Claim No. CC-2020-MAN-000002

Neutral Citation Number [2021] EWHC 2590 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

Before HHJ Cadwallader sitting as a Judge of the High Court

9th September 2021

BETWEEN:

BIP CHEMICAL HOLDINGS LIMITED

Claimant

and

MRS JEAN BLUNDELL

Defendant

Martin Budworth (instructed by JMW Solicitors) for the Claimant

Lesley Anderson QC(instructed by Glaisyers Solicitors) for the Defendant

Hearing dates 7-9, 12-13 July 2021

JUDGMENT

Introduction

1. On 5th March 2019 Mrs Blundell sold the entire issued share capital in Centec International Ltd ("Centec") to BIP Chemical Holdings Ltd ("BIP") for £1.4m. Centec had been Mrs Blundell's late husband John's business, but he had died in June 2017, leaving her his share. She already held one share herself. John Blundell had founded the business. Centec's business was the refinement and treatment of chemicals. Its core

business was the recycling of mixed fuels, for example where a driver puts diesel into a petrol vehicle or vice versa.

2. The core business of BIP was the recycling of waste solvents. The premises of the 2 companies are adjacent. The owner and managing director of BIP was Michael Bennett.
3. In these proceedings, BIP sues Mrs Blundell for damages for breach of warranties contained in the share purchase agreement dated 5 March 2019, and for misrepresentation.

The pleaded issues

4. In outline, the claim was pleaded in the following way. BIP alleged that in breach of warranty the unaudited accounts of Centec for the period ending 31 May 2018 ("the Accounts") were false or inaccurate, and there had been undisclosed material adverse changes to the business between then and the completion of the share sale on 5 March 2019. By the time of the trial, however, the claim that the Accounts gave rise to a breach of warranty had fallen away because BIP accepted that even if they did, it had suffered no loss in consequence. The core of the case was therefore what had happened in the period between the Accounts and completion. The accounts had shown a profit of £235,284 after provisions in excess of £400,000 had been made; but internal management information packs ("MIPs") showed consistent losses thereafter which in total amounted to £622,120.44 down to the completion date. Furthermore, it was alleged that Centec had been subjected to a prolonged and systematic fraud by a former director, Lucian Davies, in conspiracy with a customer of Centec, Refuels Ltd ("Refuels"). There was also alleged to be an undisclosed liability for electricity charges for the period 1 April 2018 to 28th of February 2019 of £40,928.37, though this did not really figure at trial.

5. Further or alternatively, BIP alleged that misrepresentations for which she is responsible were made to BIP on behalf Mrs Blundell. In particular, it is alleged that on 26 February 2019 her solicitor, Mr Akbar Ali, advised Mr Bennett that Centec was showing a profit of £200,000; that on 27th of February 2019 Mr Donnan, her financial adviser, recklessly represented that Centec's management team were forecasting EBITDA of £250,000 for the 12 months to December 2019, a figure supported by no reasonable grounds; that on 3 March 2019 Mr Ali, and Christopher and Svetlana Blundell (respectively, her son and his wife) represented that the business had continued on a similar basis to that shown within the 2016, 2017 and 2018 accounts, and Mr Ali said that a valuation of £1.7m would be correct. BIP alleged that it relied on those representations when entering into the SPA, but that in truth Centec was operating under a 2019 budget of £29,645 which itself relied on projected turnover from 2 key contracts which were not secure. On that footing, the Claimant claims damages to put it in the position it would be in if the representations had not been made that is, as if the transaction had not taken place.
6. Mrs Blundell denied the breaches of warranty alleged and in particular that there had been any undisclosed material adverse change to the business since the date of the Accounts, and that neither she nor the board of directors knew anything about the alleged Refuels fraud. She denied the alleged misrepresentations and, in any case, that BIP relied on them, because of an alleged synergy between BIP and Centec because of their physical proximity and the fact that they were both chemicals companies. Mrs Blundell denied any liability, and counterclaims for £100,000, the outstanding balance of the purchase price which was due to be paid on or before 5 September 2019.

Background

7. The following background facts do not appear to be in issue. John Blundell ("Mr Blundell") founded a chemical business known as Agrotech International. At some point in the 1990s he sold this business (including its factory) and it eventually became a part of the business of BIP. Mr Blundell used the sale proceeds to set up a new chemicals business in Centec.

8. Centec engaged Howard Worth as its accountants. Michael Donnan, who was a witness at trial, joined Howard Worth as tax partner in October 2007. His audit/accounts partner, Andrew Hague, dealt with compliance work (corporation tax and computation and presentation of the annual accounts for the year ending 31 May), while Mr Donnan provided taxation services. Representatives of Howard Worth would meet Mr Blundell at least a couple of times a year. Mr Donnan retired from Howard Worth on 30th April 2016 but continued to act as a consultant, including for Centec. Howard Worth also dealt with the personal tax affairs of Mr and Mrs Blundell and their son Christopher, and with the affairs of the Blundell family property partnership.

9. In 2015, Centec brought in Graham Williams ("Mr Williams") as managing director, expecting him to replace Mr Blundell. He continued as such following Mr Blundell's death. According to Mr Donnan, that led to tensions within Centec and the Blundell family. After Mr Blundell's death in June 2017, Mrs Blundell was left as sole owner of Centec, but she had never had a substantial involvement in Centec's business, and remain focused on her real love, which is music.

10. In June 2018, David McGreal ("Mr McGreal"), who was managing director of a business called Goodwood Management Services, joined Centec, not as a director or employee, but as a consultant, with a view to his improving its sales and business. From October 2018, Mr McGreal was explicitly interested in acquiring the shares in Centec and he was given an option to purchase which was to expire by the end of January 2019.

On 19 October 2018 Mr McGreal made an 'in principle' offer for Centec of £500,000, which was accepted in principle. Christopher Blundell and his wife Svetlana were both on the board of Centec. Christopher regarded himself as a non-executive director. Svetlana was actually finance director of the company, but doubted she was really qualified for the post. As part of the understanding with Mr McGreal, in October 2018 they agreed to step back from the business so that he would be seen as the face and future of Centec. In November, Mr Bennett was expressing interest in acquiring Centec, but was told that it had been sold to Mr McGreal. By January 2019, however, Mr Donnan sensed that Mr McGreal had got cold feet about the purchase. On 26 February 2019 a meeting took place between Mr Bennett, Christopher Blundell and Akbar Ali at the offices of Glaisyers solicitors (for whom Mr Ali then worked). That was the occasion on which Mr Ali was alleged to have advised Mr Bennett that Centec was showing a profit of £200,000. On 27 February 2019, Christopher Blundell told Mr Donnan that BIP was now a potential purchaser. This was also the date upon which it is alleged that Mr Donnan represented to BIP that Centec's management team were forecasting an EBITDA of £250,000 for the 12 months to December 2019. A further meeting took place on 3 March 2019 in the Bear's Head public house in Sandbach. It was attended by Christopher and Svetlana Blundell, Mr Ali, Mr Donnan, Mr Bennett, and Lee Warburton. Mr Warburton (who gave evidence before me) was a partner in Voisey & Co, Chartered Accountants, and acted for Mr Bennett in connection with the acquisition of Centec, among other things. This was the occasion upon which, it is alleged, Mr Ali, and Christopher and Svetlana Blundell represented that the business had continued on a similar basis to that shown within the 2016, 2017 and 2018 accounts, and Mr Ali told Mr Bennett that a valuation of £1.7m would be correct. On 5th March

2019 BIP entered into the SPA and completed the purchase. BIP's letter of claim followed very rapidly however, on 17 April 2019.

11. In order to understand the way the case is put, it is necessary to look at the terms of the SPA in some detail.

The SPA

12. The relevant terms of the SPA are as follows.

13. By clause 5.1, the Seller warranted to the Buyer that each Warranty was accurate. "Warranties" was defined to mean Fundamental Warranties and General Warranties. By clause 1.1 "General Warranties" were defined to mean the statements in Part 2 of Schedule 3 of the SPA. I do not need to set out the Warranties relating to the accounts down to 31 May 2018 and company records. So far as relevant, therefore, the General Warranties were as follows:

    (1) that since the Accounts Date [Centec's] business had been carried on in the normal and ordinary course without any interruption or change in its manner, nature or scope, and so as to maintain it as a going concern: paragraph 7.1

    (2) that since the Accounts Date, so far as the Seller was aware, there had been no material adverse change in the financial or trading position, or turnover of [Centec] and so far as the Seller was aware there was no fact or circumstance which might give rise to such a change: paragraph 7.2

    (3) that since the Accounts Date, [Centec] had not been adversely affected by the termination, or a change in the terms, of an important agreement: paragraph 7.4.1

    (4) that since the Accounts Date, [Centec] had not been adversely affected by the loss of or material reduction in orders from a customer: paragraph 7.4.2

(5) that since the Accounts Date, [Centec] had not been adversely affected by the loss of or material reduction in any source of supply: paragraph 7.4.3

(6) that since the Accounts Date, [Centec] had not been adversely affected by any abnormal factor not affecting similar businesses to a similar extent: paragraph 7.4.4

(7) that since the Accounts Date, [Centec] had not been adversely affected by and so far as the Seller was aware there was no fact or circumstance which might give rise to any such adverse effect [as mentioned in paragraphs 7.4.1 to 7.4.4]: paragraph 7.4.5

(8) that [Centec] was not, or was not in negotiations to become, bound by or entitled to the benefit or any agreement or arrangement, or subject to any liability, which was of an unusual, onerous or abnormal nature or was not of an entirely arm's length nature: paragraph 14.1.1

14. "Accounts Date" was defined to mean 31 May 2018: clause 1.1 of the SPA.

