Neutral Citation Number: [2024] EWHC 2902 (Ch)

Case No: BL-2024-MAN-00005

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 18 November 2024

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

MR DARRYL ADIE & MR BRETT COOPER	**Claimants**
- and -	
INGENUITY DIGITAL LIMITED	**Defendant**

- -
- -

Christopher Lloyd (instructed by **DWF Law LLP, Manchester M3**) for the **Claimants**

Joseph Wigley (instructed by **Squire Patton Boggs (UK) LLP, Manchester M3**) for the **Defendant**

Hearing dates: 16 – 17 October 2024
Draft judgment circulated: 11 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 18 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

His Honour Judge Stephen Davies:

A. Introduction and conclusions

1. This is a Part 8 claim by which the claimants, Mr Adie and Mr Cooper, are seeking declarations as to the true interpretation of a Share Purchase Agreement dated 31 January 2022 ("**the SPA**").

2. The claimants were the sellers under the SPA and the defendant, Ingenuity Digital Limited (previously known as Ingenuity Digital Holdings Limited), was the buyer. The subject of the SPA was the entire issued share capital of two companies, referred to as the Targets, Ampersand Commerce Limited ("**Ampersand**") and Snow.io Limited ("**Snow.io**"), which were both engaged in the digital marketing business[1].

3. The dispute relates to the calculation of the deferred consideration payable under the SPA.

4. It arises because, shortly before the SPA was due to be signed, one of Ampersand's most valuable customers, Online 4 Baby Limited ("**O4B**"), emailed Mr Adie complaining about what it contended was Ampersand's unacceptable performance of its contract with O4B. It was complaining about the quality and the timeliness of the contracted work. It said that unless its complaints were speedily resolved it reserved the right to terminate the contract and seek repayment of all sums paid as well as to make claims for losses suffered. It indicated that in the meantime it was not prepared to pay invoices already rendered.

5. I shall refer to this email as **the O4B email** and the claim advanced in the email as **the O4B claim** (as it was named in the SPA, even though as at the date of the email and the SPA it was not a claim as such but rather a notice that a claim would be made if matters could not be speedily resolved).

6. Mr Adie shared the email with those negotiating the SPA for the defendant. The defendant was willing to proceed with the SPA but required amendments to the SPA to address this potential problem. These amendments were speedily agreed and included as an additional sub-clause (c) to the existing indemnity clause 8.1 and the SPA was duly signed and completed.

7. Ultimately, however, the O4B claim was not resolved and became a full-scale dispute. As part of a negotiated compromise of the dispute, Ampersand – by this time of course under its new

[1] The claimants were joint owners of the Ampersand shareholding but only Mr Adie was the owner of the Snow.io shareholding. Snow-io does not feature in this case.

owners - wrote off two outstanding invoices for work done in the last two months of what the SPA described as "the deferred consideration period". Ampersand also lost O4B's future business.

8. Under Schedule 7 of the SPA, which provided for payment of deferred consideration, the defendant was to prepare a deferred consideration statement. This would fix the figure for EBITDA[2], adjusted as required by Schedule 7. It would then be multiplied by a factor of six to arrive at what was referred to as the "enterprise value" (i.e. the agreed sale price for the shares). From that sum would be deducted the sum of £6 million already paid as "the initial payment" under the SPA and the balance would be payable as the deferred consideration.

9. The deferred consideration statement as prepared by the defendant included a specific adjustment to the figure for EBITDA to deduct the amount of the written off invoices, a total of £203,822 ("**the O4B invoices**" and "**the O4B adjustment**"). The effect, when multiplied by the factor of six, would lead to the claimants receiving £1,222,932 less than they otherwise would have done, which is of course a relatively substantial amount.

10. The defendant also subsequently intimated a claim for breach of a specific indemnity clause given by the claimants in relation to the O4B complaint, including a similar amount in respect of the O4B invoices, together with other losses, totalling £1,811,712.23, another relatively substantial amount.

11. The claimants' case is that, on a proper interpretation of the SPA: (a) primarily, the defendant is not entitled to adjust the EBITDA figure by deducting the amount of the two invoices, because its sole remedy in relation to the O4B complaint lies under the indemnity clause; (b) secondarily if, contrary to this primary case, the defendant is entitled to do so, then it may not also claim the same or similar amount in respect of the two invoices ("**the O4B invoices claim**") under the indemnity clause.

12. It is common ground that any dispute as to the adjustment of the EBITDA figure is to be referred to expert determination under the relevant provisions of the SPA. However, the claimants contend that the prior question as to whether the defendant was entitled to make any adjustment to the EBITDA figure in relation to the O4B complaint is a pure question of law, which can and should be determined by the court before the parties incur the time and cost of an expert determination. The claimants also seek a declaration in the terms of its alternative case (b) if they fail on case (a).

13. The defendant accepts that these disputes are suitable for Part 8 determination and seeks its own declaration that it is entitled to do what it has done and that the underlying dispute about the determination of the EBITDA should be referred to expert determination.

14. The court has given directions for the determination of the Part 8 claim. The parties have produced witness evidence which is of limited, if any, value to the questions of contract interpretation which I have to resolve. More helpfully, I have received excellent written submissions and equally excellent oral submissions over the course of the hearing from counsel for the claimants and for the defendant respectively.

