Neutral Citation Number: [2020] EWHC 1375 (QB)

Case No: BM00005A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Birmingham Appeals Centre
Remote hearing by Skype for Business

Date: 29/05/2020

Before :

MR JUSTICE CAVANAGH

- -

Between :

(1) Dr Annant Dayah	**Appellants**
(2) Dr Vandana Mannan	
- and -	
(1) The Partners of Bushloe Street Surgery	**Respondents**
(2) The Partners of Wigston Central Surgery	

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Martin Young (instructed by **Lewis Nedas Law**) for the **Appellants**
Imogen Halstead (instructed by **BHW Solicitors**) for the **Respondents**

Hearing date: 5 May 2020

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Approved Judgment

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

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MR JUSTICE CAVANAGH

Mr Justice Cavanagh:

Introduction

1. This is an appeal against the judgment of HHJ Murdoch, handed down on 11 December 2019, at Northampton County Court. In an order that was perfected on 13 December 2019, the Respondents, who were the Claimants below, were awarded judgment against the Appellants in the sum of £27,812 plus interest and costs.

2. The sums claimed by the Respondents were sums that they claimed were due from the Appellants as their share of the running costs of a Medical Centre, the Two Steeples Medical Centre, in Wigston Leicestershire, for the period from 21 December 2015 to 6 June 2016.

3. The Appellants are two doctors who practised in partnership as GPs at the Two Steeples Medical Centre, as the Long Street Medical Partnership. The Respondents are two other GP partnerships which practised from the same location. Responsibility for the running costs of the Medical Centre was shared, and was allocated between the partnerships in accordance with the terms of two agreements, a Facilities Management Agreement ("the FMA") and a Mutual Indemnity Agreement ("the MIA").

4. On 21 December 2015, the Care Quality Commission ("the CQC") obtained a court order for cancellation of the Appellants' registration as a health service provider under section 30 of the Health and Social Care Act 2008 ("the 2008 Act"), as a result of concerns about the quality of care that was being provided to patients by their practice. This meant that the Appellants could no longer practice from the Two Steeples Medical Centre with effect from that date. The care of their patients was taken over by the partners of the Second Respondent, the Wigston Central Surgery, under an Emergency Caretaking agreement. The Appellants appealed against the cancellation of their registration. When that appeal came on for hearing, in August 2016, the CQC did not oppose the appeal and offered no evidence, and so the Appellants' registration was reinstated. The fact remained, however, that they had been barred from conducting their practice at the Medical Centre during the intervening period, from December 2015 to August 2016, and, in the event, it was not possible for them to restart their practice at the Medical Centre after August 2016: their patients had largely moved elsewhere, or had registered with the other partnerships located at Two Steeples Medical Centre.

5. The claim for the Appellants' share of the running costs of the Medical Centre relates to the running costs for the period from the cancellation of their registration on 21 December 2015 to 6 June 2016, on which date their contract with the local Clinical Commissioning Group ("CCG"), to operate a GP practice at the Medical Centre, was terminated.

6. The Appellants dispute that they are liable for the sums claimed on two alternative grounds. The first is that, in the circumstances that happened, their obligations under the FMA and the MIA were discharged by frustration. Alternatively, they contend that the Respondents are estopped from claiming the sums that would otherwise have been due to them under the FMA and the MIA.

7. The Appellants say that the agreements were frustrated because they were barred from making use of the Medical Centre during the relevant period as a result of their registration being cancelled in error. They were unable to use the premises for reasons that were not their fault, and which were outside their control. They say, in the alternative, that the Respondents are estopped from recovering the sums that would otherwise be due for the running costs, on the basis that the Respondents alone used the facilities at the Medical Centre during the relevant period, and that the Second Respondent was paid for taking over the Appellants' patients. Moreover, they submitted that the Respondents conducted themselves in a manner which allowed or encouraged the Appellants to assume that the agreements had been discharged with effect from 21 Dec 2015. In particular, the Respondents did not issue any monthly invoices to the Appellants from then on. The Appellants submitted that in the circumstances it would be unconscionable and inequitable for them to be expected to contribute to the running costs. Before me, Mr Young, on behalf of the Appellants, emphasised that they were not relying specifically on promissory estoppel, or proprietary estoppel, but on equitable estoppel more generally.

8. The Appellants represented themselves at trial, though they had been represented by counsel at an earlier stage. HHJ Murdoch rejected the Appellants' arguments and found in favour of the Respondents on these issues.

9. On 5 March 2020, Martin Spencer J gave leave to appeal in respect of the frustration and estoppel arguments. He also imposed a stay. He refused leave to appeal on three other grounds. Before me, the Appellants renewed their application for permission to appeal on one of those grounds, which is that the Judge erred in law in refusing to permit the Appellants at trial to dispute the amount of the sums claimed by the Respondents under the MIA and the FMA.

10. The Appellants have not renewed their application for permission to appeal on the two other grounds, namely that the Judge erred in declining to adjourn the hearing in December 2019, and that the Judge erred in awarding the Respondents the whole of their costs, because the Respondents should have taken part in ADR.

11. The Appellants were represented before me by Mr Martin Young, and the Respondents by Ms Imogen Halstead. I am grateful to them both for their helpful submissions. Ms Halstead had represented the Respondents at the trial in the county court.

12. I will first set out the facts in greater detail and I will then deal with the three remaining grounds of appeal in turn.

