Neutral Citation Number: [2022] EWHC 464 (QB)

Case No: QB-2019-002778

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 04 March 2022

**Before**:

**MR. NIGEL COOPER Q.C.**

**(Sitting as a Deputy High Court Judge)**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**INSTAGROUP LIMITED** **Cla**

**- and -**

(1) **DAVID CARROLL**

**Defen**

(2) **CHRISTOPHER BARCLAY**

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

**Ms. Anna Scharnetzky** (instructed by **Clarkslegal LLP**) for the **Claimant**

**The First Defendant in person**

Hearing dates: 02 to 04 February 2022

- - - - - - - - - - - - - - - - - - - - -

**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.

.....

NIGEL COOPER QC

**If this Judgment has been emailed to you it is to be treated as 'read-only'.**
**You should send any suggested amendments as a separate Word document.**

This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 4 March 2022.

**Mr. Nigel Cooper Q.C. sitting as a Deputy High Court Judge:**

1.

In this action, the Claimant (“Instagroup”) seeks to enforce personal guarantees given by the First and Second Defendants (respectively Mr. Carroll and Mr. Barclay) to secure the liabilities to Instagroup of Warmspace Insulation Ltd (“Warmspace”); a company for which they were both directors and the ultimate owners. Warmspace entered administration in early February 2017 and shortly thereafter Instagroup sought recovery of debts owed to them by Warmspace from Mr. Carroll and Mr. Barclay.

2.
In the end the trial proceeded between Instagroup and Mr. Carroll only as, shortly before the trial, Mr. Barclay and Instagroup concluded a settlement. I was informed that a Tomlin Order dated 21 January 2022 had been filed.

3.
The hearing took place before me over three days between 02 and 04 February 2022. Instagroup were represented by solicitors and counsel. Mr. Carroll acted as a litigant in person although he had previously instructed solicitors at an earlier stage in the litigation and his Defence had been drafted by counsel.

Summary

4.
Instagroup manufactures and supplies insulation materials. It also sub-contracts the installation of such materials to third parties including, until early 2017, Warmspace. Warmspace’s business included the installation of insulation materials for consumers. The installation work is routinely funded by energy suppliers or by government funded schemes. Warmspace was placed in administration on 03 February 2017 and it was common ground that there was no prospect of a distribution being made to unsecured creditors.

5.
In a management buy-out in late July 2015, the Defendants, who were directors of Warmspace at the time, acquired the entire issued share capital in Warmspace via their company, BCCD Group Ltd. In the context of their buy-out, the Defendants sought to agree with Instagroup in May 2015 that Instagroup would re-schedule outstanding payments from Warmspace and would continue to work with and supply Warmspace. Instagroup were willing in principle to do this provided an acceptable schedule for clearing outstanding payments could be agreed and provided that the Defendants would give personal guarantees “in respect of all such sums as are now or shall in the future become due from [Warmspace] to Instagroup.” The personal guarantees were contained in credit account application forms signed by Mr. Carroll and Mr. Barclay on 11 August 2015.

6.
Instagroup informed the Defendants of the requirement for personal guarantees at a meeting on 07 May 2015 between the Defendants on the one hand and Mr. Robson and Mr. Milne on the other. There was then a period of negotiation between Instagroup and Warmspace as to the terms of the re-payment schedule by which Warmspace would clear its debt to Instagroup and pay for future supplies. There is a dispute of fact as to what was said at the meeting on 07 May 2015 and in subsequent conversations however it is agreed that the personal guarantees were signed on 11 August 2015 but only sent to Instagroup in May 2016.

7.

Instagroup now looks to recover sums owed to it by Warmspace from the Defendants pursuant to the terms of the guarantees. Instagroup says that at the time Warmspace went into administration, it owed Instagroup a total sum of £1,521,767 (excluding interest) made up as follows:

i)
Unpaid Invoices: £1,339,324.85 in respect of unpaid invoices for insulation materials ordered from and supplied by Instagroup;

ii)
Overpaid Measures: £24,384.88 in respect of credits/payments provided by Instagroup to Warmspace for work sub-contracted to Warmspace, which subsequently failed an Ofgem-mandated audit carried out by SSE and Npower.

iii)
SSE and Npower Share: £158,059 in respect of Warmspace's share of Instagroup's further liabilities to SSE and Npower following the Ofgem-mandated audit into measures submitted by Instagroup. SSE and Npower had extrapolated from the sample of measures which failed the audit, the general percentage rate failure of all measures submitted by Instagroup and claimed reimbursement from Instagroup in accordance with that calculation.

8.
Instagroup also claimed interest from Mr. Carroll at 2% above the RBS base rate in accordance with the terms of his personal guarantee and clause 9.7 of Schedule 1 to Master Agreements 2013 and 2016.

9.
Mr. Carroll advances no positive case to dispute that the sums Instagroup claims from Warmspace are owed by Warmspace. By way of defence to the claim against him under the personal guarantee, he advances four principal arguments:

i)
That his signature on the credit account application form was obtained in circumstances such that he is entitled to rely on a defence of economic duress;

ii)
That the credit account application form is not in the form of a deed and the personal guarantee within it is not supported by any valid consideration;

iii)
That he was induced to agree to the terms of the personal guarantee by fraudulent or negligent misrepresentations made by Mr. Robson and Mr. Milne at the meeting on 07 May 2015;

iv)
That Instagroup are estopped from enforcing the personal guarantee because of the representations made at the meeting on 07 May 2015.

10.
For the purposes of his defence of economic duress, Mr. Carroll pleads that at the meeting on 07 May 2015, Mr. Robson and Mr. Milne expressly stated that unless Mr. Carroll and Mr. Barclay signed credit account application forms incorporating the personal guarantees, Instagroup would stop supplying insulation materials to Warmspace and would take immediate steps to enforce Warmspace's

obligations. This, it is said, would have stopped the proposed management buy-out from proceeding and constituted illegitimate pressure on Mr. Carroll and Mr. Barclay to sign the credit account application forms.

11.
The defence of failure of consideration rests on a plea that the stated consideration in the credit account application forms, namely Instagroup agreeing to supply goods on credit as requested, is not good consideration in law to render any unilateral promises made by Mr. Carroll and Mr. Barclay in respect of past debts allegedly incurred by Warmspace legally enforceable.

12.
For the purposes of the pleas of fraudulent or negligent misrepresentation and estoppel, Mr. Carroll says that at the meeting on 07 May 2015:

i)
Mr. Robson said “don’t worry, it is not our policy to use [the personal guarantee] as a way of holding you personally responsible for the debt. To be honest as a guarantee, it is not worth the paper it is written on”;

ii)
Mr. Milne said “we would never come after your properties or anything”;

iii)
Mr. Robson further represented that Instagroup’s board did not, as a matter of policy, extend credit to customers over £500,000 unless credit account application forms were signed.

13.
Mr. Carroll also pleaded that in a telephone call on 20 May 2015 and 29 May 2015, Mr. Robson provided further assurances that Instagroup would not enforce the personal guarantees.

14.
Mr. Robson and Mr. Milne deny making the representations alleged by Mr. Carroll and deny giving the assurances he alleges.

Application for permission to amend

15.
Instagroup’s pleaded case was that the interest on all the unpaid invoices and Warmspace’s liability for the clawback liabilities arose under the terms of a Master Agreement dated 15 January 2016 made between Instagroup and Warmspace. The difficulty with this case was that the Master Agreement only came into effect from its commencement date, namely the 15th of January 2016 whereas a proportion of the invoices related to sales made in 2013 and 2014 and the clawback liabilities arose out of events in 2013 and 2014. When I raised this difficulty during opening submissions, I was told that there was a previous version of the Master Agreement from 2013 and that in any event, it was clear from the correspondence, including correspondence signed by Mr. Carroll, that Warmspace accepted its liability for both the unpaid invoices and the clawback liabilities. On day 2 of the hearing, Instagroup provided draft Amended Particulars of Claim pleading reliance on both the Master Agreement 2013 and on acceptance by Warmspace of its liability for both the unpaid invoices and the clawback liabilities. Instagroup also disclosed a copy of the Master Agreement 2013. After hearing submissions from Ms. Scharnetzky and from Mr. Carroll, I granted Instagroup permission to amend the Particulars of Claim in the form provided to me and allowed the Master Agreement 2013 to be put in evidence. I

made permission to amend conditional on Mr. Robson returning to the witness box to answer any questions Mr. Carroll might have as to the Master Agreement 2013 and to the reasons for its late disclosure. I indicated that I would give reasons for my decision in this judgment.

