

Neutral Citation Number: [2018] EWHC 1506 (QB)

Case No: E40CF004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 19 June 2018

Before:

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

Between:

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL	<u>Claimant</u>
- and -	
BLACKSTONE (SOUTH WALES) LIMITED	<u>Defendant</u>

Matt Hutchings QC and Shomik Datta (instructed by **Geraint Morgan, Solicitor to the Claimant**) for the **Claimant**
Hugh Sims QC and Oliver Mitchell (instructed by **Veale Wasbrough Vizards LLP**) for the **Defendant**

Hearing dates: 1 June 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE KEYSER Q.C.

H.H. Judge Keyser Q.C. :

Introduction

1. This is my judgment upon cross-applications by the claimant, Merthyr Tydfil County Borough Council (“Merthyr”), and the defendant, Blackstone (South Wales) Limited (“Blackstone”), for judgment pursuant to CPR Part 24. Merthyr’s application is by notice dated 1 March 2018, and Blackstone’s is by notice dated 17 May 2018. Merthyr’s application notice includes an application for an order striking out Blackstone’s Defence and Counterclaim pursuant to CPR r. 3.4, but in the circumstances of this case that alternative way of putting the matter seems to me to add nothing to the Part 24 application and I do not think it necessary to give it separate consideration.
2. The case may be summarised very briefly as follows. Merthyr is the local planning authority for the area that includes land at Ffos-y-fran (“the Site”) on the outskirts of Merthyr Tydfil. Blackstone, which until 15 February 2018 was called Miller Argent (South Wales) Limited, though I shall refer to it as Blackstone throughout, carries on opencast coal-mining at the Site and is the operator of the Ffos-y-fran Reclamation Scheme, the purpose of which is to restore the Site to common land or farm land. On 21 December 2015, after Blackstone had been working the Site for several years, a contract called the Escrow Account Agreement was entered into between Merthyr, Blackstone and HSBC Bank. In broad terms, the Escrow Account Agreement provided that Blackstone would set up an account at HSBC for the purpose of accruing a deposit balance that would fund the restoration of the Site when the mining operations ended. Provision was made for Blackstone to make quarterly deposits into the account. If all of the quarterly payments to date had been made, the total deposits would now be £5,000,000, with a further £625,000 being due on 29 June 2018. However, since entering into the Escrow Account Agreement Blackstone has made no deposits at all. In these proceedings, Merthyr claims an order requiring Blackstone to pay the sums that, it says, ought to have been deposited.
3. The grounds on which Blackstone seeks to defend the claim are set out in an Amended Defence dated 16 May 2018. (An Amended Counterclaim seeks declaratory relief but raises no additional issues.) In substance, the defence rests on three bases, which were the matters advanced in argument before me. First, Blackstone says that, on the true construction of the Escrow Account Agreement, it was not obliged to make any quarterly deposits at all; its sole obligation regarding payments was to ensure that there were the requisite funds in the account by a longstop date, namely 30 June 2022. The second and third bases are alternatives to the first, if Blackstone is wrong on the construction point. The second basis of defence is that Merthyr cannot enforce the Escrow Account Agreement, because it was on notice both that the agreement was contrary to Blackstone’s commercial interests, in that it gained no benefit from it but came under a new liability to make periodic deposits, and that it had entered into the agreement because it was under the controlling influence of its parent company, which obtained a release from obligations as part of the wider arrangement that included the Escrow Account Agreement. Third, similar matters are relied on in support of the contention that Merthyr cannot enforce the Escrow Account Agreement because it knew that Blackstone’s directors had no authority to enter into it, since it was a contract manifestly not in the interests of Blackstone.

4. The evidence adduced by Merthyr on these applications comprised two witness statements by its solicitor, Mr Geraint Morgan, and one witness statement from its chief executive, Mr Gareth Chapman. Blackstone relied on one witness statement by a director, Mr David Lewis, and one witness statement by its solicitor, Mr Edward Husband. There is a great deal of repetition and irrelevance in the exhibits to the witness statements, and Mr Husband's statement is the only one to contain an orderly explanation of the material background.
5. I am grateful to Mr Hutchings Q.C. and Mr Datta, who appeared for Merthyr, and to Mr Sims Q.C. and Mr Mitchell, who appeared for Blackstone, for their helpful written and oral submissions.

Part 24

6. Rule 24.2 provides:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

7. In *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477, the Court of Appeal has cited with approval the guidance given by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) as to the correct approach to applications under Part 24. (That guidance was given in the context of applications by defendants, but *mutatis mutandis* it shows the correct approach to applications by claimants also.)

“15. [T]he court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

The facts

8. Blackstone is and at all material times has been a 100% subsidiary of a company that used to be called Miller Argent Holdings Limited but is now called Blackstone Holdings Limited. I shall call it “Holdings”.
9. Until 6 January 2016, Holdings was a subsidiary of Miller Group Limited (now called FT TMGL Limited) and Argent Group Plc (later renamed Argent Group Limited). I shall refer to those companies individually as “Miller Group” and “Argent Group” respectively, and together I shall refer to them as the “Parent Companies”.
10. Blackstone carries out its operations at the Site pursuant to planning permission granted by Merthyr on 11 April 2005. The permission is subject to numerous conditions, which were varied by a decision of a planning inspector in 2011. Requirements of those conditions include that all coal extraction should cease no later than 6 September 2022, that final restoration of the land should be completed no later than 6 December 2024, and that aftercare be undertaken for a period of not less than five years upon certification of completion of each phase of a progressive restoration scheme. The scheme for the restoration of the Site was subject of a section 106 Planning Agreement entered into shortly before planning permission was granted.
11. By a Deed of Guarantee dated 13 July 2007 the Parent Companies and each of them gave to Merthyr a guarantee (the “Parent Company Guarantee” or “PCG”), limited to £15,000,000, in respect of the reclamation of the Site. Mr Husband’s evidence, which for present purposes I accept, was that the Parent Companies “were, either in their own right or as part of a wider group, very significant financial entities.”
12. In the course of 2014 Miller Group and Argent Group decided to get out of coal mining, which was no longer their core activity, and to sell the Miller Argent business. It was naturally advantageous for Miller Group and Argent Group to extricate themselves from their liability under the Guarantee.
13. In or around August 2015 a Mr James Poyner, writing for and on behalf of Blackstone and Holdings, presented to Merthyr a written “Proposal for the Replacement of Parent Company Guarantee and the Establishment of an Escrow Account” (the “Proposal”). The Proposal set out the background and then made its pitch:

“[Blackstone] was created specifically to carry out the works at the FLRS and as such had no trading record or worth in its own right, so it was agreed that its parents, [Miller Group] and [Argent Group], would provide the Guarantee.

