Neutral Citation Number: [2018] EWCA Civ 2763

Case No: A4/2017/1353

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT
BEFORE HIS HONOUR JUDGE BIRD
Case No: B40MA050

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

Date: 11/12/2018

B E F O R E:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
and
DAME ELIZABETH GLOSTER

- -

Between:

PHILIP MORRIS	**Appellant/ Claimant**
- and –	
SWANTON CARE & COMMUNITY LIMITED	**Respondent/ Defendant**

- -
- -

Mr Alain Choo-Choy QC (instructed by **Morris Law Limited**) for the **Appellant/Claimant**
Mr Adam Zellick QC (instructed by **Ropes & Gray International LLP**) for the **Respondent/Defendant**

Hearing date: 28 June 2018

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Approved Judgment

Dame Elizabeth Gloster:

Introduction

1. This is an appeal by the claimant, Philip Morris ("the claimant"), against the judgment of His Honour Judge Bird (sitting in the Mercantile Court, Manchester District Registry) ("the judge") handed down on 24 March 2017 ("the judgment"). By the judgment, the judge rejected the claimant's claim to additional "*Earn-Out Consideration*" under the terms of a written "*Agreement for sale and purchase of Glenpath Holdings Limited*" dated 9 November 2006 ("the SPA"). By the judge's consequential order, dated 24 March 2017, the claim was formally dismissed and the claimant ordered to pay the costs of the action incurred by the defendant, Swanton Care & Community Limited ("the defendant"). By a further order, dated 20 April 2017, the judge refused the claimant permission to appeal, but extended time for the filing of an Appellant's Notice with the Court of Appeal to 11 May 2017. On 14 September 2017, Longmore LJ gave permission to appeal.

2. The issue is whether the judge was correct in his construction of the provisions of the SPA that governed the claimant's right to Earn-Out Consideration (namely, Clauses 3.1 and 3.3 and Schedule 5 to the SPA) and, in particular, the judge's application of well-established principles concerning the enforceability of agreements to agree.

Factual background

3. On 9 November 2006, the claimant and his business partner, Christine Smith, sold their shares in the capital of Glenpath Holdings Limited (defined in the SPA as "the Company") to the defendant for an initial consideration of £16,077,842 subject to certain adjustments, and a deferred consideration through an earn-out provision. The Company provided residential care for autistic men and women. The terms of the agreement were set out in the SPA.

4. Christine Smith was unwell at the time the Agreement was entered into and has since died. Her estate has played no part in the proceedings.

Relevant provisions of the SPA

5. The relevant provisions of the SPA (in which the claimant was referred to as one of the Sellers and the defendant was referred to as the Buyer) provided as follows:

    i) By Clause 2.1, the Sellers (defined in Schedule 1 as the claimant and Christine Smith, each being beneficial owner of 1 ordinary share in the Company) agreed to sell, and the Buyer (i.e. the defendant) agreed to buy, the whole of the legal and beneficial interest in the Shares (defined as the 2 fully paid ordinary shares of the Company and representing the whole of its issued share capital).

    ii) Clause 1.1 defined the "Consideration" as follows:

> "means the consideration for the purchase of the Shares set out in Clause 3, subject to adjustment[1] in accordance with Clause 4";

iii) Clause 3.1 stated that the consideration for the purchase of the Shares:

> "shall be the aggregate of the Initial Consideration and the "Earn-Out Consideration" which shall be divisible among the Sellers as set out in Schedule 1".

iv) Clause 1.1 defined the "Initial Consideration" and the Earn-Out Consideration respectively as follows:

"Initial Consideration"	means the sum of £16,077,842, subject to adjustment in accordance with Clause 4;"
"Earn-Out Consideration"	has the meaning given to it in Clause 3.3"

v) Schedule 1 described the proportions in which the Initial Consideration was to be shared as between the claimant and Christine Smith (i.e. 49% and 51% respectively).

vi) Clause 2.2 provided for the payment of the Initial Consideration upon Completion.[2]

vii) Clause 3.3 provided that:

> "The Earn-Out Consideration (if any) shall be determined in accordance with paragraph 2 of Schedule 5 and shall be payable by the Buyer to Mr Morris [i.e. to the claimant alone] in accordance with paragraph 3 of Schedule 5."

viii) Schedule 5, at the centre of this appeal, provided as follows:

> "1. **Consultancy Services**
>
> 1.1 Mr Morris shall have the option for a period of 4 years from Completion and following such period such further period as shall reasonably be agreed between Mr Morris and the Buyer to provide the following services:
>
> 1.1.1 identifying up to seven suitable new properties from which to conduct services similar to those of the Group

[1] The adjustment provisions are not relevant to the dispute between the parties and were not relied upon by either.

[2] Defined in Clause 1.1 as the completion of the sale and purchase of the Shares as provided for in the SPA. Clause 5 in particular dealt with the completion of the transaction. (The precise mode of payment of the Initial Consideration is not relevant.)