16.
In summary, I granted permission to Instagroup to amend its Particulars of Claim because, having in mind the principles laid down by Carr J (as she then was) in Quah v. Goldman Sachs International [2015] EWHC 759 at [38], I considered taking into account the overriding objective and the explanation for the timing of the amendments, that I should exercise my discretion to grant permission to amend. In this regard:

i)
The essence of Instagroup's amendments was to plead the correct contractual basis for elements of a claim, which had already been made.

ii)
Mr. Carroll did not advance a positive case in his Defence that the sums claimed by Instagroup were not due from Warmspace and therefore not sums which could be recovered under the terms of the personal guarantee.

iii)
For the purposes of the issues before me, the Master Agreement 2013 was in materially the same terms as the Master Agreement 2016.

iv)
Save for the Master Agreement 2013, the evidence on which Instagroup relied to make its claim against Mr. Carroll was already before the Court. In particular:

a)
Mr. Robson gave evidence in his witness statement that there had been a previous version of the Master Agreement in force prior to the Master Agreement 2016; and

b)
There was correspondence from Warmspace signed by Mr. Carroll admitting liability for the sums claimed.

v)
The application for permission to amend was made very late but was made in circumstances where no positive case had previously been made in the Defence that the Master Agreement 2016 was not the governing agreement for Warmspace's liabilities to Instagroup.

vi)
There would be prejudice to Instagroup if the amendment was not allowed because elements of their claim might otherwise fail on what would essentially be a pleading point; the evidence in support of the claim being already before the court. Any prejudice to Mr. Carroll would be offset by allowing him to cross-examine Instagroup's witnesses as to the Master Agreement 2013 and why it had not previously been disclosed.

The Key Issues

17.
The key issues I have to determine are:

i)
Are the guarantees unenforceable pursuant to the doctrine of economic duress?

ii)
Did Instagroup provide consideration for the guarantee?

iii)
Did Mr. Robson and Mr. Milne make the representations alleged?

iv)
Did Mr. Carroll rely on those representations when giving his guarantee?

v)
Is Instagroup estopped from enforcing the guarantee against Mr. Carroll?

vi)
What sums were due from Warmspace, which would be recoverable under the terms of the personal guarantee?

The Witnesses

18.
On behalf of Instagroup, I heard oral evidence from Mr. David Robson, the CEO and from Mr. Bruce Milne, a director of the Claimant, who was responsible for overseeing three divisions of the company, including the commercial division. Mr. Carroll also gave oral evidence. Inevitably, the focus of each witness's oral evidence was directed to what was said in the meeting of 07 May 2015 and whether Mr. Robson and Mr. Milne reassured Mr. Carroll and Mr. Barclay that if they signed personal guarantees Instagroup would not enforce them in any circumstances.

19.
Unsurprisingly given the passage of time, none of the witnesses could remember exactly what was said at the meeting. But both Mr. Robson and Mr. Milne were firm that they did not make the representations alleged by Mr. Carroll.

20.
Mr. Milne accepts that he may have said that Instagroup would only enforce a personal guarantee against a director's property as a matter of last resort but states that he did not say and would not have said that Instagroup would never come after Mr. Carroll's or Mr. Barclay's properties. He also says Mr. Robson did not make the representations, which Mr. Carroll says he did.

21.
Mr. Robson recalls explaining why the personal guarantees were required. He also denies making the representations which it is said he did. He makes the point that there would be no commercial sense for him to on the one hand say that the personal guarantees were necessary if Instagroup were to continue to trade with Warmspace and yet on the other hand say that they are not worth the paper they are written on. He says that Mr. Milne did not make the statement which it is alleged he did.

22.
Mr. Carroll also has no clear recollection of what was said at the meeting. His witness statement does not deal in any detail with the meeting of 07 May 2015 or the telephone calls of 20 May 2015 and 29 May 2015. Instead, he refers to a document created in February 2017, which was prepared for the purposes of his defence of this action, headed 'Background, Build-Up and Detail of meetings with

Insta, May 2015’. In his witness statement, Mr. Carroll said that although this document was created in February 2017, it was produced from handwritten notes of the meetings made by both himself and Mr. Barclay. In cross-examination, Mr. Carroll accepted that the only handwritten notes in question were the two notes in the trial bundles, one relating to the meeting on 07 May 2015 and one relating to the call of 29 May 2015.

23.
I set out my conclusions as to what was said or not said at the meeting on 07 May 2015 and in the subsequent telephone calls in my findings of fact below.

24.
So far as the credibility of the evidence of Mr. Robson and Mr. Milne is concerned, I consider that each was truthful and seeking to assist the Court. Mr. Carroll suggested that, where there was a conflict of evidence between his evidence and theirs, I should not accept their testimony for several reasons. However, none of the reasons given undermine their credibility in my opinion.

i)
It was suggested that in circumstances where both gentlemen say that they cannot recall what they did say at the meeting, I should not accept that they can be certain as to what they did not say. I do not accept this criticism. It seems to me that given the time which has passed, it would be less credible if they did claim to recall in any specific detail what they said at the meeting. In contrast, it seems to me to be more credible that when set against the background to the meeting, they can be more certain as to what they did not say or at least what they would not have said.

ii)
My attention was drawn to the fact that there are no board minutes or other internal company documents recording the discussions with Mr. Carroll and Mr. Barclay about the personal guarantees or discussing the payment schedule for Warmspace. I do find this more surprising. However, I was told by Mr. Robson that all the directors are working directors, that the discussions with Warmspace were regarded as operational matters within the company and that although he and Mr. Milne would have discussed matters with their fellow directors, they were authorised to make decisions as to the arrangements with Mr. Carroll and Mr. Barclay and Warmspace. I was also told that Instagroup had carried out searches for relevant internal documents and none had been found. I pressed Mr. Robson on this point in circumstances where the Master Agreement 2013 was found after a further search having previously not been found. However, he was firm that there were no further documents. I accept Mr. Robson’s assurances and do not consider that the absence of documents on its own undermines the credibility of his or Mr. Milne’s evidence.

iii)
Mr. Carroll also pointed out that Instagroup had pleaded in their Particulars of Claim that it had taken personal guarantees from two former members and directors of Warmspace and Mr. Robson had signed the statement of truth for those Particulars on 28 June 2019. Yet, on 11 November 2021, Mr. Robson signed a witness statement saying that he believed that Instagroup did not hold personal guarantees from the former owners of Warmspace, Mr. and Mrs. Hennessy. Mr. Robson acknowledged the error in the Particulars of Claim but did not accept that the error undermined his evidence as to what was said at the meeting on 07 May 2015 or his evidence as to why Instagroup wanted personal guarantees from Mr. Carroll and Mr. Barclay. While the confusion over whether or not Instagroup held personal guarantees from Mr. and Mrs. Hennessy forms part of the background to be considered

when deciding what happened at the meeting on 07 May 2015, the error in the Particulars of Claim does not otherwise undermine the credibility of Mr. Robson's evidence.

iv)
Mr. Carroll drew my attention to the fact that Instagroup had initially been unwilling to provide disclosure of certain documents that Mr. Carroll expected Instagroup to disclose. He also pointed to the fact that Instagroup had been inconsistent in its position as to the VAT treatment of the sums claimed from him in respect of invoices unpaid by Warmspace. However, neither matter assists me in determining the credibility of the evidence of Mr. Robson and Mr. Milne.

