Neutral Citation Number: [2021] EWHC 63 (Comm)

Case No: CL-2019-000408

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

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

Date: 15 January 2021

Before :

MRS JUSTICE COCKERILL DBE

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Between :

ARDENT ADVISORS LIMITED	**Claimant**
- and –	
(1) UK WEB MEDIA LIMITED **(2) FUNDRAISING INNOVATIONS LIMITED** **(3) COMPARISON TECHNOLOGIES LIMITED**	**Defendant**

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Mr Cleon Catsambis (instructed by **Rosenblatt**) for the **Claimant**
Mr Mark Harper Q.C. (instructed by **DWF Law**) for the **Defendants**

Hearing dates: 9,10,11,12,16 November 2020
Draft Judgment sent to parties: 8 January 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 15 January 2021 at 10:30.

Mrs Justice Cockerill:

Introduction

1. The present dispute, concerned with advisory fees payable to the Claimant in respect of the sale of the first two Defendants to the Third Defendant, falls within a very narrow compass. There are two issues.

2. The first is a dispute between the Claimant and the Defendants as to extent of the Defendants' obligations to pay a success fee to the Claimant. The question can be put thus: was the Gross Transaction Value of the sale of each of the Defendant companies £59,623,248 (£29,811,624 each) or was it £29,858,766 in total? If the latter, the Claimant has been paid its success fees in full, having received £681,248.16 and £295,218.47. If the former approach is correct, the Claimant is entitled to a balance of success fees of £266,970.82 and £474,130.75.

3. The second issue is a dispute about the Claimant's entitlement to be issued with Equity and Loan Notes in the new company post sale – did it have an absolute entitlement or only an option, and if so, did it exercise that option?

The Facts

4. The Claimant ("Ardent") is a corporate finance advisor. Its CEO and Managing Director is its founder Mr Gareth Williams. He is an expert in company valuation. He was a Senior Manager in Corporate Finance with Price Waterhouse Coopers ("PwC") and later project lead of "ValueBuilder", an initiative to train all PwC partners in the fundamentals of Shareholder Value and company valuations. He designed and managed Shareholder Value courses for PwC partners across all disciplines in the US, South America, and Europe.

5. Mr Williams founded Ardent in 2003. In 2015 Ardent was engaged as the corporate finance advisor for the sale of 100% of the equity in the First Defendant ("UKWM") pursuant to an Engagement Letter dated 2 October 2015 (the "UKWM Engagement Letter").

6. UKWM owns and markets a number of consumer focussed websites across a variety of sectors including telecommunications, travel and financial products. Its business is essentially that of offering price comparisons free to consumers. The principal shareholder in UKWM was Mr Jamie Harwood.

7. UKWM's interest in selling had been triggered by an approach from a potential buyer; however that deal did not materialise and it decided to ask Ardent to find a buyer.

8. Later Ardent was appointed as the sole corporate finance advisor for the sale of 100% of the equity in the Second Defendant ("FIL") pursuant to an Engagement Letter dated 21 July 2016 (the "FIL Engagement Letter").

9. FIL operates in the same marketplace as UKWM via its Energy Helpline price comparison offering which offers consumers free advice on gas and electricity deals. Its main shareholder was Mr Paul Green.

10. FIL had been looking at the possibilities of selling its business from 2013, at which point Ardent pitched for the business unsuccessfully. In 2016, following three unfruitful approaches from potential buyers, FIL decided to re-enter the market for a sale and retained Ardent.

The Terms of the Engagement Letters

11. The Engagement Letters are the contracts which govern Ardent's entitlement to success fees. Though entered into some considerable time before the sale of the companies was achieved, neither letter was ever amended.

12. The Engagement Letters provided that, in addition to a monthly retainer, Ardent would receive Success Fees by reference to the "Gross Transaction Value" ("GTV"). Thus Clause 5.2 of the UKWM Engagement Letter ("Sale or Partial Disposal Process Execution Success Fee") provided that "*Ardent shall receive a success fee (the 'Cash Success Fee') the greater of a minimum fee of £200,000 or a fee equal to 3.0% of the Gross Transaction Value*". Similarly Clause 5.2 of the FIL Engagement Letter ("Sale or Partial Disposal Process Execution Success Fee") provided that "*Ardent will be paid a success fee of 2.25% for a Gross Transaction Value below £20.0 million and a success fee of 2.5% for a Gross Transaction Value of £20.0 million or greater*".

13. "Gross Transaction Value" is the term at the centre of this dispute. It was expressly defined in both the Engagement Letters in the following (identical) terms:

> "Gross Transaction Value shall mean the fair market value of all cash, securities, property or debt forgiveness or assumption (or any combination of the foregoing) provided to or by the Company or its shareholders pursuant to the Proposed Transaction, including the full value of any upfront component together with the full value of any additional payments as received by the Company shareholders in accordance with the terms of any earn-out mechanism, with fees paid to Ardent when the corresponding cash payments are received by the Company Shareholders."

14. The UKWM and FIL Engagement Letters were both expressly for the sale of 100% of the shares in each of UKWM and FIL:

 i) Clause 2 of the UKWM Engagement Letter provides that: "*The Company is now seeking an acquiror to support its growing customer base and continue the expansion of its market presence*". Similarly, Clause 2 of the FIL Engagement Letter provides that "*The Company has asked Ardent to explore potential opportunities for the Company shareholders to realise some or all of their investment*";

 ii) Clause 3 of the UKWM Engagement Letter ("Scope of Engagement") provides that "*Ardent will act as the sole corporate finance advisor to the Company in the preparation for and execution of a sale of the Company with institutional or strategic acquirors*". Similarly, Clause 3 of the FIL Engagement Letter provides that "*Ardent will act as the sole corporate finance advisor to the Company in*

the preparation for and execution of a sale of a controlling interest in the business";

iii) Clause 3.1 of the UKWM Engagement Letter ("Sale Process") makes multiple references to acquirors (e.g. "*Identification of potential acquirors*", "*Approach and engagement with potential acquirors*" "*Negotiation of acquiror Term Sheets*"). Clause 3.1 of the FIL Engagement Letter is in materially identical terms.

15. The success fees are referred to in Clause 5.2 of the both Engagement Letters ("Sale or Partial Disposal Process Execution Success Fee"). This provides that the Success Fee will be due "*in the event that a sale transaction is completed during the course of this engagement or during the twelve month period following the termination of this agreement (for any reason)*".

Project Flame

16. The interest which had triggered the decision to sell each of UKWM and FIL dropped away. In late 2016 Ardent was having no success in finding a purchaser for either of the companies. Ardent then introduced Paul Green of FIL to Jamie Harwood the CEO of UKWM as "*Ardent believed that a merger of the two businesses would create tremendous synergy value and enable both companies to realise greater valuations than as stand-alone businesses*". UKWM and FIL had no previous commercial relationship.

17. The next step in the timeline is an "Indicative Offer" for FIL of £23,427,000 which was put forward by Independent News Media in January 2017, but which did not proceed. That was based on a 9 times multiple of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), and contemplated a sum of just over £18 million payable on completion with the remainder of the consideration deferred. The offer was stated to be "*within the valuation range provided by Ardent in earlier correspondence*".

18. After this it was agreed by all parties that a merger of UKWM and FIL would enable the companies to realise greater valuations than as stand-alone businesses. Ardent proceeded to run a broad and extensive search process to find an equity investor to purchase the companies.

19. It was originally anticipated that FIL would acquire UKWM before seeking an acquiror for a significant stake in the bolstered FIL entity. The Third Defendant ("CTL") was formed by Mr Green of FIL to serve as the vehicle through which FIL would acquire UKWM. However, it was ultimately decided that CTL would form part of the structure in the ultimate set of transactions, which the parties referred to as "Project Flame". CTL would be the ultimate holding company of the combined group and the prospective acquiror would be purchasing a controlling majority stake in CTL instead (or, as it was ultimately structured, in the Project Flame vertical group).

20. So on 5 May 2017 FIL made an offer for UKWM based on the Enterprise Value for 100% of UKWM's share capital. As to the split of the group valuation, the original intention was that UKWM would account for 40% of the "*Combined Group Equity Valuation achieved in the private equity financing transaction*" (i.e. UKWM would receive 40% of the purchase consideration and FIL would receive 60% of the purchase consideration).

21. There was then the question of cash:equity split. It was envisaged that UKWM shareholders would receive 70% of the consideration due to them in cash with the remaining 30% in equity in CTL. After some negotiations, it was agreed that FIL shareholders would receive 40% of the consideration due to them in cash with the remaining 60% in equity in CTL.

22. However, following a higher than expected financial performance from UKWM and subsequent negotiations, it was expressly agreed between Mr Green and Mr Harwood that the split as between the two companies would be adjusted to 50:50: "*We have agreed that we are happy to split the total consideration on a 50/50 basis*". That is to say, it was agreed between the parties that in the ultimate sale UKWM and FIL would benefit in equal measure.

23. On this basis, the draft Project Flame structure was envisaged to comply with two structural requirements:

    i) It would give UKWM and FIL a 50:50 valuation split; and

    ii) It would give UKWM a 70:30 cash: equity split and FIL a 40:60 cash:equity split.

