Neutral Citation Number: [2020] EWHC 3190 (Comm)

Case No: CC-2019-MAN-000054

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

Judgment handed down in private at 10am on 24/11/2020

Before:

HIS HONOUR JUDGE PEARCE

- -

Between :

THE ANDERSON GROUP LIMITED	**Claimant/Part 20 Defendant**
- and -	
Mr MICHAEL JOHN BRAGG	**Defendant/Part 20 Claimant**

- -

- -

WILLIAM HARMAN (instructed by **DLA Piper UK LLP**) for the **Claimant/Part 20 Defendant**

MARTIN BUDWORTH (instructed by **JMW Solicitors LLP**) for the **Defendant/Part 20 Claimant**

Hearing dates: 12 and 13 November 2020

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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.

His Honour Judge Pearce:

Introduction

1. This claim was originally brought as an action by Anderson, the Claimant/Part 20 Defendant, alleging breaches of warranty in a Share Purchase Agreement that it entered into with Mr Bragg, the Defendant/Part 20 Claimant. A Counterclaim was brought by way of amendment to the original Defence, following the disclosure of what is described below as "the Settlement Agreement" alleging that, pursuant to the Share Purchase Agreement, Anderson was obliged to repay monies to Mr Bragg following termination of the employment of Mr John Price.

2. This case has proceeded to trial on the counterclaim, the Claimant/Part 20 Defendant having discontinued the original claim. To avoid confusion, I refer to the parties as "Anderson" on the one hand and "Mr Bragg" on the other. Page references are to electronic pages within the Core Bundle ("CB"), Main Bundle ("MB") and Disclosure bundles 1 to 4 ("DB1" etc.) in the format **Bundle/Page Number**.

3. During his working life, Mr Bragg built up a company called Alloy Bodies Limited ("ABL"), whose business was vehicle body building. He was the sole shareholder in the company and on 23 May 2017 he sold his shareholding to Anderson pursuant to a contract called "the Share Purchase Agreement." At the time of sale, Mr Bragg wished to reward three senior employees of ABL, Ms Jackie Murphy (then the Finance Director), Mr Simon Morgan (Sales Director) and Mr John Price (Operations Manager). (Collectively these three will be described as "the Managers", although this case is only concerned with payments to Mr Price). However Anderson wanted to retain the services of the Managers. Accordingly, by the Share Purchase Agreement, Mr Bragg left £1.6 million in the company on sale as what was called "retained consideration" with a view to it being paid equally to the Managers (£533,333 to each) by instalments as a loyalty bonus. The Managers were to enter into new contracts of employment with ABL. In broad terms, if any of the three employees ceased to be entitled to their share

(or part of their share) of the Retained Consideration in accordance with their new contract of employment, then to that extent, the money became repayable to Mr Bragg. Thus, if the Retained Consideration was not paid to the Managers, it was repaid to Mr Bragg.

4. The relevant contract in the case of Mr Price ("the Service Agreement") provided that he was entitled to loyalty bonuses comprising an initial payment of £66,671 and 14 further quarterly payments of £33,333. However, if his employment was terminated whether by ABL or Mr Price, his entitlement to the loyalty bonus ceased from the date on which his employment terminated, unless his termination fell in what is called a "Good Leaver" exception. Thus the agreement achieved Mr Bragg's desire to pay monies to Mr Price (rather than to Anderson) whilst avoiding Mr Price having an incentive to leave the company's employment in less than 3½ years.

5. In 2019, discussions took place between Ms Murphy, by then Managing Director of ABL, and Mr Price, who had been made Operations Director, which led to agreed terms for the termination of his employment. This took effect from 31 December 2019. At that time, three of the instalments of the loyalty bonus, totalling £133,332, remained outstanding. In an agreement entered into by ABL and Mr Price on 19 December 2019, stated to be in full and final settlement of all employment related claims that Mr Price might have against ABL arising from his employment or its termination ("the Settlement Agreement"), it was agreed that, amongst other things, a payment of £140,000 would be made by ABL to him. Anderson contend that this comprises the balance of the loyalty bonus plus a further sum of £6,668.

6. Anderson has failed to repay any of the retained consideration to Mr Bragg. It is Mr Bragg's case that the effect of the termination of Mr Price's employment was that the remaining instalments of the bonus were not due to Mr Price and hence Anderson is obliged to repay them. Anderson contend that Mr Price's termination of employment fell within the Good Leaver exception (or is to be treated as such) and hence they are not required to repay any part of the retained consideration relating to his employment.

