



Neutral Citation Number: [2019] EWHC 2753 (Ch)

Case No: CH 2019 000110

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON

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

Date: 18/10/2019

Before:

MR JUSTICE MORGAN

Between:

**THE ENGINEERING EQUIPMENT AND
MATERIALS USERS ASSOCIATION LIMITED**

Appellant

- and -

(1) JT LIMITED

Respondents

(2) JTL

Steven Thompson QC (instructed by **Fox Williams LLP**) for the **Appellant**
Andrew Thornton (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing date: 9 October 2019

**Judgment Approved by the court
for handing down**

MR JUSTICE MORGAN:

Introduction

1. This judgment concerns an appeal and a cross-appeal against the order of HH John Hand QC, sitting as a Deputy Circuit Judge (“the judge”), in the County Court at Central London, the order having been made on 15 March 2019. The judge granted both parties permission to appeal in relation to identified paragraphs in his order.
2. The dispute between the parties concerns the meaning and effect of an agreement, called the Business Sale Agreement (“the BSA”), dated 30 April 2014. In the BSA, the Engineering Equipment and Materials Users Association (“the Association”) was the Seller, JT Limited (“JT”) was the Buyer and JTL (the parent of JT) was the Guarantor. It will be necessary to refer to the terms of the BSA in detail later in this judgment but at this point I can summarise the dispute as relating (in particular) to the terms of the BSA in respect of Book Debts and in respect of Cash.
3. The case for the Association in the county court and again on appeal was that JT owed obligations to the Association in relation to both Book Debts and Cash, as those terms were defined in the BSA. In particular, the Association argued that JT’s obligations in relation to Book Debts produced the result that JT was obliged to pay £373,672 to the Association and that JT’s obligations in relation to Cash produced the result that JT was obliged to pay £202,189 to the Association. It was not disputed that JTL was liable as the guarantor of JT to the extent (if any) that JT was liable to pay these monies to the Association.
4. The case for JT and JTL in the county court and again on appeal is that JT did not owe any relevant obligation to the Association in relation to Book Debts and Cash and no sums were therefore due from JT or JTL in relation to those matters.
5. The judge dismissed the Association’s claim in relation to Book Debts and the Association now challenges that decision on this appeal. As regards the Association’s claim in relation to Cash, the judge rejected JT’s argument that it had no relevant obligation in relation to Cash. However, the judge did not accept the Association’s arguments in their entirety but held that there ought to be an account and an inquiry to establish what if any sums in respect of overheads and expenses should be deducted from the sum of £202,189, and following such account and inquiry, JT would be liable to pay to the Association the sum of £202,189 less any such overheads and expenses. On this appeal, the Association contends that the judge was wrong to provide for a possible deduction in relation to overheads and expenses and JT contends that the judge was wrong to allow the Association to recover any sum in relation to Cash.
6. Mr Thompson QC appeared for the Association in the county court and again on this appeal. Similarly, Mr Thornton appeared for JT and JTL in the county court and again on this appeal. I am grateful to them for the clarity of their submissions.

The terms of the BSA

7. The BSA contained the following recitals:

“WHEREAS

(A) The Business is now and has for some time been carried on by the Seller under the Business Name.

(B) The Seller has agreed to sell and transfer, and the Buyer has agreed to purchase, the Business as a going concern from the Effective Date (as defined below) on the terms and conditions of this agreement and in particular on the basis of the warranties, undertakings, and agreements set out in this agreement.

(C) The Guarantor has agreed to guarantee the obligations of the Buyer under this Agreement.”

8. The BSA contained a large number of definitions. The following definitions are potentially material to the present dispute:

“**Assets**” means the property, rights and assets of the Business (other than the Excluded Assets) agreed to be sold pursuant to clause 2.1;

“**Assumed Liabilities**” means the obligations of the Seller at the Effective Date under the Business Contracts (but excluding the Excluded Liabilities);

“**Balance Sheet**” means the balance sheet relating to the Business as at 31 March 2014 in the Agreed Form;

“**Balance Sheet Date**” means 31 March 2014;

“**Book Debts**” means the book and other debts due from customers of the Business arising in or referable to a period up to and including the Effective Date;

“**Business**” means the competency development, assessment and certification scheme known by the Business Name and carried on by the Seller immediately prior to the Completion Date;

“**Business Contracts**” means the Customer Contracts and Supplier Contracts, and all other contracts, arrangements and other commitments relating to the Business entered into on or before, and which remain to be performed in whole or part at, the Effective Date, which have been entered into by or for the benefit of the Business, or the benefit of which is held in trust for or has been assigned or subcontracted to the Seller.