Since 2004 a number of things have changed. [Blackstone] has become one of the most successful land reclamation and surface mining companies in the United Kingdom. It now has an enviable credit rating and is a company of significance in its own right with a very healthy balance sheet. The company has consistently over the past three years generated circa £20 million of operational cash flow and over £10 million of annual operating profit each year and has net assets in excess of £20 million. The company is now over half way through the project

and is running approximately one year ahead of programme. Restoration works have commenced and the success of those works is evident for all to see ...

Miller and Argent have re-structured their groups for strategic reasons, the companies which provided the PCG in favour of [Merthyr], [Miller Group] and [Argent Group] are not the ‘top’ companies in their re-structured groups, their balance sheet covenants have reduced considerably and the companies are effectively being traded out.

It is therefore proposed, and we respectfully request, that the Council consents to the following proposal, which not only provides more comfort for [Merthyr] but also demonstrates the company’s commitment to restoring the site:-

- Replacement of the £15 million PCG provided by Miller and Argent Groups replaced by an identical PCG from [Holdings], [Blackstone’s] immediate parent company, for the remaining full term of the project, including restoration.
- In addition, a cash escrow fund will be established for the purpose of securing £15 million of the restoration costs of FLRS ... The escrowed funds will sit outside of the collateral available to [Holdings] / [Blackstone’s] funders. ...”

The Proposal then provided some detail as to the way the escrow fund would be accumulated and held. I do not need to set out those details here, though I make some further reference to them below.

14. As chief executive of Merthyr, Mr Chapman wrote a Full Council Report on the Proposal, dated 7 September 2015. The background and the details of what was envisaged were taken, largely verbatim, from the Proposal. The Report stated that the proposal would provide “a significantly stronger security package than the current PCG from two parent companies that are being progressively wound down over time as a result of the changes to their respective businesses” and recommended that it be approved. That recommendation was accepted at a full council meeting on 9 September 2015 and delegated authority was given to the chief executive, in consultation with the leader of the council, to make an agreement to reflect the proposal.
15. On 21 December 2015 the Escrow Account Agreement was executed. I have summarised the nature of that agreement in paragraph 2 above and shall consider closely its detailed provisions later in this judgment.
16. On 22 December 2015 a Guarantee Release Deed was executed by Merthyr, Miller Group and Argent Group. It released Miller Group and Argent Group (there referred to as “the Guarantors”) from their liabilities under the PCG Guarantee. The Recitals set out the position clearly:

- “(A) On 30 March 2005, [Merthyr] (1) and [Blackstone] and Miller Argent (Nominee No. 1) Limited (2) entered into an agreement under s. 106 of the Town & Country Planning Act 1990 in respect of the Ffos-y-fran Land Reclamation Scheme (‘FLRS’) (the ‘Original Agreement’).
- (B) Pursuant to the s. 106 Agreement [Merthyr] (1) and the Guarantors (2) entered into a deed of guarantee dated 13 July 2007 (the ‘Guarantee’).
- (C) The Original s. 106 Agreement ceased to have effect pursuant to a unilateral undertaking entered into between [Merthyr] (1) and [Blackstone] and Miller Argent (Nominee No. 1) Limited (2) dated 11 February 2011 (the ‘Unilateral Undertaking’).
- (D) Upon the Original s. 106 Agreement ceasing to have effect, it was intended that the Guarantee would continue to be effective in respect of the Unilateral Undertaking.
- (E) The Council has agreed to a release of the Guarantors’ obligations under the Guarantee (the ‘Release’) on the terms and subject to the conditions of this Deed.
- (F) As a condition of the Release (i) a cash escrow fund will be established in the name of [Blackstone] for the purpose of controlling £15 million of the restoration costs of FLRS and (ii) [Holdings] will provide a replacement guarantee in favour of [Merthyr] on the same terms as the Guarantee (the ‘Replacement Guarantee’). The Replacement Guarantee shall be entered into on the same date as this Deed.”
17. As envisaged by those Recitals, Holdings executed a replacement guarantee dated 21 December 2015.
18. The resulting position was set out as follows in paragraph 20 of Mr Husband’s witness statement:
- “1) Blackstone continued to be liable for the restoration of Ffos-y-Fran.
- 2) The Parent Companies’ guarantee obligations were replaced by Holdings’.
- 3) An additional payment obligation arose for Blackstone under the [Escrow Account] Agreement (although, for the reasons set out in its draft Amended Defence, Blackstone contends that such obligation does not become enforceable until 30 June 2022).”

19. At essentially the same time as these agreements were made with Merthyr, the Parent Companies sold their entire shareholding in Holdings (and thereby their indirect ownership of Holdings' subsidiary, Blackstone) to Gwent Investments Limited. The Sale and Purchase Agreement was dated 21 December 2015 and completion took place on 6 January 2016. This means, of course, that the ultimate owners of Blackstone now are different from those who were its ultimate owners when the Escrow Account Agreement was negotiated. I might add that it has not been suggested that Gwent Investments Limited did not know of the Escrow Account Agreement when it bought Holdings.