24. In terms of the valuation which was being discussed internally, by email dated 12 October 2017, Mr Green informed Mr Williams at Ardent that following a meeting with Mr Harwood they were agreed that: "*The valuation for the group needs to be a minimum of £56m. Obviously we are keen to get the highest amount possible above this minimum threshold.*" In the spreadsheet attached to Mr Green's email, using 12-13 times EBITDA, he valued Project Flame Topco as high as £69,240,000.

Inflexion's Offer Letter

25. One of the companies introduced by Ardent was Inflexion Private Equity ("Inflexion"), whose investment director was one Jonathan Ma. He led the negotiations which led to the eventual purchase by Inflexion of the combined businesses of UKWM and FIL under the umbrella of CTL. By December 2017 Inflexion had produced a draft offer letter. From the start this proposed transaction introduced greater sophistication to the arrangements. For example it introduced a management pool of "sweet equity" – that is rights to receive further shares which increase the value of management equity, depending on future performance.

26. By email dated 20 December 2017 Mr Peter Callander, the CFO of CTL, wrote to Mr Green with some queries on the draft Inflexion Offer Letter and Equity Term Sheet (also referred to as the Heads of Terms). So far as material, Mr Callander states: "*so lets (sic) say we give someone 10% sweet equity – valued at £5m now [...]*". This suggests that at this point he considered that 100% of Project Flame Topco would be valued at £50m.

27. Inflexion then submitted its formal Offer Letter on 30 January 2018. The Offer Letter:

    i) Used an Enterprise Value of £48m and reflected the 50:50 split between UKWM and FIL (£24m valuations being placed on each);

ii) Suggested a cash payout to Mr Harwood of £12.83 million and a cash payout to Mr Green of £3.3 million;

iii) Recorded the use of Loan Notes (£14 million cash paid; £14 million payment in kind); and

iv) Set out in detail how the "*Day 1 cash out and rollover would look*", which complied with the two structural requirements referred to earlier. The projected ownership of CTL was as follows:

Inflexion: 50.1% (for an investment of £28,049,000)
FIL: 26.4%
UKWM: 13.4%
Sweet Equity (equity share capital in CTL issued to UKWM and FIL's managers): 10%

28. That offer was based on "Transaction Assumptions" which included such things as due diligence and actual trading supporting the forecasts set out in the financial model provided to Inflexion.

29. By email dated 2 February 2018, Mr Williams summarised the discussion and agreement he had with Mr Ma on 31 January 2018 and stated: "*Final Enterprise Valuation: £48m based against project ebitda of FY18 of £5.6m*". The email also referred to performance based earn out deferred consideration and recorded Ardent's fees as being £1.54 million noting "*Ardent has elected to invest £250,000 of these fees into CTL on the same terms as the investor*". This discussion of the rollover of a portion of Ardent's fees was said by Mr Williams to have taken place after Mr Harwood tipped him off that there might be some discomfort on Mr Green's part about the level of Ardent's fees.

30. On 2 February 2018 Mr Williams then discussed matters with Mr Ma and indicated that he considered the fee amounts due would be £1.54 million, based on the figures then current.

31. On 9 February 2018 Mr Callander set out an analysis of the fees which CTL would incur, including £1.264 million to be paid to Ardent out of a total of £1,272,500. Mr Williams took issue with these figures and Mr Callander updated the figures to show fees of £1,475,000 in total for Ardent.

The Heads of Terms

32. On the basis of Inflexion's Offer Letter, the parties entered into Heads of Terms dated 8 February 2018. These were signed by Mr Ma (Inflexion), Mr Green (personally and on behalf of FIL and CTL) and Mr Harwood (personally and on behalf of UKWM). They set out "*the principal terms and conditions on and subject to which the Buyer is prepared to enter into the Acquisition and Inflexion is prepared to enter into the Investment*". They expressly stated that "*except as specifically provided*" they were not intended to be legally binding. The Heads of Terms effectively brought into effect an exclusivity period in which a deal could be properly negotiated.

33. Schedule 3 of the Heads of Terms was an Equity Term Sheet which included such matters as good leaver and bad leaver provisions (relevant to treatment of sweet equity)

and drag along and tag along provisions. It noted "*the transaction is to be structured in a tax efficient manner for the Founders and new management shareholders so as to fall within the BVCA MoU to the extent applicable*". It provided that tax advisers of both sides would work together to maximise the shareholders' tax position on the transaction and afford the benefit of Entrepreneur's Relief on the CTL shares where possible.

34. Schedule 5 of the Heads of Terms is called "IFX Pricing Spreadsheet" and records the following:

    i) Enterprise Value of £48m and Equity Value of £50.099m (i.e. the Enterprise Value plus £2.099m in cash (described as "Net debt")). [Enterprise Value was described by Mr Williams as "*the value of the business traded by the company*". It can also be described as a company's market capitalisation + total debt -cash and cash equivalents. Equity Value is the value of the company's equity, which is the Enterprise Value plus/minus excess assets/liabilities: see *Cardamon v MacAlister* [2019] EWHC 1200 (Comm) [135]]

    ii) The Purchase Price was to be the Equity Value "subject to due diligence" and conditional on the absence of any material adverse change;

    iii) Inflexion would invest £28,002,000 in shareholder loan notes for 50.004% equity in a Project Flame Topco;

    iv) FIL shareholders would sell 43% of FIL equity for £10,800,000 in cash and 57% of FIL equity for 25.5% of equity in Project Flame Topco. Mr Green would get £3.17 million in cash;

    v) UKWM shareholders would sell 68.5% of UKWM equity for £17,180,000 in cash and 31.5% of UKWM equity for 14% equity in Project Flame Topco. Mr Harwood would get £13.34 million in cash; and

    vi) Ardent would receive a rollover of £250,000 of its fees in the form of a 0.4% equity in Project Flame Topco.

35. At about this point Inflexion indicated that it would not pay sellers' fees, which it had not agreed. This became a bone of contention between Mr Ma and Mr Green, which appeared to have been resolved by Mr Callander making a tweak to the structure which generated a tax saving to CTL sufficient to cover the amount of the fees.

36. By email dated 9 April 2018, Mr Callander asked Ardent to "*send me for completeness a breakdown of your fees by company showing gross transaction value and % charge*". Mr Williams responded to Mr Callander on the same day in the following terms:

> "This GTV of £59,623m is split 50:50 between FRI and UKWM
>
> | | | |
> |---|---|---|
> | UKWM Fees: | £29.811m * 3% | = £894,330 |
> | FIL Fees: | £29.811m * 2.5% | = £745,275 |
> | Total | | = £1,639,605 |
> | Less: Investment in CTL: | | = £250,000 |
> | Net Total Payable: | | = £1,389,605 |

Split	
UKWM	= £769,330
FIL	= £620,275
Net Total Payable:	= £1,389,605

We will issue invoices against these amounts to UKWM and FRI but can adjust the split as suits your cash flow".

37. In terms of the overall deal, by late March there were detailed discussions about details such as how to roll over the share of one shareholder, Mr Aamir Baloch, who wished to sell his 5% share in FIL for cash, with a £1,252,000 figure identified as problematic, and the impact of a tax paper which was being prepared by PwC.

38. Mr Williams (and hence Ardent) seems to have been very much involved in these debates. It is clear that he understood the complicated structure which began to take shape. In his evidence he indicates that he understood the use of a Topco, for example, to be a structure which avoided the potential taxation sensitivities of loan notes originating from a connected company.

39. The level of his embeddedness and understanding is clear not just from his witness statement but from the contemporaneous record. For example in an email to Mr Green on 24 March 2018 he summarised the position at that point: "*The benefit to management of a low tax valuation and hence low hurdle on the sweet equity far outways [sic] the cost of compensating Aamir hence that was Inflexion's preferred solution*."

40. Mr Green responded: "*But we all sell our shares for the same amount. This provides the cash out. Those who decide to roll are taking on additional risk as the value of CTL is low but they make a judgement this is a good deal because they believe that value can be created in the future.*"

41. On 29 March 2018 Mr Ma noted in an email to Mr Williams "*as previously discussed (albeit the vendors will need your guidance on this) the sweet equity has been designed to minimise any future tax burden, hence the equity pot is set at £1m*". By this stage the PwC tax paper was in circulation, because Mr Ma added "*feel free to call me over the weekend if you have any questions on the tax steps paper*". Mr Williams confirmed that he received the paper on that day.

42. By email dated 8 April 2018, Mr Jonathan Roy (of Paris Smith LLP, legal advisor to UKWM) said to Gareth Williams that "*the total consideration*" was £48m (pre-grossing for share options etc).

43. In respect of Mr Baloch PwC finally designed a structure whereby 80% of his 5% share in FIL was sold for £508,500, but he also received an employee bonus of £854, 715. Overall this suggested an Equity Value for FIL of £25 million.

The final structure of Project Flame

44. The transaction was thereafter finalised in accordance with the terms of the Tax Structuring Paper prepared by PwC's M&A Taxation Services group and dated 17 April 2018 (the "PwC Tax Structuring Paper"). It is this document which provides the basis for the Loan Note valuation which is a key element of disagreement between the parties.