15. Of the relevant Warranties set out above, Warranties (2) and (7) alone were qualified by reference to the Seller's awareness. Unless otherwise stated, where a warranty was qualified by the expression "so far as the Seller is aware" (or any similar expression), which was the case in warranties (2) and (7), the Seller was deemed to have such knowledge, information and belief as she would have obtained had she made enquiries into the subject matter of that warranty with the board of directors of [Centec]: clause 5.5. The board of directors of Centec consisted of Christopher Blundell, and Mrs Blundell, Svetlana Blundell, Lucian Davies and Graham Williams down to the date of the SPA.

16. The General Warranties were subject to and qualified by any matter which was Disclosed as well as by the limitations in Schedule 4 of the SPA: clause 5.2.

17. “Disclosed” was defined to mean “fairly disclosed in the Disclosure Letter or contained within the Disclosure Documents with sufficient clarity to enable the Buyer to assess with reasonable accuracy the nature of the matter disclosed”. The Disclosure Letter was the letter of the same date as the agreement from the Seller to the Buyer containing disclosures against the Warranties and including the Disclosure Documents, which were the Agreed Form Bundle of documents (contained in a cloud-shared drive) listed in the schedule to the Disclosure Letter.

18. The potentially relevant limitations in Schedule 4 were as follows.

    (1) The total liability of the Seller for all claims was not to exceed 75% of the total consideration actually received by the Seller: paragraph 1.2

    (2) importantly, “nothing in this Schedule 4 excludes or limits the liability of the Seller to the extent that a claim arises by reason of any fraud or fraudulent misrepresentation by or on behalf of the Seller”: paragraph 3

    (3) the Seller was not liable for a claim to the extent that the relevant liability would not have arisen but for an act or omission by the buyer or any of its directors, employees or agents at any time: paragraph 4.2.2.

19. The Claimant’s pleaded case was unfortunately not very explicit about which of the matters of which it complained were said to be breaches of which particular warranties. Ignoring the breaches originally alleged in respect of the Accounts, the relevant breaches had to do with the allegedly undisclosed post-Accounts losses of Centec (“the losses issue”); the undisclosed fraud alleged against Lucian Davies in conspiracy with Refuels Ltd (“the Refuels issue”); and undisclosed liability for electricity (“the electricity issue”). However, counsel for the Claimant opened the case to me on the footing that the core of the warranty case was the adverse change warranty; and since the expert witnesses had separately concluded, and had agreed, that there had been a

material change since the Accounts Date, the question was whether Mrs Blundell had the relevant awareness, and whether Disclosure had been adequate. In her opening remarks, leading counsel for the Defendant accepted that there had been a material change.

20. Counsel for the Claimant explained that the secondary part of the Claimant's case related to the Refuels issue, the non-disclosure of which amounted to a breach of the onerous agreements warranty. The electricity issue was not pursued.

The witnesses

21. I turn, therefore, to the factual evidence. Events were for the most part fairly fully documented by contemporaneous material, though there were significant gaps as well as issues over the accuracy of some documents.

22. I heard factual evidence for the Claimant from Mr Bennett, its director, and Mr Warburton, a chartered accountant. They gave evidence in a way which appeared straightforward and honest. For the Defendant, I heard evidence from Mrs Blundell, Mr Ali (remotely), Christopher Blundell, Glenn Brown (a CIMA qualified accountant and a former consultant with Centec, who also gave his evidence remotely), Mr Donnan, and Svetlana Blundell. Christopher Blundell gave his evidence in a way which appeared rather detached and vague, which led me to exercise care in considering its reliability on disputed points. Svetlana's evidence by contrast, though mostly to the same effect, was given in a quite fiercely partisan manner. I refer to Mr Ali later and the other factual witnesses for the Defendant later.

The course of events

23. I turn to the facts in more detail at this point, therefore.

24. On 31 August 2018 Mr Williams sent Mr Bennett an email asking for a chat about possible opportunities between Centec and BIP, and they agreed to meet on 3

September 2018. He had met Mr Williams at a meeting in Middlewich about 18 months before the SPA with John Blundell, and at his suggestion. This email had come out of the blue, however and I accept that Mr Bennett did not know what to expect.

25. At the meeting on 3 September 2018, as I accept, Mr Williams introduced Mr Bennett to Mr McGreal and explained that Mr McGreal had been brought in as a contractor to increase the commercial activities of Centec, and that the management thought the best option for the shareholders was to put the business up for sale. Mr Williams asked if Mr Bennett would be interested. Mr Bennett said he was very interested but was not prepared to pay the sort of 'silly numbers' that had been mentioned in a conversation with Mr Blundell several years earlier. He said he wanted to see the financial figures, but had a range in mind that might be acceptable and would be interested in exploring matters further if they were not too far apart. Mr Williams mentioned a figure of about £1-1.5 million, which Mr Bennett had since forgotten. Mr Bennett had been keeping an eye on Centec's filed accounts from time to time, which showed that the business had a healthy balance sheet and had generally been profitable. Mr Williams said that he would speak to the Blundell family and get back to him. Mr Bennett heard nothing for 3 or 4 weeks and asked Mr Williams what was happening. He said that he would come back to him shortly.

26. In the meantime, by an email dated 11 October 2018 Mr Brown told Mr Williams, Svetlana, Mr Davies and Mr McGreal that the latest forecast EBITDA for the year 2018/2019 based on the newly adjusted budget was (only) £25,873.14 for the period ending 31 May 2019.

27. On 18 October 2018 Mr Williams emailed Christopher and Svetlana, with copies to Mr McGreal, Mr Brown and Mr Davies referring to a 'difficult' conversation the previous day with Christopher, and summarising the key points in the following way: Centec

was going to defer payment of rent; an urgent review of fixed cost savings needed to be undertaken; he had asked Svetlana to carry out an immediate cash flow forecast for the rest of the financial year to 31 May 2019.

28. On 19 October 2018 Mr McGreal, on behalf of his company, confirmed an oral offer to Christopher Blundell of £500,000 for the entire share capital of Centec. I accept that Christopher at this stage thought the offer was from Mr McGreal alone, whereas it turned out later that he was in effect fronting the entire management team of Centec. Mr Williams had approached Centec's bankers for finance, as appears from their request for information in an email dated 25 October 2018. It is not clear whether this was for finance for Centec, or for the purchase of Centec, however.

29. On 26 October 2018 Christopher and Svetlana Blundell met Mr McGreal and Mr Donnan to discuss Mr McGreal's offer. It appears from Mr Donnan's notes dated 29 October 2018 that Mr McGreal explained the business was losing money and he expected it to run out of cash by the end of January or early February 2019. He laid out their options, including a sale to him. Christopher and Svetlana seem to have given this some credence since they agreed to progress a call option as a matter of urgency. It was at about this time, October 2018 that they stood back from their roles on the board and in the business to allow Mr McGreal space to operate, and leaving the management team in, as they said, sole control. I return later to the question what they knew of the affairs of the company thereafter, which was a matter of dispute.

30. On 15 November 2018 Mr Williams contacted Mr Bennett again suggesting a further meeting with Mr McGreal. He promised it would be interesting. I accept that Mr Bennett expected the meeting would involve making progress from the previous discussion. In his oral evidence, he explained that he was very interested in buying the company, but only subject to the financial analysis. The main reason he was keen was

because it was a similar business, but its core strengths lay in other fields from those of BIP, for example, its fine chemicals division, and recycling fuels receiving mis-fuels in bulk. The aspect he was most keen on was fine chemicals. The core business of BIP was just recycling solvents. A secondary reason was that Centec was next door, which made things easier. In fact, after completion he connected the two premises with a walkway. I accept his evidence on this, in particular his desire for financial information at this stage. Such information is usually required; his wish for it is amply borne out by latter contemporaneous documentation, even though he ultimately did not get much; and although he was keen to buy, the object was after all to make money. Mr Bennett's evidence carried conviction.

31. At the meeting however (which may have taken place the following day), Mr Bennett's evidence (which I accept) was that Mr Williams told him that Mr McGreal had already bought Centec, and that the family were not interested in pursuing a sale to Mr Bennett. Not unnaturally, Mr Bennett was very annoyed. On 19 November 2018 Mr Williams wrote to Mr Bennett, "Let's keep talking?" Later that day, however, Mr Bennett said he had found the meeting a little bizarre. He said he did not believe Mr Williams' explanation that Mr McGreal had bought Centec without his knowledge and while he, Mr Williams, the managing director, was on holiday. Mr Bennett felt he had been treated dishonestly by being led to believe a deal could be made with him, when instead they were just testing his appetite. His disobliging remarks in that email about Centec's performance and contracts in his email were overstated out of irritation, and did not reflect a deep independent understanding of the company's affairs, only what was in the public domain, and he had heard from employee gossip. I accept this. Mr Bennett demonstrated his continuing indignation and irritation in his oral evidence.

32. Mr Bennett also contacted Christopher Blundell directly by email on 19th November 2018. He asked in effect if it was true that Centec had been sold to Mr McGreal and whether Mr Williams had told Christopher of his own interest in the purchase. Mr Blundell immediately confirmed that Centec had indeed been sold, subject to contract. Since it was only subject to contract, Mr Bennett reaffirmed his own interest in a purchase. He said he suspected that Christopher Blundell had been told that a lot of money needed to be spent which actually did not, and made a number of other points. In oral evidence he accepted he was 'mudslinging', out of the same irritation and, I think, in the hope of interposing himself in the deal, but had genuinely held the suspicions to which he referred. Christopher Blundell thanked him again for his interest, said that the deal was done and the details were private, and that he thought the company had good future prospects, and that there had been no conspiracy around Mr Williams and that 'the family' had been involved on a day-to-day basis.

