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Case No: CL- 2014 – 000173

CL- 2014 - 000762

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 03/03/2016

**Before** :

THE HON. MR JUSTICE POPPLEWELL

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**Between :**

|  |  |  |
| --- | --- | --- |
|  | 1. **EUROPA PLUS SCA SIF**
2. **ANTHRACITE BALANCED COMPANY (R-26) LIMITED**
 | Claimants |
|  | **- and -** |  |
|  | **ANTHRACITE INVESTMENTS (IRELAND) PLC** | Defendant |

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**JASBIR DHILLON Q.C.** (instructed by **Sidley Austin LLP**) for the **1st Claimant**

**GEOFFREY KUEHNE** (instructed by **Trowers & Hamlins LLP**) for the **2nd Claimant**

**SIMON SALZEDO Q.C.** (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 25 & 26 January 2016

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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.

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THE HON. MR JUSTICE POPPLEWELL

**The Hon. Mr Justice Popplewell :**

**Introduction**

1. Europa Plus SCA SIF (“Europa”) is an open ended investment company incorporated in Luxembourg. In these actions Europa and, contingently, Anthracite Balanced Company (R-26) Ltd (“Balco”), which is beneficially owned by Europa, claim €1.3 million from Anthracite Investments (Ireland) PLC (“AII”). AII counterclaims €1.6 million from Europa.
2. The amounts represent two payments received by AII on 7 July 2008 as partial redemption of investments in hedge funds managed by an Italian company, Duemme Hedge SGR S.P.A (“Duemme Hedge”) pursuant to a series of transaction documents entered into as part of a structured note offering. Under the terms of the transaction documents, the sums ought then to have been paid by AII to Balco, but were overlooked. The transactions were unwound by an agreement dated 16 March 2012 (“the Termination Agreement”). The current dispute turns mainly on whether AII is bound to pay the two sums to Europa under paragraph 14 of the Termination Agreement as payments received “in respect of Duemme Shares”. AII contends that Duemme Shares means only the shares then held by AII which were being transferred to Europa by the Termination Agreement; and that the 2008 payments fall outside the scope of the provision because they were redemptions of shares previously held by Duemme Hedge in funds which no longer existed and were not the subject matter of the transfer. AII paid the €1.6 million to Europa, but not the €1.3 million, in May 2014. AII now seeks repayment of that sum on the basis that it was made in the mistaken belief that AII was liable under paragraph 14. Europa and Balco contend that in paragraph 14 the expression Duemme Shares includes all shares previously held in Duemme hedge funds pursuant to the note, and so includes the two July 2008 payments; alternatively that a term to like effect is to be implied. Balco contends that if the sums are not payable to Europa under paragraph 14, they remain owing to Balco under the transaction documents. In response to this contingent claim, AII argues that any such liability to Balco under the transaction documents was extinguished by paragraph 8 of the Termination Agreement.

**The background to the Termination Agreement**

1. In 2003 Lehman Brothers International (Europe) arranged a note issue programme of US$10 billion. In the form registered in 2007 under Irish financial services regulation, it provided for a series of notes to be issued by AII which might be listed on the Irish Stock Exchange or other identified markets.

*AII*

1. AII was incorporated in the Republic of Ireland as a public limited company in 2003. It is administered by AIB International Financial Services Ltd. At the time of the events in dispute it had two directors, Mr Bergin and Mr Geary.
2. AII is a special purpose vehicle established by Lehman Brothers for the purposes of the note programme, and what is described as an “orphaned” company, that is to say one which is not intended to have any commercial shareholders with an economic interest. Its authorised share capital is registered in the name of share trustees, and by nominees who hold their shares on trust for the share trustees. The share trustees are charitable trusts which are required to apply any income derived by them from AII solely for charitable purposes. The share trustees covenanted not to dispose of or deal with the shares of AII, and they have no beneficial interest in the shareholding other than their entitlement to fees for acting as share trustees.
3. Under the terms of a trust deed as amended and restated on 12 January 2007 (“the Trust Deed”) AII covenanted with HSBC Trustee (C.I.) Ltd, who would act as trustee for the noteholders (“the Trustee”), that for so long as any of the notes were outstanding, it would not have any employees or subsidiaries; it would not trade or conduct commercial operations, save for entering into the agreements relating to the note programme and carrying out its obligations under that programme and related agreements; it would hold no assets other than the security with respect to each series of notes which it issued, the benefit of other agreements relating to each series, the sum of €40,000 representing its share capital, and fees generated in connection with the issue of each series of notes; and it would not issue any shares or make any distributions to its shareholders save for a dividend of up to €500 per series under the note programme; nor could it have any interest in a bank account save for its administration and management costs and for the holding of amounts charged to the Trustee pursuant to the notes. The registration document and Trust Deed also made clear that the notes would provide for limited recourse against AII by noteholders, such that any noteholder would be able to enforce only by reference to the property on which its particular series of notes was secured, or its proceeds.
4. The purpose of this structure was to protect each set of noteholders from the potentially adverse consequences of AII participating in multiple issues. Each set of noteholders was not to have recourse to assets which AII was holding as security under different notes; and AII was to be made “bankruptcy remote”, as required by credit agencies for the purposes of rating the notes, so that one set of noteholders could not disrupt the efficacy of AII’s participation in the other notes by insolvency proceedings.
5. AII was therefore a vehicle which, as Mr Salzedo QC accurately put it, was intended to operate not for the benefit of its shareholders but for the benefit of the noteholders.