15. The declarations sought by the claimants are as follows (with the wording appropriately adjusted).

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[2] A well-known accounting abbreviation used in business sale transactions, short for "earnings before interest, taxes, depreciation and amortisation". It is intended to capture the true profitability of the business for the period in question.

a. On the true interpretation of the SPA, the defendant is not entitled to include the O4B adjustment as a reduction or adjustment to Ampersand's EBITDA for the purposes of calculating the deferred consideration due to the claimants under Schedule 7.

b. Further or alternatively, on the true interpretation of the SPA, the defendant is not entitled to include the O4B adjustment as a reduction or adjustment to Ampersand's EBITDA for the purposes of calculating the deferred consideration due to the claimants under Schedule 7 and also to make a claim for the O4B invoices under clause 8.1(c) of the SPA.

16. The declarations sought by the defendant (again with wording adjusted) are that:

a. Irrespective of whether the defendant has a right to claim under the O4B indemnity, on the true construction of the SPA the defendant is entitled in principle to include the O4B adjustment as an adjustment to EBITDA in preparing the draft Deferred Consideration Statement.

b. If the defendant is entitled in principle to include the O4B adjustment as an adjustment to EBITDA in preparing the draft Deferred Consideration Statement, the subsequent question as to whether as a matter of fact the O4B adjustment should have been/be applied is properly an issue for determination by the expert to be appointed pursuant to the mandatory dispute resolution provisions at paragraph 3, Schedule 7, and is not a matter for determination by the court.

17. My conclusion is that the claimants are not entitled to either of the two declarations and that their remedies are: (a) to contest the O4B adjustment on the merits under the expert determination procedure under the SPA; (b) to contest the O4B invoices claim in any court proceedings which may be issued by the defendant (or any other member of the Buyer's Group) under the clause 8.1(c) indemnity, so that the defendant is entitled to the declarations which it seeks.

B. The relevant principles of contractual interpretation

18. There was no significant disagreement about the relevant principles, which are now well-established. Mr Lloyd referred me to the summaries of Lord Hamblen JSC in Sara & Hossein v Blacks Outdoor Retail [2023] UKSC 2; [2023] 1 WLR 575 at [29] and the then Chancellor, Sir Geoffrey Vos, in Lamesa Investment Ltd v Cynergy Bank [2020] EWCA Civ 821; [2021] 2 All ER (Comm) 573 at [18]. Mr Wigley referred me to the summary of Professor A Burrows QC, sitting as a Deputy High Court Judge in Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm); [2019] 1 C.L.C. 207 at [32].

19. The only authority to which I need specifically refer is Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526; [2019] JPL 989 in which, at [41-57], Leggatt LJ had to resolve a dispute as to the limit on the rule making admissible evidence as to the genesis and the objective aim of a contract. In short, was that rule limited to evidence as to the genesis and aim of the contract as a whole or could it extend to the genesis and aim of a specific provision within that contract? It is well-established that evidence of the factual background, even if part of the pre-contract negotiations, may be adduced to show the genesis and objective aim of the contract as a whole, but the dispute was to whether it may be adduced in relation to a specific provision of the contract.

20. That is of some relevance to this case where, as I have said, the SPA was amended very shortly before execution to address the possibility of losses arising out of the O4B claim ("**O4B losses**"). Mr Lloyd submits that it is significant that, although the existing indemnity clause was amended to address this late arising issue, no change was made to the deferred consideration provisions.

He submits that the circumstances in which only the indemnity clause was amended are relevant, because they show that the parties must have proceeded on the basis that an indemnity claim was the exclusive remedy for any O4B losses, given that they chose not to make any equivalent amendments to the deferred consideration provisions.

21. Leggatt LJ, with whom David Richards and Longmore LJJ agreed, at [50] endorsed an earlier first instance decision of Mr David Halpern QC (sitting as a Deputy High Court Judge) that evidence may be admitted if "the genesis and aim of a particular provision may be sufficiently important to qualify as part of the genesis and aim of the whole transaction". He noted, however, that there might be borderline cases where the line would be difficult to draw.

22. In my judgment this is not such a case, since it cannot be said that the O4B claim which has now arisen as an issue can be said to have been sufficiently important to qualify as part of the genesis and aim of the whole transaction.

23. However, in the end this point does not matter as much as it might have done, because in his oral submissions Mr Wigley very sensibly accepted that since the O4B email was expressly referred to in the SPA itself, it would not offend the exclusionary rule for both parties to rely on the O4B email as evidence of the fact that this issue arose, and the relevant part of the indemnity clause was added as a result, very shortly before the SPA was signed and completed.

24. It is also to be noted that there is no evidence, admissible or otherwise, as to whether the absence of any equivalent amendments to the deferred consideration provisions was the result either of some express agreement to that effect during negotiations (and, if so, an agreement either that the defendant had no entitlement to deduct the invoices from EBITDA or an agreement that it was unnecessary to amend because the defendant was allowed to do so anyway under the existing deferred consideration provisions) or, simply, because this question never even entered the minds of both of the parties, let alone was the subject of any discussion or agreement between them.

C. The relevant terms of the SPA and its proper interpretation

25. In order to avoid unnecessary citation of all of the clauses of the SPA referred to or potentially relevant, I will focus in this section on the key clauses which are directly relevant to my determination and include my important conclusions about them along the way.

