Neutral Citation Number: [2020] EWHC 501 (Comm)

Case No: CL-2019-000548

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10/03/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

Damoco (Bermuda) Limited and Others	**Claimants**
- and –	
Atlanta Bidco Limited	**Defendant**

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- -

Simon Colton QC (instructed by **Eversheds Sutherland**) appeared for the **Claimants**
Graham Chapman QC and **Kendrah Potts** (instructed by **Signature Litigation LLP**) appeared for the **Defendant**

Hearing date: 26 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE MOULDER

MRS JUSTICE MOULDER:

1. This is the reserved judgment on the claimants' application for summary judgment dated 6 November 2019 (the "Application").

2. The application is supported by witness statements of Mr Adam Fisher, a partner at Eversheds Sutherland (International) LLP ("Eversheds") acting for the claimants, dated 6 November 2019, 17 January 2020 and 14 February 2020. The claimants have also filed the first witness statement of Mr Ian Pilgrim.

3. In response to the application the defendant has filed two witness statements of Mr Daniel Spendlove, a partner at Signature Litigation LLP ("Signature"), acting for the defendant, dated 13 December 2019 and 28 January 2020. The defendant has also filed the witness statement of Mr McFarlane, a director of Damoco Holdco Limited and CEO of the Damovo Group of companies, dated 25 February 2020.

Amended statements of case

4. The defendant filed a draft amended Defence prior to the hearing on 31 January 2020 and the parties are agreed that the summary judgment application should be determined on the basis of that draft amended Defence.

5. On 25 February 2020, in the light of matters arising at the hearing on 31 January 2020, the claimants have agreed and filed an amended Particulars of Claim.

Background

6. The first claimant, Damoco (Bermuda) Limited is a special purpose vehicle through which Oakley Capital Private Equity II held a substantial shareholding in Damoco Holdco Limited (the "Company").

7. By a sale and purchase agreement dated 5 July 2018 (as amended) (the "SPA") the claimants together with certain individuals (together the "Sellers") agreed to sell all the shares in the Company to the defendant, Atlanta Bidco Limited (the "Buyer").

8. The consideration for the sale of the shares included any deferred consideration determined and payable in accordance with Schedule 11 of the SPA (the "Deferred Consideration").

9. Schedule 11 provided that if the FY19 Pro forma Audited IFRS EBITDA was equal to or greater than €15,300,000 and equal to or less than €19 million, the Deferred Consideration would be €20 million.

10. "FY19 Pro forma Audited IFRS EBITDA" was defined in Schedule 11 as:

> "the EBITDA of the Group for the financial year ending 31 January 2019 as determined from the audited Deferred Consideration Accounts as adjusted in accordance with this Schedule 11"

11. Schedule 11 provided for the Buyer to deliver to the Sellers a draft of the "Deferred Consideration Accounts" within 30 days after the date upon which the audited

financial statements of the Company "are in such condition as could be formally signed off by the Auditors and in any case no later than 30 June 2019" (paragraph 3 of Part 3).

12. The claimants assert that in breach of its obligations under Schedule 11, the Buyer failed to deliver to the Sellers a draft of the Deferred Consideration Accounts on or before 30 June 2019 (Paragraph 12 of the Particulars of Claim).

13. Mr Till and Mr Twiney of Oakley Capital Limited ("Oakley Capital") spoke to representatives of the Company and the Buyer in May 2019, and again in June 2019, about the expected EBITDA and were told that, based on the management accounts, the EBITDA was above the lower limit.

14. Oakley Capital and their lawyers, chased the defendant for the draft Deferred Consideration Accounts and (on 5 July 2019, 19 July 2019 and 26 July 2019) threatened to issue proceedings for a mandatory injunction if the draft Deferred Consideration Accounts were not delivered.