“**Business Intellectual Property**” means the Intellectual Property owned, used or held for use by the Seller in relation to the Business as set out in Schedule 1;

“Business Intellectual Property Rights” means all rights in Business Intellectual Property owned, used or held for use by the Seller.

“Business Name and Goodwill Assignment” means the agreement in the Agreed Form in relation the assignment of the Business Name and the Goodwill to be entered into on the same date as this Agreement between the Seller (1) and the Buyer (2);

“Cash” means all the cash in the bank account(s) or accounts at any other financial institution in relation to the Business as at the Effective Date, and which have been administered by the Buyer prior to Completion;

“Completion” means the completion of the sale and purchase of the Business and the Assets in accordance with this Agreement;

“Completion Date” means close of business on the date on which Completion takes place pursuant to clause 5;

“Consideration” means the consideration for the Business and the Assets to be paid by the Buyer to the Seller as set out in clause 3;

“Creditors” means all trade debts and accrued charges owing by the Seller to the trade creditors of the Seller in the ordinary course of the Business;

“Customer Contracts” means all contracts, engagements or orders entered into on or prior to the Effective Date by or on behalf of the Seller, with Customers for provision of services by the Seller in connection with, and in the ordinary course of, the Business which, at the Effective Date, remain to be performed in whole or in part by the Business;

“Customers” means the customers of the Business at the Effective Date;

“Deed of Termination” means the deed of termination in the Agreed Form in relation to the Existing Management Agreement to be entered into on or around the date of this Agreement between the Seller (1) and the Buyer (2);

“Effective Date” means the 31 March 2014;

“Excluded Assets” means the assets used in the Business set out in clause 2.2 as being excluded from the sale pursuant to this agreement;

“Excluded Liabilities” means all the liabilities or obligations relating to the Business or Assets and outstanding on, or accrued or referable to the period up to and including, the Effective Date or arising by virtue of the sale and purchase recorded by this agreement, including any and all liabilities in respect of National Insurance, PAYE, VAT or other Taxation attributable to the Seller in respect of the Business or the Assets relating to the period ending on the Effective Date;

“Existing Management Agreement” means the management agreement between the Seller (1) and the Buyer (2) dated 26 April 2011;

“Goodwill” means the goodwill, custom and connection of the Seller in relation to the Business, together with the exclusive right for the Buyer and its successors and assigns to carry on the Business under the Business Name (and all other names associated with the Business) and respectively to represent themselves as carrying on the Business in succession to the Seller;

“Initial consideration” means the sum of £1,248,701 payable by the Buyer to the Seller in accordance with clause 3.2.1;

“Outstanding invoice” means the invoice in the sum of £9,407.00 for the fees owed by the Buyer to the Seller pursuant to the Existing Management Agreement for the period 1 April – the Completion Date which immediately prior to the Completion Date remained unpaid.

“Supplier Contracts” means all contracts, engagements or orders entered into on or before the Effective Date by or on behalf of the Seller for the supply or sale of goods or services to the Seller in connection with and in the ordinary course of the Business, which at the Effective Date remain to be performed in whole or in part.”

9. Clause 2.1 provided for the Seller to sell and the Buyer to purchase certain specified assets. Clause 2.2 stated that certain assets were excluded from the sale. By clause 2.2.4 there was excluded:

“all the Seller’s cash-in-hand or at the bank or at any other financial institution in relation to the Business;”

By clause 2.2.5 there were excluded “the Book Debts”.

10. Clause 2.4 apportioned a consideration of £1.0 million between identified assets.
11. Clause 3 dealt with the uplift in the consideration of £1.0 million to £1,298,701 so that the Seller would receive the consideration of £1.0 million net of tax and there was

provision for adjustment of the sum payable if the tax turned out to be less than £298,701.

12. Clause 5 provided for completion. By clause 5.3.3, the Buyer was to pay to the Seller the Outstanding Invoice and by clause 5.3.4 the Buyer was to “transfer the Cash to the Seller”.

13. Clause 9 was headed “Risk” and provided:

“9.1 The Business and the Assets shall be at the risk of the Buyer from the Effective Date.

9.2 All profits and receipts of the Business referable only to the period up to and including the Effective Date shall belong to the Seller.

9.3 All losses and, subject to clause 10, all outgoings incurred or payable by the Seller in connection with the Business and referable only to the period up to and including the Effective Date shall be paid and discharged by the Seller (subject to the Buyer’s obligations under the terms of the Existing Management Agreement).