The Written Terms of the Relevant Contracts

7. It is necessary to consider the terms of the three contracts identified above:

   (a) The contract by which Anderson purchased Mr Bragg's shareholding in ABL ("the Share Purchase Agreement");

   (b) The Mr Price's contract of employment with ABL ("the Service Agreement");

   (c) The contract arising from termination of Mr Price's employment with ABL ("the Settlement Agreement").

8. The Share Purchase Agreement is dated 23 May 2017 and signed by Mr Bragg on his behalf and Irvine Anderson on behalf of Anderson. The relevant terms of the Share Purchase Agreement are:

   (a) By the preamble, "Seller" is Mr Bragg is defined as Mr Bragg; "Purchaser" as Anderson; and "Company" as ABL.

   (b) Clause 1.1:

      i. *"…**"Agreed Form",** in relation to a document, means the form approved and for identification purposes initialled by or on behalf of the Seller and Purchaser"*

      ii. *"…**"Managers"** means each of Jackie Murphy, John Price and Simon Morgan"*

      iii. *"…**"Retained consideration"** means the sum of £1,600,000 in aggregate to be retained by the Buyer at the request of the Seller and to be paid by the Company to the Managers as loyalty bonuses in the proportions and pursuant to the terms of their respective Service Agreements entered into on the date of this agreement, or to be repaid to the Seller in the manner described in clause 3.3"*

      iv. *"…**"Service Agreements"** means the service agreements in the Agreed Form to be entered into on completion between the company and each of (a) Jackie Murphy, (b) John Price and (c) Simon Morgan."*

(c) Clause 3.3: "*If in accordance with the provisions of the Service Agreement of a Manager, such Manager ceases to have any further entitlement to all or any of the Retained Consideration (**"the Unpaid Retained Consideration"**), the Buyer shall pay to the Seller an amount (to be paid gross) equal to such Unpaid Retained Consideration in respect of such Manager, any such payment to be made in the manner described in clause 16 and to be paid within three Business Days of the date on which such Manager ceases to be employed by the Company. The Buyer undertakes to notify the Seller within three Business Days of the date when such Manager cease to have any further entitlement to all or any part of the Retained Consideration pursuant to the terms of the Manager's Service Agreement."*

9. Mr Price's contract of employment with ABL is signed by Tim Ward (who was the Chief Executive of Anderson) on behalf of ABL and by Mr Price himself. In the preamble, "Company" is defined as meaning ABL and "You" as Mr Price. It is undated save for "2017" at its head, though at paragraph 20 of his witness statement, Mr Price tells us that he first signed it on 23 May 2017. The Loyalty Bonus is dealt with at section 9. The relevant clauses are:

(a) Clause: 9.1: "*Subject to clauses 9.2 to 9.6 (inclusive), You shall be entitled to receive a gross liability bonus payment of a maximum of £533,333 subject to any statutory deductions) ("**Loyalty Bonus"**) which shall be paid in instalments as follows:*

9.1.1 an initial payment of £66,671 (subject to any statutory deduction) paid with Your first salary payment after completion of the Sale; and thereafter

*9.1.2 14 further instalments of £33,333 (subject to statutory deductions) payable on a quarterly basis with your salary payments in January, April, July and October of each relevant year (subject to any expedited payments under clause 9.2 below) until the entire amount of the loyalty bonus has been paid (**"Instalments"**).*

(b) Clause 9.2 deals with circumstances in which Mr Price might have become entitled to the expedited payment of instalments. It has no relevant to the issues in this case.

(c) Clause 9.3: "*If either You or the Company terminate or serves notice to terminate your employment under this agreement at any time and for any reason then subject to clause 9.4 below:*

9.3.1 You will not be entitled to receive payment of any further Instalments with effect from the date on which your employment terminates and the balance of the Loyalty Bonus as at such date shall be forfeit; and

9.3.2 the provisions set out in clause 9.2 will no longer apply and You shall not be entitled to (and will forfeit your right to) any future payments under such clause;"

(d) Clause 9.4: *"If your employment terminates or either you or the Company serves notice of termination and you are a Good Leaver then:*

9.4.1 You shall continue to receive payments of the Instalments under clause 9.1.2 in accordance with the timescales under that clause, subject to and conditional on your ongoing compliance with the terms and conditions of this agreement (including (without limitation) clauses 22, 23, 24 and 19 (if applicable));

9.4.2 you will not be eligible to receive payment of any expedited Instalments under clause 9.2"

(e) Clause 9.5: "*For the purpose of this clause 9, You will be considered to be a "**Good Leaver**":*