Companies (the "**New Properties**") in order to provide up to 35 new beds in total ("**the Target Capacity**");

1.1.2 oversee the redevelopment of the New Properties to such standard as currently reflects the Properties;

1.1.3 use all reasonable endeavours to fill such places as are available and suitable for residents as the New Properties can cater;

provided that all of the above actions and all other material decisions regarding the acquisition, development and operation of such properties shall be subject to the prior approval of the board of the Company, such approval not to be unreasonably withheld.

1.2 The Buyer shall:

1.2.1 use its reasonable endeavours to promote the activities of Mr Morris as set out in paragraph 1.1 above;

1.2.2 fund the acquisition and development of the New Properties on terms reasonably approved by the Board of the Company;

1.2.3 not terminate the Consultancy Services prior to the Target Capacity being reached irrespective of whether his employment with the Buyer's Group is terminated.

2. **Determination of Earn-Out Consideration**

2.1 Mr Morris shall be paid such sum as equates to one year's fees (as are set out in the written placement contracts between the Group Companies or any of the Buyer's Group Companies and the relevant authority) for each individual placement as is taken up at the New Properties.

2.2 The fee payable in respect of 2.1 shall only become due when the individual to which such fee applies has resided at the relevant New Property for at least 3 months (the "**Probationary Period**").

3. **Payment**

3.1 Mr Morris and the Buyer shall within 5 Business Days of 1 July and 31 December of each year in which Mr Morris provides the Consultancy Services ascertain the number of beds which have been filled in the previous six months (the "**Relevant Period**") and, from which the individuals concerned have resided at the relevant New Property for at least the Probationary Period. The fee payable in respect of such placements shall be established and the applicable fee shall be

> agreed in writing (the "**Relevant Earn Out Consideration**"). In respect of each bed in a New Property an amount shall be included in the calculation in 2.1 above in respect of the first placement only, and subsequent placements shall be disregarded. Any dispute relating to the determination of the Applicable Fee shall be referred to the Independent Accountant.
>
> 3.2 Any Relevant Earn Out Consideration payable in respect of the Relevant Period shall be satisfied within 10 Business Days by the issue to Mr Morris of Loan Notes by the Buyer, subject to Mr Morris having executed a deed of subordination in relation to the Loan Notes with the Royal Bank of Scotland in such form as the bank requires.

6. Contemporaneously with the execution of the SPA, the claimant and the defendant also executed a "*SIDE LETTER*", bearing the same date as the SPA (9 November 2006) ("the Side Letter"). In summary, the Side Letter described the Earn-Out Consideration as being in the nature of deferred consideration and contained tax gross-up and other set-off provisions depending upon the treatment of the consideration by HM Revenue & Customs.

7. It was common ground before the judge that the claimant had the right to provide what were referred to as the Consultancy Services (although not defined as such) during the initial 4-year period of the SPA. It was also common ground that, in the years following the SPA, four New Properties were identified and redeveloped; that, by November 2010, four years after the SPA, 29 placements had been filled; and that, as a result, the claimant was paid Earn-Out Consideration of £4,146,371 in respect of these placements.

8. Towards the end of the initial 4-year period, the claimant asked the defendant for "a reasonable extension" by email dated 7 October 2010. The judge described what then occurred as follows:

> "54. On 7 October 2010 Mr Morris wrote to the Buyer [the defendant] to discuss the terms of an extension of time noting that "an extension would be appropriate in this case" then citing a number of factors which he felt justified an extension. The email ended with the words: "accordingly, I formally seek a reasonable extension".
>
> 55. At the time the request was received, Mr Parsons told me that:
>
> "The focus of the business was to get back to the core strengths of the company and what we were doing from before 2010, but certainly 2010 onwards, was building brand new 60-bed private pay focused care homes."
>
> 56. The response to the request came on 27 October 2010. The extension was declined. A number of reasons were given,

> including the fact that the economic climate had changed dramatically since the agreement was entered into. When asked in cross examination about the refusal Mr Parsons told me that this was intended to convey the following message:
>
> "Get real. There was a £16 million upfront payment, there's been a £4 million earn-out payment. You're a very lucky person to have received that".
>
> 57. The refusal concludes with the words: "I do not see how it would be possible for the Board … To recommend an extension to the earn out". When pressed about reasons for the refusal in cross examination Mr Parsons told me there was no appetite in the business for an extension. He went on to say:
>
> "the world had moved on enormously. Any number of care home companies had gone bust. He would not have got that sort of deal even 18 months later. And the company has moved on, the company has confronted the new reality with a … new strategy, which is about how it allocated its resources."

The proceedings below

9. The claimant's claim (issued in March 2015) was that, after the expiry of the four years of the Earn-Out Consideration in November 2010, he was entitled under paragraph 1.1 of Schedule 5 to a further period of time in which to be paid further Earn-Out Consideration.

10. At trial, the defendant submitted that it was not obliged to give the claimant a further period for the Earn-Out Consideration. The defendant contended that was because inter alia: (i) the reference in paragraph 1.1 of Schedule 5 to a further period to be agreed was no more than an agreement to agree and applicable only if both parties agreed; (ii) the wording of paragraph 1.1 was not mandatory on its true meaning; and (iii) the defendant did not act unreasonably (nor was it pleaded that it did) and it was reasonable for the defendant not to agree an extension.

