Case No: A3/2009/1930

Neutral Citation Number: [2010] EWCA Civ 761
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
MR MICHAEL FURNESS QC
HC09CO1765

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2010

Before :

LADY JUSTICE ARDEN
LORD JUSTICE CARNWATH
and
MR JUSTICE MORGAN

- -

Between :

(1) MENTMORE INTERNATIONAL LIMITED **(2) JASWANT DHOOPER** **(3) JOGA SINGH ATWAL**	**Respondents/ Claimants**
(4) ROSSO SEVEN LIMITED (formerly known as FESTIVAL CARE MANAGEMENT LIMITED)	**Fourth Claimant**
- and -	
(1) ABBEY HEALTHCARE (FESTIVAL) LIMITED	**Appellant/ First Defendant**
(2) PRABHDYAL SINGH SODHI	**Second Defendant**

- -

Hashim Reza (instructed by) for the Respondents
Anthony Trace & Ciaran Keller (instructed by Nockolds LLP) for the Appellants

Hearing date : Wednesday 12th May, 2010

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Judgment

LORD JUSTICE CARNWATH :

Background

1. By a share purchase agreement ("SPA") dated 9 October 2008 between the First Claimant ("Mentmore") and the First Defendant ("Abbey"), Abbey contracted to buy from Mentmore the entire share capital of five care home businesses. The purchase price was £5,983,842, to be paid partly on completion ("the Completion Payment") and partly by way of Deferred Consideration. The Completion Payment of £2,500,000 was duly paid by Abbey.

2. Two aspects of the agreement, and their interaction, are of direct relevance to the issues in the appeal: first, those relating to the calculation and payment of Deferred Consideration, and secondly those relating to the release of guarantees of previous directors.

Deferred consideration

3. By clause 3.1 the purchase price, and consequently the Deferred Consideration, fell to be "adjusted in accordance with clause 4.3". By clause 4, the sum due fell to be adjusted by any amount by which the Completion Net Assets of the Companies and Subsidiaries exceeded or fell below £5,983,842, and by clause 4.3 the balance was to be added to, or deducted from, "the Deferred Consideration on the first Payment Date".

4. Clause 3.2 of the SPA provided that the Deferred Consideration (£3,483,842 before adjustments) should be paid in two instalments. The first, directly relevant to the appeal, was:

> "… £2,000,000 on 28 February 2009 or sooner (adjusted in accordance with Clause 4.3)"

The second was a sum of £1,483,842 to be paid on 15 December 2009. This was not in terms subject to any reference to adjustment. "Payment dates" were defined by clause 1.1 as "the dates on which the instalments of the Deferred Consideration are payable".

5. At the time of the hearing, Mentmore had accepted that a reduction of £710,917 was appropriate, but Abbey were at that time contending for a further deduction in excess of £3,700,000. That would have eliminated the whole of the Deferred Consideration under both instalments. Under schedule 6 of the SPA, the disagreement was referred to an independent expert for a binding decision. At the time of the hearing below, the expert's report was still awaited.

6. The expert's determination became available in February 2010, and there have been further exchanges between the parties' accountants. We were told that there now remains a relatively limited area of dispute. Mentmore claims to be entitled to remaining Deferred Consideration of £2,174,607; Abbey claims a further adjustment of £298,357. It follows that the minimum sum outstanding is £1,876,250. In other words, rather than the £3.7m deduction claimed before the judge, the maximum deduction now claimed by Abbey from the Deferred Consideration is about £1.6m

(£3,483,842 - £1,876,250). If deducted from the first instalment only (£2m), that would leave a figure of c£400,000 due on the first payment date, subject to a possible increase to £700,000 if Mentmore is right on the remaining issues. On the same basis, a further £1,483,842 became payable on the second payment date, but that is not presently claimed in these proceedings.

Personal guarantees

7. This issue concerns the failure of Abbey (or its sole director Mr Sodhi) to comply with obligations owed to the Second and Third Claimants, Jaswant Dhooper and Joga Atwal ("the former directors"), former directors of the Companies and Subsidiaries who had given personal guarantees totalling some £1,075,000 to the Royal Bank of Scotland, Clydesdale Bank Plc and Abbey National Plc ("the three banks"). Under clause 5.4(a) of the SPA, Abbey undertook certain obligations (the content of which is in dispute) directed to securing the release of the personal guarantees.

8. The former directors joined Mentmore in seeking to enforce the benefit of this undertaking, but not being parties to the SPA, they rely on the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"). The judge noted that this was a matter of considerable concern to them because the guarantees covered £1,075,000 worth of liability, and they had been notified in April 2009 that due to the default of Festival Care Homes Ltd the conditions for payment under a guarantee to RBS of £200,000 had been met. However, as we understand, no actual payment has yet been demanded by RBS or the other banks under any of the guarantees.