45. Ardent says that the purpose of this document was for taxation considerations only. It drew attention to the following points in relation to this document:

    i) The contract between Inflexion, CTL and PwC dated 6 April 2018 identifies that the services to be provided by PwC are set out in "*Schedule 1 – Provision of services relating to Project Flame*" and "*Schedule 2 – Tax valuation services*".

    ii) Schedule 1 makes plain that it relates to "*tax structuring services*", sets out 7 items of work PwC will undertake and identifies two key deliverables. PwC makes clear that "*We are only advising on those issues which are set out in this schedule*". None of those issues have anything remotely to do with the Fair Market Value of the CTL Rollover Loan Notes.

    iii) Schedule 2 is headed "*Tax valuation services*".

    iv) PwC does not state that it is performing a commercial valuation. It states, so far as material, as follows:

    > "We shall provide you with an estimate of the market value, for UK tax purposes, as defined below, of the proposed management incentive plan (the "MIP Shares") of Project Flame.
    >
    > […]
    >
    > A valuation for tax purposes may require that certain legal or commercial factors be ignored. For example, an actual sale may not be possible or even legal and any actual transaction involving the sale of the asset might be concluded at a higher or lower price, depending upon the precise circumstances of the transaction and the business and the knowledge and motivations of the buyers and sellers at the time. Accordingly, a valuation prepared for tax purposes may not necessarily be appropriate for a commercial valuation and vice versa.
    >
    > Limitations
    >
    > By its very nature, valuation work cannot be regarded as an exact science and the conclusions arrived at, in many cases, will of necessity be subjective and dependent on the exercise of individual judgment. There is, therefore, no indisputable single value and we normally express our valuation analysis as falling within a likely range although we shall determine a single figure expression of value within that range as appropriate for our valuation analysis."

    v) The purpose of the paper was said to be:

    > "The purpose of this paper is to provide an overview of the steps required to implement the proposed structure and to highlight the key structuring and tax considerations."

vi) The Structuring Objectives made it clear that the focus of the work was taxation. The paper set out in steps the structure proposed. At Step 4c (of 9) it noted "*Consideration should be given to the value of the shares being acquired, given the transaction is not likely to fall within the Memorandum of Understanding agreed between HMRC and the BVCA. PwC is preparing a valuation to support the position taken*".

46. In the notes to the paper PwC records the UK Statutory basis of valuation as the price the asset might reasonably be expected to fetch on the open market and states:

> "This sale is interpreted in case law to mean a sale between a hypothetical willing vendor and a hypothetical willing purchaser each of whom is acting for self-interest and gain and both of whom are equally well informed about the asset and the market within which it operates. We also assume that the asset will continue to operate as a going concern under its present management.
>
> A valuation for tax purposes may require that certain legal or commercial factors be ignored. For example, an actual sale may not be possible or even legal and any actual transaction involving the sale of the asset might be concluded at a higher or lower price, depending upon the precise circumstances".

47. The final Project Flame structure in the light of this advice and the various issues which had arisen was considerably more complicated than the structure originally envisaged. It involved the acquisition of FIL and UKWM (referred to together as the "Targets") "*indirectly by Inflexion through 2 newly incorporated acquisition vehicles and an existing acquisition vehicle incorporated in August 2017 [CTL]*".

48. This was described in more detail thus:

> "The acquisition of the shares in the Targets will be undertaken by a UK incorporated and UK tax resident acquisition vehicle, Comparison Technologies Limited ("Bidco").
>
> - …. The entire share capital of Bidco will be acquired by another UK incorporated and UK tax resident company, Project Flame Midco Limited ("Midco").
>
> -Midco will be a wholly owned subsidiary of Project Flame Topco Limited ("Topco"), a UK incorporated and UK tax resident company."

49. In summary and with a degree of simplification, the material transaction steps were as follows:

i) (Step 2) Inflexion subscribed for:

a) £478,001 for 478,001 £0.01 A shares in Topco with 50.1% of the voting rights;

b) £14,010,956 of Inflexion A loan notes; and £14,010,956 of Inflexion B1 loan notes from Midco.

ii) (Step 4a) CTL entered into an SPA with the shareholders of FIL to purchase the entire issued share capital for initial consideration settled in £10,010,034.00 cash and £259,966.00 of rollover CTL loan notes (accruing 8% until exit/redemption) and deferred consideration;

iii) (Step 4b) CTL entered into an SPA with the shareholders of UKWM to purchase the entire issued share capital for consideration settled in £17,949,362.00 cash and £126,638.00 of rollover CTL loan notes and deferred consideration;

iv) (Step 4c) Midco then acquired CTL's rollover notes totalling £386,604 via put and call options in exchange for the issue of unsecured rollover loan notes in Midco in the same amount; and Topco then acquired £386,604 of the unsecured rollover loan notes in Midco via put and call options in exchange for the issue of shares.

50. PwC gave specific consideration to the interest on the loans – in particular as to whether tax relief would not be available on it. Overall this was seen as low risk – the debt instruments were said to have been the result of commercial negotiations and the rates were realistic. It was also noted that the securities issued should not give rise to a disguised remuneration risk.

51. The end result of the Project Flame transaction was that:

i) Inflexion invested cash of £28,499,913 for 47.8% equity in Project Flame Topco and shareholder loan notes in Project Flame Midco;

ii) The Inflexion investment was structured as: (i) £478,000.00 in cash for 47.8% of the equity in the Project Flame Topco; and (ii) £28,021,912.00 of Inflexion Loan Notes in the Project Flame Midco.

iii) UKWM shareholders sold c.70% of UKWM for £17,949,362 in cash and sold c.30% of UKWM for 12.664% in equity in Project Flame Topco;

iv) One shareholder Mr Steve Brown opted only to receive cash. He received £1,41 million for his 5.6% share in UKWM;

v) FIL shareholders sold c.40% of FIL for £10,010,034 in cash and c.60% of FIL for 25.996% in equity in Project Flame Topco; and

vi) The sweet equity was issued at nominal value for tax purposes, giving the sweet equity shares an immediate value of £5.6m.

52. The transaction completed on 17 April 2018, some two and a half years after Ardent was first retained.

The Success Fees

53. On the evening before completion Inflexion indicated that the working capital of the new companies would be insufficient to pay the fees at the levels previously set out in

the document passing between the parties and that the fee which would be paid was one calculated by reference to the PwC valuation.

54. On the day of completion, Ardent submitted an invoice for Success Fees totalling £1,639,639.33 + VAT. The covering letter stated:

> "As discussed please find attached the Ardent invoice to CTL on behalf of FIL and UKWM, calculated as per the two engagement letters to FIL and UKWM. The equity valuation was split 50:50 as per the agreement between you and Jamie Harwood. The eventual valuation of £59m is slightly higher than the £56m we always discussed due to the late introduction of additional sweet equity as the alternative to the proposed ratchet. This sweet equity diluted Inflexion down to their eventual equity holding of 47.8% for the total investment of £28.4m giving the total gross valuation of £59m"

55. This figure was calculated as follows:

> "Gross Transaction Value (as defined in the engagement letters):
>
> Total investment by Inflexion (A) is £28,499,913.00 (Combination of equity and loan notes)
> Capital Structure post completion Inflexion Equity (B) is 47.8%
> Gross Transaction Value: A/B £59,623,249.00
>
> As agreed between CEO's of the companies, the equity values are equally 50% of the combined entity each.
>
> UKWM GTV: = £29,811,624.00
> Advisory Fee at 3% = £894,348.73
>
> FIL GTV = £29,811,624.00
> Advisory Fee at 2.5% = £745,290.60
>
> Total Amount Due £1,639,639.33
>
> VAT at 20% £327,927.87
>
> **Amount Due:** **£1,967,567.20**"

56. The Defendants disputed this calculation and the fees. UKWM and FIL adopted a different interpretation of the meaning of GTV in the Engagement Letters. CTL wrote on 14 May 2018 as follows;

> "Appendix 2 to this letter contains full detail of how we have calculated the Gross Transaction Value applicable …
>
> In summary, the Gross Transaction Value (based upon the completion transaction value) of the FIL transaction is £10,934,022. By applying the relevant success fee percentage (2.25%) Ardent is entitled to £246,015. The Gross Transaction

Value (based upon the completion transaction value) of the UKWM Transaction is £18,924,744. By applying the relevant success fee percentage (3%) Ardent is entitled to £567,742. Accordingly, the total fee Ardent is contractually entitled to at this time is £813,757. We acknowledge and accept that Ardent is likely to become entitled to future additional fees assuming earn-out payments are made…

Appendix 2 …

Ardent Success Fee Calculation - FIL

1) Full Market Value of All Cash 10,010,034

2) Full Market Value of All Securities 259,960 (£1m value of group 25.996% ownership of equity

3) Full Market Value of all Property 0

4) Full Market Value of all Debt Forgiveness 664,028

5) Full Market Value of Earnout Payments … 0

Gross Transaction Value 10,934,022

…

Ardent Success Fee Calculation - UKWM

1) Full Market Value of All Cash 17,949,362

2) Full Market Value of All Securities 126,640 (£1m value of group 12.664% ownership of equity

3) Full Market Value of all Property 0

4) Full Market Value of all Debt Forgiveness 848,742

5) Full Market Value of Earnout Payments … 0

Gross Transaction Value 18,924,744"

57. On 30 April 2018, in line with these calculations, UKWM and FIL made payments totalling £813,757.39 + VAT purportedly in full satisfaction of the Success Fees. They maintain these calculations as correct.

The Equity and Loan Note Agreement

58. Separately, it is common ground between the parties that there was an oral agreement in or around January and February 2018 and evidenced and/or confirmed in writing on 2 February 2018 concerning Ardent's entitlement to roll over £250,000 of its Success Fees into equity and loan notes in CTL on the same terms as Inflexion's investment (the "Equity and Loan Note Agreement").