11. In summary, the judge found that, whilst the claimant had an enforceable right to provide the Consultancy Services during the initial 4-year period, he did not have an enforceable right to provide the Consultancy Services during any further period to be reasonably agreed between the claimant and the defendant. In so holding, the judge took the view:

    i) that the SPA imposed an obligation on the parties to agree on the length of the second period in a reasonable way (see [69]);

    ii) but that this obligation was not enforceable because the agreement was effectively an agreement to agree and there was no mechanism set out in the SPA to enable the court to reach a conclusion as to the length of the second period in the SPA or objective standard that the court could resort to in order to determine the length of the further period (see generally [70] – [80]).

The claimant's arguments on the appeal

12. Mr Alain Choo-Choy Q.C., who appeared on behalf of the claimant on the appeal[3], in summary submitted as follows in relation to the grounds of appeal.

Ground 1: relying on inadmissible evidence of subjective intention

13. Mr Choo-Choy complained that, although the judge correctly summarised the principles of objective contractual interpretation at [26] and [27], noting in particular that he should disregard any evidence of the subjective intention of the parties, he nonetheless, when identifying the background against which the agreement was to be interpreted, stated at [61] that:

> "a key aspect of the background which I ought to bear in mind is, as Mr Parsons [for the defendant] told me in evidence …, the buyer was very keen to have control over the period of the earn out and did not want to enter into an open-ended obligation."

14. Mr Choo-Choy therefore submitted that the judge erred in his construction by wrongly taking account of (and indeed characterising as "key") inadmissible evidence of the defendant's subjective intentions and desires during the pre-contractual negotiations. In addition to being inadmissible as a matter of construction, Mr Choo-Choy also submitted that the evidence of the defendant's subjective intention and/or desire did not in any event conflict with the claimant's construction that paragraph 1.1 of Schedule 5 imposed a binding obligation on the defendant to agree a reasonable period of extension with the claimant. He argued that such an agreement would not be "open-ended" since it would be subject to an objective requirement of reasonableness and there was in any event a cap of up to 35 new beds in total (the Target Capacity) and a clearly and carefully defined mechanism for determining the amount of the Relevant Earn-Out Consideration under paragraphs 2.1, 2.2 and 3.1 of Schedule 5.

Ground 2: wrongly treating the initial 4-year period and further period as being "wholly distinct"

15. Mr Choo-Choy submitted that the judge erred yet further in applying the interpretation principles set out at [26] and [27] by treating the period of 4 years from Completion and the "further period as shall be reasonably agreed between [the parties]" as being two separate or wholly distinct periods to which entirely different considerations applied (see [63] – [65]). Apart from the fact that the second period was to be reasonably agreed between the parties, Mr Choo-Choy contended that there was nothing intrinsically different between the two periods – the Earn-Out Consideration was part of the defined Consideration. Thus:

    i) The claimant had the option to provide the Consultancy Services (as described in paragraphs 1.1.1 to 1.1.3 of Schedule 5) during both periods.

    ii) The defendant's duties under paragraph 1.2 of Schedule 5 applied to both periods; and

[3] Although he had not appeared below.

iii) The detailed provisions of paragraphs 2.1 to 3.2 for the determination of the Earn-Out Consideration were capable of applying and applied to both periods.

16. Mr Choo-Choy submitted that, in treating the two periods as being wholly distinct, the judge had failed to construe paragraph 1.1 of Schedule 5 as a whole and to have proper regard to its objective purpose and to the context in which it was agreed. He argued that, in construing paragraph 1.1 of Schedule 5 in the context of the agreement as a whole, and having regard to the objective purpose and context of that provision, the judge ought to have found as follows:

i) Paragraph 1.1 of Schedule 5 conferred upon the claimant an option (i.e. a contractual right) to provide the specified services for a period comprising (i) an initial period of 4 years from Completion, and (ii) a further period "as shall reasonably be agreed" between the parties – in other words, the claimant's right to provide the Consultancy Services applied to both periods.

ii) The claimant's entitlement to provide the Consultancy Services during those periods must, by necessary implication, have been matched by the defendant's corresponding obligation to accept and permit the provision of the Consultancy Services by the claimant during both periods.

iii) The above interpretation was consistent with the defendant's express obligation under paragraph 1.2 of Schedule 5 (inter alia) to use its reasonable endeavours to promote the activities of the claimant as set out in paragraph 1.1 of Schedule 5. Significantly, the defendant's obligation under paragraph 1.2 was not restricted to the claimant's activities during the initial 4-year period, but extended to all such activities under paragraph 1.1 and hence therefore to the further period described in paragraph 1.1.

iv) The plain and obvious purpose of the option reserved to the claimant under paragraph 1.1 of Schedule 5 was to enable the claimant to earn (and the defendant to defer payment of) part of the consideration for the sale and purchase of the Shares.