9. Since it is central to the issues in the case, I set out clause 5.4 in full as it appears in the agreement, subject to one correction:

> "Release of Personal Guarantees
>
> (a) The Buyer undertakes to the Seller and each of Jaswant Dhooper and Joga Atwal that it will procure by no later than the first Payment Date the release of all personal guarantees given by Jaswant Dhooper and Joga Atwal on behalf of the Companies and Subsidiaries to any third party (using its best endeavours (including, without limitation, the offering of a suitable Buyer guarantee or other security, if required)).
>
> (b) Pending such release:
>
> (i) between Completion Date and the first Payment Date, the Buyer and the Seller agree that each of Jaswant Dhooper and Joga Atwal shall be indemnified against all amounts payable by each of them to such third parties under the personal guarantees (and all costs incurred in connection with such obligation) and such indemnity amounts will be deducted forthwith from the Deferred Consideration reducing the amount payable to the Sellers accordingly; or
>
> (ii) in the event that *[the Buyer]* has not procured the release of all personal guarantees given by Jaswant Dhooper and

> Joga Atwal by the first Payment Date, the Buyer's solicitor is to retain from the first instalment payable pursuant to the Deferred Consideration the sum of £1,000,000 in their client account ("**the Retention**") until such time (i) the personal guarantees have been released or (ii) *[?]* are required to indemnify Jaswant Dhooper and/or Joga Atwal against all sums payable by them to such third parties under the personal guarantees (and all costs incurred in connection with such obligation)."

10. I have corrected (b)(ii) by substituting "Buyer" for "Seller". Although the judge noted a dispute on this point (para 7), he does not appear to have resolved it. It seems to me the word "Seller" must be a mistake, because it is the Buyer on whom the corresponding obligation is placed by (a). It does not in fact seem to matter in the present context, since on either view the pre-condition to condition (b)(ii) was satisfied, release of the guarantees not having been procured by anyone.

11. A further difficulty is posed by the gap in the grammar which I have indicated by *[?]*. The subject of the phrase "are required to indemnify..." seems to be missing. Another oddity is that, whereas the obligation to secure release of the guarantees is that of Abbey, the risk of them failing to do so is reflected in a reduction in the purchase price payable to Mentmore. For reasons which will become apparent, I do not find it necessary to examine these issues in detail in this judgment.

The proceedings

12. The present proceedings were launched by a claim dated 28th May 2009, seeking (i) payment of "£2,000,000 or such lesser sum as may be due" as the first instalment of Deferred Consideration and specific performance of paragraphs 5.4(a) and (b) of the SPA, or alternatively an order for payment of £1m by Abbey to its solicitors, and associated relief. The present application for summary relief was issued on the same day. The relief sought in the application was:

> "1. Summary judgment against [Abbey]… for (i) specific performance of clause 5.4(a) and (b) of the [SPA] (ii) an Indemnity (iii) forthwith payment of £1,000,000 to its solicitors or as directed
>
> 2 (i) an Interim Declaration under CPR Part 25.1(1)(b) and or (ii) an order that a specified fund of £1,000,000 be paid into Court or otherwise secured under Part CPR Part 25(1)(l)"

13. I observe at once (as is now I believe common ground) that the reference to CPR Part 25(1)(l) (which deals with disputes over rights to "specified funds") was misplaced. As will appear, the payment into court which the judge directed seems in purported exercise of powers under Part 24.

14. After a hearing lasting three days, the judge gave judgment in which he held that clause 5.4 did not impose an absolute obligation to secure the release of the guarantees but only one of "best endeavours"; but that Abbey had no realistic

prospect of defending the allegation that it had failed so far to use its best endeavours in that regard.

15. Other points decided in the judgment, which are not in issue before us, were:

i) He rejected Abbey's argument that the obligation to pay into the solicitors' account under clause 5.4(b)(ii) only arose if the amount due on the first Payment Date amounted to at least £1m. He held that if the amount due fell below £1m, "that lesser amount should be set aside under clause 5(4)(b)(ii)" (paras 12, 14);

ii) In response to Abbey's evidence designed to show that it was entitled to compensation for breach of warranties, he held that these did not count as "substantiated claims" as defined, and therefore could not be set off against or deducted from the Deferred Consideration (para 16);

iii) He accepted that Abbey was not obliged to pay Deferred Consideration "to the extent that" an unresolved difference over the amount of the net assets leaves the amount of Deferred Consideration in issue:

> "That must mean that the obligation to set aside £1 million out of the Deferred Consideration under clause 5.4(b)(ii) and the obligation to indemnify under clause 5.4(b)(i) must similarly stand wholly or partly in abeyance during this period." (para 17)

16. He added that, as things then stood, there was a dispute over the amount of net assets, which, if resolved in Abbey's favour, would "entirely excuse it from any obligation to pay Deferred Consideration at all". He was concerned that the report on which Abbey's claimed adjustment was based had been prepared by Mr Sodhi himself, rather than by Abbey's accountant as required by the agreement, although he accepted that Mentmore had "in effect waived" that requirement (para 41). He said:

> "If Abbey had complied with Schedule 6, and produced a report from their own accountant, I would have accepted that there was a genuine issue between the accountants in respect any amount of reduction in Completion Net Assets claimed by those accountants. As it is I have little idea whether Mr Sodhi's own adjustments have merit in accountancy terms. On the other hand, it does appear that there is some prospect of a further significant downward adjustment in Net Assets." (para 42)

17. He made an order running to eleven paragraphs, the main points being:

i) He declared the right of the former directors to enforce the undertakings under clause 5.4 in their own names;

ii) He adjourned the granting of an order for specific performance of the undertakings pending disclosure of information by Abbey under (iii)

iii) He ordered Abbey to disclose to the claimants by 4th September 2009:

a) All correspondence or documents passing between the defendants and each of the banks concerning steps taken to secure the release of the personal guarantees, including offers or requests for security;

b) Up to date financial information relating to Abbey's income assets and liabilities.

iv) Thereafter, until release of the personal guarantees, Abbey was required to supply information to the claimants relating to the progress of negotiations with the three banks on refinancing.

v) Abbey was ordered to pay £1,000,000 into court pending the outcome of the determination of the expert under schedule 6, and thereafter to be paid out in accordance with paragraphs 14 and 43 of the judgment.

vi) If the sum was not paid into court, the claimants would be entitled to an order for £1,000,000 to be paid by Abbey to its solicitors, to be held in accordance with clause 5.4(b)(ii) of the agreement.

vii) Subject to those points the defendants were given permission to defend the claim.

18. The judge gave Abbey permission to appeal on point (i). On 15th October 2009, the Court of Appeal (Sullivan LJ and Owen J) gave them permission to appeal on the two "issues of fact", which have been referred to before us as the Best Endeavours issue and the Retention Issue. They refused a stay, but extended time for compliance with orders (iii)-(v) until 22nd October 2009. Mentmore seeks permission (out of time) to cross-appeal on the "absolute obligation" issue, and on certain other matters to which I shall refer at the end of this judgment.

19. On 5th January 2010 Mentmore issued a new claim for payment in respect of the second instalment of Deferred Consideration (following the second Payment Date on 15th December 2009). Abbey has counterclaimed for damages for breach of warranty. The possibility of consolidation with present proceedings is to be considered at a Case Management Conference due to take place after the determination of this appeal.

Summary judgment

The principles

20. It is important to keep in mind the principles to be applied in deciding whether a case is suitable for disposal on a summary basis. The most authoritative up-to-date statement is that of Lord Hope in *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513:

> "In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases

> are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents, without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, [2001] 1 All ER 91, at p. 95 that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

21. Another frequently cited passage on the same theme is the judgment of Colman J in *De Molestina v Ponton* [2002] 1 Lloyd's Rep 271, 280 para 3.5, speaking of the difficulty of basing summary judgment on inferences of fact in a complex case:

> "…, as *Three Rivers District Council* shows, where the application in such complex cases relies on inferences of fact, the overriding objective may well require the claim to go to trial in the interest of a fair trial. That is because the relevant inference could not be safely drawn without further discovery and oral evidence at the trial. It is thus necessary, where such inferences are relevant, to guard against the temptation of drawing them as a matter of probability, because the achievement of the over-riding object requires a much higher degree of certitude. Where in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to trial."

22. To these familiar citations, Mr Reza adds the words of Potter LJ in *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 para 10:

> "However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…"

23. If Mr Reza was hoping to find in those words some qualification of Lord Hope's approach, he will be disappointed. The *Three Rivers* case was specifically cited by Potter LJ. He was in my view intending no more than a summary of the same principles. Lord Hope had spoken of a statement contradicted by "*all* the documents or other material on which it is based" (emphasis added). It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in my view important not to equate what may be very powerful cross-examination ammunition, with the kind of "knock-out blow" which Lord Hope seems to have had in mind.

The conduct of these proceedings

24. Mr Trace QC, who did not appear below, observed that at the hearing there were 17 witness statements, five produced during the hearing itself, and six volumes of

documents running to nearly 1,000 pages; and that a hearing estimated to take less than three hours, lasted three days. He commented:

> "Regrettably, the hearing before the Deputy Judge appears to have turned into a "mini-trial". It lasted 3 days, with voluminous evidence and documents and numerous authorities cited."

25. It has not been necessary to go into the circumstances in which this came about. However, in fairness to the judge, and to the claimants' counsel, it is right that I should record Mr Reza's account of the background. As he says, the proceedings were commenced by the claimants at the end of May 2009, "after 3 months of repeated, unsuccessful attempts" by their solicitors to obtain explanations from Abbey and its solicitors why they had failed to secure release of the personal guarantees by the time stipulated in the contract. Their letter before action and a reminder were received with silence. This was said to be "in stark contrast to the deluge of material" subsequently produced by Abbey in response to the application for summary judgment, including allegations of fraudulent misrepresentation and "trickery", raised after the time when the evidence should have closed, and which were on consideration dismissed by the judge as unjustified (judgment para 45).