59. The precise terms of the Equity and Loan Note Agreement are in dispute. In broad summary:

    i) Ardent contends that there was a final agreement pursuant to which Ardent would receive £250,000 of the Success Fees in the form of equity and loan notes in the Project Flame group on the same terms as Inflexion, such amount to be automatically deducted from the UKWM and FIL Success Fees on a 50:50 basis upon completion of Project Flame; and

    ii) The Defendants contend that the agreement was merely an option to subscribe in Project Flame Topco which Ardent did not elect to take up.

60. Ardent was never issued with equity or loan notes in CTL, which I am told would now have appreciated in value very significantly.

The Trial

61. The trial has been conducted fully remotely over four and a half days, with witness evidence but no expert evidence. It was conducted in an atmosphere of complete courtesy and professionalism which was noteworthy and for which I commend all those involved.

62. For reasons to which I will come I did not find much of the witness evidence to be relevant, though much of it was interesting. The witnesses called were:

    i) For Ardent, Mr Williams. Mr Williams was a knowledgeable and intelligent witness. It was plainly difficult for him to divorce his role as a witness of fact from his position as the principal of Ardent and also to refrain from injecting elements of expert opinion into his evidence. Having said that I considered he was an honest witness.

    ii) For FIL, Mr Callander and Mr Green: Mr Callander was a lively and frank witness. The impression which he gave was that, given the involvement of a specialist, he had not taken a very in depth view on the technical aspects of the deal. Mr Green's memory was not enormously clear as to details;

    iii) For UKWM, Mr Harwood. Mr Harwood was a notably frank witness whose evidence was manifestly honest and straightforward, though his recollection was, as he made clear, less than perfect.

63. As to expert evidence the situation was that at the CCMC on 22 November 2019, Ardent applied for permission to rely on a Corporate Finance expert to assist the Court on the question of "*what is the industry practice and understanding of how Gross Transaction Value would be calculated*". However, this was opposed by the Defendants on the basis that "*what the industry might say or understand GTV to be is irrelevant – it is what the parties to the Engagement Letters agreed it to be and the Court's interpretation/construction and application of the same*". The application was refused by Mr Justice Henshaw.

64. The issues for determination therefore concern two distinct aspects of the contractually agreed remuneration due to Ardent in respect of the services it duly provided in Project Flame: (i) the Success Fees; and (ii) the Equity and Loan Note Agreement.

65. The issues as agreed by the parties during the course of trial (narrowing down from a much more lengthy List of Issues) were:

    i) What is the GTV of Project Flame for each of UKWM and FIL? This breaks down thus:

        a) On a proper construction, what is the meaning of Gross Transaction Value in the Engagement letters? (inherent in this is a decision as to the correct approach to calculating GTV);

        b) What is the Fair Market value of the CTL Rollover Loan Notes?

        c) What was the equity value of the Project Flame group at completion?

    ii) What is Ardent's entitlement under the terms of the Equity and Loan Note Agreement?

        a) What were the terms of the Equity & Loan Note Agreement – automatic subscription/option?

        b) Was it agreed that the amount of £250,000 would be automatically deducted from the Success Fees or was it agreed that could be paid with or without deduction?

        c) If an option period – did Ardent elect to subscribe?

    iii) To what relief is Ardent entitled, if any?

The proper construction of "Gross Transaction Value" in the Engagement Letters

The parties' contentions

66. The parties' contentions can be briefly summarised.

67. Ardent contends that:

    i) The correct question to ask is what the Gross Transaction Value is, and that the inquiry into methodology is to some extent a red herring.

    ii) However to the extent that it is necessary to settle on a methodology the "grossing up" method of assessing the Equity Value should be adopted. As Inflexion paid £28,499,913 for 47.8%, the Equity Value and hence the GTV is £59,623,249.

    iii) If aggregation was appropriate, on a proper construction the Fair Market Value of the CTL Rollover Loan Notes at completion of the Project Flame transaction was £22,774,000 and that this value should be used in determining Ardent's Success Fees; and

iv) The terms of the Equity and Loan Note Agreement required the Defendants and Inflexion to automatically execute Ardent's investment on completion through a deduction to the Success Fees.

68. In relation to the first point it is Ardent's case that the Equity Value of Project Flame Topco at completion of the Project Flame transaction was £59 million, within which the value of the CTL Rollover Loan Notes (which account for a combined 38.66% of equity in Project Flame Topco) was £22,774,000 ("Ardent's Construction"). This Equity Value GTV valuation, Ardent submits, reflects the economic substance and commercial reality of Project Flame and the very considerable consideration UKWM and FIL shareholders received by means of equity in Project Flame Topco. It is also, Ardent says, the valuation which the parties actually used in the run up to the deal.

69. Ardent submits that its approach to construction is confirmed by: (i) the pre-completion documentation; (ii) the structure of the final transaction; (iii) the buy-outs of UKWM's and FIL's shareholders; and (iv) the uncontested method in which Ardent's fees were calculated throughout the transaction.

70. Ardent submitted that the items listed in the GTV definition should be regarded as a non-exhaustive list of ingredients, rather than as an exhaustive recipe and the fact that the aggregation approach tracks the language of the clause does not mean it is the more appropriate approach. As for the grossing up approach it was submitted that the fact that it was a short cut did not mean that one needed to have the precise individual figures.

71. Ardent also submitted that the quest for the correct methodology was artificial because the two methods inevitably arrive at the same figures – "*they are not apples and oranges, but two halves of the same orange*".

72. The Defendants say that the correct construction is the "aggregation approach" and that this is apparent from a simple reading of the relevant definition. They submit that Ardent's case is impermissibly based on a "grossing up" approach to the valuation of Project Flame and is uncertain, that their approach to calculation of the success fees, based on aggregation of values of discrete elements, reflects the wording of the relevant clause and that Ardent's approach to construction is based on an impermissible reliance on events which happened well after the Agreements were concluded.

Discussion

73. There was no issue between the parties as to the authorities as to the exercise of construction, which need not be cited here. It was common ground that I am required both to consider the language used (read against the backdrop of any relevant factual matrix) and the question of commercial purpose/business common sense. It was also common ground that the exercise is objective; thus the fact that Mr Williams of Ardent subjectively intended to use one method rather than another in calculation of Ardent's fees is irrelevant in circumstances where he did not explain his intentions to the Defendants. So too is the subjective understanding of Mr Green and Mr Harwood of how the exercise would be undertaken.

74. The starting point for the exercise of construction is that the parties accept that their relationship throughout Project Flame continued to be governed by the original

Engagement Letters. The parties are also agreed that those letters were never varied, though the shape of the deal changed from two sales to a joint sale, to a joint sale with a "*relatively involved corporate structure*". It follows that what Ardent is entitled to is what is set out in those agreements.

The words

75. The starting point is a textual consideration of the clause. The relevant clause has been reproduced above. However in the light of the argument as advanced the salient portions repay repetition.

> "Gross Transaction Value shall mean the fair market value of all cash, securities, property or debt forgiveness or assumption (or any combination of the foregoing) provided to or by the Company or its shareholders pursuant to the Proposed Transaction, including the full value of any upfront component together with the full value of any additional payments as received by the Company shareholders in accordance with the terms of any earn-out mechanism, ….."

76. On its face therefore the clause seems to set out a method for calculating GTV. That method involves aggregating everything provided to or by the Company or its Shareholders pursuant to the transaction. It specifically mentions, separately, a number of items: cash, securities, property, debt forgiveness and assumption of debts. That suggests on its face that one adds together the value of each of these things, plus anything else which falls within the meaning of being "*provided to or by the Company or its shareholders pursuant to the Proposed Transaction*".

77. The process of summation described by the clause is an achievable exercise. We know this because on its face it reflects the exercise which the Defendants performed. The first preliminary conclusion is that the process described on its face appears to be that which the Defendants performed – the aggregation approach.

78. The process of course is not the exercise which Ardent performed. The exercise which Ardent performed as described in the invoice (the "grossing up approach") does not directly relate to the clause.

79. To deal with this problem Ardent submitted that this list should be read as a "list of ingredients" rather than as a recipe. I find that submission distinctly unpersuasive. One important reason for that is because that approach merely leads to uncertainty. Another is because the actual grossing up approach effectively ignored these ingredients.

80. The "ingredients" approach is underpinned by a submission made by Mr Catsambis in closing, that there are a number of ways in which one might approach the calculation of GTV. That is plainly right. Thus the British Venture Capital Association's International Private Equity and Venture Capital Valuation Guidelines (the "BVCA Guidelines"), to which I will revert below say this:

> "For certain Investments, Fair Value is determined by aggregating the individual Fair Values of portions of the business. This may be the case in situations where an Underlying

> Business has distinct parts where Market Participants would apply different metrics to value each portion. In such circumstances, it may be appropriate to determine the Fair Value of each part and then aggregate the values to determine the overall Fair Value".

81. This passage indicates fairly clearly the possibility of other approaches; and that possibility was plain on the evidence. The critical point however is that those approaches will not all produce the same result.

82. However for the purposes of this clause, plainly there has to a single correct answer – so that the Defendants know what they have to pay, and so that Ardent can complain if they get the maths wrong.

83. The approach of Ardent neglects this problem and suggests a very good reason why what is stated in the clause should be taken literally. That factor too therefore suggests that the Defendants' approach is correct.

