Neutral Citation Number: [2021] EWHC 1314 (Ch)

Appeal No. CH-2020-000296

Case No: CR-2018-006093

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 18/05/2021

Before :

MR JUSTICE MILES

- -

Between :

BWT AKTIENGESELLSCHAFT **Appellant**

- and –

(1) FORCE INDIA FORMULA ONE TEAM LIMITED (IN LIQUIDATION)
(2) GEOFFREY PAUL ROWLEY (as liquidator of the above-named company) **Respondents**

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Adam Al-Attar (instructed by **Onside Law LLP**) for the **Appellant**
James Segan QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondents**

Hearing date: 5 May 2021

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APPROVED JUDGMENT

(revised version issued on 20 May 2021)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii at 10.30 am on 18 May 2021.

Mr Justice Miles :

1. BWT Aktiengesellschaft ("BWT") appeals from a decision of Deputy ICC Judge Baister dated 23 November 2020 ([2020] EWHC 3187 (Ch)). He dismissed an appeal by BWT under r.14.8 of the Insolvency Rules 2016 against the rejection by the Second Respondent ("the liquidator") of part of BWT's proof of debt in the liquidation of Force India Formula One Team Limited ("Force India" or "the company").

The facts

2. The company carried on business as a Formula One racing team. BWT, a supplier of water treatment products, wanted to promote its brand through sponsorship. The parties therefore entered a Contribution and Rights Agreement ("CRA") dated 10 March 2017. BWT became the company's principal sponsor, providing about €15m per annum in tranches. The CRA, which was for a five-year term, recited that BWT wished to contribute to the racing, trackside and hospitality costs incurred by the team. The sponsorship payments were "front-loaded" (rather than being spread evenly) because much of the cost of running a F1 team is incurred between seasons: the racing season runs from about March to late November each year and the development and testing of a new car for the season is done in the downtime (between December and February). This is the main expense of a F1 team.

3. By February 2018 the company had begun to get into financial straits and was failing to provide promised information to BWT. BWT nonetheless continued to provide support, including by giving the company a bridging loan in March 2018. BWT was concerned about the company's ability to continue in business and race and sought to bolster its contractual rights. On 7 May 2018 its solicitors sent the company a draft Deed of Variation ("the DOV"). This was executed on 8 May 2018. It was drafted by BWT's solicitors and presented to the company for signature. The terms were not negotiated.

4. The DOV amended the terms of the CRA. It also provided for the company to grant security to BWT, but in the event that never happened.

5. BWT terminated the CRA with effect from 1 July 2018 by notice given on 28 May 2018 under an express power contained in clause 18.2 of the CRA.

6. A creditor of the company then applied for an administration order. This was made on 27 July 2018. The company, with support from BWT, traded in administration before its business and assets were sold, on 16 August 2018, to a company called Racing Point. The company later went into liquidation.

7. BWT submitted a proof of debt dated 5 June 2019 in the company's administration. The particulars were amended on 28 August 2019. The amended proof stands as BWT's proof in the liquidation. On 28 November 2019 the liquidator admitted the proof as to £1.264 million odd but rejected the balance. The parties are now agreed that the amount of BWT's disputed claim is €4.25 million.

The relevant contractual terms

8. The CRA contained the following relevant terms:

1. Interpretation

The definitions and general provisions in Schedule 1 apply to this agreement.

"Fees" were defined in Schedule 1 as: "The fees to be paid by BWT to Force India as a contribution towards the racing, trackside and hospitality costs incurred by the Team in respect of each year of the Term in accordance with clause 17.1."

3. Grant of rights from Force India

3.1 In consideration of and subject to the payment of the Fees by BWT in accordance with clause 17 hereunder, Force India grants to BWT, on a royalty free and (unless otherwise expressly stated) non-exclusive basis, the following BWT Rights for use during the Term: [*there then follows a description of the rights granted to BWT*].

4. Force India's obligations and rights

4.5 In the event that Force India ceases to operate a Formula One team competing in the World Championship, this agreement shall be terminated with immediate effect and (subject to clause 18.5) without penalty to any party.