33. As to that, Mrs Blundell's evidence was that she left all the negotiations for the sale of the business to Christopher and Svetlana on her behalf, and they would keep her updated as necessary. She herself was really not interested, and any proceeds would, she supposed, go into a trust anyway. She had no discussions with anyone else about the state of the company. I accept her evidence about this. Christopher's reference to the family's involvement was to this arrangement.

34. Mr Bennett did not know what figure the management team had agreed to pay, but even so he replied the same day with an offer to better any deal on the table by 20% and buy the freehold from which Centec operated. That might rather have suggested that money was no object to him, but in his oral evidence he explained that there had been no point in merely matching the management offer, whatever it was, and he needed to pique the family's interest. He was not exactly bidding blindly, either, because he thought that

management would have a good idea of the value of the company when they made their offer; but in any case, this was only an opening gambit. I accept this explanation: it is commercially and (having seen him in the witness box) personally plausible. It did not work, however: Christopher Blundell again rejected his advances.

35. Among the management team, however, there were concerns about the company's position. On 12 December 2018, Mr McGreal emailed Mr Williams and Mr Brown about the loss of 2 members of staff having left them vulnerable, and how Mr Davies had been the only credible alternative and was potentially a great asset, despite Mr Williams' views. Svetlana was not party to this email. But she and Christopher were aware by at least 17 January 2019 that Mr McGreal wanted the company to have a rent holiday for its premises; and his email to them of that date painted a dark picture. He suggested they did not fully understand Centec's actual situation, and the risk he would be taking on as purchaser. He said Mr Brown's cash forecasts only gave Centec enough funds to pay its bills until the end of February and then it might run out. Whether or not the family wholly believed Mr McGreal, whose interests as purchaser lay in talking the company down, they appear to have had no better information.

36. Mr Bennett contacted Christopher Blundell again on 22 January 2019 because he had heard on the grapevine (employee gossip again) that the management purchase had not yet completed. Mr Blundell responded that the deal was solid and due to be signed off soon, and declined the offer of a meeting.

37. On 23 January 2019 Mr McGreal emailed Mr Brown with a copy to Mr Williams with a new cash flow forecast. In a very few days the position appeared to have worsened. The core business only made money when it sold fine chemicals as well, but at the current forecast volume the core business was losing money, and the fine chemical business was too small to survive independently. Overall, the business was heading for

bankruptcy and any sensible board should begin discussing when to call in the receiver. This was a business that should be paying somebody to take it on, not the other way round. He concluded the business was not worth anywhere near £500,000 and that although it might be possible to restructure a deal, it would need common sense on both sides, which he said was sadly lacking in the seller: this was a reference to the Blundell family, and in particular to Mrs Blundell, as she accepted in her evidence. He concluded he should walk away from the purchase, and asked for comments. Mr Williams responded that it made for grim reading, but that they needed fully to understand what failed earnings had caused a £1.1 million shortfall in revenue. He agreed that it was impossible to have a sensible discussion with the Blundells.

38. That discussion occurred on 30 January 2019, as appears in particular from Mr McGreal's email of that date to Christopher and Svetlana thanking them. He confirmed that he was withdrawing his offer to buy Centec for £500,000 by letting the call option run out on 2 February 2019. Instead, he offered only £200,000, and said that if it was not acceptable he would stop acting as a consultant to Centec too.

39. A negotiation ensued. The following day, 31 January 2019, Mr McGreal wrote to them again with an offer effectively of £250,000 by staged payments, of which £100,000 would be payable on the first anniversary if the business achieved its current EBITDA target of £243,700; with an additional £50,000 should the company be sold within a specified period.

40. This appears to be the first reference to this target. It is very different from the figure of £25,873.14 mentioned earlier. It is evidently for the year to December 2019. Mr Flint, the Defendant's expert, says it is inconsistent with the Sage data as at 5 March 2019 and the MIPs. Even given Mr McGreal's interest in talking down the company's value, it is impossible to draw any inference why it is inconsistent, if it is; and of course

it is important to note that it is the figure which was given by Mr McGreal to Christopher and Svetlana, who are likely, absent any other figure, to have believed it, albeit perhaps with some caution. But it is apparent from Mr Flint's schedule B8 that the figure varied widely from month to month.

41. Christopher and Mr McGreal spoke that evening and agreed an extension of the time for the extra £50,000. On that basis, Christopher (and therefore Mrs Blundell) was prepared to proceed. On 1 February 2019 Mr McGreal therefore emailed Christopher, Mr Donovan, Mr Ali and a colleague, with a copy to Svetlana, setting out the terms agreed, and pressing for an early completion. This email therefore informed Mr Ali, if he had not previously known, of the current EBITDA target, as well as what the management team was prepared to pay.

42. It is worth noting that after the SPA had completed, in an email of 20 March 2019, Mr Brown sent Mr Bennett a copy of the original budget that had been issued, he said, to all stakeholders including Mr Ali as at 1 January 2019, indicating a total annual loss of approximately £36,000. He said it was amended slightly in January due to an increase in volume inputs, to reflect a loss of approximately £30,000 going forward. In that email he also supplied an updated budget and profit and loss report as at 1 February 2019. The annual EBITDA forecast was now at £-203,000, down from a positive £146,000; revenue had been reduced by £1/2 million, downgrading the gross profit forecast by £400,000; the budget forecast was now £-399,000; and revenue had to be adjusted because of the loss of an order from Econic; but those more recent figures will not have been available to the family in February.

43. On 22 February 2019 the bank wrote back to Mr Brown to decline an application by Centec for an invoice finance funding facility. The grounds they gave were concern about the financial performance of the business and its ability to service the ongoing

funding. Christopher Blundell's evidence was that he had not known about this: this is surprising, given Mr McGreal's agenda, but I am prepared to accept it, and little turns on it in any event.

44. Against the background of Mr McGreal's severely reduced offer, and his comments about the company's affairs, Christopher Blundell had a change of heart. He contacted Mr Bennett on 25 February 2019, to ask if he would meet him and Svetlana for a cup of tea. Mr Bennett had heard from an employee that this might happen. They met at the Bear's Paw, a local pub, that very day. He does not remember the Blundells' explaining their sudden interest in discussing Centec with him, and there was no suggestion that they did. In fact, he seems not to have been very curious. He again confirmed his interest in buying the company. Mr Blundell said that he would get back to him: the sale of the management team was still progressing and was scheduled to complete within around 10 days, and that he did not want to lose that deal, so he wanted to move quickly with Mr Bennett.

<u>The meeting on 26 February 2019</u>

45. Accordingly, at 3 PM on 26 February 2019 a meeting took place between Mr Bennett, Christopher and his lawyers at Glaisyers' offices, at Mr Blundell's request. This was the meeting at which the first representation was allegedly made, and accounts of it differ.

46. Mr Bennett spent some time explaining to Mr Ali why he was the best person to purchase the company. According to Mr Bennett, the idea was that if he should make a formal offer, he would be stepping into the existing management deal structure. Importantly, given the Defendant's case, Mr Bennett asked for all the financial information, particularly the management financial information for the last 3 years.

47. On Mr Bennett's evidence, Mr Ali said at the meeting that the management were potentially predicting a profit of £200,000 for the year 2019, but Mr Bennett wanted to verify this and have a proper look at finances before committing himself. Mr Ali said he might have access to this information and would get back to him, but agreed to let him have a copy of the due diligence that had already been done by the management team. Mr Ali recommended a Tom Ellis as a lawyer whom Mr Bennett might instruct.

48. Mr Ali's evidence, however, was that he did not remember saying anything like this, nor whether he had any made any note of the meeting. It seems he did not, because none was produced, and it appears from a letter dated 11 June 2021 from Glaisyers, his former employers, that they had checked and found none on file. Mr Bennett's recollection, by contrast, was unequivocal that Mr Ali had mentioned that Centec's management were potentially predicting a profit of £250,000 for the year 2019, but he wanted to verify this and have a look at Centec's finances before committing to any figures. The reference to £250,000 appears to be a mistake for £200,000, however. Mr Bennett's email to Mr Ali that very evening emphasised he was desperate to have the last 3 years' financial management information so that his accountant could appraise the data, and went on to say that "based on the discussion today in your office where it was mentioned the business is potentially showing £200k profit, I have no issue with a multiple of 6." That is the best evidence of what Mr Ali had actually said and, particularly given that no contemporaneous note from Mr Ali is available, I accept that he did so.

49. I do not accept Mr Ali's suggestion in cross-examination that the email was just wrong. He did not write back and say that Mr Bennett was under a misapprehension. He offered no good explanation for this omission. His email in response on 27th of

February 2019 did not correct the reference to £200,000; and his email at 05:35 the following day actually referred to it.

50. In cross-examination Mr Ali said that anyway he had been clear in the meeting that he was not offering Mr Bennett any advice. Of course he was not: Mr Bennett and BIP were not his clients. But plainly he was offering them information, and doing so with a view to promoting a deal, at a price favourable to his clients. Otherwise he would not have said it.

51. Christopher Blundell's evidence was that they told Mr Bennett they did not have up-to-date information any more but this did not put him off. I accept this, as far as it goes; but I also accept Mr Bennett's evidence that they said they would try and get some: otherwise, Mr Bennett's email would hardly have emphasised the importance to him of obtaining the last 3 years' financial management information so that his accountant could appraise the data. In the event, he never got it.