84. Another factor which can be added to the textual consideration is that if Ardent were correct, it would have been extremely easy to define GTV in the terms in a way which reflected the approach now advocated for. The definition could simply have said "*GTV shall be the Equity Value of the Company at the time of sale*". Or it could have outlined the exercise which Ardent did, which was to extrapolate from the value paid for the percentage of CTL acquired, a value for CTL overall. Yet this was not done. That is despite the fact that these were effectively Ardent's own terms, hence the identical definitions in both contracts.

85. Ardent effectively had no argument at the textual level which could carry it beyond the possibility of another approach to the result it needed, of reading the clause as actually mandating that other approach. Although Mr Williams said in his statement that "*the calculation of Gross Transaction Value is obvious and universally understood*" I cannot accept that it is obvious or even slightly indicated by the wording of the clause that Ardent's approach is correct. On the contrary a textual approach to the relevant term provides strong support for the Defendants' position.

86. That of course is far from being the end of the enquiry. It is then necessary to review this preliminary conclusion by reference to what we all now call the iterative process, taking into account such matters as factual matrix and commercial purpose.

Factual Matrix

87. No factual matrix was pleaded, and no argument was made specifically on this basis. There was no pleaded case that the industry understanding was that the right way to perform this calculation was (despite the wording) the grossing up method. The Particulars of Claim simply pleaded the Equity Value as the GTV. This is reiterated in the Reply which states: "*As at 17 April 2018, the correct equity valuation (and therefore Gross Transaction Value) was £59,623,249.00*".

88. One argument deployed by Ardent was that the clause should be read in line with its approach because it was said to be well known that the grossing up approach and the aggregation approach were both valid methods which would produce the same result

and were thus essentially interchangeable. Of course this was not a pleaded case – had it been pleaded there might well have been an order for expert evidence on this subject, as the point would then have been in issue on the pleadings.

89. I will come in due course to whether the interchangeability point is right as a matter of fact. However even assuming that it were right, that is an argument which effectively involves both parties to the contract having expert knowledge, so as to produce a quasi-private dictionary meaning. On the facts of this case, that could not be right, because neither Mr Green nor Mr Harwood had such knowledge.

90. Indeed Mr Green demonstrated memorably that he had no clear understanding of terms such as Equity Value, indicating that he thought that Enterprise Value and Equity Value were the same thing (which they are not, though in some cases they may produce the same figure). Plainly therefore it could not be assumed as part of the factual matrix that Ardent's counterparties would "read in" to the term that equivalency. It is fair to say that this aspect of the argument was wisely not pushed with any degree of force by Mr Catsambis.

91. No other aspect of factual matrix was explicitly contended for.

92. Ardent relied on two main lines of argument as to the issue of construction.

93. The first was to say that on its natural and ordinary meaning, the definition captures all flows of valuable consideration to UKWM and FIL and its shareholders arising from all steps of the Project Flame transaction. It placed particular emphasis on the reference to "Fair Market Value", which it says must be presumed to be deliberate and to serve a purpose; it must do some "lifting".

94. Yet this argument too was based on a quasi-expert analysis, proceeding from the basis that "*the concept of Fair Market Value is a familiar one to professionals in many industries*" and by reference to a definition which has been adopted by the International Valuation Standards Council ("IVSC") and the Royal Institutional of Chartered Surveyors. Again the full understanding of this phrase cannot be attributed to the contractual counterparties by way of factual matrix. Nor can this understanding be imputed by virtue of the adoption of the definition by the Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50, which (i) cannot itself be assumed to be known to the parties and (ii) was done on the basis of evidence.

95. Nor can I see any proper basis in the evidence for the submission that "*the inclusion of the phrase 'Fair Market Value' ... particularly in the context of corporate finance – is to counter any artificial or contrived structure ultimately introduced into the transaction for tax or other purposes*".

96. But in any event the focus on Fair Market Value does not assist as to the "*ingredients versus recipe*" debate. It may assist on interchangeability, but it cannot, absent being able to succeed on the point above, produce a commercial context which means that the grossing up method is to be preferred to the aggregation method.

97. The second aspect on which reliance was placed was the BVCA Guidelines. However, again, there is no evidence that the contents of these Guidelines were known to both of

the contracting parties. That being the case, their relevance to the exercise of construction cannot be allowed.

Commercial Purpose

98. Then we turn to commercial purpose. Here Ardent did urge a relevant commercial purpose. It was however an inadmissible commercial purpose.

99. Ardent's case was that I should have reference to the subsequent development and negotiations of Project Flame as an aid to construction of the Engagement Letters on the basis that:

> "this is not a typical construction argument that resolves itself upon the Court determining the objective meaning of the disputed contractual phrase; the Court must go on to apply that contractual phrase to the facts of the Project Flame transaction in order to ascertain the Fair Market Value of the CTL Rollover Loan Notes (which necessarily involves ascertaining the Equity Value of Project Flame Topco, even on the Defendants' case). The analysis is not confined to the four corners of the Engagement Letters (which can offer no insight as to the ultimate Equity Value of Project Flame Topco) but must take into account the evolution and final structure of Project Flame."

100. This submission branched out in evidence to cover evidence as to whether the schedules produced for the purposes of the developing deal and the parties' correspondence demonstrated an agreement to Ardent's fees calculated on a grossed up basis. It pointed to the following facts:

i) Ardent's fees were shared with Mr Ma of Inflexion on 2 February 2018 following discussions on 31 January 2018 and the figure of £1.54 million mentioned without demur;

ii) Mr Callander separately prepared "*my latest analysis of fees that CTL will incur for the transaction*" and attached them to an email dated 9 February 2018. In respect of Ardent's fees, it indicated that FIL was liable for £677,000 (of which £40,000 had already been paid) and UKWM was liable for £672,000 (of which £45,000 had already been paid);

iii) Those figures were amended to £695,000 for each of FIL and UKWM by Mr Williams on 26 February 2018; again without demur;

iv) At a meeting attended by all parties on 20 March 2018, Ardent's understanding of the fees was again disclosed to no disagreement;

v) This was reiterated via the exchange of emails dated 9 April 2018 and a "cash flow analysis" sent by Mr Callander on 12 April 2018.

101. Ardent submitted on this basis that evidence demonstrated that the parties at all times agreed and knowingly proceeded on Ardent's methodology for calculating GTV and Ardent's fees – that the journey was predicated on the original Equity Value, which

should be regarded as "baked in". This was the more so when there was nothing to suggest that Inflexion has overpaid or underpaid or that the valuation placed on the deal prior to the PwC Tax paper was anything other than arms' length.

102. No authority was cited for the proposition that the development of the later project was relevant or admissible in the construction exercise. The question of the relevance and admissibility of this evidence was flagged by me as a question for closing and was not really grappled with. It was submitted that where there was no real dispute between the parties as to the Equity Value as the transaction progressed it was artificial to approach the matter in this light. Failing that I should not regard the pleadings as exhaustive and to the extent appropriate I should grant equitable relief.

103. I have no hesitation in rejecting this heterodox submission. This is not a case where one can look to pre-existing price expectations, which then harmonise with later expectations. What we have here are contracts in 2015/2016 and no suggestion of a target Equity Value until much later. One cannot therefore "finesse" the timeline. The same goes for the suggestion that we know the minimum value that the parties were expecting; that too is later. And also there is evidence (to which I shall refer below) that the prices aimed at were, to an extent, aspirational.

104. There is of course a possibility that such conduct and negotiations could become both relevant and admissible if there were a case of variation or of estoppel by convention; and at times the submissions advanced for Ardent seemed to suggest that this was the case being run. But a case on variation was expressly disavowed. There is no case (pleaded or otherwise) that a binding agreement was made pre-completion that Ardent could invoice and would be paid on this basis, regardless of the terms of the Letters of Engagement. As for estoppel by convention, that was never pleaded, as of course it would have needed to be, in order to enable cross-examination on the relevant constituent parts. And it takes relatively little reflection to see the difficulties which such an argument would have faced.

105. But the bottom line is that if these avenues are closed, as they are, the evidence as to the evolution of Project Flame really is neither here nor there when it comes to considering the meaning of the GTV definition in the (pre-existing and unamended) Engagement Letters. More specifically, the fact that the parties were, in the lead up to the completion of the transaction, proceeding without comment on the basis of fee estimates provided by Ardent that were calculated by reference to the grossed-up Equity Value is irrelevant.

106. Nor is there any mileage in the argument that Ardent was prevented from calculating the Success Fees in the contractual mode. This was not a pleaded claim; it appeared throughout that Ardent simply proceeded on the basis that the wording did not matter. This reflects Mr Williams' evidence that he considered it was obvious that the correct value was the grossed up value. It was only effectively at the door of the court that an argument began to be cast by reference to the aggregation method. Certainly there is no slightest piece of evidence which would support a conclusion that Mr Williams ever sought to calculate the fees on the aggregation basis.

107. The result is that I conclude that the meaning of GTV in the Engagement Letters was as contended for by the defendants, namely that it mandated an approach based on aggregation, not grossing up.

What was the Fair Market Value of the Loan Notes?

108. This brings us to what was effectively Ardent's backup position, which was to say either (i) that Equity Value and GTV based on aggregation were the same and so the Equity Value relied on by Ardent was the correct GTV or (ii) that the Fair Market Value of the Loan Notes produced a result which was the same as the figure for which it contended. There is obviously a significant overlap between these points.