9.4 All profits and receipts of the Business and, subject to clause 10, all losses and outgoings incurred or payable by the Seller in connection with the Business payable by the Seller in connection with the Business and referable only to the period from the Effective Date shall belong to, and be paid and discharged by, the Buyer (subject to the seller’s obligations under the Management Agreement).

9.5 The buyer warrants to the Seller that:

9.5.1 the Balance Sheet gives a true and fair view of the affairs of the Business as at the Balance Sheet Date;

9.5.2 neither the assets or liabilities of the business have changed by a significant amount (meaning less than a 0.25% increase or decrease in any of the amounts shown in the Balance Sheet) since the Balance Sheet Date;

9.5.3 all liabilities of the Business have been included in the Balance Sheet other than liabilities which have arisen since the Balance Sheet Date;

9.5.4 it is not aware, having made due and careful enquiry, that the Seller will retain any liabilities of the Business under the terms of this Agreement other than those liabilities set out in the Balance Sheet or which have arisen since the Balance Sheet Date.”

14. Clause 10 was headed “Apportionments” and provided:

“10.1 Where any service is to be provided by the Buyer under any contract after the Effective Date, but any payment (whether by way of deposit, prepayment or otherwise) in respect of the price or cost of such product or service has been received by the Seller before the Effective Date, the Seller shall pay an amount equal to the amount of that payment (excluding any amount in respect of VAT for which the Seller is required to account) to the Buyer and shall hold such sum in trust for the Buyer until it is paid.

10.2 Where any product or service is to be provided to the Buyer under any contract after the Effective Date, but any payment (whether by way of deposit, prepayment or otherwise) in respect of the price or cost of it has been made by the Seller before the Effective Date, the Buyer shall pay an amount equal to the amount of that payment (excluding any amount in respect of VAT for which the Buyer is required to account) to the Seller and shall hold such sum in trust for the Seller until it is paid.

10.3 All money or other items belonging to the Buyer, which are received by the Seller on or after the Effective Date in connection with the Business, shall be held in trust for the buyer and shall be paid promptly to the Buyer.

10.4 All money or other items belonging to the Seller, which are received by the Buyer on or after the Effective Date in connection with the Business, shall be held in trust for the Seller and shall be paid promptly to the Seller.

10.5 Any sum due between the parties pursuant to this clause 10 shall be paid in cash within 10 Business Days of receipt:

10.5.1 if to the Seller, to such bank account as the Seller may notify to the Buyer.

10.5.2 if to the Buyer, to such bank account as the buyer may notify to the Seller.”

15. Clause 11 was headed “Book Debts” and provided:

“11.1 The Seller and the Buyer shall cause to be prepared from the accounting records of the Business a list of the Book Debts showing (amongst other things) the names of the debtors and the amounts owing to the Seller by each of the relevant debtors as at the Effective Date.

11.2 The Buyer shall not acquire the Book Debts, which shall remain the property and responsibility of the Seller.

11.3 Notwithstanding that the Book Debts are Excluded Assets, the Buyer shall endeavour to collect the Book Debts on the Seller's behalf, but shall not be bound to take any legal proceedings or other steps to recover the same save as may be usual in the ordinary course of business. Subject to any express intention to the contrary on the part of the debtor, any money received by the Buyer in the course of collecting any Book Debts from a person who is also indebted to the Buyer shall be deemed to have been paid in or towards the discharge of the oldest debt.

11.4 Within 10 Business Days of the end of each month, commencing after Completion, the Buyer shall provide the Seller with a statement of the Book Debts collected in that month (or, in the case of the first such month, the period between completion and the end of such month) and shall remit to the Seller the amounts received during that period.

11.5 If it becomes apparent that recovery of any Book Debt is not likely to be possible within a reasonable period unless legal proceedings are instituted, the Buyer shall advise the Seller in writing and furnish the Seller with full particulars of the steps taken by the Buyer to effect recovery.”

Background matters

16. Before the parties entered into the BSA, the relationship between the Association and JT was governed by a Management Agreement dated 26 April 2011. This agreement was referred to in the BSA as the Existing Management Agreement and I will refer to it as “the EMA”. The recitals to the EMA stated that the Association had established a competency development, assessment and certification scheme known as CompEx and that it wished to appoint JT “to manage and administer the CompEx Scheme” on the terms of the EMA.
17. Clause 3 of the EMA identified the undertakings and services to be provided by JT. By clause 3, JT was to promote and support the interests of the CompEx Scheme and to manage and administer it in accordance with the detailed provisions set out in schedule 2 to the EMA. Schedule 2 identified the responsibilities of the Association in relation to the CompEx Scheme and set out the obligations of JT in relation to the management and administration of the scheme. In particular, JT was to manage the scheme through a management committee made up of representatives of both the Association and JT. Further, JT was to collect all fees and monies associated with the scheme and was to account for all such fees and monies and was to pay certain expenses arising.
18. Clause 4 of the EMA provided that it was to continue in force until terminated in accordance with clause 6. The provisions as to termination do not directly matter because, as will be seen, the EMA was terminated by agreement in connection with the parties entering into the BSA. Clause 6.3 provided that in the event that the Association ceased operation, JT would have the option to purchase the CompEx Scheme at market value.