17. Fees and Payments

17.1 In consideration of Force India's obligations BWT will pay to Force India the Fees, to be received by Force India, subject to BWT having received an invoice from Force India at least thirty (30) days in advance (other than in relation to the instalment referred to in clause 17.1.1.1) as follows:

17.1.1 In 2017, twelve million five hundred thousand Euros (€12,500,000) to be received as follows:

17.1.1.1 ten million Euros (€10,000,000) on or before 17 March 2017; and

17.1.1.2 two million five hundred thousand Euros (€2,500,000) on or before 1 July 2017.

17.1.2 In 2018, fifteen million Euros (€15,000,000) to be received as follows:

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

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

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

17.1.3 In 2019, fifteen million Euros (€15,000,000) to be received as follows: [*three tranches as for the 2018 Fees, but one year later in each case*]

17.1.4 In 2020, fifteen million Euros (€15,000,000) to be received as follows: [*three tranches as for the 2019 Fees, but one year later in each case*]

17.1.5 In 2021, fifteen million Euros (€15,000,000) to be received as follows: [*three tranches as for the 2020 Fees, but one year later in each case*]

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

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

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

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

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

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

18. Termination

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

18.1.1 An Insolvency Event;

18.1.2 Default; or

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

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

[…]

> 18.5 In the event of any termination of this Agreement pursuant to clause 4.5, or by BWT pursuant to clause 18.1, the total aggregate Fees, Helmet Logo Fees and Driver Drink Bottle Branding Fees payable by BWT to Force India over the entire Term shall be deemed to accrue on a daily basis during the Term and shall be pro-rated to the Termination Date. Any such pro-rated sums paid in relation to any period after the Termination Date shall be reimbursed by Force India to BWT within thirty (30) days after the Termination Date.

9. The DOV was signed on 8 May 2018. That was after BWT had paid the first and second tranches for 2018 under clause 17.1.2 of the CRA, but before the third.

10. The DOV included these terms (corrected for typos):

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

> Agreement, the Security Agreement and/or any bridge loan provided by BWT to Force India; or
>
> (c) without delay (without notice from BWT being required) in the amount allocated to the relevant World Championship Race below if: (i) Force India has not commenced that Race with at least one Car; or (ii) Force India has not commenced that Race and the previous Race with two Cars in each Race, provided that: (A) BWT's rights under this sub-paragraph (c) shall not apply to the extent that a Car has not commenced a Race due to a genuine and bona fide mechanical breakdown or Driver illness/injury; and (B) Force India will use its best endeavours to replace any ill/injured Driver and resolve any mechanical breakdown.
>
> [*A Table follows with columns detailing races, amount and status as at the date of the deed – see further below*]
>
> 2.4 BWT's obligations under paragraphs 2.1.1, 2.2 and 2.3 above (including its agreement to amend Clause 18.2 of the C&R Agreement as set out in paragraph 2.1.1, provide the bridge loan pursuant to the Second Bridge Loan Agreement as set out in paragraph 2.2 and enter into the Facility Agreement as set out in paragraph 2.3), are conditional on the Parties entering into the Security Agreements by no later than the Longstop Date. For the avoidance of doubt, the Security Agreements must be in a form acceptable to BWT and will secure Force India's obligations under this deed, the First Bridge Loan Agreement, the Second Bridge Loan Agreement, any further bridge loan agreements agreed between the Parties, the Facility Agreement and the C&R Agreement. If the Security Agreements are not entered into by the Parties by the Longstop Date, BWT's obligations under paragraphs 2.1.1, 2.2 and 2.3 above shall be void and have no legal effect, but the provisions of paragraphs 2.1.2, 2.1.3 and 2.1.4 (and all other provisions of this deed) shall continue to remain in full force and have legal effect.
>
> 2.5 Save to the extent expressly amended herein, all terms and conditions of the C&R Agreement and the First Bridge Loan Agreement shall remain in full force and effect.