26. The SPA was professionally drafted and followed a conventional structure, beginning with a lengthy series of definitions, followed by the operative provisions extending over a further 18 clauses and 24 pages, and concluding with 9 separate Schedules extending over a further 70 pages.

27. Ampersand and Snow_io were defined as "the Targets" and were also included (from completion) as members of the "Buyer's Group" which, naturally, included the defendant itself. This inclusion is relevant to the construction of the indemnity clause as addressed below.

28. The "Last Accounts" were defined as the unaudited company accounts of each of the Targets made up to the "Last Accounts Date" of 28 February 2021 ("**FY21**"). The fact that the companies' year end was 28 February, whereas completion was to take place on 31 January 2022 immediately after the SPA was signed, was a factor of some relevance, as was the fact that the most recent management accounts referred to in the SPA (and the subject of warranties under Schedule 3, as were the Last Accounts) were for the 10 month period ending 31 December 2021. In short, because the "deferred consideration period" was defined in Schedule 7 as being the 12 month period ending 28 February 2022 ("**FY22**"), it followed that as at the date of the SPA: (a) there was one month of trading which was not covered by the existing management accounts; and (b) there was a further month of trading post completion which also needed to be included

in the "deferred consideration statement" (i.e. the management accounts for the deferred consideration period which would be used for the purposes of ascertaining the deferred consideration payment).

29. A further relevant definition for the purposes of Schedule 7 and the warranties was "Relevant Accounting Standards" ("**RAS**"), which was defined to meaning "FRS 102 (being the Financial Reporting Standard for Companies in the UK and Republic of Ireland issued by the Financial Reporting Council)". This standard, as is well-known, provides an independent standardised approach for the preparation of company accounts.

30. In addition to the myriad other provisions to be found in the SPA, the two which concern this case are the provisions for payment of deferred consideration in Schedule 7 and the provisions for indemnity in clause 8.

C.1. Schedule 7

31. I will consider Schedule 7, containing the provisions for deferred consideration, first. Mr Wigley submitted that these were the starting point for the contract interpretation exercise and, being in his submission clear and unambiguous, the end point as well. Mr Lloyd submitted that Schedule 7 could not and should not be construed independently of the whole SPA or without reference to the admissible background. That submission is clearly right as a matter of law and I proceed accordingly.

32. It is however also right to note, when considering the relative weight to be attached to Schedule 7, to the remaining provisions of the SPA and to the factual matrix, that clause 3 of the SPA specified that the calculation and satisfaction of the deferred consideration was to be "in accordance with Schedule 7" and clause 9 stated that "the parties agree that the provisions of Schedule 7 shall apply in relation to the calculation of the Deferred Consideration and the management and direction of the Targets during the Deferred Consideration Period".

33. It is also relevant that Schedule 7 was, to large extent, a self-contained schedule. It had its own definitions section at paragraph 1, including definitions of:

(a) the "deferred consideration period", as being the 12 month period ending 28 February 2022;

(b) the "deferred consideration pro forma", as being "the excel spreadsheet, in agreed form, which contains the methodology for calculating the amount of the Deferred Consideration a copy of which is contained at Data Room Document 1.18.5"; and

(c) the "deferred consideration statement", as being "the statement in the form set out in Part 1[3] of this Schedule 7 and prepared in accordance with this Schedule 7 by the Buyer setting out: (a) the EBITDA; and (b) the amount of Deferred Consideration payable to the Sellers (if any) for the Deferred Consideration Period"[4].

34. Provisions for payment of deferred consideration in SPAs are, of course, common in share sale and purchase agreements although their terms, commercial, financial and legal, also vary greatly. The deferred consideration provisions in this case are relatively straightforward. That is at, least

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[3] The document in fact appears as Part 2 and there is no separate Part 1. This is agreed to be a numbering error, but Mr Lloyd notes that this is one of a number of similar errors in Schedule 7 which, he says, supports his case that it cannot be regarded as a carefully drafted schedule. As appears below, and more generally, I accept that there are a number of instances of careless drafting in Schedule 7 but none, in my judgment, which cast any real doubt on its meaning and intent.

[4] The deferred consideration pro forma and the deferred consideration statement each referred to were in almost identical form and content, so that I can refer to them interchangeably.

in part, a consequence of the fact that there was no lengthy earn-out period for which detailed provision had to be made.

35. It is convenient to begin first at paragraph 4.1, which fixed the deferred consideration[5] as being a multiple of "6 x EBITDA minus £6 million" where the deduction of £6 million was, as I have said above, the deduction for the initial payment already made. EBITDA was defined as meaning "the consolidated earnings before interest, taxes, depreciation and amortisation of the Targets for the Deferred Consideration Period which shall be adjusted and calculated in accordance with this Schedule 7 using the methodology provided in the Deferred Consideration Pro Forma".

36. Paragraph 2, headed "preparation of the deferred consideration statement", stated in 2.1 that the defendant was to prepare a draft of the deferred consideration statement in accordance with Schedule 7 and submit it for approval to the claimants within 90 business days of the end of the deferred consideration period.

37. Paragraph 2.2 stated that the deferred consideration statement was to be prepared in accordance with the provisions of (a), (b) and (c), and in that order of precedence.