26. One sees a reflection of this account in the judgment. Commenting on the period of inconclusive correspondence between solicitors, the judge said:

> "Mentmore says about this correspondence, and I agree, that Abbey's answers to Mentmore's questions about what exactly Abbey has been doing to procure the release of the personal guarantees are wholly inadequate. Beyond bland reassurances, it is really impossible to see from that correspondence whether Abbey has made any real effort at all to secure the release of the personal guarantees." (para 26)

27. Similarly, he commented on Mr Sodhi's evidence of his dealings with RBS, against the background of his general case that the banks were unwilling to consider release of the personal guarantees except as part of consideration of the restructuring of the finance of each business as a whole:

> "When the hearing began there was absolutely no evidence from Mr Sodhi as to what steps he had taken recently to achieve a re-financing arrangement nor was there any evidence of RBS's position. During the course of his submissions Mr Jacobson said that RBS was indeed considering a re-financing package at the moment and that this was currently before its security committee. This was confirmed in a further witness statement from Mr Sodhi submitted at the end of the hearing. According to Mr Sodhi there is no documentation relating to this re-financing package. As I understand his position he says that neither he nor the banks have produced any documentation (or at least any documentation supplied to him) relating to these proposals." (para 35)

28. I mention these points because they help to explain the scepticism with which the judge approached the defendants' case; and because they suggest that the defendants may have to bear a substantial share of the responsibility, both for the form and timing of the proceedings, and for the course they took before the judge. However, those points do not alter the test which the judge had to apply.

Issues

29. On the basis of the submissions we have heard, I would identify four main issues:

    i) *The 1999 Act issue* Whether the former directors are able to sue under the 1999 Act although not parties to the agreement.

    ii) *The Absolute Obligation issue* Whether the judge was right to construe the obligation to secure release of the personal guarantees as requiring only "best endeavours".

    iii) *The Best Endeavours issue* Whether the judge was entitled to conclude summarily that the Abbey was in breach of the obligation so construed.

    iv) *The Retention issue* Whether he was entitled to conclude summarily that there was significant doubt over the likelihood of the deferred consideration being reduced below £1m, and in any event whether it was appropriate to order a payment into court of that sum.

Personal guarantees

30. It is convenient to deal with the first three issues together. They all turn on the interpretation or application of clause 5.4 (see above). At this stage I am concerned with part (a) which places an obligation on the Buyer (Abbey) to achieve, or endeavour to achieve, the release of the guarantees not later than "the first Payment Date".

31. I note that before the judge there was some argument as to whether the first Payment Date was 28 February 2009 (given as the first such date in clause 3.3), or whether that was to be treated as postponed until ascertainment of the amount of Deferred Consideration. Although the wording of paragraph 20 of the judgment is a little obscure, the judge decided as I understand it that the relevant date for these purposes was 28th February 2009, regardless of whether the amount of the adjustment remained uncertain. Although before us Mr Trace did not abandon the alternative interpretation, he did not press it, and in my view he was right not to do so. On this issue I agree with the judge.

Best endeavours - construction

32. I can deal quickly with the first two issues.

33. The first, as the judge recognised, is a point of some difficulty under the 1999 Act. Section 1 enables a third party to enforce a term which "purports to confer a benefit on him", unless it appears "on a proper construction of the contract" that the parties "did not intend the term to be enforceable by him". In this case the answer depends on the intended inter-relationship between clause 5.4, which is expressed as an

undertaking to the former directors personally, and clause 20, which provides that (with certain specific exceptions) the agreement is not "intended to benefit or be enforceable by" anyone other than the parties, their successors and assigns. The judge held that clause 5.4 should "take priority over what appears to be a standard form clause…" (para 23). However, in giving permission to appeal he acknowledged that the point was arguable either way.

34. I do not think we need or ought to decide this issue at the summary stage. It raises a potentially novel point under the 1999 Act, the solution to which may depend on a fuller understanding of the intended purpose of clause 20 than has emerged from the short hearing before us. On the other hand the point seems of very limited (if any) practical significance, since it was common ground that Mentmore itself could sue on the undertaking for the benefit of the former directors. It was suggested that there might be costs implications, but it was not explained why the additional costs arising from their involvement as parties (even if held to have been wrong) would be significant. The issue of costs, if any, is best considered if and when it arises.

35. The second issue, by contrast, is readily answered. The judge said:

> "On the question whether clause 5.4(a) imposes an outright obligation or merely an obligation to use best endeavours to procure the release of the personal guarantees, I have no doubt that the latter was what was intended. Although the clause is awkwardly worded, in that the reference to best endeavours is tacked on in parentheses to what otherwise reads like an absolute obligation, it is clear that effect must be given to those closing words." (para 15)

In my view, that is clearly correct. There was no purpose in including a reference to "best endeavours" unless it was intended to qualify the obligation. The contrary is not realistically arguable, and I would refuse permission to appeal on this point.