25.
So far as Mr. Carroll's evidence is concerned, there were inconsistencies between his witness statement and his oral evidence. For example, in his Defence and in the February 2017 Note, Mr. Carroll suggests that Mr. Robson gave further reassurances that Instagroup would not enforce the personal guarantees in the telephone conversation of 29 May 2015. In cross-examination, Mr. Carroll accepted that no such reassurances had been given. Further, in his witness statement, Mr. Carroll suggested that the February 2017 Note was written with the benefit of handwritten notes prepared by him and Mr. Barclay of the meetings with Instagroup. In cross-examination, Mr. Carroll moved from saying that he had further handwritten notes which had not been disclosed to saying that he had only the handwritten notes which had been disclosed and that he had not destroyed any further notes. Mr. Carroll accepted in the end that the only notes of meetings with Instagroup, which he had when preparing the February 2017 Note were the two handwritten notes that had been disclosed.

26.
I find that Mr. Carroll does not have a clear recollection of what was said at the meeting of 07 May 2015, indeed he accepted as much. I am also unable to accept that the February 2017 Note provides an accurate reflection of what was said at the meeting of 07 May 2015. The note does not reflect the contents of Mr. Carroll's handwritten notes of the meeting nor does the note reflect the contents of the handwritten notes of the meeting of 29 May 2015. In these circumstances, however certain Mr. Carroll may be as to what he believes was said at the meeting on 07 May 2015, I have to be cautious in relying on his testimony to assist me in deciding what was in fact said at the meeting.

The Facts

27.
Instagroup has two main divisions, a sales division and a contracting division. The former supplies insulation materials to house builders and others in the insulation industry. The latter sub-contracts the installation of insulation materials by sub-contractors who purchase their materials from Instagroup.

28.
The cost of installations for consumers carried out on Instagroup's behalf by sub-contractors is usually funded by energy suppliers under various government-backed energy efficiency schemes, including 'Green Deal' and ECO (Energy Company Obligation). Instagroup also acts as a managing agent for energy suppliers in the administration of funding under the schemes.

29.
Warmspace operates in a number of different markets, including in the installation of cavity wall insulation in the retrofit market for residential properties.

30.
Warmspace and Instagroup began trading together in around 2005. At that time, the owners and directors of Warmspace were a couple, John and Julie Hennessy.

31.
On 21 March 2013, Warmspace and Instagroup signed the Master Agreement 2013.

32.
As a result of legislative changes to the ECO scheme in 2013, I am told that the insulation industry went through a very difficult period. During this time, Instagroup supported a number of its customers or sub-contractors, including by extending credit terms and making on account payments to customers in respect of measures submitted for payment under the government-backed energy efficiency schemes. The evidence of Mr. Milne and Mr. Robson is that it was also at about this time that Instagroup placed more focus on requiring personal guarantees from the directors of its customers.

33.
It was also in 2013 that Ofgem mandated an audit of the measures submitted under the government-backed energy efficiency schemes. Ofgem required energy suppliers, including SSE plc ("SSE") and Npower plc ("Npower") to conduct an audit of the measures submitted for payment under the ECO scheme by all installers including the measures installed by Warmspace and submitted for payment by Instagroup. The audit took two forms:

i)
A number of specific measures submitted by Instagroup were selected for audit by SSE and Npower, including 19 measures installed by Warmspace, which were found not to meet the requirements of the ECO scheme. As a result, Instagroup was required to repay SSE and Npower the funds received for these overpaid measures. In turn, Instagroup sought to recover that sum, totalling £24,384.88, from Warmspace.

ii)
SSE and Npower then extrapolated from the results of the audit the general percentage rate failure of measures submitted by Instagroup and other installers and used this rate to estimate the number of other measures submitted by Instagroup and the other installers which would have failed to meet the requirements of the ECO scheme. SSE and Npower then withheld from Instagroup a proportionate amount of all payments due in respect of measures submitted by Instagroup. In turn, Instagroup looked to recover the sums withheld by SSE and Npower from the sub-contractors responsible for their installation. However, Instagroup only claimed from the sub-contractors 70% of the sum withheld. In relation to Warmspace, Instagroup claimed £31,280.00 from Warmspace in respect of measures submitted to SSE and £126,778 in respect of measures submitted to Npower.

34.
Warmspace was in financial difficulties in 2014 and by the end of the year was indebted to Instagroup for a sum of approximately £580,000 excluding its clawback liability.

35.
In early 2015, there were meetings between Mr. Robson and Mr. Milne on the one hand and Mr. Hennessy regarding the debt due to Instagroup but no agreement was reached for its repayment. It appears that Mr. Barclay was also party to the discussions with Mr. Milne and Mr. Robson.

36.
In November 2014, Mr. Barclay and Mr. Carroll started to discuss a management buyout of Warmspace with Mr. and Mrs. Hennessy, who were looking to retire. At a Warmspace board meeting on 29 April 2015, Mr. Carroll and Mr. Barclay were given permission to talk to Instagroup about the possible buyout. It was in this context, that Mr. Carroll and Mr. Barclay sought a meeting with Mr. Robson and Mr. Milne to discuss the future of Warmspace and the debt due to Instagroup.

37.
On 06 May 2015, Mr. Robson wrote to Mr. Barclay to provide an update on the Ofgem audit and explain what Instagroup was doing to challenge issues within the audit. The letter pointed out that overall, the liability that Instagroup was at that time potentially going to be passing on to Warmspace was a liability of £234,479.00.

38.
The meeting on 07 May 2015 took place at Instagroup's offices. Prior to the meeting, Mr. Carroll prepared a hand-written note, which was a script for what he and Mr. Barclay wanted to say. It was Mr. Carroll's evidence that this was his usual practice for meetings and that during the meeting, he would add to the note points arising during the meeting. This is what happened at the meeting on 07 May 2015 as can be seen from points added to the note in a different pen.

39.
The notes, which Mr. Carroll added at the meeting included the following:

"- Angry at the thought of funding MBO – "not paying for John Hennessy's retirement."

- Asked us to sign a Credit Account Application – said everyone signed – found JoH hadn't on checking files.

- No a/c increase debt above 500k without board approval"

40.
There is no record on the note of any reassurance given by Mr. Milne and Mr. Robson that the personal guarantee would not be enforced in any circumstances. In circumstances where Mr. Carroll was making a note of the discussions in the meeting and where it is his evidence that he and Mr. Barclay were uncomfortable signing the credit account application forms, one might have expected that he would have recorded the fact of any reassurance given.

41.
Mr. Robson accepts that he may have said at the meeting that he was not prepared to allow Warmspace's debt to increase above £500,000 but does not accept that he would have said that this was not permitted without board approval because he and Mr. Milne had authority to agree the operational steps to take in relation to Warmspace's debt. He may have said that approval would have to be sought from Instagroup's bank to extend the debt above £500,000.

42.
In addition, to the handwritten note, Mr. Carroll explained the purpose of the meeting of 07 May in his cross-examination. The meeting was an informal discussion because if the management buy-out was to proceed, he and Mr. Barclay needed to know if Warmspace would have continuing support from Instagroup and to know if a manageable re-payment schedule could be agreed. The meeting was the first occasion on which Mr. Robson and Mr. Milne were made aware of the possible management buy-out. Mr. Carroll also explained that he and Mr. Barclay were not provided with a copy of the credit

application form at the meeting. Rather, Mr. Robson held up a copy and told them that they would have to sign one, including the personal guarantee.

43.
My conclusions as to whether Mr. Robson and Mr. Milne made any of the representations alleged to Mr. Carroll and Mr. Barclay are set out later on in this judgment.

44.
Mr. Carroll wrote to Mr. Robson on 13 May 2015 putting forward proposals for repayment of Warmspace's debt. That proposal was not acceptable to Instagroup as Mr. Robson explained in his e-mail of 19 May 2015. It is notable that in this e-mail, Mr. Robson refers to discussing the schedule at length at a Board meeting and finishes by saying that he would be more than happy to discuss ways of achieving a solution 'within the constraints that our Board have agreed'.