38. Under 2.2(a) the EBITDA was to be adjusted for certain specified items at (A) - (H), each of which reflect what were plainly specific agreements in relation to specified items. Although none are directly relevant for present purposes, Mr Lloyd notes that: (a) they are all the kind of adjustment one would expect to see included in order to strip out or to add in specific items which the parties had agreed were required to reflect the true EBITDA for the purposes of ascertaining the deferred consideration payment; (b) some are specified figures, whereas others require the amounts to be ascertained; (c) one specifically involves the re-allocation of a specific revenue item for O4B into FY22. He therefore submits that, in the same way, it would have been perfectly possible to include any adjustment for any O4B losses as another specified item within paragraph 2.2(a). There can be no doubt that this would indeed have been possible as a matter of drafting.

39. Mr Lloyd also identifies another drafting error because item (g) was not specifically shown in the pro forma deferred consideration statement. Mr Wigley suggested that it may have been excluded deliberately because it would not have been known that an adjustment needed to be made for this item, unlike the others. He may be right but, in any event, I do not regard this as material either way.

40. Under paragraph 2.2(b), "to the extent not covered by sub-paragraph 2.2(a)" the deferred consideration statement was to be prepared [in accordance with] "the accounting principles, practices, policies and procedures applied in the Last Accounts (to the extent that these are consistent with the Relevant Accounting Standards as in force for the financial year ending at the Last Accounts Date)". I have included the words in square brackets, even though Mr Lloyd observed that they did not appear in (b), whereas they did, as will be seen immediately below, appear in (c). I have no doubt that this was a pure drafting omission and that the sense of the clause requires that it be read as if they were included[6].

41. Finally, under paragraph 2.2(c), "to the extent not covered by sub-paragraphs 2.2(a) and 2.2(b)" the deferred consideration statement was to be prepared "in accordance with the Relevant Accounting Standards as in force at the date of this agreement".

42. Mr Lloyd submitted that these two provisions were largely otiose, because there was no reason to think that the same principles had not been followed in preparing the management accounts

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5 Subject to clause 13 of the agreement – the set off clause.

6 I accept however that this was yet another error in the grammar of Schedule 7.

to 31 December 2021, especially given that: (a) they had been warranted as having been "prepared in accordance with accounting policies consistent with those used in preparing the Last Accounts"; (b) the FY21 accounts had themselves been warranted as having been prepared in accordance with RAS; and (c) the defendant had been able to conduct the usual due diligence with the benefit of assistance from its accountancy advisers, Grant Thornton.

43. In response, Mr Wigley submitted that these two provisions were not otiose and were of real benefit to both parties, because they provided comfort to both that the deferred consideration statement was in accordance with the previous FY21 accounts and RAS. Indeed, he submitted, since the preparation of the deferred consideration statement was in the control of the defendant, these provisions conferred a particularly obvious benefit on the claimants, in that they prevented manipulation by the defendant by departing from the previous accounting principles and from RAS so as to reduce the EBITDA used to calculate the deferred consideration payment.

44. I have no doubt that Mr Wigley is correct in this submission. That is particularly evident by reference to the remainder of paragraph 2 and to paragraph 3, which together provide a detailed procedure for the parties to seek to agree the draft deferred consideration statement and to seek to agree any specific disputed items (albeit expressly "without prejudice to the Buyer's right to claim under the Warranties, Schedule 5 or otherwise in respect of any other matter"), failing which under clause 3 either party was entitled to refer the disputed matters to expert determination by an independent firm of chartered accountants for a final and binding decision (although again "without prejudice" as above). In short, the combination of these provisions give the claimants valuable protection against manipulation of the deferred consideration statement by the defendant by departing from previous accounting policy and from independent standards.

45. I reach this conclusion notwithstanding Mr Lloyd's further reliance upon paragraph 5, which included a number of restrictions on the defendant's freedom to act within the deferred consideration period without the claimants' prior written consent. This included: (a) taking any action or inaction, or causing or permitting anything with the purpose or effect of avoiding, frustrating or reducing the amount of the deferred consideration; and (b) cancelling or releasing any indebtedness owed to it or any claims held by it.

46. Mr Lloyd submitted that these restrictions were sufficient in themselves to prevent manipulation by the defendant with a view to reducing EBITDA. However: (a) whilst these restrictions may also prevent manipulation, they do not cover the same ground as paragraphs 2.2(b) and (c), so that the latter are by no means rendered completely redundant; but, even if I was wrong about that (b) arguments from redundancy "seldom carry great weight" (see Leggatt LJ in the Merthyr case at [39], citing Sir Kim Lewison on The Interpretation of Contracts).

47. I have already referred to the deferred consideration pro forma and to the fact that its definition states that it contains the "methodology" for calculating the amount of the deferred consideration.

48. Mr Lloyd referred to the format of the pro forma. Entry A of the pro forma stated "reported EBITDA per FY22 management accounts - TBC". Entry B included the various adjustments in paragraph (a)[7] to produce "total adjustments" which, when combined with entry A, produced Entry C, being the "Adjusted EBITDA (A+B)". This, when multiplied by six, produced entry E ("Total Enterprise Value"), and then, after deduction of the £6 million initial consideration, produced the figure for deferred consideration.