The Escrow Account Agreement

20. The Escrow Account Agreement contains thirteen substantive clauses and six schedules and extends over thirty-one pages. Although it must be considered in its entirety, I shall set out as little of it as possible. It referred to Merthyr as the "Council", to Blackstone as the "Company" and to HSBC Bank as the "Account Bank", and I shall retain these designations in direct quotations.
21. Clause 3 provided that Blackstone and HSBC should open, operate and maintain an Escrow Restoration Account in the name of Blackstone, at HSBC's London branch.
22. Clause 4.2, headed "Funding the Account", is of central importance to the issues in this case. It provided:
- “(a) Subject to paragraphs (b) and (c) below, on each Funding Date, the Company shall deposit an amount equal to £625,000 (as adjusted pursuant to paragraphs (c) and (d) below, the 'Quarterly Amount') into the Account.
 - (b) Subject to paragraphs (c) and (d) below, if on any Funding Date the Company fails to pay all or part of the Quarterly Amount into the Account (the 'Missed Funding Date'), the Quarterly Amount for the following Funding Date shall be equal to £625,000 plus the outstanding amount payable on the Missed Funding Date.
 - (c) Subject to paragraph (d) below, if the Company fails to pay all or part of the Quarterly Amount on two or more consecutive Funding Dates, the Quarterly Amount shall increase on each subsequent Funding Date by an amount equal to the aggregate outstanding amounts on each previous Missed Funding Date.
 - (d) If the Final Funding Date is a Missed Funding Date, the Company shall pay an amount equal to Total ERA Sum less the amount standing to the credit of the Account on the Final Funding Day by 30 June 2022 (the 'Funding Longstop Date').”

The following definitions in clause 1 are relevant to clause 4.2:

- “Funding Date” means “each date set out in Schedule 1”. Those dates were the last working days in March, June, September and December for each year from 2016 to 2021 inclusive.
- “Total ERA Sum” means “£15,000,000”.
- “Final Funding Date” means “31 December 2021”.

23. The primary issue between the parties concerns clause 4.2. Merthyr contends that, if Blackstone fails to pay a Quarterly Amount on a Funding Date, it is in default. Blackstone contends that, on the contrary, the effect of missing a payment is simply that the unpaid amount is rolled forward; default would only occur if it failed to bring the total deposit in the account up to £15,000,000 by 30 June 2022.

24. Clause 6 was headed “Event of Default”. Certain Events of Default were identified in clause 6.1. The first was that the “amounts standing to the credit of the Account are less than the Total ERA Sum on the Funding Longstop Date.” The second concerned breaches of Blackstone’s obligations regarding restoration works. The third was one of a number of occurrences indicating that Blackstone was insolvent. Clause 6.2 provided:

“Upon the occurrence of an Event of Default, the Council may deliver a Blocking Notice to the Account Bank and the Company and the Company and the Account Bank shall comply with the terms of that Blocking Notice upon receipt thereof.”

A Blocking Notice was to be in the form contained in Schedule 2. It provided that, until Merthyr served an Unblocking Notice, Blackstone might not withdraw any monies from the Account without the prior written consent of Merthyr. Merthyr was obliged to serve an Unblocking Notice promptly upon the resolution, to its reasonable satisfaction, of the circumstances giving rise to an Event of Default: clause 6.3.

25. Clause 4.3 made provision for withdrawals prior to a Blocking Notice:

“Prior to the receipt of a Blocking Notice and subject to Clause 4.6 (*Withdrawal of the Surplus Interest*), the Company and the Council may make withdrawals or transfers from the Account by giving a Withdrawal Instruction to the Account Bank, *provided that* each such Withdrawal Instruction:

- (a) is issued after the Drawdown Commencement Date;
- (b) is substantially in the form set out in Part A (*Withdrawal Instructions—Pre-Blocking Notice*) of Schedule 5 (*Forms of Withdrawal Instruction*);
- (c) specifies the amount and is consistent with the Restoration Drawdown Schedule;

- (d) is signed by two of the Company's Authorised Individuals;
and
- (e) is counter-signed by the Council's Authorised Individual."

The following provisions are relevant to the interpretation of clause 4.3:

- Clause 1 provided that "Drawdown Commencement Date" meant "the date on which the Company notifies the Council that coaling has concluded and the Council confirms in writing that restoration of the Ffos-y-fran Land Reclamation Scheme may commence."
 - The "Restoration Drawdown Schedule" was set out in Schedule 4. It provided for nine quarterly withdrawals of £1.5 million, a subsequent withdrawal of £1.3 million in the tenth quarter, and an Aftercare Balance of £0.2 million. A Note to the Schedule provided that the actual date of the first withdrawal should be "a date agreed between the Parties, falling within the first quarter following the Drawdown Commencement Date."
 - The prescribed form of the Withdrawal Instruction in Schedule 5 contained declarations given by Blackstone and by Merthyr to HSBC. Blackstone's declaration was a confirmation that the Withdrawal would "be applied solely in respect of the Restoration Works and/or the Agreed After Care Provisions (as applicable)." Merthyr's declaration was a confirmation "that the Restoration Works and/or the Agreed After Care Provisions (as applicable) are on, or ahead, of the schedule set out in the Ffos-y-fran Land Reclamation Scheme."
 - Clause 1 defined the "Restoration Works" and the "Agreed After Care Provisions" by reference to planning applications concerned with variations of the conditions applicable to the Ffos-y-fran Land Reclamation Scheme.
26. Clause 4.4 made provision for withdrawals after service of a Blocking Notice; I do not need to set them out. Clause 4.5(a) provided:
- "Subject to paragraph (b) below [which concerned withdrawals and transfers of interest], each of the Company and the Council hereby acknowledge and agree that all amounts standing to the credit of the Account shall be withdrawn and applied solely in respect of the Restoration Works and the Agreed After Care Provisions and the Account Bank shall not be obliged to ensure that such amounts are applied to this purpose."
27. Clause 12.2 provided that the Agreement might not be amended or waived other than in writing signed by each of the Parties. Clause 12.7 provided
- "This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement."

Construction of the Escrow Account Agreement

28. Blackstone's primary ground of defence relates to the correct construction of clause 4.2 of the Escrow Account Agreement; see the short summaries of its position in paragraphs 3 and 23 above.

Principles

29. The proper approach to construing a written contract was summarised by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

“The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.”

30. The ramifications of that approach have been discussed in detail in many cases. I refer in particular to *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173.

31. In *Arnold v Britton*, a case about a lease, Lord Neuberger PSC said:

“15. When interpreting a written contract, 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 them to be using the language in the contract to mean’, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. ...

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of

the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. ...

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, 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, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or

synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. ...”