11. The Table appearing after clause 2.1.2 identified each of the races for the 2018 season and set out the "status (as at the date of this deed)". It allocated the total amount of €15 million of the 2018 Fees to those races. The first four races had already happened before the date of the DOV: their status was "Fee paid by BWT for rights received". For the remaining seventeen races the status included the rubric: "Advance payments made by BWT for rights not yet received. Such amount to be secured under the Security Agreement, repayable as set out in paragraph 2.1.2 above and not deemed Force India income until rights are received."

The issue

12. The Fees set out in clauses 17.1.2.1 and 17.1.2.2 of the CRA were paid to the company by March 2018. The CRA was terminated by BWT under clause 18.2 of the CRA with effect from 1 July 2018, before most of the races listed in the Table set out in clause 2.12 of the DOV had taken place. The issue is whether, on termination of the CRA under clause 18.2, part of the amounts paid by BWT to the company under clauses 17.1.2.1 and 17.1.2.2 of the CRA were repayable to BWT.

The judgement below

13. The judge decided in favour of the liquidator. He considered the textual and contextual arguments. He summarised the principles of interpretation by reference to the leading cases, including the three leading Supreme Court cases of *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. The judge recorded at [14] that the process is unitary and iterative, contextual and textual. He held (in brief outline) that BWT's termination of the CRA under clause 18.2 did not require the company to repay BWT any part of the instalments paid under clauses 17.1.2.1 and 17.1.2.2 of the CRA. On the contrary, clause 18.2 (which was not varied by the DOV) stipulated that those instalments were not repayable whether in accordance with clause 18.5 of the CRA or otherwise, and nothing in the DOV affected that part of clause 18.2. The judge also decided in the alternative that any ambiguities should be resolved in favour of the company under the *contra proferentem* principle.

The grounds of appeal and the parties' submissions

14. BWT does not criticise the judge's statement of the legal principles but says that he misapplied them. There are two grounds of appeal: (a) the judge's approach to interpretation was flawed; and (b) in any case he reached the wrong interpretation of the contracts.

15. As to the first ground, BWT contends (in outline) that the judge concentrated on textual arguments to the effective exclusion of the context and the commercial consequences of the rival interpretations.

16. As to the second ground, BWT submits (in outline) as follows:

    (i) The general rule is that termination of a contract does not affect accrued rights unless the contract specifically caters for this.

    (ii) The CRA created an initial payment regime, including for the Fees. The Fees were the various payments referred to in clause 17.1. The "avoidance of doubt" wording in subclause 18.2(b) made it clear that certain of the Fees would be retained by the company in the event of termination under that clause.

    (iii) But clause 2.1.2 of the DOV created a new and "revised payment regime" for the 2018 Fees which superseded that under the CRA. The effect of this revised payment regime was that the Fees for 2018 were contractually apportioned to the 2018 season's races and only became the "income" of the company when the relevant races happened. Until then the payments were advance payments which the company had no right to retain. The advance payments were a debt in favour of BWT which remained due to it unless and until the relevant race had occurred (at which point the relevant amount would become "income" of the company).

    (iv) Since that debt had accrued due to BWT, under general principles of law (point (i) above) it was payable to BWT on termination of the CRA, subject only to any contrary agreement between the parties.

(v) The contracts did not contain any agreement that BWT would relinquish this debt. Clause 18.2 does not do so when properly interpreted in the light of the DOV. So when the CRA was terminated on 1 July 2018 the company became liable to repay such element of the advance payments as it had not yet earned (by taking part in relevant races).

(vi) BWT says that there is further textual support for this conclusion (I shall elaborate this when setting out my analysis). It argues that, after the parties had entered the DOV, clause 18.2 of the CRA was at best ambiguous.

(vii) BWT submits that its interpretation accords better with the commercial context and makes more commercial sense than the liquidator's; and that any ambiguities should be resolved in its favour. As to the context, BWT submits that BWT was seeking through the DOV (which was not negotiated) to bolster and improve its contractual rights. BWT's concern when entering the DOV was that it should be able to recover as much of the money it had expended for which it received no real benefit (a point the judge correctly recorded in [39(c)]).