49. The point which Mr Lloyd sought to draw from this formatting was that the "methodology" did not include any option for further adjusting EBITDA to include any adjustments required by

[7] See fn. 6 above.

paragraphs 2.2(b) and (c). This, he submitted, showed that it was neither envisaged nor contractually permissible to make such amendments.

50. In the course of the hearing I had observed that the absence of this option did not seem to me to be particularly surprising, because the parties would reasonably have expected the EBITDA figure in Entry A to have already taken into account these adjustments anyway. However, in my post-hearing judgment preparation I noted that one of the defendant's own witnesses, Ms Couch, had said that "the idea was that to get the figure which would go into 'A' at the top of the Draft DCS the Sellers would produce management accounts in line with the way they had always done and then Grant Thornton would undertake further due diligence to make sure that these management accounts did not contain any errors and that they had been prepared in line with the SPA – ultimately in line with the relevant standard accounting principles, a bit like a 'mini audit'".

51. Although that evidence did not provide any explanation as to how this "idea" had emerged, so that it could not be said that it fell within the category of admissible evidence to construe the SPA, it was a timely reminder that it can sometimes be dangerous to make assumptions after the event about why a particular part of a contract is worded in a particular way.

52. Ultimately, in my judgment, the absence of any line items for specific adjustments required by sub-paragraphs 2.2(a) and (b) is of no particular relevance. The deferred consideration pro forma only contained the "methodology". The methodology or format of the pro forma cannot sensibly be thought to dictate what should and should not be included by way of adjustments, when the express wording of paragraph 2.2 stated that the deferred consideration statement should be prepared in accordance with (a), (b) and (c). In my judgment the format of the pro forma cannot take precedence over the substance of the Schedule and the reference to "methodology" cannot dictate the outcome.

53. Pausing there, it will be clear that I accept Mr Wigley's submission that if Schedule 7 is read in isolation it is clear beyond doubt that it was an express contractual obligation that the deferred consideration statement should be prepared in accordance with sub-paragraphs 2.2(b) and (c) as well as under 2.2(a), albeit in the specified order of precedence. It follows that it is not open to the claimants to contend that as, a matter of strict contractual interpretation, there should be no adjustment to EBITDA in the deferred consideration statement to reflect the O4B claim even if that was required by (b) or by (c) and notwithstanding that it was not specifically included either in (a) or as a line item in the deferred consideration pro forma. Whether or not there should be such an adjustment and, if so, what adjustment, was of course a matter for agreement, failing which for expert determination.

54. It is however necessary to test this conclusion from Schedule 7 alone against the other relevant terms of the SPA, acknowledging that it is no more than a provisional conclusion at this point which must, if appropriate, yield to a different conclusion if the reading of the SPA as a whole against the admissible factual matrix requires a different conclusion.

C.2. The introduction of the clause 8.1(c) indemnity

55. Under clause 8.1 the Sellers agreed to indemnify the Buyer (including the Buyer's Group and, thus, the Targets) against all losses (as widely extended)[8] which any of them might incur arising out of or in connection with any of the matters falling within sub-clauses (a) to (c).

56. As I have already stated, it is not in dispute that sub-clause 8.1(c) was added shortly before execution as a result of the O4B email and the appreciation of the O4B claim.

[8] The actual clause includes a lengthy list of the types of loss included, which it is not necessary to set out here.

57. The stated subject of 8.1(c) was "the alleged breach by Ampersand of its contracts with Online 4 Baby as outlined in a notice sent by email by Mr Nick Cooling of Online 4 Baby to Mr Darryl Adie of Ampersand on 28 January 2022 at 18:07 PM, including (but not limited to) any costs and expenses incurred by Ampersand in remedying any such alleged breach by Ampersand and, if applicable, the costs and expenses of re-performing any relevant services under such contracts".

58. As Mr Lloyd submitted, it cannot seriously be disputed that this is wide enough to extend to any claim for invoices written off by Ampersand as a result of the O4B claim.

59. Clause 8 went on to make detailed provisions in relation to such a claim. Thus, and in summary, sub-clauses 8.2 – 8.4 made provision for how claims between the defendant or Ampersand and O4B were to be dealt with, including by delegating sole conduct of such claims to the claimants, subject to where that might adversely impact the defendant's or Ampersand's insurance position or have a material adverse effect on its wider business and other interests.

60. Three points should be made about this.

61. First, as Mr Wigley submitted, even though these clauses were plainly drafted, agreed and included at speed, they were nonetheless extremely detailed and plainly intended to be comprehensive.

62. Second, as Mr Lloyd submitted, it was already known to the defendant, through the due diligence and disclosure process, that Ampersand maintained both credit insurance and liability insurance. That said, both were – of course – subject to various exclusions such that it could not have been said with any confidence at the time of entry into the SPA whether they would actually have entitled Ampersand to receive an indemnity against any invoices written off or claims successfully made against them.

63. Third, and importantly, as Mr Lloyd also submitted, it cannot be seriously disputed that, if the parties had applied their minds to this question at the time, they would have appreciated that it was conceivable that if an invoice rendered within FY22 was subsequently written off as a result of the O4B claim, then that might result in the claimants facing: (a) that invoice value being omitted from the EBITDA under Schedule 7, whether from the outset or as a result of the application of sub-paragraphs 2.2(b) or (c); and (b) an indemnity claim being made under clause 8.1(c). I shall refer to this as to the "**potential double-claim issue**".