19. Clause 5 of the EMA provided:

“5. Consideration

5.1 In consideration of the right to manage and administer the CompEx Scheme, [JT] shall pay [the Association] in the manner set out below.

5.2 [JT] shall create a quarterly analysis document containing all relevant information that will allow [the Association] to create an invoice within 4 weeks of each quarter end date (beginning with 1 January of each relevant year). [The Association] shall then create an invoice based on the analysis and the pricing structure agreed by the Management Committee of the CompEx Scheme. Such pricing structure to be revised by the Management Committee from time to time and recorded in its minutes. Invoices to be promptly settled in full by [JT].”

20. What is clear from clause 5 is that the parties to the EMA intended that JT would pay the Association a fee for the benefit of the EMA and, in particular, for the ability to manage and administer the CompEx Scheme. Thus, this was not a case where the Association was running the business involved in the CompEx Scheme, through the agency of JT, and earning the revenues from that business and rewarding JT with a payment for its management services.
21. Mr Thompson submitted that clause 5 of the EMA was too vague to be enforceable. I accept that difficult issues may have arisen if there had been a dispute as to the operation of clause 5 and the court had been asked to resolve that dispute. However, there had not been any relevant dispute between the parties as to the operation of clause 5 and therefore those possible difficulties did not arise. Instead, the judge found that the parties had agreed on the amount of the fee which should be paid by JT pursuant to clause 5 of the EMA. The judge found that the fee was calculated as a percentage of the revenues of the business of operating the CompEx Scheme. It would seem to follow from the fact that JT was buying the right to earn the revenues from the CompEx Scheme that in return for paying the agreed fee, the revenues would belong to JT rather than to the Association. Earlier references in the EMA to JT accounting for monies received in the CompEx business are to be understood in the light of the way in which the parties operated the EMA. JT had to account for monies received so that the parties could calculate the amount of the fee to be charged by the Association to JT; the process of accounting did not mean that the monies received were owed by JT to the Association.
22. The judge made specific findings as to which entity was entitled to the revenues produced by operating the CompEx Scheme. He held that JT was entitled to the net revenues so produced.
23. Clause 8.1 of the EMA recorded that the Association retained ownership of the CompEx Scheme.
24. As set out above, the BSA referred to the terms of the EMA. The BSA provided for JT to pay to the Association “the Outstanding Invoice” which related to the fee

payable by JT for its right to operate the CompEx Scheme up to the Completion Date. It is to be inferred that as this invoice was the only one outstanding, that JT had paid the fee required to be paid under the EMA up to the Effective Date under the BSA, namely, 31 March 2014. This means that JT had paid for the right to retain the net revenues of the business until the Effective Date and was to pay for a similar right until the Completion Date.