v) The agreement of the further period (and the related opportunity that such further period presented for the claimant to earn additional Earn-Out Consideration) was therefore part and parcel of the consideration for the transfer of the Shares to the defendant. Conversely, the transfer of the shares was consideration from the Sellers (including the claimant) in return for the defendant's obligation to reach a reasonable agreement regarding the further period. By the transfer of the Shares to the defendant, therefore, the claimant had already provided a substantial quid pro quo for the defendant's obligation to reach a reasonable agreement for the further period. (That was an important element of "part performance" which was relevant to the application of the principles set out in *Mamidoil v Okta* [2001] 2 Lloyds Rep.76.)

vi) The objective purpose of and context for the provision of the Consultancy Services over an extended period of several years (and potentially extending to more than 4 years) was to enable the claimant to reap the rewards of his Consultancy Services in circumstances where new beds would only become occupied by new residents at the New Properties after an extensive programme

of site location, building and refurbishment, staff recruitment and training, and residents' assessment, the precise length of which could not be predicted with precision at the time of signature of the SPA.

Ground 3: alleged absence of an objective standard by which to measure the length of the further period

17. Third, Mr Choo-Choy contended that the judge had erred in holding (at [65]) that there was nothing in paragraphs 1.1.1 to 1.1.3 of Schedule 5 which could sensibly be read as providing any framework or objective standard that the court could use to fill the gap left by the parties' failure to agree a reasonable period of extension. In adopting this defeatist attitude to the parties' clear agreement that the further period "shall reasonably be agreed", as opposed to a purposive construction, Mr Choo-Choy argued that the judge had ignored or paid insufficient regard to some fundamental principles of construction. In particular he submitted that:

i) By their description of the further period as being one which "shall reasonably be agreed", the parties had expressly agreed an objective criterion of reasonableness, by which the court could, in the event that the parties themselves failed to agree, determine a reasonable period.

ii) The parties' express adoption of the criterion of reasonableness shows that they clearly intended there to be a binding obligation to determine a further period under paragraph 1.1 of Schedule 5; otherwise there would have been no need to specify any requirement of reasonableness – either the parties agreed or failed to agree, whether reasonably or not.

iii) The courts had repeatedly recognised and applied the concept of reasonableness as an objective standard which was enforceable as a matter of law, the precise boundaries of reasonableness being dependent upon the particular subject matter and circumstances of the case – see e.g.:

a) principle (viii) in *Mamidoil supra* as set out at [33] of the judgment, viz:

"For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable";

b) the citation at paragraph 58 of Rix LJ's judgment in *Mamidoil* from Lord Wright's speech in *Hillas and Co Limited v. Arcos Limited* [1932] 147 LT 503, at 517:

"When the learned Lord Justice speaks of essential terms not being precisely determined, i.e. by express terms of the contract, he is, I venture with respect to think, wrong in deducing as a matter of law that they must therefore be determined by a subsequent contract; he is ignoring, as it seems to me, the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts";

c) to the same effect, see Chadwick LJ's fifth point in *BJ Aviation v Pool Aviation* [2002] 2 P&CR 369, as cited by the judge at [34]:

> "Fifthly, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined – where appropriate by ordering an inquiry".

Ground 4: artificial restriction of criterion of reasonableness to the manner of agreement as distinct from the length of the further period

18. Fourth, Mr Choo-Choy argued that the judge's view (at [66] – [67]) that the adverb "reasonably" only related to the manner in which agreement between the parties was to be reached, but did not relate to the further period to be agreed, was devoid of common sense and realism. According to Mr Choo-Choy, it reflected a failure on the judge's part to construe the expression "such further period as shall reasonably be agreed" as a whole and with commercial common sense. There was no sense in a construction which presupposed that there could be a reasonable agreement in respect of an unreasonable period. The notion of reasonableness had, objectively, to be taken to go to both the agreement and the period, on the sensible understanding that:

i) If (on the one hand) the parties agreed on the length of the further period, it could hardly be supposed then that either the manner of the agreement or the period could be said to be unreasonable (or indeed that it would matter in that event whether or not the agreement had been arrived at in a reasonable manner or whether the agreed further period was objectively reasonable); and

ii) If (on the other hand) the parties failed to agree (no matter how reasonably they may each have behaved in trying to agree), the court could determine what a reasonable period was.

Ground 5: alleged uncertainty in determining the further period

19. Fifth, Mr Choo-Choy submitted that the judge's analysis of the issue of enforceability at [70] – [80] was inherently flawed in multiple respects. Although the judge had rightly reasoned at [68] – [69] that:

> *"[in] summary then, on its proper interpretation, the contract imposes on the parties an obligation to agree on the length of the second period with each adopting a reasonable approach to the negotiation*",

he then went on erroneously to conclude that such an obligation was not enforceable on the ground of uncertainty (see especially [75] – [77]).