Best endeavours - evidence

36. We are left with the third issue, that is, whether on the evidence as presented the judge was entitled to find against the defendants in summary proceedings; in other words, that their case was "fanciful because it [was] entirely without substance" (see per Lord Hope, above). The judge's treatment of this issue runs to some eight pages of the judgment, in which he examines the evidence in considerable detail, both generally and in relation to each of the three banks. For the purposes of the appeal it is unnecessary to do more than cite the main points.

37. Abbey's case, as ultimately presented to the judge, can be shortly stated by reference to a few extracts from Mr Sodhi's witness statement. Thus he said (at para 10):

> "In the months following the SPA… it quickly became clear that on account of the financial position that (Mentmore) had allowed the various care home businesses to get into, the banks were not prepared to consider the personal guarantees in isolation, but were only prepared to consider the re-structuring of the finance of each of the care home businesses as a whole."

Later in the same statement he referred to six meetings between July 2008 and March 2009, at "almost" all of which he had "requested that the existing personal guarantees be released"; at the last the RBS representatives "informed me that the personal guarantees will have to remain in place until the re-structuring of the finance was in place" (para 18-19). Later he said that, although at his first meeting with RBS in July 2008, he had not offered to replace the personal guarantees with further security of his own, he "did so at subsequent meetings which, as set out above, RBS refused" (para 22)

38. The judge's evaluation of Abbey's case can best be seen from paragraph 27 of the judgment:

> "Abbey's case, as elaborated by Mr Jacobson in submissions, was that the banks were simply not interested in looking at the release of the personal guarantees in isolation from a general refinancing of the Companies, and that Abbey has used its best endeavours to bring about that refinancing but has been hampered by a lack of co-operation from Mentmore. In other words, Abbey has been putting all of its efforts into securing an overall refinancing of the Companies, as a means to securing the release of the personal guarantees, but it has not, as I read the evidence made any effort to attempt to persuade the banks to deal with the personal guarantees first, in advance of the more complex task of re-structuring the finances as a whole. Abbey's case, and Mr Sodhi's evidence, is to the effect that the banks are not interested in dealing with the personal guarantees in advance, *but that is not the point*. As part of the duty to use its best endeavours, it seems to me *it was incumbent upon Abbey at least to offer its own personal guarantee in place of Mr Dhooper and Mr Atwal's guarantees, if necessary backed by cash deposits or other assets as security for the replacement personal guarantee*. There is simply no evidence to show that Abbey ever made such an offer, notwithstanding the ample opportunity which Abbey, and Mr Sodhi, have had to put such evidence before the Court." (emphasis added)

39. The passages which I have emphasised are in my view crucial. Having accurately summarised the content of Mr Sodhi's evidence, the judge implicitly recognised that it would not be appropriate, in summary proceedings, to dismiss it as incredible. However, that in his view was "not the point". In other words, even if true, it was insufficient to satisfy Abbey's obligation in the absence of evidence of specific offers of Abbey's own guarantee backed by cash deposits or other security. There being no evidence of such offers, Abbey could not defend the charge of failure of use best endeavours. Similarly, when dealing with the individual banks, he referred to the lack of evidence of "any concrete proposals" being made to RBS (para 36), or to Clydesdate (para 37), for the release of the personal guarantees on the basis of alternative security, in advance of any restructuring.

40. The difficulty with that approach, in my view, is that it involves reading into clause 5.4 something which is not there. The obligation was to use "best endeavours" to achieve release of the guarantees. It is true that it was also stipulated that those

endeavours should include "the offering of a suitable Buyer guarantee or other security, if required". As the judge said (para 25), that indicated "one obvious way" in which Abbey might go about performing its obligation. However, the obligation to make such an offer only arose if that was required by the banks in order to secure release. There was nothing to oblige Abbey to make the offer if there was no prospect in practice of it achieving its objective. On Mr Sodhi's evidence, if believed, that was indeed the position. The banks were unwilling to consider release on any terms, except as part of restructuring.

41. One point which influenced the judge was Abbey's apparent failure at the time to inform the banks that the sale had actually gone through. This led to a complaint from RBS in March 2009 that he had not been open with them about the ownership of the business. The judge noted that counsel for Abbey had explained that Mr Sodhi was trying to negotiate a restructuring without telling the banks that he had bought the companies. He saw these "negotiating tactics" as further evidence of Mr Sodhi's failure to use best endeavours:

> "For as long as Mr Sodhi concealed the fact that Mr Dhooper and Mr Atwal no longer had any connection with the ownership of the Companies, no approach to RBS based on the proposition that their personal guarantees should be released on the basis of, for example, the provision of matching cash deposits and substitute guarantees, could ever realistically be made. This is because the rationale for releasing Mr Dhooper and Mr Atwal is that they no longer had any connection with the company whose debts they were guaranteeing. Mr Jacobson submitted that no such approach would have been acceptable to the banks, but that is, of course, no excuse for Abbey, in pursuance of its obligation to use its best endeavours, not to put such proposals forward." (para 33)

42. With respect to the judge, this seems to me to fall into the category of cross-examination material, rather than anything more conclusive. On Mr Sodhi's account, at least, there was no reason to think that the bank's attitude would have changed materially if they had been told more promptly about the change of ownership. If the sticking-point was their insistence on agreeing the restructuring as a whole, there was no reason to think that earlier knowledge of the sale would have made any difference.