25. On 12 August 2013, the Association, JT and JTL entered into Heads of Agreement which set out the principal terms for the intended sale and purchase of the CompEx business. The Heads of Agreement were formal and detailed but were expressed to be subject to contract. Clause 3.1 of the Heads of Agreement stated that the consideration for the sale and purchase was specified in Annex 1 to the Heads of Agreement. The copy of this document in the appeal bundle did not have an Annex 1. I was told that neither party had a completed Heads of Agreement with an Annex 1. I enquired about Annex 1 and Mr Thornton provided me with a draft of Annex 1 dated 26 June 2013 which stated that the consideration for the sale and purchase of the business was to be £1,298,701, save for the possibility that the tax payable by the Association might be less than £298,701 in which event that element of the consideration would be appropriately reduced. I was also taken to the oral evidence given by Mr Hird who had been the Chief Executive of JT. In the course of his cross-examination, Mr Hird stated the he was told by the Association that the consideration for the sale and purchase would be £1 million plus taxes so that the true cost to JT would be about £1.3 million.
26. As set out earlier, the BSA referred to the (possible) existence of a Balance Sheet in relation to the CompEx business and that the Balance Sheet was to be in an Agreed Form. In particular, the Balance Sheet was referred to in clause 9.5 of the BSA. The appeal bundle contained an email dated 6 December 2013 from the solicitor acting for the Association to the solicitor acting for JT. This email referred to liabilities which the Association was to retain or to assume. On account of that, the solicitor for the Association wanted JT to produce a balance sheet as close as possible to the intended completion date to record these liabilities. It may be that the solicitor for the Association wished to have a balance sheet for other purposes as well but the email focussed on the question of liabilities which, it was said, the Association was to retain or assume. The email also asked the solicitor for JT to confirm that it was the intention that the balance “of the bank account” as at completion would be transferred to the Association on completion. It appears that there was no reply to this request for confirmation so that the solicitor for JT did not give the requested confirmation but nor did he deal with the point in any other way. I was told that on completion, the solicitor for the Association did not request JT to pay to the Association any sum in money in any bank account.
27. In due course, JT did produce various sets of accounts including balance sheets. Initially, JT produced balance sheets for JTL which (it seems to have been agreed) were not relevant or helpful. Then, on 15 April 2014, the solicitor for JT produced further accounts. These accounts included a summary of income and expenditure; this summary showed the income from the CompEx Scheme and a small sum of money apparently from another source.
28. The accounts provided on 15 April 2014 included a balance sheet for JT. Under the heading Current Assets were figures for Debtors Control, Bank and Cash and for

Prepayments and Accrued Income, respectively, £373,672, £202,189 and £3,644. The balance sheet then listed Current Liabilities which included figures for creditors, VAT liability and Accruals and Deferred Income. Mr Thornton told me that this last heading related to payments which had been received by JT in relation to services to be provided in the future (i.e. future courses and the like) to its customers. The figure for this heading was substantial (£301,587). As explained to me, it was to be expected that some of this money had been spent by JT and some of it might conceivably have been banked as cash which would therefore be part of the figure of £202,189 listed as Bank and Cash elsewhere in the balance sheet.

29. As contemplated by the BSA, on 30 April 2014, the Association and JT entered into a Deed of Termination of the EMA with effect from 30 April 2014, whereby the EMA was terminated and the parties were released from any future obligations under the EMA and so that neither party continued to be bound by the EMA.

The legal principles

30. There was no dispute between the parties as to the legal principles which are to be applied for the purpose of resolving the dispute. I was, of course, provided with a number of well-known authorities as to the construction of contracts. It is not necessary in this judgment to set out any specific passages from the authorities but I will say that I was reminded in the course of written and oral submissions of what was said in *Arnold v Britton* [2015] 1 AC 1619, in particular at [14]-[23], and *Wood v Capita Insurance Services* [2017] AC 1173, in particular at [8]-[15]. There was also no dispute on the hearing of these appeals as to the admissibility of background material as an aid to the interpretation of the BSA.

The dispute as to Book Debts

31. The provisions of the BSA which are of principal relevance when considering the dispute as to Book Debts are the definition of Book Debts (which definition refers to “customers” and “the Business” which are also defined terms), clause 2.2.5 (which excluded Book Debts from the sale), clause 9.2 and clause 11, which was the specific clause dealing with Book Debts.
32. The case for the Association can be summarised as follows:
 - i) The definition of the Business referred to the business of the CompEx Scheme; JT was managing and administering the business of the CompEx Scheme; JT’s customers were customers of that Business;
 - ii) The definition of Book Debts referred to debts due from customers of the Business; this definition was not restricted to debts owed to the Association but could include debts owed to JT;
 - iii) Clause 2.2.5 provided that the Book Debts, as earlier defined, were excluded from the sale to JT;
 - iv) Clause 9.2 provided that all receipts of the Business referable to the period up to the Effective Date should belong to the Association;

- v) Clause 11.1 provided for the preparation of a list of debtors and “the amounts owing to the Seller”; this phrase should be read as if it had said “amounts owing to the Business”;
- vi) Although it was now reasonably clear that the debts shown in the Balance Sheet were debts owed to JT and not to the Association, that might not have been clear earlier; in particular, the terms of the EMA and the vagueness of clause 5 of the EMA meant that the parties would not have been clear that the debts in the Balance Sheet were not debts owed to the Association; the solicitors for the parties might not have known the position when they drafted the BSA;
- vii) One of the purposes of the Balance Sheet provided by the solicitors for JT to the solicitors for the Association was to identify the amount of the Book Debts;
- viii) Clause 9.2 provided that all receipts of the Business referable to the period up to the Effective Date should belong to the Association; this overrode the pre-existing position whereby JT, having paid the fee due under clause 5 of the EMA, was entitled to the net receipts of the Business;
- ix) It may be that the BSA had been drafted on a mistaken basis but there was no claim for rectification so that JT was bound by the express terms of the BSA even if it now emerged that JT had made a bad bargain;
- x) Even if the result contended for by the Association was an uncommercial one, the words of the BSA are clear and unambiguous and must be given effect;
- xi) If the BSA is construed as contended for by JT, the provisions as to Book Debts do not refer to anything and are otiose.