9.5.1 if the Company terminates your employment by reason of redundancy (as defined in section 139(1) of the Employment Rights Act 1996);

9.5.2 in the event of your death;

9.5.3 if the Company terminates your employment by reason of your long-term absence from the Company due to ill-health for a continuous period of not less than 12 months, subject to the Company received

written independent medical evidence confirming that you are permanently incapacitated from performing your services for the Company;

9.5.4 if you are constructively unfairly dismissed by the Company as determined by a court and/or Employment Tribunal of competent jurisdiction in England and Wales provided that each party has exhausted any appeal stage relating to any proceedings and You have exhausted all internal procedures of the Company prior to bringing such proceedings; or

9.5.5 if you are unfairly dismissed but the Company (pursuant to section 94 of the Employment Rights Act 1996) as determined by an Employment Tribunal of competent jurisdiction in England and Wales provided that each party has exhausted any appeal stage relating to any proceedings and You have exhausted all internal procedures of the Company prior to bringing such proceedings but you shall only be deemed to be a Good Leaver in such circumstances if the relevant Employment Tribunal makes a finding that the Company did not have a potentially fair reason to dismiss You under Section 98 of the Employment Rights Act 1996."

10. It is also relevant to note that the Service Agreement contained terms that were intended to survive the termination of Mr Price's employment, in particular:

    (a) Clause 22, which dealt with the use of Confidential Information;

    (b) Clause 24.4, which restricted Mr Price from holding himself out as being associated with ABL or other companies in the same group.

    (c) Other parts of clause 24, which for a period of 12 months following service of notice of termination of Mr Price's employment, restricted him from soliciting, canvassing or dealing with various customers or potential customers of ABL; seeking to entice away, employ or entire into partnership with any of certain employees of ABL; being involved in carrying on certain business in competition with ABL; or endeavouring to cause certain suppliers of ABL to cease to supply ABL or to supply it on materially detrimental terms.

11. Clause 31 of the Service Agreement was in these terms:

    "***VARIATION***

    The company reserves the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any changes as soon as possible and in any event within one month of the change."

12. The Settlement Agreement is dated 19 December 2019 and is signed by Jackie Murphy on behalf of ABL, Mr Price and a Solicitor, who confirms that Mr Price has been given independent advice. By its preamble, ABL is identified as "the Company" and Mr Price as "the Employee". The relevant terms of the Settlement Agreement are:

    (a) Clause 1: "*The employment of the Employee by the Company will terminate on 31 December 2019 ("The Termination Date"). The Employee will continue to be bound by their contract of employment until the Termination date."*

    (b) Clause 2: "*This agreement is in full and final settlement of all employment related claims that the Employee has and/or may have against the Company arising out of their employment of the termination of employment whether or not they are or could be in the contemplation of the parties at the time of signing this agreement."*

    (c) Clause 3: "*The company shall… 3.2 Without admission of any liability as claimed or otherwise, pay to the employee by way of compensation for the termination of employment and loss of office the sum of £140,000.00 (one hundred and forty thousand pounds) ("The Payment").*

13. A further clause of relevance in the Settlement Agreement is clause 4.15, which provides that Mr Price "*shall … continue to be bound by the terms and conditions in* [his] *contract of employment at clause 24 which relate to restrictive covenants save that the period of restriction set out at 2.4.3.1 will reduce to 6 months from the notice Date."*

14. In addition to these three contracts, Anderson contends that there was a fourth contract of relevance between the parties which is, according to paragraph 19 of Anderson' Amended Defence to Counterclaim, contained in or evidenced by an

email from Ms Murphy to Mr Price dated 29 November 2019 at **DB3/701**. The email states:

> "*Your employment: Confidential settlement proposal*
>
> *As requested I write to outline the Company's offer to terminate your employment under a settlement agreement.*
>
> *The terms we would like to offer you are as follows;*
>
> 1. *Payment for any accrued and untaken holidays (if any due) subject to tax and NI*
> 2. *Payment in lieu of 4 months' notice totalling £35,000 subject to tax and NI*
> 3. *You would receive an agreed reference covering your employment with us.*
> 4. *Finally, I confirm that you would be considered as a good leaver and will receive all outstanding payment of the sale bonus owing to you when due.*
>
> *...*
>
> *I look forward to hearing from you on the proposal set out above.*"

15. Anderson pleads that this is either evidence of a contract or amounts to a contract, pursuant to which ABL and Mr Price "*agreed that on termination Mr Price would be treated as a Good Leaver and would be entitled to all outstanding loyalty bonus payments (the "Good Leaver Agreement").*

The Issues

16. Mr Harman on behalf of Anderson identifies an overarching issue namely whether Mr Price ceased to have any further entitlement to retained consideration following the termination of his employment with the company. He describes this as engaging three issues:

    (a) What payments were actually made to Mr Price before and after the termination of his employment ("issue 1");

    (b) Were the payments made to Mr Price after the Settlement Agreement sums retained by ABL at the request of Mr Bragg to be paid to the Managers as loyalty bonuses? ("issue 2");

(c) Were such payments made "in the proportions and pursuant to the terms of" Mr Price's service agreement ("issue 3").