45.
There was then a telephone conversation between Mr. Carroll, Mr. Barclay and Mr. Robson on 20 May 2015 to discuss the re-payment schedule. In his pleaded case, Mr. Carroll alleged that during this conversation, Mr. Robson gave further assurances that Instagroup would not seek to enforce the personal guarantees and explained that Instagroup's bank would feel more comfortable if the credit application forms were signed even though Instagroup knew the forms did not give the bank any security. Mr. Robson denies giving any such assurances. During cross-examination, Mr. Carroll seemed to accept that Mr. Robson did not give the assurances alleged because it was his evidence that at the time his focus was on obtaining an agreed repayment schedule for Warmspace and that Instagroup would keep to that schedule and not immediately demand repayment of Warmspace's debt once the management buyout had gone ahead.

46.
Mr. Carroll's evidence in cross-examination is consistent with the terms of his e-mail to Mr. Robson dated 21 May 2015. That e-mail opens by saying that he and Mr. Barclay wanted a proper commercial trading relationship with Instagroup and not one where Instagroup feels it is being treated as a bank. The e-mail goes on to provide a further repayment schedule and asks for a letter from Instagroup confirming that as long as Warmspace holds to the agreed repayment schedule Instagroup will not take any action against the company in relation to the debt. There is no mention in the e-mail of the personal guarantees or any reassurances said to have been given in relation to the guarantees.

47.
On 29 May 2015, Mr. Carroll and Mr. Barclay had a further conversation with Mr. Robson and Mr. Milne to discuss the revised repayment schedule. Mr. Carroll provided a handwritten note of this conversation. There was a discussion of the clawback liabilities, which were calculated at that time to be £182,444. There was also a discussion of the revised re-payment schedule, which was acceptable to Instagroup in principle. Instagroup was also happy to provide a letter confirming that Instagroup would not enforce its debt against Warmspace provided Warmspace kept to the repayment schedule. There was also a discussion of the personal guarantees. In his pleaded case, Mr. Carroll asserts that Mr. Robson again provided assurances that Instagroup did not use the personal guarantees as a means of enforcing the obligations of its debtors and that enforcement was not Instagroup's policy. Some support for Mr. Carroll's pleaded case could be taken from the handwritten note, which does contain a line 'agreed repayment – no intention enforcement. Not [policy]'. The final word in this sentence is not particularly legible and so may not read 'policy' although this word fits in context. In any event, the sentence could also be consistent with Mr. Robson and Mr. Carroll discussing the fact

that provided Warmspace kept to its agreed repayment schedule, Instagroup would not take steps to enforce the debt. This reading of the note is consistent with Mr. Carroll's evidence that still at this time, his and Mr. Barclay's focus was on agreeing a repayment schedule to enable the management buyout to go ahead and seeking reassurance that provided Warmspace kept to the schedule, Instagroup would not take early steps to enforce their debts. In any event, Mr. Carroll accepted in cross-examination that Mr. Robson and Mr. Milne did not make any promises or reassurances as regards the personal guarantees in the conference call. He also accepted that it was only after the call that he and Mr. Barclay received a copy of the credit account application form and saw what they were being asked to sign.

48.
Following the call, Mr. Robson arranged for Mr. Barclay to be sent a copy of the credit account application form. Mr. Carroll wrote to Mr. Robson sending him a revised payment schedule to include the clawback liabilities. He also thanked Mr. Robson for the personal guarantee wording in the following terms:

"Thank you for the personal guarantee wording you sent through. We will be back to you early next week when we've digested exactly what the implications are. In terms of commitment to the business and our plan, you can rest assured that we are totally committed and absolutely convinced that we will succeed in turning the business round."

49.
There is no mention in this e-mail of Mr. Robson or Mr. Milne giving any assurances that Instagroup would not enforce the terms of the personal guarantee. On the contrary, the fact that Mr. Carroll and Mr. Barclay intended to take the time to digest the implications of the personal guarantees would seem to contradict the suggestion that the guarantees were to be of no effect.

50.
Mr. Robson sent Mr. Barclay a letter dated 01 June 2015 updating Warmspace on the position in relation to the clawback liabilities and confirming that the sum sought from Warmspace was £182,444.

51.
Having received the credit account application form from Instagroup, Mr. Carroll and Mr. Barclay had a conversation with Mr. Jeff Jenkins of their solicitors, Clark Holt, the firm advising them on the management buyout. Mr. Carroll has waived privilege in his note of that conversation and in respect of a number of other documents in the trial bundles. There is no reference in the note to any assurances having been given by Mr. Robson or Mr. Milne that the guarantees would not be enforced. The note does record various arguments that Mr. Carroll says he discussed with Mr. Jenkins as to why the guarantees would not be enforceable including the possibility of challenging the guarantees on the basis of economic duress. Mr. Carroll also told me that Mr. Jenkins considered the guarantee wording poorly drafted.

52.
During early June 2015, further correspondence took place between Mr. Jenkins and Mr. Carroll over the terms of the draft letter for Instagroup to sign. In an e-mail dated 03 June 2015, Mr. Carroll asked Mr. Jenkins if he or his colleague could draft something to give them the protection they needed bearing in mind the personal guarantee but:

“… without saying that we are only signing that because they said it wasn’t worth the paper it was printed on. The tone needs to be professional but not adversarial or aggressive in any way”

53.
I asked Mr. Carroll to explain why, if Mr. Robson and Mr. Milne had given him the assurance that Instagroup would not enforce the personal guarantees in any circumstances, it would have been adversarial or aggressive to record that assurance in the letter. His answer was to the effect that, this would have been the sensible thing to do but the advice from Mr. Jenkins was that the personal guarantees were appallingly drafted and that if Mr. Carroll and Mr. Barclay went back to Instagroup and told them this, then they would not be willing to continue with finding a solution that would enable the management buyout to go ahead. Mr. Carroll also said that he was concerned that if he asked Mr. Milne and Mr. Robson to repeat the assurances, they would not do so. Mr. Carroll’s answers are significant in three respects:

i)
It is clear that at this time, Mr. Carroll and Mr. Barclay are receiving legal advice as to the effect of the personal guarantees;

ii)
It would appear Mr. Carroll’s approach to the personal guarantees was being guided by the advice he was receiving from Mr. Jenkins;

iii)
Whatever might have been said at the meeting on 07 May 2015, Mr. Carroll was concerned not to ask Mr. Robson and Mr. Milne for an unconditional reassurance at this time in case he was rejected.

54.
Mr. Carroll sent the draft letter prepared by Clark Holt to Mr. Robson on 11 June 2015. That letter included the following passages:

“…

Thank you for sending through the terms of the personal guarantees that Instagroup require, which Chris and I are happy to accept on the basis of our discussions around the manner in which the guarantee is intended to work in practice and Insta’s stated policy in relation to enforcement.

[the draft then set out the debts covered by the proposed re-payment schedule and the basis of that schedule]

…

On the basis of the above, Instagroup agrees that it will not make any claim or take any steps to recover any monies due to it (or enforce any security in relation to such monies, including any guarantee given by myself or Chris), unless Warmspace fails to meet its commitment to repay the historic debt by 31 st December 2015 and the HTTC debt by 31 st May 2016, without prior written agreement from yourselves.

Once the historic debt and the HTTC debt have been repaid in full the guarantees given by both Chris Barclay and myself will automatically lapse and terminate and Instagroup will not be entitled to make any claim against them.

…”

55.
Subsequently on 12 June 2015, Mr. Carroll wrote to Mr. Robson asking how Instagroup would like him and Mr. Barclay to sign the credit application form. He continued:

“In the meantime, I hope you are happy with the wording in my letter that confirms you will give us the agreed timescale to repay the old debt and the HTTC liability.”

56.
There then followed an exchange of correspondence about the draft letter because Instagroup were not prepared to sign the letter with the paragraph referring to the guarantees automatically lapsing. The final version of the letter countersigned by Instagroup is dated 26 June 2015. It includes the passages from the draft of 11 June 2015 set out above but without the paragraph referring to the guarantee lapsing automatically. In his Defence at sub-paragraph 10(13), Mr. Carroll refers to this letter as setting out “the Defendants’ recollection of the conversations, which they had had with Messrs. Robson and Milne about the contents and construction of and the intention of the Claimant towards the Credit Account Application Forms”.