(viii) As to the commercial consequences, BWT says that the liquidator's reading requires the "for the avoidance of doubt" wording in clause 18.2 of the CRA to release a debt in favour of BWT created by clause 2.1.2 the DOV. The intent of clause 2.1.2 was that the company would only earn the Fees by actually racing and it makes no commercial sense that the company should be able to keep those parts of the Fees that the parties did not regard as its earned income. To allow the company to keep the advances would go against the purpose of the BWT, which was to bolster BWT's rights.

17. The liquidator argues that the judge was right. He submits (in outline) as follows:

(i) It is common ground that the amounts in issue were paid by BWT pursuant to clauses 17.1.2.1 and 17.1.2.2 of the CRA. BWT accepts that those monies, having been paid to Force India, were the property of Force India for it to use as it wished. There is no restitutionary or proprietary claim. The claim is made for a contractual debt and the issue is therefore one of contractual interpretation.

(ii) The CRA was validly terminated by BWT with effect from 1 July 2018 by a notice served by BWT under clause 18.2. The company was under no contractual obligation to repay the relevant monies to BWT on a termination by BWT under clause 18.2. On the contrary, clause 18.2 expressly does the opposite: subclause 18.2(b) is clear and unambiguous and BWT has failed to advance a sensibly available alternative reading of the text.

(iii) The DOV does not alter this analysis: (a) despite creating new repayment obligations in respect of certain events, clause 2.1.2 does not do this where BWT terminates under clause 18.2; (b) the amendments to clause 18.2 of the CRA that would have been made by clause 2.1.1 of the DOV were never brought into effect; and (c) clause 2.5 of the DOV confirms that save to the extent expressly amended, the terms and conditions of the CRA should remain in full force and effect.

(iv) Clause 2.1.2 did not create a "new payment regime". While clause 2.1.2 of the DOV provided for certain sums already paid under the CRA to be deemed "advance payment" rather than "income" and for repayment in certain circumstances, they did not provide for repayment in the event of termination for convenience.

18. The liquidator notes that the CRA allowed various kinds of termination and provided differing consequences for each. So, he says, there is nothing commercially surprising about subclause 18.2(b) being read and applied naturally.

19. The liquidator also relies on the *contra proferentem* canon as a last resort. It was common ground that BWT was the *proferens,* as the party who put the clause forward and which relies on it. The liquidator says there is no ambiguity, but that if there was any, it should be resolved against BWT.

Analysis

20. The legal principles are well known and were not disputed. They were conveniently rehearsed in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18] (omitting internal citations):

> "i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
>
> ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made;
>
> iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision;
>
> iv) Where the parties have used unambiguous language, the court must apply it;
>
> v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used;
>
> vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made;

> vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent; and
>
> viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain."

21. The first ground of appeal is that the judge erred in law in the application of these principles. I can take this challenge shortly. The judge considered the text and the context, which included the company's financial difficulties and BWT's wish to bolster its protection against an insolvency or other failure of the company to perform. He also addressed the commercial sense of the rival readings and understood BWT's contention that the liquidator's reading involved the company retaining advance payments which the DOV described as advances rather than income. He also noted that the agreements had been drafted by lawyers. In my judgment the judge carried out an iterative and unitary approach and did not fall into the trap of excessive textualism. This ground of appeal is dismissed.

22. I turn to the meat of the appeal, which concerns the true interpretation of the contracts.

23. I start with two general observations. The first is that the two contracts were professionally drafted by skilled lawyers. They contain no obvious errors of expression and there is no reason to think that anything has gone wrong with the drafting.

24. The second is that the CRA contained a number of different grounds of termination and these had varying consequences. If the company ceased operating an F1 team in the championship, the CRA would be "terminated with immediate effect and (subject to clause 18.5) without penalty to any party" (clause 4.5). According to clause 18.5, if that occurred the fees payable by the applicant over the entire term of the agreement were to be "pro-rated to the Termination Date" and "[a]ny such pro-rated sums paid in relation to any period after the Termination Date [were to] be reimbursed by Force India to BWT". In the event of termination for cause (insolvency, default or non-payment as defined) and the other party exercising its right under clause 18.1 to terminate, clause 18.5 pro-rating would also apply.