The seventh point mentioned by Lord Neuberger related specifically to contracts of the kind with which *Arnold v Britton* was concerned; I need not refer to it. But the other points are of general relevance. The reason why Lord Neuberger highlighted them appears from the facts of that case. Put shortly: the contract terms clearly meant one thing; that thing was, in the circumstances, rather unpalatable; but neither the unpalatable nature of the outcome nor an invocation of commercial common sense could justify rewriting the contract that the parties had made.

32. The relationship between text and context was discussed by Lord Hodge in *Wood v Capita Insurance Services Limited*:

“10. The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties’ contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath

para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

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

or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.”

33. One further principle of some relevance to this case is that evidence of pre-contractual negotiations, though admissible to establish what was within the shared knowledge of the parties, is inadmissible as an aid to interpretation of a concluded contract: see, for example, *Chartbrook Homes Limited v Persimmon Homes Limited* [2009] UKHL 38, [2009] 1 AC 1101.

Application to this case

34. For Blackstone, Mr Sims submitted that the parties’ intention, as it appears from the words used in clause 4.2, was that Merthyr’s remedy for a Missed Funding Date was simply to roll forward the amount to the next Funding Date; only in the event of failure to pay the full amount by the Funding Longstop Date would further consequences ensue. He submitted that this intention was demonstrated by the “cascade, interlinked manner” in which clause 4.2 was drafted: the obligation to pay in paragraph (a) is stated to be subject to paragraphs (b) and (c); paragraph (b) is stated to be subject to paragraphs (c) and (d); and paragraph (c) is stated to be subject to paragraph (d); only paragraph (d), providing for the obligation to pay such moneys as are required to bring the balance up to the Total ERA Sum by the Funding Longstop Date, is unqualified. Accordingly,

“It must follow that whilst in advance of any particular Funding Date the parties intended that [Blackstone] should deposit £625,000, or a multiple of that in the event that earlier Funding Dates had been missed, as soon as that date passed and the payment was not made the obligation to pay the increased sum became, again, a future obligation—it was rolled forward. In other words, once passed the parties intended the obligation that had just passed to be wiped clean, and there was no present obligation to pay.” (Skeleton Argument of Mr Sims and Mr Mitchell, paragraph 32)

The consequence is clear by considering matters as they stand at the date of this judgment. The total amount that was due to have been deposited as at the last Funding Date, 30 March 2018, was £5,000,000. No deposits were made on that or any previous Funding Date. Therefore the sum of £5,625,000 is due on the next Funding Date, 29 June 2018. But that is a future “obligation”: there is no present obligation to pay £5,000,000. And if no deposit is made on 29 June 2018 there will be no subsisting obligation to pay £5,625,000; rather there will be an “obligation” to pay £6,250,000 on the next Funding Date. And so on. The scare quotes around “obligation” are mine. They draw attention to the unusual or even inaccurate usage.

35. In support of this submission, Mr Sims argued that a contrary interpretation of clause 4.2 would turn the careful scheme of its paragraphs into redundant elaboration, from which the “subject to” references should be excised. If there were to be a subsisting obligation to pay on each Funding Date, all that would have been necessary was to state

the bare obligation and provide for a remedy in default. In fact, not only were the payment provisions qualified in the manner already mentioned but there was no provision for any remedy, except under clause 6 in an Event of Default, which (so far as concerned payments) related only to a failure to pay the Total ERA Sum by the Funding Longstop Date. The wording of the Agreement ought to be given particular respect, as it was clearly the result of careful professional input from both sides.

36. In developing his submissions, Mr Sims had regard not only to fine textual analysis but also to the commercial purpose said to be apparent from the very provisions of the Agreement:

“The overall idea behind clause 4.2, therefore, is to build up a total fund of £15m in the Account—the ‘Total ERA Sum’—by 30 June 2022—called the ‘Funding Longstop Date’. The commercial purpose of this is plain to see: it is intended to provide the Council some reassurance that the Company will discharge the restoration and aftercare obligations in relation to the Site by ensuring that the Total ERA Sum is paid by no later than 30 June 2022, but that if a Funding Date is missed before then the amount outstanding is rolled forward so as to increase the sum required to be paid at the next payment date.” (Skeleton Argument, paragraph 27)

The obvious question to which that submission gives rise is how the final clause of the second sentence relates to the commercial purpose identified previously in that sentence.

37. Mr Sims drew further support for his construction of clause 4.2 from what he said was an apparent oddity in the drafting of the Agreement as a whole. The Agreement appears to contemplate that the Total ERA Sum will be built up by 2022, when the coaling finishes, and that restoration works may then commence and, for that purpose, Blackstone may make withdrawals after the Drawdown Commencement Date. However, the Full Council Report dated 7 September 2015 stated in section 1.5: “The company is now over half way through the project and is running approximately one year ahead of programme. Restoration works have commenced and the success of those works is evident for all to see.” Mr Sims submitted that, if the Agreement were construed as he contends it ought to be, the apparent oddity would be substantially resolved, “since the Company is able to carry out restoration works as it goes along, without having to divert such monies to sit in the Account, and the parties agreed it would only be an event of default if the Total ERA Sum was not paid into the Account by the Funding Longstop Date.”
38. Mr Sims mentioned another matter that, he said, supported Blackstone’s proposed construction of the Agreement. In the section of Mr Poyner’s Proposal (paragraph 13 above) dealing with the detail of the proposed Escrow Account (“TERA”), a schedule of quarterly payments is set out and then is the following text:

“In the (unlikely) event that [Blackstone] is unable to meet a quarterly payment, then it is agreed with [Merthyr] to roll forward the outstanding payments, subject to the full £15 million being deposited into TERA no later than six months after the

final date in the ‘Schedule of Quarter Dates for Payments’ detailed above, i.e. by 30th June 2022.”

That text was repeated in section 1.7 of the Full Council Report. There is no evidence of adverse comment on the text in the council’s discussions, which resulted in approval of the recommendation in the Report. Mr Sims submits that the text quoted above is the genesis of the rolled-forward obligation in clause 4.2 of the Agreement, though the latter is likely to reflect the manner in which the legal draftsmen dealt with the uncertain concept of Blackstone’s inability to meet a quarterly payment.