52. Christopher Blundell's evidence was that after the meeting he told Mr Donnan to give Mr Warburton, Mr Bennett's accountant, as accurate a picture of Centec as possible, without alerting Mr McGreal. I accept this. However, I do not accept his evidence that this was in accordance with Mr Bennett's preference alone. Certainly, Mr Bennett did not want to get into a bidding war with Mr McGreal, but equally Christopher did not want to prejudice the deal with Mr McGreal by letting on that Mr Bennett was interested: he was less interested in a bidding war, than in keeping Mr McGreal on board.

53. For his part, Mr Bennett instructed Mr Ellis and Mr Warburton to go through all the information they could lay their hands on with a view to his making a formal offer for Centec. The same day he emailed Mr Ali reinforcing his need for financial information.

27th of February 2019

54. Mr Ali replied early in the morning of 27 February 2019, saying that Svetlana was getting the financial documents, which would be sent across, and confirming that Mr McGreal had stated that the projected EBITDA for 2019 was £250,000, though this was only a projection.

55. Mr Bennett had also had a telephone call with Mr Ali in which the latter had said that the Blundells had concerns about releasing the accounting information, Mr Ali wanted a reassurance in respect of confidentiality. Mr Bennett asked Mr Warburton to deal with this. He refers to this in his email timed at 09.25 that day.

56. At 9:30 AM, also on 27th of February 2019, Mr Williams emailed Mr Ali with the financial information Mr Ali had requested, including in particular version 2 of the total budget for 2019. Mr Williams had requested it from Mr Brown, an employee of Centec. It contemplated, not a profit of £200,000, but a loss of £35,345.23. This information was not passed to Mr Bennett or Mr Warburton. I can only assume this was deliberate on the part of the family or its team.

57. At 10.01 the same day Mr Warburton emailed Christopher Blundell, with a copy to Mr Bennett with a confidentiality undertaking.

58. At 11.10 that morning Svetlana emailed Mr Donnan, with a copy to Christopher Blundell and to Mr Ali, certain accounts, but nothing up-to-date, beyond the cash in bank accounts in January 2019. She expressed some scepticism about Mr McGreal's pessimism.

59. At 14.17 the same day, Mr Bennett asked Mr Warburton to obtain up-to-date management information because he was aware from Mr Ali, and also through gossip, that Centec had lost a big account (Essar) and he wanted to understand the impact, though he did not think it would be too great. He left it to Mr Warburton to chase up

the financial information. Mr Warburton contacted Christopher Blundell who referred matters to Mr Donnan.

60. At 18.07 the same day Mr Donnan emailed Mr Warburton, with copies to Christopher and Svetlana Blundell, with the statutory accounts which Mr Bennett already had, or had access to. He did not include or mention version 2 of the total budget for 2019. He made a number of points.

61. In particular Mr Donnan said,

> "As the Blundell family has stepped back from the business during the current sale process, we do not have more recent financial information but our understanding is the management are forecasting EBITDA of £250K for the 12 months to December 2019".

62. Mr Donnan said in cross-examination that the points he made in that email about the stock write-off and the exceptional costs had come from Svetlana, who had sent him some information by email earlier that day. He did not remember if it had attachments (such as the budget). Unfortunately, that email from Svetlana does not appear to have been disclosed. Whether it included the budget or not does not matter much: either she chose not to send it for disclosure to Mr Bennett, or, acting on instructions, Mr Donnan did not pass it on. I reject as implausible that Mr Donnan will have acted on his own initiative in relation to this. He gave evidence, which I accept, that Christopher had scoped out what he wanted him to provide to Mr Warburton, and that Christopher's brief was not quite to give all the information that one could, but to provide some assistance by sharing information and explaining as best he could. Christopher's own evidence around this was neither clear nor helpful, and gave the impression of evasiveness. It is hard to resist the conclusion that some elements of the Blundell family were using their distance from day-to-day operations, and a certain squeamishness around Mr McGreal, to suggest that they did not have information which in fact they

did. Mr Donnan appeared to be uncomfortably conscious of this possibility because he suggested that when, in that email, he said 'we' do not have more recent financial information he was referring to himself and his firm, not to the Blundell family; and that when he referred to 'our understanding' he was again referring to his firm. That might easily be regarded as casuistry. At any rate I do not accept it. Plainly he was referring to the family and his firm.

63. Mr Donnan's evidence was that the figure of £250,000 had been communicated to Christopher, Mr Ali and himself by Mr McGreal in an email. I take it to be the email of 31 January 2019 to which I have already referred, or a forwarded copy of it. He accepted Mr McGreal had referred to it as a target not, as in his own email, as a forecast. In attempting to explain this apparent discrepancy, he suggested that whether one described EBITDA as a budget, forecast, or target, it all came to much the same thing in a company of this size, and that there was no significance in his referring to it in one way rather than another. I am prepared to accept the truth of that, but it seems to me that calling it a forecast was intended by the family or its advisers to make it look more reliable than a mere target.

64. Mr Donnan said that he had not known that the forecast EBITDA had fallen to £-203,000 by 1st of February 2019. I accept that, on the basis that it appears those figures were not ready at this point in time.

65. He suggested that at any rate, where he had presented the figure of £250,000, he had made it clear that it was to be treated with scepticism. On the contrary, I find it was plainly intended to be relied upon.

66. Mr Warburton's evidence was that he thought that Mr Donnan was trying to be helpful. However, he was disappointed that the latest information provided only ran to May 2018, though he had no sense that anyone was trying to impede the flow of information.

Ordinarily, he would expect to base any deal on the latest financial information, and that was what he wanted. I accept that.

67. Mr Warburton responded to Mr Donnan, with a copy to Christopher and Svetlana Blundell, asking for further background. As Mr Bennett accepted in oral evidence, it was impossible to undertake full due diligence, which would ordinarily take 6 to 9 months. It was not a situation of his own making, but he had asked Mr Warburton to get as much financial information as he could. The time pressure came because of the proposed completion date for the management team's purchase, not from himself. I accept this.

68. One of Mr Warburton's questions in this email was therefore in relation to management information. He wanted to know if Mr Donnan had access to current management information, and whether he had the management information for May 2018 and May 2017 as part of his year-end procedures and reconciliation in year-end accounts to management information.

69. On 28th February 2019 Christopher Blundell replied to Mr Warburton's email to say that he was no longer a member of the executive team of Centec, and that, as he had mentioned to Mr Bennett, he was confident that Centec's current order book to which the forecast relates would increase substantially were Centec to have a new and proactive controlling ownership, because it had a physical capacity which was far from being fulfilled by its present workload. The forecast to which he referred was the forecast that EBITDA would be £250K for the 12 months to December 2019.

70. Mr Donnan responded to Mr Warburton later that morning, again copying in Christopher and Svetlana Blundell, explaining that he had ceased to act for Centec or the Blundell family in September 2018, so Howard Worth were no longer involved, and Centec had new accountants. Some of the information would be in the records of

Howard Worth and, while he could ask for it, there was no guarantee that it would be provided in the next week. There was more of a problem with information in the hands of Centec management, because it was essential that they should not be alerted to Mr Bennett's interest.

71. Mr Warburton reported back to Mr Bennett on 27th and 28 February 2019, and explained that he was having difficulties obtaining some of the information he had asked for, in particular, more recent financial information.

72. On 1 March 2019, Mr Ellis reported to Mr Bennett that Mr Ali had indicated to him that "a million quid will buy it". By this point Mr Bennett had seen the financial statements for the year ended 31 May 2018 showing a profit of around £250,000. He had already been told that EBITDA the following year was at about the same figure and I accept that he was happy to proceed with an offer of £1 million on that basis. Mr Bennett knew that Centec had reported a loss in 2017, but that seemed to be because of exceptional items. He privately estimated that the management team must have been offering about £750,000-£800,000. Mr Warburton felt that he had taken matters as far as he could. Mr Warburton's oral evidence was that ultimately the decision they made was informed by their having been told by Mr Donnan and Mr Ali that management had prepared information forecasting a level profit of approximately £250,000. Mr Bennett and Mr Warburton had no information to the contrary. I accept this evidence.

73. In the light of this understanding, Mr Bennett instructed Mr Warburton to make an offer of £1.05 million, and in the afternoon of 1 March 2019 Mr Warburton did so by email. It was suggested to him that the reason this offer was made on the basis that the net assets of the company on acquisition were not less that the offer price was because it was the net assets of the company which mattered, rather than its profitability. Mr Bennett was emphatic in denying this, and stated that he had already applied a multiple

of 6 to what he had been told the company was making, approximately. I accept this evidence.

74. Earlier that evening Mr Ali wrote to Mr Warburton, copying in Mr Bennett. He acknowledged the offer and said that he had discussed it with Christopher Blundell and Mr Donnan. He said he was planning to meet the family on Sunday in order to give the offer full consideration and to bring Mrs Blundell, the actual seller, up to speed. He suggested the aim should be to complete at 3 PM on 5 March 2019, having told the management buyer the day before that Mrs Blundell would not be proceeding with him, subject to receipt of cleared funds of 10% in his client account. Mr Bennett responded immediately copying in everyone, expressing his concern about telling the management buyer before the deal with him was signed, lest they have an opportunity to interfere in some underhand way with sensitive information pertinent to the business. Mr Ali said they could discuss it on Sunday. Mr Warburton pointed out that Mr Bennett had already paid funds over. In cross-examination he accepted that it was unusual to put in funds before a deal had even been struck, though in his experience it happened from time to time.