43. The judge accepted that Clydesdale and RBS had "taken quite a hard line on the terms on which re-financing might be undertaken" (para 37). In relation to the third bank, Abbey National, there was evidence (in the form of an e-mail from the bank to Mr Sodhi in June 2009) which the judge interpreted as showing that the possibility of a release of the personal guarantees was "there for the asking" in 2008, and that Abbey had failed to pursue it. He noted Mr Sodhi's answer was that he had concentrated on the other two banks because that was where the greater risk lay, to which the judge responded:

> "That sentiment completely overlooks the fact that Abbey's priority should have been the securing of the release of the personal guarantees, and that, at least in the case of Abbey

> National, that was on offer in 2008 and was simply not pursued by Abbey." (para 38)

44. Mr Trace submits that the email is not in fact inconsistent with Mr Sodhi's evidence. This was that he did indeed offer a replacement guarantee in 2008, but that the bank, having initially shown willingness, had later indicated that they would only offer the opportunity to restructure the finances once occupancy of the homes had risen to a sufficient level. I agree that again this is an issue which cannot properly be resolved in summary proceedings.

45. I have some sympathy with the judge's sceptical reaction to Abbey's evidence, particularly against the background of the earlier inconclusive correspondence, and the lack of documentary support. However, in my view, it was not permissible for him, on an application for summary judgment, simply to disbelieve Mr Sodhi's account. It might have seemed improbable, but as the cases show, that is not enough. It was not inherently incredible, and the judge did not so find it. If accepted, it provided a possible answer to the claim.

46. I should add that the similar problems arise in relation to the judge's discussion of the order. Although he held that Abbey had no defence to the claim, he did not feel able to order specific performance. He recognised the lack of precision in the obligation:

> "An order to the effect that Abbey use its best endeavours, without specifying what those endeavours are to consist of, is not satisfactory. On the other hand, an order requiring Abbey to make specific offers to the banks may distract the banks from consideration of the refinancing proposals which Mr Sodhi claims are currently on the table." (para 48)

47. Instead he decided to order disclosure of documents relating to refinancing proposals, with a view to putting the court in a better position to decide "exactly what further steps it should order Abbey to take". It is not clear to me how the information was expected to help, unless he hoped that it might show, contrary to Mr Sodhi's evidence, that there was some form of alternative security which the banks had been prepared to accept. But, if so, that would tend to reinforce the view that there was not enough material before him to justify disbelieving Mr Sodhi at the summary stage.

48. In my view, therefore, the judge was wrong to reject the defence at the summary stage. The case should have been left to go to trial on this issue. I would allow the appeal on this ground.

Retention issue

The issue before the judge

49. This issue relates to the judge's order for a payment into court of £1m. His reasoning appears from paragraphs 42 and 43. The starting point was his uncertainty as to the likely resolution of the adjustment of the purchase price under clause 4.3. He indicated that, had there been a report from Mr Sodhi's accountants to support his proposed adjustment, he would have accepted that there was a "genuine issue".

Without it he was left with "little idea" as to their merit. He explained his proposed order as follows:

> "So far as concerns the Claimant's request for an order that Abbey pay £1 million to its solicitors under the terms of clause 5.4(b)(ii), I think it would be premature to conclude that Abbey has no real prospect of successfully obtaining an adjustment to the value of Completion Net Assets which would eliminate the obligation to make such a payment. On the other hand, because of Abbey's failure to provide an accountant's report it is hard to evaluate the real strength of Abbey's contentions on this point. In my judgment the appropriate course would be to order Abbey to pay £1 million into court pending the outcome of the expert's determination. If the Expert agrees that a downward adjustment in Completion Net Assets should be made in excess of £1 million then to the extent that the adjustment exceeds £1 million Abbey should be permitted to withdraw the monies paid in. To the extent that the expert determines that the adjustment should be less than £2 million Mentmore may apply to have the £1 million (or the adjusted amount of the Deferred Consideration if less) paid into Abbey's solicitor's account to be held on the terms of clause 5.4(b)(ii)."

50. As already noted, his order referred in terms to this paragraph and was designed to give it effect. Mr Trace questions the basis for ordering a payment into court, given that at that stage the judge had accepted that no payment was in fact due.