15. On 5 August 2019 Ms Miller on behalf the Buyer sent an email to Mr Hall (previously CFO of the Company) in which she stated:

> "…Further to paragraph 3 of Part 3 of Schedule 11 of the SPA we attach for your kind attention the draft Deferred Consideration Accounts. Please note that the figures contained in the draft Deferred Consideration Accounts are not yet final and are provided in draft form only. They have been prepared internally, are not approved by the Board of Directors, and are still subject to review and adjustment which may materially change the information presented.… Further, and for the avoidance of doubt, the provision of the draft Deferred Consideration Accounts to the Sellers at this stage is without prejudice to:
>
> 1 the Buyer's position that the clear effect of the SPA is that the draft Deferred Consideration Accounts are to be provided after completion of the Company's audit; and
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> 2 the Buyer's position that the calculation of the Deferred Consideration is to be based on audited (and not draft) Deferred Consideration Accounts, and that as that calculation cannot take place unless and until the audit has been completed, accordingly no Deferred Consideration currently falls due…"

16. By a letter of 8 August 2019 Oakley Capital Manager Limited and Mr Hall wrote to the Buyer stating that no adjustments needed to be made to the draft Deferred Consideration Accounts, that the draft Deferred Consideration Accounts were "now final and binding" on the parties and the Deferred Consideration payable was €20 million. The letter demanded payment within 10 business days of the date of receipt of the notice.

17. The Buyer responded on 21 August 2019 denying that the Deferred Consideration was due and owing.

18. According to the defendant's evidence there was a delay in the preparation of the audited accounts (for reasons outside the Company's control) and the draft Deferred Consideration Accounts were only delivered to the Sellers on 25 February 2020.

19. In these proceedings the claimants seek declarations that (in summary):

    i) on 5 August 2019 the Buyer delivered to the Sellers draft Deferred Consideration Accounts as required by Schedule 11:

    ii) on 8 August 2019 the draft Deferred Consideration Accounts became final and binding for the purposes of the SPA;

    iii) as set out in the Deferred Consideration Accounts the FY19 Pro Forma Audited IFRS EBITDA is between €15.3 million and €19 million and accordingly the Deferred Consideration is €20 million; and

    iv) the Buyer became liable to pay the Deferred Consideration on 27 August 2019.

20. In the alternative (the "Alternative Case"), the claimants assert, that if the Buyer did not provide the draft Deferred Consideration Accounts within the meaning of Schedule 11 on 5 August 2019, then the Buyer was obliged to deliver a draft no later than 30 June 2019 and the Buyer remains in breach of that obligation and the breach has caused the Sellers loss in that but for the breach, the Sellers would have received draft Deferred Consideration Accounts which would have shown that the Deferred Consideration would have been €20 million and this would have been payable by 22 July 2019.

21. At a hearing on 31 January 2020 at which the Application was to be heard, the court and the defendant learnt that the first claimant was in liquidation. It now appears from the third witness statement of Mr Fisher that the first claimant is in Members Voluntary Liquidation and has been since 10 September 2018. Mr Fisher states, in that witness statement, that the liquidation of the company was not a distress measure but was for the purpose of efficient tax planning following the sale. As the fact of the liquidation only emerged at the hearing on 31 January 2020, it was necessary to adjourn the hearing so that further enquiries could be made and the Application was then heard on 26 February 2020.

22. As a result, the defendant now raises further issues in response to the Application as to whether the commencement of the proceedings was properly authorised by the liquidator, Mr Pilgrim, acting on behalf of the first claimant and whether the letter of 8 August 2019 purporting to agree the draft Deferred Consideration Accounts was properly authorised.

Relevant law

23. The law on the approach to be adopted by the court on a summary judgment application was largely common ground.

24. CPR 24 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that 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"

25. The court was referred to the oft cited dicta of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "15. … the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
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> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 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*
>
> 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]
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> 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 ;
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> 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 ;
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> 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 ."

The Application

26. The Application gives rise to 3 discrete issues (albeit that there is an overlap in the evidence):

    i) were the accounts which were delivered on 5 August 2019 the draft Deferred Consideration Accounts for the purposes of the SPA (the "Paragraph 3 Issue");

    ii) was the notice which the Sellers purported to give in the letter of 8 August 2019 pursuant to the SPA to accept the draft accounts as the Deferred Consideration Accounts, without adjustment and thus as final and binding duly authorised on behalf of the Sellers; and

    iii) did the first claimant have authority to commence these proceedings.

27. The Paragraph 3 Issue raises two sub issues:

    i) whether as a matter of fact, the defendant delivered the draft Deferred Consideration Accounts by its email of 5 August 2019 which were then accepted for the Sellers as the Deferred Consideration Accounts by the letter of 8 August 2019; and

ii) the construction of Paragraph 3 of Part 3 of the SPA (the "Construction Issue").