39. In my judgment, the construction of clause 4.2 proposed on behalf of Blackstone, though advanced with much skill by Mr Sims, is wrong.
40. First, with regard to Mr Sims’ submission concerning the “genesis” of clause 4.2, it is convenient to remark on the materials available as an aid to construction. It is well established that pre-contract negotiations are inadmissible for that purpose; see paragraph 33 above. From time to time judicial dicta have suggested that regard may be had to negotiations for the purpose of establishing the “genesis and object” of a provision. In my view, even if that is correct in principle (as to which I have doubts), it is an approach that is rarely helpful and is not helpful in this case. In *Excelsior Group Productions Limited v Yorkshire Television Limited* [2009] EWHC 1751 (Comm), Flaux J said at [25]:

“It seems to me that there is a very fine line between looking at the negotiations to see if the parties have agreed on the general objective of a provision as part of the task of interpreting the provision and looking at the negotiations to draw an inference about what the contract meant (which is not permissible), a line so fine it almost vanishes.”

In *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607, Arden LJ said at [35] that “judges should exercise considerable caution before treating as admissible communications in the course of pre-contractual negotiations relied on as evidencing the parties’ objective aim in completing the transaction.” With specific reference to the present case, however, it may be noted that clause 4.2 does not make provision in accordance with the passages relied on in the Proposal and the Full Council Report—Blackstone insists that it is able to make the quarterly payments but has chosen not to do so because it has better things to do with its money. Therefore to trace the relationship between those passages and clause 4.2 would require an impermissible investigation of the course of negotiations and drafting.

41. It may or may not be the case that, as Mr Hutchings suggested, the statement at section 1.7 of the Full Council Report would give rise to a legitimate expectation in Blackstone that, if it were genuinely unable to meet its commitments under clause 4.2, the Council would act reasonably and honour its commitment to permit the obligation to be rolled forwards; this might be a public law defence to a private law action. Whether or not that is the case has no bearing on the true construction of the Agreement.
42. Second, as Mr Sims acknowledged, the clear commercial purpose of the Escrow Account Agreement, when viewed in the context of the release of the existing PCG and the substitution of a new one, was to provide some reassurance to Merthyr that

Blackstone would have the funds for the restoration works by 30 June 2022, which was just over two months before all coaling had to cease in accordance with the terms of the planning permission. However, the obvious manner in which the Agreement sought to achieve that assurance was by the accumulation of the funds over time in a protected bank account. Of course, it would be possible to provide some form of reassurance by way of a commitment to place an account in funds some two months before the date by which coaling must cease. If that is the effect of the Agreement, so be it. But this provides no reassurance whatsoever for the six and a half years between December 2015 and June 2022. The fairly obvious purpose of the Agreement was “to build up a fund to provide security for [Blackstone’s] restoration obligations” (Skeleton Argument of Mr Hutchings and Mr Datta, paragraph 16). This leads to the next point.

43. Mr Sims’ argument from the apparent oddity of the fact that restoration works had begun before the Drawdown Commencement Date takes matters nowhere. The Agreement provided for one, and only one, Total ERA Sum; there was no provision for adjustment on account of prior expenditure of moneys on ongoing restoration works. That is sufficient to dispose of the point. However, it ought to be noted that, insofar as the unspoken premise is that the total restoration costs are only £15,000,000, it appears to be false. Blackstone’s financial statements for the year ended 31 December 2016 are in evidence and show that during that year its directors reassessed the provision for future liabilities in respect of restoration and *reduced* it by £10.5 million to £51.5 million. Note 24 to the financial statements said: “Restorations will commence while mining operations are ongoing and the provision is expected to be largely utilised over the next 10 years.” It is obvious, in any event, that the carrying out of restoration works while coaling is ongoing does not mean that further significant works will not be required after coaling has ended.
44. Third, whatever difficulties may attend Merthyr’s construction of the Agreement, they are as nothing compared with the fact that Blackstone’s construction negates any obligation to make deposits until 30 June 2022. Clause 4.2 is naturally understood to impose obligations to make quarterly payments: the language is that of “shall”, “fails”, “outstanding” and “payable”. But Blackstone’s case is that any payments before 30 June 2022 were merely optional: as it did not wish to make the payments, it did not have to do so. It is no answer to this objection to speak of “obligation” in the Pickwickian sense in which on occasion Mr Sims used it, because that is simply to say that one has an obligation to make a payment but that, if one chooses not to make it, the obligation is cancelled; the only meaningful obligation is to put the account in funds by 30 June 2022. Further, clause 4.2 does not provide for the cancellation of any obligation.
45. Fourth, there is no need to construe the “cascade” provisions in clause 4.2 in the manner proposed by Mr Sims. As Mr Hutchings observes, the language of “subject to” in paragraphs (a), (b) and (c) has reference to increases in the amounts due. The point is not that the obligations are conditional. It is rather that, although the payment obligation is only £625,000 on each Funding Date, it is more than that if there are arrears. Mr Sims submitted that to read the provisions in this way created a logical difficulty: there was duplication of obligations, because there was a subsisting obligation (to pay the £625,000 due and unpaid on the last Funding Date) and also a new obligation (to pay £625,000 and the amount previously unpaid on the next Funding Date). Mr Hutchings responded that this submission lacked all reality and I agree.

46. Fifth, to make payments into the Escrow Account optional is to make a commercial nonsense not only of the very concept of such an account but also of the detailed provisions regarding withdrawals prior to a Blocking Notice.

Undue Influence

47. Blackstone's second line of defence to these proceedings is to say that Merthyr cannot enforce the Escrow Account Agreement, construed as I have construed it, because it had notice that Blackstone's entry into it was the result of equitable wrongdoing by those who controlled it. Two kinds of wrongdoing are relied on, which I shall consider in turn: first, undue influence by the Parent Companies; second, breach of fiduciary duty by Blackstone's directors. Blackstone contends that in respect of each of these matters there are triable issues, so that Part 24 judgment ought not to be given in favour of Merthyr. Merthyr, however, contends that neither of these matters has a real prospect of succeeding as a defence at trial.

