Ffrees Family Finance Limited v U Holdings Limited


No Substantial Judicial Treatment

Court
Chancery Division

Judgment Date
8 July 2020

Case No: BL-2019-001499

High Court of Justice Business and Property Courts of England and Wales Chancery Division

[2020] EWHC 1911 (Ch), 2020 WL 04209160

Before: Deputy Master Linwood

Wednesday, 8 July 2020

Hearing: Friday 19th June 2020

Representation

Cleon Catsambis (instructed by Crowell & Moring LLP) appeared on behalf of the Claimant.
Kyle Lawson (instructed by Walker Morris LLP) appeared on behalf of the Defendant.

Judgment

The Deputy Master:

1. By application notice dated 28 April 2020 the claimant applies for (1) summary judgment pursuant to CPR 24.2 and/or (2) strike out of the defence pursuant to CPS 3.4(2) on the ground it discloses no reasonable grounds to defend this claim or else, in the alternative, pursuant to the court's inherent jurisdiction.

2. The key issue is the meaning of a clause in a sale and purchase agreement entered into by the administrators of the claimant company with the defendant company in March 2019 following a pre-pack sale.

3. Solicitors and counsel for the parties have complied in all respects with the Chancery Master's directions for remote hearings which has considerably assisted me in the hearing of this application. In particular, I am grateful for their detailed skeletons, the agreed case summary and the joint statement of issues which frame the background and set out the matters I am to determine, all of which are most helpful.

The Facts

4. The agreed case summary provides as follows:

1. By a written and signed agreement dated 29 March 2019 between the Claimant, the Joint Administrators of the Claimant and the Defendant (the " **SPA** "), the Claimant agreed to sell, and the Defendant agreed to buy, whatever right, title or

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interest the Claimant may have had in or to the Claimant's business and the assets used in connection with the Claimant's business, subject to the terms and conditions set out therein.
2. Clause 3.1 of the SPA provided that, "by way of consideration, the Defendant would pay the Claimant £150,000 (the **"Consideration"**), which would be payable at the completion date."
3. In addition, Clause 5.1 of the SPA provided that, "in the event that the Defendant sold the Claimant's business or all or any of its assets or the shares in the Defendant or U Account Limited (a wholly owned subsidiary of the Claimant) (an " **Uplift Event** ") within a period of two years from the date of the SPA (i.e. 29 March 2019), then additional provisions of the SPA would apply regarding the payment of **"Uplift Consideration"** ."
4. Clause 5.2 of the SPA provided that, "for the purposes of calculating the amount of any Uplift Consideration payable by the Defendant, both (i) the Consideration and (ii) the sum of any investment made by the Defendant in the Claimant's business following completion (**"Buyer's Investment Sums"**) would be deducted from the consideration obtained for any Uplift Event."

5. Clause 5.3 of the SPA provided that:

a. "In the event that a value of £50m is achieved from an Uplift Event, the Buyer's Investment Sums shall first be deducted from that sale sum and the Buyer will pay 15% of the resulting net sum to the Seller;
b. In the event that a value of between £50m - £100m is achieved from an Uplift Event, the Buyer's Investment Sums shall first be deducted from that sale sum and the Buyer will pay 10% of the resulting net sum to the Seller;
c. In the event that a value of over £100m is achieved from an Uplift Event, the Buyer's Investment Sums shall first be deducted from that sale sum and the Buyer will pay 5% of the resulting net sum to the Seller."

6. On 21 June 2019, Morses Club PLC acquired the Defendant through its wholly owned subsidiary, Shelby Finance Limited (the **"Onward Sale"**). It is common ground that the Onward Sale constituted an Uplift Event.

7. The consideration for the Onward Sale comprised an initial cash payment of £5.8 million, and deferred consideration of up to an additional £5 million, payable in cash by February 2023 in the event that certain net profit criteria are met.

8. By letter dated 28 June 2019, the Joint Administrators demanded that the Defendant make payment of the sum of £847,500 by 5 July 2019. The Joint Administrators claimed that this sum was due in accordance with the terms of Clause 5 of the SPA. The sum demanded was calculated as being 15% of £5,650,000 (being the initial consideration of £5.8 million payable for the Onward Sale, less the £150,000 Consideration that had already been paid by the Defendant to the Joint Administrators under the SPA).

9. By letter dated 4 July 2019, the Defendant explained that no Uplift Consideration was due to the Claimants because Clause 5.3 of the SPA had not been engaged.

10. It is common ground that, on a literal reading of Clause 5.3(a) of the SPA, no Uplift Consideration is payable in respect of an Uplift Event if a value of less than £50 million is achieved in respect of the Uplift Event.

11. The Claimant's position is that, as a result of what it claims was an obvious mistake or typographical error on its part, Clause 5.3(a) of the SPA omitted the words *"up to"* (i.e. the clause provided that Uplift Consideration would be payable *"In the event that a value* of £50m *is achieved from an Uplift Event"* as opposed to *"In the event that a value of* up to *£50m is achieved from an Uplift Event"*).

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12. The Claimant contends that:

a. on a proper construction, Clause 5.3(a) of the SPA requires the Defendant to pay the Claimant Uplift Consideration of 15% of the sale sum (net of the Buyer's Investment Sums) in the event that a value of up to £50 million is achieved from an Uplift Event;
b. in the alternative, the words *"a value* up to *£50m"* should be implied into Clause 5.3(a) of the SPA; and/or
c. in the further alternative, Clause 5.3(a) of the SPA should be rectified for alleged unilateral mistake on the part of the Claimant through the insertion of the words *"... a value of* up to *£50m"* .