*The transaction documents*

1. The current dispute has its origins in the issue of notes which were Series 26 in the note programme, on the terms of an amended and restated offering circular dated 31 January 2008 (“the Notes”). The Notes were 100% subscribed to by Fondazione Enasarco, an Italian pension fund provider, to invest €780.47m in a portfolio of assets managed by Lehman Brothers Asset Management Ltd, comprising funds of hedge funds (80%) and long only traditional mutual funds (20%).
2. The maturity of the Notes was 14 June 2023. Under their terms, Enasarco was entitled to give instructions for a change in the composition of the fund investments, including realisations, subject to certain guidelines, for so long as it remained the sole Noteholder.
3. The structure of the Notes was that they were not issued by AII, but by a Cayman Island incorporated special purpose vehicle, Anthracite Rated Investments (Cayman) Limited (“ARIC”). ARIC was to receive the proceeds of Enasarco’s investment in the Notes and transfer them to a wholly owned subsidiary, Balco, in return for the issue of preference shares.
4. Balco was another Cayman Island special purpose vehicle established by Lehman Brothers. Balco was to make the investments in the underlying funds. The three directors of Balco were employees of HSBC Financial Services (Cayman) Ltd (“HSBC Cayman”), which was appointed as the Administrative Agent, Share Trustee and Corporate Administrator. Balco’s banker was HSBC Bank Plc (“HSBC London”), which was appointed Issuing and Paying Agent and Custodian.
5. The portfolio included, amongst other things, shares in two hedge funds managed by Duemme Hedge, namely (1) Duemme Multi-Strategy Series 2 Fund (“the Series 2 Fund”) and (2) Duemme Hedge Protection Fund (“the Old HP Fund”). Together these shares comprised 24.57% of the part of the portfolio invested in hedge funds. So far as these investments were concerned, Balco could not invest directly in the Duemme funds because it did not come within the qualifying investor status so as to be eligible for tax exemption on the operating profit. AII, however, did. Accordingly these investments were achieved by two total return swaps (one for each of the two Duemme funds), dated 31 January 2008 and 29 February 2008 (“the Swaps”), pursuant to an ISDA Master Agreement, and a supplemental trust deed dated 31 January 2008 (“the Supplemental Trust Deed”).
6. The purpose and effect of the Swaps was that AII made the investments in the Duemme fund shares for the economic benefit of Balco. Under their terms, Balco was to pay AII at the outset the amount needed for AII to invest in the relevant Duemme fund shares; Balco was to be paid by AII at term (14 June 2023) by AII arranging for redemption of the relevant Duemme fund shares; prior to term, Balco was entitled in certain circumstances (including an instruction from Enasarco) to require AII to arrange for some or all of the relevant Duemme fund shares to be realised with the redemption proceeds being paid by AII to Balco.
7. The Supplemental Trust Deed secured Balco’s rights under the Swaps. The Duemme fund shares were to be held by HSBC London on behalf of AII as Custodian. AII granted a first charge over the Duemme fund shares, and all proceeds, income, assets or property arising or deriving therefrom (clause 4.2(a) and (b)), in favour of the Trustee (HSBC Trustee (C.I.) Ltd). The Trustee was obliged to use the proceeds to discharge Balco’s entitlements under the Swaps after deducting its fees. AII also covenanted with the Trustee to perform all its obligations under the Swaps, and the Trustee was to hold the benefit of such covenant on trust for Balco. Clause 4.10(a) of the Supplemental Trust Deed provided that Balco’s rights under the Swaps were limited to recourse to the secured assets or their proceeds, i.e. the Duemme fund shares or the proceeds thereof.
8. Under these agreements AII’s role was essentially to hold the investments in the Duemme fund shares and to act as a conduit through which the entire financial benefit of those investments would pass to Balco.

*Subsequent events*

1. On 21 April 2008, AII submitted requests for redemption of €1.3 million worth of shares in the Series 2 Fund and €1.6 million worth of shares in the Old HP Fund. The redemption proceeds in these amounts were paid into AII’s account at HSBC on 7 July 2008. These are the sums in dispute in this action. Under the terms of the Swaps they should then have been paid by AII to Balco, but they were overlooked in circumstances which are unexplained. They remained in the HSBC account of AII until 2014. It was common ground that up until the Termination Agreement in 2012, AII remained obliged to pay those sums to Balco and was in breach of contract in failing to do so.
2. On 25 July 2008 AII made a request for a further redemption of shares in the Series 2 Fund and the Old HP Fund. This was the subject matter of a letter agreement dated 24 October 2008 between AII, Balco, HSBC and Duemme Hedge, which provided for direct payment by Duemme Hedge to Balco’s bank account at HSBC, rather than via AII, including a term that such payment was to discharge AII’s obligations pro tanto under the Swaps. A further letter agreement of 18 November 2008 recorded that there had been redemption requests for €32.5m worth of shares in the Series 2 Fund and €30.9m worth of shares in the Old HP Fund; and provided that the terms of the 24 October 2008 letter agreement should apply to the proceeds.
3. On 30 April 2009, a further letter agreement recorded that a request was to be made on behalf of AII for redemption of €15m worth of shares in the Series 2 Fund and €5m worth of shares in the Old HP Fund; and again provided for direct payment by Duemme Hedge to Balco with such payment being treated as a pro tanto discharge of AII’s obligations under the Swaps.
4. On 26 May 2009 there was a fourth letter agreement. It recognised that there had been a “Suspension Event” under the terms of the Notes, which required the shares in the two Duemme funds to be liquidated. The agreement recorded that Balco was thereby instructing AII to redeem all the shares in the two Duemme funds, but recognised that the realisation would be best managed in stages. Credit Suisse International (now the Calculation Agent in place of Lehman Brothers International (Europe) following the latter’s insolvency) was to handle the management of the share realisation. Again there was an agreement for the proceeds to be paid directly by Duemme Hedge to Balco, rather than via AII, with a pro tanto discharge of AII’s obligations under the Swaps. This letter agreement contained a provision, in materially identical terms to that in paragraph 8 of the subsequent Termination Agreement (see below), that on realisation in full, the Swaps would be irrevocably terminated in full with immediate effect.
5. The full realisation envisaged by this agreement had not taken place by March 2012 when the Termination Agreement was entered into, for reasons which remain obscure.
6. In the meantime there was a restructuring of Duemme Hedge and its funds. On 1 September 2009 the Series 2 Fund and the Old HP Fund were merged into a single fund called the Duemme Hedge Protection Fund. Although this bore the same name as the Old HP Fund, it was a different and separate legal entity, to which I shall refer as “the New HP Fund”. Thereafter AII’s holdings were no longer in the Series 2 Fund or the Old HP Fund but solely in the New HP Fund. In October 2009, Duemme Hedge merged by incorporation with Duemme SGR SPA (“Duemme”).
7. It was common ground at the hearing that the Swaps and Supplemental Trust Deed applied to the shares in the New HP Fund although there was no amendment to the terms of those agreements. Although it is arguable that the Supplemental Trust Deed was wide enough in its terms to apply to the shares in the New HP Fund, the terms of the Swaps themselves were not: they covered specifically and only the Series 2 Fund and Old HP Fund shares respectively. Mr Salzedo’s analysis, which I accept, is that there was an agreed assumption by all parties prior to the Termination Agreement that the Swaps and Supplemental Trust Deed applied to the New HP Fund shares, which gave rise to an estoppel by convention.
8. In December 2011 Europa acquired certain of Enasarco’s assets. Enasarco transferred its investments (held through Balco) into a sub-fund of Europa, and by January 2012 had transferred to Europa ownership of the redeemable preference shares in Balco. In this way there was a transfer to Europa of Enasarco’s previous economic interest in the subject matter of the Notes, including the ultimate economic interest in respect of the Duemme fund shares. This formed the catalyst for the Termination Agreement of 16 March 2012 which provided for AII to transfer all its remaining interest in the Duemme fund shares to Europa and for the termination of the Swaps and the Supplemental Trust Deed.
9. In April 2013 AII discovered from HSBC that the €1.3m and €1.6m remained in its account there. AII took advice from Matheson, its Irish lawyers, as to who was entitled to the sums. It received advice that the €1.6m was payable to Europa but not the €1.3m. On 9 May 2014 AII instructed HSBC to pay the €1.6m to Europa, who acknowledged receipt of payment on 30 May 2014.