75. On 2 March 2019 Christopher Blundell emailed Mr Bennett to propose arrangements for a meeting on Sunday at the Bears Head (not the Bear's Paw).

<u>3 March 2019</u>

76. On 3 March 2019 Mr Bennett therefore met Mr Ali, the Blundells, and Mr Warburton at the Bear's Head. This was the meeting at which the Claimant alleges that Mr Ali, and Christopher and Svetlana Blundell misrepresented that the business had continued on a similar basis to that shown within the 2016, 2017 and 2018 accounts, and Mr Ali said that a valuation of £1.7m would be correct.

77. Mr Bennett's own evidence supported this. He was emphatic, and I accept, that he remembered the meeting clearly, because it was one of the biggest things he had ever done in his life. His evidence was not substantially shaken in cross-examination. Mr Warburton's evidence supported his account. Mr Warburton prepared a note of the meeting, which was in evidence. In cross-examination he said he dictated it when he got home that afternoon. I accept that: there was no evidence to the contrary and the contents of the note did not suggest otherwise. He had not 'sat there taking notes' during the meeting; but he had a notepad. He did not accept that this made the note unreliable. I agree. No one else prepared a note or, if they did, it was not in evidence. Mr Warburton's note is in my judgment the best contemporaneous documentary evidence of what took place.

78. The note states, among other things, "[Mr Ali] suggested this was an understatement of the value of the company given the net asset position and the profitability of the company, especially with the cost savings and synergy benefits and using suitable multipliers of the profits that the valuation should be more. [Mr Warburton] asked how much more and [Mr Ali] confirmed more in the order of £1,700,000." Christopher Blundell's evidence about this was that Mr Warburton asked what figure the Blundells were thinking of, and Mr Ali responded that they were hoping for £1.7m., a figure which they had discussed before the meeting as an opening offer. It was not a valuation. Svetlana's evidence was to the same effect. Mr Donnan was not there. Mr Ali's evidence was that it was 'a complete fabrication' to say that he had said that the value of the company was more in the order of £1.7m. He did not remember saying that. It had not been for him to talk about the company finances and he would not have done so, and everything that he did say would have been heavily caveated in any event.

79. Although a great deal of time was spent attempting to undermine the accuracy of the note, little headway was made. I do not accept Mr Ali's suggestion that it was a complete fabrication to say that he had said that the value of the company was more in the order of £1.7m. Looking at the documents as a whole, I formed the clear impression that Mr Ali regarded himself as more of a dealmaker than as a simple draftsman of contractual documentation. In oral evidence he failed to distinguish consistently between his not remembering having said something, and its being a fabrication to say that he had. It is actually just the thing he is likely to have said. In observing him give evidence, I did not feel wholly confident that the evidence he gave reflected a disinterested intention to assist the Court. Even if I were wrong about that, the fact is that he took no notes or, if he did, they were not available in evidence.

80. In my judgment, Mr Warburton's note is broadly accurate. In particular, it is accurate in saying that he had said that the value of the company was more in the order of £1.7m. To the extent that the Defendant witness adduced evidence to the contrary, I reject it. However, I entirely accept his evidence, and that of the Blundells, to the effect that Mr Ali was not proffering anything which purported to be an actual valuation, whether by himself or anybody else, formal or informal. The figure had come from a discussion about their opening position at a meeting immediately beforehand. In my judgment, the words recorded in Mr Warburton's note, and which Mr Bennett recalls, do not suggest otherwise.

81. Mr Warburton was asked why the note recorded Mr Bennett as saying nothing, and responded that a lot of the conversation had actually between Mr Ali and himself. It was suggested that it had not recorded Mr Bennett saying how much he wanted the company, but Mr Warburton thought that was too obvious to note. It was put to him that there was nothing in the note about their reaction to the figure of £1.7 million. Mr

Warburton fairly responded that their response had been to increase BIP's offer. It was put to him that it did not record any proposal for an upfront price of £1.4m. and a delayed payment of £400,000, but Mr Warburton said he did not remember that being discussed at all.

82. That the note is broadly accurate does not mean it is wholly accurate. For example, it records that Mr Bennett understood that his offer of £1.05m had been accepted providing a 10% deposit was paid. But his offer had not been accepted; and if it had, he would not uncomplainingly have entered into further negotiation, as the note records he did. Mr Bennett accepted that it was not accurate in that respect. Mr Warburton agreed. Again, it was put to Mr Bennett that the note did not record a discussion which had taken place at the meeting about a different deferred consideration structure, with £1m upfront, and £400,000 deferred. Mr Bennett accepted he probably had offered that and, implicitly, that the note did not record it. In fact, where Mr Bennett accepted the note was inaccurate, he said so; and his evidence was plausible. Where he did not, his evidence is also plausible; and the fact that he made these distinctions without difficulty in cross-examination tends to support his account.

83. The note records that Mr Warburton asked if Mr Bennett was getting the same deal as the management team, that Mr Ali refused to answer. That is plausible and consistent, Christopher Blundell did not dispute it, and I accept that the note is accurate on this point too.

84. Mr Bennett's evidence was that he was concerned about the lack of financial information particularly recent information, but relied on the willingness of the Blundells to give warranties. That is consistent with his stance throughout, as recorded by contemporaneous documentation, and I accept it.

Completion

85. After the meeting Mr Ali circulated an email setting out the agreed heads of terms and set out a timetable for completion on 5 March 2019. On 5 March 2019 the SPA was signed and the deal completed at a meeting. This was the first and only time Mr Bennett met Mrs Blundell. As she said in her evidence, she had given carte blanche to Christopher and Svetlana to deal with the matter. She had not given any thought to making enquiries about the business of Centec before giving the warranties which she gave. She thought all that would be done by the people who were advising her. I accept that.

The warranty claims

86. The case was opened before me on the footing that the relevant warranties were those at paragraphs 7.1, 7.2 and 14. It is convenient to deal with paragraph 14 first, the paragraph 7.1 and finally 7.2.

Paragraph 14.1.1

87. Paragraph 14.1.1 was the warranty that Centec was not, or was not in negotiations to become, bound by or entitled to the benefit or any agreement or arrangement, or subject to any liability, of an unusual, onerous or abnormal nature or not of an entirely arm's length nature. Here, reliance is more distinctly placed upon the fraudulent and disadvantageous quality of the contract with Refuels. This was a secondary part of the Claimant's case. The Claimant's pleaded case was that Centec had been subject to a prolonged and systematic fraud perpetrated by Mr Davies, a director, in conspiracy with Refuels. Refuels were in the practice of collecting mixed and contaminated fuel and sold about 2 tankers' worth a week to Centec for about £27,000 each, although both Mr Davies and Refuels knew the contents were worth no more than £20,000: Mr Davies

and Refuels had an agreement to split the excess. The effect was that Centec's margin was only 6p per litre whereas it should have been about 20p per litre.

88. The Defendant's pleaded case was that if there had been such a conspiracy its effect would have been to artificially reduce profits, so that Centec was worth more than its records might suggest; any claim by Centec against Refuels was an asset not a liability; and the Claimant would have to repay any recovery over to the Defendant under the SPA. In any case, any liability was excluded by paragraphs of 4.2.2 and/or 4.2.3 of Schedule 4 of the SPA. Moreover, to the extent that the contract was fraudulent, Centec was not bound by it, so it fell entirely outside the scope of the warranty.

89. The Claimant suggested that if the company was not bound, there must therefore be a breach of the warranties at paragraph 14.2.1 and 14.2.5. Paragraph 14.2.1 was a warranty that neither Centec nor the Seller had any knowledge of the invalidity of or a ground for termination, avoidance or repudiation of any agreement by which Centec was bound to the benefit of which it was entitled. Paragraph 14.2.5 was a warranty that there was no dispute or claim relating to any such agreement and, so far as the Seller was aware, there was no fact or circumstance which might give rise to any such dispute or claim.

90. The Claimant's pleaded case, and Mr Bennett's evidence, was that Mr Bennett found out about the alleged fraud when he had a telephone call out of the blue from Mr Cross, CEO of City Fuel Services Ltd. They arranged to meet on 20 March 2019. Mr Cross provided documents and explained that they related to Prosolve Distillates Ltd, a company of Mr Davies' wife, and were copies of daily internal cash flow, payment and bank control spreadsheets for Refuels which Mr Cross had been given by a former employee of that company. The documents showed that Prosolve was receiving a margin on dealing between the two companies created by Centec's overpaying for

mixed fuel and being underpaid for storage costs. Furthermore, Refuels was using Centec's waste management licence as if it were its own. Mr Bennett interviewed Mr Davies, who denied nothing and admitted that Prosolve was the vehicle for a secret profit share, and that he knew that it was a fraud. Mr Bennett suspended Mr Davies immediately and told him to leave, which he did. Mr Bennett then had a meeting with Mr Taylor, the managing director of Refuels who was accompanied by its commercial director Lee Burke. He presented them with the information Mr Cross had given him. They were shocked and unable to explain, and ended the meeting. Mr Bennett cancelled the contract with Refuels. Refuels instructed solicitors who initially threatened an injunction and to sue for unpaid invoices of over £130,000, but nothing further was heard. Mr Bennett did not cause Centec to pursue the matter for fear of irrecoverable and substantial legal costs. I have seen the correspondence.