109. Looking at the first point, which can cover the contention that the two methods will inevitably produce the same result, I was not persuaded by this as a general proposition. It may be the case that in a number of cases the aggregation route and the grossing up route will arrive at the same result. However even in the abstract one can plainly see scope for it not doing so.

110. That possibility is given further support by a consideration of a portion of the BVCA Guidelines relied on in opening by Ardent:

i) "*The value of the business as a whole at the Measurement Date (Enterprise Value) will often provide a key insight into the value of Investment stakes in the business*".

ii) "*Indicative offers received recently from a third party for the Underlying Business may provide a good indication of Fair Value*".

iii) "*In determining the Fair Value of an Investment, the Valuer should use judgement. This includes consideration of the specific terms of the Investment which may impact its Fair Value. In this regard, the Valuer should consider the economic substance of the Investment, which may take precedence over the strict legal form*".

111. Those quotations suggest that the BVCA see equivalence more in terms of "may" or "will often" than "will inevitably". They also emphasise the role of judgment in determining Fair Value. And as soon as one has scope for judgment, one has scope for difference.

112. Yet further support comes from a portion of the Guidelines referred to in closing. Within the Valuation Guidelines is the following passage:

> "2. Principles of Valuation …
>
> 2.2. In estimating Fair Value for an Investment, the Valuer should apply a technique or techniques that is/are appropriate in light of the nature, facts and circumstances of the Investment and should use reasonable current market data and inputs combined with Market Participant assumptions. …
>
> 2.3. Fair Value is estimated using the perspective of Market Participants and market conditions at the Measurement Date irrespective of which valuation techniques are used.
>
> 2.4. Generally, for Private Equity, Market Participants determine the price they will pay for individual financial instruments using

> Enterprise Value estimated from a hypothetical sale of the Investee Company, …
>
> 3. Valuation Methods …
>
> 3.2 (ii) The Valuer should use one or more of the following Valuation Techniques, taking into account Market Participant assumptions as to how Value would be determined: …"

113. This section demonstrates that the BVCA sees scope for more than one method of determining value; it is inherent in this and also in the references to estimation and use of judgment that different results may eventuate. That is reflected in the range of results produced by Mr Green via an EBITDA calculation in the context of the developing negotiations, and the range of values apparently provided by Ardent to a prospective buyer of FIL at an earlier stage.

114. This was also the effect of Mr Williams' own evidence, which was that grossing up provides a "short cut". He also did not say that it was the standard way to calculate GTV, but rather "*This is the standard way to calculate the total equity value of a transaction.*" – equity value, not GTV. Again in his oral evidence he positively asserted that the two methods would reach a different result:

> "if I had taken the exercise to the go through all the constituent parts of that structure… I would have got to a much bigger number if I had used fair market value at each stage. So, holistically, the value of the transaction was represented by grossing up of Inflexion's investment"

115. Further support for the "*no one right answer*" approach might be seen in the PwC Steps paper, though I place no reliance on this here, dealing with that document principally below, in the context of the second part of the inquiry.

116. The approach advocated by Ardent also seemed to sit ill with Ardent's own emphasis on Fair Market Value; while the overall purchase price may well – and doubtless often will – be a fair market price, as that would be understood by professionals, it does not necessarily follow. For example a bidding war between rival businessmen with a personal grudge might well result in a figure above a realistic market figure. Here again, see the qualifications in the BVCA passage above.

117. So too can one see that other elements might distort the result. Here the value finally asserted by Ardent of £59 million was reliant on, as Mr Williams said "*the late introduction of additional sweet equity as the alternative to the proposed ratchet*". The inclusion of sweet equity as a basis for diluting the equity holding used for valuation purposes seems on its face questionable given its speculative nature; and the more so when it is included as an alternative to something which it seems would not have affected the Equity Value calculation.

118. Thus one can discount the possibility that the difference in methodology is necessarily no more than a chimera.

119. What then of the possibility that Ardent can get home via the Defendants' methodology – that on the facts the result of the aggregation approach in this case is the same.

120. Mr Harper QC urged me to dismiss this argument *in limine* because no claim had been pleaded on this basis "*nor does it plead that the D[efendant]s should have used different figures for the elements in the calculation(s) exhibited to and relied upon in the Defence(s)*". The Defendants submitted that if Ardent had advanced such a claim then there would have been an issue as to the fair value of the Rollover Loan Notes, an issue that would require expert evidence. There is no such expert evidence (and while expert evidence was sought by Ardent, it was not sought on this issue) therefore (even if the claim was pleaded) it could not be resolved or sustained.

121. I have been instinctively unwilling to accede to this submission, despite the fact that it plainly has some considerable force. I do bear in mind that the Court is reluctant to throw up its hands and to refuse to decide issues when, for example, the assessment of damages is difficult: Chitty on Contracts 33rd Ed. paragraph 26-018, *Crewe Services & Investment Corporation v Silk* [1998] 2 EGLR 1.

122. However in the end I have been persuaded that it is the correct approach because this really was a point which required to be pleaded and have evidence addressed to it if a proper determination was to be made. In particular (i) it seems apparent that whatever the answer is via the aggregation method, it is not the sum pleaded by Ardent (ii) a case as to the aggregation method and the elements which go to make it up would have required to be pleaded to enable expert evidence to be adduced on the controversial aspects in order for me to be in a position to reach a precise answer with any degree of confidence at all. On what I have, were I to do other than go with one of the figures advocated by the parties, I could do no more than make an uneducated guess.

123. But in any event, I conclude that if I were to do the best I can, regardless of the situation on the pleadings, Ardent's claim would fail in any event, for essentially similar reasons. That is because, as I will explain further below, I would come to the view that (i) Ardent does not advance a case which justifies the fees it has sought in its pleading based on the aggregation method (ii) Ardent does not advance any case which enables me to reach a conclusion as to the correct figure for the valuation of the Loan Notes and (iii) the Defendants rely on a professional valuation, albeit for a different purpose, and I do not on the evidence have the material to say that the view which opposes the Defendants' calculation is the stronger.

124. The starting point is that the Defendants have avowedly followed the aggregation methodology. They have presented a calculation which takes into account the items specifically identified in the definition of GTV. That calculation is set out thus:

GTV Element	**UKWM**	**FIL**
Cash	£17,949,362.00	£10,010,034.00
Securities	£126,638.00	£259,966.00
Property	0	0
Debt Forgiveness	£848,742	£664,028.00

Total	£18,924,742.00	£10,934,022.00
Success Fee	£567,742.26 plus VAT	£246,015.00 plus VAT

125. Until the date of the hearing no issue was taken with any element of this (other than, implicitly, the Loan Note Valuation). Even at the hearing, the argument advanced by Ardent only openly engaged with this portion, though in oral opening issue was taken in passing with the Debt Forgiveness element, and by closing there was issue also taken with the treatment of the sweet equity.

126. Ardent then, at the hearing, put forward in submissions the following alternative aggregation calculation:

GTV Element	**UKWM**	**FIL**
Cash	£17,949,362	£10,010,034
Securities	£7,550,693	£15,499,671
Debt Forgiveness	0	0
Property	0	0
GTV	£25,500,055	£25,509,705
% of GTV as required under Letters of Engagement	**3%** = 765,001.65	**2.5%** = 637,742.63
Total GTV		£51,009,760
Total Success Fee due		£1,402,744.28

127. There was therefore no pleaded case on the mechanics of aggregation. Further it will readily be noted that the figures advanced via this calculation as the correct success fees are not the same as those given in the Particulars of Claim (£894,348.73 and £745,290.60). Nor are they the same as the figures which follow from the Loan Note valuation asserted in paragraph 13 of the written opening (£22,774,000). Setting aside the Loan Note valuation issue, there is also a difference as to Debt Forgiveness, which Mr Catsambis agreed did have the effect of reducing the success fees due to Ardent.

128. It follows, as I have said above, that other than via its primary case, which I have rejected, Ardent does not advance a case for the sum which it claims in this action. (It also follows, I note by way of parenthesis, that this stage of the analysis provides another illustration of the falsity of the submission that the two methodologies must result in the same outcome, in that Mr Catsambis was actually unable to advance a case based on the aggregation method which supported his pleaded case).

129. It can also be seen that the case presented was very much a moving target. The issues which arose as to just what Ardent's case was, also do illustrate that there really was scope for expert evidence if this point were to be taken, and that this extended not just as to the Loan Note valuation point but also as to Debt Forgiveness (and possibly sweet equity). When one has at least two elements of expert evidence missing, the question

as to whether it is appropriate to press on and reach a conclusion without it becomes very significant.

130. Even if one were to ignore this point, and one were to attempt to reach a conclusion as to the valuation issue, the argument advanced does not persuade me that the above calculation is to be preferred to the Defendants' calculation. There are a number of reasons for this.

131. The first is that it puts forward as an alternative to the £1 million figure the figure of £59 million which derives from the working documents as the deal developed. As regards the £1 million figure, I entirely appreciate the apparent unattractiveness of that figure. It originates in the PwC Tax Structuring Paper, which, as I have noted above, was a document plainly produced with tax efficiency rather than GTV or Equity/Enterprise Value valuation in mind. There is plainly a disjunction between the way the parties were presenting the figures internally before PwC's involvement and how PwC presented them in the context of the fully developed multi-layered structure, with that question of taxation front and centre of their consideration.