28. In relation to the Paragraph 3 Issue, it was submitted for the claimants that although the interpretation of the correspondence between the parties was a question of fact, the court had all the evidence necessary to resolve the matter and in relation to the Construction Issue, the court could and should resolve the issue of construction now. In relation to the Construction Issue, it was submitted for the defendant that the meaning of Paragraph 3 of Part 3 was clear, although the defendant also sought to defeat the Application on the basis that additional evidence would be available at trial which went to the factual context against which the provision should be construed.

29. The claimants' Alternative Case was not relied on for the purposes of the Application.

Paragraph 3 Issue

Claimants' submissions

30. It was submitted for the claimants that on 5 August 2019 the Buyer delivered to the Sellers a draft of the Deferred Consideration Accounts, the Sellers then notified the Buyer that no adjustment needed to be made and so the draft Deferred Consideration Accounts became final and binding. It was submitted for the claimants that if the court finds that these were the draft Deferred Consideration Accounts then the claimants' case must succeed.

31. It was submitted that:

i) the Buyer was not prohibited from providing draft Deferred Consideration Accounts even if it was not required until later; and

ii) the defendant was wrong to argue that the Deferred Consideration Accounts did not need to be provided until 30 days after the Company's financial statements were in a position to be signed off by the auditors if that date fell after 30 June 2019, as that date was a long stop date to ensure that the Buyer could not drag its heels in preparing the accounts and paying the Deferred Consideration.

Defendant's submissions

32. It was submitted for the defendant that:

i) as a matter of construction of Paragraph 3, the accounts were not to be delivered until 30 days after the accounts were at the point at which they could be signed off by the auditors, even if that date fell after 30 June 2019; the exception to this was if the accounts were at the point of sign off within 30 days of 30 June, in which case the draft accounts had to be delivered by 30 June;

ii) the correspondence clearly shows that the accounts which were delivered on 5 August 2019 were not the draft Deferred Consideration Accounts pursuant to Paragraph 3; and

iii) even if the construction of Paragraph 3 of Part 3 of Schedule 11 was capable of being determined at this stage, and the claimants' proposed construction were correct, the audited accounts confirmed that no Deferred Consideration is payable. To the extent the claimants wish to challenge the figures in those accounts, the SPA provides that any such dispute must be referred for determination by a chartered accountant.

The Construction Issue

33. In my view the appropriate starting point is the construction of the relevant provisions of the SPA.

34. The relevant legal principles were not in dispute. The defendant referred the court to Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"…And it does so by focussing on the meaning of the relevant words…, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…".

35. Schedule 11 deals with the calculation of Deferred Consideration. The amount of Deferred Consideration payable is determined according to the level of the "FY19 Pro forma Audited IFRS EBITDA" (paragraph 2 of Part 1). That is defined (paragraph 1 of Part 1) as:

> "the EBITDA of the Group for the financial year ending 31 January 2019 as determined from the audited Deferred Consideration Accounts as adjusted in accordance with this Schedule 11".

36. Part 3 of Schedule 11 states (paragraph 1) that:

> "The Deferred Consideration Accounts will be prepared in the format of the pro forma set out in part 5 of this Schedule 11."

37. Paragraph 2 states:

> "The Deferred Consideration Accounts will be prepared in accordance with…

> 2.1.1 the specific accounting policies set out in Part 4 of this Schedule 11;
>
> 2.1.2 to the extent not inconsistent with paragraph 2.1.1, using the same accounting principles, policies, practices… adopted by the Financial Statements [for 31 January 2018] applied on a consistent basis;
>
> 2.1.3 to the extent not inconsistent with paragraphs 2.1.2 and 2.1.1, in accordance with Accounting Standards as at the date to which the Deferred Consideration Accounts are drawn up."

38. Paragraph 3, the key provision in issue states:

> "The Buyer will deliver to the Sellers a draft of the Deferred Consideration Accounts (draft Deferred Consideration Accounts) within 30 days after the date upon which the audited financial statements of the Company which relate to the Deferred Consideration Period are in such condition as could be formally signed off by the Auditors and in any case no later than 30 June 2019. "

I note that the term "Auditor" (used in Paragraph 3) is defined as Deloitte LLP (Part 1 of Schedule 11) and that one of the restrictions imposed in Part 6 of Schedule 11 is that the Buyer is not permitted to dismiss Deloitte LLP as auditor of any company in the group.

