Neutral Citation Number: [2022] EWHC 893 (Ch)

Claim No: BL-2019-001896

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
IN BUSINESS LIST (Ch D)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 12 April 2022

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between:

(1) JOHN ASHER
(2) ALEXANDER CRAVEN
(3) GORDON MARTIN
(4) MATTHEW MARTIN
(5) BRIAN WADSWORTH **Claimants**

- and -

JAYWING PLC
Defendant

- -
- -

MARK HARPER QC (instructed by **DWF Law LLP**) appeared for the **Claimants**
JOSEPH WIGLEY AND JOSH O'NEILL (instructed by **Fieldfisher LLP**) appeared for the **Defendant**

Hearing dates: 28 February, 1, 2, 3, 4, 7, 8 and 11 March 2022

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Approved Judgment

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

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 12 April 2022 at 10.30am.

DEPUTY JUDGE ROBIN VOS:

Introduction

1. These proceedings concern a dispute about the entitlement of the Claimants to earn-out payments in respect of the sale of shares in Bloom Media (UK) Limited ("Bloom") to the Defendant, Jaywing Plc ("Jaywing").

2. Bloom is a digital marketing business. The five Claimants between them held approximately 82.5% of the shares. The remaining shares were held by five other individuals who are not parties to these proceedings.

3. The shareholders in Bloom sold their shares to Jaywing under the terms of a Sale and Purchase Agreement ("SPA") in August 2016 in return for an immediate cash payment plus deferred consideration consisting of three possible earn-out payments depending on the performance of Bloom between the date of the sale and 31 March 2018. The maximum earn-out payment for the financial period ending 31 March 2017 was paid in July 2017.

4. Jaywing's position is that the conditions relating to the payment of the second and third earn-out payments have not been met. However, the Claimants say that, as a result of an oral agreement reached at a meeting on 15 January 2018 at which new conditions for the payment of the earn-out were agreed, they are entitled to a second earn-out payment of £1,212,500 and a third earn-out payment of £40,760.

5. The Claimants also say that, even if no binding agreement was reached on 15 January 2018, Jaywing is estopped from relying on its strict legal rights under the SPA. Alternatively, they claim that Jaywing is in breach of the terms of the SPA and that, as a result of this, they are entitled to damages of the same amount or, possibly a greater amount, depending on the court's assessment of the amount of the earn-out based on the terms of the SPA.

6. One factor which provides a significant hurdle for the Claimants is that, like many commercial agreements, the SPA contains a provision requiring any amendment to its terms to be in writing and signed by the parties (which I shall refer to as the No Oral Modification or NOM clause).

Issues

7. The key point for the court to determine is whether a valid and binding agreement was reached at the meeting on 15 January 2018. As well as denying the existence of the agreement, Jaywing also relies on uncertainty, lack of consideration and lack of authority as well as the NOM clause. In relation to this last point, there is a separate issue as to whether Jaywing is estopped from relying on the NOM clause.

8. If there is no valid agreement, there is a further issue as to whether Jaywing is estopped from denying that the earn-out payments are due. In practice, what the Claimants are arguing is that, as a result of representations it has made, Jaywing cannot require the entitlement to the earn-out payments to be assessed by reference to the strict terms of the SPA. In his closing submissions, Mr Harper QC, appearing on behalf of the Claimants, did not pursue this point with much vigour, recognising that it would be difficult to establish such an estoppel in circumstances where the Claimants had failed to establish a new agreement or a valid variation to the existing agreement and where the estoppel contended for would, in substance, have the same effect.

9. In the absence of any agreement or estoppel, the next question is whether Jaywing was in breach of the terms of the SPA; in particular, whether it failed to follow the process laid down in the SPA for calculating and agreeing the amount of the earn-out payments. If so, the court will then need to go on to determine the appropriate measure of damages which is likely to involve the court assessing the amount of the earn-out payments based on the terms of the SPA although, as will be seen, the Claimants have invited the court to take a rather more broad brush approach to the assessment of damages.

Oral agreements and the approach to evidence

10. The comments made by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 at [15-23] and in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [65-70] about oral agreements and the unreliability or fallibility of human memory are well known and do not need to be repeated.

11. There is no doubt that, in these sorts of cases, the right approach is, to the extent possible, to base factual findings primarily on the documentary evidence taking into account any light shed on those documents during the course of cross-examination, including in relation to the motivation of the parties. In this respect, as noted in *Simetera Global Assets Limited v Ikon Finance Limited* [2019] 4 WLR 112 at [48], it may well be that internal documents rather than documents passing between the parties are more illuminating as such documents may be more likely to reveal what was really in the minds of the parties or the witnesses.

12. Having said that, it is clearly not the case that the witness evidence should simply be ignored in favour of the documentary evidence and the inferences which can be drawn from those documents. The evidence given by the witnesses both in their witness statements and under cross-examination is important but does need to be tested carefully against what the documents show and the inferences which can be drawn from those documents.

The terms of the SPA and the earn-outs

13. It is necessary to set out in some detail the provisions of the SPA relating to the earn-out payments.

14. The purchase price for the shares is set out in clause 3.1 of the SPA. As I have already mentioned, this comprised an initial cash payment together with three potential earn-out payments. These earn-out payments are referred to as the "First Earn-out Amount", the "Second Earn-out Amount" and the "Excess Earn-out Amount".

15. The detailed provisions relating to the earn-out payments are contained in schedule 9 to the SPA. There were two earn-out periods. The First Earn-out Amount relates to Bloom's performance between 31 August 2016 (the date of completion of the sale) and 31 March 2017 (the end of Bloom's financial year). The Second Earn-out Amount is calculated by reference to Bloom's performance during the following financial year starting on 1 April 2017 and ending on 31 March 2018. The Excess Earn-out Amount is calculated by reference to Bloom's aggregate performance over both of these periods.

16. Bloom's performance is measured by reference to what is defined as "Contribution". I shall come to the precise definition in due course but the Contribution is, broadly speaking, revenue less costs.

17. As far as the First Earn-out Amount and the Second Earn-out Amount are concerned, a payment becomes due if a certain minimum level of Contribution is achieved. This is referred to in the SPA as the "Base Plan Amount" although it is generally referred to in the documents as "Burton Base". The earn-out payment increases the higher the level of Contribution subject to a cap if the Contribution reaches an upper threshold referred to in the SPA as the "Burton Plan Amount".

18. The Excess Earn-out Amount becomes payable if the aggregate of the Contribution in the two earn-out periods exceeds the aggregate of the Burton Plan Amount over those two periods. One effect of this is that if the Contribution in the First Earn-out Period is significantly in excess of the Burton Plan Amount for that period (as it was), there could be an Excess Earn-out Amount payable even if the Contribution in the Second Earn-out Period falls short of the Base Plan Amount for the Second Earn-out Period and no Second Earn-out Payment is due.

19. For the Second Earn-out Period, with which we are primarily concerned, the Base Plan Amount (Burton Base) was £899,657 and the Burton Plan Amount was £1,019,611.

20. There is a complicated formula for calculating the Second Earn-out Amount. However, the minimum payment, if the Base Plan Amount (but no more) is achieved, is £1,212,500. The maximum amount (if the Burton Plan Amount is achieved) is £2,025,000.

21. The Excess Earn-out Amount is rather simpler to calculate, being twice the amount by which the Contribution for the two earn-out periods exceeds the Burton Plan Amount for the two periods, subject to a maximum of £1,500,000.

22. The key definitions in calculating the amount of Contribution in each earn-out period are as follows:

"**Contribution**:

Sales less Cost of Sales less Direct Costs. In relation to an Earn-out Period, the Contribution to the profit or loss of the Company for that period calculated in accordance with Schedule 11 as shown in the Reference Accounts for that Earn-out Period, but only to the extent that such Contribution arises from ordinary trading performance and is not affected by exceptional items and/or accounting releases, and adjusted so that the costs of Alex Craven, Neil Lockwood, Dave Wood and Peter Laflin shall be deducted on a fair and equitable basis depending on time spent between the Company and Newco (with a minimum of 40% and a maximum of 60%) and 50% of the costs of Emma Dickinson shall be deducted."

"**Direct Costs**:

Variable costs assigned to and directly associated with delivering sales including but not limited to staff and staff related costs (with the exception of recruitment) including salary, NIC, pension, bonus, staff benefits, training, subcontractors, freelancers, expenses, mobiles/telephones/broadband, print/posts/stationery and any similar costs. For the avoidance of doubt, the costs relating to any member of staff either employed by or working for the Company will be included in Direct Costs or Cost of Sales (other than Alex Craven, Neil Lockwood, Dave Wood, Peter Laflin or Emma Dickinson, whose costs will be as specified in the definition of Contribution)."

"**Reference Accounts**:

(1) …

(2) in respect of the Second Earn-out Period, the accounts of the Company including an audited balance sheet and profit and loss account, for the financial year ending on 31 March 2018."

"**Sales**:

Any income invoiced to a client either directly or through another Group member."

23. As can be seen, the definition "Contribution" cross refers to schedule 11 of the SPA. This simply contains a list of nominal ledger codes used by Bloom at the time, identifying whether each category of revenue or costs comprises revenue, cost of sales, overheads or direct costs.

24. Each earn-out payment became due on the earlier of the publication of Jaywing's financial statements for the relevant year or 31 July in that year.

25. Paragraph 4 of schedule 9 sets out the process for agreeing the amount of the earn-out payments. To the extent relevant, it provides as follows:

> "4. **Earn-out Statement and agreeing the Earn-out Payments**
>
> 4.1 In relation to each Earn-out Period, the Buyer shall use its reasonable endeavours to procure that the Reference Accounts for that Earn-out Period are prepared as soon as practicable and in any event on or before the Earn-out Due Date and shall deliver to the Sellers draft Reference Accounts before they are audited as soon as reasonably practicable following the completion of audit field work.
>
> 4.2 As soon as practicable and in any event on or before the Earn-out Due Date the Buyer shall deliver to the Sellers:
>
> 4.2.1 a copy of the relevant Reference Accounts; and
>
> 4.2.2 a statement prepared by the Buyer's auditors (**Earn-out Statement**) setting out in reasonable detail:
>
> 4.2.2.1 its calculation of the Contribution for that Earn-out Period;
>
> 4.2.2.2 any adjustments made in calculating the Contribution; and
>
> 4.2.2.3 its calculation of the resulting relevant Earn-out Payment (if any) payable in respect of [the] relevant Earn-out Period.
>
> 4.3 The Sellers shall, within 10 Business Days from receipt of the Reference Accounts and the Earn-out Statement for an Earn-out Period (**Review Period**), deliver to the Buyer a written notice stating whether it agrees with the Earn-out Statement and the Buyer's calculation of the Earn-out Payment. In the case of any disagreement, the notice (**Objection Notice**) shall specify the areas disputed by the Sellers and describe, in reasonable detail, the basis for the dispute.
>
> 4.4 If the Sellers fail to deliver an Objection Notice during the Review Period it shall, with effect from the expiry of the Review Period, be deemed to agree the Earn-out Statement and the amount of Earn-out Payment specified in it.
>
> 4.5 …
>
> 4.6 … If the parties are unable to reach agreement within 10 Business Days of the service of the Objection Notice, then

> at any time following the expiry of such period either party may, by written notice to the other (**Resolution Notice**), require the disputed matters to be referred to an Independent Accountant for determination in accordance with paragraph 5 of this Schedule.

26. Paragraph 4 is supplemented by paragraph 5 which provides for the parties to agree on the identity of an independent accountant to resolve any dispute. If agreement is not possible, either party is entitled to ask the President of the ICAEW to appoint an independent accountant on behalf of the parties.

27. Paragraph 6 of Schedule 9 contains protections for the sellers as to how Bloom's business is carried on during the Earn-out Period. In particular, paragraph 6.1.1 requires Jaywing to:

> "procure that the Company carries on its business in the normal course and on a basis consistent with how the business was carried on at Completion … unless the Buyer and Alex Craven agree otherwise in writing;"

28. There are two other provisions of the SPA which I should refer to. The first is clause 16 dealing with variations and waivers which, to the extent relevant, provides as follows:

> "16. **Variation and waiver**
>
> 16.1 No variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
>
> 16.2 A waiver of any right or remedy under this agreement or by law is only effective if given in writing and signed by the person waiving such right or remedy. Any such waiver shall apply only to the circumstances for which it is given and shall not be deemed a waiver of any subsequent breach or default.
>
> 16.3 A failure or delay by any person to exercise any right or remedy provided under this agreement or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under this agreement or by law shall prevent or restrict the further exercise of that or any other right or remedy."

29. As can be seen, clause 16.1 is the NOM clause which I have already referred to.

30. The second relevant provision is clause 18 dealing with notices. In summary, this provides that a notice given to a party under or in connection with the SPA must be delivered by hand or sent by post to a specified address. In the case of the sellers, Mr Wadsworth was nominated as the sellers' representative for this purpose and any notice given to him is deemed to be properly given to all of the sellers. Clause 18.9 provides specifically that a notice given under or in connection with the SPA is not valid if sent by email.

Background facts

31. Before turning to the issues in dispute, it is helpful to set out the background facts in relation to which there is no real disagreement.

32. On 1 September 2016, the day after the completion of the sale of Bloom to Jaywing, Bloom transferred part of its business to a new company, Jaywing Innovation Limited ("Jaywing Innovation"). In line with the SPA, this agreement (referred to as the Hive-across agreement) envisaged that Alex Craven, Dave Wood, Neil Lockwood, Peter Laflin and Emma Dickinson would split their time between Bloom and Jaywing Innovation.

33. Prior to the sale of Bloom, the directors comprised certain of the sellers, including Mr Craven and Mr Wadsworth, together with one other individual, Mr Gurdev Singh. Following the sale, the directors of Bloom were changed. Mr Craven remained a director. However, the other five directors resigned in favour of Rob Shaw, Michael Sprot and Adrian Lingard.

34. During the relevant period, Mr Shaw was Jaywing's CEO, Mr Sprot was Jaywing's Chief Financial Officer and Mr Lingard was Jaywing's Chief Operating Officer. They were all on the board of Jaywing. The other members of Jaywing's board at this time included Martin Boddy (Executive Chairman), Andy Gardner (Chief Strategy Officer) and a number of independent directors. Messrs Boddy, Lingard, Shaw and Sprot all ceased employment with Jaywing in 2020. Mr Gardner left Jaywing at some point before then.

35. Jaywing required all of its operating subsidiaries to complete management accounts on a regular basis in a standard format devised by Mr Sprot. Amongst other metrics, these management accounts tracked gross profit, contribution and EBITDA.

36. On 13 July 2017, following an enquiry from Mr Wadsworth in relation to the First Earn-out Payment, Bloom's financial controller, Mrs Dickinson (at Mr Sprot's request) emailed Mr Wadsworth a copy of the March 2017 management accounts which showed a Contribution of £1,000,819. However, she noted that Mr Wadsworth's costs of £18,750 should be added back, giving a total Contribution figure of £1,019,567.

37. At the same time, Mr Sprot emailed Mr Wadsworth directly confirming that, assuming the sellers agreed the figures, the maximum First Earn-out Payment of £2,250,000 would be paid. He also confirmed that the Contribution for this period exceeded the Burton Plan Amount (the upper threshold for the earn-out) by £140,334 and that this amount would therefore be taken into account in calculating any Excess Earn-out Amount at the end of the following financial year. Mr Wadsworth confirmed his approval on behalf of the sellers later the same day. The First Earn-out Payment was made on 17 July 2017.