132. Mr Catsambis understandably made much of the fact that the Defendants' factual witnesses were unable to explain or to support the £1 million figure. However given the complexity of the structure (Mr Green understates it when he describes it as "*a relatively involved corporate structure*") and the multitudinous considerations which led to the evolution of the figures from the parties' discussions into the final structure, I cannot say that I find this at all surprising.

133. A good deal of evidence was directed to the status of the PwC Tax Structuring Paper and the £1 million valuation. Mr Catsambis submitted that the PwC Tax Structuring Paper could have no status in this dispute because:

i) The Engagement Letters do not include any mechanism for a third party valuation, much less a unilateral exercise undertaken by the Defendants. Such a valuation is not required because the GTV is readily ascertainable from the transaction via the grossing up method;

ii) Ardent never contracted with PwC, never agreed the content of the PwC Tax Structuring Paper and never consented to be bound by it;

iii) The PwC Tax Structuring Paper was not in existence or contemplation when the parties entered into the Engagement Letters;

iv) Ardent only received the draft PwC Tax Structuring Paper (dated 28 March 2018) on 29 March 2018 (i.e. shortly before completion); and

v) Ardent has never seen PwC's workings and it only received the final PwC Tax Structuring Paper (dated 17 April 2018) as part of disclosure in these proceedings.

134. I am not persuaded that any of this matters. Either the PwC Tax Structuring paper is evidence of the value of the CTL Loan Notes, or it is not. Certainly absent an agreement by Ardent, Ardent could not be bound by it, in the sense of being precluded from disputing it. The fact that it was not commissioned for this purpose may well (indeed

must) go to weight, but it does not make it irrelevant if it objectively offers any evidence.

135. Ardent submitted – or came close to submitting – that it was an entirely artificial figure, bearing no relation to reality and arrived at only for the purposes of tax. I do not consider that this is a fair analysis. True it undoubtedly is that the PwC valuation was not produced as a Fair Market Value valuation for the purposes of the GTV calculation. True it also is that it was specifically flagged as being for a specific purpose.

136. My conclusion is however that the PwC valuation cannot (at least without expert evidence which I do not have) be simply pushed to one side. As I have also noted above, PwC do not speak of their exercise in equity valuation terms. However it was a formal valuation of the Loan Note element. It was given because the shares needed to be valued so as to ascertain and confirm to HMRC that they were not being acquired at an undervalue. PwC do not at all disavow a "Fair Market Value" valuation – they merely give a warning both as to possible differences in the abstract and as to the existence of a range produced by the operation of judgment. They do indicate (i) that a valuation will support their figures (ii) that the structure with this valuation will be low risk in terms of vulnerability to challenge on being at an undervalue (i.e. that the valuation is within a credible range) (iii) that the loan elements are commercially negotiated. Critically, too, they reiterate the "range" potentialities of any valuation.

137. What I therefore appear to have in this paper is a form of valuation by professionals, which was not done for the purposes of the specific fee calculation exercise, or with a focus on GTV/Equity Value, but which is a valuation which PwC considered defensible as a value within a range of possible outcomes.

138. Before I move on I should deal with two points on which Ardent placed much emphasis. The first was the submission that the PwC figure was the fixed book value of the shares in Project Flame TopCo as recorded in the nominal ledger account. This was disputed by the Defendants and absent expert evidence I am certainly not in a position to draw a firm conclusion on this. Nor, it may be said, were Mr Callander and Mr Green, on whose evidence Ardent relied. To the extent I need to form a view however the evidence set out above seemed to me to justify a conclusion that it certainly was more than a notional or book value and that it partook of the nature of a genuine valuation albeit one for tax purposes.

139. The second was that "*the £1m figure is not Fair Market Value, it breaches the transaction's pre-requisites and it produces perverse outcomes*". However the first half of this proposition is not logically related to the second. The subjective intentions of the parties as to the division of the spoils has nothing at all to do with whether the valuation is a "Fair Market Value". In addition:

i) The elevation of those subjective intentions to "pre-requisites" is one which is not reflected in any contractual obligations, still less as ones in any contract with Ardent.

ii) The supposed perverseness of the outcomes is predicated on the fact that a division was hypothesised on an entirely different structure to the one which was finally adopted.

140. Against this incomplete material on the £1 million value I have the £59 million figure. What this figure is not, on any analysis, is a formal valuation. What it appears to be is a derivation of a working hypothesis arrived at on a fairly informal basis. There was never a formal valuation of £59 million. There is no expert evidence verifying this hypothesised figure. Given the circumstances in which it arose there are grounds for a degree of scepticism. This was a figure which to some extent originated in the parties' own wishes for what they wanted to achieve. For example the figure increased to £59 million to include the value of sweet equity, which was speculative and never part of the original analysis.

141. It is certainly the case that at the outset, when the two sales were being advanced separately, UKWM set a minimum value of £10 million and FIL set a minimum value of £20 million. That then developed in the later documentation into a £50 million figure (and later the £59 million figure). But that does not mean that any of these figures were real values – or even realistic, as the absence of interest in the individual sales shows. The history of trying to sell each company may also provide an indication. As Mr Harwood said, the Inflexion deal was the only deal in town: "*Flame was not the deal we wanted, [we] just had to take it*". That suggests the value was one in the hands of the buyer, and not equivalent to the aspirations of the sellers.

142. What Mr Harwood also said as to value was:

> "the aspiration was always to achieve sort of a circa £10 million cash in my pocket. So, I took this transaction -- or took this deal in the view that I only ever really paid attention to the money I would get in my pocket. Anything else was essentially an up-side"

143. The evidence therefore makes clear the partially aspirational nature of the initial valuations. The same can be said for the later joint figure. It is certainly the case that as at October 2017 Mr Green was pressing Mr Williams to achieve a minimum £56 million valuation for Project Flame, but again that was aspirational. It is not a figure which has been deconstructed and justified.

144. It makes perfect sense that these valuations were, as Mr Callander noted, speculative when each of UKWM and FIL was hugely dependent for business and hence for value on one major customer, on an eighteen month contract, who might go elsewhere. The prospects of the new company were also far from clear – or as Mr Callander said, with a £50-60 million valuation you were betting quite a lot of money on significant growth over a couple of years, which growth might not occur.

145. That deals with the business fundamentals. There is then the question of the treatment of the £28 million of debt which was included in the structure by the time of completion. While I would perhaps not accept the submission advanced by Mr Harper that the £59 million figure "*could never be sustained as a valuation as it takes no account of the debt in the business of £28m*", there is a real (and unanswered) question about the correct way to treat the £28 million of debt which forms part of the final structure. If that figure is to be taken on its face, an equity value of £59 million would produce an enterprise value of £87 million.

146. Thus, as I say, I understand the questions which Ardent raises as to the status of this debt, but it does, on its face, appear to be the case that if Topco was to be sold on the day after completion the shareholders would not receive £59 per share but £31 per share. I was not persuaded that the response that there was no right of anyone to sell on Day 1 after the transaction really provided an answer to this point.

147. This question of the treatment of the debt is also put in context by the Equity and Loan Note Agreement with Ardent and the fact that Ardent would treat the Equity (£4,192 worth of shares in Topco) and Loan Notes (£245,807) as a stapled value of £250,000 and not £493,607 (£245,807 + £247,800 Equity on basis of approach taken by Ardent to valuation of shares in Topco). That makes it slightly nonsensical if (as Ardent contends) FIL and UKWM are to be treated as receiving greater value.

148. The other factor relied upon by Ardent as supporting its valuation was the buying out of Mr Baloch and Mr Brown. Both those gentlemen, as noted above, were apparently bought out based on an Equity Value of £25 million for each of UKWM and FIL. However I do not find this factor particularly helpful given the facts that:

    i) It does not actually produce the result which is the basis of Ardent's claim. It indicates a value of £50 million, not £59 million;

    ii) There was plainly in the case of each of these gentlemen a negotiation, and given the existence of a range, and the desire not to have a problem with the overall deal arising out of these two relatively minor players, they were well placed to bargain for top of range. It may well be (and appears to me likely to be) an example of price not being necessarily an indicator of value;

    iii) Their exit price was not based on an agreed formulation and is nowhere suggested to have been calculated on an aggregation basis.

149. Finally I should mention the suggestion that the early Indicative Offer for FIL supports the Ardent valuation, relying on the fact that the BVCA Guidelines state that indicative offers received from a third party may provide a good indication of Fair Value. However I conclude that the submission that this as a contemporaneous offer from an arm's length interested party, is the best evidence outside of the Inflexion deal of FIL's true market value takes matters too far. This was an early stage indicative, non-binding offer which did not progress. The BVCA Guidelines do not in any event suggest that there is a necessary correlation between offers and values – and for the reasons I have already given above, I conclude that the point is not a good one.

150. Ultimately I can quite well see that it may well be the case that the Equity Value of the companies was near the £50 million mark, and that the Fair Market Value of the Loan Notes if specifically valued for GTV purposes would be more than £1 million. There is a range, and the figure given for tax purposes will likely be at the bottom of the permissible range, while the GTV valuation may well be higher in the range.

151. However this does not assist in the absence of some better evidence than I have. As I have noted above, the nature of this claim is that it requires a precise answer. I have only one pleaded case on the aggregation method. Further and in any event I do not have the material to decide anything other than which of the pleaded figures is more probably right on the material before me.