Principles

48. The principles relating to undue influence have been clearly stated by the Court of Appeal in *Allcard v Skinner* (1887) 36 Ch D 145 and by the House of Lords in *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773. I shall take these largely as read.
49. In the present case, Blackstone relies not on "actual undue influence" but on "presumed undue influence". The labels are potentially misleading, inasmuch as they might suggest that the doctrine of undue influence applies both in cases where there actually has been undue influence and in cases where there has not in fact (actually) been undue influence. Properly, however, the two labels describe different ways in which undue influence is exercised and, accordingly, different ways of proving that undue influence has in fact been exercised; for that reason the use of one label rather than another is not critical in considering the present proceedings, provided one focuses on what case is being advanced. In very general terms, in a case of actual undue influence it is necessary to prove some overt act by which influence was exercised, whereas in a case of presumed undue influence the influence will be exercised less directly and its existence is inferred from a consideration of the facts relating to the transaction under consideration and the relationship of the parties to that transaction.
50. A transaction between two persons, A and B, is liable to be set aside on the ground of (presumed) undue influence if it arises out of a relationship in which A has acquired over B a measure of influence or ascendancy of which A takes unfair advantage. The principle will be engaged where the relationship is such that B places such trust and confidence in A that he is, without more, disposed to agree a course of action proposed by A, and where A takes advantage of that trust and confidence. But the principle is not confined to such a case; it extends to the exploitation of the dependent and vulnerable and to any case "in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him" (*per* Lindley LJ in *Allcard v Skinner* (1887) 36 Ch D 145, 181). As Lord Nicholls observed in *Etridge* at [8], relationships are "infinitely various". At [11] he said this:

“... The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.”

51. If what I shall refer to as a “relationship of ascendancy” is the first prerequisite for making a prima facie case of presumed undue influence, the second is that “the transaction is not readily explicable by the relationship of the parties”: *Etridge, per* Lord Nicholls at [21]. As Lord Nicholls went on to say at [24]:

“... something more [than merely the relationship of ascendancy] is needed before the law reverses the burden of proof, something which calls for an explanation.”

52. I have referred above to a transaction between two persons, A and B. In the present case the relevant transaction (the Escrow Account Agreement) was between Merthyr and Blackstone. But Blackstone alleges undue influence not by Merthyr but by those who controlled Blackstone. The principles in tripartite situations have been worked out in cases involving relationships of or akin to suretyship, of which *Etridge* is now the leading example. The basic principle is that A can avoid a transaction with B on the ground of undue influence exercised by C if B had actual or constructive notice of that undue influence. For present purposes the important point is that B will have constructive notice if A’s entry into the transaction is difficult to explain in the absence of the exercise of undue influence by C.
53. *Etridge* was concerned with situations where, classically, a wife enters into a suretyship relationship with a bank in respect of her husband’s debts. Lord Nicholls considered the principles applicable to tripartite situations:

“82. ... [T]he law does not regard sexual relationships as standing in some special category of their own so far as undue influence is concerned. Sexual relationships are no more than one type of relationship in which an individual may acquire influence over another individual. The *O’Brien* decision [*Barclays Bank Plc v O’Brien* [1994] 1 AC 180] cannot sensibly be regarded as confined to sexual relationships, although these are likely to be its main field of application at present. What is appropriate for sexual relationships ought, in principle, to be appropriate also for other relationships where trust and confidence are likely to exist.

83. The courts have already recognised this. Further application, or development, of the *O’Brien* principle has already taken place. In *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 the same principle was applied where the relationship was employer and employee. Miss Burch was a junior employee in

a company. She was neither a shareholder nor a director. She provided security to the bank for the company's overdraft. She entered into a guarantee of unlimited amount, and gave the bank a second charge over her flat. Nourse LJ, at p 146, said the relationship 'may broadly be said to fall under [*O'Brien*]'. The Court of Appeal held that the bank was put on inquiry. It knew the facts from which the existence of a relationship of trust and confidence between Miss Burch and Mr Pelosi, the owner of the company, could be inferred.

84. The crucially important question raised by this wider application of the *O'Brien* principle concerns the circumstances which will put a bank on inquiry. A bank is put on inquiry whenever a wife stands as surety for her husband's debts. It is sufficient that the bank knows of the husband-wife relationship. That bare fact is enough. The bank must then take reasonable steps to bring home to the wife the risks involved. What, then, of other relationships where there is an increased risk of undue influence, such as parent and child? Is it enough that the bank knows of the relationship? For reasons already discussed in relation to husbands and wives, a bank cannot be expected to probe the emotional relationship between two individuals, whoever they may be. Nor is it desirable that a bank should attempt this. ...

85. The relationship of parent and child is one of the relationships where the law irrebuttably presumes the existence of trust and confidence. Rightly, this has already been rejected as the boundary of the *O'Brien* principle. *O'Brien* was a husband-wife case. The responsibilities of creditors were enunciated in a case where the law makes no presumption of the existence of trust and confidence.

86. But the law cannot stop at this point, with banks on inquiry only in cases where the debtor and guarantor have a sexual relationship or the relationship is one where the law presumes the existence of trust and confidence. That would be an arbitrary boundary, and the law has already moved beyond this, in the decision in *Burch*. As noted earlier, the reality of life is that relationships in which undue influence can be exercised are infinitely various. They cannot be exhaustively defined. Nor is it possible to produce a comprehensive list of relationships where there is a substantial risk of the exercise of undue influence, all others being excluded from the ambit of the *O'Brien* principle. Human affairs do not lend themselves to categorisations of this sort. ...

87. These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent

to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as ‘put on inquiry’ in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.

88. Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.

89. By the decisions of this House in *O’Brien* and the Court of Appeal in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, English law has taken its first strides in the development of some such general principle. It is a workable principle. It is also simple, coherent and eminently desirable. I venture to think this is the way the law is moving, and should continue to move. Equity, it is said, is not past the age of child-bearing. In the present context the equitable concept of being ‘put on inquiry’ is the parent of a principle of general application, a principle which imposes no more than a modest obligation on banks and other creditors. The existence of this obligation in all non-commercial cases does not go beyond the reasonable requirements of the present times. In future, banks and other creditors should regulate their affairs accordingly.”