91. Mr Bennett's witness statement gave substantial detail. I do not need to go into it in the same detail. He was not cross-examined about it, beyond suggesting to him that it was mere suspicion, a suggestion which he denied. Mr Warburton gave supportive evidence about his investigations into Prosolve, and his estimation that it benefited to the tune of about £570,000. There was very little cross-examination about it, and he confirmed his evidence. Mrs Blundell said she knew nothing of it, and I accept that she did not. Christopher likewise gave evidence that he had no knowledge of it, and it was not suggested that he did. He suggests that the claim against Refuels was never issued because of poor prospects of success, but was unable to amplify. Mr Brown's evidence was that he was aware that while the Refuels contract involved a large volume to be processed, it had a very small profit margin, but that he was told that Centec was locked into standard rates, and there was nothing to indicate to him that there was a fraud. His cross-examination added little to this. Svetlana Blundell's evidence was that she was

not aware of any fraud, and did not think there was any, still less that there was any need to terminate the contract with Refuels. She was not cross-examined about this. Mr Hayman, the Claimant's expert witness, expressed the view that the arrangement was of an onerous and abnormal nature, and not in the normal and ordinary course of business. The experts were not asked to consider whether a fraud had actually occurred. Not unnaturally, there was no evidence from Mr Davies, Mr Taylor or Mr Burke.

92. I am satisfied for the purposes of the present case that the Claimant has established, on the balance of probability, that Refuels did defraud Centec in conspiracy with Mr Davies. Mr Bennett's evidence of this is detailed, plausible and supported by documentation. There has been no serious challenge to his evidence on it, and it was laid out very fully in statements of case. None of the Defendant's witnesses were in a position to give evidence to the contrary. I can place no reliance on Refuels' denial in correspondence, which lacked detail, and had not been tested in cross-examination. It is telling that they have apparently decided to let sleeping dogs lie, and have not themselves pursued outstanding invoices.

93. For the Defendant, it was submitted that the Claimant had not proved the agreement alleged to the requisite standard. It was submitted that, for fraud, what was required in order to satisfy the balance of probabilities, was to prove it to a high degree of assurance, and that this was so even where the issue arose, not between the alleged fraudster and the victim, but between the victim and a third party. I am not persuaded that proof to a high degree of assurance is required in such circumstances, but even if it were, in my judgment the requirement would be adequately satisfied for the purposes of this case.

94. It was argued that if it was tainted by fraud, the Refuels contract did not bind Centec, so that the warranty did not apply to it at all. I was not addressed on the effect of the

fraud in any detail, but it seems to me that at its highest it would have rendered the contract unenforceable by Refuels, rather than void. Centec would still have had the benefit of it, had it chosen to retain it; and it was still in place at the date of completion of the SPA. The warranty therefore applied to it.

95. In my judgment, therefore, Centec was bound by and entitled to the benefit of the agreement with Refuels, and that by virtue of the fraud that agreement was of an unusual, onerous and abnormal nature, and by virtue of Mr Davies' role in relation to it, was not of an entirely arm's length nature. Furthermore, although this is not a finding which is necessary for me to make, it was outside the normal and ordinary course of business, as fraud is: it was not argued that because it was a long-standing fraud it was normal and ordinary for Centec, and I would not have accepted such an argument.

96. Paragraphs of 4.2.2 Schedule 4 of the SPA affords no defence. The claim for breach of warranty in relation to this does not arise because of any action on the part of BIP or Mr Bennett in procuring that BIP terminate the Refuels contract, but from the nature and operation of the contract itself. (I should add that I consider it to have been perfectly reasonable of Mr Bennett and Centec to have terminated the contract with Refuels once the true position had been discovered after completion, rather than renegotiating it or insisting that it be operated in an honest way. The alternative would have been to continue to deal with a company which had been involved over a long period in defrauding Centec, which in my judgment would have required a restraint and trustingness hardly to be expected or required of any sensible businessman.) No more does paragraph 4.2.3 of Schedule 4 of the SPA afford a defence. I need not deal with paragraphs 14.2.1 and 14.2.5, and was not addressed upon them.

97. For obvious reasons, it is not suggested that this was a matter which was Disclosed in the disclosure letter.

Paragraph 7.1

98. Paragraph 7.1 was a warranty that that since the Accounts Date Centec's business had been carried on in the normal and ordinary course without any interruption or change in its manner, nature or scope, and so as to maintain it as a going concern. As I understand it, to the extent that the Claimant had a distinct case about this, it centred around the fact that the parties' experts agreed that Centec was not viable as a going concern after the termination of the Refuels contract. It was terminated very shortly after completion of Mr Bennett's purchase. Mr Bennett's case is that he was bound to do that because the entire customer relationship was a fraud, and I accept that for the reasons already stated. I did not form the impression from the submissions made to me, however, that the Claimant really relied on this as a breach of warranty, in the event. It was not submitted to me that performing that contract since the Accounts Date represented a change in the manner in which the business of Centec had been carried on, and on the evidence it did not: the fraud was of longstanding. The fact that upon its termination Centec ceased to be a going concern does not seem to me to mean that Centec's business had not until then been carried on 'so as' to maintain it as a going concern. (The question whether it is to be valued as such appears to me to be a separate one). Again, no such submission was distinctly made. I am not satisfied that a breach of this warranty was established.

Paragraph 7.2

99. The main thrust of the warranty case, however, was the warranty at paragraph 7.2 of Schedule 4, that so far as the Seller was aware there had been no material adverse change in the financial trading position or turnover of Centec and no fact or circumstance which might give rise to such a change. The experts agreed that there had

in fact been a material adverse change in Centec's financial trading position between May 2018 and March 2019. Mr Flint, the Defendant's expert accountant, expressed the view that the reason for it was loss of customers, loss of contracts, possibly excess stocks, reduced profit margin, increase in administrative expenses, and/or reduction in net assets due to losses. Mr Hayman, the accountant instructed by the Claimant, simply said that it was because of losses, and the loss of the Essar contract. He agreed Mr Flint's reasons, but thought they were effects rather than causes, and pointed out that Centec's turnover fell 28% in the year to May 2017, and 10% and 14% in the following 2 years. The experts agree that they do not know why that happened. Mr Hayman considered that it might be simply a company in decline and/or poor management. Mr Flint did not disagree, and they both agreed that neither of them knew. Further detail is given in their reports, in Mr Flint's case in sections 4 and 7.10, and in Mr Hayman's case at paragraphs 6.29 to 6.32. I do not need to set that out here.

100. The parties agree that Mrs Blundell was not personally aware of this material adverse change. That being so, it is perhaps odd that it was argued that it had been adequately Disclosed in the Disclosure Letter. The SPA defines Disclosed as

> "fairly disclosed in the Disclosure Letter or contained within the Disclosure Documents with sufficient clarity to enable the buyer to assess with reasonable accuracy the nature of the matter disclosed".

The Disclosure Letter lists the warranty provisions by number, and makes disclosures opposite them. The warranty at paragraph 7.2 is not listed, and accordingly no disclosure was made specifically in relation to it. However, the Letter (which was part of the SPA) explicitly states that the headings and numbering are for convenience only, and do not alter the construction of the letter nor in any way limit the effect of any of the disclosures,

> "all of which are made against the relevant warranties as a whole. A disclosure or qualification made by reference to any particular paragraph of the relevant warranties schedule shall be deemed to be made. In respect of any other

> paragraph of the relevant warranties schedule to which the disclosure or qualification may be applicable".

Furthermore,

> "where brief particulars only of a matter are set out or referred to in this letter, or a document is referred to but not attached, or a reference is made to a particular part only of such a document, full particulars of the matter and the full contents of the document are deemed to be disclosed, and it is assumed that the Buyer does not require any further particulars."

The Disclosure Letter forms part of the transaction agreements, and was signed on behalf of BIP as well as Mrs Blundell. The fact that no disclosure was made specifically against the warranty at paragraph 7.2 is not of any particular significance, therefore. The question is whether the Disclosure Letter contains disclosures which fairly disclose matters which would otherwise amount to a breach of this warranty with sufficient clarity to enable BIP to assess with reasonable accuracy the nature of the matter disclosed, brief particulars being sufficient.

101. In my judgment, the disclosure letter is wholly inadequate to disclose what would otherwise be breaches of this warranty. It refers to the loss of the Shell/Essar contract, the implementation of cost saving measures, and the fact that it might have lost one or two other customers during the time, but that Mrs Blundell was unable to verify it. This makes no mention of values, excess stocks, reduced gross profit margin, increased administrative expenses, and above all no mention of reduction in net assets due to losses, as Mr Hayman points out. It refers to the possible loss of one or two contracts, but gives no particulars at all, even brief ones. It does not fairly disclose any of the matters to which the experts refer. It affords no clarity whatever to allow an assessment by the Buyer of what is being disclosed.

102. Even though Mrs Blundell might not actually have been aware of the relevant matters, by clause 5.5 of the SPA she was deemed to have such knowledge, information and belief as she would have obtained had she made enquiries into the subject matter of that warranty with the board of directors of the company.

103. The board of directors of Centec consisted of Christopher Blundell, and Mrs Blundell, Svetlana Blundell, Lucian Davies and Graham Williams. Enquiries were not in fact made of the board. The board had not met since 21st March 2018 at the latest, according to Christopher, as I accept. I accept Mr Brown's evidence that he himself had continued to provide monthly information packs thereafter, but that they were provided not to the board but to the management team, which for this purpose did not include Svetlana. His evidence, which I accept, was that the family never asked to see them. Mr Warburton told me he assumed that the board would have been kept informed, but in fact it appears it was not. After 18th October 2018 Mr Williams did ask Svetlana with input from Mr Brown to carry out an immediate cash flow forecast for the rest of the financial year to 31 May 2019, but she did not complete it before going on holiday, and it was Mr Brown who completed it, as I accept. She never saw the completed version, and never asked to. When in his email dated 27th of February 2019 Mr Ali told Mr Bennett that Svetlana was getting some financial documents, I have no basis for rejecting her evidence that she understood him only to be asking for the statutory accounts. If enquiries had been made of the board as to its actual state of knowledge, therefore, it would not have known of the material adverse change without making inquiries.