13. The Claimant seeks declaratory relief and specific performance of the SPA (in the event that the declaratory relief which it seeks is granted), requiring the Defendant to make payment of Uplift Consideration (estimated by the Claimant to be a sum of £847,500, plus 15% of any deferred consideration that may subsequently be received by the Defendant in respect of the Onward Sale).

14. The Defendant's position is that the natural and ordinary meaning and effect of clause 5.3(a) of the SPA is clear and the Defendant therefore denies that any Uplift Consideration is due to the Claimant because the Onward Sale did not achieve a value of £50 million or more.

15. The Defendant:

a. denies that it entered into the SPA on the basis of any mistaken or misapprehension as to the meaning or effect of the terms of the SPA;
b. puts the Claimant to strict proof as to the Claimant's subjective understanding or belief as to the terms of Clause 5.3 prior to entering into the SPA; and
c. denies that the Defendant was in fact aware, or that it ought reasonably to have been aware, of an alleged mistake by the Claimant prior to entering into the SPA.

16. Accordingly, the Defendant denies that:

a. the Claimant's proposed construction of Clause 5.3(a) is correct;
b. the words *"up to"* should be implied into Clause 5.3(a) of the SPA; and that
c. the Claimant is entitled to obtain rectification of Clause 5.3(a) of the SPA in the terms that it seeks.

17. In addition, the Defendant contends that, pursuant to Clause 5.5 of the SPA, no Uplift Consideration is payable to the Claimant in any event because the Onward Sale involved the sale of the entire issued share capital *of the Defendant* to Shelby Finance as opposed to a sale *by the Defendant* of the business or any of the assets of the Claimant, such that no consideration was ever received by the Defendant in respect of the Onward Sale.

The Issues

5. The joint statement of issues for determination states:

1. Should summary judgment be entered against the Defendant on the whole of the claim pursuant to CPR r.24.2 on the basis that the Defendant has no real prospect of successfully defending the claim on the grounds that:

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a. on a proper construction of clause 5.3(a) of the SPA dated 28 March 2019 (the " **SPA** "), *"Uplift Consideration"* is only payable to the Claimant by the Defendant in the event that a value *"of 50m* " or more is achieved from a relevant *"Uplift Event"* ; and/or
b. it is not necessary to imply the words *"a value of* up to *£50m"* into clause 5.3(a) of the SPA in order to give business efficacy to the SPA; and/or
c. on a proper construction of Clause 5.5 of the SPA, the Defendant is only obliged to pay *"Uplift Consideration"* to the Claimant within five Business Days of receipt by the Defendant of any consideration payable in respect of the relevant *"Uplift Event"* .

2. In the alternative, should the Defence dated 24 September 2019 be struck out pursuant to CPR r.3.4(2)(a) , or pursuant to the Court's inherent jurisdiction, on the basis that it discloses no reasonable grounds for defending the claim?
3. If the Claimant is successful in its application, what declaratory or other relief is appropriate?

6. The evidence before me in support of the claimant's application is a witness statement by the claimant's solicitor, Ms Catherine Williams, who drafted clause 5(3) of the SPA dated 28 April 2020. The responsive evidence is by Mr Nicholas Lees, solicitor for the defendant, and is dated 9 May 2020. No evidence was served in reply. The witness evidence is short and to the point, as to be expected where the facts are limited and for current purposes essentially agreed.

The procedural background

7. This, so far as relevant, can be summarised as follows:

28 June 2019, claimants sent letter before action to defendants;

4 July 2019, defendants respond denying any payment due;

21 August 2019, claim form and Particulars of Claim served on defendant;

27 August 2019, defendant enters acknowledgement of service;

24 September 2019, Defence served;

22 October 2019, Reply served;

8 November 2019, claimant and defendant served direction questionnaires. Claimant refers to potential application for summary judgment;

13 November 2019, notice of hearing set out for CCMC on 26/02/20;

26 February 2020, CCMC before Master Shuman. Directions through to and listing of trial given;

3 March 2020, trial fixed for 24 to 26 November 2020 inclusive;

8 April 2020, claimant's solicitors confirm they will apply for summary judgment and attach draft application notice and draft unsigned witness statement;

15 April 2020, defendant's solicitors inform claimant's solicitors that in their view, the proposed application is inappropriate and misconceived;

28 April 2020, claimant issues and served application;

12 May 2020, after considerable correspondence with the court, a hearing is listed for 19 June 2020.

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8. It will be apparent from the above that this application at the earliest could have been issued as from 28 August 2019, after the acknowledgement of service was filed and served, almost eight months before it actually was issued. Further, the claimant definitively knew of the defendant's position as opposed to as stated in correspondence by 24 September 2019 upon service of the Defence.

9. The claimant apparently referred to this application at the CCMC but it still took a further two-and-a-half months to issue and serve what is a concise and limited (in the sense that the issues and facts are confined as opposed to being under-evidenced) application. I emphasise I do not criticise the witness evidence of the claimant nor that of the defendant, both of which are admirably succinct and to the point.

The law: Summary judgment and strike out

10. CPR rule 24.2 states:

"The court may give summary judgment against a … defendant on the whole of the claim or on a particular issue if -

(a) it considers that -

…

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

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

11. CPR 3.4(2)(a) states:

"(2) The court may strike out a statement of case if it appears to the court -

(a) that the statement of case discloses no reasonable grounds for … defending the claim."