51. The first step is to understand the legal basis of the order as made, which is not easy to discern by reference solely to the judgment. The apparent explanation appears from an email written by the judge dated 24th August 2009, in connection with the agreement of the order, the judge said:

> "At the judgment hearing I did indicate that the requirement for a payment in was a condition for defending the indemnity claims. Mr Jacobson, as I understood him, said his client was prepared to submit to a simple order for a payment in, and so the question of conditionality was not explored. …
>
> The payment in was intended to be a condition for defending against a claim for specific performance of the obligation to make a retention of £1 million be paid to the Purchasers' solicitors to be held on the terms of clause 4.3.(b)(ii), as security for indemnities in favour of C2 and C3. So if the payment in is not made C1-3 are entitled to an immediate order that £1 million be lodged in Nockolds solicitors account on the terms of 4.3(b)(ii). C1-3 will not be able to claim on that money until the expert determination has determined the quantum of the Purchase Price…."

52. We were shown an extract from the transcript, which Mr Reza asked us to interpret as a "concession" by counsel then appearing for Abbey. That is reading too much into

the somewhat inconclusive exchange there recorded. On the other hand, I do not understand the approach suggested in the judge's email to have been contradicted before the order was drawn up. Abbey's then Counsel has not been instructed in the appeal, and Mr Trace is unable to help us further. In those circumstances, I think it fair to start from the assumption that the judge proceeded without dissent on the basis proposed in the email. On that footing his order should be treated as equivalent to a conditional order under CPR Part 24, related to his view of the prospects of successfully defending a claim for payment of £1m into the solicitors' account under clause (b)(ii). The issue was whether the adjustments sought by Abbey would reduce the first payment to nil, and hence eliminate the obligation under (b)(ii). The conditional order implicitly reflected the judge's scepticism as to the likelihood of Abbey achieving a reduction of that scale.

53. Even as so explained, I do not think the order was justifiable, at least as matters stood at the time. The judge had accepted that there was no immediate obligation on Abbey to pay anything at all by way of Deferred Consideration, under either instalment, in view of the unresolved differences which might have reduced it to nil (see para 15(iii) above). If there was as yet no liability to pay any part of the first instalment, there could be no present obligation to retain any part of it in the Solicitor's account under (b)(ii), and no grounds for specific performance of such an obligation. On the basis of the judge's email, however, the existence of such a specifically enforceable obligation was the foundation of the order for payment in. In my view the necessary foundation was missing. Accordingly, if the facts had remained as they stood at the time of the order, I would have held the payment should be returned.

Subsequent events

54. As I have already indicated, events have moved on. Not only has the second payment date now passed, but the dispute over Deferred Consideration has narrowed significantly. We now know that, in total under the two instalments, at least £1.8m of Deferred Consideration is in principle payable.

55. I do not think that we can properly ignore these developments. Unfortunately, because of the way the case developed, and the late emergence of the new evidence, the precise consequences were not explored in argument. As it seems to me, the application for summary judgment having failed, the present appeal must be seen as a staging post towards full trial. Further, although we cannot pre-empt the Case Management Conference, we should take account of the prospect of a consolidated trial relating to both instalments. If on the facts as they now stand, and the current state of the two sets of proceedings, there is an arguable basis for upholding the judge's order, it would seem premature to order payment out until that issue has been resolved, whether by us or on remittal by the lower court.

56. Mr Trace would argue, I believe, that, since there are outstanding issues as to the final amount, albeit much narrowed, the position remains that no part of the Deferred Consideration is yet payable. If that is correct, there is still no obligation to retain any money under (b)(ii), and no more solid foundation for the judge's order than there was at the time it was made.

57. At first sight, such an argument seems unattractively legalistic, in circumstances where a total of £1.8m is known to be outstanding, and both payment dates have long

since passed. The judge found that Abbey was under no present obligation to pay "to the extent that" unresolved differences remained. He was not required to consider what would happen if the remaining differences were as limited as they have now become.

58. However, even if one looks at the two sets of proceedings together, and one accepts that the full undisputed amount of Deferred Consideration has now become immediately payable, there are further issues. First, there is a question as to the allocation of the agreed adjustments between the two instalments. Read literally, clause 4.3 envisages any adjustment being reflected in an increase or reduction of the *first* payment, not the second; and clause 5.4 also refers to the £1m being retained out of the *first* payment. As I have noted, the figure now accepted by Abbey implies a downwards adjustment from the original purchase price of some £1.6m. If this is all deducted from the first payment of £2m, the amount due under that payment comes down to £400,000. This accordingly would be the maximum amount to be paid into the solicitors' account under (b)(ii). By the same token, on the basis of the judge's order, the amount of the payment in should be reduced to the same amount. On a strict reading, this position is unaffected by the fact that second payment date has now passed, and a much larger sum is due.

59. Secondly, it may be said, in looking at the overall picture in respect of both instalments we cannot ignore the counterclaims for breach of warranty. As the judge held, these are not "substantiated claims" and therefore could not be set off against the second instalment. However, even if Mentmore is entitled in principle to summary judgment for the second instalment, the court would be able to grant a stay pending trial of the counterclaim. On that footing, unless success on the counterclaim is found "improbable" (see White Book 24 PD 4), it would not be appropriate to order payment in of any amount in respect of the second instalment.