**The law**

*Construction*

1. There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896; ***Attorney General of Belize v Belize Telecom Ltd*** [2009] 1 WLR 1988; ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] 1 AC 1101; ***Re Sigma Finance Corp*** [2010] 1 All ER 571; ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900; ***Arnold v Britton*** [2015] AC 1619 and ***Marks and Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd*** [2015] 3 WLR 1843.
2. In ***Chartbrook*** Lord Hoffman said:

“14. There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. They are well known and need not be repeated. It is agreed that the question is 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. The House emphasised that “we do not easily accept that people have made linguistic mistakes, particularly in formal documents” (similar statements will be found in *Bank of Credit and Commerce International SA v Ali* [2002] I AC 251, 269; *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, 681-682 and *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, 296) but said that in some cases the context and background drove a court to the conclusion that “something must have gone wrong with the language”. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.”

1. Giving the majority judgment in ***Arnold v Britton***, Lord Neuberger 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] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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. In this connection, see *Prenn* [1971] 1 WLR 1381, 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.

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 (e.g. in *Chartbrook* [2009] AC 1101, 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. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

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. An example of such a case is *Aberdeen City Council v Stewart Mime Group Ltd* 2012 SC (UKSC) 240, where the court concluded that “any… approach” other than that which was adopted “would defeat the parties’ clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract: see paras 21 and 22.”

1. The process of interpretation, which requires both a textual analysis of the language used against the background of facts reasonably available to the parties, and consideration of the commercial consequences of the rival interpretations, has been described as an “iterative process”. In ***Napier Park European Credit Opportunities Fund v Harbourmaster Pro-Rata CLO 2 BV*** [2014] EWCA Civ 984, Lewison LJ said:

“31. The approach to the interpretation of a tradable financial instrument of this kind was authoritatively considered by the Supreme Court in *Re Sigma Finance Corp* [2009] UKSC 2; [2010] 1 All ER 571. In that case Lord Mance, approving Lord Neuberger’s dissenting judgment in the Court of Appeal, said at [12]:

“Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving “checking each of the rival meanings against other provisions of the document and investigating its commercial consequences”.”

32. The iterative process thus described is not confined to textual analysis and comparison. It extends also to placing the rival interpretations within their commercial setting and investigating (or at any rate evaluating) their commercial consequences….

33. Thus we must seek to discern the commercial intention, and the commercial consequences from the terms of the contract itself; and that feeds in to the process of deciding whether a particular word or phrase is in reality clear and unambiguous. It follows in my judgment that, where possible, the court should test any interpretation against the commercial consequences. That is part of the iterative exercise of interpretation. It is not merely a safety valve in cases of absurdity. So much is, in my judgment, also made clear by the decision of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900. In that case Lord Clarke said at [20]:

“It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme that it was unintended, the court must give effect to that meaning.”

…………

36. I do not therefore agree with Mr Snowden that commercial considerations have no part to play in deciding whether a particular interpretation is or is not ambiguous. Moreover, to say that ambiguity or unambiguity is the governing factor may be to miss the point. As Lord Sumption observed in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [14]:

“It is generally unhelpful to look for an “ambiguity”, if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.””

1. These principles apply to the interpretation of contractual provisions using defined terms. As is well known, the use of defined terms in commercial contracts is a commonplace; they are a convenient drafting technique as shorthand labels to express a concept or meaning more fully set out in the defined term (cf ***Chartbrook*** at [17]). Where the Court is interpreting a contractual provision which uses a defined term, the starting point for a textual analysis will often be the defined meaning, because the fact that the parties have chosen to use it in the provision being interpreted is often an indication that they intended it to bear its defined meaning when so used. Often, but not always. It is a common experience that defined terms are not always used consistently by contractual draftsmen throughout a commercial contract. Where a defined term is used inconsistently within a contract, so as sometimes to bear the defined meaning and sometimes a different meaning, the potency of the inference that the parties intended it to bear its defined meaning in a particular provision is much diminished. The question becomes whether they intended to use it in its defined meaning, as in some other clauses, or as meaning something other than its defined meaning, as in different other clauses. Even where there is no inconsistency of use within the contract outside the provision being interpreted, it does not follow that effect must always be given to the defined meaning. If, as is well known, parties sometimes use defined terms inappropriately, it follows that they may have done so only once, in the provision which is being interpreted. The process of interpretation remains the iterative process in which the language used must be tested against the commercial consequences and the background facts reasonably available to the parties at the time of contracting. Such an exercise may lead to the conclusion that the parties did not intend the defined term to bear the defined meaning in the provision in question. That is no different from the Court concluding that the parties intended a word or phrase to have a different meaning from what would at first sight seem to be its ordinary or natural meaning. For a recent example of such a case see ***LBG Capital No 1 PLC v BNY Mellon Corporate Trustee Services Ltd*** [2015] EWCA Civ 1257.
2. This is no less so in contracts drafted by or with the assistance of lawyers. Indeed it is in such contracts that defined terms are most commonly encountered. As Gloster LJ said in the ***LBG*** case:

“89. Moreover, the fact that this was a substantial transaction with the involvement of lawyers did not mean that any infelicity in the drafting was “extremely unlikely”, as Mr Dicker suggested. As Lord Collins recognised in *In Re Sigma Finance Corporation* [2009] UKSC 2, at para 37, in complex documents of this kind,

“there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose.”

1. I would therefore respectfully agree with the observations of Flaux J in ***Starlight Shipping Company v Allianz Marine and Aviation Versicherungs AG*** [2014] EWHC 3068 (Comm) at [45]-[50] that the dictum of Jacob LJ in ***City Inn Jersey Ltd v 10 Trinity Square Ltd*** [2008] EWCA Civ 156 at [8], to the effect that the court will only fail to give effect to the use of a defined term if absurdity is established, is not consistent with the reasoning of the Supreme Court in ***Rainy Sky*** (or indeed subsequent authority) and is not the law.

*Implication of terms*

1. The law on implication of contractual terms was recently considered by the Supreme Court in **Marks & Spencer**, in which Lord Neuberger gave the majority judgment. I derive the following principles from paragraphs [14] to [24]:
	1. There are two types of contractual implied term. The first is a term to be implied into a particular contract in the light of the express terms, commercial common sense, and the factual circumstances known or reasonably available to the parties at the time the contract was made. The second type arises where the law, sometimes by statute sometimes through common law, effectively imposes terms into certain types of relationships unless such a term is expressly excluded. What follows applies to the first type.
	2. The question whether a term is to be implied is to be judged at the date the contract, and is to be made by reference to a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances available to the parties. The implication of a term is not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.
	3. Subject to the comments and qualifications below, in order for a term to be implied each of the following four conditions must be satisfied:
		* 1. it must be reasonable and equitable; and
			2. it must either:
				1. be necessary to give business efficacy to the contract; or
				2. be so obvious that ‘it goes without saying’

(although in practice it would be a rare case where only one of those two requirements would be satisfied); and

* + - 1. it must be capable of clear expression; and
			2. it must not contradict any express term of the contract;
	1. Requirement (ii)(a) (necessity/business efficacy) involves a value judgment. The test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. A more helpful way of putting this requirement may be that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.
	2. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the Court considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.
	3. It may well be doubtful in a particular case whether the parties have failed to make provision for the matter in issue by oversight, or whether, by contrast, it was by a deliberate omission. Implying a term in the latter case would be impermissible because it would be contrary to the intention of the parties who had specifically chosen to leave the matter unprovided for. Accordingly a term will not be implied where it is possible that the omission of the term may have been deliberate (see per Lord Bingham as MR in ***Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*** [1995] EMLR 472 at pp. 481-482, and as Bingham LJ in ***The AJP Priti*** [1987] 2 Lloyd’s Rep 37 at p. 42).
	4. It is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown that there was only one contractual solution, or that one of several contractual solutions would have been preferred. In other words it is not sufficient if it is necessary to imply some term; it must be necessary to imply the term which is contended for: see ***Philips v British Sky Broadcasting*** at p. 482.