12. Mr Catsambis cited the well-known approach of Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited [2009] EWHC* at paragraph 15 approved of by the Court of Appeal in *AC Ward & Son v Catlin [2009] EWCA Civ 1098* at [24]:

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

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

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

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

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

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

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

13. I have also reminded myself of the notes to CPR 24.2 and the authorities referred to there. As to strike out, there is substantial overlap with applications for summary judgment, it being held in *Francois Kryvenko v Renault Sport Racing Limited [2016] EWHC 2284 (Comm)* that there is no material difference in the summary judgment test of "No real prospect" and that under CPR 3.4(2)(a) of "no reasonable grounds".

14. As to the timing of this application, PD 26 paragraph 5.3(1) states:

"A party intending to make such an application should do so before or when filing his directions questionnaire."

15. The note to CPR 24A paragraph 24.4.1 provides:

"A party intending to apply for summary judgment should do so before or when filing their directions questionnaire. If they do so, the court will not usually allocate the claim to a track before the hearing of the application. Where a party files a directions questionnaire stating they intend to apply for summary judgment but have not done so, the case will usually be listed for an allocation hearing. The application for summary judgment may be heard at that allocation hearing if the application notice has been issued and served in sufficient time."

(Quote unchecked)

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16. Practice Direction 23A applicable to all applications at paragraph 2.7 states:

"Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."

17. And at paragraph 2.8, echoing the note in [15] above:

"Applications should wherever possible be made so that they can be considered at any other hearing for which a date has already been fixed or for which a date is about to be fixed. This is particularly so in relation to case management conferences, allocation and listing hearings and pre-trial reviews fixed by the court."

The Law: Construction

18. As is apparent from paragraph 10 of the agreed case summary, on a literal reading of clause 5.3(a), no uplift consideration is payable if a value of less than £50 million is achieved. Mr Lawson submits that the natural and ordinary meaning is clear and should not be departed from.

19. Mr Catsambis submits it may be so departed from in two circumstances. First, where that natural and ordinary meaning produces an absurd outcome in the context of the overall contract. He cites Lord Hoffmann's first principle at page 912 in *Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896* :

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

20. In construing a contract, reference, he submits, must be made to its object and terms, notwithstanding the clause concerned is but one very small part of the whole. That context is described in the second principle in *Investors Compensation Scheme* :

"The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945* ."

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21. Mr Catsambis particularly relies on the fifth principle:

> "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 AC 191* , 201…"

22. Mr Catsambis also referred me to *Chitty on Contracts* (33rd edn) at 13-050 and 13-061 and in particular paragraph 13-083 which states:

> "So the principle that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or create some inconsistency with the rest of the instrument and may also not be applied, as Lord Hoffmann indicates, where there has been an obvious linguistic mistake or where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result or impose upon the contractor responsibility which it could not reasonably be supposed he meant to assume. In *Wickman Machine Tools v L Schuler AG* , Lord Reid said:
>
> > 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

(Quote unchecked)

23. Mr Catsambis submits the second circumstance where the natural and ordinary meaning should be departed from is where the outcome is neither commercially sensible nor intended by the parties, citing *Chitty* again at paragraph 13-084:

> "There is a significant body of authority in which the courts have attached substantial weight to the importance of giving to commercial documents the meaning which is commercially sensible. Thus it has been stated that commercial documents 'must be construed in a business fashion' and that 'there must be ascribed to the words a meaning that would make good commercial sense'. Indeed, in *The Antaios* , Lord Diplock said that:
>
> > 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must yield to business common-sense.'"

(Quote unchecked)

24. Mr Lawson's emphasis, as to be expected, emphasises the language of the clause. He cited the first six of Lord Neuberger's seven factors in *Arnold v Britton [2015] AC 1619* at [17] to [22]:

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"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

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

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. 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 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 Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114* , 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 17 and 22)."

25. Mr Lawson also referred me to Lord Hoffmann's speech in *Chartbrook v Persimmon Homes Limited [2009] 1 AC 1201* at [20] and [23]. I have had regard to all of paragraphs 20 to 24 and then at 25 Lord Hoffmann said:

"What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."

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26. Mr Catsambis submitted it was not the function of the court to re-write a contract but that the House of Lords held in *The Starsin [2003] UKHL 12* that, where the court can see that the words are omitted and what they are, then the court has a duty to supply them and that process is construction not rectification.

27. Accordingly, in *KPMG v Network Rail Infrastructure Limited [2017] EWCA Civ 363* , Carnwath LJ said that:

> "… the existence of two plausible alternatives does not undermine the case for correction, or force the court to adopt a solution which has no plausibility at all."

28. I referred counsel also to the decision two weeks ago of Fancourt J in *Monsolar IQ Limited v Woden Park Limited [2020] EWHC 1407 (Ch)* . That was the trial on paper of a combined Part 8 claim as to the true interpretation and effect of an indexation clause in the rent review provisions of a lease of land for a solar photovoltaic development.

29. In short, a literal interpretation was agreed by the tenant as meaning that cumulative RPI increases would result in the rent rising in year 25 to some £76 million per annum as opposed to £30,000 per annum if non-cumulative RPI increases applied to the initial rent of £15,000 per annum.

30. The submissions of the claimant landlord and tenant defendant was similar to here in that the tenant contended that any reasonable observer would be bound to conclude something had gone wrong and what the parties intended was an increase or decrease with RPI that was non-cumulative. The landlord contended the language was unambiguous and there was no obvious mistake in the wording.

31. Fancourt J summarised the law at paragraphs 39 to 51 inclusive and concluded that the increases in rent were "illogical, irrational and arbitrary and likely to produce an absurd result", distinguishing *Arnold* on its facts.