33. The case for JT can be summarised as follows:

- i) The debts referred to in the Balance Sheet in the sum of £373,672 were debts owed to JT and not to the Association;
- ii) JT had the benefit of those debts, and the Association did not have the benefit of those debts, because under the established arrangements between the Association and JT, JT paid to the Association a fee which gave it the right to retain the revenues from the business;
- iii) The BSA itself, when referring to the Outstanding Invoice, was drafted on the basis that JT was obliged to pay the fee under the EMA not only up to the Effective Date but also up to the Completion Date;
- iv) The Association was not in a position to recover the debts in the JT balance sheet from the relevant debtors;
- v) If the Association had terminated the EMA and had taken back control of the Business, the Association would not have been entitled to the debts shown in the JT balance sheet;

- vi) If the Association had sold its business to a third party, it would not have been able to transfer the benefit of the debts in the JT balance sheet to that third party;
- vii) The suggestion that JT should, in effect, transfer to the Association the benefit of the debts owed to JT makes no commercial sense;
- viii) The specific clause in the BSA which deals with the subject of Book Debts is clause 11; clause 11.1 makes it clear that the only Book Debts which are the subject of the obligations in clause 11 are debts “owing to the Seller”;
- ix) The phrase “owing to the Seller” is clear and unambiguous and accords with commercial sense; clause 11 is only dealing with debts owing to the Association; clause 11 does not deal with debts owing to JT;
- x) This interpretation of clause 11.1 is consistent with clause 11.2 which states that the Book Debts are not acquired by JT and are to “remain” the property and responsibility of the Association; the debts shown in the JT balance sheet could not “remain” the property of the Association as they never had been the property of the Association; the reference to JT not acquiring the Book Debts only makes sense if it is referring to debts which were the property of the Association;
- xi) To read clause 11.1 by substituting the words “owing to the Business” for the clear words “owing to the Seller” is not permissible by any process of construction and flouts business common sense;
- xii) The fact that there may have been no relevant debts owing to the Association so as to come within clause 11 is nothing to the point; in particular, this fact is not sufficient to distort the meaning of the words “owing to the Seller” so that they become “owing to the Business” and then extend to debts “owing to the Buyer”;
- xiii) JT agrees with the submission of the Association that the solicitors who drafted the BSA appear to have been mistaken as to the way in which the Business had been run prior to the BSA and included standard provisions which would have been appropriate if the Association had been running the Business itself or through an agent where the rights and liabilities of the Business were the rights and liabilities of the Association;
- xiv) Clause 9 and in particular clause 9.2 is an example of the mistaken understanding on the part of the solicitors as to the way in which the Business had been run; for example, clause 9.3 refers to the Association’s losses in relation to the Business; clause 9.3 simply does not make any sense in the light of how the Business had been run; similarly clause 9.2 does not make any sense when the arrangements between the parties were that JT acquired the right to the revenues of the Business by paying a fee for that right to the Association.