38. It will be readily apparent that the process which was followed in July 2017 did not follow the terms of paragraph 4 of schedule 9 to the SPA.

39. It is common ground that revenues of £106,636 derived from Bloom's client, CWG was not included in the March 2017 management accounts but were instead recognised in the management accounts for the period starting on 1 April 2018. However, Jaywing's auditors, Grant Thornton, disagreed with this treatment and, following discussions with Jaywing and Mrs Dickinson, it was agreed that this revenue should be recognised in the 2017 audited accounts as the work had actually been performed in that period. However, no adjustment was made to the management accounts.

40. During the first half of the 2017/18 financial year, Bloom was operating below budget. The financial report up to the end of October 2017 showed that, in order to achieve the minimum Contribution needed for an earn-out payment, it would

need to deliver a monthly Contribution of £95,000 for the remaining five months of the year compared to an average for the first seven months of approximately £60,000 a month.

41. More generally, Jaywing was having a difficult year. In advance of a meeting of the managing directors of all of the Jaywing operating companies in December 2017, Mr Shaw emphasised the "need to land a big Q4 to ensure we beat our revised market expectation" and "to understand…the actions everyone is taking to finish the year strong and gear up for 2018/19".

42. Despite a good month in November, the required Contribution for the final four months of the year had increased to £100,000 per month or, if the projected Contribution for December was no more than forecast, the required Contribution for each of the final three months of the year would be almost £115,000. At that stage, the shortfall between the forecast Contribution and the Base Plan Amount was approximately £180,000.

43. During December 2017 and January 2018, Mr Wadsworth was discussing with the accountant acting for the sellers the potential capital gains tax liability resulting from the sale which was affected not only by the amounts which had already been received but also by the anticipated amount of the Second Earn-out Payment.

44. There was also discussion between the sellers as to how the capital gains tax liability should be shared between them. The reason for this was that it had been thought that Mr Wood would qualify for entrepreneur's relief (giving a lower rate of capital gains tax) but, due to an oversight, his shareholding was just below the threshold so that his share of the gain would be subject to the normal rate of capital gains tax. It was therefore proposed that those shareholders who qualified for entrepreneur's relief would reimburse Mr Wood for the additional tax he would have to pay.

45. In January 2018, discussions took place between Mr Craven, Mr Shaw, Mr Sprot and Mr Lingard in relation to Bloom's progress towards the second earn-out. As part of this, Mr Craven produced a presentation entitled "Road to Burton Base" which he sent to Mr Shaw on 9 January 2018. The presentation identified various revenue streams which, if achieved, would result in a Contribution for the year of

£989,939 which was between the upper and lower thresholds for the Second Earn-out Payment. The presentation showed that this would result in a Second Earn-out Payment of £1,824,019 and an excess earn-out payment of £221,324 – i.e. just over £2m in total.

46. It is the Claimants' case that the discussions following that presentation resulted in an agreement, finalised at a meeting on 15 January 2018 between Mr Craven, Mr Shaw, Mr Sprot and Mr Lingard, the main effect of which was that Bloom was free to pursue all of the revenue streams shown in the presentation as long as Bloom's Contribution for the Second Earn-out Period was limited to the Base Plan Amount (£899,657), with any excess being deferred to the following financial year. All of this would be based exclusively on the management accounts. This is strenuously denied by Jaywing although it is accepted that a meeting did take place on 15 January 2018. The question as to whether or not an agreement was in fact reached is discussed further below.

47. The Bloom management accounts for the year to 31 March 2018 showed that Bloom had achieved a Contribution of £899,980 – i.e. slightly above the Base Plan Amount of £899,657.

48. In early May 2018, Bloom was having discussions with its bankers (Barclays) in relation to its cashflow requirements. Barclays required Jaywing's forecasts to be reviewed by an independent accountant, EY. As part of this, Mr Boddy proposed that EY should review the Bloom earn-out. This work did not however start until the end of June 2018.

49. EY produced their initial report on 4 July 2018. This took the form of suggesting a number of adjustments to the Contribution figure together with an opinion as to whether such adjustments would be likely to be accepted by an independent accountant if there were a dispute as to the calculation of the earn-out.

50. Based on the EY report, Mr Sprot prepared a draft earn-out statement which was amended by EY. Mr Sprot took on board some of EY's changes but made further amendments to the figures before the draft earn-out statement was presented to the board of Jaywing.

51. On 9 July 2018, the board of Jaywing approved the second earn-out statement and, at the same time, approved the audited accounts for the group, including Bloom. The second earn-out statement showed the Contribution for the period as being reduced from £899,980 to £537,851, as a result of a number of adjustments said to reflect the terms of the SPA. The result of this was that no Second Earn-out Payment or Excess Earn-out Payment would be due.

52. Mr Boddy emailed the second earn-out statement, the management accounts and the unsigned audited accounts to Mr Wadsworth on 10 July 2018, explaining that no further earn-out payment was due.

53. Mr Wadsworth responded formally to this on behalf of the sellers by a letter on 23 July 2018. He indicated that, in their view, the process for agreeing the earn-out set out in paragraph 4 of schedule 9 to the SPA had not been followed (with the effect that the period for sending an objection notice had not started to run) but nonetheless summarised the sellers' objections to the earn-out statement.

54. On 23 January 2019, DWF, on behalf of the sellers, sent a letter of claim to Fieldfisher, who were acting for Jaywing. These proceedings were issued on 10 October 2019.

The Witnesses

55. Three of the Claimants, Mr Craven, Mr Wadsworth and Matthew Martin gave evidence. In addition two employees of Bloom, Emma Dickinson and Robert McCann (an Account Director) also gave evidence on behalf of the Claimants.

56. As far as Jaywing is concerned, the evidence came from four of the five members of the executive team at the time, being Mr Shaw, Mr Sprot, Mr Lingard and Mr Boddy.

57. The Court also heard expert evidence in relation to the calculation of the earn-out amounts from Mr Paley on behalf of the Claimants and from Mr Richardson on behalf of Jaywing.

58. Mr Craven was the key witness on behalf of the Claimants. He was the Managing Director of Bloom and the only one of the sellers directly involved in the

discussions which the Claimants say led to the agreement on 15 January 2018. Initially, Mr Craven's evidence was relatively straightforward although, in answering the questions put to him, he had a tendency to provide a significant amount of additional explanation or narrative which was not always relevant to the question which had been asked.

59. As the cross-examination moved on to more contentious matters Mr Craven's evidence at times became more problematic. On more than one occasion, his explanation of correspondence or documents which could be taken as supporting the lack of any agreement being reached in January 2018 did not sit well with the documentary evidence. I will refer to this in more detail below but, in line with what I have already said about my approach to the evidence, it is enough to say that, where this was the case, I have preferred to rely on the inferences which can be made from the documents.

60. Whilst my impression of Mr Martin was that he was doing his best to answer the questions put to him, it was clear that his memory was quite hazy in relation to some aspects. By his own admission, he is "not great at dates". I have however considered his evidence carefully in the light of the other available evidence.

61. Mr McCann and Mrs Dickinson were straightforward witnesses. They gave clear answers in cross-examination.

62. Mr Wadsworth, on the other hand, was a less reliable witness. He was not closely involved in relation to the key factual matters in dispute. He had little recollection of what he had been told by Mr Craven about any possible agreement. His main area of involvement concerned the payment by the sellers of their capital gains tax liability in relation to the sale. As with Mr Craven, his evidence in relation to this did not appear to be supported by the documentary evidence.

63. Turning to Jaywing's witnesses, Mr Harper criticised the way in which they had prepared their witness statements. This took the form of a question and answer session with Jaywing's lawyers without any significant use of the contemporaneous documents which they would have seen at the time in order to refresh their memories. Whilst they did review such documents in advance of giving evidence at the trial, it was clear that, in a number of cases when they were

asked to explain statements which they had made in correspondence, they had not considered the document in any detail before giving evidence.

64. Whilst I accept Mr Harper's suggestion that this means that, in some respects, they were not able to give the "best evidence" they could have done, it does not, in my view, on its own affect the weight which should be placed on the evidence which they were able to give. It is however another reason, in the light of what I have already said, for preferring to draw inferences from the documentary evidence rather than placing significant weight on oral evidence which, often, amounted to no more than speculation as opposed to recollection.

65. It is also right to mention that evidence which might otherwise have been available from electronic devices belonging to Jaywing's witnesses (principally electronic notes made using the Good Notes application) was not available as a result of the devices having being wiped or the information deleted at or after the time when they ceased to be employed by Jaywing (in each case, employment ceased during the course of 2020 – i.e. after proceedings had commenced but before documents were disclosed and witness statements prepared although in some cases the information was lost after disclosure of documents/exchange of witness statements). It was not suggested on behalf of the Claimants that any adverse inferences should be drawn from this so far as the evidence of Jaywing's witnesses is concerned. Once more however, this emphasises the need to test the evidence given by Jaywing's witnesses carefully against the documentary evidence which is available.

66. Mr Harper drew attention to the fact that Jaywing failed to disclose any board minutes. He submits that the Court should infer from this that the board minutes do not support the evidence given by Jaywing's witnesses and that, for this reason and in the light of the concerns I have mentioned in paragraphs [63-64] above, their evidence should be approached with a great deal of caution. As will be clear, I have however based my findings primarily on the (voluminous) documentary evidence available. In my view, any inferences which can be drawn from the lack of board minutes do not carry sufficient weight to affect the findings I have made based on the actual documents which are available. There is one issue relating to the authority of Messrs Shaw, Sprot and Lingard to enter into any agreement on

behalf of Jaywing where there is no real documentary evidence and where I have made inferences from the lack of board minutes in coming to my conclusion.

67. Looking at Jaywing's witnesses individually, Mr Lingard, like Mr Craven, had a tendency to supplement his answers with narrative and explanation apparently designed to bolster the Defendant's case. His performance seemed well rehearsed and the impression he gave in answering many of the questions put to him was to try and stick to a particular message rather than answering the specific questions.

68. Mr Sprot appeared fundamentally to be an honest witness but at times seemed to struggle with his evidence in an effort not to give untruthful answers. There were numerous occasions where he claimed not to be able to recall certain matters or events, some of which would have been significant at the time. At times there was a sense that, whilst he was telling the truth, he was not telling the whole truth.

69. Mr Shaw was the most straightforward of Jaywing's witnesses. He generally gave concise answers to the questions put to him although, as with the others, there were some areas where he had difficulty recalling events. In addition, there was one particular area (which I will come to) where his evidence was inconsistent and his explanation of the documentary evidence was simply not credible.

70. Mr Boddy was much less involved in the relevant events than Jaywing's other three witnesses. He had surprisingly little recollection of some of the key events given his position as Executive Chairman. He accepted that much of his evidence was speculation based on his recent review of the documents rather than his actual recollection of events. However, where he did provide answers, he gave no reason to suppose that they were anything other than a genuine attempt to answer the questions put to him.

71. The comments I have made about the evidence of the witnesses on both sides really emphasise the need to focus, to the extent possible, on the inferences to be drawn for the contemporaneous documents and to weigh the evidence of the witnesses carefully against what can be gleaned from those documents.

72. Mr Wigley, appearing for Jaywing, made the point that Mr Craven, Mr Martin and Mr Wadsworth had a significant financial stake in the outcome of the case whilst

Jaywing's witnesses had no such interest and, indeed, no real motivation to do anything other than tell the truth bearing in mind that they were no longer employed by Jaywing.

73. It is of course true that the motivation of witnesses is a relevant factor in assessing their evidence. However, it would be simplistic simply to accept that because one witness had an interest in the outcome of the case whilst another did not, the evidence of the latter should be preferred as there may of course be other factors at play. For example, in this particular case, it should not be forgotten that Jaywing's four witnesses were running Jaywing at the time the decision was made that the earn-out conditions had not been met and continued to do so until after these proceedings had been commenced. It is however a factor I have taken into account in my overall assessment of the evidence.

74. I will deal separately with the evidence of the experts when I come on to consider whether any earn-out payments have become due.

The alleged 2018 agreement

75. The terms of the agreement which the Claimants say was reached at the meeting on 15 January 2018 are as follows:

75.1 All additional revenue sources identified in Mr Craven's Road to Burton Base presentation would count towards the Contribution for the Second Earn-out Period.

75.2 The Contribution for the Second Earn-out Period would be determined solely by reference to Bloom's management accounts, as had been the case in relation to the First Earn-out Period.

75.3 The Contribution for the Second Earn-out Period would not exceed the Base Plan Amount (£899,657). Any revenue in excess of this would instead be recognised in the first quarter of the financial year ending 31 March 2019 (and would not therefore count towards the earn-out).

75.4 Bloom would be free to pay an employee bonus of up to £36,000.

75.5 If the Contribution for the Second Earn-out Period reached the Base Plan Amount, the Second Earn-out Amount would be paid. This would be the minimum amount which was £1,212,500.

76. Jaywing denies that any such agreement was reached. As I have already mentioned, its position is that, even if there were an agreement, there are a number of reasons (uncertainty, lack of authority, lack of consideration and the effect of the No Oral Modification clause) why the agreement would not be valid and binding.

77. The first point however is to determine whether there was any agreement. If there was not, there will be no need to consider in detail the other points raised by Jaywing as to why any such agreement would not be valid.

The events preceding the alleged agreement

78. Mr Harper placed significant emphasis on the position the parties found themselves in in the period leading up to January 2018. I agree that this factual background is relevant in determining the parties' motivations in relation to the discussions which then took place and which the Claimants say resulted in an agreement.

79. Looking first at the position of the sellers and, in particular, Mr Craven who, as Managing Director, was the driving force behind the performance of Bloom, it is clear from the monthly commercial reports produced by Bloom that, up to December 2017, Bloom was performing behind budget and that the monthly Contribution which the business needed to achieve during the remainder of the year in order to hit the Base Plan Amount had been increasing. Based on the December 2017 commercial report, the monthly Contribution would need to be approximately £115,000 compared to an average for the first nine months of the year of approximately £60,000 each month.

80. In order to address this, Mr Craven needed to find significant additional revenues for the final quarter of the financial year. His evidence is that he wanted absolute clarity as to what revenues would count towards the earn-out so that Bloom did not pursue revenues which might be excluded. It is clear that this was a large part

of his motivation in preparing the Road to Burton Base presentation. He was clearly aware of the "ordinary trading performance" requirement in the SPA and, indeed, enclosed a copy of the SPA when he sent the Road to Burton Base presentation to Mr Shaw on 9 January 2018.

81. During this period, Bloom was not the only division of the Jaywing Group to underperform. At a meeting of the managing directors of the various divisions in December 2017, the executive team of Jaywing encouraged all of the divisions to deliver a strong performance in Q4 in order to meet market expectations for the business. Mr Shaw and Mr Sprot confirmed that this included the possibility of pulling forward revenues from the first quarter of the next financial year where appropriate but not to the extent that this would cause a problem with meeting their targets for the following financial year.

82. At the same time, Jaywing was concerned about cashflow. Whilst I accept Mr Sprot's evidence that there were no immediate concerns in January 2018, Mr Sprot confirmed that, even then, Jaywing would need to consider the possibility of raising new finance in order to fund the payment of any earn-out in July 2018. Cashflow would have been tight had the earn-out become due and, all the more so, if the amount payable turned out to be the projected figure of approximately £2,000,000 shown in the Road to Burton Base presentation.