The facts

13. The Medical Centre is a modern and purpose-built medical centre in Wigston, Leicestershire, which opened in about September 2014. Until December 2015, it was occupied by three medical partnerships, namely the two Respondents' partnerships, and the Appellants' partnership.

14. At all material times, each of the three GP practices was separate from the other, occupying different parts of the building, though there were also common parts. Each practice had a separate contract with the local CCG to deliver primary medical

services to patients on their register. The two Respondent practices each provided Primary Medical Services under a General Medical Services Contract with the CCG. This was the East Leicestershire and Rutland Clinical Commissioning Group. The Appellants had a different type of contractual arrangement. They had a Personal Medical Services Agreement with the CCG.

15. The rent for the Medical Centre building was paid by NHS England. However, the other costs of the running the practices in the same building were shared between the three practices under the terms of three agreements, the lease, the FMA and the MIA. These costs included, for example, the costs of medical and non-medical equipment and the general costs of running the premises and the practices, repairs, utilities and telephone costs, and professional fees, security services, window cleaning, maintenance, telephone rental, and so on.

The lease

16. The lease was dated 25 September 2014. The parties to the lease, along with the landlord, were one named partner from each of the three practices, including the First Appellant. The terms of the lease, as one would expect, imposed an obligation upon the doctor signatories to pay rent, but, as I have said, in practice the rent was paid by NHS England. Under clause 5.2.2 of the lease, the doctor signatories also covenanted to pay all gas, water, electricity, other utility and telephone bills. Under clause 5.3, they covenanted, inter alia, to keep the building in good repair, to replace fixtures and fittings when they wore out, to redecorate from time to time, and to arrange for the windows to be cleaned.

17. Clause 2 of the lease contained a definition of "Qualifying Practice", which is "a doctor's practice having the benefit of full leasehold premises funding of rental costs under the Premises Costs Direction or a similar funding by way of substitution for or replacement of it." So far as I can tell, although the phrase "Qualifying Practice" is defined in the lease, it is not used in any of the provisions of the lease. As will be seen, however, the phrase appears in the MIA.

18. The reference to the Premises Costs Direction is to the National Health Service (General Medical Services – Premises Costs) (England) (Directions) 2004. It was common ground between the parties that if GPs in a practice lost their registration under the 2008 Act, the practice lost its entitlement to full leasehold premises funding of rental costs and so could not come within the definition of "Qualifying Practice".

19. Clause 5.7.2 of the lease provided that the doctor signatories would not share or dispose of occupation or possession of the premises or any part, otherwise than by a legal assignment or underlease, except that the tenants were permitted to share the premises with a person providing the Permitted Use or services ancillary to the Permitted Use. The "Permitted Use" was defined in clause 1 of the lease to mean the provision of primary medical services under the National Health Service Act 2006 and other ancillary primary and community healthcare purposes.

20. Clause 5.7.5 provided that the signatories could assign the premises upon the retirement or admission of a partner, but only provided that the partnership or practice consists of at least three persons who are registered medical practitioners and who are eligible for full reimbursement of rent under the Premises Costs Directions or NHS

Funding. Clause 5.7.5.1.5 provided that the landlord could withhold consent to assignment where the assignees are not general medical practitioners or who are but are not at least three in number and/or are not eligible for full reimbursement of rent under the Premises Costs Directions or NHS Funding.

21. Clause 5.7.7.8 provided that a tenant was not permitted to underlet if meant that the tenant would not be in possession of the minimum amount of space specified in the Premises Costs Directions that the tenant needs to occupy to qualify for full reimbursement of rent from the NHS funder.

22. Clause 5.9.1 provided that the doctor signatories would not use the premises otherwise than for the Permitted Use.

23. Clause 5.29 provided that if the tenant is a general medical practitioner, s/he must use their best endeavours at all times to remain a general medical practitioner and to use and occupy the premises for the Permitted Use, such that the tenant will be entitled to full reimbursement of rent from the NHS funder pursuant to the Premises Costs Direction.

The FMA

24. The FMA is also dated 25 September 2014. All of the GP partners of the three partnerships are signatories.

25. The preamble to the FMA referred to the lease and stated that:

> "As the Practices are currently independent practices who are separately funded but are joined in the lease together and are jointly and severally liable under the Lease for the obligations therein, they wish to agree how certain shared costs and responsibilities in the Lease and the running of the building should be shared between them."

and

> "The Practices in addition to entering into this agreement and the Lease have entered into a Mutual Indemnity Agreement on the same date as this Agreement so that any breaches by any of the Practices or the partners therein can be enforced by the other practices against the defaulting party."

26. Under the terms of the FMA, the Appellants were obliged to pay 21.66% of the total costs of the payment obligations under the lease and the FMA. Clause 3 provided that the parties would share a very wide range of costs in relation to the common parts or shared areas in the same proportions. These included building insurance, cleaning contract costs, heating and electricity, furniture and fittings, general maintenance, repairs, security services, service contracts, water charge, window cleaning, salary costs for the Finance Manager and Premises Co-Ordinator, and any other costs that may arise from time to time.

27. Clause 3 also provided that the Finance Manager would reconcile the accounts on a quarterly basis and would send an invoice to the individual practices for their share of the costs for the shared areas.

28. Clause 10 provided that each practice would be responsible for complying with the terms of the lease.

The MIA

29. The MIA is undated but must have been entered into on or about the same time as the other two agreements. The agreement was between the partners of the three practices who were to share Two Steeples Medical Centre.