57.
In his oral evidence, Mr. Carroll sought to explain that the first paragraph of the letter was intended to refer to the assurances, which he says he was given at the meeting on 07 May 2015 and that the reference to Instagroup’s policy was to those reassurances rather than to the agreement at the end of the letter that Instagroup would not enforce a claim for any monies due including by way of enforcing the personal guarantees if Warmspace kept to the agreed payment schedule. I do not accept this explanation. It is not consistent with the natural and ordinary meaning of the words used in the letter. To treat the first paragraph of the letter as having the meaning that Mr. Carroll seeks to give to it would deprive the later reference to Instagroup refraining from enforcing the personal guarantees of any purpose. Further, Mr. Carroll did not identify any reason why if there was a shared intention that Instagroup would not enforce the personal guarantees in any circumstances that intention could not be expressed in correspondence rather than the qualified intention, which does appear in the letter of 26 June 2015.

58.
Mr. Robson and Mr. Milne gave evidence in their witness statements that they did not understand the introductory paragraph of the letter of 26 June 2015 to mean that Instagroup had no intention to enforce the personal guarantees and that was not Instagroup’s policy. Their evidence is that if they had understood that this was the intention of the introductory paragraph, they would not have signed the letter. That evidence was not challenged in cross-examination.

59.
Mr. Carroll and Mr. Barclay completed the management buyout of Warmspace in late July or early August 2015. After that date, on 11 August 2015, Mr. Carroll and Mr. Barclay signed the credit account application forms. However, they did not send them to Instagroup at that time. The personal guarantee in the credit account application forms is in the following terms:

“…I hereby personally guarantee payment in respect of all such sums as are now or shall in the future become due from the Company to InstaGroup Ltd including interest at the rate specified in your Conditions of Sale or which shall otherwise be payable by law. This guarantee is to be a continuing guarantee and my liability under it shall not be affected by your giving time or any other indulgence to the Company or to me by any credit limit which may have been imposed from time to time or by any other matter or event whereby I would but for this provision have been released.”

60.
On 15 January 2016, Warmspace and Instagroup entered into the 2016 Master Agreement, which took effect from the date of its signature.

61.
On 09 May 2016, Mr. Milne asked Mr. Barclay and Mr. Carroll for signed versions of the credit account application forms, which Mr. Barclay then sent through.

62.
Unfortunately, Warmspace was not able to keep to the agreed repayment schedule and its debt increased. By the end of September 2016, Warmspace's debt was approximately £1.3 million (including VAT).

63.
Instagroup did not take steps at this time to enforce claims against Warmspace or to enforce the personal guarantees. There were regular meetings and discussions with Mr. Carroll and Mr. Barclay about Warmspace's debt. In September 2016, Mr. Carroll and Mr. Barclay asked if Instagroup would provide financing of around £200,000 to Warmspace. Instagroup were prepared to consider granting such a loan provided it could obtain additional security in the form of second guarantees over the property of Mr. Carroll and Mr. Barclay. Mr. Carroll and Mr. Barclay were, however, reluctant to grant both a second charge and maintain the personal guarantees. On 20 September 2016, there was an exchange of e-mails between Mr. Barclay and Mr. Robson. Mr. Barclay explained that previously the guarantees had been referred to as a gesture of commitment rather than a punitive measure and that he and Mr. Carroll were nervous about having the personal guarantee sit alongside a second charge because the guarantee had no amounts or limits. Mr. Robson replied:

"As discussed yesterday, the PGs offer some protection to Insta but not enough to extend the debt further. The second charge gives us additional protection. Whilst I understand your concern, Insta's position remains that the best way of the debt being repaid is through future profits and that is why we are proposing what we are."

64.
Mr. Robson's response suggests that Instagroup did consider that the personal guarantees were intended to provide some security to it for Warmspace's existing debts.

65.
Subsequently on 30 September 2016, there was an exchange between Clark Holt acting for Mr. Barclay and Mr. Carroll and Clarkslegal acting for Instagroup relating to a draft agreement in connection with the additional financing. Within that exchange there was a discussion of a clause relating to the personal guarantees. Clark Holt explained their understanding that once a level of 'normalised' debt had been reached both the second charge and the personal guarantees would fall away. Clarkslegal responded agreeing that the second charge should fall away but explaining that their instructions were that the guarantees were to remain in order to provide the same security as Instagroup already held. There was no suggestion in this exchange that the personal guarantees were not to be enforced in any circumstances. Similarly, in an exchange on 14 October 2016, Mr. Robson stated his position that once the second charges drop away, the existing personal guarantees were to remain in force as they already were. Mr. Carroll responded thanking Mr. Robson for taking the time to respond and saying that his clarification was very helpful. Mr. Carroll did not say anything about any prior reassurance that Instagroup would not enforce the guarantees in any circumstance.

66.
In the end, Instagroup did not provide the financing sought by Mr. Carroll and Mr. Barclay and did not take a second charge over their properties. In January 2017, Warmspace was facing insolvency and in an attempt to avoid this outcome offered to sell Warmspace to Instagroup for £1. Instagroup rejected that proposal. Mr. Carroll prepared a handwritten note headed "Insta Communication Timeline. January 2017". The note is an account of Mr. Carroll's and Mr. Barclay's communications with Mr. Robson and Mr. Milne in January 2017 concerning Warmspace's financial difficulties. The note discusses the personal guarantees and Mr. Robson's view that they gave Instagroup some security. Mr. Carroll records that this is not the advice he has received from Clark Holt but there is no mention of any prior reassurance that Instagroup would not enforce the personal guarantees.

67.
On 25 January 2017, Mr. Barclay wrote to Mr. Milne to explain the steps Warmspace were taking to try and avoid insolvency. Mr. Barclay refers to the fact that Instagroup believes it has a measure of security in place due to the credit account application forms. Again, there is no mention of any earlier assurances. Mr. Barclay goes on to outline his and Mr. Carroll's combined assets and the fact that they have other personal guarantees to their invoice discounters totalling £307,000.

68.
In early February 2017, Warmspace went into administration with no prospects of any distributions being made.

69.
On 10 February 2017, Clarkslegal wrote to Mr. Carroll demanding payment of £1,525,944.05 pursuant to the personal guarantee in the credit account application form. Mr. Carroll has not made any payment in response to that letter.

The Law

Economic duress

70.
The principles relating to economic duress are to be found in Times Travel (UK) Ltd v. Pakistan International Airlines Corpn [2021] 3 WLR 727 at [1], [78] – [80], [97] – [99] and [136]. In order to establish economic duress, it is necessary to establish the following elements:

i)
The making of an illegitimate (albeit lawful) threat by one party;

ii)
Sufficient causation between the threat and the threatened party entering into the contract or making the non-contractual threat; and

iii)
The lack of any reasonable alternative to the threatened party giving into the threat.

71.
The illegitimacy of a threat is to be determined by focusing on the nature and justification of the demand made by the threatening party having regard to, among other things, the behaviour of the threatening party (including the pressure it applied) and the circumstances of the threatened party. The law generally accepts that the pursuit of commercial self-interest is justified in commercial

bargaining and a demand which is motivated by commercial self-interest will in general be justified. A threat will be illegitimate if it amounts to reprehensible or unconscionable conduct, which in the context of the equitable doctrine of undue influence has been judged to render the enforcement of a contract unconscionable.

Failure of consideration

72.
The relevant principles relating to the concept of consideration are well-established.

i)
Unless a promise is made in a deed, a party must provide something in exchange for the promise in order to be able to enforce it. However, the courts are not concerned with the question of whether 'adequate' value has been given.

ii)
The promisee must provide consideration but that consideration does not need to move to the promisor. The requirement for consideration is satisfied when the promise confers a benefit on a third party; Chitty on Contracts, 34th ed. at §§6-41 – 6-042 and International Petroleum Refining Supply Ltd v. Caleb Brett & Son Ltd. [1980] 1 Lloyd's Rep. 569 at 594.