83. There is however no evidence that, at this stage, these concerns were anything more than a part of the normal financial management and planning for the Group. Whilst Mr Harper draws attention to the mention by Mr Lingard of a possibility of renegotiating the earn-out (a suggestion which had been made by Mr Gardner), it is clear that this comment was made in the context of a concern about a disagreement as to what constitutes ordinary trading as opposed to any cashflow issue.

84. Mr Shaw confirmed in his evidence that he was keen to minimise the risk of future disagreements with the sellers as to what constituted ordinary trading. It is clear from the correspondence between Mr Shaw, Mr Sprot and Mr Lingard in early January 2018 that their main concern was whether what Mr Craven was proposing in the Road to Burton Base presentation constituted ordinary trading.

85. Another point relevant to motivation which appears from the correspondence at this time is that the executive team wanted the sellers to achieve the earn-out target. Mr Shaw explained in his oral evidence that the reason for this was that, from the start of the next financial year, Mr Craven would be running a separate division (Jaywing Innovation – the company to which Bloom had transferred part of its business in accordance with the Hive-across agreement immediately after the sale to Jaywing) and so he needed Mr Craven to be motivated to stay with Jaywing for several more years.

The January 2018 discussions

86. With that background in mind, I turn now to look at the discussions which actually took place in January 2018 culminating with the meeting on 15 January 2018 at which the Claimants say the agreement in question was concluded.

87. The initial conversations in early January were between Mr Craven and Mr Lingard who in turn reported back to Mr Shaw and Mr Sprot. The conversations focussed largely on the bringing of work forward from the next financial year, including the use of freelancers and other resources within the Jaywing Group in order to carry out the work as well as the impact on the future EBITDA of Bloom's business. At this time, it is clear that Mr Lingard was not familiar with the details of the SPA as Mr Craven pointed out to him that there was no requirement in the SPA for Bloom to maintain its EBITDA after the end of the earn-out period.

88. Mr Lingard's initial advice to Mr Craven was that he should not use freelancers in order to hit the earn-out target and that he needed to make sure that work was done properly and that people were not under too much pressure in the final quarter.

89. Shortly after this, the executive team (Mr Shaw, Mr Sprot and Mr Lingard) focussed on the "ordinary trading" wording in the SPA and, in correspondence amongst themselves, expressed concern that, when everything Mr Craven appeared to be proposing was taken together, it was starting to look "unusual".

90. On 9 January 2018, Mr Craven delivered his "Road to Burton Base" presentation to Mr Shaw. This identified a number of revenue streams which, if achieved, would result in a Contribution for the Second Earn-out Period approximately £90,000 in excess of the Base Plan Amount. The revenue streams principally involved accelerating work for existing clients but also included work for two clients (Datacity and The Sipping Shed) which are companies in which Mr Craven and some of the other sellers proposed to make an investment. The work with Datacity had already been done but not been paid for. The work for The Sipping Shed was new work.

91. The initial reaction of the executive team to the presentation was again to focus on whether what was being proposed constituted normal trading and, in particular, what should count and what should not count towards the earn-out.

92. Mr Shaw sent a holding response to Mr Craven saying that they were planning to get some legal advice from David Bowcock, the lawyer at Brabners who had originally acted for Jaywing in relation to the SPA, in relation to what counted and what did not. The email went on to say that their initial reaction was that there were "some revenues/initiatives that we absolutely agree with, some we absolutely don't and some that sit in the middle!", going on to suggest that a meeting should be organised to go through the various initiatives. An initial call between Mr Craven and Mr Shaw was arranged for the morning of Friday 12 January with a follow-up meeting between Mr Craven, Mr Shaw, Mr Sprot and Mr Lingard arranged for the afternoon of Monday 15 January.

93. Following discussions amongst the executive team about the approach to be taken to the discussions with Mr Craven, Mr Lingard prepared some notes for Mr Shaw's call with Mr Craven on 12 January. It is clear from those notes that the focus was on complying with the terms of the SPA and, in particular whether the initiatives either individually or collectively would constitute ordinary trading given the proposal to increase the Contribution for the last three months of the year from an average of £60,000 per month to £120,000 per month, as well as the potential impact on trading in the first quarter of the following financial year.

94. On 11 January 2018, Mr Sprot spoke to Mr Bowcock. He was unable to remember the details of the advice given but it is clear from the documentary evidence that the advice being sought was in relation to the definition of ordinary trading and the extent to which the proposals contained in the Road to Burton Base presentation might fall foul of that provision. Mr Shaw's evidence is that the gist of the advice was not to focus on individual revenue streams but to look at the shape of the revenues over each quarter and, in particular, to focus on any adverse impact the proposals might have on the performance of the business in the first quarter of the following financial year.

95. Following that advice, Mr Shaw wrote to Mr Craven to say that he would share the advice with Mr Craven in the call the following day and that he (Mr Shaw) could now see a "clear way forward".

96. When asked specifically about the nature of the clear way forward in cross-examination Mr Shaw suggested that this related to the shape of revenues across Q3 and Q4 of the 2018 financial period and the first quarter of the subsequent financial period and in particular ensuring that the relative performance over these quarters should not look unusual and that the revenues that were included should not look unusual.

97. Mr Lingard on the other hand accepted that the clear way forward was for Bloom to limit its Contribution to the Base Plan Amount and that anything over and above that should go into the next financial year. However, he explained that this was in the nature of guidance to try and ensure that trading in the first quarter of the following financial year would be acceptable and would not fall foul of the ordinary trading requirement.

98. Although not in the context of what constituted the clear way forward referred to in Mr Shaw's email to Mr Craven on 11 January, Mr Shaw did also concede in cross-examination that his guidance to Mr Craven in order to ensure that Bloom's performance had the right shape for ordinary trading was that the Contribution for the Second Earn-out Period should be limited to the Base Plan Amount and that any revenue over and above this should go into the first quarter of the following year.

99. This is reflected in the notes which Mr Shaw prepared for the call with Mr Craven on 12 January. The notes emphasise that “ordinary trading performance” was key and that whilst Jaywing wanted Bloom to hit the earn-out and for Mr Craven to be incentivised, this all depended on Q1 of the next financial year not going off a cliff.

100. The note also referred to the need for “an agreement to get to base”. In cross-examination, Mr Shaw speculated that the reference to a need for an agreement to get to base may simply have been something which Mr Craven said on the call and which he noted down. However, it is clear from the way in which the notes are organised that this is something which Mr Shaw wrote as part of his notes in advance of the call.

101. Both Mr Shaw and Mr Craven are agreed that the call that took place on the morning of 12 January 2018 was a short call in which Mr Shaw says he raised some general concerns about the shape of the revenues and Mr Craven recalls that, whilst Mr Shaw made it clear that the process needed to be managed, it should be possible for Bloom to achieve its earn-out. Neither Mr Shaw nor Mr Craven say that, during this call, it was suggested that Bloom should limit its contribution to the Base Plan Amount with excess revenues being deferred to Q1 of the next financial year.

102. This evidence seems surprising in the light of the documentary evidence. After the call in the morning of 12 January, Mr Shaw sent an email to Mr Lingard and Mr Sprot saying that Mr Craven “understands where we are coming from and appreciates a plan that hits base and anything beyond creates a bonus pot that all goes into next year”. Despite the evidence of both Mr Craven and Mr Shaw, it does therefore seem clear that there was some discussion on the call of the possibility of achieving the Base Plan Amount but deferring any excess revenue into the following financial year.

103. Mr Lingard’s reaction to this was that it “sounds like a good result”, whilst Mr Sprot considered it to be “excellent news”. It is however clear from this correspondence that there was no discussion on the call of the detailed terms of what the Claimants say was agreed at the meeting on 15 January 2018.

104. Mr Craven says that a meeting took place in the evening of 12 January at which the detailed terms were explained by Mr Shaw to Mr Craven. Mr Shaw denies that there was any such meeting. Taking into account all of the evidence, I am not satisfied that this meeting took place.

105. In his first witness statement, Mr Craven states that the meeting took place "later that day". His evidence is that Mr Shaw went through the detailed terms of what he says then became the 2018 agreement and that, following this, Mr Craven communicated with each of the sellers to obtain their approval to what he says was being proposed. He recalls in particular that he spoke to Mr Martin in Bloom's office on Friday afternoon.

106. It is however apparent that Mr Shaw was travelling on business in Swindon that day and only travelled back in the evening. Train tickets have been produced which show Mr Shaw's plan to get a train which arrived at Leeds (where Bloom and Jaywing had offices) at around 7:15pm and then taking a train on to Harrogate at about 7:30pm. Mr Shaw accepts very fairly that the trains from Leeds to Harrogate run on a regular basis (approximately every half an hour) and so it would have been possible for him to break his journey in order to meet Mr Craven but he is clear that he did not do so.

107. Mr Craven goes into more detail about the meeting which he says took place on 12 January in his second witness statement. However, he says nothing more about the time of day when the meeting took place and, as far as the location is concerned, simply notes that he had originally thought that the meeting had taken place at Jaywing's office in Leeds but that it may have taken place at Bloom's office which was right next to the train station.

108. During cross-examination, Mr Craven claimed to have a much more detailed recollection of the meeting. He recalled staying late in Bloom's office on his own in the dark, the specific meeting room where the meeting took place and the places round the table where he and Mr Craven were sitting. He claimed that these memories were triggered by seeing the train ticket showing that Mr Shaw only arrived back in Leeds in the evening. However, as Mr Wigley pointed out, the train ticket had been disclosed before Mr Craven produced his second witness

statement and so it is surprising, if that was the case, that these memories were not referred to in the second witness statement.

109. In my view, bearing in mind the guidance in *Gestmin* and factoring in the inferences I have drawn from the documentary evidence (or lack of documentary evidence), these memories are not reliable. For example, the picture Mr Craven has of him and Mr Shaw around the meeting table in a particular meeting room at Bloom's offices could easily relate to a completely different meeting.

110. As far as documentary evidence is concerned, Mr Harper places significant reliance on a diagram drawn in Mr Craven's notebook designed to illustrate the requirement that Bloom's performance in the first quarter of the 2018/19 financial year should not fall off a cliff. Mr Craven's evidence is that Mr Shaw drew the diagram in Mr Craven's notebook at the meeting on 12 January 2018.

111. In his second witness statement, Mr Craven goes into some detail in explaining that the diagram must have been drawn on 12 January. However, in cross-examination, Mr Craven accepted that, taking account of the surrounding entries in the notebook, it could have been drawn at any time between 10-16 January 2018 and could therefore have been drawn at the meeting on 15 January 2018.

112. Mr Shaw's evidence is that he drew the diagram in question in his own notebook (not Mr Craven's notebook) during the call on 12 January 2018 in order to help him explain to Mr Craven the need for the shape of Bloom's performance over Q3 and Q4 of 2017/18 and Q1 of 2018/19 to be appropriate in order to constitute ordinary trading.

113. The problem with this is that it is clear, again from the surrounding notes, that the diagram in Mr Shaw's notebook was drawn on 15 January 2018 and not on 12 January. Mr Shaw appears to acknowledge this in his second witness statement where he notes that the diagram in his notebook appears after notes taken at an earlier meeting on 15 January and suggests that he drew the diagram either in preparation for, or in the course of, the 15 January meeting. He does however add that he would have shown the diagram to Mr Craven at the meeting on 15 January.

114. During cross-examination, Mr Shaw was hazy about the diagram although flatly denied drawing the diagram in Mr Craven's notebook. He speculated that he might have moved the diagram in his electronic notebook by dragging it forward. However, this is not something referred to in his witness statements and, given the layout of the notes, is not, in my view, a credible explanation.

115. Ultimately, the evidence in relation to the diagram is inconclusive in relation to the question as to whether a meeting took place between Mr Craven and Mr Shaw on 12 January. Whilst it is possible that Mr Shaw drew the diagram in Mr Craven's notebook on 12 January, it is equally possible that Mr Shaw drew the diagram in his own notebook on 15 January and that Mr Craven copied it down at the meeting which took place on that date. Given my conclusion, for the reasons set out below, that no meeting took place on 12 January, I have concluded that the latter is more likely.

116. Mr Craven's position is that the proposal for the Contribution for the Second Earn-out Period to be limited to the Base Plan Amount with excess revenues being deferred to the first quarter of the following year was not discussed during the telephone call on the morning of 12 January and that this was only outlined by Mr Shaw at the meeting that evening. However, his evidence (confirmed by Mr Martin) is that he met with Mr Martin that afternoon to ask for his approval to this proposal. It is clear that, if the proposal was only made at the meeting that evening, the discussion with Mr Martin could not have taken place earlier in the afternoon.

117. Taken together with Mr Shaw's email immediately after his call with Mr Craven in the morning (referring to a plan to hit base with anything in excess of that going into the following year), my conclusion is that this point was discussed during the call and that the discussion with Mr Martin which Mr Craven describes in his evidence took place as a result of that call and not as the result of any meeting between Mr Craven and Mr Shaw.

118. Although it is not suggested that all of the terms of the alleged 2018 agreement were discussed on the call, the conclusion I have reached about Mr Craven's discussion with Mr Martin strongly suggests that no meeting took place between

Mr Craven and Mr Shaw in the evening of 12 January. It would otherwise have been necessary for Mr Craven to have a further discussion with Mr Martin so he could explain to him in more detail the terms of the proposals which he says were made at the meeting.

119. This conclusion is supported by the fact that there is no evidence in any of the contemporaneous documents that such a meeting took place. There is no communication between Mr Shaw and Mr Craven suggesting the need for, or arranging, such a meeting. There is no suggestion in Mr Shaw's email to Mr Lingard and Mr Sprot after his call with Mr Craven that he planned to have a meeting with Mr Craven. Indeed, to the contrary, he notes that he has suggested to Mr Craven that they have a further chat on Monday 15 January which is clearly a reference to the meeting which had already been arranged on that date.

120. There is also no written communication from Mr Craven to the other sellers nor from Mr Shaw to the executive team reporting on the outcome of any such meeting. Given the significant and detailed proposals which Mr Craven says were discussed at that meeting, this seems very surprising indeed. As far as Mr Shaw is concerned, it was clearly his practice to keep Mr Lingard and Mr Sprot up to speed with developments, as is demonstrated by his email to them immediately after his call with Mr Craven that morning.

121. I note that Mr Craven reported back to his colleagues (which included two of the sellers) after the initial call with Mr Shaw on 9 January giving Jaywing's initial reaction to the Road to Burton Base presentation. However, he did not do so after the call on 12 January nor the meeting which he says took place later that day. In cross-examination, his explanation for this was that there was nothing significant to report given the meeting which was due to take place the following Monday. However, given the importance of the proposal which he says was made at the meeting on 12 January (which is essentially what he says was then agreed at the meeting on 15 January), this is difficult to accept, particularly as Mr Craven's evidence is that he told Mr Shaw that he would need to talk it through with the team.

122. In light of this evidence, I have concluded that there was no meeting between Mr Craven and Mr Shaw on the evening of 12 January 2018.

123. I do however accept that Mr Craven consulted the other sellers between 12 January and 15 January. Mr Martin clearly recalls agreeing to an arrangement under which the earn-out would be limited to the base amount, as does Mr Wadsworth. Neither of them recalls anything more detailed than this which would of course be consistent with those conversations taking place in the light of the relatively brief discussion between Mr Craven and Mr Shaw on the morning of 12 January.

The meeting on 15 January

124. The meeting on 15 January 2018 was attended by Mr Craven, Mr Shaw, Mr Sprot and Mr Lingard. It is agreed that the meeting was relatively short, lasting only about half an hour.