30. The preamble to the MIA referred both to the lease and the FMA and stated:

> "As each Practice are independent NHS medical practices and are therefore financed separately they wish to enter into this Deed to record the obligations and responsibilities between them and to agree to indemnify each other in the event of any breach by any Practice of their obligations contained in the Lease or the [FMA]."

31. By clause 1 of the MIA, the practices agreed to observe and perform the obligations in the FMA and to pay the practices' costs in accordance with the FMA and the lease.

32. Clause 2.1(ii) provided that in the event of a breach by a practice of its obligations to make payment under the lease or the FMA, it will make good such default or if it fails to do so shall indemnify the other practices for the consequences of its failure.

33. Clause 2.2 provided:

> "Each Practice hereby covenants with the other Practices to use all reasonable endeavours to remain a Qualifying Practice for the term of the Lease (as that term is defined in the Lease)."

Cancellation of the Appellants' registration

34. Pursuant to the regime set up under the 2008 Act, GP practices such as the Appellants' provide a "regulated activity" and must be registered with the CQC. It is an offence to practice without registration (2008 Act, s10(1)).

35. Section 30 of the 2008 Act provides for an urgent procedure for cancellation of registration. Section 30(1) provides;

> "(1) If-
>
> (a) the Commission applies to a justice of the peace for an order cancelling the registration of a person as a service

provider or manager in respect of a regulated activity, and

(b) it appears to the justice that, unless the order is made, there will be a serious risk to a person's life, health or well-being,

the justice must make the order, and the cancellation has effect from the time when the order is made."

36. Section 32 provides that an appeal against a decision made by a justice of the peace under section 30 may be made to the First-Tier Tribunal.

37. On 21 December 2015, upon the application of the CQC, DJ Temperley made an order under section 30(1)(b), cancelling the Appellants' registration, under section 30(1)(b). This was on the basis of concerns about the standard of care that was being offered. This meant that the Appellants could no longer run a GP practice from the Two Steeples Medical Centre. They would have committed a criminal offence if they had done so.

38. The Appellants appealed against the order of DJ Temperley and the order was eventually set aside by the First-Tier Tribunal in August 2016. In fact, the CQC did not attempt to justify the cancellation, HHJ Murdoch held, correctly in my view, that the Appellants were exonerated by their appeal being allowed from the allegations that had been made against them which had led to their registrations being withdrawn, and he was not going to go behind that. This was an important finding for the purpose of the frustration argument, because it meant that the change of circumstances was not the fault of any of the contracting parties.

39. As soon as the Appellants' registration was cancelled in December 2015, the Second Respondent was invited by the CCG to take over care of the Appellants' patients on an emergency basis, and did so on the basis of a contract for Emergency Caretaking Arrangements. A Summary of the Specification for GP Service to be provided under Emergency Caretaking Arrangements for the period from 22 December 2015 to 31 January 2016 was in the papers before me. This provided that the Second Respondent would provide services to the Appellants' registered patients and to temporary residents. These included clinical triage, services at the Medical Centre and home visits. All existing staff directly employed by the Appellants' practice continued in employment.

40. The remuneration for the Emergency Caretaking services provided by the Second Respondent under this agreement was payment for (1) medical locum cover; (2) the services of a Practice Manager; (3) out of hours cover for Christmas Eve; and (4) additional hours' work by the Second Respondent's medical team, admin, pharmacy and support staff. The total estimated to be payable for this contract was £66,677.

41. A similar further Emergency Caretaking contract was entered into for the period from 1 February 2016 to 31 March 2016. Once again, the description of remuneration in the Summary of Specification made clear that the Second Respondent was being paid for the provision of services by doctors and other staff. A payment was made for two

locums and an advanced nurse practitioner, plus support staff/managerial services. The payment was £71,864 for the month of February and £65,648 for March.

42. Other similar contracts were entered into from time to time over the first half of 2016. They came to an end on 6 June 2016, when the Appellants' Personal Medical Services Agreement was terminated, and the Second Respondent took over the practice previously run by the Appellants on a permanent basis.

43. The Appellants contended that the terms of these Summary of Specifications show that the Second Respondent was being paid during the Emergency Caretaking period for all the costs of running the Long Street practice, and so that the payments encompassed the share of the running costs that would otherwise have been the responsibility of the Appellants. The Appellants pointed out that the Second Respondent was being paid more per month for running the Appellants' practice on a caretaker basis than the Appellants were paid for running their practice in normal times.

44. The Judge, however, found that this was not supported by the evidence. He found that during the period of caretaking, from 22 December 2015 to 6 June 2016, the Second Respondent was reimbursed for providing clinical resources to the patients of Long Street surgery. These were essentially the costs of the time of medical practitioners and clinical staff and administrative managerial staff costs. They did not include the practice running costs. He said that this was demonstrated by the terms of the Summary of Specifications. Moreover, the position was confirmed in (undated) correspondence from the CCG, which was placed before the Court, in which the CCG said that the reimbursement did not include any financial resources for the business commitment of the surgery. The letter said, that "The business commitment to Long Street Surgery remained with the GP partners, which included the commitment to any premises costs."

