Neutral Citation Number: [2019] EWHC 1257 (Comm)

Claim No: CL-2017-000697

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17/05/2019

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

AUDEN McKENZIE (PHARMA DIVISION) LIMITED

ACTAVIS HOLDINGS UK LIMITED

CHILCOTT UK LIMITED

Claimants

-and

AMIT PATEL

MEETA PATEL

Defendants

JOLANTA PATEL

Non-Cause of Action Respondent

ALLERGAN PLC

Third Party

Andrew George QC and Victoria Windle (instructed by **Byrne and Partners LLP**) for the **Claimants**

Paul McGrath QC and Ciaran Keller (instructed by **Bryan Cave Leighton Paisner**) for the **Defendants**

Edmund King QC (instructed by **Latham & Watkins**) for the **Third Party**

Hearing dates: 20-22 November 2018

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JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

ROBIN KNOWLES J:

Introduction

1. This litigation is due to be tried in two stages, the first of which will be in early 2020.

2. This judgment deals with matters that various of the parties contend may be dealt with now by way of summary judgment or strike out. There is a related question of interim payment and a question of amendment.

3. The case has its complexities and many points are interconnected. Some of the matters raised in practice involve an invitation to the court to decide preliminary issues, although no application has been made for there to be a trial of preliminary issues.

4. As a result, and as will be clear from the course I take below, there are a number of related decisions to be made which are effectively case management decisions about whether in the particular case points are best addressed now or at trial.

5. The parties are agreed that the court has power to grant summary judgment in respect of all or part of a claim or defence where a defendant or claimant has no real prospect of success and there is no other reason why the claim or issue should be left to be disposed of at trial.

6. The parties are also agreed that all or part of a claim or defence may be struck out where a statement of case discloses no reasonable ground for bringing or defending the claim. The parties cited well known authority illuminating aspects of the approach to be taken, and there was no real issue between them over these.

7. On questions on contract interpretation the parties again cited well known authority illuminating aspects of the principles applicable, and there was again no real issue between them over these.

Context

8. On 23 January 2015 the Second Claimant (Actavis Holdings UK Limited) entered into a Share Purchase Agreement (SPA) to purchase the holding company (Auden McKenzie Holdings Limited) of the First Claimant (Auden McKenzie (Pharma Division) Limited) from the Defendants for an initial consideration of £323.5 million.

9. The Third Claimant (Chilcott UK Limited) is the assignee of the rights and interests of the Second Claimant in the SPA, and in the event it was the Third Claimant not the Second Claimant that became the ultimate owner of the First Claimant. The SPA also provided for additional consideration under earn-out arrangements and the Third Party (Allergan plc) is a guarantor of the Second Claimant's obligations under those earn-out arrangements.

10. The litigation includes claims in deceit by the Second and Third Claimants against the Defendants. It is alleged the Defendants misrepresented the financial circumstances of the First Claimant. The alleged loss and damage is said to be affected by activity that

in due course led to an investigation by the Competition and Markets Authority over an alleged abuse of a dominant position by the First Claimant in charging excessive and/or unfair prices in relation to the sale of hydrocortisone tablets. The activity may have consequences for the First Claimant and its economic successors, both in the form of of fines imposed and also damages claims from purchasers where products were sold at excessive prices.

Payments against false invoices

11. Between 2009 and 2014 the First Defendant, or both Defendants, procured the First Claimant to make payments in the total sum of £13,763,452 ultimately to offshore accounts legally or beneficially owned by the Defendants, or otherwise to the order of the Defendants. The payments were made against invoices which falsely described them as in respect of research and development. The purpose was to extract the money for the Defendants themselves and avoid the payment of tax on the payments.

12. There is no material issue on these facts. The First Claimant applies for summary judgment against the First Defendant for that sum of £13,763,452 on the basis that the First Defendant acted in breach of his (agreed) fiduciary duties as a director of the First Claimant. Other claims also arise out of the same facts but are not the object of the application. The First Defendant says there is inconsistency between some of the claims. That should not prevent my considering the claim the subject of this application on its own merits.