64. Before I address the consequences of the inclusion of sub-clause 8.1(c) I should also refer to the remainder of clause 8 and to clause 7 as well as the other relevant provisions of the SPA.

C.3. Other relevant provisions

65. Sub-clause 8.1(a) provided for an indemnity against Ampersand's use of the coronavirus job retention scheme ("**CJRS**") for the period up to and including completion, including but not limited to any claim under the CJRS by Ampersand which is deemed by HMRC to be incorrect, inaccurate or fraudulent or which had not been made in accordance with applicable HMRC guidance or legislation.

66. The potential relevance of this indemnity to the question I have to determine is whether or not it might be said that, if the parties had applied their minds to this indemnity at the time, they would have appreciated that it was conceivable that, if a payment made under CJRS within FY22 was subsequently successfully challenged by HMRC as contravening relevant provisions, that might result in the same potential double-claim issue as in relation to the O4B claim. If so, this would be relevant to my consideration as to why no express provision was made about this in the SPA even before the materialisation of the O4B email. Although Mr Lloyd told me on instructions

that no CJRS claims were made or paid within FY22, and took me to warranties and disclosures in respect of the same, it seems to me to be something which – at least potentially – could have raised the same issue as the O4B claim at an earlier time, before the O4B claim materialised and when there was no time pressure to deal with its consequences.

67. It was not clear to me prior to the beginning of the hearing whether the claimants' case on contract interpretation was limited to the clause 8.1(c) potential double-claim issue or extended to any clause 8 potential double claim issues and, indeed, any clause 7 potential double-claim issues. Mr Lloyd submitted that this was not a relevant consideration, because the only live issue in this case was the clause 8.1(c) O4B potential double-claim issue. In my view, however, when construing the SPA I must have regard to the wider consequences of the claimants' case and its impact on the overall position of the parties under the SPA (as might reasonably have been anticipated by the parties at the time) when deciding whether the claimants' interpretation is to be preferred.

68. In the end, however, Mr Lloyd's position was that any matters leading to claims under clauses 7 and clauses 8 were also, as a matter of contract interpretation, also excluded from the scope of any Schedule 7 EBITDA adjustment. I can see why he maintained that position, not only because it would have been difficult to justify a difference other than through a much narrower argument, namely that this "carve-out" only applied to clause 8.1(a) due to the late emergence of the O4B claim coupled with the failure to make specific provision for it in Schedule 7. However, I do have to consider his case in the light of his case that the carve-out applied to all warranty and indemnity claims, whilst noting his submission that in reality it was only the O4B claim which was likely to raise the particular problem which has arisen in this case.

69. Sub-clause 8.1(b) related to breach of certain "fundamental warranties" as to the shares which are the subject of the SPA. I accept Mr Lloyd's submission that it is not at all likely that breach of these warranties could result in the same potential double-claim issue.

70. By clause 7 the claimants gave warranties to the defendant in respect of those matters contained in Schedule 3, subject – as is common in such cases – to the matters the subject of specific disclosures and also to the limitations and qualifications in relation to such claims set out in clause 7.

71. As with clause 8.1(a), there was some debate before me as to whether or not breach of any of the warranties might result not only in a breach of warranty claim but also a claimed adjustment of EBITDA. It suffices to say that I am satisfied that there might be such cases so that, in the same way as with clause 8.1(a), I am satisfied that this is not a case where it could credibly be said that it was only the late emergence of the O4B claim which might have prompted the need for consideration of the potential double-claim issue and the need for any potential carve-out to address it.

72. There was, however, an express provision in clause 7.7 of some relevance to this case. This provided that: "If any amount is paid by the Sellers in respect of a breach of any Warranty … the Indemnities or otherwise pursuant to this clause 7, the amount of such payment shall be deemed to constitute a reduction in the consideration payable under this agreement to the extent permitted by law".

73. Mr Lloyd's submission was that this was a clear indication that the SPA did not contemplate a double-claim under the deferred consideration provisions and the warranty / indemnity provisions, because it was self-evidently inappropriate to allow the Buyer to deduct an amount from EBITDA and then to be entitled to make a second reduction in the consideration payable under the SPA.

74. Mr Wigley's first response was that it was apparent that the only true purpose of clause 7.7 was not to create a substantive right of set-off, but instead to create a "deemed" reduction for tax purposes, which is supported by the concluding words "to the extent permitted by law".

75. I think that there is some force in this point, however rather than deciding this case on this narrow basis it is necessary to address it more widely, beginning by reference to the express set-off provision at clause 13, entitled "Set-Off".

76. In summary, clause 13 permitted the defendant to set off against the deferred consideration any claims which had either been settled at the time when the deferred consideration became payable or had been subject to an interim determination through obtaining counsel's advice. These were defined as "settled claims" and "counsel claims".

77. Similarly to clause 7.7, clause 13.5 provided that payment of such claims by the Sellers was deemed to constitute a reduction in the consideration payable under the SPA.

78. I was also referred to clause 7.18, headed "No double recovery", which prohibited the defendant from recovering damages "or otherwise obtain reimbursement or restitution" more than once in respect of any warranty or indemnity claim. This clearly shows an agreement to exclude double recovery. However, as Mr Lloyd accepted, correctly in my judgment, an adjustment of EBITDA under Schedule 7 cannot be said to be a claim for restitution or reimbursement, and it is obviously not a claim for damages, so this clause cannot be said to be directly applicable.