The Law: Implied terms

32. The difference when compared to construction is that implication involves inserting what is not but should be there if it had occurred to the parties as distinct from but still related to construction which concerns deciding what the parties meant but did not say in words that are already there: see *Chitty* again at 14-003 and also *Marks & Spencer plc v BNP Parabas [2015] UKSC 72* at [15] where, referring to the two types of contractual implied terms, Lord Neuberger stated:

> "The first is a term which is implied into a particular contract in order to give effect to the intention of the parties to the particular contract in the light of the express terms of the contract, commercial common sense, and the facts known to both parties at the time the contract was made."

33. Mr Lawson emphasised the test in *Marks v Spencer* for implication is whether the implication is "so obvious that it goes without saying" (see paragraph 16) or is necessary to give business efficacy (see paragraph 17) so that no such term will be implied if the contract is effective without it (see paragraph 18).

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34. Mr Catsambis also cited the principles set out by Lord Hughes in *Ali v Petroleum Company of Trinidad & Tobago [2017] UKPC 2* at [7]:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

The Issues: 1(a) Construction

35. Mr Catsambis put forward the following set of surrounding circumstances (which I will call "the surrounding circumstances") which Mr Lawson during the hearing accepted:

(1) The joint administrators were under a duty to maximise the value recoverable by the claimant's creditors in the quickest way possible.
(2) That was the commercial purpose or genesis of the transaction, the SPA and the anti-embarrassment clause.
(3) The anti-embarrassment clause was for the sole benefit of the claimant and its creditors.
(4) (was not agreed).
(5) The SPA and the anti-embarrassment clause were drafted, amended and finalised by the claimant's solicitors.
(6) In terms of the mechanics of drafting, it was therefore the version of the anti-embarrassment clause prepared by the claimant which did include the words "up to £50 million" in clause 5.3(a) rather than the defendant having requested that language or asked for "up to" be removed.
(7) The entire drafting, negotiation and finalisation of the SPA was completed within a single week, 22 to 28 March 2019.
(8) The SPA was only one of a number of transaction documents and processes taking place simultaneously, including "Know your Business" documentation for the purchaser, novations, outstanding debts, payroll, FCA authorisation and notice of appointment.

36. Certain other circumstances were, understandably I consider, not agreed by Mr Lawson as lacking in evidence or else amounting to a submission. Mr Catsambis emphasises the simplicity of the construction exercise, limited to a single clause, not ambiguous, complex or technical, with no gaps as to concept due to oversight of the parties, nor correction of a bad bargain, simply the addition of the words "up to" which I will call the "corrective construction".

37. The alternative, which I will call the "literal construction", would mean no uplift consideration would be payable on the current and indeed any sale up to, say, a pound below £50 million, then 15 per cent if exactly £50 million is achieved and 10 per cent if a sale price is £1 over £50 million.

38. I must have regard to how the formula works literally. On a gross basis it would result in a payment of £7,500,000 on a sale price of £50 million and £5,000,000.10 on a sale price of £50,000,001, a saving of almost £2,500,000 for the payment of £1. However, a sale at £49,999,999 would mean no payment, a saving of £7,500,000 for paying another £1 less.

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39. Mr Lees in his evidence at paragraph 59.2 states the clause is "entirely operable and workable as drafted. It simply does not operate or work in a manner which would enable the claimant to obtain any further consideration from the defendant."

40. Mr Catsambis submits that the literal construction produces an absurd outcome which is not commercially sensible and further cannot have been intended by the parties; but the evidence of the defendant pre-contract is that they entered into the SPA in the specific knowledge of no uplift consideration on a sale for anything under £50 million. Mr Catsambis's response to that is that the court must only look at an objective analysis of the SPA based upon what was known to the parties.

41. So to split the error; the mistake is the omission of "up to" and the correction is their inclusion, which is immediately easy to identify and to implement. The context is a ratchet which on the literal construction has two defined steps- first, by clause 5(b) of 10 per cent for £50 million to £100 million, and secondly, by clause 5(c) of 5 per cent for over £100,000.

42. Mr Lawson submits that the defendant has a real prospect of successfully defending this claim because it relies upon what the contract says as opposed to adding in words or implying them so that no uplift consideration is payable. That is, he submits, the plain and natural meaning of the clause and is agreed by the claimant on a literal interpretation: see paragraph 10 of the agreed case summary.

43. He emphasises the one-sided approach of the claimant as, first, the court's task is to determine what the parties (plural) intended to agree so mistake must be by both parties, which is not applicable here as this clause benefits the defendant. Secondly, the claimant drafted and proposed these terms which the defendant accepted. Thirdly, the claim to construe the contract according to commercial common-sense flies in the face of, on the one hand, the natural meaning and on the other the fact this clause arose from a negotiated outcome between two parties with very different interests.

44. Fourthly, the claimant pleads in the alternative but not as part of this application for summary judgment, a claim for rectification. Accordingly, Mr Lawson submits the line between this application for corrective constructive and rectification is a fine one and should be properly dealt with at a trial when all the evidence is before the court.

Discussion and Decision: Issue 1(a)

45. Before I turn to the construction question and whether or not the defendant has a real prospect of successfully defending this claim, there are three other matters raised by Mr Lawson, each of which, he submits, or else collectively, mean this application should be refused. They fall under the "no other compelling reason" as to why this matter should be disposed of at a trial and/or in respect of two of them, proper case management should mean, he submits, that the matter should go to trial as opposed to summary judgment.

Delay

46. Mr Lawson submits there has been extraordinary delay on the part of the claimant in bringing this application, as can be seen from my above chronology. Further, this has caused the defendant real prejudice in that there have been the costs of the CCMC and the defendant has complied with the directions in preparing for the trial listed for 24 to 26 November 2020.