13. Taking just one of the fiduciary duties relied on by the First Claimant and admitted by the First Defendant, the First Defendant owed to the First Claimant a duty "to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". The First Defendant could not conceivably have considered "in good faith" the payments would "promote the success of the company".

14. The First Defendant relies on the principle in Re Duomatic, allowing the approval of all members of a company to ratify a breach of fiduciary duty. The First Defendant argues that it is plainly more than merely fanciful in the circumstances of this case that the consent of the Defendants, as the only shareholders in Auden McKenzie Holdings Limited, itself the only shareholder in the First Claimant, and who were entitled to and took all decisions on its behalf, would be sufficient for the purposes of the principle in Re Duomatic.

15. The First Defendant offers suggested examples where Re Duomatic would save actions in other circumstances and, by suggested parallel, should (it is argued) do so here. Mr Paul McGrath QC and Mr Ciaran Keller for the First Defendant add the submission that this is "… a classic example of the sort of undecided point in a difficult and developing area of the law, on which differing reasons have been expressed in this jurisdiction and across the Commonwealth, that is inappropriate for summary determination …".

16. In the present case payments were procured dishonestly; they were said to be for research and development when they were not; they were for the Defendants to have for themselves and to have in a way that dishonestly evaded the tax consequences. Whatever else may be the precise compass of the Re Duomatic principle, as a

principle developed to save conduct it has not been developed to save conduct of this nature. The company, the First Claimant, could not do lawfully what was done and the assent of all its members could not alter that. The principle is for transactions that are "honest": Parker and Cooper Ltd v Reading [1926] Ch 975 at 984 (per Astbury J) cited with approval in Randhawa and Another v Turpin and Another (as former Joint Administrators of BW Estates Limited) [2017] EWCA Civ 1021; [2018] Ch 511 at [56]-[57] (Court of Appeal; Sir Geoffrey Vos CHC).

17. But the First Defendant then approaches the matter in a second way. He argues that the payments would have been made lawfully if they had not been made unlawfully, and as result there is no loss. Referring to Target Holdings Ltd v Redferns (a firm) [1996] AC 421, the First Defendant says of the claim for equitable compensation in particular that the court is not required to shut its eyes to subsequent events or ignore the reality of what would actually have happened.

18. Lord Browne-Wilkinson's words (at 436D-E) in Target Holdings are emphasised:

> "… the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been had there been no breach."

19. So too, the First Defendant emphasises the words of Lord Reed JSC in AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] AC 1503 at [107]:

> "… to impose an obligation to reconstitute the trust fund, in order to enable the client to recover more than he has in fact lost, 'flies in the face and is in direct conflict with the basic principles of equitable compensation'. That is clearly correct. As Lord Browne-Wilkinson went on to explain, an obligation to reconstitute the trust fund does not inexorably require a payment into the fund of the value of the misapplied property, for example where the consequences of the breach of trust have been mitigated by subsequent events."

And Lord Neuberger MR in Sinclair Investments (UK) Limited v Versailles Trade Finance Ltd [2011] EWCA Civ 347; [2012] Ch 453 at [47] invoking the words of Kirby J in the High Court of Australia in Maguire v Makaronis (1977) 188 CLR 449, 496:

> "[The remedy] will be fashioned according to the exigencies of the particular case so as to do what is 'practically just' as between the parties … The fiduciary must not be 'robbed'; nor must the beneficiary be unjustly enriched."

20. The First Defendant gives evidence that had the payments not been made he would have consulted with his advisers as to the most appropriate and tax efficient mechanism to get the monies into the Defendants' hands. Even if that had not happened, the monies would, says the First Defendant, in any event have been paid out to the Defendants prior to completion under the SPA as a pre-completion dividend (as was another £51 million) because the SPA allowed the Defendants to procure such a dividend provided that cash balances of at least £6 million remained at completion.