45. Furthermore, on 4 March 2016, the CCG served a document, called a Notice of Sanction, on the Appellants which reduced the monthly sum that the CCG was paying to the Appellants under the Personal Medical Services Agreement. The Notice of Sanction said that the amount the practice would be paid reflected the staff costs, use of premises and equipment, but would no longer include payment for the clinical work done by the Appellants, as they were no longer doing any. The Judge found that this supported the view that the obligation to pay for the premises and facilities remained with the Appellants. They were receiving payments which were to cover the staff costs and the running costs of the practice. It was true that the payments reduced as the headcount of patients reduced but, nonetheless, the Judge took the view that this showed that the CCG was still making payments to the Appellants to cover their running costs, staff costs and their share of the premises costs, even after their registration was cancelled.

46. The First Appellant gave evidence that they paid their legal bills from some of the monies provided by the CCG during this period. This was at least partly why there was insufficient monies to pay their contributions to the running costs.

The Appellants' arguments in the county court

47. In the county court, the Appellants relied upon the frustration and estoppel arguments, along with two other arguments which were not pursued on appeal.

48. The first of these other arguments was that a partner in the First Respondent had deliberately encouraged and assisted the CQC to intervene in the Appellants' practice, for the personal gain of the partners of the First Respondent. The Judge said that this was a serious allegation for which there was absolutely no evidence, and he rejected it.

49. Second, the Appellants contended that there was a contractual agreement between the Second Respondent and the CCG to the effect that the Second Respondent would cover the running costs of the Appellants' practice during the Emergency Caretaking period. This argument was not specifically pursued on appeal, though there are echoes of it in the way that the estoppel argument is now put.

Frustration

50. Having set out the relevant terms of the relevant arguments, and the key findings of fact by the Judge, I come to the issue of frustration. I will first set out how HHJ Murdoch dealt with it.

51. The Judge started with the law relating to frustration. The Judge reminded himself that frustration takes place when something occurs after the formation of the contract, without default of either party, and for which the contract makes no sufficient provision, which renders it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically or fundamentally different obligation from that undertaken at the moment of entry into the contract. He referred to the leading authorities of **Davis Contractors v Fareham UDC** [1956] AC 696, and **National Carriers v Panalpina (Northern) Ltd** [1981] 1 AC 675.

52. The Judge referred to some examples given by Chitty on Contracts of frustrating events, such as destruction by fire of the subject matter of the contract, and the seizure of a ship by a foreign government. He observed that mere inconvenience or hardship or financial loss involved in performing the contract, or delay which is within the commercial risk undertaken by the parties, has been held insufficient to frustrate particular contracts.

53. Perhaps most pertinently for present purposes, the Judge noted that there can be frustration where a statutory power in existence at the time the contract is made is subsequently exercised to render illegal the performance of the contract. The leading authority on this is **Re Shipton** [1915] 3 KB, in which a contract was held to be frustrated when it concerned a delivery of wheat which was requisitioned by the Government under a wartime statutory power before the time for delivery. This was held to absolve the buyer from the obligation to pay for the wheat.

54. Pausing there, in my judgment the Judge summarised the law relating to frustration entirely accurately, and, indeed, the Appellants do not suggest otherwise.

55. Moving on to apply the law to the facts of this case, the Judge expressed some sympathy for the Appellants, given that they were stopped from practice by the cancellation of their registration, in circumstances in which the CQC did not even

attempt to justify at the appeal stage. In the meantime, they were unable to practice, and their patients drifted away.

56. However, the Judge found that the evidence and, in particular, the Notice of Sanction, showed that, even after 21 Dec 2015, the Appellants were being paid a sum by the CCG in respect of their share of the running costs of the building, albeit reduced to take account of the fact that no clinical sessions were actually being carried out by them. This shows, he said, that the CCG had not immediately terminated the Personal Medical Services Agreement with the Appellants. This agreement was eventually terminated, in June 2016, but this was not done at the very outset of the CQC's intervention. For a while at least, the Appellants had hoped that the appeal would be successful, and that they would be able to go back and work at Two Steeples as before.

57. The Judge held that the removal of the Appellants' registration was not a frustrating event because something like this happening had been foreseen and taken into account when the FMA and MIA were entered into. It was in the parties' minds when the contracts were agreed, because the importance of a practice being a Qualifying Practice (ie a registered practice) was reflected within the MIA. Under the terms of the MIA, clause 2.2, the three practices agreed to use all reasonable endeavours to remain a Qualifying Practice. Moreover, the terms of the lease would not prevent a non-Qualifying Practice from taking over the lease, and so the significance of being Qualified must have been in the parties' minds when the contract was entered into.

58. As the possibility of ceasing to be registered was contemplated within the contractual relationships between the parties, the Judge said, it could not, therefore, be a frustrating event.

59. Moreover, the Judge found that the FMA and MIA were not contracts for the provision of medical services. The Appellants had contracted to provide medical services to the CCG, not to the other two practices. The obligation that they had assumed towards the other practices which shared the same premises was separate. It was an agreement to contribute a share to the running costs of the premises.

60. It is true that the funds to pay for the running costs came from the Appellants' medical practice, but, nonetheless, the Judge said, there was no contractual obligation owed by them to the Respondents to continue to provide medical services. The Judge used the analogy of someone who loses their job, unfairly. This does not affect the person's obligation to pay their mortgage.