*Construction and implication as a single exercise*

1. The relationship between the processes of interpretation and implication has also been addressed in the recent authorities. Interpretation and implication are two logically distinct exercises with separate rules (***Marks and Spencer*** per Lord Neuberger at [26], [29], ***Trump International Golf Club Scotland Ltd v Scottish Ministers*** [2016] 1 WLR 85per Lord Hodge at [35]). The process of interpretation logically precedes the process of implication (***Marks and Spencer*** at [27]-[28]). Nevertheless they can be closely related. Both involve determining the scope and meaning of the contract (***Attorney General of Belize*** per Lord Hoffman at [21], explained by Lord Neuberger in ***Marks and Spencer*** at [23] and Lord Clarke at [76]). Both involve taking into account the words used in the contract, the surrounding circumstances known or available to the parties at the time of the contract, commercial common sense and the reasonable reader or reasonable parties (***Marks and Spencer*** at [27]). In ***Aberdeen City Council v Stewart Milne Group Ltd*** [2011] UKSC56, [2012] SLT 205, Lord Hope said that the implication of a term in that case was the “product of the way I would interpret the contract”. Lord Clarke in a separate judgment made clear that the result could be achieved only by implication of a term, not as a matter of interpretation of the language used: paras [28]-[32]. The other three Supreme Court justices felt able to agree with both judgments. In ***Trump***, Lord Mance said:

“42 As Lord Neuberger PSC indicates in para 23 in the Marks and Spencer case, whether an implication is necessary to give business efficacy must be judged objectively, in the light of the provisions of the contract as a whole and the surrounding circumstances at the time when the contract is made. But I would not encourage advocates or courts to adopt too rigid or sequential an approach to the processes of consideration of the express terms and of consideration of the possibility of an implication. Without derogating from the requirement to construe any contract as a whole, particular provisions of a contract may I think give rise to a necessary implication, which, once recognised, will itself throw light on the scope and meaning of other express provisions of the contract.

43 This applies whether one is concerned, as in this case, with a public document in the interpretation of which there is, as Lord Hodge JSC notes in para 33, limited scope for the use of extrinsic material or with, for example, a commercial contract, where the overall aim is to give effect to the parties’ assumed intentions, objectively assessed by reference to the contractual language they used understood against the background of their wider relationship and the circumstances of which both must be taken to have been aware when contracting.

44 In the light of the above at least, it appears to me helpful to recognise that in a broad sense as Lord Neuberger and Lord Clarke of Stone-cum-Ebony JSC recognise in the *Marks and Spencer* case at paras 26 and 76, the processes of consideration of express terms and of the possibility that an implication exists are all part of an overall, and potentially iterative, process of objective construction of the contract as a whole.”

**The Termination Agreement**

1. The Termination Agreement, which was governed by English law, was in the form of a letter from AII countersigned by the other parties. The counterparties were Balco, Europa, the Trustee (HSBC Trustee (CI) Ltd), the Custodian (HSBC London) and GWM Asset Management (Malta) Ltd (managing agent for Europa). The Agreement was drafted and negotiated by transactional legal advisers for all the parties. It included the following relevant terms:

 “16 March, 2012

**Subject: Total Return Swap Termination and Release of Security**

Dear Sirs,

1. We hold shares (the “**Duemme Shares**”) in Duemme Hedge Protection Fund (the “Fund”) managed by Duemme (held by the Custodian under its nominee name of HSBC Global Custody Nominee (UK) Limited on our behalf).

2. We have entered into an ISDA Master Agreement (Multicurrency - Cross Border) dated 31 January 2008 (as amended, restated or supplemented from time to time) and Schedule thereto dated 31 January 2008 with the Balanced Company (the **“ISDA Master Agreement”**).

3. We have also entered into two EUR total return swap transactions with the Balanced Company (the **“Total Return Swap Transactions”**) referencing the Duemme Shares evidenced by:

(i) a confirmation dated 31 January 2008 which supplements, forms part of and is subject to the ISDA Master Agreement as amended and supplemented from time to time; and

 (ii) a confirmation dated 29 February 2008 which supplements, forms part of and is subject to the ISDA Master Agreement as amended and supplemented from time to time (together with the ISDA Master Agreement and item (i) above, the **“Swap Documents”**).

4. We and the Trustee are parties to a trust deed dated 3 November 2003 as amended and restated on 12 January 2007 (the **“Principal Trust Deed”**) establishing a programme for the issue from time to time of secured notes. We, the Balanced Company, the Trustee and the Custodian have also entered into a supplemental trust deed in respect of the Total Return Swap Transactions (the **“Supplemental Trust Deed”**), dated 31 January 2008, pursuant to which we created security in respect of our obligations under the Swap Documents over the Duemme Shares and the Swap Documents in favour of the Trustee and the Balanced Company.

5. There has been correspondence in the past between us and a number of the parties to this letter in relation to the Total Return Swap Transactions and the Duemme Shares. We refer to our letters of 24 October 2008, 18 November 2008, 30 April 2009 and 26 May 2009 in this regard. Since such correspondence, (in consideration for shares in its EUROPA PLUS SCA SIF-RES 1 sub-fund) Europa has acquired a 100% beneficial interest in the Duemme Shares that are currently subject to the Total Return Swap Transaction.

6. We have been approached by a number of the parties to this letter (other than the Trustee) and requested to consider the transaction or transactions as further set out in this letter, including the transfer of the Duemme Shares in consideration for the termination of the Total Return Swap Transactions and the Swap Documents without any further amounts being payable by us in connection with such termination.

7. We and the Balanced Company authorise the Custodian, upon execution of this letter by all parties hereto, to submit a transfer request to Duemme in a form which is attached as Annex 1 to this letter (the **“Transfer Request”**) in relation to the transfer of the Duemme Shares from the Custodian to Europa or, if applicable, to the custodian of Europa at the relevant time (the **“Transfer”**).