47. Disclosure took place on 1 June 2020, although the claimant did suggest an adjournment of that date and task. That I can deal with in short. It would neither be proportionate nor sensible to suspend disclosure or other trial preparation as (a) an *ex*

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tempore judgment was not on balance likely, the more so from a remote hearing and this application was always going to be heard at a remote hearing, so (b) the trial date could have been threatened. Accordingly, the defendant was correct in its refusal.

48. No explanation whatsoever is given by Ms Williams in her witness statement or her correspondence for that substantial and excessive delay, save that in her email of 20 April 2020 Ms Williams said, "The intervening lockdown as a result of COVID-19 has impacted the timing." As I indicated during the hearing, I deprecate that un-evidenced and unsupported throwaway line in circumstances where the application is short, the witness statement is just eight pages, and in the context of many people being substantially affected in their health and employment by the pandemic.

49. Further and in any event, the lockdown commenced on 23 March 2020, almost exactly six months after the Defence was served and no explanation is given for that six month delay. Whilst technically an application for summary judgment is possible at any time, the key requirement is that any application is made as soon as desirable or necessary: see PD23 at 2.7, and applications for summary judgment should be made before or when filing the directions questionnaire so that it is issued before the CCMC. Whilst the claimant says summary judgment was mentioned to Master Shuman at the CCMC, there is no contingency in the filed costs budget for it, indicating that mention was particularly uninformed and unintended as of then.

50. Later applications can be made but for the orderly administration of justice and so as to avoid unnecessary time and costs for the parties, there should ordinarily be a change in circumstance to warrant same, especially evidential, for example, arising on disclosure or a change of position by a key witness or an agreed statement of experts being wholly in one party's favour.

51. I accept Mr Catsambis's submissions that, as disclosure has been completed in early June, nothing has been disclosed which adversely affects this application and that it has no impact on trial preparation as to the witness evidence due on 1 September. However, in fixing this hearing with an estimated length of one day plus two hours pre-reading, initially resulted in a hearing listed for 1 October 2020. It was only after some considerable correspondence with the court and fortuitous listing circumstances as to the court's diary, that it was accommodated on 19 June 2020.

52. This delay possibly could affect the trial date if either party appeal my judgment as there is a real risk the subsequent appeal judgment might not be given before trial in late November 2020. Further, there is no clear nor agreed path in terms of what the parties should do in the period between my judgment and determination of the appeal in terms of trial preparation and compliance with the order on directions, which is unsatisfactory.

53. On balance, however, I do not consider the claimant's failures to bring this application on a timely basis amount to a good reason to dismiss this application as a matter of case management, nor refuse it on a substantial merits nor does it amount to some other compelling reason for trial for these reasons:

(1) there will be a reduction in court time and resources at trial;
(2) likewise, the parties' time and costs in preparation of witness statements and for attendance at trial generally will be less;
(3) whilst it appears prejudice may have been suffered by the defendant, (a) that is limited to time and costs but (b), if it is in the context of an unmeritorious defence, the defendant arguably should and could have conceded in any event, so (c) the overall costs would have been lower. But overall any prejudice the defendant may have suffered can be compensated in costs.
(4) Whilst I must in accordance with the overriding objective case manage claims to achieve speedy and just resolution of disputes at minimum cost and time, that does not extend to trying to anticipate the likely course of an appeal. I should make my decision unfettered by such concerns which will be resolved if and when they arise with appropriate case management and provision for costs.

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Is this application unsuitable for summary judgment and/or strike out?

54. Mr Lees at paragraph 47 of his witness statement lists nine factual matters Ms Williams he says relies upon but fails to acknowledge in her witness statement. I take the last one of these as an example. Paragraph 47.9 questions "whether it was likely or unlikely that a sale price of £50 million might be achieved for the business acquired by the defendant within 24 months of the acquisition and, if so, why that was the case."

55. It is pellucidly clear on a superficial reading of the above issue that it no doubt would involve disclosure and oral witness evidence to determine it. Seven of the remaining eight issues similarly would require disclosure and oral evidence. One does not, namely 47.5 which asks if "up to" was omitted as a result of "typographical and inadvertent error" by the claimant and/or Ms Williams and it arises from paragraph 9 of her witness statement.

56. Ms Williams' account as to the omission of "up to" is not and cannot be challenged. Mr Lees also at paragraph 47 states the factual matters are not limited to just these nine matters. As a result, he says the court is expected to determine the "factual matrix" and so that will amount to a mini-trial of disputed questions of fact. There is also, Mr Lawson submits, non- CPR Part 35 opinion evidence which the claimant relies upon. All of these factors, he submits, indicate this application is unsuitable for summary judgment.

57. I disagree for these reasons:

(1) The agreed case summary combined with the agreed surrounding circumstances I have set out above contain all the facts and background I consider I need to properly determine this application and the supporting documentation is limited and unchallenged.
(2) The claimant is not asking for my determination nor does it need a finding in respect of the issue at 47.9 nor any of the other seven like issues, so oral evidence and disclosure is unnecessary. Further, as to the latter, disclosure has been given and it appears there is nothing which adversely affects the case of either party as far as this application is concerned.
(3) Determination of this application cannot include (nor am I invited to consider) precontractual negotiations or the evidence to be expected on the claim for rectification.
(4) This application is limited on its factual scope and accordingly would be suitable for determination by a Part 8 procedure. I therefore should "grasp the nettle" as to this short point of construction as I consider I have all the evidence necessary to properly determine it and the parties have had full opportunity to address me by witness evidence, skeleton arguments and oral submissions.
(5) I cannot see that "something may turn up" in any additional witness statement evidence, which is the only evidential step to be completed before trial, nor that oral evidence could put the documentary evidence in a different light in view of its simplicity as to the question of construction.