61. The Judge held that the loss of the ability to pay the running costs did not frustrate the obligation to pay those costs. The Judge added, moreover, that the Appellants did not produce any evidence regarding their overall financial situation to show that the loss of their registration meant that they could no longer afford to pay the running costs. It was their choice to use some of the money that they were given by the CCG under the Personal Medical Services Agreement to defray their legal costs.

62. Finally, the Judge pointed out that the First Appellant, Dr Dayah, was a signatory to the lease, but he made no effort to come off the lease when his registration was cancelled. This suggests that he did not, at the time, think that the cancellation was a frustrating event.

The Appellants' argument on appeal

63. Mr Young said that there was no express provision for cancellation in either the FMA or the MIA. He accepted that the reference, in clause 2.2 of the MIA, to the requirement for the practices to use all reasonable endeavours to remain in capitalise may well indicate that the need to do so was in the contemplation of the parties when the MIA was entered into. But, he submitted, this is not enough. In **Panalpina**, Lord Simon said that provision in the relevant contract to cover the eventuality which took place had to be "sufficient", and this was not sufficient.

64. Mr Young submitted that the central reason why the FMA and MIA had been frustrated was because the Appellants were, through no fault of their own, barred from operating a GP practice from the Medical Centre during the relevant period, and this meant that they were not receiving anything in return for the obligations they assumed under the FMA and the MIA. These Agreements did not envisage a state of affairs in which one of the practices was prevented from continuing at the Medical Centre, and this transformed the Appellants' obligation to comply with the FMA and the MIA into a radically or fundamentally different obligation from that undertaken at the moment of entry into the Agreements. Put bluntly, the obligation to pay for the running costs was turned into an obligation to make payments for nothing in return.

65. He said that the case was similar to **Re Shipton,** in that, since it became illegal for the Appellants practice at the Medical Centre, it became illegal for them to use the premises, and this meant in turn that it was illegal for the FMA and MIA to be performed as envisaged.

66. Mr Young further submitted that the test for whether there was frustration of a contract was a multi-factorial one, and that the Judge had erred in focusing on the question whether the Appellants had lost their funding as a result of the cancellation of their registration. What really mattered was that they had lost the right to operate a GP practice out of the Medical Centre.

Discussion on frustration

67. As I have said, Mr Young did not contend that the Judge had misdirected himself as regards the legal test for frustration. Rather, he submitted that the Judge had erred in law in the way that he applied the law to the facts.

68. The test for frustration is well-settled. In **Davis Contractors**, Lord Radcliffe said, [1956] AC 696, at 729:

> "… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do … There must be … such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

69. In the same case, Lord Reid said,

> "The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation. If it is not, then the contract is at an end."

70. In **National Carriers Ltd v Panalpina (Northern) Ltd** [1981] AC 675, at 700, Lord Simon said:

> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

71. As the quotation from Lord Reid's judgment in **Davis Contractors** makes clear, this is a question of construction of the contract. In order to conduct this exercise, the Court must undertake a "multi-factorial" approach, which has regards, amongst other factors, to the following:

> "… the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances." (**Edwinton Commercial Corp v Tsavlirlis Russ (Worldwide Salvage and Towage Ltd) (The Sea Angel),** [2007] EWCA Civ 547, at 111)

72. In my judgment, applying the approach set out in the authorities, it is clear that the cancellation of the Appellants' registration did not frustrate the FMA and the MIA, and so HHJ Murdoch did not err in law in his conclusion on the frustration issue.

73. There are a number of cumulative reasons why I have reached this conclusion.

74. First, the lease, the FMA and the MIA were an interlocking set of agreements which have to be construed together. This is made clear by the preambles to the FMA and the MIA. It is clear, in my judgment, that these agreements envisaged the possibility that one of the tenant practices might no longer be able to conduct its practice at the Medical Centre.

75. The possibility that a tenant practice might cease to operate a GP practice from the Medical Centre was envisaged in a number of places in the Agreements.

76. Clause 5.29 of the lease imposed an undertaking on the tenants to use their best endeavours at all times to remain a general medical practitioner and to use and occupy the premises for the Permitted Use, such that the tenant will be entitled to full reimbursement of rent from the NHS funder pursuant to the Premises Costs Direction. The "Permitted Use" was defined in clause 1 of the lease to mean the provision of primary medical services under the National Health Service Act 2006 and other ancillary primary and community healthcare purposes.

77. It follows from this provision that the signatories to the lease envisaged the possibility that a tenant may be unable to continue to provide primary medical services (ie operate as a GP practice) or may lose the right to full reimbursement of rent from NHS England (which would happen if registration were cancelled). It is also significant that the lease did not say that, if that were to happen, the relevant practice's obligations under the lease would automatically come to an end.

78. Clause 2.2 of the MIA provided that:

> "Each Practice hereby covenants with the other Practices to use all reasonable endeavours to remain a Qualifying Practice for the term of the Lease (as that term is defined in the Lease)."

79. A GP practice was only a Qualifying Practice, as defined, if it had a right to its rent being paid by NHS England under the Premises Costs Direction and this required inter alia, that the practice hold a current registration with the CQC. Once again, therefore, the agreements took account of the possibility that a practice at the Medical Centre might lose its right to operate a GP practice there.

80. This means, in my judgment, that the terms of the Agreements show that an event which led to a practice being unable to continue to operate at the Medical Centre was not a completely unexpected and unanticipated event which rendered performance of the agreements radically different from what had been anticipated. Put another way, and to use the wording of **Panalpina,** the contractual documentation made sufficient provision for this eventuality.