8. We and the Balanced Company agree that, provided Duemme accepts the Transfer Request, upon Duemme recording the Transfer in the register of the Fund (the **“Transfer Registration”**), (i) the Total Return Swap Transactions and the Swap Documents shall be irrevocably terminated with immediate effect, (ii) no further amounts shall be payable in connection with the Total Return Swap Transactions by either party thereto, and (iii) the parties to the Total Return Swap Transactions shall be released and discharged from all further obligations to each other in respect of the Total Return Swap Transactions and the Swap Documents and their respective rights against each other pursuant to the Total Return Swap Transactions and the Swap Documents shall be cancelled.

9. The Balanced Company, in its capacity as Derivative Counterparty under the Supplemental Trust Deed, directs the Trustee to agree to, and act in accordance with, the terms of this letter.

10. The Trustee hereby consents to the Transfer (such consent to be effective immediately prior to the release of security as set out below), irrespective of whether or not the Trustee’s consent to the Transfer is required pursuant to the terms of the Principal Trust Deed or the Supplemental Trust Deed, and absolutely and unconditionally at such time as is necessary to permit the Transfer to be made:

10.1 releases to us, to the extent charged to the Trustee by or pursuant to the terms of the Principal Trust Deed, as supplemented by the Supplemental Trust Deed, the Mortgaged Property (as such term is defined in the Supplemental Trust Deed); and

10.2 assigns to us, to the extent assigned to the Trustee by or pursuant to the terms of the Principal Trust Deed, as supplemented by the Supplemental Trust Deed, all of its rights, title and interest under the Derivative Agreement (as such term is defined in the Supplemental Trust Deed) and any sums received under the Derivative Agreement,

to the intent that such property shall be held free and discharged from the security and from all claims under the Principal Trust Deed, as supplemented by the Supplemental Trust Deed, and the Trustee shall be released from its obligations to the same extent thereby.

11. Each of the parties to the Supplemental Trust Deed agrees that upon the release and assignment referred to in paragraph 10 above, their respective rights, obligations and liabilities related to, or arising out of, or in connection with, the Supplemental Trust Deed shall be terminated and each of them shall be released and discharged from any further obligations to each other under the Supplemental Trust Deed.

12. The Custodian and the Balanced Company entered into a custody agreement dated 15 April 2009 (the **“Custody Agreement”**). Each of the parties to the Custody Agreement agrees that upon the release and assignment referred to in paragraph 10 above, their respective rights, obligations and liabilities related to, or arising out of, or in connection with, the Custody Agreement shall be terminated and each of them shall be released and discharged from any further obligations to each other under the Custody Agreement.

13. If the release and assignment referred to under paragraph 10 above occurs prior to the Transfer Registration, we shall hold the property subject to such release on trust for Europa, as the Balanced Company’s transferee, until such time as the Transfer Registration occurs and we shall take all action as is required by the Balanced Company to ensure that the Transfer Registration occurs.

14. Subject to paragraph 15 below, from and after the Transfer Registration, (i) any payment or distribution received or collected by any party to this letter (other than Europa and the Custodian) (such party, a **“Receiving Party”**) in respect of the Duemme Shares prior to the Transfer Registration which was not paid over (or forwarded on) to the Balanced Company prior to the Transfer Registration and (ii) any payment or distribution received or collected by a Receiving Party in respect of the Duemme Shares from and after the Transfer Registration which relates to the period prior to the Transfer Registration, shall constitute property of Europa to which Europa shall have an absolute right. The relevant Receiving Party shall hold the payments or distributions referred to in (i) and (ii) above for the account and sole benefit of Europa. The relevant Receiving Party shall have no equitable or beneficial interest therein and shall pay over (or forward on) such payments or distributions to Europa within ten (10) business days but in the case of a cash payment or distribution, within five (5) business days following the receipt thereof; in accordance with Europa’s instructions. If the relevant Receiving Party (other than the Trustee and Anthracite Investments (Ireland) PLC) fails to deliver any payment or distribution within the applicable time period specified above, then such Receiving Party shall also pay Europa interest thereon at a rate per annum equal to five percent (5%) for the applicable period.

15. The parties hereby agree and acknowledge that on the date of this letter:

(a) a cash payment in the amount of €8,000.00 shall be paid by the Balanced Company to the cash account of Anthracite Investments (Ireland) PLC, the details of which shall be notified separately by us to the Balanced Company;

(b) a cash payment in the amount of £6,840.00 shall be paid by the Balanced Company to the cash account of the Trustee, the details of which shall be notified separately by the Trustee to the Balanced Company; and

(c) a cash payment in the amount of $2,000.00 shall be paid by the Balanced Company to the cash account of the Custodian, the details of which shall be notified separately by the Custodian to the Balanced Company.

…

17. By its acknowledgement of and agreement to this letter, each party to this letter agrees to the terms of this letter. Notwithstanding this paragraph 17, Duemme is a party to this letter solely for the purposes of its agreements and acknowledgements in paragraphs 14, 16 and 18.

18. Notwithstanding any other provision hereof, the parties hereby agree that they shall have recourse in respect of any claim against Anthracite Investments (Ireland) PLC (the **“Company”**) in connection with this letter, the Transfer and any of the matters in relation thereto (including, but not limited to any claims against the Company pursuant to paragraph 14 of this letter) only to sums derived from the Mortgaged Property (as such term is defined in the Supplemental Trust Deed) subject always to the charges and other security interests created by the Supplemental Trust Deed and any such claim by any and all such parties shall be reduced *pro rata* so that the total of such claims does not exceed the aggregate value of the property so available after meeting claims secured thereon and, following the realisation of the same, no party hereto or any person acting on its behalf shall be entitled to take any further steps against the Company to recover any further sums due to any such party but still unpaid and the right to receive any such sum shall be extinguished. In particular, each party agrees that it will not petition or take any other step or join any other person in instituting steps for the winding up of the Company. ”