Application to this case

54. The case advanced on behalf of Blackstone is to the following effect. Blackstone was a distinct legal entity from Holdings and the Parent Companies. The Parent Companies, through their control of Blackstone, were able to cause Blackstone to enter into transactions which might not be in its best interests. The effect of what happened in December 2015 was that the Parent Companies gained a benefit by obtaining their release from their obligations under the PCG and that Blackstone incurred onerous obligations under the Escrow Account Agreement. That Agreement was contrary to the commercial interests of Blackstone, “as distinct from the interests of [Blackstone] taken together with associated entities and associated interests” (Amended Defence, paragraph 18A). Accordingly: (1) the Parent Companies had a position of ascendancy over Blackstone; (2) the transactions effected in December 2015 called for an explanation, in that they were not in the commercial interests of Blackstone; and (3) Merthyr, knowing of these things, had notice such as disentitles it to rely on the Escrow

Account Agreement, unless it is able to rebut the presumption of undue influence. Blackstone does not seek Part 24 judgment on this issue but contends that it ought to be resolved at trial and that therefore Merthyr's application for Part 24 judgment ought to be refused.

55. Mr Sims submitted that there was no reason of principle why undue influence, including presumed undue influence, could not operate in the commercial or corporate context. He argued that Lord Nicholls' remarks at [87]-[88] in *Nicholls* showed no more than that the mere fact of the relationship between the Parent Companies (C) and Blackstone (A) did not put Merthyr (B) on notice. They did not show that, where the relationship between C and A was commercial and corporate, B could never be on notice. In this case, the combination of the relationship and the obviously disadvantageous nature of the transaction for Blackstone (when its own interests were considered separately) did place Merthyr on notice. He submitted that the transaction, viewed as a whole, "should have made alarm bells ring" for Merthyr, because it involved giving up a "gold-plated" guarantee from the Parent Companies and taking a less advantageous guarantee, with the limited comfort of the Escrow Account Agreement, in its place.
56. In the course of his submissions, Mr Sims directed my attention to two lengthy letters, dated 6 March 2018 and 19 March 2018 respectively, from Blackstone's solicitors to Merthyr. I have read those letters, though I cannot pretend to think it satisfactory that substantive reliance is placed on *inter partes* correspondence rather than on witness statements, documents and submissions. The letters, particularly the earlier one, were said to have a bearing on the issue of the state of Merthyr's, and in particular Mr Chapman's, knowledge. In fact, to the extent that the matter of the letters went beyond Blackstone's pleaded case, they seem to raise the quite different point that Merthyr entered into the transaction as a result of itself being the victim of misrepresentation or undue influence; cf. in particular paragraphs 23 and 34 of the letter of 6 March 2018. Nevertheless, the point on which Blackstone ultimately relies is that the transaction was driven by the Parent Companies and wholly for their benefit.
57. In my judgment, this line of defence has no real prospect of success. Indeed, it is completely hopeless.
58. I shall assume that undue influence can be exercised by one company upon another company. However, there remain in this case the three questions of relationship of ascendancy, of a transaction not explicable in terms of the relationship (i.e. without undue influence), and of notice.
59. As to the relationship, this is one of (indirect) ownership: the Parent Companies owned Holdings, which owned Blackstone. However, a company is managed by its directors. Although Mr Sims made much of the distinct personality of a limited company, his argument seems to me to rest on the extraordinary notion that the owners of (the shares in) a company are in a position of ascendancy over it for the purposes of the law relating to undue influence. No other matters are relied on in this case as establishing the necessary relationship. The case is put simply on the basis of indirect ownership and its concomitant control. To suppose that this is sufficient to establish the first requirement of presumed undue influence is tantamount to saying that the relationship of parent to subsidiary is within the category of presumptive relationships, such as the relationship of parent and child or that of solicitor and client. I was referred to no authority for such a proposition or anything like it and regard it as obviously wrong.

60. As to the transaction being one that calls for an explanation, there seem to me to be three problems. First, if (as Mr Sims urged) Blackstone's position be considered in isolation, there is nothing that calls for an explanation, in the sense that without an explanation it suggests that something is amiss. Blackstone was already under obligations regarding the restoration of the Site. The obligations under the Escrow Account Agreement were not additional obligations regarding restoration; they related to putting money aside for the performance of those obligations. Certainly, that involves the assumption of a burden of some sort. But it hardly suggests the need for an explanation. Second, in the context of companies within the same group it makes no commercial sense to approach this question, as the Amended Defence and Mr Sims do, in terms of "the commercial interests of [Blackstone] (as distinct from the interests of [Blackstone] taken together with associated entities and associated interests)", if by that is meant that one should focus on the effect of a particular contract on one company in isolation. (That is what Blackstone means: otherwise its argument, which relies on the onerous nature of the obligations under the Escrow Account Agreement upon it, makes no sense.) Of course, one company in a group is a distinct entity from another company in the group. And I also accept that the relationship among companies in the same group does not justify the directors of one company sacrificing that company's interests to those of other companies in the group. But that does not mean that the commercial and financial interests of one company are necessarily to be assessed *in isolation from* the bigger group picture. The transaction, viewed as a whole, was connected with a group re-structure, whereby the Parent Companies sold Holdings (and thereby its wholly owned subsidiary, Blackstone) and the purchasers acquired Holdings (and Blackstone) subject to liabilities vis-à-vis Merthyr. The transaction is perfectly explicable in terms of the relations between group companies. To suppose that one must ignore those relations is simply wrong. Third, Blackstone's approach is inconsistent both with the operation of the commercial world and with Lord Nicholls' remarks in *Etridge* at [88]. Those remarks were, of course, made in the context of guarantees and contracts of suretyship more generally. Within the group context the parent company might often be the one giving the guarantee. However, Lord Nicholls' remarks are not limited to such a case, and trading subsidiaries may well give guarantees for liabilities of holding companies. The dicta indicate that group companies and other commercial entities are properly to be regarded by those who contract with them as capable of standing on their own two feet and forming their own commercial judgments. Were it otherwise, the adverse effects on the certainty and security of commercial contracts would be all too obvious.
61. As to notice, the problems concerning the relationship and the call for an explanation are magnified. This is not an *Etridge*-type case, in that the relationship between A and C is commercial. Blackstone must therefore rely on the Parent Companies' ultimate ownership of it as giving Merthyr notice of a relationship of ascendancy. And it must rely on the supposedly disadvantageous nature of the transaction to its interests, when viewed in isolation from its interests having regard to its group relations, as putting it on enquiry so that it had to satisfy itself of the absence of undue influence. For reasons appearing from the foregoing paragraphs, I regard such reliance as being in each case impossible.