104. However, if it had been asked, it would in my view inevitably have responded to the sole shareholder (who was in any event a member of the board herself) and, if it did not know, it would have taken steps to find out, and would have obtained and passed on the information. Had it done so, I have no doubt that it would have been aware of the material adverse change which had occurred to Centec's affairs since the Accounts Date. The information was available.

105. By an email dated 11 October 2018 Mr Brown told Mr Williams, Svetlana, Mr Davies and Mr McGreal that the latest EBITDA for the year 2018/2019 was only £25,873.14. On 26 October 2018 Christopher and Svetlana Blundell met Mr McGreal and Mr Donnan to discuss Mr McGreal's offer. It appears from Mr Donnan's notes dated 29 October 2018 that Mr McGreal explained the business was losing money and was expected to run out of cash by the end of January or early February 2019. He laid out their options, including a sale to him. Christopher described the company's position to Mr Williams as invidious (by which I take it he meant unenviable). Also on 26th October 2018 the monthly management information pack showed substantial losses. The following month's pack was no better. I accept that either Christopher or Svetlana or both must have seen the budget as at 1 February 2019 which Mr Brown referred to as having been issued to all stakeholders (and which appears to have indicated a total annual loss of £36,000 and was amended in January 2019 to show a loss of about £30,000 going forward), and at any rate it was available to them if they had asked. Christopher and Svetlana knew by 14th January 2019 that Mr McGreal had approached the bank for a loan against Centec' assets to fund the purchase, but had been refused, and by 17th January 2019 that Mr Brown thought it was at imminent risk of running out of cash. Christopher knew that Mr McGreal had reduced his offer from £500,000 to £300,000 and why; and in view of his email dated 31st January 2019 it is beyond serious dispute that he had gone through the figures with Mrs Blundell herself, although I do not know whether she understood that they represented an adverse change. On 27th of February 2019, Mr Williams emailed Mr Ali with the financial information Mr Ali had requested, including in particular version 2 of the total budget for 2019. Mr Williams had requested it from Mr Brown, an employee of Centec. It contemplated, not a profit of £200,000, but a loss. The bank refused an invoice discounting facility in February

2019 too. All this information was available to the board, either through at least one of its members, or on inquiry.

106. Accordingly, neither Mrs Blundell's actual ignorance nor that of the board as such, gives rise to a defence to this claim for breach of warranty. I accept that the Blundell family decided not to ask for information which might alert Mr McGreal to BIP's potential purchase, but the result that they did not know or may not have known the full extent of the true situation cannot afford the Defendant a defence. Nor of course does it make a difference that Mr Bennett, for BIP, knew of and at least accepted that approach, because he was entitled to rely on the contractual warranty which he obtained through the SPA.

Damages for breach of warranty

107. It was common ground that if I should find there had been a breach of warranty, the Claimant would be entitled to be put into the position it would have been in if the warranties had been true, which in effect is the difference between the 'as warranted' value of Centec and its value 'as is'. In that context I was referred to the decision of Cockerill J. in *116 Cardamom Ltd v MacAlister* [2019] EWHC 1200 (Comm). I did not understand the law to be in dispute.

As warranted

108. The purchase price is the obvious place to start when considering the value as warranted. That was £1,400,000. But the court is not obliged to adopt the purchase price as the best evidence of the value as warranted, and is entitled to look at expert valuation evidence for the true value as warranted. Mr Hayman, for the Claimant, valued the shares as warranted at £2,080,000. His report sets out his reasoning, which is cogent, persuasive, and not the subject of detailed challenge. Mr Flint was not

instructed to undertake an 'as warranted' valuation at all. He agrees that if Mr Hayman's approach is correct, then his figure is correct. In cross-examination he made it clear that he did not disagree with Mr Hayman's method and agreed his figure. That must be right: in particular, it makes sense to take the 2018 accounts as a basis for valuation in the context of the warranty that there had been no material adverse change since.

As was

109. The experts are very far apart in relation to the share valuation 'as was'. On the basis that Centec should not be regarded as a going concern at completion, and should therefore be valued on a breakup basis, Mr Hayman's view is that its true value was £245,000. Mr Flint, by contrast, offered two valuations, both on a going concern basis. On an earnings basis, is value was £600,000; while on an assets basis it was £1.4m. Mr Hayman expressed the view that valuation on an asset basis was inappropriate.

110. The first question is therefore whether Centec should be regarded for valuation purposes as a going concern at the completion date. The experts agree both that Centec was not viable as a going concern after the termination of the Refuels contract, and that if it had not been terminated, Centec would be valued on a going concern basis. Of course, the Refuels contract was only terminated after completion, so the question is whether this should be taken into account when valuing the company as at the completion date, and that if so, it should be valued on a breakup basis.

111. It is not, in my view, sufficient to say that if the company was being run as a going concern at the relevant date, it should be valued as such. If at the relevant date the business of the company was precarious, so that it might cease to be a going concern at any time, then it seems to me that the appropriate valuation basis is a breakup valuation. In the present case, the Refuels contract was all that made Centec a viable

concern, but it was thoroughly tainted by fraud, and it would not be realistic to value Centec on the basis that the contract's continuation was secure. It makes no difference that it was Mr Bennett's decision in the end, because anybody in his position would have done the same. Mr Hayman's evidence was to the following effect in his replies to Part 35.6 questions dated 18 December 2020: if the termination of that relationship was commercially inevitable at the date of the transaction, then the core business of Centec had no future, and, commercially speaking, it was not a going concern and should not be valued as such. I refer also to his remarks at paragraph 8.6 of his report. I agree, and it seems to me that to value it in any other way would be unrealistic.

112. Mr Hayman did not undertake a net asset valuation, unlike Mr Flint. It was suggested to him that he ought to have done so before considering whether a breakup valuation was the correct basis. Mr Hayman said he did not follow the logic of this, and neither do I.

113. Accordingly, I accept Mr Hayman's evidence that Centec should be valued on a breakup basis, that is, the value of the net assets if Centec had ceased trading at the date of the SPA, 5 March 2019. Only Mr Hayman gave a figure for such a valuation (though he described it market value, which was actually discounted from break-up value), and that figure was £245,000. Again, his reasoning is persuasive.

114. Part of it depended on an estimated realisable value for plant and machinery at only £115,000 (as opposed to the figure in the balance sheet as at 28 February 2019 of £1,008,056). In oral evidence in chief, he explained that the figure of £115,000 had arisen from discussion with Mr Bennett, who had obtained it from a named dealer. There was also a figure of £5000 for computer equipment (as opposed to the figure in the balance sheet as at 28 February 2019 of £47,594). This figure had come from the Claimant's engineering manager. Mr Hayman considered these figures were not out of

the way. Under cross-examination he denied the figures were therefore useless, and said they were the best he could do. He accepted that in his report he had not identified his informants, but pointed out that in paragraph 8.7(a) of his report he had said "Mr Bennett has taken advice as to potential resale value of the equipment and the cost of removal to arrive at an estimated value for the assets." The fact that the figures upon which Mr Hayman relied had come from elsewhere was apparent from his report. I was not told that any questions had been raised about it until cross-examination. The way in which Mr Hayman obtained them gives some basis for thinking they are realistic. He himself thought them not out of the way. There were no competing figures. In the circumstances, I accept them.

115. The evidence was that Mr McGreal eventually agreed to buy Centec for £200,000 plus a possible further £100,000 on a sale within 3 years. It is difficult to know what weight to place upon this, however, and I do not see it is particularly supportive of Mr Hayman's break-up value, since it is not a break-up value itself, though of course it is by no means inconsistent with Mr Hayman's figure.

116. Accordingly the damages to be awarded for breach of warranty are £2,080,000-£245,000 = £1,835,000.

117. Schedule 4 of the SBA contains a number of limitations on the potential liability of the seller. By paragraph 1.2, it shall not exceed 75% of the total amount of the consideration actually received by the seller. The consideration actually received by the seller has been £1.3 m. 75% of that is £975,000.

118. However paragraph 3 of Schedule 4 of the SPA provides that nothing in the Schedule excludes or limits the liability of the Seller to the extent that a claim arises by reason of any fraud or fraudulent misrepresentation by or on behalf of the Seller. I do not need to consider fraudulent misrepresentation at this point, since I am considering the warranty claim. The

notion of a fraudulent warranty is perhaps an odd one, given that liability under warranties ordinarily arises regardless of their honesty. It was accepted on both sides, however, that this provision applied to a warranty given in the knowledge that what it stated was not true, or recklessly as to whether it was true or false. Counsel for the Claimant, and the Claimant himself, made it clear that it was not suggested that Mrs Blundell knew that there had been a material adverse change in the financial or trading position or turnover of the company, or that there were facts or circumstances which might give rise to such a change. It is a question of recklessness, if anything, therefore.

119. Counsel for the Defendant submitted that fraud had not been adequately alleged, so that it was not open to the Claimant to rely upon it in this context. Certainly, fraud was not alleged in the Particulars of Claim in relation to the warranties. In the context of the warranty at paragraph 7.2 of Schedule 3 of the SPA, the Defendant did plead that the Board of Directors had no reason to know that Centec had suffered the change in fortunes. The Claimant's Reply denied that. That is not an allegation, or at least an adequate allegation, that this warranty had been given fraudulently, whether in the sense that she had recklessly failed to check with the board, or otherwise.