*Paragraph 14*

1. The first critical question is whether the expression “Duemme Shares” in paragraph 14(i) encompasses the shares in the Series 2 Fund and Old HP Fund, as a matter of interpretation or implication.
2. The factual matrix by reference to which it falls to be construed includes the entirety of the background I have set out above. Four aspects deserve emphasis.
3. First, the genesis of the Agreement lay in the acquisition by Europa of Enasarco’s economic interest in the subject matter of the Notes. AII had only been interposed into the transactional structure through the Swaps in the first place because Balco did not qualify as an investor so as to be able to derive the fiscal benefits of the specific investment in Duemme funds if held in Balco’s own name. The same was not true of Europa. The Termination Agreement was therefore concerned to provide for the transfer of the remaining Duemme shares to Europa; and to terminate the Swaps so as to remove AII and Balco from the structure (paragraph 6), whilst retaining AII’s liability for certain payments received pursuant to the Swaps in, or in respect of, the period prior to completion of transfer (paragraph 14).
4. There was a dispute before me as to whether the relevant factual matrix included any knowledge by AII that Europa had acquired Enasarco’s economic interest in anything more than the remaining Duemme shares; and in particular its economic interest in Balco. Mr Salzedo emphasised that paragraph 5 of the Termination Agreement referred only to Europa acquiring a beneficial interest in the remaining Duemme shares, i.e. the new shares which were the subject of the transfer. He submitted that there was no reference in the Agreement to Europa having claimed to have acquired any interest in any other claims which Balco might have had against AII; that there was nothing in the evidence to suggest that AII knew that Europa had acquired any other economic interests of Enasarco beyond the remaining Duemme shares, or any other economic interest in Balco; nor was such information reasonably available to AII.
5. I am unable to accept this argument. What had happened was that following the collapse of Lehman Brothers in 2008, the Notes had been restructured. The Series 26 Notes were cancelled and replaced by Notes on the same terms issued by a Credit Suisse special purpose vehicle incorporated in Ireland, Custom Market Securities Plc (“CMS”). CMS became the 100% owner of the shares in Balco, in place of ARIC. Enasarco became a noteholder in the CMS Notes on the same terms as the Series 26 Notes. When Europa acquired the relevant assets of Enasarco in December 2011, Europa acquired the CMS Notes and redeemed them, following which, in a transaction completed by the end of January 2012, CMS transferred to Europa the 100% shareholding in Balco.
6. It is clear from an email of 28 February 2014 that by then Mr Donagh of Matheson knew that Europa owned Balco. But more significantly, Mr Donagh was also involved in January 2012, when Matheson was representing CMS in the transaction by which the Balco shares were transferred by CMS to Europa, so he was obviously aware of that at the time of the Termination Agreement shortly thereafter. Matheson was also representing AII in the negotiation of the Termination Agreement (see Europa Reply paragraph 5 adopted by Mr Salzedo in paragraph 27 of his skeleton argument). It is therefore reasonable to infer that at the time of the Termination Agreement this relevant information, which was known to Mr Donagh, was communicated to his client, AII. At the least, it was information which was reasonably available to AII from that source. Moreover paragraph 13 of the Termination Agreement itself suggests that AII was aware that Europa had beneficially acquired Enasarco’s economic interest in the Swaps. So much is to be inferred from the provision that in the period between the release of the existing security arrangements and the completion of the transfer AII is to hold the Mortgaged Property (as defined in the Supplemental Trust Deed) on trust for Europa “as [Balco’s] transferee”. As explained below, the Mortgaged Property included all Balco’s rights under the Swaps against AII, including the right to the July 2008 payments. Accordingly the Termination Agreement falls to be construed on the basis that it was part of the relevant background that Europa had acquired the 100% shareholding in Balco, and had thereby acquired Balco’s economic interest in the Swaps.
7. The objective of the Termination Agreement can therefore fairly be described, in broad terms, as being to replace Balco’s entitlements under the Swaps with rights vested in Europa, in return for collapsing the Swaps and security arrangements in connection therewith. Balco’s rights under the Swaps extended to the July 2008 payments.
8. Secondly at the time of the Termination Agreement, it is clear that AII, Balco and Europa were all unaware of the fact that the July 2008 payments had not been paid on by AII to Balco. However each could have discovered that fact had they made enquiries which were reasonably open to them. AII had received the payments and had access to its account records. Europa by then owned Balco, and Balco had either made the redemption requests, or had had them made on its behalf by Lehman Brothers in circumstances where inquiries would have revealed that fact and whether there were any outstanding payments due. The payments therefore form part of the background of facts which was reasonably available to the parties, although not actually known by them. In any event, each of those parties was or ought to have been aware of the possibility that there might have been unpaid amounts due to Balco remaining with AII. Accordingly the language has to be interpreted upon the assumption that the reasonable reader of the contract was aware of the existence, or at least the possible existence, of payments having previously been received by AII which at the time remained owing to Balco under the terms of the Swaps.
9. Thirdly, AII was an orphaned company with the characteristics set out above. It existed for the benefit of the various noteholders, in this transaction for the benefit of Enasarco, which was to be replaced in economic terms by Europa. It had no power to distribute sums otherwise than to its charitable shareholders, and even then only up to €500 for this Note series. It could not hold a bank account save for the purposes of its administration costs and in order to hold sums charged to the Trustee under the note programme. It is true that the transaction documents recognise the possibility that some sums may be received by AII in circumstances in which AII ends up with an unencumbered beneficial interest. For example, the calculation of the payments due from AII under the Swaps might differ slightly from the actual realisation proceeds of the shares due to differences in value date; and the waterfall in paragraph 4.8 of the Supplemental Trust Deed identifies AII as the last recipient of any residue after discharge of its obligations to Balco and payment of its fees. But the essential scheme was that AII was making the investments wholly for the economic benefit of Balco, and ultimately Enasarco which had provided the funds. The restrictions imposed on AII by the trust covenants recognise that any sums which AII might end up owning, apart from its fees, were contemplated as being relatively small. It obviously was not envisaged by anyone concerned with these transactions and investments that AII would be entitled to obtain for its own benefit sums running to millions of Euros. On the contrary, had the parties had their attention drawn to the July 2008 payments and been asked by the officious bystander at the time of the Termination Agreement whether they intended AII to obtain the benefit of the €2.9m which Balco was owed by AII, there can be little doubt that the response would have been “of course not”. I asked Mr Salzedo in the course of argument what was to happen to the €1.3m if AII were to succeed in these actions, to which he gave the response that it would go to the charitable shareholders (but only when all the notes had been fulfilled or unwound, when AII itself could go into liquidation). On any view that would not be regarded as a sensible commercial consequence of the Termination Agreement by any reasonable observer armed with the background knowledge available to the parties at the time.