20. Although the judge had correctly set out the principles laid down by the court of Appeal in *Mamidoil* and *BJ Aviation* (as applied by both Eder J. and the Court of

Appeal in *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm)) at [70] – [80]), Mr Choo-Choy contended that the judge had failed altogether, or failed properly, to apply the above principles. In particular, he submitted that:

i) At [71], [72] and [79], the judge appeared to have proceeded on the basis that he was dealing with a situation where there was no binding contract at all in existence between the parties. That was clear especially from his statement at [79] that "*this is a case which falls squarely within (ii) and (iii) [of the Mamidoil summary of principles]*". Yet, it was indisputable in the present case that there was not only a binding SPA in existence between the parties, but also a binding option within that contract (paragraph 1.1 of Schedule 5) entitling the claimant to provide the Consultancy Services during both the initial 4-year period and a further period to be reasonably agreed between the parties.

ii) Once this was understood, it was clear that the pertinent principles, which the judge did not specifically mention in his analysis of enforceability at [70] – [80], were *Mamidoil* principles (iv) to (viii). It was in the context of those principles that the significance of the claimant's part performance, in at least two respects (namely, through (1) the original transfer of his Share to the defendant, and (2) provision of the Consultancy Services during the initial 4-year period), could be appreciated.

iii) On the above approach, the judge's rejection (at [79]) of the claimant's reliance on considerations of part performance was plainly wrong. There had been substantial part performance by the claimant in consideration of the defendant's obligation to agree a reasonable period for the claimant's provision of Consultancy Services. In those circumstances, the judge ought to have applied *Mamidoil* principles (v) to (viii). Specifically:

    a) As to principle (v), there was already a contract into existence;

    b) As to principle (vi), there was a practical need or desire at the time of conclusion of the SPA to leave the length of the further period for future determination in light of the circumstances prevailing towards the end of the initial 4-year period;

    c) As to principle (vii), the defendant had in return for its promise to pay Earn-Out Consideration (and hence its promise reasonably to agree to a further period of Consultancy Services) obtained the advantage of transfer of the Shares and of the benefit of the claimant's Consultancy Services during the initial 4-year period. For his part, the claimant agreed to (and in that sense, "*invested in*") the transfer of his Share in return for the defendant's obligations in relation to the Earn-Out Consideration (including the obligation to agree reasonably to a further period of Consultancy Services); and

    d) As to principle (viii), the criterion of reasonableness had been expressly agreed in relation to the agreement of the further period.

iv) The judge had wrongly asserted at [76] that there was no mechanism in the SPA to allow the court to come to a conclusion as to what the further period should be and that there was no objective standard to which the court could resort. But the parties had expressly agreed upon the objective standard of reasonableness for the determination of the further period. Applying the clear statements of principle enunciated by Rix LJ in *Mamidoil* and by Chadwick LJ in *BJ Aviation*, the court was well able to intervene in order to determine the length of the further period by applying the parties' chosen criterion of reasonableness. The determination of a reasonable period by the court would self-evidently be one that would depend upon the circumstances prevailing when the claimant sought to exercise his option for the further period, having regard to the then stage of redevelopment of the New Properties reached, any delays that may have held up such redevelopment, the bed capacity created within the New Properties, the number of places that remained to be filled, the assessment stage reached in respect of any potential residents, and any other prevailing circumstance that might have fairly affected the court's assessment of a reasonable further period.

v) At [77], the judge had continued to rely on his wrong view that paragraph 1.1 of Schedule 5 only required that the parties' negotiations to agree be approached in a reasonable manner. It might have been for this reason that the judge thought (at [76]) that there was no objective standard that the court could resort to in order to determine the length of the further period (as distinct from the manner in which the parties sought to reach agreement). That approach wrongly treated the criterion of reasonableness as being confined to the manner of attempted agreement, but not as relating to the further period to be agreed.

vi) The judge's statement (at [79]) that the agreement "functioned perfectly well without any second period coming into existence" betrayed a degree of misunderstanding and confusion between cases where it was necessary for the court to imply a term in order to make the contract workable and cases where the parties had expressly agreed the relevant criterion to be applied by the court. The present case was not one where the court needed to imply any relevant criterion. Under paragraph 1.1 of Schedule 5, the relevant criterion – namely, that of a reasonable period – had been expressly agreed by the parties. All that remained, in the absence of the parties' agreement, was for the court to determine what a reasonable further period would be in the context of the agreement and the circumstances of the case as a whole.

vii) Even if, contrary to the foregoing, the criterion of reasonableness were narrowly (if not bizarrely) to be seen as relating only to the manner in which the parties were to try to agree the further period, rather than to the length of the further period, in accordance with *Mamidoil* principles (v) to (viii), the court should have readily implied that the defendant's obligation under paragraph 1.1 of Schedule 5 was to agree a reasonable period. Such an implication would have been obvious from the obligation for the parties to reach a reasonable agreement regarding the further period.

21. Mr Choo-Choy submitted that, in summary, therefore, the judge's conclusion of unenforceability on the ground of uncertainty was fundamentally flawed.