21. These arguments for the First Defendant do not assist him. The period for the factual inquiry that the authorities contemplate is now complete in a part of the case otherwise suitable for summary judgment. There is no question that the First Defendant caused loss in the amount of the payments by reason of the breaches. If the payments had not been made unlawfully then the company would still have the money "in the till".

22. The court is as well placed now as it will be at trial to make an assessment with the full benefit of hindsight and one that takes a practical and common sense view of causation. None of the avenues to which the First Defendant now refers were in fact pursued at any point when it was in the power of the Defendants to do so, including by reversing the unlawful payments and then taking the steps to which the First Defendant refers. The availability of the avenues was as apparent at the time as it is now, and yet the Defendants chose not to pursue those avenues. It would be wrong to treat them as having been pursued. The First Defendant has no foundation for a claim that there was an obligation on the First Claimant to make a payment of £13 million. This remains the position now. These are the facts. The authorities do not invite speculation.

23. The above is subject to one accepted qualification. It is accepted by the First Claimant that credit should be given for £613,973. The sum is the amount of tax rebates received by the First Claimant as a further consequence of the First Defendant's dishonest behaviour in procuring the payments. The First Claimant recognises it was never entitled to the rebates and the First Defendant has repaid them to the tax authorities.

24. The First Defendant criticises the First Claimant for refusing to give credit for the corporation tax that would have been payable by the First Claimant had the payments not been made and instead represented increased profit. The First Defendant also gives evidence that all tax liabilities of the First Claimant for making the payments have been settled with the tax authorities. He points to it being common ground that the basis of the settlement with the tax authorities was that the payments were treated as an undeclared portion of the First Defendant's salary and the corporation tax liability of the First Claimant was calculated on the basis that the amount of purported research and development expenditure was reduced by the amount of the payments and the directors' salary was increased by the amount of the payments.

25. All this is as may be. It does not affect the payments or what actually happened. The First Claimant will be left with whatever tax liability it has by reference to the true position (that is, (a) that it did not spend £13,763,542 of its earnings on research and development, and (b) it will recover £13,763,542 (less credit for £613,973) now).

26. The First Defendant also makes three points about related impact. First that had the payments not been made and no alternative avenue pursued, there would have been an additional sum, equal to the amount of the payments, in cash in the First Claimant with the result that a higher figure would have been payable by the (Second or) Third Claimant to the Defendants in respect of consideration for the purchase of the First Defendant under the SPA. Second that the claim for fraudulent misrepresentation in relation to the SPA does not give credit for any part of the payments being recovered. Third, that the Third Claimant includes in its claim for breach of warranty the contention that the value of the First Claimant would have increased had the payments actually been used for research and development.

27. The first of these points is irrelevant to the liability of the First Defendant to the First Claimant, indeed it is founded on the basis that the First Claimant, not the First Defendant, has the payments. The second of these points will depend on recovery from the First Defendant, which should be clear by the date of trial. The third point is not necessarily inconsistent with the claim for recovery from the First Claimant, but the position on the Third Claimant's claim is best addressed at trial. It does not affect the First Claimant's right to recover the payments, even if it will be said that the exercise of that right has implications for the way the Third Claimant puts its case.

28. Also for trial will be the like claim against the Second Defendant and the claim by the First Claimant based on equitable fiduciary duties and for an account and proprietary relief. The continued existence of these claims does not mean that the court should leave over a part of the case that is plain now. Indeed the commercial position is usefully advanced, and the legal issues narrowed, if that decision is taken now.

29. My conclusion is that the First Defendant has no real prospect of successfully defending the claim to damages or equitable compensation and there is no other reason why this claim or issue should be left to be disposed of at trial. The amount is readily calculable, as £13,763,542 less £613,973.

Additional consideration under earn-out arrangements

30. As indicated above, the SPA also provided for additional consideration under earn-out arrangements and the Third Party (Allergan plc) is a guarantor of the Second Claimant's obligations under those earn-out arrangements.