Trial necessary in any event

58. It is common ground that if the claimant succeeds as to the construction and/or implication of terms it contends for, a trial may still be necessary as quantum is not agreed in principle, subject to liability as the clause requires the "buyer's investment sums" to be deducted from the sale consideration of £5,650,000 prior to applying the appropriate percentage to the net sum resulting.

59. Mr Lawson therefore submits as a matter of case management it would be best to have all issues determined in the November 2020 trial rather than the two stages the claimant's application necessitates. Mr Catsambis submits quantum is

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a question of fact. The intention of the parties was that it would be determined under the SPA and that, if the defendant's evidence is sufficient it will be accepted, otherwise the matter must be heard.

60. Mr Lees in his statement at paragraph 55.1 says the possibility of agreement of quantum following disclosure is "a very optimistic one" and that a second hearing "will be required in any event". I find that statement in the absence of evidence of impossibility of agreement of simple figures to verge on the deliberately obstructive. It flies in the face of the expectation of cooperation of the parties with the court and compliance with the overriding objective. Here the onus is on the defendant to evidence the buyer's investment sums, which as appears in [62 & 63] below it has already calculated in accordance with the contractual formula. I note Mr Lees does not say that cannot be done, which must stand in contradiction to his statement that a trial is "required".

61. Indeed, the pleadings show the limited extent of a trial of quantum. Paragraph 13 of the Particulars of Claim states:

> "To the best of the claimant's knowledge, the defendant has made no investment in the business between completion of the SPA and the onward sale which would further need to be deducted from the uplift consideration in accordance with clause 5.2 of the SPA."

(Quote unchecked)

62. Paragraph 19 of the Defence states:

> "Paragraph 13 is denied. Between March and May 2019 the defendant made significant investments totally approximately £942,826 in the acquired business of the claimant for the purpose of funding the working capital requirements of the business, including in respect of product development, customer acquisition, payroll and day-to-day operations. In the premises if, which is denied, that any uplift consideration is payable by the defendant then, pursuant to clause 5.2 of the SPA, the sum of the investments made by the defendant would fall to be deducted from the sale consideration obtained by the defendant from any uplift event. Paragraph 17.2 above is repeated."

(Quote unchecked)

63. And then at paragraph 31(3)(a) as to rectification the defendant states:

> "Further and in any event, if which is denied any uplift consideration is payable to the defendant then -
>
> (a) even on the claimant's own case, the sum that would be payable to the claimant would be £706,076.10 and not £847,500 after taking into account the investments which the defendant made in the acquired business. Paragraph 19 above is repeated."

(Quote unchecked)

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64. In its Reply at paragraph 15, the claimant puts the defendant to proof of the sums referred to in paragraph 19.

65. Further, the costs of any trial of quantum alone would be substantially less than a trial of liability as well. The documentary and witness evidence will be considerably reduced. Court time and judicial resources will be saved.

66. In summary, even if a trial was necessary which with sensible parties and lawyers appears unlikely, it will be far shorter, less costly and use fewer resources of the parties and the court. In my judgment those case management reasons come nowhere near to amounting to a reason to proceed to determine this application on a summary basis.

Does the defendant have a real prospect of succeeding in its defence?

67. As I have indicated above, the defendant submits its case is consistent with what the contract actually says, ie, the literal construction and the agreed result of that is that no payment is due. I accept Mr Catsambis's submission that Mr Lees has been very careful in his statement in not claiming that the clause accurately reflects what the parties agreed. In other words, the claimant made a mistake which the defendant recognised and let pass.

68. I must determine, taking into account the surrounding circumstances, whether it is clear the clause is a typographical error and, if so, how it can be corrected. I start with the literal construction, in effect the status quo. First, its application means there is the oddity of a spot price of £50 million and followed by first a range of £50 million to £100 million and secondly £100 million plus.

69. Clause 5(3)(a) as drafted would result in a nonsense for a sale at or around £50 million, as I have set out in my calculation at 38 above. A sale at £49,999,99 would mean no payment, but £1 more would result in a gross payment of £7,500,000 and £1 beyond that a gross payment of £5 million. That result is wholly illogical and lacking in business common-sense. It is, in my judgment, clearly irrational as no reasonable seller would sell at those figures. No explanation is proffered as to why such results would be intended.

70. An alternative would be to delete clause 5(3)(a) in its entirety. That would achieve the practical effect of the clause as it currently is, but wholesale removal, especially in the context of a ratchet would do "too much violence" to the words of the clause and cannot be correct. Further, there is no evidence before me that the minimum price from which a percentage uplift consideration is payable is at £50 million. That again is illogical and irrational.

71. Therefore, whilst the literal construction was accepted by the defendant, it would not appear to be intended by a reasonable and informed person reviewing the SPA. That person would assume it to be a drafting mistake as the alternative or literal construction just does not make sense. It is an absurd outcome which must "yield to business common-sense". I note in particular that Mr Lees does not state the parties knowingly agreed to a minimum sale value of £50 million, as the literal construction applies before uplift consideration is payable.

72. I appreciate parties can and do enter into contracts which are ill-advised and result in poor bargains. The latter especially could apply here in the context of the claimant's sale for £150,000 of the business in March 2019 followed by the onward sale at £5.8 million in June 2019, plus a further consideration in 2023. But the figures do not make sense on a literal construction. I am aware of the danger of re-writing a contract to assist an unwise party or penalise an astute party, but here the factual result makes the position clear and accordingly the need for corrective construction. A reasonable person, having all the

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background knowledge that was available to the parties as they were at the time the SPA was entered into, would construe the clause with "up to" included, which is not the correction of a bad bargain.