25. If, however, BWT elected to terminate for convenience under clause 18.2, payments already made were to be retained by the company. More specifically clause 18.2 gave both parties a right to terminate on notice for convenience. There was a limited window for serving a notice (running from 15 May to 31 May 2018). Subclause 18.2(b) stated that where BWT terminated under the clause the payments referred to in clauses 17.1.2.1, 17.1.2.2, 17.2.2 and 17.3.1.1 to 17.3.1.2 would be retained by the company and that there would be no pro rata reimbursement for such Fees whether in accordance with clause 18.5 or otherwise. So, taking the CRA alone, in the event of termination under clause 18.2, the treatment of any sums paid under clauses 17.1.2.1 and 17.1.2.2 was clear. The company retained them and BWT had no claim to reimbursement.

26. BWT in fact terminated the contract by notice given under clause 18.2. The liquidator submits that the answer to this case is therefore delivered by sub-clause (b): the company retains the earlier payments made under clauses 17.1.2.1 and 17.1.2.2; and that is the end of the analysis.

27. BWT submits that the treatment of the 2018 Fees was transformed by the DOV. The parties agreed by clause 2.1.2 of the DOV to treat the Fees set out in clause 17.1.2. (i.e. those for 2018) either as "advance payments" or as "income". The 2018 Fees were to be apportioned to the races set out in the Table and were (so to speak) only earned by the company when (but only when) each listed race occurred. The advance payments were unearned and were therefore an accrued debt of the company to BWT unless and until BWT received its rights for the relevant race. The advance was therefore repayable under the general law if the CRA is terminated before the money had been earned. This was a revised payment regime, which superseded the CRA.

28. BWT submits that this interpretation is supported by the parties' agreement that the amounts of the advance payments would be secured in favour of BWT. This shows that the advance payments were regarded as a payment obligation (or debt) of the company to BWT.

29. BWT argues that it would be commercially very surprising to suppose that the parties, having expressly created a debt in BWT's favour by clause 2.1.2 of the DOV, should also have intended that it should be taken away by subclause 18.2(b) of the CRA. BWT says that the commercial context of the DOV was that it was seeking and obtaining greater protection than it had under the CRA and that should lead to the conclusion that it effectually obtained the rights it bargained for under clause 2.1.2 of the DOV.

30. As to the text of clause 18.2(b), BWT submits that the words "payments referred to in clauses 17.1.2.1 and 17.1.2.2" exclude such element of the 2018 Fees as were characterised as advance payments by clause 2.1.2 of the DOV. The parties acknowledged by that clause that the relevant parts of Fees were an unearned debt (until the relevant race had been run). Those advance payments were no longer "payments referred to in clauses 17.1.2.1 and 17.1.2.2" as that phrase is used in 18.2 of the CRA.

31. I am unable to accept this submission:

    (i) Clause 2.1.2 of the DOV refers in terms to the Fees set out in clause 17.1.2 of the CRA. The definition of "Fees" and the reference to clause 17.1.2 directs the reader back to the various payments referred to in that clause.

    (ii) Clause 2.1.2 does not, as BWT suggested, create a new payment regime. BWT's payment obligations in respect of 2018 are found in clause 17.1.2 of the CRA and these were not amended by the DOV. Clause 2.1.2 of the DOV did not change the dates on which BWT was required to pay the 2018 Fees or the amounts of the tranches. Indeed the clause presupposes that BWT has complied with its obligations in the CRA to make the payments. Instead clause 2.1.2 deems those payments to be either advances or income for certain purposes (which are then spelt out in the clause). Clause 2.1.2 of the DOV

therefore divides the set of 2018 Fees into the subsets of advance payments and income.

(iii) Returning to the text of clause 18.2 of the CRA, I cannot see how the two payments of the instalments paid before March 2018 (against invoices issued by the company under those clauses) were anything other than "payments referred to in clauses 17.1.2.1 and 17.1.2.2." They were (as a matter of fact) payments made under those clauses and nothing the parties said in DOV when deeming parts of them as advances or income changes that.

(iv) Clause 2.5 of the DOV is relevant here. The CRA, including clause 18.2 of the CRA, has full effect unless expressly amended by the DOV.