125. Mr Craven's account of the meeting is that he was asked by Mr Shaw if the sellers were willing to agree the proposals which he says had been outlined by Mr Shaw at the meeting on 12 January. Mr Craven confirmed that the terms were agreed and, at Mr Shaw's request, recounted what he understood had been agreed, being the terms set out above. Mr Craven says that he was told by Mr Shaw that the agreement was outside the SPA and that this had been checked with Brabners, who had told them that this was fine.

126. Mr Sprot and Mr Lingard appeared to have no clear recollection of the discussion on 15 January. Their evidence is principally that the discussion related to the need for trading to be ordinary trading in line with the SPA and, in particular, for there not to be a significant drop in trading in the first quarter of the following financial year.

127. Mr Shaw, in his witness statement, appeared to have a clearer recollection of the meeting on 15 January than his colleagues. He confirms that the main focus was to discuss ordinary trading and, in particular, the shape of revenues across the various different periods and the need to ensure that Q4 of the 2017/18 financial period was not enhanced at the expense of Q1 of the following financial year.

128. Mr Shaw also makes the point that the title of the meeting in the calendar invite was "Agree the scope of the final quarter and walk through the various initiatives to give Alex a steer on where to focus effort". His evidence is that the meeting was never intended to be one at which an agreement might be reached which would make sweeping changes to the way in which the earn-out provisions would work.

129. As can be seen, there are starkly contrasting accounts of what took place at the 15 January 2018 meeting. Based on all of the evidence my conclusion is that, whilst the discussions went beyond what Mr Shaw, Mr Sprot and Mr Lingard refer to in their witness statements and, in particular, (as they conceded in cross-examination) included a proposal to limit the Contribution for the Second Earn-out Period to the Base Plan Amount and for any excess revenues to be recognised in the following financial year, I am not satisfied that any agreement was reached, let alone one which the parties intended to be legally binding, incorporating all of the terms alleged by the Claimants.

130. One point which it is important to bear in mind is that what a commercial person may consider to be an agreement will not necessarily constitute a legally binding agreement. The terms, for example, may not be sufficiently certain or the parties may not intend the agreement to have legally binding effect.

131. This is in my view such a case. Whilst the parties may have considered that, following their discussions, there was a clear way forward which would meet their respective concerns, what transpired was not, and was never intended to be, a legally binding agreement amending or superseding the terms of the SPA. It was no more than an understanding as to how Bloom might be able to reach the base plan amount in a way which would qualify as normal trading for the purposes of the SPA.

132. I appreciate that this did not, of course, give Mr Craven and the other sellers the certainty they may have been looking for, as it gave no guarantee that Bloom's performance could not be challenged based on the ordinary trading requirement. However, it would have given Mr Craven a degree of confidence that his plans could be achieved without falling foul of that requirement.

133. I will now explain the reasons for the conclusion I have reached.

134. I have found as a fact that the meeting which Mr Craven says took place on the evening of 12 January 2018 did not in fact occur. One result of this is that whilst Mr Shaw may have suggested that one way of dealing with the normal trading requirement would be to limit the Contribution for the Second Earn-out Period to the Base Plan Amount, with any excess revenues being recognised in the first quarter of the following financial period, there was no occasion prior to the meeting on 15 January on which Jaywing set out the detailed terms alleged by the Claimants. They could not therefore have been agreed by all of the sellers.

135. This is consistent with the evidence of Mr Wadsworth and Mr Martin, whose understanding was only that they were accepting a position whereby, if the targets were hit, they would only get the minimum earn-out. Based on this, Mr Craven's recollection of the meeting on 15 January 2018 cannot be correct.

136. In addition, the terms of the agreement alleged by the Claimants are inconsistent with what was clearly uppermost in the minds of the Jaywing executive, being the impact of generating significant revenues in the final quarter of the 2017/18 financial year on the performance of the business in the first quarter of the following financial year. It is true that the effect of recognising any revenue in excess of the Base Plan Amount in the following financial year would assist the first quarter performance. However, it does not remove the risk that the effect of accelerating revenues in order to meet the earn-out target might mean that the performance of the business in the first quarter could, in the words of Mr Shaw, fall off a cliff.

137. The Claimants do not suggest that the requirement for the performance of the business not to fall off a cliff in the first quarter of the subsequent financial year formed any part of the agreement which they say was reached. Given the importance of this to the Jaywing executive, as is clear from their internal communications, as well as their communications with Mr Craven, this simply makes no sense.

138. The suggestion that a legally binding agreement outside of the SPA had been reached and that this had been approved by Mr Bowcock is also inconsistent with

what can be inferred from the documents about the advice given by Mr Bowcock. It is quite clear from the correspondence between the Jaywing executive that the advice to be sought from Mr Bowcock related only to the meaning of ordinary trading. There is absolutely no evidence that Mr Bowcock was to be asked about the legality of a new agreement outside the SPA, let alone that any such advice was given.

139. Indeed, in the light of the No Oral Modification clause and the notorious difficulty (as to which, see further below) in determining whether an agreement constitutes a variation or a separate agreement it would be very surprising indeed if Mr Bowcock had advised that it was fine for the Jaywing executive to make an agreement which had the effect of varying the terms of the SPA (even if it could be described as an independent agreement) without that agreement being reduced to writing.

140. The fact that such a significant agreement is not somehow evidenced in writing is also powerful evidence against the existence of the alleged agreement. Neither Mr Craven nor Mr Shaw made any notes of the meeting on 15 January 2018. The only record in their respective notebooks is the diagram which illustrates how the shape of the revenues of the business over the last two quarters of the 2017/18 financial year and the first quarter of the 2018/19 financial year might result in the Contribution either complying with the ordinary trading restriction or falling foul of that provision. This of course supports the importance of that comparison which, as I have observed, is not said by the Claimants to form any part of the alleged 2018 agreement.

141. None of the other terms alleged by the Claimants have been recorded either in Mr Craven's notebook or in Mr Shaw's notebook. The only written record of what was discussed therefore supports Jaywing's case rather than the Claimants' position in relation to the alleged agreement.

142. There is of course no dispute that the terms of the alleged agreement were not recorded in a formal written agreement. However, in addition, there is no email correspondence between Mr Craven and his team, between Mr Craven and the Jaywing executive or between Mr Shaw, Mr Sprot and Mr Lingard and any other

members of the Jaywing executive (such as Mr Boddy) summarising the terms of the agreement which the Claimants say had been reached or even recording the fact that an agreement had been reached.

143. The only document referred to by Mr Harper to counter this is a text message sent by Mr Craven to Mrs Dickinson on 16 January saying that he needed to update her on a few things in relation to "the Bloom budget per earn-out 'rules'". Mr Craven's evidence is that the "rules" he explained to Mrs Dickinson when he met her were that the budgets should limit the Contribution for 2017/18 to the Base Plan Amount plus any bonus and that anything in excess of this should be deferred to the next financial year.

144. This does not however evidence any agreement between the parties. It is equally consistent with there simply being a plan or guidance in order to try and ensure that the ordinary trading requirement was complied with. Indeed, it is notable that the text message does not in terms refer to any agreement.

145. All other things being equal, the only reasonable conclusion to draw from the lack of any contemporaneous documents on or shortly after 15 January 2018 evidencing an agreement is that no agreement was reached which was intended to vary or override the terms of the SPA and that what took place instead was a discussion which resulted in an understanding as to how the earn-out target might be achieved without contravening the ordinary trading restriction.

146. Mr Harper submits that an agreement along the lines alleged by the Claimants would meet the objectives of both parties. Indeed, Mr Sprot accepted in his oral evidence that this might be true. However, even if this were right (which, for the reasons set out above, I do not accept), it does not of course mean that such an agreement was actually entered into.

147. I also accept that Mr Shaw, in his notes which he made in advance of the call with Mr Craven on 12 January, referred to the need to reach an agreement with Mr Craven. However, in the light of the other evidence, this does not in my view support the existence of a legally binding agreement as opposed to a plan or an understanding as to how Bloom might achieve its earn-out target without falling foul of the ordinary trading restriction.

148. Both the Claimants and Jaywing also rely on the way in which matters unfolded after 15 January 2018 in support of their respective positions as to the existence or otherwise of an agreement and I turn now to consider those events.

The events after 15 January 2018

149. There are a number of factors which Mr Harper draws attention to which, he submits, show that the agreement contended for by the Claimants must have been reached in January 2018. Likewise, Mr Wigley, on behalf of Jaywing, refers to other matters which, he says, show that there was no such agreement.

150. The first matter relied upon by Mr Harper is that, in the period immediately following the end of the financial year on 31 March 2018, the Jaywing executive considered that the earn-out targets had been met and that the earn-out payment was therefore due. This is supported for example by a text message from Mr Gardener to Mr Lockwood on 23 March 2018 congratulating him on Bloom hitting the earn-out. In addition, in early May when Jaywing approached its bank for additional funding, the cashflow projections produced by Mr Sprot made provision for the payment of the earn-out.

151. Mr Shaw accepted in his oral evidence that the common view of the board/executive in April 2018 was that Bloom had hit its earn-out target. He had no good explanation for why, if the key concern in the minds of the Jaywing executive was the potential impact of accelerating revenues on Bloom's performance in the first quarter of the following financial year, this was not immediately checked.

152. It is however apparent from correspondence on both sides that the shape of Bloom's revenues and, in particular, the comparison between Q3 of the 2017/18 year and Q1 of the 2018/19 year remained an issue. For example, on 9 May 2018, Mrs Dickinson emailed her team to say that the figures for May were looking to be a bit of a problem, going on to say "*Q3 v Q1 in danger and budget in danger*". Similarly, on 14 June 2018, Mr Craven sent Mr Shaw a comparison of Q3 2017/18 against the projections for Q1 2018/19 and there was a subsequent discussion of concerns about this comparison.

153. It is therefore clear that there was a continued monitoring of Bloom's Q1 performance compared to the previous year and that both Bloom and Jaywing considered that this could potentially have an impact on the earn-out. The fact that there was no immediate issue flagged by the Jaywing executive in April 2018 therefore carries little weight in supporting the existence of the alleged January 2018 agreement, particularly as there would, at that stage, be no firm basis on which to have any real visibility as to Bloom's performance in the first quarter of the 2018/19 financial period.

154. Mr Harper also places significant reliance on an email exchange between Mrs Dickinson and Mr Shaw on 28 February 2018. The exchange related to the proposal for a bonus to be paid to the Bloom staff. The Claimants' case is that part of the 15 January 2018 agreement was that a bonus of up to £36,000 could be paid to the Bloom staff but that, subject to this, anything above the Base Plan Amount would be recognised in the following financial year.

155. Following a brief email discussion with Mrs Dickinson, Mr Craven authorised her to put forward a proposal that the bonus pot should be £40,000 rather than £36,000 and that anything on top of this in excess of the Base Plan Amount would go 50% into the bonus pot and 50% would count as part of the Contribution for the calculation of the earn-out.

156. Mr Shaw's reaction to this was that the bonus pot should be limited to £36,000 as anything over this "is not what we discussed with Alex". In addition, Mr Shaw observed that their view was that anything over this should go into Q1 of the following financial year noting that "we talked about this with Alex".

157. Far from supporting the existence of the agreement alleged by the Claimants, the strong inference from this exchange of emails is that there was in fact no such agreement.

158. Before sending her email to Mr Sprot, Mrs Dickinson asked Mr Craven whether there was a cap on the amount of the bonus. His response was that the Jaywing executive needed to see a proposal before they could give approval. He then suggested the £40,000 cap with anything over that being split between the bonus pot and the contribution to the earn-out.

159. Mr Craven's explanation was that he was trying to get a better deal. However, as Mr Wigley submits, had there been an agreement on 15 January 2018, there is no reason why Mr Craven would not have told Mrs Dickinson what had been agreed in relation to the bonus and in relation to what should happen to any surplus over the Base Plan Amount. Mr Harper himself noted in his submissions that internal correspondence on one side is often more revealing than correspondence which passes between both sides. This is a good example of that.

160. Mr Shaw's response to Mrs Dickinson is entirely consistent with Jaywing's case that the discussions were no more than advice or guidance as opposed to an agreement. For example, he goes on to ask for Mrs Dickinson's views on how the different initiatives are looking "in terms of being comfortable with what is being banked as revenue to hit Burton Base". Had, as the Claimants contend, there been an agreement that all revenue sources in the Road to Burton Base presentation would count, there would be no reason to ask this question.

161. Looking at other internal correspondence, Mr Harper also places emphasis on an email sent by Mr Sprot to Mr Shaw on 9 March 2018. The email relates to projections for Bloom's performance between January – April 2018. The projections show a very significant reduction in performance in April 2018 compared to the previous three months. Mr Sprot comments that "in Q4 they are aiming to get to base (which was agreed) but I'm nervous they might be pulling more work forward than previously agreed". Mr Harper submits that this is clear evidence of an agreement having been reached.

162. There is however no dispute that Bloom was free to hit the Base Plan target nor that Bloom should be careful about pulling too much work forward. Read in this context, I do not accept that Mr Sprot's email provides any significant support for the existence of the agreement which the Claimants say was reached. Indeed, it clearly supports Jaywing's case that the way in which Bloom reached its target had to constitute ordinary trading and that this would be tested by reference to the performance of the business in the first quarter of the following financial year.

163. At Mr Sprot's request, Mrs Dickinson devised a spreadsheet comparing Bloom's performance across Q3 and Q4 of 2017/18 and Q1 of 2018/19. This showed a

target for the Contribution of £899,657 (i.e. the Base Plan Amount) plus a bonus of £36,000 making a total of £935,657. The spreadsheet also shows any surplus work in progress over and above the target amount being deferred to the first quarter of the following year. Mr Harper submits that this is again evidence of the existence of the alleged January 2018 agreement.

164. Whilst I accept that this is consistent with the agreement which the Claimants say was reached, it is in my view also consistent with Jaywing's position which is that their advice to Mr Craven was that the best way of satisfying the ordinary trading requirement would be to limit the Contribution to the Base Plan Amount with any surplus being recognised in the following financial year.

165. I also note that the purpose of the spreadsheet was of course to compare the performance in Q3 of 2017/18 against the projected performance in the first quarter of 2018/19 which, on the Claimants' case, was not a term of the alleged agreement at all but was a key concern of the Jaywing executive. Again, the very existence of this spreadsheet in my view is more supportive of the Jaywing's version of events.

166. Mr Harper also refers to an email sent by Mr Craven to Mrs Dickinson on 26 June 2018. The context for this email is that, partly as a result of Jaywing's discussions with its bank about funding, the bank had required an independent accountant (EY) to check Jaywing's cashflow projections. On 15 May, Mr Boddy had suggested that EY should also be asked to review the earn-out position. The email from Mr Craven was sent just before the initial meeting with EY to discuss the scope of their work in relation to the earn-out.

167. Mr Craven's initial email to Mrs Dickinson notes that "there is a clear process in the SPA… independent advice comes later". This appears to be a clear acknowledgment on the part of Mr Craven that the calculation of the earn-out payment is governed by the SPA. There is no suggestion, as the Claimants now allege, that it had been agreed that the earn-out payment would be calculated solely based on the management accounts without any possibility of adjustment.

168. Mr Craven goes on to say:

> "Year end is fine, this will all be about the definition of Q3-Q3 [presumably this should be a reference to Q1] 'like-for-like'... we know we have met the expectation we believe we were set but as it was a verbal agreement and they seem to be deliberately trying to exploit the situation to avoid making the payment… we know the agreement was 'mustn't fall of a cliff' but they seem to be pursuing a different version.."