Misrepresentation

73.
A misrepresentation, which would justify rescission of a contract can also be used as a defence to an action brought by the representor against the representee. A contract can be rescinded for both negligent misrepresentation and fraudulent misrepresentation. For both forms of misrepresentation, the person seeking to rescind a contract must establish:

i)
A statement of fact amounting to a representation;

ii)
The statement is false;

iii)
The statement must be by or known to the other contracting party.

74.
To rescind a contract for negligent misrepresentation, the representation must be one, which (a) the representor had no reasonable grounds to believe and (b) induced the representee to enter into the contract in the sense that but for the misrepresentation, the representee would not have entered into the contract.

75.
To rescind a contract for fraudulent misrepresentation, the requirement for causation is weaker, it is sufficient to show that the representation was a factor in the representee's decision and that but for it, they might have acted differently; see Cassa di Risparmio della Republica di San Marino SpA v. Barclays Bank Ltd [2011] EWHC 484 (Comm) at [233]. In addition, the representee must establish that the misrepresentation was made (i) knowingly, (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false. The third is in reality an ingredient of the second as someone who

makes a statement under such circumstances can have no real belief in the truth of what they say; Derry v Peek (1889) 14 App Cas 333 and Cassa di Risparmio at [225].

76.
In order to determine whether any and, if so, what representation was made by a statement requires construing the statement in the context in which it was made and interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee; Cassa di Risparmio at [215]. Further, in order to be actionable a representation must be as to a matter of past or present fact. A representation as to intention is only false if at the time the representation is made or continues to have effect, there is no intention to do that which is represented; London Estates Limited v. Maurice Macneill Iona Ltd [2017] EWHC 998 (Ch) at [44]. This almost inevitably means that for a representation as to intention to be false, it must have been made fraudulently.

77.
Finally, in the context of a serious allegation such as one of fraudulent misrepresentation, this does not mean that the standard of proof is higher. However, the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether on balance the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established; Cassa di Risparmio at [229].

Discussion

Economic Duress

78.
The pleaded threat alleged by Mr. Carroll is that at the meeting on 07 May 2015 Mr. Robson and Mr. Milne told him and Mr. Barclay that unless they signed the credit account application forms, Instagroup would stop supplying insulation materials to Warmspace and take immediate steps to enforce Warmspace's obligations. This threat, it is said, was made in circumstances where Instagroup knew that the supply of insulation materials was critical to the survival of Warmspace's business.

79.
I find that no such threat was made by Mr. Robson and Mr. Milne. On Mr. Carroll's evidence, the meeting on 07 May 2015 was an informal meeting at which he and Mr. Barclay wanted to tell Mr. Robson and Mr. Milne about the possible management buy-out and discuss whether Instagroup would be prepared to support them in their plans by agreeing a payment schedule for Warmspace's debts and by continuing to supply Warmspace.

80.
Against the background described in the previous paragraph, it is unsurprising that Mr. Robson and Mr. Milne explained to Mr. Carroll and Mr. Barclay that they would require them to give personal guarantees by signing the credit account application forms. I accept that Mr. Robson may well have said at the meeting on 07 May 2015 that Instagroup would not increase Warmspace's debt above £500,000 without board approval or without the approval of Instagroup's bank. Mr. Robson believes he would not have referred to needing board approval to go above £500,000 but it is notable that in his subsequent e-mail of 19 May 2015, he does refer to discussing the situation with Warmspace at length at a board meeting and that he goes on to refer to the constraints that Instagroup's board have agreed. But, if this was said, it still does not seem to me to be anything more than an explanation of

Instagroup’s commercial position rather than a threat of a type which would form the basis for a defence of economic duress.

81.
Mr. Carroll and Mr. Barclay did not have copies of the credit account application forms at the meeting of 07 May 2015. Mr. Milne arranged for copies to be sent to Mr. Barclay on 29 May 2015. After which, Mr. Carroll and Mr. Barclay took legal advice on the terms of the personal guarantee. It is Mr. Carroll’s evidence that he was advised that the personal guarantees would be unenforceable on grounds of economic duress and were poorly drafted.

82.
It is no doubt true that Mr. Carroll and Mr. Barclay did feel by August 2015 that they had no choice but to sign the credit account application forms but this was because they wanted to go ahead with the management buyout. They knew that to do this they required the support of Instagroup and that Instagroup required them to sign the credit account application forms. The evidence before me reveals a process of commercial negotiation between Instagroup and Warmspace from May 2015 until the guarantees were signed in August 2015 that is not unusual and does not show Mr. Robson or Mr. Milne making demands which could be described as reprehensible or unconscionable. The request for the personal guarantees was one, which would be justified by the commercial self-interest of Instagroup.

83.
Turning to the other elements of the test for economic duress, the evidence also showed that there were alternative suppliers who could provide the same materials to Warmspace and could also provide the same services in relation to contracts under the government funded energy efficiency schemes. Mr. Robson gave evidence that there were alternative suppliers available to Warmspace and that he believed Warmspace were doing business with other suppliers. This evidence is borne out by an e-mail from Mr. Barclay to Mr. Milne and Mr. Robson dated 26 January 2015 discussing Warmspace’s outstanding payments at that time in which he expresses concern about Warmspace being required to purchase all insulation material in 2015 from Instagroup.

84.
Mr. Carroll’s answer to the suggestion that there were alternative suppliers was that at the time of the discussions with Mr. Milne and Mr. Robson in May and June 2015, Warmspace would not have been able to find an alternative supplier due to their cashflow issues. This interjection only served to emphasise that the pressure on Mr. Carroll and Mr. Barclay to sign the guarantees was not any threat from Mr. Milne or Mr. Robson. Rather, the pressure was a consequence of their desire to proceed with a management buyout at a time when Warmspace was facing financial difficulties. Mr. Carroll and Mr. Barclay believed they could make Warmspace profitable but needed the assistance of Instagroup to do so. It was clear from Mr. Carroll’s evidence that his and Mr. Barclay’s focus in May and June 2015 was on determining if they could achieve the management buyout and could agree a repayment schedule with Instagroup that they believed Warmspace could meet. If that schedule could not be agreed or if the management buyout had failed for other reasons, then Mr. Carroll would not have signed the credit account application form. Further, on Mr. Carroll’s evidence, he also signed the personal guarantee in August 2015 because he believed, having taken separate legal advice, that the guarantee would be unenforceable.

85.

It follows that I am also satisfied that there was no sufficient causative link between what was said at the meeting on 07 May 2015 (or indeed the discussions on 20 and 29 May 2015) to establish any defence of economic duress. Mr. Carroll had both sufficient time and the benefit of independent legal advice to decide whether or not he was willing to sign the credit application form.

86.
The defence of economic duress accordingly fails.

Failure of consideration

87.
Mr. Carroll's pleaded case is that on its true construction the credit account application form contained a unilateral promise given by Mr. Carroll and by Warmspace, consideration for which was Instagroup agreeing to supply goods on credit as requested. This consideration is said not to be adequate in law to render unilateral promises made by Mr. Carroll in respect of past debts allegedly incurred by Warmspace legally enforceable.

88.
The first point to make is that this defence appears to be advanced only in respect of invoices outstanding at 11 August 2015 and in respect of the claw back liabilities.

89.
In any event it is rare for a commercial agreement to be unenforceable for failure of consideration and the agreement between Mr. Carroll and Instagroup is not one of those rare cases. The wording of the credit account application form describes the consideration provided by Instagroup for the promises made by a personal guarantor signing the form as being the supply of goods on credit. I consider that the promise by Instagroup to supply goods on credit is in principle good consideration for the personal guarantee given by a guarantor in respect of both past and future debts. Instagroup is promising that they will continue to supply goods to the company of which the guarantor is a director in return for the promise by the guarantor that they will stand as surety for the company's debts.