Ground 6: commercial absurdity

22. Sixth, Mr Choo-Choy submitted that the judge had failed to consider and appreciate that the net effect of his construction of paragraph 1.1 of Schedule 5 was to turn the language of mandatory option and mandatory agreement of a further period for the provision of the defined services into a mere possibility of an entitlement to such further period if the Buyer so agreed. On such a construction, he argued that it was impossible to see why the parties had chosen to use the language "shall have the option for … such further period as shall reasonably be agreed between [the Seller] and the Buyer to provide the following services"; they should instead have provided that the claimant "may be asked to provide the following services for such further period as the Buyer may agree"; they should not have expressed the matter in terms of the claimant having an option (i.e. a contractual right) to provide the Consultancy Services during the further period; and there would have been absolutely no reason for them to agree that the further period was to be "reasonably agreed". As to the last point, if nothing was intended to be binding and enforceable unless and until agreed to by both the claimant and the defendant and if (as held by the judge) it was open to the defendant to refuse to agree for whatever reason (and indeed to refuse even to negotiate) in the naked pursuit of its self-interest, it was impossible to discern why the parties took the trouble of agreeing that the further period "shall reasonably be agreed" in paragraph 1.1 of Schedule 5. He thus argued that the peremptory language only made sense on the basis that it was objectively intended that a reasonable period was to be agreed between the parties, with the court stepping in if they were themselves unable to agree what that period should be.

23. Thus, Mr Choo-Choy submitted, taking the peremptory language into account and having regard to Chadwick LJ's second and fourth points in *BJ Aviation*, it would not make sense to conclude that the parties' intention was that the defendant was to have a right of veto over (or to be free to walk away without determination of) the further period. Nor would it make sense to conclude that the parties' intention was that the defendant could take the full benefit of the transfer of Shares and of all of the claimant's work during the initial 4-year period, with placements attributable to such work crystallising after the expiry of that period, without having to make any payments to the claimant in respect of such placements. Such a result was inherently uncommercial and did not amount to a sensible commercial construction of paragraph 1.1 of Schedule 5. Nor was it justified by the language of Clause 3 and Schedule 5 as a whole.

Quantum of Earn-Out Consideration

24. At the start of the hearing of the Appeal, Mr Choo-Choy abandoned the claimant's appeal on the quantum point.

The defendant's arguments on the appeal

25. Mr Adam Zellick QC appeared on behalf of the defendant both at first instance and on the appeal. The court did not consider it necessary to call upon him to elaborate his written submissions by further oral argument. It is not necessary to summarise his arguments as they are reflected in the reasons which I rehearse below for dismissing the claimant's appeal.

Discussion and determination

26. Despite Mr Choo-Choy's careful and detailed arguments, I have no doubt that, on their true construction, the relevant provisions of paragraph 1.1 of Schedule 5 amount to an agreement to agree in relation to the further period after the agreed 4 years and are consequently unenforceable. It follows that I agree with the judge's conclusion and would dismiss this appeal. My reasons may be summarised as follows.

27. The words "as shall reasonably be agreed between Mr Morris and the Buyer", when construed in the context of the entire agreement, make it plain that, for there to be any further period, there first has to be a further agreement between the parties. The parties did not at the time of entering into the SPA specify a further period but, instead, only agreed that there would have to be a further agreement in the future. As Mr Zellick submitted, that is the very paradigm of an agreement to agree.

28. As a matter of grammar, the word "reasonably" is an adverb that modifies the verb "shall be agreed". It is not the adjective "reasonable" nor does it qualify the phrase the "further period". Although the verb "agreed" is used in the passive form, it is clear that it is the parties who have to do the agreeing. On the proper construction of the relevant provisions, therefore, there was no existing agreement in place that the Consultancy Services would be extended by a reasonable period. To the contrary, the option is expressed to continue for "such further period as shall reasonably be agreed". Thus, any period of extension could be agreed, with the words "shall reasonably" applying to the agreeing, and not to the further period itself. The claimant's argument seeks to transfer the "reasonable" requirement to the period itself, on the basis that if the clause is read to provide for a reasonable period, the court can then determine what a reasonable period is. But that is wrong for two reasons: first, it is not what paragraph 1.1 of Schedule 5 says and the exercise would require transposing reasonableness from agreeing to the further period. Secondly, the proposition is that, on the assumption that there was such a thing as an objectively reasonable period, that is what the parties acting reasonably should have agreed. The difficulty with this, apart from the actual terms of the clause, is that it presupposes that there is such a thing as a reasonable period which everyone could equally recognise as being reasonable, rather than the different commercial interests and different perspectives involved in any extension of the Earn-Out Consideration. Moreover, the court would have to identify some objective benchmark for determining the reasonable period without reaching an alternative subjective view or descending into the commercial fray; but that is not possible.

29. Accordingly, I accept Mr Zellick's submission that, at most, the agreement was reasonably to agree a further period. On a true construction of the words used, the parties intended to leave the issue of any extension to the period to be agreed. This necessarily meant that either of them would be free to agree or disagree about that matter and they would need to reach agreement between them. The consequence was that that provision of the agreement was void for uncertainty, albeit that the SPA in other respects was a binding agreement; see: *Lewison, The Interpretation of Contracts (6th ed, 2016) at 8.17; May & Butcher Ltd v R* [1934] 2 KB 17 per Lord Buckmaster at 20, per Viscount Dunedin at 21 and per Lord Warrington at 22; and, generally, *Walford v Miles* [1992] 2 AC 128.