Directors' Breach of Duty

62. The same matters that are raised in respect of the plea of undue influence are also relied on by Blackstone in support of a new plea introduced by paragraph 18A of the Amended Defence:

“Further or in the alternative, the [Escrow Account] Agreement is unenforceable against the Defendant and/or liable to be set aside and should be set aside, since the Claimant was on notice at the time it entered into the Agreement that the servants or agents of the Defendant who procured it to enter into the Agreement were acting for an improper purpose, since the Agreement was contrary to the commercial interests of the Defendant (as distinct from the interests of the Defendant taken together with associated entities and associated interests), for reasons which have already been pleaded as aforesaid, and accordingly in excess of actual and/or ostensible authority.”

63. The argument in short was to the following effect. Blackstone's directors owed the fiduciary duties in section 171 (to act within powers), section 172 (to promote the success of the company), section 173 (to exercise independent judgment), and section 175 (to avoid conflicts of duty) of the Companies Act 2006. The transaction was not in the best interests of Blackstone; see above. Therefore the directors entered into it without authority. Merthyr was on notice that the transaction was not in the best interests of Blackstone and therefore cannot avail itself of section 40(1) of the Companies Act 2006, which, in favour of a person dealing with a company in good faith, deems the powers of the directors to bind the company to be free of any limitation in the company's constitution.

64. Mr Sims referred to the judgment of Pennycuik J in *Charterbridge Corporation Limited v Lloyds Bank Limited* [1970] 1 Ch 62, where directors of the plaintiff had created a guarantee and charge in favour of the defendant bank for the debts of another company in the group and had given no separate consideration to the interests of the plaintiff company itself. The plaintiff sued for a declaration that the charge was ultra vires and invalid. The actual decision was that the subjective mental states of the officers of the plaintiff and the defendant were immaterial. In case he were wrong, however, he considered the position of the directors and of the bank. In respect of the directors, he said at 74:

“Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.”

At 75 he turned to the position of the bank:

“Finally, I must refer to the knowledge, or reputed knowledge, of the bank. This knowledge is an essential part of the claim as formulated on behalf of the plaintiff company. The bank’s officers admitted that they had full knowledge of the affairs of the group, including Castleford, and, as I have held, had in all relevant respects the same attitude to the transaction as did Mr. Pomeroy himself, i.e., they looked to the group as a whole and did not consider the interests of the companies, including Castleford, severally. I am wholly unsatisfied that the bank’s officers knew or must be treated as knowing that the transactions were not for the benefit of Castleford. Even if the plaintiff company had surmounted all its other obstacles, it would, I think, fall at this final one. I do not see how it could be possible to impute this knowledge to the bank’s officers. Clearly, one could not do so merely by reason that the bank was looking to the interests of the group as a whole. For the reasons which I have given, this action fails.”

65. Mr Sims submitted that the issue of Merthyr’s knowledge was entirely unsuited to a summary disposal but ought to be considered at trial. He referred in support of that submission to the treatment of a similar issue by the House of Lords in *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 (cf. in particular *per* Lord Scott of Foscote at [19] and [28]-[32]) and by Blackburn J in *Ford v Polymer Vision Limited* [2009] EWHC 945 (Ch), [2009] 2 BCLC 160 (esp. at [97]).
66. I reject this line of defence also, for reasons that are in substance the same as those already set out.
67. The starting-point is that Blackstone will only be permitted to defend the claim if its defence has a “realistic” prospect of success. It is quite correct to note that, in deciding whether the prospects of success are realistic, the court will have regard not only to currently available evidence but also to the nature of the evidence that can reasonably be expected to be available at trial. However, that is not the same thing as saying that one should refuse summary judgment in case something turns up. And it is a far cry from saying that one should disregard the defence that is actually being advanced.
68. The transaction in December 2015, when viewed as a whole, was a wide one, involving a release of the Parent Companies, a guarantee by Holdings and entry into the Escrow Account Agreement by Blackstone; and, yet more widely, the sale of part of the Parent Companies’ business. Yet the actual contract entered into by Blackstone was the Escrow Account Agreement. All that Blackstone has done in these proceedings is say that the assumption of the obligations in that Agreement are not in the best interests of Blackstone, because they are obligations, and that Merthyr had knowledge (a) that this was so and (b) that the assumption of the obligations was intended to serve the interests of the Parent Companies as being the price of their release from the PCG. However, first, it is by no means obvious that the obligations of the Agreement *even viewed by themselves* were not in Blackstone’s interests and, second, no ground whatsoever has been shown for concluding that Merthyr knew or ought to have known that entry into the Agreement, in the context of a group re-structuring, was contrary to Blackstone’s interests.

Conclusions and Remedies

69. I have concluded that Merthyr's proposed construction of the Escrow Account Agreement, upon which it sues, is the correct one. The issue in that regard is susceptible of summary determination.
70. I have also concluded that Blackstone's other substantive grounds of defence have no realistic prospect of success.
71. Mr Sims submitted that the equitable remedy of specific performance ought to be refused, for two reasons advanced in paragraph 25 of the Amended Defence: first, Merthyr's delay in seeking to enforce payment; second, the absence from the Escrow Account Agreement of any provision for a remedy prior to the Funding Longstop Date, 30 June 2022.
72. I do not consider that either of those matters is a reason for refusing to require Blackstone to comply with its obligations under what is a commercial agreement. There has been no waiver of the obligations, and as Mr Sims himself observed clauses 12.2 and 12.3 significantly restrict a party's right to treat informal conduct or delay as a waiver of a right or remedy. The fact that non-payment of a quarterly payment is not an Event of Default for the purposes of clause 6 simply means that the provisions regarding an Event of Default do not apply. It does not mean that performance of the Agreement cannot be enforced. Blackstone does not claim to have failed to perform the Agreement on account of inability to do so.
73. Accordingly, I shall order Blackstone to pay the moneys now outstanding under the Agreement and to make the payment that falls due at the end of this month.
74. This judgment is being handed down in the absence of the parties. As the parties have not informed me of any agreement as to the appropriate terms of the order, I shall adjourn the hearing part-heard in order to receive further submissions.