39. Paragraph 4 provides a 30 business day period after delivery of the draft accounts for the Sellers to notify the Buyer that no adjustment needs to be made or of a list of proposed adjustments. If the Sellers notify the Buyer that no adjustment needs to be made to the draft Deferred Consideration Accounts, paragraph 4.1 states that the draft Deferred Consideration Accounts will be final and binding on the Buyer and the Sellers for the purposes of the SPA on the date of such notification.

Submissions

40. It was submitted for the claimants (in summary) that:

i) Paragraph 3 of Part 3 goes only to the timing of delivery of the draft accounts;

ii) although the defined terms in Schedule 11 referred to "audited" figures, these are merely labels and it is clear that the Deferred Consideration is not calculated by reference to audited accounts but pursuant to the accounting principles and policies identified in Schedule 11;

iii) the phrase "in any event no later than 30 June" provided a long stop date by which the draft accounts had to be delivered in order to protect the Sellers and the alternative interpretation advanced for the defendant, that the long stop date only operated to advance the delivery of the accounts where the accounts were finalised within the 30 day period leading up to 30 June but thereafter a 30 day period again applied, made no sense; and

iv) the Company is responsible for producing its accounts not the auditors and there is therefore no requirement for the accounts to be audited in order for the Deferred Consideration to be calculated.

41. It was submitted for the defendant that:

i) the amount of any Deferred Consideration cannot be calculated until the relevant accounts have been audited/are in a position to be formally signed off by the auditors; and

ii) the process for agreeing the Deferred Consideration Accounts requires the audited accounts to be available (or in such condition as could be formally signed off).

Discussion

42. In my view this is an Application which gives rise to a short point of construction and, for the reasons set out below, I am satisfied that the court 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 therefore is a case where in my view, the court can and should grasp the nettle and decide the Construction Issue.

43. As a matter of language, it could be inferred from Paragraph 3 that the requirement that the draft accounts be delivered after the date upon which the audited financial statements of the Company "are in such condition as could be formally signed off" means that the starting point for the preparation of the Deferred Consideration Accounts is that the financial statements are in almost final form.

44. It is submitted for the claimants that the provision that requires the draft accounts to be sent no later than 30 June 2019 indicates that the accounts can be provided even if they have not yet reached the point where they could be formally signed off. It was submitted that Paragraph 3 goes only to the timing of delivery of the draft accounts and that the reference to accounts being in a condition as could be formally signed off was merely a matter of convenience for the Buyer. It was submitted that it was open to the Buyer to use the final financial statements and submit these as the draft Deferred Consideration Accounts but that this was only as a matter of convenience and was not a necessary prerequisite to the delivery of the draft accounts under Paragraph 3.

45. It seems to me that the submission that Paragraph 3 goes only to the timing of the draft accounts is not supported by the language used. As was submitted for the defendant, if the meaning of paragraph 3 was to state that the draft accounts were to be provided in any event by 30 June, regardless of the point which had been reached in relation to the audited accounts, this could have been done in simpler language. Had it merely been a matter of convenience it would have been open to the defendant to use the version of the financial statements which were (almost) final without any need to refer to it in paragraph 3.

46. I accept however that based solely on the words used in Paragraph 3, there is ambiguity in the objective meaning and therefore in accordance with established

principles of construction, the court looks to test the rival interpretations against the other provisions of the contract, the factual matrix and commercial context.

Other provisions of the SPA

47. As set out above "FY19 Pro forma Audited IFRS EBITDA" is defined as:

> "the EBITDA of the Group for the financial year ending 31 January 2019 as determined from the audited Deferred Consideration Accounts as adjusted in accordance with this Schedule 11". [emphasis added]

Counsel for the claimants was obliged to submit that the reference to "audited" in the definition was a mistake and should be ignored.

