rely on any such failure in order to terminate the FCA.
27. Dr Al-Subaihi's position is that clause 4 must be read with the preamble (which is incorporated into the FCA by clause 1) and clause 6. By those clauses, Mr Al-Sanea "pledges" to pay US\$16million to the Respondents, in the amounts and on the days specified in clause 6. As the Judge found, clause 6 makes clear that the defendant is undertaking a primary liability to pay by instalments, as the preamble puts it, "in settlement of the outstanding debts". Mr Al-Sanea breached that obligation.
28. It is said that the interpretation advanced by Mr Al-Sanea gave the Respondents no means to enforce the "pledge" made by Mr Al-Sanea in clause 6. It would mean:
 - i) That the carefully negotiated timetable and reduction would all become void a week into the agreement if Mr Al-Sanea chose not to make a payment;
 - ii) If Mr Al-Sanea paid the first two instalments and missed the third, the Respondents would have to repay those instalments as having been paid under a void contract;
 - iii) That the FCA was in no way a "Final Clearance Agreement", but an agreement with no certainty of clearance at all.
29. Dr Al-Subaihi submits that such an outcome is "commercially absurd". Mr Al-Sanea's own evidence was that the proposed interpretation "sounded odd" and "did not make any sense to him". In this context, it is said that there was no evidence that the Respondents knew that Mr Al-Sanea did not have the resources to pay. Mr Al-Sanea's evidence had been that they thought that he would be able to pay.

30. Dr Al-Subaihi places reliance on a line of authorities where the courts have construed clauses rendering a contract void due to breach of contract by one party as “void, at the option of the innocent party”: *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] AC 222 (“*Quesnel*”) at 226; *Davenport v The Queen* [1877] 3 App Cas 115 (PC) (“*Davenport*”) at 128-9; *Python Pictures v Paragon Entertainment* [1998] EMLR 640 at 683; *Law Debenture Trust Corp plc v Elektrim SA* [2009] EWHC 1801 (Ch) at (“*Law Debenture*”) at [18(v)]; *Cerium Investments Ltd v Evans and others* [1991] 62 P & CR 203 (CA) at 209. *Gyllenhammar* is said to be of no relevance, being concerned with contractual terms of entirely different wording and with a different context and purpose. And there is no proper analogy to be drawn with the outcome in *Cheall*, since the duty there breached was owed to a stranger, and not to the other party to the contract.

The Law

31. The relevant well-known legal principles of contractual construction are non-contentious and to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 (“*Rainy Sky*”); *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 (“*Wood v Capita*”).
32. In summary only, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to 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. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with business common sense and to reject the other (see *Rainy Sky* at [21] and [23]).
33. In *Wood v Capita* (at [9] to [11]) Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a “parsing of the wording of the particular clause”; 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. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.
34. Turning to *Cheall*, there Lord Diplock (at 188H to 189A) referred to what he described as:

“the well-known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end”.

He was referring back to the decision of the House of Lords in *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1. Lord Diplock went on (at 189B):

“This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as: “A man cannot be permitted to take advantage of his own wrong”. But this may be misleading if it is adopted without defining the breach of duty to which the pejorative word “wrong” is intended to refer and the person to whom the duty is owed.”

35. On the facts of the case in *Cheall*, the relevant breach related to a duty owed to a third party, and not the contractual counterparty. In those circumstances, the “rule” namely that a person may not take advantage of their own wrong - which I will call “the wrongdoer presumption” - did not prevent the wrongdoer from relying on their own breach. As the Judge identified at [202], the wrongdoer presumption has been applied in many subsequent cases.
36. A number of observations can usefully be made:
 - i) The phrase “clear express provisions to the contrary” needs to be treated with caution. As was said in *BDW Trading Ltd (t/a Barratt North London v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 (at [34] to [36]), they should not be read as meaning more than a clear contractual intention to be gathered from the express provisions of the contract;
 - ii) The authorities universally recognise, in line with *Cheall*, that the wrongdoer presumption is not an immutable rule (see by way of example only *Davenport* at 129; *Quesnel* at 227; *Law Debenture* at [189(v)]);
 - iii) The wrongdoer presumption is not a rule of law; rather it is an aspect of the principle of interpretation that leans against interpretations that produce unreasonable or absurd consequences that could not have been intended. The contractual intention is still to be decided by reference to the ordinary principles applicable to the interpretation of contracts. (See the helpful discussion in *Lewison on the Interpretation of Contracts*, 7th Edn, at 7.110 and 7.118.)

Analysis on the facts

37. The first and central question is whether, by failing to pay in accordance with the timetable identified in clause 6, Mr Al-Sanea was in breach of contract. The Judge proceeded in short order on the basis that he was.