169. Whilst I accept that this email to some extent supports the Claimants' case that an agreement was reached (albeit there seems to be a suggestion that, as it was a verbal agreement, it was not legally binding), the clear inference is that any agreement related to the need for Bloom's performance in Q1 of the 2018/19 financial year to be comparable to its performance in Q3 of the 2017/18 financial year (on a like for like basis).

170. However, as I have already observed, the Claimants do not suggest that this was any part of the agreement which they say was reached on 15 January 2018. Indeed, in his oral evidence, Mr Craven stressed that the need for the Q1 trading to look respectable was no more than a reason for the agreement which he says was reached and was not part of the agreement itself. Therefore, to the extent that this email supports the existence of an agreement, it is clearly not the agreement which the Claimants now say was made in January 2018.

171. Finally, Mr Harper draws attention to notes made by Mr Shaw of a conversation he had with Mr Craven on 11 July 2018, just after the sellers were notified that no earn-out would be paid. He records Mr Craven telling him that "[the sellers'] position is that the EY work does not reflect what we have agreed outside of the SPA". When asked about this in cross-examination, Mr Shaw explained that he simply wrote down what Mr Craven said on the call. He made a conscious decision not to respond.

172. It is apparent from this comment that Mr Craven thought that something had been agreed. However, when taken with the email exchange between Mr Craven and Mrs Dickinson on 26 June when EY were due to commence their work, the inference to be made from this is that his complaint was that EY were not comparing the performance of the business in Q3 of the financial year 2017/18 and Q1 of the financial year 2018/19. Instead, the work done by EY was to

identify a number of specific adjustments to revenues and costs (and therefore to the Contribution figure) based on an application of the terms of the SPA.

173. This does of course lend some support to the proposition that Jaywing had indicated that it would not look closely at individual revenue streams if the Q1 performance was acceptable. However, it is also clear from this correspondence that Mr Craven believed that if the performance in the first quarter of the new financial year "fell off a cliff", the earn-out could be questioned.

174. As I have already indicated, this is not the agreement which the Claimants say was reached. Instead, they say that the agreement was simply that, if the Contribution figure was limited to the Base Plan Amount, with surplus revenues falling into the first quarter of the following financial year, the minimum earn-out payment would be made and that this would be based purely on the terms of the management accounts without any of the possible adjustments provided for by the SPA and without any consideration of trading performance in the first quarter of the following year.

175. It is also telling that, whilst Mr Craven may have referred on one or two occasions to an "agreement", it is not apparent from the documents that, even in his mind, there was a formal, legally binding agreement. This comes across from his exchange of emails with Mrs Dickinson on 26 June 2018. In addition, there are a number of occasions in correspondence where there is no reference to an agreement at all in circumstances where it might be expected that the existence of the agreement would have been mentioned, had it in fact existed.

176. One example of this is an email sent by Mr Craven to Mr Boddy, Mr Gardner and Mr Shaw on 26 June. The email is a plea by Mr Craven to those individuals at Jaywing who were primarily involved in the negotiation of the SPA to take a pragmatic view in relation to the earn-out. Mr Craven reminds them, as part of the negotiations, they made a commitment that if the numbers were close, Jaywing would help ensure that they "crossed the line successfully". There is no mention at all in that email of the alleged January 2018 agreement which, if it existed, would surely have been a much more fruitful avenue for Mr Craven to take in trying to persuade Jaywing not to have the figures reviewed by EY.

177. The next relevant piece of correspondence is a letter sent by Mr Wadsworth to Mr Sprot on 23 July 2018 after having received an earn-out statement showing that no earn-out was due. The letter sets out the sellers' objections to the earn-out statement. This does refer to the discussions in January 2018 but, again, does not suggest that there was a legally binding agreement. Instead, the letter states:

> "You directed that steps be taken so that certain revenue was held back to Q1 of FY 2019 and a lower contribution was provided… You manipulated a position that this revenue should be held back and on this basis no issue would be raised on 'ordinary trading'. In breach of your obligations you held this revenue back and despite this you have raised issues on ordinary trading."

178. The inference (confirmed by the subsequent letter of claim mentioned below) is that holding back this revenue was a breach of the SPA (rather than a breach of a separate agreement) so that any revenue held back should be included as part of the Contribution for the 2017/18 financial year (i.e. the Second Earn-out Period). This is of course contrary to the Claimants' case that the alleged 2018 agreement was independent from the SPA.

179. Finally, the letter of claim sent by the Claimants' lawyers to Jaywing's lawyers on 23 January 2019 again, makes no mention of the alleged 2018 agreement. Like Mr Wadsworth's letter, the letter of claim suggested that holding back revenue to Q1 of FY 2019 was "not appropriate or in accordance with usual operational practice and this revenue should be included in FY 2018 and count towards the earn-out payment". It was said that this was a breach of clause 6 of the SPA (requiring Jaywing to procure that Bloom carried out its business in the normal course) as opposed to a breach of some separate agreement reached between the parties.

180. In my view, these omissions are significant. The way in which the January 2018 discussions are portrayed strongly support Jaywing's case that no legally binding agreement was made between Jaywing and the sellers.

181. There is one other piece of correspondence which is also significant in determining whether an agreement was reached on 15 January 2018. This is an email sent by Mr Craven to Mr Wadsworth on 16 January 2018 – i.e. the day after the Claimants say that the agreement was finalised. Mr Wadsworth had asked Mr

Craven for the earn-out projections which, he explained, was in the context of his discussions with the sellers' accountants about the payment of tax in relation to the earn-out. In response, Mr Craven sent a copy of an earn-out calculation based on a number very slightly in excess of the Base Plan Amount (£899,939). Mr Craven's covering email reads:

> "See attached.. think we're nearly there re agreement over what we count under this.. assume c.£30k over Burton Base for now.."

182. Both Mr Wadsworth and Mr Craven insisted in cross examination that the reference to "we're nearly there re agreement" referred not to any agreement with Jaywing about the earn-out but to a completely different agreement, being an agreement amongst the sellers as to how the capital gains tax liability should be shared between them.

183. Mr Wadsworth explained that, as mentioned above, due to an oversight, one of the sellers (Mr Woods) would not qualify for entrepreneurs' relief. It had therefore been agreed that some of the other sellers would reimburse Mr Woods for the excess capital gains tax.

184. Mr Wadsworth gave evidence that one of the sellers, Neil Lockwood, was pushing back on this. However, this is not borne out by the correspondence. On 9 January, the accountants had sent Mr Wadsworth a suggestion as to how the excess liability should be allocated between the sellers. On 15 January, Mr Wadsworth sent this on to those sellers who would be contributing to the payment, including Mr Lockwood. There is no evidence that Mr Lockwood disagreed with what was proposed.

185. Mr Wadsworth also sent the proposed allocation to Mr Woods on 18 January and transferred to Mr Woods his share of the contribution on 23 January. Again, there is no suggestion within the correspondence that Mr Lockwood was querying his share of the contribution. Of course, had he been, Mr Wadsworth would no doubt have waited until any problems had been sorted out before paying Mr Woods his own share of the tax given that the amount might have changed depending on the outcome of any discussions with Mr Lockwood.

186. In any event, given the wording of Mr Craven's email of 16 January, it is absolutely clear to me that the agreement he is referring to can only be a possible agreement with Jaywing as the agreement he is referring to is "what can count under this" – i.e. what revenue sources will count towards the earn-out.

187. There is therefore no doubt in my mind that on 16 January 2018, Mr Craven did not consider that any agreement had been reached with Jaywing. Mr Harper accepted that, if no agreement had been reached on 15 January 2018, there was no agreement as the Claimants' case is clearly pleaded on the basis that any agreement was reached on that date.

188. For all of these reasons, my conclusion is that no agreement was reached between Mr Craven and Jaywing at the meeting on 15 January 2018, whether on the terms alleged by the Claimants or any other terms. It was understood that the key to complying with the ordinary trading requirement was to look at the shape of Bloom's trading over the third and fourth quarters of the 2017/18 financial year and the first quarter of the 2018/19 financial year rather than looking at individual revenue streams and that, in this context, limiting the Contribution for the Second Earn-out Period to the Base Plan Amount with any surplus being recognised in the first quarter of the following financial year would be likely to help. However, there was no agreement that, if this was done, the earn-out would inevitably be payable.

189. Having reached this conclusion, I do not strictly need to deal with the alternative arguments put forward on behalf of Jaywing as to the legal validity of any such agreement. However, as the points were argued, I will address them very briefly.

Would any agreement be legally binding?

190. As I have already mentioned, Mr Wigley puts forward a number of reasons why, had an agreement been reached, such an agreement would not be valid or binding on the parties. The first reason is the "No Oral Modification" clause in the SPA. The other reasons relate to the basic requirements for an effective contract which include not only an intention to create legal relations (which, it will be apparent from what I have already said, I do not believe exists) but also that the agreement must be complete, sufficiently certain and supported by valuable consideration

(see for example *Blue v Ashley* at [49]). Jaywing also suggests that Mr Shaw, Mr Sprot and Mr Lingard had no authority to conclude the alleged agreement.

Are the terms of the alleged agreement complete and certain?

191. Mr Wigley submits that the terms of the alleged agreement are insufficiently certain and are incomplete. For example, he notes that one of the terms is that all of the additional revenue sources set out in the Road to Burton Base presentation would count towards the Contribution for the Second Earn-out Period. He questions how that interacts with the definition of "Contribution" in the SPA. He also submits that the alleged agreement is incomplete in that it is incapable of operating without reference to the definitions contained in the SPA.

192. In my view, these criticisms are unfounded. The terms of the alleged January 2018 agreement are that, in return for Bloom limiting the Contribution to the Base Plan Amount, with any excess revenues being recognised in the first quarter of the following financial year, all of the revenue sources identified in the Road to Burton Base presentation would count towards the Contribution and that the management accounts would be conclusive in relation to the calculation of the Contribution. Assuming the management accounts showed that the Base Plan Amount had been achieved, the minimum earn-out would be paid.

193. It is therefore clear that, on the basis of the Claimants' case, there would be no need to resort to the SPA in relation to the calculation of the Contribution. I accept that it might be necessary to import some of the definitions from the SPA (such as the "Second Earn-out Period Contribution" and the "2018 Base Plan Amount") but, given the factual background to the alleged agreement, there is in my view no problem in importing these definitions where necessary. It does not mean that the alleged agreement is incomplete or uncertain.

194. The only point I would note is that the suggestion that Jaywing gave up its right to challenge the amount of the Contribution shown in the management accounts not only based on whether or not particular revenue streams counted as ordinary trading but also for any other reason seems far-fetched and is another reason which supports the conclusion that such an agreement was not in fact reached. This is all the more so given that, whilst the pleaded terms of the alleged 2018

agreement refer to the fact that the earn-out for the first period had been based on the management accounts, it is not disputed that there was in fact an adjustment to the management accounts (in the sellers' favour) as a result of costs which had wrongly been deducted in the management accounts and which were then added back to the amount of the Contribution for that period.

Consideration

195. Jaywing's position is that the prospect of Bloom exceeding the Base Plan Amount was "non-existent" and that the agreement to limit the contribution to the Base Plan Amount was therefore of no value or benefit to Jaywing.

196. However, this is clearly not supported by the evidence. The correspondence shows that the Jaywing executive considered in January 2018 that Bloom was capable of reaching the Base Plan Amount. An agreement which limited the Contribution to the Base Plan Amount was therefore of value to Jaywing and would constitute consideration, had an agreement been reached.

Authority

197. Jaywing also says that, if there were an agreement reached on 15 January 2018, Mr Shaw, Mr Sprot and Mr Lingard had no authority to do so. I accept that an agreement as significant as the one suggested by the Claimants (having a financial implication for Jaywing in excess of £1 million) would not be within the usual authority of individual directors (or even the executive team as a whole).

198. However, the evidence of Mr Boddy, Mr Sprot and Mr Shaw was that the board would have been kept apprised of discussions relating to the earn-out. In the absence of any board minutes confirming the position one way or the other, it must in my view be inferred from this that, had an agreement been reached, the team representing Jaywing would have had authority from the board to conclude the agreement (i.e. actual authority). I therefore reject the submission that any agreement would have failed through lack of authority.

No oral modification clause

199. Both parties are agreed that, in the light of the decision of the Supreme Court in *MWB Business Exchange Centres Limited v Rock Advertising Limited* [2018] UKSC 24, a No Oral Modification clause is binding, with the safeguard against possible injustice lying in the various doctrines of estoppel (see paragraphs [15] and [16]).

200. Mr Harper's primary response to this is that the alleged 2018 agreement is a separate and independent agreement rather than a variation of the SPA. As such, he submits that it is not within the scope of clause 16.1 of the SPA which only relates to a variation of the agreement. In support of this, he relies on the line of authority starting with *Morris v Baron & Company* [1918] AC 1.

201. The cases in question however deal principally with situations where statute requires an agreement to be in writing. It is perhaps worth bearing in mind the observation of Toulson LJ in *Samuel v Wadlow* [2007] EWCA Civ 15 at [46] that:

> "The principle in *Morris v Baron* was brought into existence in order to deal with the technical problems produced by legislation analogous to the statute of frauds. The less that it is brought into other parts of the law to deal with problems of a different nature which do not require a formalistic approach, the better."

202. Leaving this on one side, Mr Harper submits that the question as to whether an agreement is an independent agreement or whether it is a variation of an existing agreement depends on the objective intention of the parties (see, for example *Samuel v Wadlow* at [35-41]). As evidence of this intention, Mr Harper relies on the alleged statement by Mr Shaw at the 15 January 2018 meeting that he had consulted Mr Bowcock who had advised that the agreement could be made outside the terms of the SPA.

203. I have, however, found as a fact that Mr Bowcock gave no such advice and that Mr Shaw made no such statement. The purpose of consulting Mr Bowcock was in relation to the definition of "ordinary trading". There is no suggestion that he was being asked for any advice about what might be needed in order to reach a new legally binding agreement, whether as a separate agreement or as a variation to the SPA.

204. In any event, it is clear from the authorities that the relevant question is not whether the parties intended to make a new agreement which is separate from the existing agreement but is whether their intention is to replace the existing contract (or, at least, what is left of it) with a new agreement (see *Samuel v Wadlow* at [41]). It is no part of the Claimants' case that the SPA has been brought to an end. Mr Craven accepted as much in his evidence and Mr Harper confirmed in his submissions that he was not suggesting that the SPA had ceased to exist.

205. In these circumstances, even if the alleged agreement was, on its own, complete and certain in relation to the calculation of the Second Earn-out Payment, it must in my view still be seen as a variation of the SPA, which continued to exist and contained continuing rights and obligations for both parties. It is, for example, not suggested that the alleged agreement contains any provisions relating to the calculation of the Excess Earn-out Amount other than (presumably) requiring that calculation to use the amended basis for the calculation of the Second Earn-out Contribution as opposed to relying on the provisions relating to the Second Earn-out Contribution set out in the SPA.

206. On this basis, had there been an agreement, it would fall foul of clause 16.1 of the SPA and would not constitute a valid variation. The only basis on which it could have any effect would be if the Claimants can establish some form of estoppel.