73. For those reasons, I find the corrective construction of clause 5(3)(a) to be the right one. I emphasise that this is not the retrospective correction of a poor deal, nor is it extensive, technically complex or especially uncertain. There are no glaring factual or other gaps which I have to metaphorically clear by a long jump. The mistake, in my judgment, is a simple and obvious error as uplift consideration would be due in respect of any sale and not just the artificial position at around £50 million which cannot stand.

74. I now turn to what the clause means and how it must be read. The clear and obvious construction is the clause must be read with the addition of the words "up to" before £50 million. That is logical and rational. The result is far from absurd and clearly amounts to business common-sense when viewed in the surrounding circumstances, namely:

(a) The ratchet of clause 5(3) was intended to have three parts.
(b) That is especially evidenced by the words in subclause (b), namely "between" and (c) namely "over". The first step cannot logically be anything other than "up to".
(c) Likewise, the three ratchet steps work with the figures in each subclause as opposed to amounting to an illogical and irrational provision as the literal construction provides.
(d) The whole now encompasses any possible sale sum.
(e) The price range is consistent with the joint administrator's duties and objectives in these factual circumstances.
(f) The construction by addition of "up to", does not conflict with any other provision in the SPA but clarifies the whole on sale mechanism so as to remove the uncertainty and otherwise absurd result.
(g) This addition is simple to make and would be especially difficult to misinterpret or dispute.
(h) It results in business efficacy and would be logistically understood by any reasonably informed person applying business common-sense.

Issue 1(a)

75. I therefore find in summary that the defendant does not have a reasonable prospect of successfully defending the claim as to construction nor is there any other compelling reason why this aspect, namely construction of the clause, should be disposed of at trial in respect of each of the four grounds relied on by the defendant or when taken as more than one ground or all. In other words, the whole is not greater than the sum of each individual ground.

76. My answer to Issue 1(a) therefore is that summary judgment should be entered as, on a proper construction of clause 5(3)(a), the uplift consideration is payable at 15 per cent on a sale sum of up to £50 million less the buyer's investment sums.

Issue 1(b)

77. The next issue is whether the mistake can be remedied by implying "up to" before £50 million. If I am wrong as to Issue 1(a), I consider that the implication the claimant contends for is reasonable and necessary to give business efficacy so that the words "up to" can be inserted by implication for the same reasons I set out above regarding construction.

78. That accords with business common-sense in the particular circumstances which apply here, including the facts known to the claimant and defendant when the SPA was entered into. The implication of these words is necessary to make the first step of the ratchet work and is, in my judgment, obvious and necessary: see *Ali v Petroleum Company of Trinidad & Tobago* .

79. The defendant therefore has no real prospect of successfully defending this claim on the ground that implication of "up to" is not necessary to give business efficacy to the SPA, nor is there any other compelling reason in this respect as to why the matter should be disposed of at trial.

Issue 1(c)

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80. The defendant says (see paragraph 17 of the agreed case summary) that it has a further defence to the claim, namely that no uplift consideration is payable under clause 5(5) due to the nature of the onward sale.

81. Clause 5(5) provides:

> "Any uplift consideration due to be paid by the defendant in accordance with this clause must be paid to the claimant within five business days of receipt by the defendant of the consideration payable in respect of the relevant uplift event."

(Quote unchecked)

82. In essence, the defendant says that it did not sell the business or the assets as the onward sale was the sale of the entire issued share capital of the defendant to Shelby Finance Limited. Therefore there was no "receipt" by the defendant of any consideration and accordingly no uplift consideration can be payable as the consideration was paid to the shareholders.

83. Ms Williams says in her evidence that this is an artificial interpretation and refers to clause 5(1) which expressly avers a sale of those shares. At subparagraph (b), clause 5(1) states:

> "In the event that -
>
> (a) the buyer sells the business or all or any of the assets in one or more transactions, excluding -
>
> (i) sales of stock in the normal course of the operation of the business; and
>
> (ii) sale of an asset which is replaced by a new replacement asset intended to perform the same function; or
>
> (b) the shares in the buyer or U account shares are sold (together an uplift event) within the period of two years from the transfer date the following provisions regarding payment of uplift consideration ("uplift consideration") shall apply. For the avoidance of doubt, the buyer shall be entitled to issue and a lot shares as it sees fit and such an issue or allotment shall not constitute an uplift event nor shall any consideration paid on the sale of such shares be included in the calculation of the uplift consideration."

(Quote unchecked)

84. Further, clause 5(4) expressly provides for the partial sale of the shares in the buyer:

> "In the event of a partial sale of any assets or shares takes place as described in this clause, the additional consideration payable by the buyer shall be calculated on a pro rata basis.

(Quote unchecked)

85. The claimant submits clause 5(5) merely clarifies when the seller is to receive the uplift consideration, ie within five business days, and is not a restriction on the seller receiving the uplift consideration. In particular, the claimant submits such an interpretation as the defendant contends would mean a buyer could avoid any uplift consideration which was never intended.

86. In my judgment, the claimant is correct. The defendant's construction is fanciful and I reject it for these reasons:

(1) The position on sale of shares is clearly anticipated and governed by clause 5(1)(b).
(2) Clause 5(5) relates to timing and timing alone. It does not operate as a restriction on the seller's ability to receive uplift consideration nor amount to a device to circumvent it.
(3) The alternative construction is uncommercial and unworkable in the sense that, to make the whole clause work, all existing and/or future shareholders would have to be identified and bound in contractually.