81. The very fact that the parties agreed to use all reasonable endeavours to remain in Qualifying Practice shows that they recognised that difficulties would result if a practice was no longer in Qualifying Practice. The Agreements could easily have said that the obligation to make payments under the FMA and MIA would cease to apply if a practice ceased to be a qualifying practice, but it did not say so.

82. It is also worth noting that, in the immediate aftermath of the cancellation of their registration, the Appellants did not act in a manner which indicated that they regarded their obligations under the lease as having been automatically brought to an end. The First Appellant continued to contribute to the telephone costs even after 21 December 2015. The First Appellant did not assert that his obligations under the lease had come to an end.

83. Second, I am unable to accept Mr Young's submission that the obligation imposed upon the Appellants by the FMA and MIA to make payment was for use by the Appellants of Two Steeples Medical Centre for their Long Street Practice, and that once it was cancelled, it became a payment for nothing.

84. For the reasons given by the Judge, the obligations owed by the Appellants under the FMA and MIA to the other two practices were separate from the Appellants' commitment to the CCG to provide GP services at the Medical Centre. The Appellants entered into an agreement with the CCG to provide GP services, and entered into separate agreements with the Respondents to share the costs of Medical Centre. Although it is obvious that the reason why the Appellants wanted to occupy and to share the costs of the Medical Centre was to run their GP practice, the fact remains that the obligations under the MIA and FMA were free-standing.

85. It is true that the analogy, referred to by the Judge, with someone who struggles to pay his or her home mortgage because of unfair dismissal is not exact. It may be a closer analogy to use the example of someone who rents business premises to operate in a regulated industry, say as a mortgage adviser. If the person loses his or her registration, that does not frustrate his or her contract with the landlord. By the same token, the fact that the Appellants are unable to practice as GPs does not mean that they are suddenly relieved of the obligation to pay their share of the running costs of the Medical Centre, and that the burden falls on the other two practices which share the premises.

86. Moreover, the fact that it was illegal, indeed a criminal offence, for the Appellants to continue to practice from the Medical Centre did not mean that it was unlawful for them still to contribute to the running costs.

87. As Ms Halstead put it in her excellent submissions, the obligation to make the payments was not dependent on the Appellants' ability to use the premises or practice from them. The loss of registration may have affected their ability to pay but not their obligation to do so.

88. I recognise that this is somewhat harsh on the Appellants, but on the other hand it would be harsh on the Respondents if, because of something that had nothing to do with them, the totality of the running costs were to be laid at the door of the other two practices. They were not responsible for the predicament that the Appellants found themselves in, as the Judge specifically found. The Judge also found that the Respondents were not provided with additional funding to pay the extra slice of running costs and it is hard to see why the financial burden should fall on them.

89. Third, it is significant that, whilst the cancellation of the Appellants' registration on 21 December 2015 meant that they were immediately barred from continuing to run their GP practice at the Medical Centre, it did not mean that they ceased to have access to funds to defray their part of the running costs. In fact, the CCG continued to provide funding to the Appellants under the Personal Medical Services Agreement until June 2016, and this funding included money to pay for the running costs. Between 21 December 2015 and 4 March 2016, the Appellants were paid £20,690 monthly under the Personal Medical Services Agreement. The monthly sum then went down to about £14,000. This is highly significant, in my judgment. The Notice of Sanction letter dated March 2016 said that the CCG had deducted the cost of clinical sessions from the payments made to the Appellants, as they were not taking place, but that "The amount the practice will be repaid reflects the staff cost, use of premises and equipment."

90. In fact, the Appellants diverted some of the funding they were given to pay the legal costs of the challenge to the cancellation of their registration. Also, the amount of funding that they received from the CCG gradually reduced as patients resigned from their list. Nonetheless, the fact that cancellation of registration did not immediately and necessarily cut off access to funding for the Appellants to pay the running costs is a strong indication that the cancellation was not a frustrating event. This meant that cancellation did not render it physically or commercially impossible for the Appellants to comply with their obligations under the FMA and MIA.

91. Fourth, I do not think that it is a fair criticism of the Judge's judgment to say that the Judge had failed to apply the multi-factorial approach, and had focused too much on the argument that the Appellants no longer had sufficient funding to maintain their occupation of the Medical Centre. The Appellants represented themselves in the county court, and they advanced the frustration argument primarily on the basis that the FMA and MIA were frustrated because the cancellation of their registration meant that they no longer had the funding to pay for the running costs. Indeed, they argued, unsuccessfully, that the Second Respondent had been given money to pay for the running costs as part of the Emergency Caretaking arrangements. The Judge cannot fairly be criticised for focusing on the case on the basis of the way that it was put before him. As Ms Halstead pointed out, the focus of Mr Young's argument, namely upon the fact that the Appellants could no longer use the Medical Centre, was different from the focus of the Appellants' argument in the county court.

92. Ms Halstead made two other points relating to frustration argument, both of which I accept.

93. First, the sums claimed are debts. The obligation to pay was triggered by the running costs being incurred, and then assessed in accordance with the FMA, as set out in the MIA at clause 1. As they are debts, the right to the sums was dependent only upon the condition precedent of the costs being incurred and assessed. The obligation was not released because the benefit was not as valuable to the Appellants as it might have been, or because the income stream which the Appellants expected to be able to use to pay for it was less than expected.