10. Fourthly Mr Salzedo was concerned to emphasise that a combination of the provisions in the Trust Deed, the Supplemental Trust Deed, and the Swaps, including in particular the non-recourse provisions, and a covenant by Balco not to sue AII, meant that under the note structure AII was intended to be immune from what he described as “personal claims”. In effect, all property which AII was entitled to hold or receive under this note series, apart from its fees, was to be charged to the Trustee, with the collateral held by the Custodian, and it was to HSBC (C.I.) Ltd as Trustee that Balco would have to look to enforce any rights under the Swaps, which would be enforced against the security as the only recourse. This is true, so far as it goes, but is of limited assistance when it comes to construing the Termination Agreement, because in unwinding the security and Swaps structure, a new regime was being put in place. In particular there would be a termination of the security, and that would occur prior to completion of transfer of the shares (paragraphs 10 to 12) with a view to AII being able to acquire unencumbered title in order to be able to effect registration of the transfer. Accordingly the Duemme Shares, and any payments in respect of them which AII might receive during the period between security release and transfer registration, would be held by AII unencumbered by any security interest. Paragraph 13 imposes a trust in Europa’s favour over such shares and payments during that period. Only Europa could enforce its rights under paragraph 13, and it could do so in a claim against AII. Under paragraph 14 AII undertakes a liability to Europa to make payments; irrespective of the dispute as to the scope of the paragraph, this is a potential personal liability of AII towards Europa which is susceptible to enforcement by a personal claim. There is no longer any security structure for the enforcement of rights against AII in any other way. It is true that AII was to have the benefit of a fresh limited recourse provision (paragraph 18) so as to insulate any claims under this Agreement from assets which were the subject matter of other note series. But Europa’s claim is not for anything which is not permitted by paragraph 18: the €1.3 million is a sum derived from Mortgaged Property as defined in the Supplemental Trust Deed, which includes the old shares. So the scheme of the Agreement is that with the collapse of the security arrangements, which is necessary to enable transfer of the shares to take place, AII is to be potentially subject to some personal claims, immunity from which was previously justified by the security interests held on behalf of Balco, but limited to amounts which AII holds as a result of the Series 26 Note transaction with which the Agreement is concerned.
11. Turning to the process of interpretation of paragraph 14 against this background, I start with the fact that paragraph 14(i) applies to the Duemme Shares (capitalised) which is a defined term in paragraph 1, meaning the shares which are currently held and are to be transferred. These are the shares in the New HP Fund. But there is little weight to be attached to this use of a defined term once it is recognised that the expression Duemme Shares (capitalised) is not used consistently throughout the Agreement to refer to the shares in the New HP Fund. As Mr Salzedo accepted, it is used in paragraph 3 to refer to the shares in the Series 2 Fund and the Old HP Fund, which were what were referenced in the Swaps. It was only by a process of estoppel by convention completed by the Termination Agreement itself that the new shares came to be governed by the Swaps. It is similarly used in paragraph 5 to refer to the old shares when referring to the four letters from 24 October 2008 to 26 May 2009, all of which preceded the existence of any holding in shares in the New HP Fund. So too in the second part of paragraph 5 in the words “Europa has acquired a 100% beneficial interest in the Duemme Shares”; otherwise, if the expression were being used in the defined sense, the following words “that are currently subject to [the Swaps]”, would be surplusage, because that was inherent already in the definition of Duemme Shares in paragraph 1*.* Mr Salzedo also conceded that it was used in the same sense of referring to the old shares in paragraph 4, by referring to the Supplemental Trust Deed as having created security over the shares, although it seems to me at the very least arguable that the terms of clause 4.2(a) of the Supplemental Trust Deed were wide enough to create a charge over the shares in the New HP Fund as being “the proceeds of, income from or sums arising from” the old shares, so that in paragraph 4 of the Termination Agreement the reference to Duemme Shares being charged by the Supplemental Trust Deed could accurately be a reference to the new shares notwithstanding that it also charged the old shares.
12. Given this inconsistent use of the expression Duemme Shares (capitalised), when construing paragraph 14 there is little weight to be placed on the fact that it is defined in paragraph 1 as confined to the new shares, bearing in mind that in paragraphs 3 and 5, and perhaps 4, it is used to mean the old shares. The parties used the expression to mean both the new shares and the old shares in different parts of the Agreement. The use of a capitalised term therefore provides little guidance to which sense was intended in paragraph 14.
13. Mr Salzedo contended that there was a logic to this apparent inconsistency which lay in the structure of the Agreement and which pointed to the intended use of the expression in its defined sense in paragraph 14. It was that paragraph 1 defined the subject matter of the transfer, which was what the Agreement was essentially concerned with; these were the new shares which formed the existing holding; paragraphs 3 to 5 were concerned to identify the historical transactions which were going to be unwound; they therefore naturally referred to the old shares; the second half of paragraph 5, or paragraph 6 marks a turning point in the structure, from which point the substance of the Agreement is set out as being transfer of the shares in return for termination of the Swaps and Supplemental Trust Deed; these paragraphs, including paragraph 14, are therefore naturally to be read as using the expression in its defined sense of the new shares, which are what are to be transferred. The difficulty with this argument is that paragraph 14 represents a further and different aspect of the Agreement, which is independent of the transfer and termination arrangements contained in the preceding paragraphs 6 to 13. It is directed to AII’s liability “from and after” the registration of the transfer, and so marks a different temporal stage, which is no longer concerned with the transfer of the shares; it is triggered by the completion of the transfer, but takes effect thereafter. It is not confined to payments received prior to registration of the transfer. It is therefore not, or not necessarily, addressed to the subject matter of the transfer. There is nothing in the structure of the Agreement to suggest that the draftsman has maintained in paragraph 14 the defined meaning from which he departed in clauses 3 to 5.
14. If one asks which of the two meanings in which the expression has previously been used in the Agreement makes commercial sense of paragraph 14, the obvious answer is that it includes the old shares. Mr Salzedo submitted that the effect of clauses 8 and 14 is essentially to provide for a clean break for AII once the new shares have been transferred. But this submission is undermined by his concession that paragraph 14 is not confined to payments received during or in respect of the period after the execution of the Termination Agreement itself. He conceded that it could cover payments received over the previous few years in respect of the shares in the New HP Fund, such as dividend or interest payments. He was constrained to argue that because of the use of a defined term, there would be a cut-off for payments before September 2009 when the old shares were merged into the shares in the new fund. There is no commercial logic for such a cut-off, and none was suggested. If, as is conceded, paragraph 14 is wide enough to catch payments received and unaccounted for by AII prior to the Termination Agreement being concluded, there is no good reason to confine it to payments in respect of shares in the New HP Fund; on the contrary, the commercial objective was for Europa to have the benefit of sums to which Balco had been entitled under the Swaps. Moreover the orphaned nature of AII, its role in the noteholding structure, and its inability to hold substantial assets for its own benefit or to distribute more than $500 in dividends even to its charitable shareholders, means that neither party could have contemplated that almost €3 million to which Balco was entitled could be kept as a windfall by AII. The construction advanced by AII has consequences which all parties at the time would have regarded as commercially absurd.
15. A number of points of textual analysis of the Agreement also suggest that paragraph 14(i) uses the phrase Duemme Shares to include the old shares.