30. This was an agreement where, as in *BJ Aviation Ltd v Pool Aviation Ltd* [2002] 2 P&CR 25, the parties intended to leave an essential matter, namely the length of the extended option period, to be agreed between them in the future, on the basis that either would remain free to agree or disagree about that matter. Accordingly, there was no bargain which the courts could enforce.

31. Moreover, the law is clear that, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them; see *Walford v. Miles supra*, at page 138G.

32. The fact that the relevant provision required the parties "reasonably" to agree did not turn an unenforceable provision into an enforceable agreement. Thus, for example:

    i) In *Little v Courage Limited* [1995] CLC 164 at 169 Millett LJ stated the effect of the addition of such words as "best endeavours" as follows:
    "An undertaking to use one's best endeavours to agree … is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching an agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation."

    ii) Where a party is required to use "reasonable endeavours" or "reasonably agree" some matter, it remains permitted to negotiate in accordance with its own commercial interests. This principle is illustrated by *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329, where the parties to a series of gas sales agreements were to use "reasonable endeavours" to agree as much in advance as possible the dates on which the seller would commence deliveries of gas to the buyer (with a fall-back date specified if the parties were unable to agree). The seller contended that each party was obliged to use its best endeavours to reach agreement on the dates having regard only to technical and operational practicality. The Court of Appeal (per Kennedy and Potter LJJ) disagreed: the buyer was not required to disregard its own financial position, and if the parties had intended that, the contract would have needed to state it expressly. Thus, if a party judges that its own commercial interests militate against agreeing the relevant matter, it is entitled to take that stance and there is, for this reason as well, no enforceable legal obligation to the contrary.

    iii) Other examples where similar words have not resulted in an enforceable contract include:

        a) an agreement to use reasonable endeavours to agree the terms of a joint venture regarding two airports, having regard to certain agreed principles: *London and Regional Investments Ltd v TBI Plc* [2002] EWCA Civ 355;

        b) a provision in a steelworks agreement by which the parties agreed "to use reasonable endeavours to agree" a rescheduling of the works and to agree a price for the works, and "to enter into a further supplemental agreement, recording the agreement contemplated by this clause": *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited* [2006] EWHC 1341 (TCC);

c) a side letter to the sale of a company offering one of the shareholders "the opportunity to invest in the Purchaser on the terms to be agreed between us which shall be set out in the Investment Agreement" and agreeing to negotiate such agreement in good faith: *Barbudev v Eurocom Cable Management Bulgaria Eood* [2011] EWHC 1560 (Comm), [2011] 2 All ER (Comm) 951.

33. Nor was I persuaded by Mr Choo-Choy's submissions in relation to the claimant's individual grounds of appeal. I now turn to deal with these individually.

34. *Ground 1 – inadmissible evidence.* Mr Choo-Choy rightly did not press this submission forcefully in his oral argument. Even if it had been the case that the judge had taken into account inadmissible evidence in reaching his conclusion on construction, that does not lead towards a different construction of the relevant provision.

35. In any event, I do not find the criticism justified. The judge correctly directed himself as to what he was permitted to take into account (e.g. at [26]) and expressly reminded himself of the relevant requirements again (at [60]) when he came to construe the provision. He set out accurately that he was to disregard evidence of subjective intention. Although the judge mentioned one aspect of Mr Parsons' arguably subjective evidence, as Mr Zellick submitted, on one analysis that was no more than a finding by the judge that the background commercial circumstances were that the parties had agreed to provide for a fixed period but also to leave the door open for a further period if at the end of the fixed period they were both willing to agree. But this ground of appeal goes nowhere. Irrespective of whether the judge was wrong to refer to this piece of evidence, he reached the right conclusion.

36. *Ground 2 – separate periods.* I disagree with Mr Choo-Choy's criticism of the judge's statement referring to the obvious fact that the clause included two separate periods. It was clear as a matter of construction that the second period required a further agreement between the parties if it was to follow on as a second option period. Nor do I accept his submission that paragraph 1.1 or the remainder of Schedule 5 predicated a construction that the further period was in effect a "right" of the claimant. The judge was in my view correct to conclude at [65] that there was nothing in the remainder of Schedule 5 which informed the approach or gave any indication that a further period was required, nor was there any basis for the "necessary implication" advanced by the claimant in Mr Choo-Choy's written skeleton.

37. *Ground 3 – absence of objective standard*. I reject Mr Choo-Choy's submissions under this head. The judge was right to conclude on the terms of Schedule 5 that the express terms did not impose any framework or objective standard from which the court could determine what an appropriate further period should be if the parties did not "reasonably" agree. Even if, contrary to my view as set out above, one should construe the words "as shall reasonably be agreed between Mr Morris and the Buyer" as imposing an obligation on the parties to agree a "reasonable further period", there are, in the circumstances of this case, no criteria by which a court could judge what was such a further period. Indeed, the judge himself stated at [81] that:

> "It is almost impossible to decide the remaining questions sensibly. To answer those questions, I must engage in the exercise of working out what the parties would have agreed."