48. However in my view the whole tenor of Schedule 11 is that the auditors played an important role in the preparation and determination of the financial statements for the purpose of calculating the Deferred Consideration: as referred to above, Deloitte is specifically identified as the Auditor and the Buyer is restricted from changing the Auditor during the relevant period. From this I infer that the auditors were expected to have a role which afforded protection to the Sellers. It is clear from the nature and wording of the restrictions in Part 6 that they were a suite of provisions which were intended to prevent a distortion of the financial performance of the Company which in turn might otherwise lead to an avoidance or reduction of the Deferred Consideration. In my view it is to be inferred that as part of these protections the auditors provided protection to the Sellers through their oversight of the financial statements. I note that in taking the court to the relevant restrictions in part 6 and in particular the requirement in paragraph 1.14 that Deloitte should not be dismissed, counsel for the claimants in oral submissions himself observed that this provided "comfort that any financial chicanery can be spotted".

49. Although it is correct that the Deferred Consideration Accounts are not themselves audited but are subject to agreement between the parties, the SPA states that the "FY19 Pro forma Audited IFRS EBITDA" is to be determined in accordance with Schedule 11. In my view this encompasses not only adherence to the policies specifically identified in Schedule 11 but also requires (by virtue of paragraph 3 of Part 3) the starting point to be the "audited" (ie on the point of sign off) accounts. This in my view is consistent with the definition of EBITDA as the "audited Deferred Consideration Accounts as adjusted in accordance with this Schedule 11". That wording indicates in my view that the starting point is the audited accounts but adjusted as necessary to reflect the specific matters identified in Schedule 11.

Factual Matrix

50. The draft Amended Defence now sets out those matters upon which the defendant relies as constituting the factual matrix. They can be summarised as follows:

    i) the SPA was negotiated by two sophisticated commercial parties;

ii) due diligence reports prepared by Ernst & Young contained financial forecasts and in particular forecasts for UCaaS contracts. There was uncertainty as to how the UCaaS contracts would affect the Company's EBITDA;

iii) the fact that audited financial statements could produce results with significant variations from the figures forecasted was evident from the Company's audited financial statements for the year ended 31 January 2018;

iv) the accounts for the 2017/2018 year were completed by 9 June 2018 and the parties would reasonably have considered that the 2019 audit could be concluded by a similar equivalent date; and

v) the uncertainty regarding UCaaS contracts and the potential variation resulting from an audit informed the parties' approach to the SPA and the audited accounts would provide the basis upon which the Deferred Consideration would be calculated thus providing protection to and benefiting both parties.

51. It seems to me highly relevant to the Construction Issue that the previous year's audit was completed in June 2018. It was submitted for the claimant that it was no guide as to whether that would occur the following year. However in my view it is relevant in discerning the purpose of the clause. In my view this factual context supports an inference that, viewed objectively, the parties expected the accounts to be finalised within a similar timeframe and consistent with that factual matrix, Paragraph 3 provided for the draft Deferred Consideration Accounts to be provided once the accounts had been finalised and were about to be signed off by the auditors. The long stop date of 30 June 2019 was consistent with that factual matrix. In the event, unforeseen delays have occurred and the audited accounts have been delayed for a significant period. Those delays were not in my view in the contemplation of the parties at the time of entering into the SPA and did not form part of the factual matrix. Possibly as a consequence of this, in my view notwithstanding the sophistication of the parties and the involvement of lawyers, in drafting Paragraph 3 the parties and their lawyers failed to give proper (or any) consideration to this possibility.

52. The other aspect of the factual matrix which it seems to me is highly significant is the role of the auditors as providing protection to the parties (although as discussed below, I do not accept that the potential for variation from forecasts was material to the need for audited financial statements to be available in this context).

53. It is in my view also relevant to the Construction Issue that the SPA was negotiated by sophisticated parties and (as is evident on its face) that the agreement was professionally drafted by lawyers. In my view this militates against the submission that the reference in the definition of "FY19 Pro forma Audited IFRS EBITDA" to "audited" was a mistake and more significantly against the inference that the inclusion of the reference to the draft accounts being delivered within 30 days after the date upon which the audited financial statements are in such condition as could be formally signed off by the Auditors was merely a matter of convenience for the Buyer. It seems to me that in a professionally drafted agreement it is to be anticipated that provisions will have legal significance and not merely be included as recording a convenient but non binding option.