31. The earn-out arrangements are the subject of Schedule 9 of the SPA. Paragraph 2.2 provided that the "Earn-out Payment" payable by the Second Claimant to the Defendants in respect of each "Earn-out Period" in the "Second Year" "shall be an amount equal to 15% of Hydrocortisone Net Sales during such Earn-out Period".

32. By paragraph 3:

> "3.1 Following the expiration of each Earn-out Period, [the Second Claimant] shall examine the books and records of the Group in order to calculate the amount of the Earn-out Payment in respect of such Earn-out Period and [the Second Claimant] shall promptly (and, in any event, before the day falling 30 days after the expiration of each such Earn-out period) provide to each [of the Defendants] a statement giving notice of its conclusions and the proposed amount of the Earn-out Payment for such Earn-out Period to [the Defendants] (each, an "Earn-out Statement"). Such Earn-out Statement will include for each month by stock-keeping unit the volume of Hydrocortisone sold, the Hydrocortisone Gross Sales, the Hydrocortisone Net Sales (broken down by category) and the calculation of the Average Net Selling Price and the earn-out Payment.
>
> 3.2 Following the expiration of each of the First Year and the Second Year, [the Second Claimant] shall promptly (and, in any event, before the day falling 30 days after the expiration of the First Year or Second Year as applicable) provide to each [Defendant] a statement (with each of the Earn-out Statements relating to the First Year or (as applicable) the Second Year attached thereto) specifying the proposed aggregate amount payable to each

[Defendant] in respect of the Earn-out Payments for the First Year or, as applicable, the Second Year (each, a "Yearly Earn-out Statement").

3.3 Following the delivery of a Yearly Earn-out Statement to [the Defendants], [the Second Claimant] shall promptly supply to [the Defendants] (and any professional advisers appointed by any investor) such further information as is reasonably requested by [the Defendants] to verify the Yearly Earn-out Statement or any of the Earn-out Statements required to be attached thereto under paragraph 3.2. [The Defendants] shall have the right to review the calculations regarding the Yearly Earn-out Statement (or any such related Earn-out Statement) and shall have reasonable and prompt access (both for themselves and their professional advisers) to the personnel, books and records of the Group and where applicable, the Purchaser Group). [The Second Claimant] and [the Defendants] shall work in good faith and cooperate in their review of such calculations. Unless within 20 Business Days after receipt of the relevant Yearly Earn-out Statement pursuant to paragraph 3.2 above (or, in the event [the Defendants] have requested additional information pursuant to this paragraph 3.3 in respect of such Yearly Earn-out Statement (or any of the Earn-out Statements required to be attached thereto under paragraph 3.2), the day falling 20 Business Days after the date upon which [the Defendants] have received all such information and assistance), any [Defendant] notifies [the Second Claimant] in writing of any disagreement or difference of opinion relating to the matters set forth in the Yearly Earn-out Statement (or any of the Earn-out Statements required to be attached thereto under paragraph 3.2), setting forth in reasonable detail the basis for, and the amount of, such disagreement or difference of opinion (the "Notice of Disagreement"), the Parties shall be deemed to have accepted the matters set forth in such Yearly Earn-out Statement (and the related Earn-out Statements) which shall become final and binding on the Parties."

(There followed provisions for negotiation after a Notice of Agreement and for referral of a dispute to Reporting Accountants)

33. By paragraph 1,"Hydrocortisone Gross Sales", "Hydrocortisone Expenses" and "Hydrocortisone Net Sales" were to have these meanings:

> '"Hydrocortisone Gross Sales" means, in respect of any Earn-out Period, the gross amount invoiced for sales of Hydrocortisone in the UK by the Group or the Purchaser Group to a third party, in each case calculated on a basis consistent with the accounting policies, principles, bases, practices, methods, conventions, rules and estimation techniques actually applied in the preparation of the Accounts as at the Balance Sheet Date, to the extent that such policies (and the amounts resulting from their application) are in accordance with the UK GAAP, applied on a consistent basis"
>
> '"Hydrocortisone Expenses" means, in respect of any Earn-out Period, the sum of the costs of each of the following applicable to the Hydrocortisone sold in the UK by the Group or the Purchaser Group to a third party during such Earn-out Period and included in the calculation of Hydrocortisone Gross Sales for such Earn-out Period (the "Relevant Hydrocortisone"), in each case calculated on a basis consistent with the accounting policies, bases, practices, methods, conventions, rules and estimation techniques actually applied in the

preparation of the Accounts as at the Balance Sheet Date, to the extent that such policies (and the amounts resulting from their application are in accordance with UK GAAP, applied on a consistent basis:

(a) the third party costs to the Group in connection with acquisition of the Relevant Hydrocortisone, including, at the date of this Agreement the third party manufactured cost from Tiofarma BV set out in part C of this Schedule 9 (it being acknowledged that such costs includes all applicable API costs, testing costs, QP release costs and packaging costs);

(b) third party shipping and storage costs related to inventory or sales (both inbound and outbound) of the Relevant Hydrocortisone;

(c) normal and customary trade, cash, quantity discounts and rebates (including chargebacks and allowances) related to sales of the Relevant Hydrocortisone;

(d) actual accounts repaid or credited by reason of rejection, returns or recalls of the Relevant Hydrocortisone; and

(e) excise taxes, selling taxes (including VAT), other consumption taxes and customs duty imposed on the sale, importation, use or distribution of the Relevant Hydrocortisone (but not including taxes assessed against the income derived from such sale), to the extent such taxes and duties have been included in the calculation of Hydrocortisone Gross Sale for such Earn-out Period,

and so that, for the avoidance of doubt, no member of the Purchaser Group shall be deemed to be a third party for the purposes of the calculation of the Hydrocortisone Expenses for any Earn-out Period;"

'"Hydrocortisone Net Sales" means, in respect of any Earn-out Period, Hydrocortisone Gross Sales less Hydrocortisone Expenses in respect of such Earn-out Period;"

34. It is common ground that the Second Claimant has not provided a Yearly Earn-out Statement in respect of the Second Year and has made no Earn-out Payment in respect of the Second Year. On its Counterclaim and Additional Claim the First Defendant seeks summary judgment for a sum to be assessed.

35. The Second Claimant argues:

(1) "Amount invoiced" means "amount which ought to have been invoiced" so that where the sum invoiced was wrong, by reason of wrongdoing or error, the correct sum should be substituted.

(2) The SPA contained implied terms (i) that the costs of sale of hydrocortisone tablets included sums payable by companies within the purchaser group in respect of unlawful excessive pricing, unlawful agreements or other wrongdoing; and (ii) the "amount invoiced" would be reduced by any amount which any purchaser of hydrocortisone tablets could reclaim as damages or otherwise, from any company within the purchaser group.

(3) As a matter of construction of the SPA, or pursuant to an implied term, the Second Claimant was not obliged to produce an Earn-out Statement within the prescribed

time where the sums invoiced and expenses could not be calculated within that period.

36. This being an application for summary judgment by the First Defendant, rather than the hearing of preliminary issues, I am concerned with the question whether the Second Claimant has no real prospect of success on these arguments.

37. I am fully satisfied that it has a real prospect of success within the first two arguments. Essentially, on the first it is well arguable that the parties were referring to true and correct invoices. On the second it is arguable that a term that would take account of the cost and consequence of unlawful pricing meets the test of necessity for an implied term.

38. For my part, I do not consider that the Second Claimant has a real prospect of success with the third argument. The indefinite postponement that it contemplates finds no place in the terms of the SPA and is inconsistent with the scheme of paragraph 3 of Schedule 9. The problem that prompts the third argument is a problem capable of being addressed by estimation and provision and qualification in the Earn-out Statement.

39. However in the present case a declaration now that the Second Claimant is in breach of its obligation to produce an Earn-out Statement does not mean that there is any sum due to the First Defendant. Certainly I am not prepared to conclude now, even to the standard required for an interim payment, that a sum would be payable.