C.4. The overarching point – would adjustment of EBITDA under Schedule 7 and making an indemnity or warranty claim result in a double-claim?

79. This then brings me to the point which lies at the heart of this case.

80. In my view the claimants' case only has real force if it can be said that it was, or must have been, obvious to both parties as reasonable contracting parties at the time of entry into the SPA that to allow the defendant to adjust EBITDA and to make an indemnity (or warranty) claim would clearly result in a double-claim (or, in substance even if not directly within clause 7.18, in double recovery) and, hence, would plainly have been understood to both as objectionable on any sensible basis. In my judgment, the claimants have to go this far because there nothing in the clauses upon which the claimants rely which point, on their straightforward wording, to an express or obviously implied contractual prohibition against such double-claims.

81. Mr Lloyd's key submission is that if, as in this case, the loss is suffered due to the write-off of an invoice or other receivable provided for in FY22, then that is obviously the subject of a clause 8.1(c) indemnity claim – as in this case – or, potentially in other cases, a clause 8.1(a) claim or a clause 7 warranty claim. Such a claim, he submitted, would result in that loss being fully reversed. In the circumstances, he submits, it cannot have been intended that the same event should permit the buyer to make a deduction under Schedule 7 and, because of the multiplier, to deduct not just the same loss but the same loss multiplied by a factor of six. Thus, he submits, the contract should be interpreted so as to preclude such an obviously unjust result.

82. I can see the force of the claimants' appeal to a sense of basic fairness and I can understand why the claimants are so aggrieved at what the defendant is seeking to do. However, as the authorities make clear, an appeal to a judge's sense of what is fair or, more accurately, an appeal to construe the contract in the light of what now appears – with hindsight – to be an outcome which offends against commercial commonsense, is not enough to carry the day. Moreover, such an outcome would be impermissible if the terms of the contract are clear and unambiguous and do not permit such a construction.

83. However, even before one gets to that point, the defendant challenges the submission that such an outcome is self-evidently unfair or contrary to commercial commonsense.

84. Mr Wigley points out that the deferred consideration is part of the enterprise value of the companies, which under the SPA is arrived at on the basis of EBITDA multiplied by a factor of six. As he submits, it is of course extremely common for share sale transactions to be structured in this way. As it well known, it reflects a commercial assessment of the value of the shares in a company, based on its EBITDA multiplied by a factor which is selected by reference to an assessment of the prospects of those earnings being continued into the future. It follows, submits Mr Wigley, that the restoration of a written-off invoice which had previously been counted towards EBITDA does not in itself fully compensate the buyer for the loss of enterprise value. Whether it would or would not do so would depend upon the reasons why the invoice was first issued and why it was written off.

85. As the facts of this case illustrate, the writing off of the invoice was part of a resolution of the O4B claim, one consequence of which was the loss of the future O4B business when O4B was previously one of Ampersand's largest customers. In such a case, the deduction of that invoice alone would not fully compensate the buyer for the reduction in future EBITDA. Indeed, it is doubtful that even a reduction in the contractually negotiated enterprise value by multiplying the invoice value by a factor of six would do so in such a case, although I do not need to decide that point.

86. It follows, in my judgment, that for the SPA to be structured in such a way as to permit the buyer to deduct the written off invoice from EBITDA, notwithstanding that it may in principle also be entitled to make a claim for the value of the written-off invoice under the indemnity or warranty provisions, cannot in itself be a self-evidently sound basis for construing the contract to avoid such an outcome, because the latter claim will not necessarily always fully restore the defendant's loss.

87. This is not the same as saying that it will never fully restore the defendant's loss. It is enough for the defendant to show, as in my judgment it has, that this is a sufficiently realistic potential outcome to remove the fundamental foundation of the claimants' case. How can it be said that the parties must, on any objective analysis, have been taken to agree that such an outcome would plainly offend against the genesis and commercial aim of the SPA if, in fact, it would not always do so?

88. In my judgment there is no real answer to this key point.

89. Mr Lloyd sought, valiantly, to answer it. He contended that the indemnity, properly construed, entitled the defendant to make a claim for its loss of value in Ampersand's shares as a result of the invoice being written off, so that there would in such circumstances be a double-recovery.

90. I am prepared to accept that in principle the defendant might be entitled to make such a claim. However, that does not seem to me to be a sufficient reason for holding that the SPA must be construed so as to prohibit the defendant from exercising its right to make an adjustment to EBITDA, if that is what it was otherwise entitled to do. Insofar as that may lead to a double claim or to a double recovery, then if that is a sound objection as a matter of law it would be perfectly possible for that to be addressed by relief being refused or reduced in relation to any indemnity or warranty claim. This possibility is an insufficiently compelling reason to construe the SPA so as to prevent the defendant from otherwise doing what it would otherwise be entitled to do under the SPA.