54. It was submitted for the defendant that the EY due diligence reports run to approximately 440 pages and thus it would be inappropriate for the Construction Issue to be determined by way of summary judgment without allowing the parties to put forward and test further evidence regarding the relevant factual matrix.

55. I note the dictum quoted above that the court should hesitate about making a final decision without a trial 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. However, as also quoted above, this does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court.

56. From the EY reports it can be seen that there was a change to the way in which the services and products were supplied under the UCaaS contracts such that the assets were retained on the balance sheet of the Company and the accounting treatment of these contracts therefore changed. This affected the revenue that would be recognised and there would be provision in the accounts for depreciation of the assets. Whilst I accept that the change in accounting treatment of the UCaaS contracts would affect EBITDA both in terms of the absolute earnings figure and the difficulties in forecasting such figure, in my view neither of these matters demonstrate a need for the draft Deferred Consideration Accounts to be based on audited statements. As to the provision for depreciation which I understand to be made only on preparation of the audited accounts, this seems to me to go to the amount of depreciation and by definition therefore not to the calculation of EBITDA.

57. Even if I am wrong on that and further evidence on the due diligence and UCaaS contracts would assist the court, in the light of my conclusion on the Construction Issue, that further evidence, taken at its highest, would only reinforce the conclusion which the court has reached. This is not therefore in my view a valid reason to leave the Construction Issue to trial.

Commercial context

58. It was submitted for the claimants that the Company is responsible for producing its accounts not the auditors and there is therefore no requirement for the accounts to be audited in order to calculate the Deferred Consideration. However it seems to me that this ignores the crucial value of the audit process which provides independent oversight of the financial statements produced by the Company. That this was contemplated by the parties and a matter to which they attached importance in the context of the calculation of the Deferred Consideration (and thus the drafting of Paragraph 3) is in my view to be inferred as a matter of commercial common sense as well as the express language of paragraph 3 itself (referring to accounts being "in such condition as could be formally signed off by the Auditors") and the restrictions on retaining Deloitte as the auditor throughout the relevant period (referred to above).

59. I take into account the submission for the defendant that not only do the audited accounts provide protection for the Sellers that the Buyer could not attempt to manipulate the financial statements in such a way as to reduce the amount of Deferred Consideration payable, but also for the Buyer, given that a number of the management sellers who would be entitled to receive a share of any Deferred Consideration would or could still be in the Company and responsible for preparing the accounts.

60. As to the submission that the long stop date was intended to provide comfort that the Buyer could not drag its feet, it seems to me that this is inconsistent with the factual matrix discussed above. Further as a matter of commercial common sense one has to weigh this submission against the effect of this construction, namely that the Sellers were prepared to forego the protection of the oversight of the auditors if the long stop date was triggered. Whilst I accept that the Sellers would want to ensure that the Company does not act with undue delay in producing the draft Deferred Consideration Accounts, it would seem contrary to commercial common sense for the Sellers to want the protection of the oversight of the auditors and then to be prepared to jettison that protection completely once the cut off date of 30 June was reached.

Conclusion on construction of Paragraph 3 of Part 3

61. In my view the objective meaning of Paragraph 3 is as submitted for the defendant. The draft Deferred Consideration Accounts were only to be provided once the audited accounts were ready to be signed off by the Auditors and it is implicit therefore that the starting point for the draft Deferred Consideration Accounts before effecting the adjustments was the audited accounts in such condition as could be formally signed off even after the long stop date of 30 June had passed. I therefore find that pursuant to Paragraph 3 of Part 3 the obligation to provide the draft Deferred Consideration Accounts was within 30 days after the accounts were at the point at which they could be signed off by the Auditors (except where that date fell within the 30 day period immediately prior to 30 June).

62. Accordingly I find that it was not open to the Company to provide draft accounts pursuant to Schedule 11 which were not based on the accounts which were in such condition as could formally be signed off by the Auditors. Thus the accounts provided on 5 August 2019 were not capable of being the "draft Deferred Consideration Accounts" delivered pursuant to Paragraph 3 of the SPA.

63. In my view that is sufficient to defeat the application for summary judgment.

The correspondence between the parties

64. If I were wrong on the Construction Issue, then the issue is whether as a matter of fact, the defendant delivered the draft Deferred Consideration Accounts by its email of 5 August 2019 which were then accepted for the Sellers as the Deferred Consideration Accounts by the letter of 8 August 2019.