38. This is a pure point of construction: on a proper construction of the FCA, did Mr Al-Sanea come under an outright obligation to pay (in accordance with the timetable identified in clause 6), or did he merely have the option of doing so?
39. The Judge rightly disregarded any evidence as to the subjective understandings of the parties at the time. However, he was required to assess the FCA in the light of, amongst other things, the facts and circumstances known to the parties at the time.
40. The general background was that Mr Al-Sanea senior, Saad Trading and various Saad Group companies had entered into various fee agreements, including the October 2016 agreement. The Respondents had sought for many years without success to recover substantial fees under those agreements. Mr Al-Sanea was a designated point of contact for them under the 2016 agreement and over the years indicated to the Respondents that he would seek to procure payment of the outstanding fees.
41. At the time that the FCA was entered into:
- i) Mr Al-Sanea had no direct personal liability for any of the fees due, nor was anyone asserting that he did. This is a “stand-out” feature. In this context, there was some debate as to whether Mr Al-Sanea was under a potential personal liability arising out of the PNs as a matter of KSA law, Mr Al-Sanea having signed the PNs as a director of Saad Hospital. This potential liability was referred to by the Judge at [89] and [177]. However, there was no evidence (and the Judge did not find) that this potential exposure was either known to Mr Al-Sanea at the time that he signed the FCA, or that it was the subject of any discussion between the parties (or that any related threat was made by the Respondents) at the time;
 - ii) At no time had Mr Al-Sanea prior to the FCA indicated to the Respondents any willingness to accept personal liability for any of the legal fees;
 - iii) Without entering into any debate as to precisely how much the Respondents knew of Mr Al-Sanea’s financial position at the time of the FCA, it is clear that there could be no confidence on their part that Mr Al-Sanea had at his immediate disposal the necessary resources to discharge the payments as set out in the FCA. This was so, even if the Respondents believed that he was going to be able “to pull that money together” (as Mr Al-Sanea stated in his witness statement that he thought they did). Reference was made to a comment in a message from Mr Al-Muzein to Mr Al-Sanea in October 2017 stating that:

“The problem is no one can believe that you can’t pay”

However, this appears to have been a reference to payment in advance for new lawyers for the family, not payment of a sum as large as US\$16million; and in any event the reference to “you” is very open-ended (and in context more naturally extended to the family as a whole and not a reference to Mr Al-Sanea alone).
42. Against this background, I turn to the FCA itself. It was prepared by the Respondent lawyers. It is, on any view, a highly unsatisfactory piece of drafting. To take only three examples:

- i) The precise identity of the “Second Party” is open to debate. It is clear that Mr Al-Sanea himself was party to the FCA, but unclear whether Mr Al-Sanea senior and Saad Hospital were also parties. The FCA stated that Mr Al-Sanea, as the Second Party, was not only acting in his personal capacity but also as director of Saad Hospital and “on behalf of his father”. And in clause 12 Mr Al-Sanea attested that he had valid powers of attorney for both. Yet throughout the FCA (including in the preamble) Mr Al-Sanea senior was referred to explicitly and separately to the “Second Party” (for example, references were made to Mr Al-Sanea senior as “the Second Party’s father”);
 - ii) Whichever construction of clauses 4 and 6 of the FCA is adopted, there is no mechanism for addressing a situation where the first and/or second payment instalments were paid, but not the third. As the parties’ submissions revealed, the position would be far from straightforward, and in all probability contentious. Thus, Mr Gillis KC for Mr Al-Sanea argued that any payments made would go to partial discharge of the pre-existing liabilities under the PNs; Mr Robinson for Dr Al-Subaihi suggested that, in the event that the FCA were avoided, the instalments would have to be repaid as having been paid under a void contract;
 - iii) There is inconsistency between the eight-week (56 day) period for payment of the final instalment in clause 6 and the maximum 60 day settlement period in clause 4.
43. It is therefore dangerous to place too much weight on fine points of language, that danger being compounded by the added complication of intervening translation.
44. It is common ground that the FCA must be read as a whole, and that clauses 4 and 6 in particular must be read together. That is because, amongst other things, clause 4 refers to clause 6, clause 6 being “the timetable agreed upon”. The effect of the first sentence of clause 4 is to provide that settlement payment within 60 days will satisfy “the debt” identified in clause 2. The effect of the second sentence of clause 4 is to provide that in the event of non-payment in accordance with the timetable in clause 6, the window of opportunity to achieve a reduction in the debt was closed. Effectively, then, in simple terms, all bets were off. Thus, clause 6 is an adjunct to clause 4, with clause 4 coming first and being the central operative essence of the settlement agreement, recording the “give and take” agreed between the parties.
45. This conclusion is reinforced by considerations of commercial common sense: as set out above, the starting point is that Mr Al-Sanea had no direct personal liability for the debts in question. Objectively, even if Mr Al-Sanea stood to benefit indirectly from any reduction (because his fortunes were intertwined with those of his father and the Saad Group and the Saad Hospital), it would nevertheless be remarkable in such circumstances for him to have assumed an outright personal obligation to pay US\$16million within a two-month period. However, if he was able to raise the necessary funds and pay in time, he had the opportunity to discharge the debts (of others close to or connected with him) for a (significantly) reduced amount. But he was not bound to do so – he was not taking on a personal liability which he could not discharge. On the other side, the Respondents, who had been pressing vigorously though unsuccessfully for payments for their services over many, many years were prepared to take a “cut” of 33% in return for swift payment. As the Judge recorded at [32], some

£6.1 million was already outstanding as long ago as April 2014. If payment was not made swiftly, then they were free to pursue the full amount of their debts, as clause 4 emphasised, “without any deductions”.