34. Having summarised the rival cases, I consider that the case for JT must prevail. I accept all of the considerations set out above on behalf of JT but I wish to emphasise certain matters.
35. The specific clause dealing with Book Debts is clause 11. The natural and ordinary meaning of clauses 11.1 and 11.2 is that clause 11 is only dealing with debts owing to the Association. The debts in the JT balance sheet are not debts owing to the Association as they are debts already owing to JT. The submission for the Association that the words in clause 11.1 “owing to the Seller” should be read as “owing to the Business” and that phrase then interpreted as meaning “owing to the Buyer” involves a considerable departure from the natural and ordinary meaning of the words used. Furthermore, the natural and ordinary meaning of clause 11 is in accordance with business common sense and the interpretation contended for by the Association would flout business common sense.
36. The Association is able to say that, on the construction contended for by JT and on the facts of the case, there were no relevant debts owing to the Association and therefore clause 11 does not apply to any debts at all. Often, an argument of that kind would carry weight as the court would be likely to favour an interpretation of a provision which had some force and effect rather than an interpretation which did not apply to anything on the facts of the case. However, the Association accepted in the course of its submissions that the solicitors for the parties appeared to have been proceeding on a misunderstanding of the way in which the Business had been operated prior to the BSA. This misunderstanding appears to be evidenced by the internal provisions of the BSA itself, in particular, the provisions of clause 9 of the BSA. Clause 9 of the BSA appears to assume that the pre-existing arrangements were that the Association was receiving the revenues of the Business and incurring outgoings and exposing itself to losses before the BSA. Clauses 9.3 and 9.5 also appear to assume that the Association had incurred liabilities in the Business prior to the BSA and would continue to be subject to those liabilities after the BSA. Indeed, the email dated 6 December 2013 which I have referred to above and to which I was specifically referred by the Association assumed that the Association would retain or assume liabilities which had arisen in the course of the Business and which would be revealed by a balance sheet prepared by JT. None of these provisions make any real sense in the light of the actual arrangements which had been made prior to the BSA.
37. The Association sought to turn the provisions of clause 9.2 to its advantage by saying that even if the debts in question were owed to JT and not to the Association before the BSA, the terms of the BSA had turned matters around and, in effect, declared that the revenues of the Business which had been bought by JT, in return for the payment of a fee to the Association, were to become the revenues of the Association and the provisions of the BSA, such as clause 11, were to be interpreted accordingly. On that basis, the Association did not need to submit that “owing to the Seller” meant “owing to the Business” because the effect of clause 9.2 was to transform the debts owing to JT into debts owing to the Association.
38. I accept that the provisions of clause 9 are troublesome given that they do not appear to conform to the reality of the pre-existing arrangements between the parties. The interpretation of clause 9 contended for by the Association is very far reaching. I consider that clause 9 can, and should, be construed against the background facts to give effect to the commercial purpose of the BSA and to produce a sensible

commercial result by construing clause 9 as not disturbing the pre-existing state of affairs but, rather, confirming that the position up the Effective Date remains as before and is not altered by the BSA. On that basis, when clause 9.2 refers to profits and receipts of the Business belonging to the Association, it is providing that the Association is entitled to retain the profits and receipts of the Business to which it was otherwise entitled. The profits and receipts of the Business to which the Association was entitled prior to the Effective Date included the fees charged by the Association to JT.

39. Accordingly, I agree with the judge's conclusion in relation to the Book Debts and I will dismiss the appeal of the Association against that conclusion.

The dispute as to Cash

40. The provisions of the BSA which are of principal relevance when considering the dispute as to Cash are the definition of Cash, clause 2.2.4 excluding certain cash from the sale and clause 5.3.4.

41. The case for the Association can be summarised as follows:

- i) The Association relied upon many of the general considerations which it had put forward in its submissions as to Book Debts and I will not repeat those considerations here;
- ii) The definition of Cash was not restricted to cash in a bank account owned by the Association; the definition extended to cash in a bank account owned by JT;
- iii) A bank account where the monies in question were owned by JT was a bank account "administered" by JT;
- iv) Clause 2.2.4 was a specific provision which did not affect the operation of clause 5.3.4;
- v) Clause 5.3.4 was clear and unambiguous; the cash shown in the JT balance sheet was cash within the definition of Cash in the BSA and clause 5.3.4 obliged JT to transfer those monies to the Association;
- vi) The Association accepted that because the cash shown in the JT balance sheet was the property of JT prior to the BSA, JT was entitled to withdraw that cash, for example, in order to pay its creditors, to pay bonuses or to pay a dividend to JTL; however, the BSA was only entered into on 30 April 2014 and the definition of Cash referred to the cash in the bank account at 31 March 2014 so that when the BSA was entered into the amount of cash which was the subject of clause 5.3.4 was fixed;
- vii) The Association relied again on clause 9.2 of the BSA; the effect of clause 9.2 was that the cash which was owned by JT before the BSA became the property of the Association and therefore JT was obliged to transfer it to the Association;

- viii) The Association challenged the judge's conclusion that there should be an inquiry as to expenses and outgoings for which JT was liable so that JT would only be liable to pay over to the Association the cash in the bank accounts net of such expenses and outgoings.