65. I accept the submission for the claimants (which was not challenged) that although the interpretation of the correspondence between the parties is a question of fact, the court has all the evidence necessary to resolve the matter.

66. It was submitted for the claimants that irrespective of the Construction Issue, on the correspondence the draft Deferred Consideration Accounts were delivered by the email of 5 August 2019 and any purported reservation of rights in that email, was ineffective.

67. In my view the correspondence over the period for July 2019 up to the email of 5 August 2019 shows that the Buyer was being pressed on behalf of the Sellers to deliver the draft accounts and was repeatedly threatened with legal proceedings. The

defendant responded stating that the accounts were not available but agreed to provide draft accounts in an effort to be cooperative.

68. The particular evidence in this regard is that on 26 July 2019 Eversheds wrote to the defendant's lawyers. It read (so far as material):

> "In any event, your letter fails to provide our client with any certainty as to when the draft Deferred Consideration Accounts will be delivered. You say that your client is working with Deloitte to have the audit completed by 31 August 2019, or sooner if possible, but that appears not to be a matter within your client's control (as recent events have demonstrated). If your client maintains its insistence that it will not provide the information at Part 5 of Schedule 11 until completion of an audit, the Sellers can have no assurance as to when this will be received.
>
> In the circumstances, we have been instructed to issue our client's claim and application for an injunction today. If your client wishes to avoid that action being taken, it must provide a written undertaking by 9 AM on Monday, 29 July 2019, that the draft Deferred Consideration Accounts, prepared in accordance with Part 5 of Schedule 11 to the SPA, will be delivered within the next seven days. As explained above, our client considers that your client is able to prepare the draft Deferred Consideration Accounts based on unaudited financial information which is available to your client…"[emphasis added]

69. Signature responded on behalf of the defendant on 29 July 2019. The letter read, in material part:

> "…Our client's position remains that the clear effect of the SPA is that the Company should first prepare its audited financial statements, following which our client would have 30 days to provide the draft Deferred Consideration Accounts. As explained in our letter of 25 July 2019, that interpretation is consistent both with the express wording of the SPA and commercial common sense."
>
> Contrary to what is said in your letter, our client has no reason to seek to delay matters. As we explained in our letter, it is in your client's interests that the draft Deferred Consideration Accounts are based on accurate information and so it plainly makes sense to wait until the audit is completed before they are provided…
>
> However, in light of your client's very obvious desire to obtain the draft Deferred Consideration Accounts as soon as possible and without the benefit of the audit having been completed, and to demonstrate that our client is taking an open, cooperative

> and proactive approach to this matter, our client will provide the draft accounts sooner than the date required by the SPA. This agreement is, however, without prejudice to
>
> our client's position as to the correct interpretation of Clause 3 of Part 3 of Schedule 11…
>
> our client's right to revise or update the draft Deferred Consideration Accounts following the completion of the Company's audit…
>
> our client's position that the calculation of the Deferred Consideration is to be based on audited (and not draft) Deferred Consideration Accounts.…" [emphasis added]

70. I accept that the letter of 5 August stated:

> "Further to paragraph 3 of Part 3 of Schedule 11 of the SPA we attach for your kind attention the draft Deferred Consideration Accounts…"

This would suggest, if read in isolation, that the draft accounts were in fact being delivered pursuant to the SPA, however when the rest of the letter is read, this is clearly not the case. The immediately following sentence reads:

> "please note that the figures contained in the draft Deferred Consideration Accounts are not yet final they have been prepared internally, not approved by the Board of Directors, and are still subject to review and adjustment…"

The defendant thus made it clear that the accounts were not final and they had not been approved by the Board of Directors, a necessary step it is to be inferred, prior to any accounts being in a condition to be formally signed off by the auditors.

71. Lest there was any doubt in the matter from the preceding statements (and the preceding correspondence), the defendant then set out expressly in the letter of 5 August that the provision of the draft statements was "without prejudice to the Buyer's position that the clear effect of the SPA is that the draft Deferred Consideration Accounts are to be provided after completion of the Company's audit."