152. On that binary basis, given that what I have is:

    i) Material from the Defendants which provides some, though not compelling, support for the pleaded case as to value of the Loan Notes;

    ii) No case from Ardent which supports its pleaded case;

    iii) Material from Ardent which provides no real evidence to support the figure advocated for as Equity Value (which would itself produce a result different from the pleaded case).

    I would, if necessary, conclude that the Defendants' case as to Fair Market Value of the Loan Notes would be the one to be preferred.

153. It follows that Ardent's claim for further payment in respect of the Success Fees fails.

The Equity and Loan Note Agreement

154. On this issue Ardent's case is that there was a concluded oral agreement in January/February 2018 pursuant to which Ardent **would** subscribe for equity and loan notes in the Project Flame Group on the same terms as Inflexion's investment, such amount to be deducted from the UKWM and FIL Success Fees on a 50:50 basis **automatically** upon completion of the Project Flame transaction. [My emphasis]

155. The existence of the agreement is not contentious, but the questions of "would" as opposed to "could" and "automatically" as opposed to "*payment with or without deduction*" are.

156. On these issues there is a relative paucity of evidence. It was suggested in closing that the parties may (subjectively) never have addressed their minds to these questions. That seems all too possible. The agreement was plainly reached almost in passing, and never either reduced to writing or thought through. However here there is a fully pleaded case on each side and I must do the best I can with the evidence I have.

157. Doing that, I conclude that Ardent's case is probably right, but that given that it was advanced on the hypothesis that its first point was right, this may make little difference.

Would or Could?

158. On the first question – would or could, there was no positive agreement in favour of the option analysis. As the evidence came out I agree with Ardent's submission, made in closing, that the Defendants are not saying that such an agreement was reached but with the sole caveat that it was merely an option (which is the case pleaded in paragraph 12 of their Defence). Neither are they saying that there was no such agreement. The thrust of their case was actually that they cannot recall any such concluded agreement.

159. This means that Ardent have the better of the oral evidence on this. That position is reinforced by a consideration of the witness statements:

    i) Mr Green states that he does "*not have any recollection of my involvement in an oral agreement being reached with Ardent in or around February 2018*".

ii) Mr Callander makes no comment at all on the formation of the Equity and Loan Note Agreement; and

iii) Mr Harwood states that he has "*no recollection of [the discussion in or around January/February 2018] or any such agreement by [him]*" and that he "*essentially divested [himself] of all responsibility to the finer details of the deal, including the calculation and payment of advisor fees*".

160. The position on the witness evidence is consistent with the documentation, in that from February 2018, it can be seen that the Equity and Loan Note Agreement was expressly built into the transaction documentation and never described as an option, and that at no point prior to completion did anyone say to Ardent or Ardent itself say that the Equity and Loan Note Agreement was merely an option. While such documents are not admissible as an aid to construction, in the absence of any written document and the near total absence of witness evidence they have some value in determining the terms of an admitted agreement.

161. The run of relevant correspondence is as follows:

i) Mr Williams' email of 2 February 2018 following on from the discussion and agreement reached with Mr Ma on 31 January 2018: "*Ardent Fees and Investment: .... Ardent has elected to invest £250,000 of these fees into CTL on the same terms as the investor (therefore Net Cash Fees will be £1.254m)*".

ii) Mr Ma responded attaching a proposed structure which reflected Ardent's £250k rollover into loan notes. There is no suggestion that it is being treated as an "option".

iii) Schedule 5 of the signed Heads of Terms dated 8 February 2018 also expressly records the Equity and Loan Note Agreement and shows Ardent receiving a 0.4% ownership of CTL.

iv) The email of 9 February 2018 included a spreadsheet containing the Project Flame advisor fees and invited comments from Mr Williams. Mr Williams' response was not expressed conditionally:

"1. There is no deduction of retainers in the Fee Agreement.

2. Success fee is 3% on UKWM and 2.5% on FIL on the Gross Transaction Values.

3. Ardent will offset £250,000 of fees into CIL (sic)"

v) The draft PwC Tax Structuring Paper dated 28 March 2018 alluded to the terms of the Equity and Loan Note Agreement in several places:

a) Ardent is included by name in the "intended final capital structure" and its subscription for Equity of £4,196 for a 0.420% ownership of CTL is expressly recorded;

b) The Equity and Loan Note Agreement is also reflected in the "consolidated sources and uses"

c) Ardent's investment in the Project Flame group merits its own step in the PwC Tax Structuring Paper, which indicates that the acquisition was contemporaneous with completion:

"-Ardent will roll £4,196 of their fee into TopCo for
4,196 £0.0001 B2 ordinary shares.

- Ardent will roll £245,804 of their fee into 8%
unsecured C loan notes […]

Timing: Completion."

d) Ardent's share subscription and loan note subscription in the Project Flame group are again recorded.

vi) Mr Williams calculation of fees on 9 April 2018 states: "*Less: Investment in CTL = £250,000*" and calculates the "*Net Total Payable*".

vii) By email dated 10 April 2018 Mr Fabrizio Carpanini (a partner at Dorsey, corporate lawyers for CTL) opined that the Equity and Loan Note Agreement was technically not a subscription but a part-payment of Ardent's fees: "*In clause 3.1.16 and 3.1.18 there is a reference to a subscription by Ardent for shares and loan notes; however, the C loan notes are not technically a subscription but are in exchange for fees of £245,807. Peter/Gareth how would you like this expressed?*"

162. There is nothing optional or conditional about the way in which references to Ardent's entitlement is expressed in any of this correspondence. The impression given is of something agreed final, and mandatory, built into the Project Flame transaction. It is factored into the transaction's source of funds and into the final Project Flame Topco shareholding structure. That raises the question of how the option analysis emerged. Here it seems that the suggestion of an option appears to have been an *ex post facto* construct brought into the picture by Mr Ma, who in May 2018 (i.e. after completion) suggested that there had been a two week period for subscription which had now expired. Mr Green suggested that there had been some earlier conversation between Mr Ma and Mr Williams, but that he had no direct knowledge of it; in the absence of Mr Ma's evidence and in the face of Mr Williams clear evidence to the contrary, that suggestion gains no traction.

163. Further it is perhaps noteworthy (though I do not need to place any reliance on this) that Mr Ma himself was not called as a witness despite being central to all aspects of the transaction, including the Equity and Loan Note Agreement, and being slated to appear as a witness on the Case Management Information Sheet at the CMC.

164. I conclude that the evidence in favour of the argument that it was agreed that Ardent would receive part of its remuneration in the form of equity in Project Flame Topco is stronger than the evidence for the option argument. There is no case that the agreement was varied.

Automatically or "with or without deduction"?

165. As to the second point, Ardent's clear position is that the Equity and Loan Agreement was final and would be executed automatically upon completion of Project Flame through a deduction from the Success Fees. The evidence, such as it is, is that it was proposed by Mr Williams to Mr Green in order to reduce the cash flow impact on completion and was accepted on those terms. The Defendants have not contradicted this evidence and have no evidence to support their case that the Success Fees could be paid "*with or without deduction*". It follows logically from the fact that the agreement was to reduce cash outgoings on completion, that the subscription would be automatic. That is supported by the draft PwC paper and the way that Mr Williams put together his calculation in the email of 9 April. The only doubt about this seems to have been introduced by the possibility of a dispute about the level of the fees, very late in the day.

166. This links with the fact that one apparent oddity with Ardent's case is the fact that the invoice tendered by Mr Williams makes no mention of the Equity and Loan Notes. However, as can be seen from the factual section above, the invoice was issued against a background where the first serious suggestion that the level of Success Fees would be controversial had come the night before closing. It appears that Mr Williams had it in mind that the Equity and Loan Note subscription (which had come into existence as part of an arrangement to smooth the path to payment of the fees) would form part of what was in contention, and form part of the resolution of that debate. Thus as matters progressed he (unsuccessfully) offered the Equity and Loan Note amount as a bargaining chip in discussions with Mr Ma. The oddity is therefore a product of circumstances at the time, and not indicative as to the terms of the agreement.

167. There remains a question as to the form of relief in relation to this part of the claim. What is sought is either specific performance of the Equity and Loan Note Agreement or, alternatively, a monetary award that reflects Project Flame Topco's current true valuation. As is apparent from the foregoing, Ardent had anticipated purchasing the Equity and Loan Notes out of the balance of the Success Fees; I have however concluded that there is no balance owing.

168. The parties have not addressed in any detail the appropriate relief on this hypothesis that Ardent's first issue fails, though the Defendants have contended that if the Equity and Loan Note Agreement was not an option, Ardent never paid for the Equity and Loan Notes and cannot therefore complain that it has not been issued with the Equity and Loan Notes.

169. I conclude that this submission is broadly correct. There can logically be no breach of the agreement on the part of CTL in not proceeding with the subscription in circumstances where Ardent sought payment of the Success Fees in full, and did not proffer the £250,000 for the purchase of the Equity and Loan Notes, where Ardent has been paid what FIL and UKWM contends is the proper Success Fee and where Ardent has never indicated that if it is wrong about the Success Fees, it still wishes to subscribe.

170. The question of the form of relief in the light of my findings may well therefore be best resolved by a declaration in appropriate form. However this is a matter best dealt with following further submissions by the parties in the light of the foregoing.