60. An alternative view is that clause 5.4 should be looked at principally from the point of view of the former directors, whom it is designed to protect. If one disregards the drafting problems, the general intention of the clause is reasonably clear. It is to ensure that the personal guarantees are released as soon as possible, but that, if not, the directors themselves will be protected by retention of up to £1m from the Deferred Consideration. The amount of that protection would be reduced by any downwards adjustments to the Deferred Consideration, but not by unsubstantiated claims. Thus Abbey's claims for breach of warranty are irrelevant to the protection available for the directors. Furthermore, arguably, the link to the first payment was intended simply to ensure that the protection was put in place at the earliest opportunity, not to limit its amount. On a broad view of clause 5.4(b), the former directors are entitled to protection out of any Deferred Consideration. Since the total amount outstanding is known to be more than £1m, there is no reason why that amount should not be safeguarded as originally envisaged, either by retention in the solicitors' account or by payment into court.

61. As I have said, we have not heard full argument on these issues. Nor do I think it necessary for us to seek to resolve them at this level. Since the case will now return to the High Court, there is no reason why any further orders in relation to the money now in court cannot be considered at that level, in the light of up to date evidence. The forthcoming Case Management Conference will be a suitable opportunity for the parties to make submissions to how this should progress.

Respondent's application for permission to appeal

62. The only remaining matter is the respondent's application for permission to appeal, and the related application for additional evidence. Any Respondents' Notice should have been filed within 14 days of service of the Appellant's Notice dated 2nd September 2009. An application dated 19th November for an extension of time for service of the Respondents' Notice was dismissed. A Respondents' Notice was finally filed on 14th January 2010, containing a further application for an extension of time. A skeleton argument in support of that application was filed on 19th April.

63. I have already dealt with one point in the late notice (the absolute obligation issue). The other points are an extraordinary amalgam of allegations of misconduct by Mr Sodhi (and by implication his legal representatives) in relation to the hearing below. It is said that the "voluminous, irrelevant, contrived, highly selective and unreliable evidence" was part of Mr Sodhi's "strategy… to pull the wool over the Court's eyes and create a smoke-screen"; that he sought to "mislead the court" on a number of matters; and that on other aspects his evidence was "bogus and contradictory and inconsistent with the probabilities and other evidence.."

64. It is unclear to me what sort of inquiry Mr Reza was expecting this court to undertake. To the extent that the points were apparent during the hearing, they would have been matters for submission to the judge. More generally, it must have been obvious that, whatever the forum, allegations of misconduct of this kind would need to be fully particularised, an opportunity given for a written response, and directions given for the form of hearing, which almost certainly would involved oral evidence and cross-examination. If anything these points underline the unsuitability of the case for summary disposal. I am in any event quite satisfied that, whatever else may be said about these allegations, it was far too late for them to be raised by an out of time application in the context of the present appeal.

65. As far as concerns the two applications to adduce further evidence, Mr Trace did not pursue his application. Mr Reza's application included information about the expert's determination, which was referred to before us without objection. The other material was largely directed to the respondent's notice and seems to me of no relevance to the issues before us.

Conclusion

66. For these reasons, I would allow the appeal on the best endeavours issue, and give permission to defend. On the retention issue, I would also allow the appeal, but (subject to submissions on the precise form of order) simply to the extent that the issue of the retention or disposal of the money now in court will be remitted to the High Court, with liberty for either party to apply for directions. I would dismiss the applications related to the proposed cross-appeal, and the applications to adduce new evidence (save for that relating to the expert's determination, and consequent exchanges).

MR JUSTICE MORGAN :

67. Save in relation to one point, I agree with the judgment of Lord Justice Carnwath and with his conclusions as to the result of the appeal and of the various applications which have been made.

68. The one point on which I differ from Lord Justice Carnwath is the point which is considered in the judgment of Lady Justice Arden. I agree with her judgment on that point and with the course which she proposes.

LADY JUSTICE ARDEN :

69. Save in one respect, I agree with Lord Justice Carnwath on the outcome of this appeal for the reasons that he gives. However, in my judgment, as there was no basis for the judge to make an order that the sum of £1 million be paid in advance of the determination of the Deferred Consideration, that sum falls now, subject to what follows, be repaid to Abbey. The qualification is this. For the reasons given by Lord Justice Carnwath, Abbey cannot now dispute but that the first instalment of the Deferred Consideration is not less than £400,000. In those circumstances, subject to any further written submissions from Counsel lodged before this judgment is handed down, I would make an order for an interim payment of that sum pursuant to CPR 25 (1)(k). That sum would form part of the first instalment of the Deferred Consideration and thus would have to be held in accordance with clause 5.4 (b)(ii) of the Agreement. Such an order would not prevent the respondents from seeking judgment as to the balance of the first instalment of the Deferred Consideration, but, unless that balance is agreed, there will have to be a trial of that issue. Nor would this order prevent the court below from making any further order for an interim payment if it thought fit so to do. I do not, however, consider that this court should itself entertain any application to make any further order (unless the sum is agreed).