(v) It will also be noted that clause 2.1.2 of the DOV was concerned only with the treatment of the 2018 Fees. It did not create any separate termination rights and did not purport to change the rights of the parties to terminate the CRA itself. It is therefore reasonable to read clause 18.2 of the CRA as untouched by clause 2.1.2.

(vi) Nor can it be suggested that the parties overlooked clause 18.2 of the CRA when they entered clause 2.1.2 of the DOV. They expressly agreed (albeit conditionally) in clause 2.1.1 that clause 18.2 would be deleted and replaced with new wording.

32. BWT submitted that the words "the payments referred to in clause 17.1.2.1 [and] 17.1.2.2" as used in clause 18.2 of the CRA were at least ambiguous in the light of the DOV. I disagree. It seems to me that there is can be no sensible doubt that those words denoted the payments set out in clauses 17.1.2.1 and 17.1.2.1 (of specific amounts to be made on certain date against the relevant invoices). The text is clear and there is only one available meaning.

33. BWT's argument therefore requires an inadmissible reading down of the words "the payments referred to in clause 17.1.2.1, 17.1.2.2 … shall be retained by [the company] and no pro rata reimbursement of such Fees … whether in accordance with clause 18.5 or otherwise, shall apply".

34. Nor do I think that anything can be made of the use of the opening words "for the avoidance of doubt." Sub-clause 18.2 (b) was intended to have substantive effect: it stipulated what would happen in the event of termination by BWT under clause 18.2. There is also some force in the liquidator's point that the words "or otherwise" at the end of clause 18.2, were intended to emphasise that there would be no reimbursement of the relevant payments, whether under the terms of the CRA or the general law. I therefore consider that BWT's case cannot overcome the clear wording of clause 18.2 of the CRA.

35. The liquidator's reading by contrast does not involve any friction between clause 18.2 of the CRA and clause 2.1.2 of the DOV. Clause 2.1.2 of the DOV tells you what happens in the events set out in sub-clauses 2.1.2 (a) to (c): in those cases the relevant parts of the sums paid under clauses 17.1.2.1 and 17.1.2.2 of the CRA as remain advance payments are to be repaid. By contrast, clause 18.2 of the CRA tells you what

will happen if BWT opts to terminate the CRA under clause 18.2: the company retains any earlier payment of Fees under clauses 17.1.2.1 and 17.1.2.2.

36. This leads naturally to a connected textual point. Clause 2.1.2 of the DOV provides for the repayment of the remaining deemed advance payment element of the 2018 Fees in three specific groups of events: (a) the company's imminent insolvency, (b) relevant negotiations with creditors by reason of actual or anticipated financial difficulties which would adversely affect the company's ability to perform, or (c) failure by the company to participate in races. The clause does not provide for repayment on termination under clause 18.2 of the CRA.

37. BWT argues that the clause does not say that the advance payment becomes repayable only in the three stated groups of cases. That may be so, but since clause 2.1.2 of the DOV carefully specifies certain conditions of repayment, it is a reasonable inference that the parties did not intend the same outcome in other, unspecified, events. And, as just noted, the parties did not overlook the possibility of termination under clause 18.2: they addressed it in the adjacent clause of the DOV.

38. BWT submits that its argument is assisted by clause 2.1.1 of the DOV. It says that, though the clause did not actually come into effect, the intended replacement for the existing clause 18.2 of the CRA would have removed the parties' right to terminate as of 1 July 2018; and also deleted the provisions of sub-paragraph 18.2(b) of the CRA. BWT says that this is consistent with the view that, from the date of the DOV, the company's right to retain part of the instalments paid under clause 17.1.2 of the CRA was governed only by clause 2.1.2 of the DOV.

39. I do not find this persuasive. BWT's argument seems to be that clauses 2.1.1 and 2.1.2 of the DOV would have made commercial sense together if the condition in clause 2.1.1 had been satisfied. But, since clause 2.1.1 was conditional, a reasonable reader would also anticipate the case where the conditions of clause 2.1.1 did not happen. That can most naturally be achieved by leaving intact the whole of the existing clause 18.2 of the CRA, while reading clause 2.1.2 of the DOV as creating additional rights for BWT in the events specified in it.