72. In my view, the defendant having made it clear that the draft accounts provided did not fall within the meaning of Paragraph 3, it was not open to the Sellers by their response and purported notice of 8 August to transform those draft accounts into Deferred Consideration Accounts which were capable of being accepted as final and binding on the parties and which entitled the Sellers to claim the Deferred Consideration as due and payable.

Conclusion

73. I therefore find as a matter of fact, that the defendant did not by its letter of 5 August 2019 deliver the draft Deferred Consideration Accounts, pursuant to and in accordance with paragraph 3 of Part 3 of Schedule 11 and as a result the purported

acceptance of the draft accounts as the Deferred Consideration Accounts by the letter of 8 August 2019 was ineffective.

Authority issues

74. Given my conclusions above, I propose to deal with this matter shortly as they are not determinative of the Application. As stated above there are two issues:

    i) was the notice which the Sellers purported to give in the letter of 8 August 2019 pursuant to the SPA to accept the draft accounts as the Deferred Consideration Accounts, without adjustment and thus as final and binding, duly authorised on behalf of the Sellers; and

    ii) was the first claimant duly authorised to commence these proceedings.

75. Dealing first with the issue of the notice, in the amended Particulars of Claim the claimants assert that in sending the letter of 8 August 2019, Oakley Capital Manager Limited was acting as Investor Seller's Representative and Mr Hall as Warrantors' Representative in accordance with the terms of the SPA.

76. It seems to me that these entities were entitled on the face of the SPA to act on behalf of the Sellers in this regard and to give the notice and had it been necessary to decide the issue, would have concluded that there is no realistic prospect of the defendant succeeding in relation to this issue of alleged want of authority such as to defeat the application for summary judgment on this basis.

77. As to the second issue, the evidence of Mr Pilgrim is that he was the liquidator of the first claimant and authorised the initial proceedings on behalf of the first claimant. I accept the submission for the defendant that if Mr Pilgrim had in fact authorised the proceedings as liquidator, one would have expected Eversheds to have been aware of the fact of liquidation. The fact that on the evidence Eversheds were ignorant of the winding up until the hearing in January of this year supports an inference that Mr Pilgrim, although he may have purported to authorise the commencement of the proceedings did not do so in his capacity as liquidator. I also note, as was accepted by counsel for the claimants, that Mr Till should not have signed the original Particulars of Claim purportedly in his capacity as director on behalf of the first claimant at a time when the company was in liquidation.

78. However whilst in my view the defendant has a real prospect of establishing that the proceedings were originally brought by the first claimant without the authority of the liquidator, I am not persuaded that there is a real prospect of the claim of the first claimant being struck out as an abuse of process.

79. I was referred to the decision of the Court of Appeal in *Adams v Ford* [2012] EWCA Civ 544. I note that at [32] Toulson LJ said:

> "The legal consequence of proceedings being issued without authority is also well established. The proceedings are defective and liable to be struck out on that account, but they are not devoid of legal effect until they are struck out. Moreover, the court is not bound to strike them out if at the time of the strike

> out application the client on whose behalf the action was commenced wishes it to continue and to accept responsibility for it."

80. I also note at [39]:

> "It is unquestionably a sound general proposition that it is a misuse of the process of the court for a law firm to issue proceedings in the name of a person who has not given it authority to do so. There are public interest considerations…."

81. Further at [42]:

> "Determining whether there has been an abuse of process requires sensitivity to the facts of the particular case."

82. Although I accept that the issue is fact sensitive, and there is real doubt as to whether the proceedings by the first claimant were originally authorised and whether the Particulars of Claim were properly signed on behalf of the first claimant in the statement of truth, I bear in mind that a "realistic" claim to defeat a summary judgment application is one that carries some degree of conviction. This means a claim that is more than merely arguable. There seems to have been an ignorance of the winding up and quite possibly procedural irregularities but the liquidator has now made it clear that he wishes the proceedings by the first claimant to continue and authorised them. Accordingly, amended Particulars of Claim have been filed and properly attested. The evidence does not in my view support a conclusion that the circumstances were such that that there is a realistic prospect that the claim of the first claimant will be struck out as an abuse of process and had it been necessary to determine this issue, I would have concluded that there was no real prospect of the defendant defeating the claim of the first claimant on the basis that that the proceedings were an abuse of process and should be struck out.