94. Second, as Ms Halstead submitted, it was not the case that the Claimants received nothing in return for their contributions to the running costs, once their registration was cancelled. In the weeks after their registration was cancelled, the Appellants pursued their appeal to the CQC. This was on the basis that, if their appeal was successful, they would be able to return to the Medical Centre and pick up their practice. In order to keep this possibility alive, the Appellants had to retain the lease, and, with it, the FMA and MIA. In other words, there was an incentive for a practice in the Appellants' position to maintain their occupation of the Medical Centre even after their registration was cancelled. It was unfortunate that, in the event, there were delays in listing the appeal before the First-Tier Tribunal and, by the time it eventually took place, in August 2016, it was too late for the Appellants to recover their practice. Nevertheless, by keeping the suite of Agreements alive after 21 December 2015, the Appellants were keeping open the possibility that they could return to their practice.

95. For all of these reasons, I reject the Appellants' argument that the Judge erred in law in his finding on frustration.

Estoppel

96. In the county court, the Appellants estoppel argument was set out in a skeleton argument that their former counsel, Mr Butler, had drafted before he had been dis-instructed. The Appellants adopted his arguments on estoppel for the purposes of the county court trial. The estoppel argument was to the effect that there was an estoppel because the Respondents stopped sending the Appellants bills for their share of the running costs from December 2015, and thereby misled them into believing that the Respondents were taking over the Appellants' obligations under the FMA or the MIA. The Judge rejected this argument on the basis that it did not get off the ground as it did not accord with the facts. The practice managers of the two Respondent practices had chased the Appellants for their share of the costs and had written to the Appellants on 20 April 2016, to ask them to pay their share of the running costs, and warned them that the matter would be put in the hands of solicitors if they did not pay up. In my judgment, the Judge was plainly right to have given this estoppel argument short shrift.

97. In the appeal, however, Mr Young re-cast the estoppel argument. He said that an estoppel arose because the Second Respondent had received payment for the Appellants' share of the running costs as part of the terms of the Emergency Caretaking Agreements, and so the Respondents should not, in equity, be entitled to an indemnity from the Appellants. He said that this was the point that the Appellants had really been making to the county court Judge at trial.

Discussion on estoppel

98. In my judgment, this argument, too, falls at the first hurdle, because it cannot be reconciled with the facts. The estoppel argument is predicated on the proposition that the Second Respondent received funding to cover the Appellant's share of the running costs of the Medical Centre, as part of the Emergency Caretaking arrangements, during the period from 21 December 2015 to 6 June 2016. This is not borne out by the contemporary documentation. The summaries of the Emergency Caretaking Agreements, referred to earlier in this judgment, make clear that the payments made to the Second Respondent for taking over from the Appellants covered only the staffing costs of locums and support staff. The Second Respondent was not given any payment to cover the Appellants' share of the running costs during the period of the caretaking arrangements. Furthermore, it is clear that the Appellants were still being provided with funding by the CCG for their share of the running costs during the relevant period, even after the cancellation of their registration, albeit that (a) the Appellants used some of the money to pay their legal fees and (b) the sums paid by the CCG might not have been enough to cover the entirety of the running costs.

99. Against this factual background, it is clear that the Respondents were not receiving funds to cover the Appellants' share of the running costs of the Medical Centre from the CCG or from anyone else, during the period after the cancellation of the Appellants' registration. The obligation to pay their share of the running costs remained with the Appellants, and the Appellants' failure to make the payments left the Respondents out of pocket. In those circumstances, the Respondents were entitled to recover the unpaid sums from the Appellants under the terms of the FMA and the MIA, and, in my judgment, there is no conceivable basis for relying on some form of

equitable estoppel argument as a reason why the Appellants should not be liable to pay what would otherwise be due.

100. It follows that it is not necessary to explore the estoppel arguments any further. I should add, however, that I am bound to say that I did not fully understand the juridical basis of the estoppel argument that was being advanced by Mr Young, which he described as an "evidential estoppel". In particular, there was no suggestion that the Appellants had relied on any behaviour or assurances by the Respondents to their detriment, and I do not see how an estoppel could arise without any detrimental reliance. I could not find any support for Mr Young's arguments in **Ted Baker Plc and No Ordinary Designer Label Ltd v AXA Insurance** [2017] EWCA Civ 4097, the authority that was primarily relied upon by Mr Young in respect of his estoppel arguments.

The Judge's refusal to permit the Appellants to cross-examine the Respondent's witnesses on the amount of the sums claimed

101. During the hearing in the county court, the First Appellant, who was acting as advocate, with the assistance of a McKenzie Friend, started to cross examine the Respondent's first witness, Mr Whitehead, the Practice Manager for the First Respondent, about the figures claimed for the running costs in the relevant period. The Judge intervened and said that he was not going to allow cross-examination which was going to challenge the amount that was claimed, rather than the principle of whether any amount was recoverable at all.

102. In his Grounds of Appeal, Mr Young contended that the judge had erred in law in refusing to let the Appellants challenge the amount of the sums claimed. He pointed out that CPR 16.5(4) states that:

> "(4) Where the claim includes a money claim, a defendant shall be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation."