40. Further, the replacement wording for clause 18.2 in clause 2.1.1 would have moved the termination date from 1 July 2018 to 30 November 2018. That would have been at the very end of the 2018 season. The next instalment would have been that due under clause 17.1.3 of the CRA for the 2019 season on the next day, 1 December 2018. There could therefore have been no question of a return of any part of the 2018 Fees. That explains why the proposed replacement clause 18.2 deleted language found in subclause 18.2(b) of the existing clause. There would simply have been no need for it.

41. I return to clause 2.1.2 of the DOV and the expressed intention that security should be given in respect of the deemed advance payment element of the 2018 Fees. BWT submits that this is conclusive and objective evidence of the parties' contractual intention to create an immediate debt in favour of BWT, repayable under the general law. I am unable to accept this. There was no doubt an intention that the deemed advance payment element would be treated as secured. But the liquidator's reading is consistent with the parties' expressed intention that the obligations of the company under clause 2.1.2 of the DOV were to be secured. The security would, on that

interpretation, cover the contingent liability of the company to repay in the events set out in subclauses (a) to (c) but not otherwise. The intended provision of security is therefore neutral.

42. But in any case, even if BWT was right to say that the parties regarded the deemed advance elements as a present obligation of the company, it was common ground that the consequences of the termination of the CRA were subject to the overall contractual agreement of the parties. And, as I have already explained, I consider that clause 18.2(b) provides unambiguously for the consequences of a termination under that clause: the relevant sums were to be retained by the company and BWT had no claim to reimbursement to any part of them.

43. The authorities show that the court will apply and uphold the clear and unambiguous contractual language used by the parties. It is the thing over which the parties have control. There may be cases where the natural reading of the parties' chosen language (even if apparently unambiguous) leads to absurdity or results which are manifestly uncommercial or unreasonable. I have already addressed a number of facets of the context and commercial sense, but it is helpful to marshal them to see whether they affect the analysis set out thus far.

44. I do not think that the context of the DOV adds much that cannot be gleaned from reading the contract itself. The background was that the company was in financial difficulties. BWT wished to guard against the company's insolvency or inability to race or otherwise perform the contract. BWT had the whip-hand in negotiations and wanted to increase its contractual protections. BWT therefore required and acquired additional rights. Clause 2.1.2 of the DOV did that: it allocated the 2018 Fees to races, treated the "unearned" part as advances, and provided for repayment to BWT in the event of insolvency; or relevant negotiations with creditors in circumstances which BWT reasonably believed would have a materially adverse effect on the company's ability to perform under the CRA; or a failure by the company to take part in races. So clause 2.1.2 catered in terms for what would happen if the company's financial difficulties led to its demise, or inability to perform, or failure to participate in races.

45. As I have already noted, it is not surprising in this context that the parties left intact BWT's separate and distinct right to terminate under clause 18.2 of the CRA. Nor it is remarkable for the contract to leave untouched the agreed consequences of an exercise of the rights under that provision. In short, while the context informs the reasonable reader that BWT sought (and obtained) added protection under clause 2.1.2 of the DOV, there is nothing in the context to cause the reader to infer that the parties intended to alter the existing termination regime found in clause 18.2 of the CRA.

46. In analysing the arguments thus far, I have considered aspects of the commerciality of the rival interpretations. But I should address here BWT's overarching submission. BWT emphasises that it had the more powerful bargaining position and that there was no negotiation of the terms of the DOV. So, it says, having just agreed by clause 2.1.2 for the 2018 Fees to be apportioned to races and only to become part of the company's income as those races happened, it would be remarkable if clause 2.1.2 did not give BWT the right to retain the unearned part of the 2018 Fees when it served notice to terminate a few weeks later. I do not find this argument persuasive. I agree with the liquidator's observation that BWT's argument is circular: it assumes that which BWT seeks to establish. If the two contracts read together reasonably mean that

the company was entitled to keep the clause 17.1.2 payments on a clause 18.2 termination then those payment cannot be regarded as a debt payable to BWT on such a termination; and vice versa. That is the very thing in issue.