90.
Further, in the context of the agreement being discussed between Mr. Carroll and Mr. Barclay on the one hand and Mr. Milne and Mr. Robson on the other hand, the personal guarantees were one element of a wider transaction. They were a condition of Instagroup agreeing to reschedule payments owed by Warmspace and to not take steps to enforce their claims for payment provided that Warmspace kept to the agreed schedule. There is clearly consideration moving from Instagroup for the personal guarantee given by Mr. Carroll when he signed the credit account application form.

Misrepresentation

91.
In the end, Mr. Carroll's case on misrepresentation turned on what was said at the meeting on 07 May 2015 as he accepted that no representations about enforcement of the personal guarantees were made by Mr. Robson or Mr. Milne in the calls of 20 and 29 May 2015. This concession is consistent with his account of those conversations in an e-mail to Mr. Jenkins of 12 February 2017.

92.
In circumstances where none of Mr. Carroll, Mr. Robson or Mr. Milne have any clear recollection of what was said at the meeting of 07 May 2015, it is difficult to reach any positive conclusion as to what was in fact said in the meeting. However, that lack of clear recollection on the part of Mr. Carroll

might be thought to assist in determining what was not said at the meeting. Mr. Carroll's pleaded case is that a number of very specific representations were made by Mr. Robson and Mr. Milne. Mr. Robson is alleged to have said "don't worry, it is not our policy to use this as a way of holding you personally responsible for the debt. To be honest, as a guarantee it is not worth the paper it is written on." He is also alleged to have represented that as a matter of policy, Instagroup's board did not extend credit to customers over £500,000 unless credit account application forms were signed.

93.
Mr. Milne is alleged to have said in the meeting of 07 May 2015 "we would never come after your properties or anything like that."

94.
I am satisfied that on the evidence no representations were made by Mr. Robson or Mr. Milne to the effect that the guarantees were not worth the paper they were written on, that it was not Instagroup's policy to hold directors' personally responsible for debts or that Instagroup would never come after their properties. I reach this conclusion for a number of reasons:

i)
I accept the evidence of both Mr. Milne and Mr. Robson both in their witness statements and in oral testimony as to what they did not say at the meeting on 07 May 2015 and as to the limits of what they might have said to Mr. Carroll and Mr. Barclay namely that Instagroup would not enforce the personal guarantees except as a last resort.

ii)
It seems to me inherently unlikely that a company would have a standard form credit application form with a personal guarantee, which they required directors of companies they were supplying on credit to sign, if as a matter of policy they would never enforce those guarantees.

iii)
I accept that Mr. Barclay and Mr. Carroll may have been reluctant to commit to signing the credit account application forms. This is unsurprising in circumstances where they were also having to consider giving other personal guarantees for Warmspace's liabilities and where Warmspace was in a difficult financial position. However, this does not seem to me to be a sufficient reason for Mr. Robson and Mr. Milne to give the assurances which they are alleged to have given.

iv)
Mr. Carroll's explanation for why Mr. Robson and Mr. Milne would have been prepared to give the assurances he alleges that they did is not convincing. Mr. Carroll's explanation for why Mr. Robson and Mr. Milne would be prepared to give these assurances in circumstances where he says they were false is that Instagroup's turnover was dropping and that Instagroup was in danger of losing rebates offered by manufacturers to wholesalers which were measured by the volume of orders being placed. Instagroup did not therefore want to lose the orders that Warmspace one of its largest purchasers were placing. To this end, Mr. Robson and Mr. Milne were prepared to say whatever it took to get Mr. Carroll and Mr. Barclay to sign the personal guarantees. There is evidence before the Court of Instagroup's turnover having dropped in 2015 and indeed Mr. Robson accepts that this was the case. Nevertheless, I do not accept Mr. Carroll's explanation. It may be that Mr. Robson and Mr. Milne did not want to lose Warmspace as a customer but as later correspondence shows they were not prepared to accept any repayment schedule offered by Warmspace nor were they prepared at a later date to give up the personal guarantees if Warmspace's debt came down to more manageable proportions. It also seems to me that any difficulties which Mr. Robson and Mr. Milne might have faced with their

fellow directors if Instagroup lost Warmspace as a customer would be offset by the difficulties they would face if it was discovered that despite Instagroup having taken personal guarantees from Mr. Carroll and Mr. Barclay, they had separately agreed not to enforce the personal guarantees at any time. In this regard, I accept the evidence of Mr. Milne and Mr. Robson that it was Instagroup's policy to take personal guarantees from directors of new customers they were supplying and that they tightened up their procedures around this policy in 2012 or 2013. I also accept the evidence of Mr. Milne that Instagroup had taken steps to enforce personal guarantees against the directors of other companies.

v)
If I were to accept that Mr. Robson and Mr. Milne did give the assurances which Mr. Carroll alleges, then it means that I would also have to accept that the discussions leading up to the letter of the 26th June 2015, that letter and the subsequent correspondence relating, for example, to the possible second charge on Mr. Carroll's and Mr. Barclay's properties and in January 2017 all proceeded on a false basis, namely that the personal guarantees provided Instagroup with security for Warmspace's debts. I am not prepared to accept this scenario, which is one for which there is no credible explanation.

vi)
On the contrary, I find that the letter of 26 June 2015 sets out the reassurances, which were discussed at the meeting of 07 May 2015 and to the extent that the personal guarantees were discussed during the calls of 20 May and 29 May 2015 during those calls as well. The arrangement set out in the penultimate paragraph of the letter of 26 June 2015 is one which makes commercial sense for both parties and is consistent with the concerns, which Mr. Carroll said in evidence were the ones he had at the time, namely that Warmspace would not agree a repayment schedule with Instagroup only for Instagroup to claim immediate repayment shortly after the management buyout.

vii)
Accordingly, I find that Mr. Robson and Mr. Milne did not represent at the meeting of 07 May 2015 that Instagroup would never enforce the personal guarantees. I accept that they may have said that Instagroup would not enforce the personal guarantees except as a last resort but that is consistent with the arrangement reflected in the letter of 26 June 2015, namely that Instagroup would not take steps to recover any monies due to it or enforce any security in relation to such monies given by Mr. Barclay or Mr. Carroll unless Warmspace failed to meet the dates by which it was committed to repay its debts.

95.
In relation to the alleged representation by Mr. Robson that as a matter of policy, Instagroup's board did not extend credit to customers over £500,000 unless credit account application forms were signed, I accept Mr. Robson's evidence that he may have said that he was not prepared to allow Warmspace's debt to increase above £500,000. He believes he may also have said approval was required from Instagroup's bank. However, his later e-mail of 19 May 2015 does suggest that he was discussing Warmspace's situation with Instagroup's board at least after the meeting so I find that it is possible that at the meeting he may have referred to the position of Instagroup's board as to Warmspace's debt. However, even if a discussion along these lines did take place, that is a different conversation to the representation alleged namely a statement that the board had a policy not to extend credit to customers over £500,000 unless credit account application forms were signed. I find that no such representation was made. In any event, the evidence of Mr. Robson and Mr. Milne was Instagroup did typically ask directors of its customers to sign the credit account application forms.

96.
Mr. Carroll advanced a number of reasons why he would not have signed the personal guarantee had he believed that Instagroup would take steps to enforce it. These included (i) being asked to sign a guarantee without limit, (ii) being asked to sign one without having to present a schedule of his assets to prove his resources and (iii) being asked to sign a guarantee without being advised to seek legal advice. Mr. Carroll also relied on the fact that he did not in fact have assets which approached the scale of Warmspace's debt at the time that he signed the credit account application form. None of these factors persuade me, however, that Mr. Robson and Mr. Milne made the representations which Mr. Carroll alleges. In this regard, it is of particular note that (i) despite knowing of Warmspace's debts Mr. Carroll was prepared to go ahead with the management buyout because he and Mr. Barclay believed they could turn the company around, (ii) that Mr. Carroll did in fact take legal advice and (iii) that Mr. Carroll was prepared to give personal guarantees to both Instagroup and another company notwithstanding that his assets were on his own evidence insufficient to meet his potential exposure.