40. This will be for trial, by which time there may be an Earn-out Statement, or evidence of what a Statement would have shown. A Mr Paul Taylor, General Counsel of Teva UK Limited gives this evidence in an affidavit dated 15 November 2017, at paragraphs 93 and 94 (see also the evidence of Mr McKernan for the Claimants in his Fifth Witness Statement dated 28 September 2018):

> "In an ideal world, in light of what has now come to light, [the Second and Third Claimants] would like to rescind the [SPA] and the Auden Deed. However I am advised (without any waiver of privilege) that the Court is likely now to consider that rescission is no longer available to [the Second and Third Claimants] due to the passage of time and as a result of the transactions (which I describe below) which have resulted in the sale of much of [the First Claimant's] former business to a third party.
>
> Since the commencement of the [CMA] Investigation, no steps which might be considered to amount to contractual performance of the [SPA] have been taken by the Applicants (or indeed, by Teva generally). It was important for us to consider carefully all the options that were available to us in light of [the First Defendant's alleged fraud]. As a result, the second Earn-Out (provided for under the [SPA]) has not been calculated and no sum has been paid to [the Defendants]. I understand from Teva's finance team that, on the basis of figures now available the second Earn-Out would be in the region of £5,000,000. However, Teva regards the potential liabilities associated with the CMA Investigations described below as a contingent expense attributable to hydrocortisone sales, which would be deductible from hydrocortisone sales revenue for the purposes of establishing the amount of the Earn-Out payment if any Earn-Out payment would otherwise be payable. This being the case, the

likely size of the contingent liabilities means the second Earn-out payment is worthless. …"

Breach of no transfer obligations

41. Paragraphs 5.1 and 5.2 of Schedule 9 to the SPA provide:

> "… [the Second Claimant] shall procure that during the Earn-out Periods:
>
> (a) each Group Company [ie including the First Claimant] carries on its business of buying and selling Hydrocortisone in the ordinary course;
>
> ...
>
> (f) the Group [ie including the First and Second Claimant] shall not sell, transfer or otherwise dispose of the business of selling Hydrocortisone or any material part thereof, other than pursuant to a sale of the Group as a whole.
>
> … If there occurs any breach by the [Second Claimant] of any of its obligations under paragraph 5.1, the Earn-out Payment for the affected Earn-out Period shall be fairly adjusted to compensate for the adverse effect of the breach. …"

42. The Hydrocortisone business of the First Claimant at the date of the SPA was sold to Accord Healthcare Limited on 1 January 2017. The First Defendant alleges a breach of these paragraphs of the SPA. At the hearing Mr McGrath QC made clear that this part of the First Defendant's counterclaim was not pursued in respect of any breach in respect of the First Year Earn-Out, and that the issue related to the Second Year Earn-Out only.

43. In answer the Claimants assert an implied term excluding the application of the obligation to a divestment required by law, and say that such a requirement by law is to be found in a decision of the European Commission dated 10 March 2016. The First Defendant challenges the argument that the implied term meets the test of necessity, but also argues that the European Commission decision required divestment only because the Second Claimant's parent chose to purchase the global generics business of Actavis plc.

44. I am not prepared to rule out the existence of the implied term. As this is a summary judgment application I will say no more than that in the context of this case there must be force in the point that the parties would not have contemplated that the obligation to "procure" would not extend to requiring something that did not comply with the law.

45. Whether or not the divestment was a legal requirement following a voluntary decision by the Second Claimant's parent, it is well arguable that it was still required by law. But on any view this is a part of the case that should be left to trial. The SPA envisages that on breach "the Earn-out Payment for the affected Earn-Out Period shall be fairly adjusted to compensate" for the adverse effect of the breach. Little can usefully be achieved on this now.

The Second Claimant's claim in deceit

46. The First Defendant applies to strike out the claim of the Second Claimant, alternatively for summary judgment against the Second Claimant.