47. It would doubtless make sense from BWT's point of view for it to be able to recover the advance part of its sponsorship payments in the event of early termination of the CRA. But issues of interpretation cannot be determined by what seems like commercial sense from the perspective of one of the parties to the contract. You have to look at things from both sides. There is to my mind nothing commercially surprising about the liquidator's reading. On that interpretation if the company were to become insolvent or unable to perform before the end of the 2018 season the company would have to repay part of the 2018 instalments (see clause 2.1.2 of the DOV). But if BWT decided to exercise its option under clause 18.2 of the CRA to terminate the CRA entirely with effect from 1 July 2018, the company would be able to keep the clause 17.1.2.1 and 17.1.2.2 payments. There is nothing unbusinesslike in reading clause 2.1.2 of the DOV as giving BWT super-added rights, but without replacing or amending clause 18.2 of the CRA.

48. It will also be recalled that the instalments were front-loaded because most of the team's costs were met in the period December to February each year (before the racing season started). I agree with the liquidator that there is nothing inherently uncommercial in the parties agreeing that the company could keep instalments already paid should BWT choose to terminate the entire contract under clause 18.2.

49. I also return to the point that the CRA itself provided for differing forms of termination to have distinct consequences. As already noted, termination under clauses 4.5 and 18.1 of the CRA led to a time apportionment under clause 18.5. Termination under clause 18.2 had other consequences. I agree with the submission for the liquidator that, against this background, there is nothing commercially surprising in the parties agreeing (by clause 2.1.2 of the DOV) that another series of events would have yet different consequences in respect of the 2018 Fees.

50. There is another point concerning the various different termination rights. BWT accepted that the termination regime in clauses 18.1 and 18.5 survived the agreement of clause 2.1.2 of the DOV, despite the overlap between an Insolvency Event (see clause 18.1.1) and the events set out in subclause (a) of clause 2.1.2 of the DOV. BWT also accepted that there would be different apportionments for termination under clause 18.1.1 (calculated under clause 18.5) on the one hand, and the service of a notice in the events set out in clause 2.1.2(a) of the DOV on the other. BWT accepted that these two sets of rights co-existed and that it would be up to BWT whether to serve a notice under clause 2.1.2(a) of the DOV or clause 18.1 of the CRA. But it is hard to see why clause 2.1.2 of the DOV should leave intact the termination and pro-ration provisions of clauses 18.1 and 18.5 of the CRA but supersede subclause 18.2(b) in the case of a termination under clause 18.2. To my mind, a more coherent and consistent reading is that nothing in clause 2.1.2 of the DOV varied or affected any of the termination provisions of clause 18 of the CRA.

51. I return to the iterative and unitary exercise of reading the contractual text in its context, bearing in mind the commerciality of the rival readings. I have concluded that the judge correctly interpreted the contracts. I can now summarise my views very briefly. BWT's claim is for the repayment of part of the 2018 Fees paid under clauses

17.1.2.1 and 17.1.2.2. BWT terminated the CRA pursuant to clause 18.2. That clause provided in terms that, where that happened, any payments referred to in clauses 17.1.2.1 and 17.1.2.2 would be retained. Nothing in clause 2.1.2 of the DOV meant that the relevant payments ceased for the purposes of clause 18.2 to be "payments referred to in clauses 17.1.2.1 or 17.1.2.2" of the CRA. That is what they were before the DOV was entered and what they remained afterwards. Clause 2.1.2 of the DOV gave BWT separate and additional rights in respect of the 2018 Fees, but BWT chose to terminate the CRA under clause 18.2 before any such events had happened. The clear and unambiguous words of clause 18.2 should be applied. I have reached this view taking a textual and contextual approach. There is nothing uncommercial about this reading.

52. I have reached a clear view about the meaning of the contracts without needing to turn to the (last resort) *contra proferentem* canon of interpretation. But had I found the words to be ambiguous I would (like the judge) have applied that canon to resolve it in the respondents' favour.

Result

53. The appeal is dismissed.