Estoppel

207. The nature of the estoppel relied on by the Claimants is promissory estoppel. Kitchin LJ in the judgment of the Court of Appeal in *MWB v Rock* [2016] EWCA Civ 553, having reviewed the authorities, summarised the principle at [61] as follows:

> "… if one party to a contract makes a promise to the other that his legal rights under the contract will not be enforced or will be suspended and the other party in some way relies on that promise, whether by altering his position or in any other way, then the party who might otherwise have enforced those rights will not be permitted to do so where it would be inequitable having regard to all of the circumstances."

208. It is apparent from the way in which Kitchin LJ explained the principle that detrimental reliance is not a requirement (see also paragraph [62]). However, it is of course more likely that it would be inequitable for the person making the promise nevertheless to rely on their legal rights under the contract if the person to whom the promise was made has relied on it to their detriment.

209. There are two aspects to the Claimants' case in relation to estoppel. The first is that Jaywing is estopped from relying on the No Oral Modification clause as a result of representations said by the Claimants to have been made (either in words or by conduct) that the alleged agreement should be effective, notwithstanding its informality. The second approach is simply to rely on the promises the Claimants say were made on behalf of Jaywing that the second earn-out would be determined solely by reference to the management accounts and not in accordance with the SPA and the reliance placed by Mr Craven on those promises.

210. In *MWB v Rock*, Lord Sumption JSC did not go into detail in relation to estoppel. By analogy with the Vienna Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts (4th Edition 2016), he noted at [16] that a party may be precluded by their conduct from relying on a No Oral Modification provision. He went on to say:

> "This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. … I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Limited v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."

211. In *Kabab-Ji S.A.L. (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 61, Flaux LJ took the view at [74-75] (relying on an example in Article 2.1.18 of the UNIDROIT Principles) that, what Lord Sumption had in mind in *MWB v Rock* might include a situation where the person making the promise stood by and

allowed the other party to perform the terms which had been agreed orally. In the light of Lord Sumption's reference to *Actionstrength*, there may come a time when it will be necessary to explore the circumstances in which simply standing by will be sufficient. However, it is not necessary for me to do so in this case.

212. The short answer to this point is that, on the basis that no agreement was reached in January 2018, the question of an estoppel preventing Jaywing from relying on the No Oral Modification clause does not arise. In any event, in my view, none of the matters relied on by the Claimants as giving rise to an unequivocal representation that the alleged agreement could be relied on, despite its informality, can be said to have that result.

213. The first matter relied on is the fact that the first earn-out payment was calculated based on the management accounts and without following the detailed process for preparing an earn-out statement and providing Reference Accounts set out in the SPA. However, this was entirely unconnected with the alleged January 2018 agreement. There is in my view no basis on which the fact that the parties agreed the first earn-out without reference to the terms of the SPA could be understood to be a representation either that the second earn-out would be calculated in a similar way or that any purported variation of the SPA in the future could be concluded orally rather than, as required by the SPA, in writing.

214. The second matter relied on by the Claimants is the alleged statement by Mr Shaw that, based on the advice from Mr Bowcock, the purported agreement fell outside the SPA (and presumably did not therefore need to comply with clause 16.1 of the SPA). As I have already said, I am satisfied that no such representation was made.

215. The Claimants also rely on an email between Mr Craven and Mr Sprot on 9 March 2018. The exchange arose as a result of an email from Mr Sprot suggesting that the performance of Bloom in the first quarter of the new financial year would be compared with its performance in the fourth quarter of the 2017/18 financial year. The purpose of Mr Craven's email was to confirm that Q1 was in fact being compared against Q3 of 2017/18, not Q4. Mr Sprot confirmed that this was just a mistake on his part.

216. There is no basis on which this exchange of emails could be said to confirm the validity of the alleged 2018 agreement. If for no other reason, this is because the emails relate to the comparative performance of Bloom over the relevant periods which, on the Claimant's case, was never any part of the 2018 agreement.

217. The final matter relied on by the Claimants is the fact that financial reporting packs were prepared which tracked the anticipated Contribution and showed what the Claimants say was the agreed target, being the Base Plan Amount plus the potential employee bonus of up to £36,000. However, these reporting packs were prepared by Mrs Dickinson on behalf of Bloom and not by Jaywing. In addition, they were again prepared primarily to compare the performance of Bloom over the relevant financial periods. In these circumstances, the lack of any apparent objection from Jaywing to the contents of these reporting packs, does not constitute an unequivocal representation that the alleged 2018 agreement should be binding despite the fact there was no agreed variation in writing.

218. My conclusion therefore is that, even if there had been an agreement on 15 January 2018 which was invalid as a result of the No Oral Modification clause, there was no unequivocal representation by Jaywing that the agreement was nonetheless valid.

219. It is not clear to me the extent to which Mr Harper relies on the second aspect of estoppel mentioned above. As I understand it, the suggestion is that, even if there were no agreement concluded in January 2018, representations were nonetheless made (that the second earn-out contribution would be determined solely by reference to the management accounts and not by reference to the terms of the SPA) which were relied on by Mr Craven (and by extension the other Claimants), such that it would be unconscionable for Jaywing to require the second earn-out contribution to be calculated in accordance with the terms of the SPA.

220. It will be apparent from my discussion of the question as to whether or not any agreement was reached in January 2018 that I am not satisfied that any such representation was made. Whilst there was a suggestion that, if the Contribution for the Second Earn-out Period was limited to the Base Plan Amount, with any excess revenues being recognised in the first quarter of the following financial

period, this would be more likely to satisfy the “ordinary trading” requirement, there was no representation which was intended to have any legal effect and, in any event, no representation that the Second Earn-out Contribution would be calculated solely by reference to the management accounts.

221. Even if the discussions could somehow be construed as a representation, which was intended to be relied on, to the effect that, in these circumstances, Jaywing would not question whether any of the revenue sources identified in the Road to Burton Base presentation fell outside the ordinary trading requirement (which is not the way in which the Claimants’ case is put in their Particulars of Claim nor the submission which Mr Harper has made and which I do not in any event accept), it would not in my judgment be inequitable for Jaywing to resile from this in circumstances where there is limited evidence that Bloom could or would have done anything differently.

222. In particular, it is clear from the overall evidence that there was no real ability to pull other work forward from the following financial year and that it would not have been possible for Mr Craven in February or March 2018 to source additional work opportunities which could realistically have generated revenues prior to 31 March 2018. There is simply insufficient evidence that there is any way in which Bloom could have generated additional revenues outside the proposals which had already been made in the Road to Burton Base presentation.

223. Following the hearing, the court received (unsolicited) additional submissions provided by the Claimants including a schedule which purports to show additional revenues which could have been generated in the 2017/18 financial period. This is largely supported only by Mr Craven’s witness evidence. However, without going into the detail, based on the totality of the evidence, I do not accept the viability of these additional revenue sources. The evidence of Mr McCann, for example, was clear that, in reality, no work was deferred. There was therefore nothing more that could have been pulled forward. It is also clear from the evidence that, in the fourth quarter, Bloom was very much operating at maximum capacity. Mrs Dickinson, for example, refers in one email to the fact that Bloom would effectively be carrying out four months’ work in only two months.

224. One particular complaint made is that, had the representations not been made, Bloom would have delivered additional work through the use of freelancers. Aside from the fact that I am not satisfied that there would have been additional work to do (possibly apart from a small amount of additional work for The Sipping Shed – in that case a maximum of around £9,000), this does not appear to me to be realistic in the light of the "ordinary trading" requirement. In circumstances where the required rate of Contribution over the last three months of the year was already double the average for the previous nine months, the use of freelancers to increase revenues in the last three months in order to hit the earn-out target would, in my view, have carried a significant degree of risk that the ordinary trading requirement would have been breached.

225. In terms of reliance, Mr Harper also suggests that, had the alleged representations not been made, Bloom might not have paid the employee bonus of £36,000 which had the effect of reducing the amount of the Contribution (being an additional cost). Again, however, there is no evidence of this. It is clear that the bonus had been under discussion for some time and was intended to reward staff for the exceptional effort they were required to make in the fourth quarter of the financial year in order to try and achieve the earn-out target. That effort would be required whether or not the target was met. In addition, it would perhaps be surprising if, despite the effort, the bonus was cancelled in order to enable the sellers to meet the earn-out target without any additional reward to the staff.

226. The final suggestion made by Mr Harper is that the sellers might not have paid their CGT liability in January 2018 in the absence of the representations which it is said were made on behalf of Jaywing. However, there was clearly a discussion with the accountants confirming that, if the earn-out target was not met, the tax could be reclaimed. There is therefore no suggestion that the tax would not have been paid (which enabled the benefit of Entrepreneurs' Relief to be taken) had the representations not been made given that Mr Harper's hypothesis is that Bloom would in any event have aimed to reach the earn-out target by other means.

227. For all of these reasons, even if the alleged representations had been made, there is no sufficient detriment resulting from any reliance placed on those

representations, nor is there any other reason, which makes it inequitable for Jaywing to rely on its rights under the SPA.

Breach of the SPA

228. In the absence of any agreement or estoppel, the Claimants argue that they are nonetheless entitled to an earn-out payment based on the terms of the SPA. This, however, depends on the Claimants establishing that there has been a breach of the SPA entitling them to damages. Although the Particulars of Claim include a claim for specific performance, this is no longer pursued.

229. The Claimants identify two potential breaches of the SPA. The first relates to paragraph 6.1.1 of schedule 9 to the SPA which requires Jaywing to ensure that Bloom carries on its business in the normal course and on a basis consistent with how the business was carried on at Completion. The suggestion is that Jaywing required work to be deferred to the first quarter of the 2018/19 financial year in accordance with the alleged 2018 agreement.

230. However, Mr Harper did not pursue this aspect of the claim in his oral submissions as he accepted that the evidence did not support this. For the reasons set out above, I do not accept that Jaywing prevented Bloom from pursuing all of the opportunities which it could have done in the final quarter of 2018 and instead somehow required that those potential revenue streams were deferred until the first quarter of the following financial year (see paragraph [223] above).

231. The second breach alleged by the Claimants relates to the mechanics for the calculation of the earn-out in accordance with schedule 9 of the SPA (and, in particular, paragraphs 4.1 and 4.2). These require Jaywing to prepare "Reference Accounts" for the earn-out period and to deliver to the Sellers a copy of the Reference Accounts and a statement "prepared by the Buyer's auditors" showing its calculation of the Contribution for the earn-out period and its calculation of the resulting earn-out payment. This is referred to as the Earn-out Statement.

232. If the sellers do not agree with the calculation of the earn-out, clause 4.3 requires them to deliver an objection notice "within ten business days from receipt of the

Reference Accounts and the Earn-out Statement". If they fail to do so, paragraph 4.4 deems them to have agreed the amount of the earn-out payment.

233. The Claimants say that Jaywing are in breach of clauses 4.1 and 4.2 in that they have not produced Reference Accounts nor an Earn-out Statement.

234. The "Reference Accounts" are defined as "the accounts of the Company, including an audited balance sheet and profit loss account" for the relevant financial period. The email sent by Mr Boddy to Mr Wadsworth on 10 July 2018 sending him the Earn-out Statement explained that Jaywing's audited accounts had been signed off the previous day and an unsigned copy of those accounts together with a copy of Bloom's management accounts was attached to the email. Although the audited accounts were unsigned, in my view, Jaywing has complied with its obligation to prepare the Reference Accounts and send them to the Sellers.

235. Jaywing's statutory auditors (Grant Thornton) declined to prepare an Earn-out Statement due to independence concerns. In the end, the Earn-out Statement was prepared by Mr Sprot but with input from EY who, as I have already mentioned, were engaged by Jaywing to provide a review of the Contribution shown in Bloom's management accounts.

236. On the face of it, the Earn-out Statement does not therefore comply with paragraph 4.2 of schedule 9 to the SPA as it was not prepared by Jaywing's "auditors". Mr Wigley however submits that, on a true construction of the SPA, the word "auditors" (which is not defined) is a reference to any appropriately qualified third party firm of accountants engaged by Jaywing or, alternatively, that a term should be implied into the SPA on the grounds of business necessity and/or business efficacy to the effect that, in the event that Jaywing's statutory auditors were not able to prepare the Earn-out Statement, Jaywing was entitled to engage another appropriate qualified third party firm of accountants to prepare the Earn-out Statement.

237. I do not accept Jaywing's submission that the word "auditors" can be read as meaning any firm of accountants appointed by Jaywing. Given that the immediately preceding sub-paragraph refers to the Reference Accounts, which include an audited balance sheet and profit and loss account, there can be little

doubt that the reference to Jaywing's auditors in the next line must mean their statutory auditors.

238. As far as the implied term is concerned, Mr Harper objected to this on the basis that a term allowing Jaywing unilaterally to appoint a firm of accountants should not be implied. He points out that the requirement for the Earn-out Statement to be prepared by the auditors gave the Sellers some comfort that there would be a degree of independence which would not be the case if Jaywing could appoint a firm of its choice with a brief to find as many arguments as possible to reduce the amount of the Contribution.

239. I will not go into the well-known principles relating to implied terms set out by Lord Neuberger PSC in *Marks & Spencer plc v BNP Paribas Securities Services Trustco (Jersey) Limited* [2015] UKSC 72 at [15-21]. It is sufficient to say that, based on those principles, I accept that a term must be implied in order to deal with the preparation of an Earn-out Statement should Jaywing's auditors for some reason be unable to undertake this task. This is necessary to give business efficacy to the contract. Without it the contract would lack commercial or practical coherence.

240. I also accept that the term to be implied would be that Jaywing is free to appoint a suitably qualified independent firm to prepare the Earn-out Statement. The reason for this is that, if the Sellers disagree with the Earn-out Statement, they are free to lodge an objection. There is no mechanism for Jaywing to object to an Earn-out Statement. This clearly shows that it is Jaywing which has control of the preparation of the Earn-out Statement in the first instance.

241. This conclusion is supported by the fact that if, after an objection is made by the Sellers, agreement cannot be reached, the parties would then jointly appoint an independent expert to resolve the dispute. In these circumstances, it would make no sense for the appointment of the accountant to prepare the Earn-out Statement in the first instance also to be a joint appointment.

242. As Mr Wigley pointed out, allowing Jaywing to decide who should prepare the Earn-out Statement would also be consistent with the fact that the Sellers have no

control over which firm of accountants Jaywing appoints to act as its statutory auditors from time to time.

243. Having said this, in my judgment, the Earn-out Statement does not comply with the requirements of the SPA. It has not been "prepared" by EY. Instead, it has been prepared by Mr Sprot. Although EY provided a markup of an initial draft of the Earn-out Statement prepared by Mr Sprot following its review of the Contribution figure, Mr Sprot did not simply accept all of those changes and produce an Earn-out Statement in line with the markup. Instead, he accepted some of the changes but not others as well as presenting the figures in a different way to EY.

244. Jaywing is therefore in breach of paragraph 4.2 of schedule 9 to the SPA in failing to provide an Earn-out Statement which complies with that paragraph.

245. Jaywing argues that the sellers are, in any event, bound by the Earn-out Statement as they have not lodged an objection notice within the time period referred to in paragraph 4.3. However, I accept the Claimants' submission that, if the Earn-out Statement is not valid so that paragraph 4.2 has not been complied with, the following paragraphs relating to the objection notice do not come into effect. In particular a document which is not an Earn-out Statement (as defined) cannot result in a deemed agreement within paragraph 4.4 of schedule 9 to the SPA. On this basis, the question as to whether the letter sent by Mr Wadsworth to Jaywing qualifies as an objection notice within paragraph 4.3 does not arise.