16. The structure of paragraphs 7 to 13 recognises, and provides for, the delay which will occur between the request for the transfer of the new shares and Duemme actually registering the transfer in Europa’s name. Paragraph 10 contemplates that in order to enable the registration to take place, it will be necessary for the Trustee to release its security so as to provide AII with unencumbered title to the shares. Paragraphs 11 and 12 provide in such circumstances for the termination of the applicability of the Trust Deed (pro tanto), and termination of the Supplemental Trust Deed and custody agreement under which the Custodian holds the shares, all at a time which will precede registration of transfer in Europa’s name. Clause 13 provides that in the period between such release of the security under the existing transaction documents and completion of transfer by registration, AII is to hold the shares on trust for Europa until transfer registration. But paragraph 13 is not limited to the new shares. It applies to all the property which has been released from the security of the trust documents, defined in paragraph 10 as the “Mortgaged Property” as such term is defined in the Supplemental Trust Deed. That definition of property includes all payments derived from the old shares, as Mr Salzedo accepted. The result is that prior to registration, AII would be holding the July 2008 payments on trust for Europa “as [Balco’s] transferee”. This is a strong pointer towards construing “any payment or distribution received…….in respect of the Duemme Shares” in paragraph 14 as wide enough to include any sums held by AII deriving from the old shares, which it would be holding on trust for Europa immediately prior to the transfer registration. AII’s construction would involve AII holding such sums on trust for Europa until transfer registration but then not being under any obligation to pay them over under paragraph 14. That is inconsistent with the obvious purpose of paragraph 13 which is to ensure that despite the release of the security previously provided by the transactional security documents, AII is bound to hold such sums on trust for Europa until it pays them over to Europa. The fact that the property which is the subject matter of the trust in paragraph 13 extends beyond the new shares in the New HP Fund, or payments derived therefrom, and extends to payments in respect of the old shares, including the July 2008 payments, is a powerful indication that paragraph 14 was intended to apply to property of a similar class, again including the July 2008 payments. The structure of paragraphs 10 to 14 is to provide for a sequence under which in return for the release of the security in favour of Balco, Europa is to receive the benefit of the secured property which is released. That previously secured property is the subject matter of the release under paragraphs 10 to 12, and the immediate imposition of a trust in Europa’s favour under paragraph 13. The natural reading is that that is the same property to which Europa is to become entitled under paragraph 14, other than, of course, the transferred shares themselves whose transfer will by that time be complete.
17. Looked at from a different angle, it is striking that AII’s case is not that the effect of the Termination Agreement is to entitle it to *keep* a sum in which it previously held a beneficial interest, but rather that the Agreement itself *conferred* on AII an unencumbered beneficial interest in the €2.9 million which it did not have before. Prior to the Agreement, not only did AII owe such sums to Balco under the terms of the Swaps, but the sums themselves were held by HSBC in an account in the name of AII. Prior to the Agreement the sums were charged in favour of the Trustee, who could have enforced Balco’s entitlement to them under the Swaps by virtue of holding the benefit of AII’s promise to perform its Swaps obligations conferred by clause 4.5 of the Supplemental Trust Deed. It was paragraph 10 of the Termination Agreement itself which released the security over the sums. Paragraph 13 then imposed a trust over them in favour of Europa. If for some reason Duemme had declined to register the transfer of the shares, Europa would have been entitled to the July 2008 payments from AII who would have been holding them under the trust imposed by paragraph 13, together with the shares themselves. On AII’s case it was only upon transfer registration that the paragraph 13 trust in Europa’s favour lapsed, and it was at that point that AII acquired unencumbered beneficial entitlement to the sums for the first time by reason of the prior operation of paragraph 10. There is nothing in the terms of the Agreement to suggest that it was intended that it should confer new economic interests on AII and such is entirely contrary to the genesis and background to the Agreement. Nor is it consistent with Mr Salzedo’s argument that the scope of the Termination Agreement is confined to the new shares which are being transferred.
18. Paragraph 14 is expressed to be subject to paragraph 15, which provides in subparagraph (a) for the sum of €8,000 to be paid by Balco to AII at the date of the Agreement. I infer that this was in respect of fees and management costs in connection with the transaction, including the release of security. This is carved out of paragraph 14 to make clear that although it is capable of being a payment “in respect of the Duemme Shares”, it is to be kept by AII. The significance of this provision is that it suggests that the parties have addressed their minds to what benefit AII is to receive under the Agreement and contemplate it being confined to €8,000, apart from termination of the Swaps.
19. Paragraph 18 provides for recourse against AII in relation to its obligations under the Agreement, specifically including those under paragraph 14, to be limited to sums derived from the Mortgaged Property, as defined in the Supplemental Trust Deed. Again this wider category of property, which is not confined to the remaining shares in the New HP Fund but extends to all payments caught by the Supplemental Trust Deed, including the July 2008 payments in respect of the old shares, is an indication that AII’s liability under paragraph 14 can extend to such property. If, as AII contends, its liability under the Agreement is confined to the new shares which are to be transferred or proceeds deriving therefrom, one would expect the limited recourse provision to be similarly circumscribed. Recourse against AII to the proceeds of the July 2008 payments is inconsistent with AII being entitled to retain them.
20. This ties in with the discharge of obligations and cancellation of rights of AII and Balco in respect of the Swaps, which takes effect upon transfer registration pursuant to paragraph 8. Plainly the parties would be concerned to ensure that AII did not retain any liabilities to Balco which it was also assuming to Europa under paragraph 14. The converse proposition, that Europa was intended to acquire under paragraph 14 all rights which Balco previously had under the Swaps, also derives support from the release in paragraph 8 in circumstances where, for the reasons I have explained above, the parties did not contemplate that AII should be entitled to obtain a windfall of any substantial payments which it had failed to pass on to Balco in breach of contract.
21. For these reasons I conclude that as a matter of construction the expression “Duemme Shares” in paragraph 14(i) includes the old shares in the Series 2 Fund and the Old HP Fund, with the result that AII was obliged to pay to Europa the amount of the July 2008 payments. The alternative argument advanced by Mr Dhillon QC that if Duemme Shares bore its defined meaning as the new shares, the July 2008 payments were nevertheless within paragraph 14 as being “*in respect of*” the new shares, does not arise.
22. Accordingly Europa’s claim for €1.3 million succeeds. Balco’s contingent claim for that sum does not arise. AII’s counterclaim for €1.6 million fails because there was no mistake in treating it as payable pursuant to paragraph 14.
23. If necessary, I would have reached the same conclusion, that paragraph 14 covered payments in respect of the old shares, by a process of implication of a term. If, contrary to my earlier conclusion, “Duemme Shares” falls to be construed as being confined to the shares in the New HP Fund which were being transferred, a term would have to be implied to add words such as “or their predecessors”. Such a term would be necessary to give the Agreement business efficacy: without it, the Agreement would lack practical and commercial coherence because it would leave AII with substantial sums which no reasonable person in the parties’ position would have intended. If the officious bystander had asked whether the Agreement was intended to ensure that AII paid to Europa any payments it had received in respect of the old shares and mistakenly failed to pay to Balco in breach of its obligations under the Swaps, the parties would indeed have suppressed him, courteously if not testily, with the response “of course”. The implied term would meet both the requirement of necessity and that of obviousness. It would be fair and reasonable. It is capable of clear expression and would not contradict any express term. This is not a case in which there is any possibility of the parties having deliberately omitted to deal with any payments in respect of the old shares because it might have given rise to disagreement which they did not want to resolve.

*AII’s counterclaim*

1. In the light of my conclusions, AII’s counterclaim does not arise, but I should record the findings of fact which I would have made had it done so. I am satisfied on the evidence that when deciding to make the payment of €1.6 million the directors of AII did so as a result of the firm advice from Matheson that AII was obliged to do so under paragraph 14 of the Termination Agreement, and because they believed such liability to exist; that in doing so they reasonably relied on Matheson as transactional legal advisers: they did not have in contemplation the prospect of English litigation in relation to that sum so as to make it appropriate to consult English litigation advisers, nor should they have done so; that they did not have any substantial doubt that the sum was due so as to be taking a risk that the sum might not have been due; and that had Matheson been mistaken in the advice, the €1.6 million would be recoverable as money paid under a mistake of law.