46. Construing the terms of the FCA against the relevant factual matrix and in their commercial context therefore leads to the analysis that clauses 4 and 6 read together amounted to an agreement that Mr Al-Sanea could, but was not obliged to, pay in accordance with the agreed timetable.
47. Mr Robinson suggested that the fact that Mr Al-Sanea was a party at all to the FCA meant that he could only have been assuming an outright obligation. However, that is not a logical conclusion to draw. There are many reasons why Mr Al-Sanea would have been privy to the FCA without taking on an absolute obligation, not least given his role as the point of contact for fee discussions and in order to have a right to delivery of the PNs if payment was made. It was also suggested that it was commercially absurd that the FCA could become void within a week for non-payment of the first instalment when there had been a carefully negotiated timetable for payment and discount. Again, this does not follow. Ignoring the fact that the negotiations spanned no more than a month or so and were certainly not paper-heavy, such arrangements are reached all the time, for example in the banking sector.
48. Mr Robinson also sought to place weight on certain words used in the FCA:
 - i) The title of “Final Clearance Agreement” is said to confirm that the FCA must have contained an outright binding obligation. However, on any view, the FCA had the potential to be “[f]inal”. The wording does not advance the issue of construction one way or the other. Equally, the reference to “settlement” does not assist, since the settlement was that “arising between them as per the following terms and conditions”;
 - ii) The reference in the preamble to the Second Party having “pledged to pay these debts on behalf of his father” is said to evidence a binding obligation on Mr Al-Sanea’s part to pay outright. However, when that phrase is set in full context, namely the immediately ensuing reference to the PNs, it is clear that what is being referred to (albeit loosely) are the past efforts made by Mr Al-Sanea to procure payment of his father’s debts, including the execution of the PNs, not the present agreement;
 - iii) Reliance is placed on the word “fail” in clause 4 and “pledges” in clause 6 (and clause 8). The word “fail” does connote a breach, and the word “pledge” does connote a promise. However, as identified above, this is not a case where it is safe to rely on inferences (because of the infelicities in drafting generally) and in any event the words do not stand alone. The word “pledge” in clause 6 (by contrast with its use in clause 8) has to be read in the context of the purpose of clause 4. As set out above, clause 6 set out the agreed timetable referred to in clause 4. It did not override the operative effect of clause 4, the purpose of which was clearly to provide an opportunity for settlement at the discounted rate but not to mandate one. When the FCA is taken as a whole, the only objectively sound and commercially sensible outcome was that identified above.

49. Further, if one were to engage in a close analysis of the precise words and phrases used, there are pointers in the other direction. So for example, the phrase “in the event of payment” in clause 10 could be said clearly to envisage the event of non-payment.
50. That is sufficient to dispose of the matter and it is unnecessary to explore the scope and/or application of the wrongdoer presumption to the facts of this case. I would, however, emphasise briefly the following.
51. First, the wrongdoer presumption is no more than an aid to construction. At the end of the day it is always a question of assessing the objective intention of the parties on the facts of the case in accordance with the well-established principles of construction referred to above. Secondly, it follows that comparison with the outcome on the facts of other cases is unlikely to be of material assistance. The observation of this court in *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18; [2006] PIQR P17 at [102] is apt: context is so important on issues of interpretation. The cases to which reference has been made here are set in the very different land of long leases, production agreements and shipbuilding.
52. That said, assuming (contrary to my conclusion above) that Mr Al-Sanea had accepted a primary obligation to pay under clause 6, it would seem counter-intuitive for the parties to be taken to have intended that he would nevertheless escape any liability if he were to breach it. One would expect there to be very clear indications in the FCA of such an intent if such a surprising result were to have been envisaged. On such hypothesis, the wording of clause 4 would be readily open to interpretation in the manner contended for by Dr Al-Subaihi, namely that the FCA would in those circumstances be voidable at their election.

Conclusion

53. The Judge was faced with an extensive task at trial, with a large volume of written and oral evidence focussed on what were highly-charged allegations of duress, undue influence and breach of fiduciary duty. Wide-ranging fact-sensitive issues spanning events over many years fell to be considered. The construction issue was not at the forefront of the parties’ submissions (or singled out as an anterior issue). On appeal, however, the construction issue has been front and centre of the debate. With the benefit of that additional emphasis, it can be seen that, on a proper construction of the FCA, Mr Al-Sanea was not under any binding obligation to pay under clause 6. He had the opportunity to do so, in order to achieve a discount of some 33%; if he did not (or was unable to) take up the opportunity, then the Respondents still had the ability to pursue the true debtors for the full amount of legal fees outstanding.
54. On that basis, I would allow the appeal.

Lord Justice Snowden :

55. I agree.

Lord Justice Phillips :

56. I also agree.