246. My conclusion therefore is that the Claimants have established a breach of paragraph 4 of schedule 9 to the SPA. It is therefore necessary to consider whether, as a result of this, the Claimants are entitled to damages.

247. Mr Harper submits that the court should take a pragmatic approach in identifying and quantifying the loss as reliably and proportionately as possible. He suggests that, as Jaywing proceeded on the basis of the management accounts in relation to the First Earn-out Payment and did not question the management accounts for the Second Earn-out Period until it engaged EY in May 2018 and that the management accounts were not called into doubt by the audit, it would be fair and proportionate to assess the loss and damage based purely on the management

accounts. This would of course mean that the Second Earn-out Payment is due at close to the minimum level and that there would also be an Excess Earn-out Payment.

248. In support of this submission, Mr Harper refers to the decision of the Supreme Court in *One Step (Support) Limited v Morris-Garner* [2018] UKSC 20 at [37-38] and that of the Court of Appeal in *Glossop Cartons and Print Limited v Contact (Print and Packaging) Limited* [2021] EWCA Civ 639 at [40-41].

249. Those authorities are however dealing with very different situations. In *Morris*, the question related to consequential losses as a result of a breach of competition and solicitation covenants and, in particular, whether damages could be assessed on the basis of a hypothetical release fee for the covenants in question as opposed to the ordinary basis relating to actual losses. *Glossop* was a claim based on fraudulent misrepresentation in relation to the acquisition of business assets. The judge had undertaken what the Court of Appeal described as a complex exercise which took into account what the claimants had subjectively factored into their calculation of the purchase price. The Court of Appeal considered that this approach was too complex and that the judge should simply have made his own assessment, on the basis of the expert evidence, of the market value of the assets which had been purchased.

250. These cases provide authority for the proposition that, if an assessment of loss or damage on a conventional basis is too complex, a judge is free to adopt a more broad-brush approach. However, in this case, there is no suggestion that a calculation of the Contribution for the Second Earn-out Period, based on the evidence of the experts where relevant, is too complex. Indeed, in my view, it is a relatively straightforward exercise and this is the approach which I will adopt.

The calculation of the Contribution for the Second Earn-out Period

251. The parties' experts have provided evidence as to the calculation of the Contribution of the Second Earn-out Period based on the terms of the SPA. They have however taken very different approaches.

252. Mr Paley (on behalf of the Claimants) takes the position that, as the First Earn-out Payment was calculated in accordance with Bloom's management accounts, the only reasonable approach (in order to achieve consistency) is to use the management accounts to assess the contribution for the Second Earn-out Period. His conclusion therefore is that the Contribution is the figure of £899,980 reported in the management accounts for the year ended 31 March 2018. Interestingly, this is slightly higher than the Base Plan Amount of £899,657, despite the Claimants' case that there was an agreement that the Contribution should be limited to the Base Plan Amount.

253. Based on a Contribution of £899,980, Mr Paley calculates that the Second Earn-out Amount would be £1,214,688 and the Excess Earn-out Amount would be £41,410.

254. Mr Richardson's approach (on behalf of Jaywing) is to take the management accounts as a starting point but then to make adjustments where he considers these are required to comply with the terms of the SPA (for example in relation to ordinary trading or the allocation of costs) and also to make adjustments where the management accounts are inconsistent with the audited accounts. Taking this approach, Mr Richardson concludes that the Contribution for the Second Earn-out Period is either £631,721 or £681,721 depending on whether revenues of £50,000 relating to work done for Datacity (see further below) are included.

255. In case his primary position is wrong, Mr Paley has also calculated the Contribution for the Second Earn-out Period taking the figures shown in the management accounts as a starting point and then making adjustments which he believes are required to comply with the terms of the SPA. On this basis, his conclusion is that the Contribution for the Second Earn-out Period should in fact be increased to £943,945.

256. I should say at once that I reject Mr Paley's primary position. There is no justification for basing the amount of the Contribution purely on the management accounts without any adjustment simply because this is what both parties were content to do in the context of the calculation of the earn-out for the first period. There is no suggestion that it was intended by either party that one result of this

should be that the Contribution to the Second Earn-out Period should be calculated in this way rather than based on the terms of the SPA.

257. I accept this gives rise to an issue relating to consistency between the two periods and, in particular, whether revenues or expenses might be counted twice or left out of account altogether. However, the only specific issue identified by the experts relates to revenues of approximately £107,000 which were not included in the First Earn-out Period and which I refer to in more detail below.

258. There are a number of preliminary issues to consider before getting on to the detail of the calculation of the Contribution. These arise from the definitions contained in schedule 9 of the SPA.

259. The first relates to the appropriate starting point for the calculation. The definition of "Contribution" requires this to be calculated in accordance with the figures shown in the Reference Accounts. However, there is no figure shown in the audited accounts which represents the Contribution. Both experts therefore agree that the starting point is the Contribution figure in the management accounts.

260. Mr Wigley and Mr Harper agree that such an approach is not inconsistent with the terms of the SPA given that the "Reference Accounts" is defined as "… the accounts of the Company, including an audited balance sheet and profit and loss account". The management accounts clearly are part of the accounts of the company just as the audited financial statements are also part of the accounts of the company. I accept this approach.

261. The calculation of the Contribution is based on Bloom's "Sales" which is defined as "any income invoiced to a client either directly or through another Group member". This led the experts to consider whether income should only be included if it has in fact been invoiced. This would be inconsistent with the management accounts which include the value of work carried out, whether or not it has been invoiced. The experts agree that the latter approach is correct given that this is the approach adopted in the management accounts as well as the audited accounts.

262. Again, Mr Wigley and Mr Harper are content (and I agree) that there is no real inconsistency between this and the terms of the SPA given that the definition of "Sales" does not require the revenues to be invoiced in the financial year to which they relate. Instead, it seems relatively clear that the purpose of the definition of "Sales" is to capture income which is invoiced not only directly by Bloom but also work done by Bloom but which is invoiced through another group company and not to exclude work done (but not invoiced) in the relevant period.

263. A third potential inconsistency identified by the experts is that the definition of "Contribution" cross-refers to figures calculated in accordance with schedule 11 of the SPA. As I have already mentioned, this sets out a list of the nominal ledger codes used by Bloom at the time of the SPA. However, a significant number of items included in the management accounts use nominal ledger codes not referred to in schedule 11.

264. Once more, the parties are in agreement that this is not a significant issue. The approach they take (and with which I agree) is that schedule 11 is purely illustrative and that the calculation of the Contribution should follow the categorisation of revenues and costs/expenses in use at the relevant time, even if these are based on nominal ledger codes which were not included in schedule 11.

265. The final point of principle which I need to mention before going on to look at specific proposed adjustments is the approach to the "ordinary trading" requirement. The definition in the SPA provides that Contribution is only to count:

> "…to the extent that such contribution arises from ordinary trading performance and is not affected by exceptional items and/or accounting releases."

266. Mr Paley's view is that ordinary trading performance and exceptional items must be read together so that an item would only be excluded if it both falls outside ordinary trading performance and is also an exceptional item. In this context, he refers to note 1.22 of Bloom's 2017/18 audited account which states that:

> "Exceptional items are transactions that fall within the ordinary activities of the Company but are presented separately due to their size or incidence."

267. Mr Richardson notes that this follows the definition contained in FRS102. Mr Richardson has however taken the view that the ordinary trading and exceptional items are separate and that an item should be excluded either if it does not form part of the ordinary trading of Bloom or if it is exceptional in nature. Part of his reason for this is that, due to the way in which the earn-out formula works, a relatively small adjustment could make a significant difference to the amount of the earn-out payment. However, in order to be an exceptional item for the purposes of the audited accounts, it would need to exceed an appropriate level of materiality (the experts agreed that, as a rule of thumb, this might be in the region of 1% of turnover (£33,000 in this case) or 10% of EBITDA (around £66,000)). Therefore, excluding adjustments for items outside ordinary trading but which did not meet the level of materiality to be treated as exceptional would potentially distort the calculation of the earn-out.

268. I prefer Mr Richardson's approach to this issue. The natural meaning of the words used is that the Contribution should not include:

268.1 Revenues which do not constitute ordinary trading performance; or

268.2 Exceptional items; or

268.3 Accounting releases.

269. Given that both experts accepted that a relatively small change to the amount of the Contribution could make a significant difference to the amount of any earn-out payment, interpreting the words in accordance with their natural meaning makes more sense than the alternative under which items which do not constitute ordinary trading would only be excluded if they qualify as exceptional for the purposes of the audited accounts.

270. On the question as to what constitutes "ordinary trading performance", Mr Paley does not make any specific comments about how this should be interpreted. However, the inference from his approach is that, as long as the work done is within the scope of the normal business activities being carried on by Bloom and is on commercial terms, it will satisfy the ordinary trading performance requirement. He did however accept in his oral evidence that, if revenues were

shown to be contrived, fraudulent or lacking commercial logic, this would not constitute ordinary trading.

271. Mr Richardson takes a rather different approach. He agrees that, in order to constitute normal trading, the work must be of a similar type to that normally carried on by Bloom. However, he suggests that the underlying purpose of the provision is to ensure that there is a like for like comparison between the performance of the business both before and after any acquisition and so, based on his review of the evidence, has formed a view as to whether particular revenue streams comply with this requirement.

272. Ultimately, both experts accept that this is a question of interpretation and is for the court to decide rather than the experts. However, I have found their input helpful. In particular, I agree with Mr Richardson that one of the key purposes of the ordinary trading performance requirement is to ensure that any revenues forming part of the Contribution during the earn-out periods are consistent with what might be expected in a year in which there is no earn-out (whether before the sale or after the end of the earn-out period). I also agree that revenues which derive from arrangements which are artificial, contrived or uncommercial would not constitute ordinary trading for this purpose. In addition, it is clear that revenues which result from business streams which are unconnected with the nature of the business being carried on at the time of the sale would also not represent ordinary trading.

273. I turn now to consider the individual adjustments proposed by the experts. With one exception (identified by Mr Richardson), these are all based on the adjustments proposed by EY when preparing their report in July 2018. For the avoidance of doubt, I have not considered any other possible adjustments as there is no submission that any issues other than those identified by the experts need to be taken into account.

CWG deferred revenue

274. The most significant adjustment in terms of the figure is a deduction of £106,636 made by Mr Richardson in connection with work done for Bloom's client CWG/Anytime. The rationale for this is that it relates to work which was done in

the 2016/17 financial year but which was deferred in Bloom's management accounts until the 2017/18 financial year.

275. At the time of the 2017 audit, there were discussions between Bloom/Jaywing (Mrs Dickinson and Mr Sprot) on the one hand and the auditors, Grant Thornton, on the other. Grant Thornton's view was that these revenues needed to be recognised in the 2017 financial statements. Whilst Mr Sprot ultimately accepted this, he decided that no change should be made to the management accounts. The experts agreed that it would be unusual to amend the management accounts to take account of adjustments made by the auditors.

276. Mr Richardson however takes the view that, as these revenues have been recognised in the 2017 audited accounts, they cannot form part of the Contribution for the Second Earn-out Period given the requirement that the Contribution must reflect the figures shown in the Reference Accounts (which includes the audited accounts).

277. Mr Paley's view is that this cannot be right as, if the revenue is not reflected in the Contribution for the Second Earn-out Period, it will fall out of account completely.

278. Given the acceptance that the "Reference Accounts" include both the management accounts and the audited accounts, it does not in my view follow that the calculation of the Contribution must slavishly follow either the management accounts or the audited accounts where there is a divergence between the two. Instead, it is necessary to look at both sets of accounts and, if there is an inconsistency, come to a view as to which should prevail depending on the surrounding circumstances.

279. In this particular case, it is clear to me that the management accounts must prevail, despite the adjustment to the audited accounts. There is no dispute that the CWG revenues are legitimate revenues which ought to count towards the earn-out in one period or the other. Mr Sprot accepted in cross-examination that it would be wrong for these revenues not to be counted at all. On any rational basis, this must be correct. Given that they have not been included in the Contribution for the First Earn-out Period and that they have been shown in the management accounts

as part of the Contribution for the Second Earn-out Period, it must be right that they should not be excluded just because they are not included as part of Bloom's revenues in the 2017/18 audited accounts. In my view it is not therefore appropriate to make an adjustment in relation to this item.

280. Mr Harper also submits that the CWG revenues should be included on the basis that it was agreed or understood between the parties at the time the first earn-out was calculated that these revenues would be accounted for as part of the Contribution in the Second Earn-out Period, that there was a conscious decision not to amend the management accounts in order to reflect the 2017 audited accounts and that the revenues were not therefore counted as part of the contribution for the First Earn-out Period. Mr Harper accepts the difficulty posed by the "No Oral Modification" clause in the SPA but submits that, even if there is no legally binding agreement, there would nonetheless be an estoppel preventing Jaywing from relying on its strict rights in relation to this particular issue.

281. I have already decided that no adjustment should be made for the reason set out above. However, I would also agree with Mr Harper that Jaywing is estopped from requiring an adjustment in relation to this item. It is clear from the evidence that Mr Sprot had discussed the position with Mr Craven and that all parties were aware that the CWG revenues of approximately £107,000 were not included in the 2017 management accounts and were not therefore included in the Contribution figure for the First Earn-out Period but instead would be included in the management accounts for the 2017/18 financial year and therefore included in the Contribution figure for the Second Earn-out Period.

282. Taken together with the fact that Mr Sprot confirmed to Mrs Dickinson (which, I infer from the course of dealing between Mrs Dickinson and Mr Craven, Mr Craven would have been aware of) that he was not going to change the management accounts and that the management accounts were thereafter produced for the 2017/18 financial year with the CWG revenues included, there is an unequivocable representation on behalf of Jaywing that it intended the agreement to be binding.

283. The sellers relied on this in not requiring the adjustment to the audited accounts to be reflected in the management accounts so that the CWG revenues would be added to the Contribution for the First Earn-out Period (which would have been relevant to the calculation of the Excess Earn-out Payment). In the circumstances, it would in my judgment be inequitable for Jaywing to resile from this. Mr Sprot effectively agreed with this in his oral evidence, confirming that the CWG revenues should be recognised.

Salary recharges

284. The definition of "Contribution" requires the salary costs of Alex Craven, Neil Lockwood, Dave Wood, Peter Laflin and Emma Dickinson to be split between Bloom and Jaywing Innovation. Mrs Dickinson's costs were to be shared 50:50. The costs of the other four individuals attributed to Bloom were not to be less than 40% nor more than 60% of the total.

285. Both experts agree that an adjustment is needed as 80% of Mr Lockwood's costs were allocated to Bloom whilst none of Mr Laflin's costs were allocated to Bloom. Mr Paley suggests that the costs of both are split 50:50. This would increase the contribution by £5,564. Mr Richardson on the other hand suggested only 40% of the costs are allocated to Bloom, resulting in an increase to the contribution of £23,613.

286. Although there is no evidence as to the amount of time spent by each of these two employees working for Bloom rather than Jaywing Innovations, the reason why Mr Richardson has only allocated 40% of their costs to Bloom is firstly that this is the figure contained in the Hive-across agreement under which part of Bloom's business was transferred to Jaywing Innovation and secondly that it is also consistent with the treatment of Mr Craven and Mr Wood under the management accounts where only 40% of their time has been allocated to Bloom.

287. Given the definition of "Contribution", there is no doubt that an adjustment needs to be made. In the absence of any other evidence, I accept that Mr Richardson's proposed adjustment is more likely to be accurate and so conclude that an increase to the Contribution of £23,613 in relation to this is appropriate.