In my judgment he should not have embarked on such a task at all. Whether he was attempting – on a hypothetical basis – to decide what the parties would have agreed, or (a different issue) to decide what would objectively have been a reasonable period, there was no reference point in the contract, or indeed externally to justify any conclusion on any basis other than guesswork.

38. This was not a case where, absent a further agreement, the parties could be taken to have agreed that there was objective criteria of fairness or reasonableness by which the period could have been determined. Thus, for example, Mr Choo-Choy's references to Rix LJ's principle (viii) in *Mamidoil* and his dictum at paragraph 69, to the citation from Lord Wright's speech in *Hillas and Co Limited v. Arcos Limited* [1932] 147 LT 503, at 517, and to Chadwick LJ's fifth point in *BJ Aviation* were all in my view besides the point. This was simply not a case where a court could conclude that the true intention of the parties was that the matter to be agreed in the future – here the length of the further period - was capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness.

39. *Ground 4 - artificial restriction of criterion of reasonableness to the manner of agreement as distinct from the length of the further period.* The contention in Ground 4 is that the judge should not have construed the word "reasonably" as an adverb going with the words "be agreed", as those words appear in the clause, but should have adopted an interpretation re-writing the clause to have provided for a requirement to agree a "reasonable period". I have already addressed this suggested construction of the relevant provisions and concluded that the claimant's proposed interpretation is wrong.

40. *Ground 5 – alleged uncertainty in determining the further period.* None of Mr Choo-Choy's arguments under this head persuaded me. His principal points were that paragraph 1.1 included a "binding option" within it in relation to the further period and that the judge failed adequately to apply the part performance considerations referred to in *Mamidoil.*

41. So far as the first point is concerned, the use of the word "option" carries the issues of enforceability and certainty no further. If the further period were subject to further agreement, the fact that the claimant was granted an option (i.e. a right as opposed to an obligation to perform the consultancy services during the relevant period) does not affect the construction or effect of the relevant provisions relating to any agreement in respect of a further period.

42. As to the part performance point, the judge in my view rightly rejected this argument (at [79]). The authorities emphasise that all cases turn on their own facts and this case is no exception. The claimant in this case had already received substantial consideration in terms of the Initial Consideration and the Earn-Out Consideration for what he had provided under the SPA. There is nothing in his past performance (the transfer of the shares and the provision of the consultancy services), or the consideration that he had received to date, or indeed anything else, from which the court could legitimately extrapolate the length of any further "reasonable" period for

provision of his consultancy services. The relevant principles identified in *Mamidoil* in relation to part performance do not transpose the situation in the current case into one which came within the description of one "where the parties may desire or need to leave matters to be adjusted in the working out of their contract," in which case "the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain." The fact is that, in the present case, the parties had not left matters "to be adjusted" in a certain way but had decided that they required further agreement if their contract was to continue longer. This was not a case of the court being able to render certain what could be made certain. All that the court could do was impermissibly to make a new bargain for the parties – and the judge's attempt to do so even on a hypothetical basis was in my view impermissible. Indeed, the judge himself recognised that there was no sensible basis for doing so.

43. As Mr Zellick submitted, whether the time was to be extended in the context of an Earn-Out after a fixed period of four years had to be regarded as a commercial matter for negotiation. It could not sensibly be regarded as being a given because the primary period had been granted and expired.

44. Nor do I accept Mr Choo-Choy's criticisms of the judge's application of the principles as articulated in *Mamidoil*, *BJ Aviation* and *MRI Trading*. All the authorities emphasise the need to look at the particular facts and contractual provisions of an individual case. The authorities do no more than set out guiding principles to be applied in cases such as the present. Some of those principles, not relied upon by Mr Choo-Choy, support the defendant's case. The judge considered and applied the principles correctly and was entitled to reach the conclusion that, on their proper construction, the relevant provisions in the SPA amounted to an agreement to agree, and as such were unenforceable.

45. Moreover, although Mr Choo-Choy attempted to identify a number of factors which he contended would have enabled the court to determine the further period, the reality was that all such factors were commercial factors on which the court could not sensibly reach a determination based on objective criteria. Likewise, the factors identified by the defendant as relevant to any decision as to the length of a further period (if any), were also commercial factors which were for the parties, and not the court, to take into account in any commercial negotiation. All these matters support the judge's conclusion on the key question of construction that this was effectively an agreement to agree.

46. *Ground 6 – commercial absurdity*. Mr Choo-Choy submitted that the construction upheld by the judge was commercially absurd. I do not agree. There was every commercial reason, given all the uncertainties, why, on execution of the SPA, the parties should have decided *not* to agree any period beyond four years, but, rather, defer agreement on any further period and agree that they would "reasonably agree" such period at a future date. It is hardly likely that they would have understood their agreement to mean that, if they could not at that stage agree a further period, they would nonetheless leave it to a court to decide (a) that there should be such a period, and (b) how long it should be. As the judge himself said, in his conclusion (at [87]), the construction was not only clear from the words of the contract but also "has the added benefit of according with common sense." I agree.

Disposition

47. I would dismiss this appeal.

The Chancellor of the High Court:

48. I agree.