120. Accordingly, damages fall to be awarded for breach of warranty in the sum of £975,000.

The misrepresentation claims

121. In case I am wrong, and because allegations of fraud are made in this context, I should consider the claim based on alleged misrepresentations. This is an alternative case to the claim for breach of warranty.

26 February 2019

122. It is alleged that on 26 February 2019 at the meeting between Mr Bennett, Christopher Blundell and the Defendant's solicitor, Mr Ali, at the offices of Glaisyers solicitors (for

whom Mr Ali then worked), Mr Ali advised Mr Bennett that Centec was showing a profit of £200,000. Plainly this is to be understood as an allegation that he did so on behalf of the Defendant. Neither fraud nor recklessness is pleaded in relation to this allegation.

123. I have found that Mr Ali said just that. The representation was made as Mrs Blundell's solicitor, and on her behalf. Mrs Blundell's evidence made it clear that she had left everything to her family and to her advisers, including Mr Ali, and it was accepted on her behalf that no limitation on his authority had been set or communicated.

124. The representation was not true. There is nothing in the documentation or the evidence which I heard to support it. Mr Ali himself accepted that he had no material showing a £200,000 profit, so far as he could recall. The best evidence of the true position was the information which Mr Ali himself received at about 9:30 AM the following day, which included version 2 of the total budget for 2019, which predicted a loss of £35,345.23. Mr Ali did not pass that information on to Mr Bennett, and there is no indication that he even sought authority to do so.

125. Earlier that morning, however, in his email of 05:35, Mr Ali had emailed Mr Bennett to say, among other things, that the projected EBITDA that Mr McGreal had revealed verbally (that is, orally) was £250,000, £50,000 higher than the £200,000 already mentioned, but only a projection. That email treated EBITDA as if it were effectively the same as profit by drawing the £50,000 comparison, although in reality of course they are different things. There was no suggestion that Mr Ali knew or ought to have known that such a figure of EBITDA might result in a loss rather than a profit, and it is unclear exactly what Mr Bennett made of it, save that he thought it reinforced what Mr Ali had already said. Plainly, Mr Ali meant it to do so too. This figure seems to have come from an email of Mr McGreal to, among others, Christopher Blundell, Mr Ali and Mr Donnan dated 1 February 2019, where, however, it was referred to as a target, rather than a projection. I

accept that in the context of a company of moderate size, this is likely to be a distinction without a difference.

126. Given that the figure of EBITDA was as recent as 1 February 2019, and came from Mr McGreal, and that no particular distinction was drawn between EBITDA and profit by either party to the conversation, it seems to me that Mr Ali's reference to it was not a misrepresentation. It was not pleaded or argued before me that his failure to correct it when, later that day, he received a budget showing a projected loss, represented a separate misrepresentation, and accordingly I do not consider it further. For the avoidance of doubt, however, I do accept that, even though he wanted more information to verify it, Mr Bennett relied upon the supposedly projected profit figure in entering into the SPA. It may not have been the only factor, but there can be no doubt that it was one of the factors.

27th February 2019

127. The second alleged misrepresentation was that on 27th of February 2019 Mr Donnan, Mrs Blundell's financial adviser, recklessly represented that Centec's management team were forecasting EBITDA of £250,000 for the 12 months to December 2019, a figure supported by no reasonable grounds. It was not disputed that his email of that date timed at 18:07 to Mr Warburton, and copied to Christopher and Svetlana Blundell, stated that

> "as the Blundell family has stepped back from the business during the current sale process, we do not have more recent financial information but our understanding is the management are forecasting EBITDA of £250K for the 12 months to December 2019".

I have already indicated, that I do not regard the difference between target and projection as being material, and I accept Mr Donnan's evidence in that regard. The figure seems, again, to have come from Mr McGreal, as Mr Donnan described in his evidence. There is no indication that Mr Donnan was aware of the projected loss which I have already referred, and I accept his evidence that at the time he had not been aware of the negative EBITDA

which was later applied to February 2019. Accordingly, I find that there was no misrepresentation through Mr Donnan.

3 March 2019

128. The third alleged misrepresentation is that at the meeting on 3 March 2019 Mr Ali, and Christopher and Svetlana Blundell represented that the business had continued on a similar basis to that shown within the 2016, 2017 and 2018 accounts, and Mr Ali said that a valuation of £1.7m would be correct. I have found that Mr Ali did say that. However, in the context of this meeting, at which a negotiation was taking place, in describing the figure as representing the value of the company he was in my judgment doing no more than suggesting an acceptable price. In other words, even on the footing that he used the words recorded in Mr Warburton's note, I do not accept that they made a representation about the true value of the company at all.

Conclusion on claim

129. Accordingly, the alternative claim based on misrepresentation fails. However, the claim based on breach of warranty has succeeded to the extent of £975,000.

Counterclaim and set-off

130. At the hearing I was not addressed in any detail on the counterclaim, but following circulation of this judgment in draft on term as to confidentiality I received short written representations on the topic, both parties expressing themselves to be content to deal with the matter in that way rather than at a further hearing. I consider that to be a proportionate approach and will deal with it accordingly. The written submissions have revealed there to be more of an issue over this than anticipated, perhaps because the draft judgment has placed discussions between the parties in a new light, but of course at this stage I know

nothing of those. In any event, it remains appropriate to deal with the matter on the basis of those short written submissions.

131. The Claimant submits that there could be no actionable breach of the provision in the SPA for payment of the balance of £100,000 when the Claimant had been found to have already by then vastly overpaid by making the original £1.3m payment. It is suggested that to find in otherwise would be inconsistent with the way in which I have dealt with the claim for damages for breach of warranty in this judgment, and that the Claimant's letter of claim dated 17th April , which was sent before the due date for payment of the £100,000 balance, accepted the breach of warranty as discharging the Claimant from the obligation to pay it before the due date. Moreover, the Claimant's loss is not referable to the consideration under the SPA at all. The counterclaim ought therefore to be dismissed.

132. I do not agree. The Defendant's claim to be paid the balance of the contract sum is independent of the Claimant's claim for damages for breach of warranty. The Claimant has the shares (and the benefit of the claim for breach of warranty with them) and has to pay the agreed price for them. The Defence to the Counterclaim alleged that as the result of the breach of warranty the Claimant was only liable to pay the actual value of the shares and not the warranted value, but I do not recognise that as a correct proposition of law. There is nothing in this judgment to the contrary. Nor is there any basis, either in the letter of claim or otherwise, for saying that the obligation to pay was discharged on the basis of some accepted repudiatory breach of contract, and the allegation was never pleaded.

133. Accordingly, the sum of £100,000 was due on 5 September 2021.

134. What is clear from paragraph 90 of Mr Bennett's witness statement is that he did not pay the balance because he did not think Centec had been worth either £1.3m £1.4m because of the breaches of warranty and misrepresentations that he alleged. He was not cross-examined about this and I accept it was his reason. That approach is reflected in

solicitor correspondence between the parties, including the letter of claim; he felt he had overpaid already and was not going to pay more. As I see it, he was setting off his damages claim against his liability to pay the £100,000.

135. The Defendant submits he was not entitled to do so because clause 1.7 of the SPA does not permit any set-off as a matter of contract, but that clause is inapplicable because it relates to indemnities given by one party to another. There is no relevant contractual prohibition on set-off. I see no reason why a set-off should not be available. A claim to set-off is probably to be understood as the true import of the Defence to Counterclaim, which reflects the correspondence. The Claimant was relying on his alleged entitlement to damages as a defence to the counterclaim (compare Civil Procedure Rules 16.6), and in my judgment the Claimant is entitled to rely on it as a set-off.

136. A second issue was raised on the counterclaim in relation to the 75% limitation on the Seller's liability to which I refer at paragraph 117 above. It is submitted on behalf of the Claimant that if judgment should be entered on the counterclaim, contrary to his primary submission, it would provoke an addition to the damages, because the cap would have to be calculated by reference to 75% of £1.4m. not £1.3m. If so, the damages of £1,835,00 would be capped at £1,050,000, not £975,000. Although the SPA provides that the total liability of the Seller for all claims was not to exceed 75% of the total consideration 'actually received' by the Seller, and it is accepted that in a literal sense the £100,000 has not been paid, it is submitted that on its proper construction the SPA should be understood as requiring the sum counterclaimed to be taken into account (at least, I suppose, if judgment were entered for it).

137. I disagree. The words of the SPA are clear and mean what they say on this point. Otherwise they would have said something else. The £100,000 has not been paid (I would leave out of account any payment which may be made during the period since the

circulation of the draft judgment). Accordingly, the entry of judgment on the counterclaim would not affect the operation of the cap.

138. If judgment were entered on the counterclaim the Defendant submits that, as a matter of law, there would be a set-off after the judgment of the sums due in respect of the counterclaim against the damages awarded. I am not sure whether that is technically a set-off in any strict sense, but I accept that execution would only issue for the balance.

139. However, I have found that the Claimant is entitled to set-off against the £100,000, the damages of £975,000. That is a complete defence to the counterclaim. The second issue does not arise.

Conclusion

140. Accordingly, judgment falls to be entered on the claim for £975,000-100,000=£875,000. (The operation of the 75% cap is not affected because the effect of the Claimant's set-off is that the £100,000 is not treated as having been paid, but as not having been payable). The counterclaim falls to be dismissed.

141. I will receive submissions as to interest and consequential matters, and as to the form of the order, following the handing down of this judgment. If the parties are in agreement, or it appears that the matter can be dealt with adequately and more proportionately by written submissions, however, I may dispense with a hearing for the purpose.