42. The case for JT can be summarised as follows:

- i) JT relied upon many of the general considerations which it had put forward in its submissions as to Book Debts and I will not repeat those considerations here;
- ii) The word "administered" in the definition of Cash was an odd word if it was intended to be used in relation to a bank account where the monies in the account were exclusively beneficially owned by JT; in such a case, JT was not "administering" the account as it was the owner of the account; the word "administered" in the definition of Cash, read against the background facts, should be read as extending to a case where the account was in the name of the Association where JT had a mandate to administer the account or where the account was in the name of JT but JT was not the exclusive beneficial owner of the monies in the account;
- iii) Clause 2.2.4 referred to "the Seller's cash"; although clause 2.2.4 specifically referred to "cash-in-hand", the clause should be read as referring to cash whether in hand or at the bank or at any other financial institution;
- iv) The definition of Cash and clauses 2.2.4 and 5.3.4 should be read together as dealing with the same subject matter, namely, the Seller's cash; accordingly, they were not dealing with cash owned by the Buyer;
- v) The interpretation contended for by the Association made no business sense;
- vi) There was no commercial reason why JT would pay over to the Association JT's cash which it had accumulated from the revenues of the Business where JT had paid the Association for the entitlement to such revenues;
- vii) There was, in particular, no commercial reason why JT should pay the gross amount of its cash to the Association when the JT balance sheet showed that JT had substantial creditors, which (on the Association's submission), JT would be responsible for paying;
- viii) It did not make any sense for the parties to agree that JT should pay over its cash when the Association accepted that JT was entitled to pay away that cash during the course of the negotiations in order to pay its creditors, and to make a range of other payments as it saw fit; the Association's point that the BSA was entered into on 30 April 2014 and referred to the cash at 31 March 2014 did not detract from this submission because the BSA was in the course of negotiation before 31 March 2014 when JT would have been free to use its cash as it saw fit;

- ix) The only meaning of clause 5.3.4 which gave effect to the commercial purpose of the BSA was that it was confined to cash belonging to the Association and did not extend to cash owned by JT;
 - x) The fact that JT was not administering any bank account for the Association and so clause 5.3.4 did not apply to any cash, was not significant in view of the internal evidence within the BSA that the solicitors drafting the BSA had not understood the existing arrangements between the Association and BSA but had included clauses which may have been appropriate where the Business had been run by the Association;
 - xi) The earlier submissions in relation to clause 9.2 were repeated;
 - xii) JT did not support the judge's conclusion that JT was entitled to use its cash to pay expenses and outgoings but was then required to pay the net sum to the Association.
43. Once again, I prefer the case put forward for JT. Many of the considerations which I set out when dealing with the dispute as to Book Debts apply again in relation to the dispute as to Cash and I will not repeat them at any length here.
44. As a matter of language, the use of the word "administered" and the reference to "the Seller's" cash in clause 2.2.4 indicate that clause 5.3.4 is dealing with cash which is the property of the Association. Further, the interpretation contended for by the Association, requiring JT to pay over its cash to the Association, is completely lacking in any commercial sense. In the light of the commercial results of the rival contentions, I would reach the same result even without relying on the word "administered" in the definition of Cash or the reference to "the Seller's" in clause 2.2.4. My conclusion as to the lack of any commercial sense in the Association's case is supported (if any support were needed) by the fact that during most of the negotiations for the BSA, whether there was any content in any obligation to pay over JT's cash depended on the voluntary action of JT in leaving its cash in its bank account and not using it in any one of a number of ways which were open to it.
45. I also consider that a result which treats the debts owed to JT and JT's cash in the same way makes better commercial sense. It is likely to be a matter of happenstance whether a debt is paid, and so becomes cash, or remains due as a debt on the specified date of 31 March 2014.
46. I take the same view as to the suggestion that clause 5.3.4 is otiose and as to the operation of clause 9.2 as I took in relation to Book Debts.
47. It is not possible to read the BSA in the way in which the judge read it so as to entitle JT to use its cash to pay expenses and outgoings but yet be obliged to pay over the net amount to the Association. Neither party contended for that result on these appeals.
48. I will therefore allow the appeal of JT and dismiss the appeal of the Association in relation to the dispute as to Cash.

A further comment

49. If the Association had been entitled to receive from JT the amounts due to JT by way of debt and JT's cash, these sums would have formed part of the price payable by JT to the Association. The price would therefore not have been £1.0 million but approximately £1.57 million. The BSA contained provisions dealing with the tax treatment of the consideration payable to the Association. If there had been evidence at the trial as to the computation of the tax payable, a matter which affected both the Association and JT and which was the subject of express terms in the BSA, it might well have emerged that the parties were proceeding on the basis that the consideration payable was only £1.0 million and not £1.57 million and that might have been a further aid to the interpretation of the disputed provisions. However, that matter was not explored at the trial and, therefore, I have not relied on these matters which are only possibilities and which cannot be the subject of any findings on this appeal.

The result of the appeal and the cross-appeal

50. The result is that I will dismiss the appeal of the Association and allow the appeal of JT. As I understand it, this will produce the result that the claim by the Association will now be dismissed in its entirety.