47. At the heart of the First Defendant's application is the proposition that the Second Claimant has suffered no loss from the fraudulent misrepresentation alleged by it against the First Defendant in relation to the SPA, where the Third Claimant is the assignee of the rights and interests of the Second Claimant in the SPA and the Third Claimant and not the Second Claimant became the ultimate owner of the First Claimant.

48. Mr Andrew George QC and Ms Victoria Windle for the Claimants centred their response on paragraph 19.3 of the Re-Amended Particulars of Claim, a paragraph admitted in the Defence of the First Defendant. This provides:

> "By clause 21 [of the SPA], the parties were limited in their ability to assign all or any of their rights under the [SPA]. Materially, in the event of any assignment by the Second Claimant to another member of the Purchaser Group (as defined) the Second Claimant remained liable for any obligations under the [SPA]."

Further, in its Responses to Requests for Further Information of the Re-Amended Particulars of Claim, the Claimants stated that the full amount of the purchase price was paid on behalf of the Second and Third Claimants.

49. Various arguments were developed by Mr McGrath QC and Mr George QC; Mr McGrath QC concentrating on the proposition that the Second Claimant had not in fact paid anything, and Mr George QC concentrating on the proposition that the Second Claimant had undertaken liabilities to pay. Mr George QC pointed out that the First Defendant himself alleged the Second Claimant was liable to make Earn-Out Payments in respect of the Second Year. Mr McGrath QC emphasised the difference between that liability and the substantially greater scale of a claim based on the initial consideration under the SPA.

50. I respectfully decline to accept that the law is clear, or that a decision by way of summary judgment or strike out would be appropriate, to the effect that a party cannot show loss for the purpose of a claim in deceit where (as alleged here) it incurred and retained liability under a purchase transaction and the purchase price was paid on its behalf (as well as on behalf of another). It is not appropriate that I should say more about this argument when it will be addressed in full at trial. The potential for these areas to be fact sensitive was rightly and helpfully identified by Mr Edmund King QC for the Third Party.

51. The First Defendant also applies to strike out a sub-paragraph of the Re-Amended Statement of Claim (paragraph 37.2). This advances the case that loss as a result of deceit or misrepresentation would extend to "any losses that the Second or Third Claimants come to suffer by reason of any investigation by the Competition and Markets Authority into the activities of the First Claimant whilst owned by the Defendants", and sets out some ways in which those losses might come about. The First Defendant criticises the statement of case for speculating about possibilities that have not happened and failing to show in sufficient detail how these losses could come about. In my view it is particularly unsuitable for the court to interfere with this paragraph at this point in the case where the investigation by the Competition and Markets Authority is not complete.

52. All this said, the Defendants are entitled to demand clarity of the case they have to meet at trial. This hearing will have assisted, but the clarity must be there in the statements of case (and in turn the list of issues). The Second Claimant tendered some draft amendments, but these may require further consideration and (importantly) the Second Defendant, who was not present or represented at the hearing, would be entitled to consider any draft proposed amendments.

53. I propose to direct that the Claimants provide draft amendments to all parties, to see (as Mr McGrath QC sensibly suggested) if these can be agreed. If they cannot then I will deal, without a further hearing, with any area of dispute. In the normal way the amendments should deal only with the material facts relied on and not with the law, but they should convey the case that the Second Claimant will seek to make at trial.

Conclusions

54. In the circumstances, I am persuaded that there should be summary judgment on the claim in respect of payments under false invoices, and I am also prepared to make a declaration at the summary judgment stage as regards the obligation to provide a Yearly Earn-out Statement for Year Two.

55. I am not otherwise prepared to decide points on a summary judgment basis, and these must await trial. No question of interim payment in the event arises. Nor does any question of set-off, at least at this stage.

56. I am not persuaded that any parts of the statements of case should be struck out. The Second Claimant should however tender (for agreement, or order if necessary) amendments on its case as to loss on the claim in deceit. After any consequential amendments, the parties should liaise to agree a revised list of issues and common ground.