103. The Appellants' Defence had not formally admitted the amount of the sum claimed by the Respondents and so, Mr Young submitted, the Appellants were entitled to challenge the amount at trial. He acknowledged that the Case Summary stated that, "The Defendants, whilst disputing that they are liable, do not take issue with the sum quantified by the Claimants and detailed at Schedule D of the Particulars of Claim", but said that a Case Summary is not a formal pleading. He also submitted that there was a real issue as regards whether the sum that had been claimed in the Particulars of Claim was the correct one. In particular, he submitted that the Medical Centre running costs were in the form of a running account and there was an issue as regards whether the entirety of the sum claim related to the period from 21 December 2015 to 6 June 2016.

104. Martin Spencer J refused permission to appeal on this issue. He said that the learned Judge was correct not to allow any questions in relation to quantum. There was no live quantum issue before the Judge and the Appellants had not disputed the Case Summary.

Discussion on the application for permission to appeal on the procedural challenge

105. I bear in mind that the test for permission to appeal, as set out in CPR 52.6(1) is that permission should only be granted if (a) the Court considers that the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard.

106. In my judgment, Martin Spencer J was right to refuse permission to appeal on this point.

107. The Judge had a general discretion as to whether to permit evidence to be adduced or cross-examination to take place on a particular topic. This discretion is set out in CPR 31.1, which states:

> "32.1
>
> (1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> (3) The court may limit cross-examination."

108. A Judge has a broad discretion in case management decisions such as this, and so an appeal can succeed only if the Judge has exceeded the reasonable scope of his or her broad discretion.

109. In the present case, the Judge was fully entitled, and, indeed, in my view, right to take the view that it had been agreed between the parties in advance of the trial that quantum was not in issue, and that it would be unfair on the Respondents, and contrary to the overriding objective, to permit the Appellants to cross-examine on quantum.

110. The amount claimed by the Respondents as the Appellants share of the running costs for the relevant period, £27,812, was provided to the Appellants' then (directly-instructed) counsel as early as 9 March 2017. The figures were accompanied by an explanation of how they were arrived at by an accountant instructed by the Respondents. This was well in advance of the Particulars of Claim being served upon the Appellants

111. It is true that the Defence did not expressly concede that the figure pleaded by the Respondents was correct. However, it did not put up an affirmative case that the figure was wrong, let alone put forward another figure.

112. Ms Halstead confirmed that the Case Summary was agreed with counsel who was then acting for the Appellants, in advance of the Case Management Conference in March 2019, more than six months before trial. Whilst the Case Summary was not a formal pleading, there is no doubt that counsel for both parties agreed, on behalf of their clients, that quantum was not in

113. issue, in circumstances in which their agreement was intended to have an impact upon the scope of the issues that were to be dealt with a trial.

114. Moreover, the parties' legal advisers agreed a two-day listing for the trial. This would not, on any view, have been enough if the court had to deal with evidence and argument on the figures.

115. The witness statements that were served on behalf of the Respondents on 21 July 2019 did not deal with quantum. The witness statement of Mr Whitehead, the First Respondent's Practice Manager, and of his opposite number at the Second Respondent, Ms Sinfield, each said that their statements did not deal with the figures because of their understanding that there was no dispute on the figures.

116. Significantly, the Appellants' witness statements did not challenge the figure or provide any evidence or support for any alternative figures. The Appellants' McKenzie Friend, who is an accountant, wrote a letter setting out challenges to the figures pleaded by the Respondents, but this letter was dated 20 February 2020, some time after the trial was over. There was no challenge to the figures in correspondence in advance of trial.

117. The skeleton argument for trial, which was drafted by the Appellants' then counsel and is dated 15 August 2019 said that the Appellants do not have any idea how the amounts claim have been arrived at, but then went on to say that the Appellants defended the claim on three grounds, which did not include quantum.

118. Ms Halstead's skeleton argument for trial said that the quantum of the claim had been calculated as per the calculation of the Respondents' accountant and was not in dispute.

119. In light of all of this, the Appellants had, through counsel, agreed that there was no dispute on quantum and had led the Respondents and their legal advisers to believe that there would be no challenge to the figures at trial. This meant that the Respondents' witnesses were not prepared to deal with this issue, and, indeed, did not know what matters would be challenged. Ms Halstead said that if the Respondents had appreciated that quantum would be in issue, they would have instructed an expert witness. In those circumstances, it would have been grossly unfair and contrary to the overriding objective to have allowed the Appellants, via cross-examination, to raise a large new topic without notice at trial. If they had been allowed to do so, the two-day time estimate would probably have been exceeded and there would have been a grave risk of going part-heard or even adjourning the trial.

120. There is a final reason why I think that this ground of appeal has no prospect of success. This is that in their counter-claim the Appellants claimed the sum of £28,519.94 from the Second Respondents on the basis that the Second Respondents were under a contractual and/or equitable obligation to discharge the Appellants'

obligations under the FMA and MIA for the period from 21 December 2015 to 6 June 2016. This sum can only make sense as representing the Appellants' estimate of their share of the running costs for the relevant period. It follows that their estimate of the running costs was very close to the figure claimed by the Respondents, but was, in fact, a little higher. It follows in turn that, on the basis of the counter-claim, the parties were not far apart on the right figure and, if anything, the Appellants believed that the Respondents had understated the figure that they claimed by some £708. It would not be consistent with the overriding objective to waste the Court's time with cross-examination which, on the face of it, could not reduce the size of the amount claimed by the Respondents.

121. Accordingly, I refuse permission to appeal on this additional ground.

Conclusion

122. For these reasons, the Appellants' appeal is dismissed.