97.
Mr. Carroll also relies on the February 2017 Note as evidence of what he says was discussed at the meeting on 07 May 2015. It is noteworthy that this is the first document in which Mr. Carroll records the actual words he says were used by Mr. Robson and Mr. Milne at the meeting. But, it is not a contemporaneous document. It does not reflect the contents of the two handwritten notes, which Mr. Carroll accepts were the only notes he had available when he produced the February 2017 Note and it is inconsistent in its terms with both the letter of 26 June 2015 and the later correspondence discussed above dealing with the possible second charge and the possible purchase of Warmspace by Instagroup. I am not, therefore, prepared to accept that the February 2017 Note is an accurate record of what was said at the meeting on 07 May 2015 or indeed in the conversations of 20 May and 29 May 2015.

98.
It follows from my findings above that I also find:

i)
That Mr. Robson and Mr. Milne did not deliberately or otherwise misrepresent Instagroup's intentions in relation to the enforcement of personal guarantees;

ii)
That there was accordingly no statement of fact amounting to a representation, which was:

a)
False;

b)
Made without reasonable grounds to believe that it was true;

c)
Made by Mr. Robson or Mr. Milne knowing it to be false or made without belief in its truth or made recklessly without any care as to whether it was true or false.

99.
I now turn to deal with causation. Clearly, in light of my finding that Mr. Robson and Mr. Milne did not make any false representations, it must follow that Mr. Carroll's case also fails on causation. However, Instagroup also argued that even if Mr. Robson and Mr. Milne did make the representations alleged at

the meeting on 07 May 2015, those representations did not cause Mr. Carroll to sign the credit account application form in August 2015 because they were overtaken by the later events in May and June 2015. I deal with this issue on the basis that if such representations had been made, then they would have had to have been made fraudulently. This is because given the nature of the misrepresentations alleged, it is difficult to see any circumstances in which a necessary statement of fact as to Instagroup's intentions could have been made only negligently.

100.
As already noted the test for causation in relation to fraudulent misrepresentation is weaker than the test for causation in relation to negligent misrepresentation. It is enough if the misrepresentation was a factor in the representee's decision and that but for it the representee might not have entered into the contract. Notwithstanding this weaker test of causation, I find that by June 2015 the discussions between Instagroup and Warmspace as to the terms on which Instagroup was prepared to continue to supply Warmspace and as to the requirement for personal guarantees had moved on from the discussions on 07 May 2015. When I asked Mr. Carroll why the letter of 26 June 2015 did not refer to the unqualified assurances he says he was given on 07 May 2015, his reply was to the effect that he was concerned that Mr. Robson and Mr. Milne would not repeat them. He was concerned to reach a deal with Instagroup because without it the management buyout would not go ahead and in these circumstances, he was prepared to accept the terms set out in the letter of 26 June 2015. That letter was, of course, drafted with the benefit of legal advice. In this regard, I accept that by June 2015 Mr. Robson and Mr. Milne were only prepared to agree a repayment schedule with Mr. Carroll on the terms set out in that letter. I also accept that Mr. Carroll knew this, which was why he was prepared to agree to the terms of the letter and why in later correspondence discussion of the personal guarantees was on the basis that they did provide some, if inadequate, security for Instagroup and why there is no reference in the letter or later correspondence to any unqualified reassurance that Instagroup would not enforce the terms of the personal guarantees.

101.
Accordingly, I find that Mr. Carroll's case on misrepresentation would have failed for reasons of causation in any event.

102.
It follows from my findings above that Mr. Carroll's defence of misrepresentation fails for the reasons given.

Estoppel

103.
Mr. Carroll's defence based on the principles of estoppel was not particularised in his Defence other than to say that the estoppel arose because of the representations relied on to found his case on misrepresentation. In light of my findings that Mr. Robson and Mr. Milne did not make the false representations alleged by Mr. Carroll and on causation, Mr. Carroll's defence of estoppel also fails.

Sums due

104.
Pursuant to the terms of the personal guarantee found in the credit account application form, Mr. Carroll guaranteed payment to Instagroup of all sums that were due from Warmspace at the date he entered the guarantee or as would in future become due to Instagroup including interest at the rate specified in Instagroup's Conditions of Sale or which would otherwise be payable at law. Mr Carroll

did not advance any positive case disputing the sums claimed by Instagroup but put Instagroup to proof of those sums.

Invoices

105.
Instagroup claims a sum of £1,339,324.85 in respect of unpaid invoices for insulation materials ordered from and supplied by Instagroup. The evidence before me includes the individual invoices and a copy of Instagroup's sales ledger for Warmspace covering the period from June 2014 until February 2017. Of the total claimed, a sum of £232,808.06 relates to the period before Mr. Carroll signed the credit account application form and a sum of £1,106,516.79 relates to the period after the form was signed.

106.
I am satisfied that the sums claimed in respect of unpaid invoices are recoverable under the terms of the personal guarantee.

The clawback liabilities

107.
Instagroup claims a sum of £24,384.88 in respect of 19 measures carried out by Warmspace which failed the audit mandated by Ofgem. Instagroup claims a further £158,059.00 in respect of Warmspace's share of the measures which the energy suppliers calculated using a process of extrapolation also failed the audit.

108.
Instagroup made its claim to recover these sums under the personal guarantee on two bases:

i)
That Warmspace's liability to Instagroup for the clawback liabilities arose because Instagroup was only obliged to repay the sums claimed to the energy suppliers because of Warmspace's breach of provisions of either the Master Agreement 2013 or the Master Agreement 2016, which were in materially the same terms.

ii)
That, in any event, Warmspace, acting by Mr. Carroll and Mr. Barclay agreed, it was liable for the sum of £182,444.00 claimed in respect of the clawback liabilities in June 2015; consideration for that agreement being provided by Instagroup agreeing to limit its recovery in respect of the extrapolation liabilities to 70% of its liability to the energy suppliers and by its agreement in the letter of 26 June 2015 not to seek to take any steps to recover monies due from Warmspace provided Warmspace adhered to the repayment plan set out in that letter.

109.
In her closing submissions, on instructions from Instagroup, Ms. Scharnetzky limited the basis for the claim to recovery of the clawback liabilities to the second of the two bases outlined in the previous paragraph. She was right to do so as there was no sufficient evidence before me to enable me to determine whether or not Warmspace was in breach of the provisions of the Master Agreements.

110.
So far as that second basis of recovery is concerned, it is clear from the correspondence that Warmspace accepted that it had a liability for the clawback liabilities and that the sum of £182,444

was one of the sums recoverable from it under the payment schedule set out in the letter of 26 June 2015 signed by Mr. Carroll on behalf of Warmspace and countersigned by Mr. Robson on behalf of Instagroup. In these circumstances, I am satisfied that the sum of £182,444 is also recoverable under the terms of the personal guarantee.

Interest

111.
Instagroup claims interest at a contractual rate of 2% above the Royal Bank of Scotland's base rate accruing from the due date of the sums claimed until the date of actual payment, whether before or after judgment, in accordance with clause 9.7 of the Instagroup conditions of sale. I was provided with an interest calculation which shows a sum of interest outstanding on the principal sums claimed of £217,737.30 as at 25 January 2022 and continuing to accrue at a daily rate of £93.81. The personal guarantee in the credit account application form expressly provides that it extends to the interest due on sums owed by Warmspace and accordingly I find that interest in the sums claimed is also recoverable under the terms of the personal guarantee.

Conclusion

112.
For all the reasons outlined above, I find that Instagroup's claim succeeds against Mr. Carroll in respect of the following sums:

i)
£1,339, 324.85

ii)
£182,444.00

iii)
£217,737.00

113.
Interest will continue to accrue on the sum of £1,521,768.85 until paid at a daily rate of £93.81.

114.
I would ask the parties to endeavour to agree a form of order arising from this judgment for my approval. I am grateful to Ms. Scharnetzky and her instructing solicitors and to Mr. Carroll for their assistance.