288. There are two further salary recharge adjustments proposed by the experts. The first is an adjustment relating to an employee of Jaywing named Josh Dean. The costs of £5,773 recharged to Bloom were charged as a marketing expense rather than salary and have not therefore been deducted. Both experts agree that his costs should be deducted from the amount of the Contribution and I accept this.

289. The final element of the salary recharge (and the largest) is a deduction of £76,409 applied by Mr Richardson in relation to four employees of Bloom, Amy Tootell, James Bell, Josh Finch and Matt Kerridge who, during the relevant period, carried out work for Jaywing Innovation. The management accounts have deducted from Bloom's costs the salary expenses which have been recharged to Jaywing Innovation.

290. Mr Richardson believes that this is incorrect as the definition of Direct Costs in the SPA includes:

> "…variable costs assigned to and directly associated with delivering sales including but not limited to staff and staff related costs…For the avoidance of doubt, the costs relating to any member of staff either employed by or working for the Company will be included in Direct Costs or Costs of Sales (other than Alex Craven, Neil Lockwood, Dave Wood, Peter Laflin or Emma Dickinson, whose costs will be as specified in the definition of Contribution)."

291. Mr Paley does not agree that such an adjustment should be made, pointing out that no adjustment has been made in the audited accounts. He also takes the view that the definition of Direct Costs does not mean that the entirety of the employment costs of an individual employed by Bloom must be deducted from the Contribution regardless of how much time they spent working for Bloom.

292. In this case, I agree with Mr Paley. Clearly the definition of Direct Costs is a matter of interpretation rather than a matter for the experts. However, although there is a specific reference to the split of the costs of the five individuals specifically mentioned, I do not read that the definition of Direct Costs as requiring the costs of an employee of Bloom to be deducted if that individual was in fact working for another group company. This is apparent from the opening

words of the definition which only includes costs "assigned to and directly associated with delivering sales".

293. Clearly salary costs for an employee who was working for another group company have nothing to do with the delivery of sales by Bloom. The explanation for the reference "for the avoidance of doubt" to the five named individuals whose split of costs is specifically dealt with is to ensure that part of the costs of those individuals are allocated to Bloom whether or not they in fact do any work for that company. This, for example, was relevant in the case of Mr Laflin who did no work at all for Bloom but 40% of his salary nonetheless had to be deducted from the amount of the contribution.

294. Mr Wigley suggests that the deduction should nonetheless be made as there is no evidence that the individuals in question in fact did any work for Jaywing Innovation. However, in circumstances where it is clear from the evidence that both Bloom and Jaywing Innovation have agreed the amount of the recharge, I do not accept this.

295. My conclusion is that this deduction should not be made.

Datacity

296. The experts agree that an invoice for £50,000 was raised by Bloom to Datacity on 31 March 2018. On the basis that it has not been shown in the audited accounts as an exceptional item, Mr Paley takes the view that this should form part of the Contribution.

297. Mr Richardson however suggests that the revenue may not be part of the ordinary trading performance of Bloom. The reason for this is that Bloom carried out work for Datacity between 2014 and 2018 without raising any invoices and so the work in question may not have been done in the 2017/18 period.

298. The background is that Datacity was not initially a formal legal entity but was a collaboration between Bloom and the Open Data Institute in Leeds. In September 2017, Datacity was incorporated as a company. It was proposed that Mr Craven and Mr Wadsworth would become investors in that company (which they did).

One result of this is that Datacity would be able to afford to pay for some of the services provided by Bloom.

299. Again, it is accepted that this issue is a matter of applying the facts to the terms of the SPA rather than being a point for a determination by the experts. There is however one aspect where the expert evidence is helpful. This relates to the accounting principles relating to the recognition of income. Normally income will be recognised in the year in which the work is carried out. However, the agreed evidence of both experts was that income could only be recognised if it was sufficiently certain to be received.

300. The result of this is that, even if work was done for Datacity prior to the 2017/18 financial year, it would not have been appropriate to recognise any revenue in earlier years if there had been no expectation that payment would be forthcoming. Based on the evidence, I have no doubt that Bloom would not have expected any revenues to be produced by the work done for Datacity before it was incorporated as a company in September 2017. On this basis, it would be appropriate to recognise the revenues in the 2017/18 financial period.

301. However, I still need to consider whether the revenues from Datacity are within the scope of ordinary trading. Mr Wigley submits they are not, given the fact that Mr Craven and Mr Wadsworth were investors in Datacity. It is not clear how much Mr Craven and Mr Wadsworth invested although Mr Craven referred in his evidence to an investment of £100,000. It is however clear that the ability to pay Bloom depended on their investment as, in early April 2018, Mr Craven instructed Mrs Dickinson not to send the invoice to Datacity as they hadn't quite finished making their investment.

302. Mr Craven denies that the use of the investment to pay Bloom was a condition of the investment. However, he accepts that it was clear that the investment would be used (in part) to pay Bloom for some of the work which had been done. His explanation for this was that Datacity needed to acquire ownership of the work which Bloom had carried out.

303. There is no evidence as to how much work was carried out for Datacity and at what point. The proposal prepared by Bloom in February 2018 recites that Bloom

had helped to develop the Datacity concept since 2014 and that Datacity had now reached a point where it could afford to pay for the services received.

304. Mr Craven's evidence in cross-examination was that he had been told only to charge for work done in the last 12 months and so this is what he did. However, despite the EY report in July 2018 querying when the work was actually carried out, no records have been produced to show when work was done and Mr Craven's explanation that the invoice was only for work done in the last 12 months is the first time he has put forward this suggestion. It is also noteworthy that, during cross-examination, Mr Craven acknowledged that much more of the work which had been done for Datacity was done prior to the start of the 2017/18 financial year than was done during that year.

305. In these circumstances, I do not accept that the revenues derived from Datacity represent ordinary trading performance on the part of Bloom. It is accepted that the majority of the work done by Bloom was carried out in earlier financial periods. Whilst it might be right, under accounting principles, to recognise the revenue in the 2017/18 financial year, it is not in my view ordinary trading performance for that financial year if the work was done at an earlier stage, particularly in circumstances where, as I infer from the facts I have set out, at the time the work was done, there was no expectation that it would ever be paid for.

306. Coupled with this, the only reason Datacity has been able to pay for the work is as a result of the investment made by Mr Craven. Even if it was not a condition of the investment that part of it would be used to pay for the work which Bloom had already done, it was clearly understood that this is what would happen. It is equally clear that Datacity could not have paid for the work but for the investment.

307. There is no evidence that Bloom generated comparable revenues prior to the sale to Jaywing nor that there was any expectation that, in future years, Bloom would generate revenues from clients funded by Mr Craven and Mr Wadsworth (or other Sellers). These are not therefore the sort of revenues that are likely to be repeated in the future and so including these revenues as part of the Contribution would not

give a fair reflection of the performance of the business when compared to a year in which there is no earn-out.

308. The £50,000 of revenue from Datacity should therefore be deducted as it does not constitute ordinary trading performance.

The Sipping Shed

309. The Sipping Shed is another company in which Mr Craven invested. Mr Wadsworth was considering making an investment but, in the end did not do so.

310. The management accounts include £15,000 of revenue from the Sipping Shed for work carried out in the 2017/18 financial year.

311. Mr Paley notes that Mr Craven notified Mr Shaw, Mr Lingard and Mr Sprot about the proposed investment and the fact that The Sipping Shed would use part of the investment to pay for marketing services and that Mr Craven was told that this should not be a problem as long as the work was on arms' length terms. On this basis and, bearing in mind that the revenue was not treated as an exceptional item in the audited accounts, he sees no reason for any adjustment to be made.

312. On the other hand, Mr Richardson considers that the revenue does not represent ordinary trading but, instead, is a contrived arrangement to try and boost the earn-out. He bases this on an email sent to Jaywing by the Managing Director of The Sipping Shed (Mr Hipshon) in October 2018 stating that:

> "Our funding was coming from three investors who were the major shareholders in Bloom Media. They had agreed a contract with Jaywing which allowed them to fund our business on the proviso we would funnel the money back in to ensure that the buyout target was met. This was signed off by solicitors to ensure it was legitimate. We placed the order and the work began."

313. Once more, whether this constitutes ordinary trading is not really a matter for the experts but is a question of applying the terms of the SPA to the facts.

314. Mr Craven's evidence was clear that his investment was not made on condition that the funds would be used to commission work from Bloom. To the extent Mr Hipshon's email might suggest otherwise he says it is simply wrong. He accepts

however that it was intended that The Sipping Shed would engage Bloom to perform the work given that Jaywing had agreed that this would not be a problem as long as the work was done on commercial terms.

315. However, even accepting this, my view is that these revenues were not part of the ordinary trading performance of Bloom for the relevant period. Even if it was not a condition of Mr Craven's investment that The Sipping Shed would commission work from Bloom, it was clearly the intention and expectation that this is what would happen. Had Mr Craven not made the investment, the inference must be that no work would have been commissioned from Bloom.

316. Generating revenues as a result of these sorts of investments cannot be described as ordinary trading given, as I have already mentioned, the fact that there is no evidence that such revenues have occurred in the past nor that they might be replicated in a future financial period where there was no potential earn-out.

317. The Claimants have not suggested that there is some sort of estoppel arising from Jaywing's apparent acceptance that this source of revenue could be pursued.

318. The £15,000 of revenue relating to the Sipping Shed should therefore be deducted from the amount of the Contribution.

Metals 4 U

319. Bloom carried out work for Metals 4 U to the value of £75,000 of which £66,000 was recognised in the 2017/18 financial year. Bloom encountered problems with the project (which became apparent in March 2018) which ultimately resulted in Bloom having to provide a credit note for the full £75,000 in February 2019 as well as incurring remediation costs in the region of £26,000. At the time of the EY report in July 2018, the anticipated remediation costs were approximately £10,000 and EY therefore suggested this as a deduction from the Contribution on the basis that the remediation costs should be recognised in the same financial period as the revenue.

320. Mr Richardson goes further than this and, having reviewed the documentation (and, in particular, a report produced in November 2018) takes the view that the

entire £66,000 of revenue should be deducted on the basis that Bloom took on a project which it never had the skills to implement. In his view, it does not therefore represent ordinary trading despite the fact that no provision was made against these revenues either in the management accounts nor in the audited accounts.

321. Largely on the basis of this last point, Mr Paley does not consider that any adjustment is appropriate in relation to these revenues.

322. Based on the evidence, particularly that given by Mr McCann, I am satisfied that, when the project for Metals 4 U was taken on, Bloom expected to be able to deliver the project. It was only later that problems arose as a result of the integration between the platform being used for the new system and the legacy systems operated by Metals 4 U. Mr Richardson accepted that, if Bloom initially thought it could undertake the project, his view as to whether the revenues constituted ordinary trading would be different.

323. On this basis, I do not consider it appropriate to make a deduction for the £66,000 of revenue relating to Metals 4 U. The decision to issue a credit note was taken well after the audited accounts were signed off in July 2018. Both experts confirmed that it would be very unusual to make an adjustment to the accounts for an invoice in respect of which a credit note was granted after the accounts had been signed off.

324. I do however consider it to be appropriate (and accepted by both experts) for a portion of the anticipated remediation costs to be recognised in the 2017/18 financial period. At the time the 2018 accounts were signed off, the anticipated costs were £10,000. As £66,000 of revenues out of a total of £75,000 were recognised in 2017/18, a similar proportion of the remediation costs should also be recognised in that period, resulting in a deduction of £8,800.

Conference costs

325. Both experts have allowed an addition to the Contribution for conference costs of £2,228 which have been deducted but which should have been included as

overhead (which, under the terms of the SPA, is not deductible). I agree that this should be added to the Contribution.

CWG accrued income

326. In their report, EY identified a £16,000 contingency in respect of work done for CWG. This contingency was included in both the management accounts and the audited accounts for 2017/18, thus reducing the level of sales recognised in that year. EY noted that they had not seen any evidence supporting the £16,000 contingency. On this basis, Mr Paley concluded that the revenue had simply been deferred in accordance with the alleged 2018 agreement and that it should therefore be added back to the Contribution.

327. Whilst Mr Richardson also had seen no evidence supporting the contingency, he however considered that no adjustment should be made given that the contingency appeared in both the management accounts and the audited accounts.

328. In fact, it transpired that there was correspondence from Mrs Dickinson to the auditors in June 2018 confirming that the £16,000 was a contingency "in case clients started querying in Q1". Despite this, Mr Paley continues to believe that the £16,000 should be added back given EY's conclusion that there was no justification for the provision.

329. It is also apparent that Mr Sprot did not consider that the contingency was necessary. In the earn-out statement prepared by Mr Sprot, he had added back the contingency on the basis that it is "not considered required".

330. Notwithstanding this, the terms of the SPA require that the Contribution be calculated in accordance with Bloom's accounts unless this is outside ordinary trading, is an exceptional item or relates to a release of revenues. The contingency does not fall within any of these items and so, on the basis it was included both in the management accounts and the audited accounts as a result of a specific decision taken at the time (as opposed to it being, for example, a mistake), it cannot form part of the Contribution. No adjustment should therefore be made in respect of this item.

Effect of adjustments

331. The net result of these adjustments (as shown in the appendix to this judgment) is that the contribution is £846,248. This falls short of the Base Plan Amount (£899,657) with the result that no Second Earn-out Payment is due. It also means that no Excess Earn-out Payment is due as the total Contribution for the two years is £1,865,815 which is less than the Burton Plan Amounts for those two years which total £1,898,844.

332. The result is that the Claimants are not entitled to any damages in respect of Jaywing's breach of the SPA.

333. I should mention briefly one further point which is that Mr Paley suggested that, if revenues were to be deducted, any associated costs should also be deducted from the expenses to get a true figure for the Contribution. This is relevant to the deductions for The Sipping Shed and Datacity revenues totalling £65,000. The problem is that there is no evidence as to the amount of the costs relating to those revenues.

334. In order for any payment to be due, the costs in question would need to be at least £33,000. Taking into account the fact that most of the Datacity work was done before the start of the 2017/18 financial period and that the costs of Bloom's employees are required to be included in any event (unless their costs have been recharged to another group company), I am satisfied that even if an allowance was made for the costs relating to these revenues, the Contribution would not be increased to a level which would result in any earn-out payments.

Conclusion

335. It will be apparent from what I have said that the Claimants' claim must be dismissed in its entirety. It is impossible not to have some sympathy for the position they found themselves in as it is clear that Mr Craven believed that Jaywing were onboard with a plan which would allow them to hit their earn-out target. There was however no agreement. The clear lesson, as in so many cases, is that, if a legally binding agreement is the intended outcome, it should always in some way be clearly recorded in writing.

APPENDIX

Second earn-out Contribution calculation

	£
Contribution per management accounts	**899,980**
(1) CWG Revenue Adjustment	-
(2) Salary Recharges	
(a) Alex Craven, Neil Lockwood, Dave Wood, Peter Laflin, Emma Dickinson	+23,613
(b) Amy Tootell, James Bell, Josh Finch, Matt Kerridge	-
(c) Josh Dean	(5,773)
(3) DataCity Revenue	(50,000)
(4) The Sipping Shed Sales	(15,000)
(5) Metals4U Remediation Costs	(8,800)
(6) Conference Costs	+2,228
(7) CWG Accrued Income	-
Adjusted total Contribution	**846,248**