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87. My answer therefore to Issue 1(c) is that the defendant has no real prospect of successfully defending the claim on the ground the defendant has not received consideration for its sale of the business, nor are there any other compelling reasons why this part of the Defence should go to trial.

Issue 2: Should the Defence be struck out pursuant to CPR rule 3.4(2)(a)?

88. Due to the overlap with summary judgment, my answer to this is yes for the like reasons but is likewise subject to provision for a trial of quantum.

Issue 3: What declaratory or other relief is appropriate?

89. The draft order which applies to summary judgment for the whole of the claim and/or strike out of the Defence is inappropriate due to the need to dispose of the quantum calculation as is clear from the paragraphs I have quoted from the Particulars of Claim, Defence and Reply. The claimant is entitled to the declarations at paragraphs 1, 2 and 4 of the prayer to the Particulars of Claim amended as indicated. I will hear counsel as to the precise terms of then order and costs and any other necessary amendments to the listing of the trial.

(**After further submissions**)

JUDGMENT ON INTERIM PAYMENT

90. The next matter I must determine is the claimant's application following my judgment for an interim payment in respect of what it says are the sums due on the calculation of the uplift consideration following my construction of the SPA as including the words "up to £50 million" and therefore the consideration, as I have explained in my earlier judgment, is caught under the ratchet system and the sum due is 15 per cent of that amount.

91. As I also indicated in my earlier judgment, paragraph 31(3)(a) of the Defence states that "even on the claimant's own case the sum that would be payable would be £706,076.10."

92. Mr Catsambis seeks an interim payment in that amount as it is common ground that sums are due, he says. The difference is some £140,000 to his calculation of some £847,500, but that is gross before any deductions at all. There is also a precise sum I should mention in the Defence at paragraph 19, because the defendant says it made significant investments totalling approximately £942,826 in the business and therefore if, which it is denied, any uplift consideration is payable then the sum of those investments should be removed. Therefore, in two parts, and I should emphasise the two parts, both as to the construction issue and rectification, sums are put forward.

93. The question is whether it is reasonable and proportionate for me to make an order for an interim payment or possibly in the alternative it may be considered, as I suggested, for judgment on admission.

94. In any event, I do agree with Mr Catsambis, this is an irreducible minimum and it would be reasonable and proportionate for me to make an order for an interim payment in the amount that the defendant contends would be due as pleaded in the Defence, the combined effects of paragraphs 19 and 31(3)(a). Therefore, I will make an order for payment of £706,076.10.

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As I say, if I am wrong as to that, I think also I can, using my case management powers, make an order on the basis of the admissions in view of my earlier judgment.

95. Mr Lawson has asked for 21 days to coincide with the appeal period which is of course reasonable and proportionate and Mr Catsambis has agreed to that. Therefore, that is approved.

(**After further submissions**)

JUDGMENT ON COSTS

96. The first matter I must deal with is the question of the claimant's application for costs of the application only. This is in the amount of £27,040 less the VAT claimed which takes it to just (very roughly) £22,500.

97. This is broadly comparable with the defendant's costs of £23,736. Mr Lawson submits that the matter has been conducted by a Grade a fee earner at £590 an hour which is too high in all the circumstances. I did raise the question because Ms Williams was the person who conducted the commercial negotiations and the drafting, whether she was actually a litigation fee earner, but I am told that she has the requisite at least eight years' litigation experience so be properly described as Grade A. I am satisfied as to that.

98. As to the time and the rates, as the rates that Mr Lawson's instructing solicitors contend for if they had been success are for Grade a £484 per hour as Mr Lees is based I think in Leeds. I will take the same approach as I do to costs budgets. I am not that concerned with overall costs in that, if it is possible for a Grade a fee earner at a very high rate to conduct matters efficiently, and that is the whole point of the difference in grades, it may be that the costs are less or proximate. The point has to be they must be reasonable and proportionate.

99. It seems to me in this matter and looking at every item, including the schedule of work done, that the costs claimed are reasonable and proportionate. One example is the drafting of Ms Williams' statement. Whilst it is short and to the point, there is a lot of ground to cover and it is an important statement. 4.2 hours are claimed and that is an example of why I think it is reasonable and proportionate.

100. I will therefore make an order that the defendant do pay the claimant's costs excluding the VAT, which as I say is a sum roughly about £22,400/£22,500.

101. As to time for payment, Mr Catsambis says that this should be within 14 days, the usual period, as opposed to the 21 days for payment of the interim amount on account of damages. I disagree. Mr Lawson has indicated he may well appeal. It seems to me it would be an unnecessary procedural step for there to have to be two applications for a stay, one for the costs and one for the substantive order for the interim payment. The appropriate period is therefore 21 days. Therefore the costs will be due in 21 days.

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102. The next application by Mr Catsambis is in respect of an interim payment in respect of the costs of the action. I am not prepared to deal with that. Two hours has been set aside for this hearing. It would mean I would have to comb through the costs budget, allocating matters that really are properly dealt with on a detailed assessment. That is not the function of a hearing such as this, especially, as I say, bearing in mind that two hours has been set aside for judgment and dealing with all other matters, which is in itself a substantial time.

103. There are, I am sure many arguments connected with the amounts sought under the costs budget, but as I have not granted the claimant judgment in full in all respects, I am not going to make an interim payment in respect of the costs set out in the costs budget. I say that particularly because I bear in mind that Mr Lawson may have something to say on the question of costs generally.

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