91. I should also record at this point that Mr Wigley vigorously refuted that there was in any event any true comparison between the contractual right to adjust the deferred consideration price and

the right which the defendant would have to make a claim for its loss of value in Ampersand's shares. As he submitted, the normal measure of damages in a warranty claim is the difference between the value as warranted less the value in fact, where the former is not necessarily the same as the purchase price[9]. Although there might be room for argument as to whether the same approach would apply to a claim under the indemnity clause, what I am concerned with at this point is Mr Lloyd's submission that, because there would always be a complete over-lap between an adjustment of EBITDA under Schedule 7 and an indemnity or warranty claim, the process of interpretation should proceed on this assumption. I am not satisfied that this would have been clear and obvious to the parties as reasonable contracting parties at the time.

92. Further, if the clause 8.1(c) indemnity does permit Ampersand to make a claim for the written off invoices, then that is even more obviously a different claim from the defendant's claim to be entitled to adjust EBITDA under Schedule 7, because that would be an obvious case of trying to treat a claim by the company whose shares are being sold as if it was the same thing as a claim by the buyer of those shares to reduce the consideration payable for the shares.

C.5. Is Schedule 7 in its operative terms and when construed by reference to the SPA as a whole and the relevant factual matrix clear and unambiguous?

93. This then brings me onto what in my view is the second key point in the case.

94. I have already concluded that, notwithstanding some minor grammatical and other infelicities, Schedule 7 is clear and unambiguous in its terms and effect in permitting the defendant to make adjustments in accordance with paragraph 2.2(a) to (c).

95. I am also satisfied that nothing in clause 8.1(c) in its reference to the O4B claim has any obvious impact on the meaning and effect of Schedule 7 as regards the defendant's entitlement to adjust EBITDA in any circumstances justified by reference to the provisions of that Schedule.

96. Standing back, there are really only two ways in which the claimants could put their case.

97. The first is that even before the introduction of the O4B claim the parties must be taken to have intended that adjusting EBITDA and allowing a breach of warranty or indemnity claim was contrary to the proper aim of the SPA as a whole. However, in circumstances where the SPA did not in fact contain any express prohibition, it is impossible in my judgment for one to be construed from the various provisions upon which the claimants rely, with or without reference to the relevant factual matrix.

98. The second is that at the time of the introduction of the O4B claim, and in the context of the inclusion of clause 8.1(c), the parties must be taken to have intended that adjusting EBITDA and allowing a breach of warranty or indemnity claim in any respect where there was a clause 8.1(a) indemnity claim was contrary to a proper aim of the SPA as a whole. However, in circumstances where the SPA did not in fact contain any express prohibition in these more limited circumstances either, it is impossible in my judgment for one to be construed from the various provisions upon which the claimants did rely, with or without reference to the relevant factual matrix.

99. I am satisfied that what the defendant has sought to do in this case is not contrary to the proper interpretation of Schedule 7 or to the terms or overall aim of the SPA, whether by reference to clause 8.1(c), or by reference to the terms of clauses 7 and 8, or otherwise.

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[9] That this is indeed the general rule is confirmed, for example, by McGregor on Damages 22nd edition chapter 30 (sale of shares) at 30-008.

100. Insofar as what the defendant has sought to do in the particular facts of this case is contrary to the actual provisions of Schedule 7 or, indeed to the overall terms of the SPA, that can be contested by the claimants as part of the expert determination process.

101. In the circumstances, it seems to me that there is no proper legal basis for the court to make the principal declaration sought by the claimants.

C.6. The claimants' alternative case – the second declaration

102. I can deal more briefly with this.

103. There are good reasons why in my view this second declaration is not appropriate.

104. The first, as I have said, is that in my judgment it is at least arguable that the defendant would be entitled, as a matter of law, to make a contractual indemnity claim for the O4B invoices even after successfully establishing a contractual entitlement to include the O4B invoices in the adjustment of EBITA under schedule 7.

105. Whether it would, or would not, would depend on the result after hearing full argument, which is likely to be better informed with the benefit of the outcome of the expert determination process. It is true that it cannot be said with complete certainty that the expert determination will make it clear what the decision was in relation to this particular point. There is no express contractual requirement for reasons to be given by the expert. The parties may or may not agree that the expert should be asked to give reasons. Nonetheless as a general proposition it is better that this point is resolved in its proper factual context rather than in advance of any findings on the EBITDA adjustment point and in advance of any statements of case and – if necessary – trial on any subsequent indemnity claim.

106. This is consistent with authority that the resolution of any dispute on a point such as this is best left to the particular tribunal which is determining that dispute if, as and when it actually arises, whether on a strike out application or a reverse summary judgment application or at trial. As was said in the context of TCC Part 8 litigation by Eyre J in Solutions 4 North Tyneside Limited v Galliford Try Building 2014 Limited [2014] EWHC 2372 (TCC) at [76], there is a need for caution in granting declarations in Part 8 proceedings where no substantive claims are made, because in such a case the judge does not have the benefit of seeing how the competing cases advanced by the parties would work out against the actual claims in play.

107. I did wonder aloud at the hearing whether there was any merit in reserving the determination of declaration 2 until after the outcome of the expert determination process but, given my two conclusions as above, there is no real purpose in not grasping the nettle now. Accordingly, I decline to make the second declaration.

D. Conclusion

108. For the reasons stated above the claim must be dismissed and the declarations sought by the defendant should be made. In short, the first issue is properly a matter for expert determination and the second issue is, if it ever materialises, properly a matter for subsequent litigation.