17. Issue 1 is formally in dispute, though there is no evidence to contradict the case put by Anderson as summarised and its case is clearly proved.

18. For reasons set out below, the determination of issue 2 in Anderson's favour is also clear on the evidence, at least in so far as the issue relates to the intention of the makers of the Settlement Agreement as to how the payments were calculated.

19. Issue 3 lies at the heart of the dispute between the parties. For reasons set out below, it involves a number of sub-issues and it is convenient to break it down into sub-issues:

(a) On the true interpretation of Share Purchase Agreement, is the reference to the Service Agreement of Mr Price (and other Managers) a reference to the agreement as originally entered into by him or to the agreement as varied from time to time? (Issue 3.1)

(b) Did the Good Leaver Agreement vary Mr Price's Service Agreement in respect of his entitlement to loyalty bonuses? (Issue 3.2)

(c) Did the Settlement Agreement vary Mr Price's Service Agreement in respect of his entitlement to loyalty bonuses? (Issue 3.3)

(d) Did ABL vary Mr Price's Service Agreement under Clause 31 in respect of his entitlement to loyalty bonuses? (Issue 3.4)

(e) Regardless of whether the Service Agreement was varied, was Mr Price by reason of the Settlement Agreement entitled to the loyalty bonus in a manner that is properly interpreted as being *"in accordance with the provisions of the Service Agreement."* (Issue 3.5)

20. It should be noted that there is some inconsistency between the exact language of clauses 1.1 and 3.3 of the Share Purchase Agreement, as noted at paragraph 62 of Mr Harman's skeleton argument. Like him I do not consider there is any material difference in the wording and I am satisfied that the definition of the issues as above accords with the wording of each agreement.

The Relevant Law

21. The correct approach to the interpretation of written contracts has been considered most recently by the Supreme Court in the cases of Wood v Capita Insurance Services Limited [2017] AC 1173 and Arnold v Britton [2015] AC 1619. I gratefully adopt the summary of those decisions from Mr Harman's skeleton argument.

(a) The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement (Wood v Capita per Lord Hodge at paragraph 10);

(b) This is not a literalist exercise focused solely on a parsing of the wording of the particular clause; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning (Wood v Capita per Lord Hodge at paragraph 10);

(c) Interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense (Wood v Capita per Lord Hodge at paragraph 11 citing Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 per Lord Clarke at paragraph 21);

(d) In striking the balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of the drafting and must be alive to the possibility that one side may have agreed to something which in hindsight did not serve it interest (Wood v Capita per Lord Hodge at paragraph 11);

(e) The unitary exercise of interpretation involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated (Arnold v Britton per Lord Hodge at paragraph 77); and

(f) Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and

because they have been negotiated and prepared with the assistance of skilled professional assistance; but negotiators of complex formal contracts may often not achieve a logical and coherent text and there may often be provisions in a detailed professionally drawn contract which lack clarity such that the court may be particularly helped by considering the factual matrix (Wood v Capita per Lord Hodge at paragraph 13).

22. In Arnold v Britton [2015] UKSC 36, Lord Neuberger summarised the process at paragraph 15 of his judgment:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

23. It is well established that pre-contractual negotiations (about which there was a fair deal of evidence in this case) are not admissible as an aid to construction – see Prenn v Simmonds [1971] 1 WLR 1371, followed by the house of Lords in Chartbrook Ltd v Persimmon Homes. In his judgment in Chartbrook at paragraph 42, Lord Hoffman stated that this rule "*excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes; for example, to establish that a fact which may be relevant as background was known to the parties, to support a claim for rectification or estoppel."*

The Trial

24. The trial took place on 12th and 13th November 2020, with all participants taking part by video. Mr Bragg gave evidence on his own behalf. Mr Ward, formally the

Chief Executive of Anderson, Ms Murphy, still the Managing Director of ABL, and Mr Price gave evidence for the Defendant. All were cross examined.

25. My impression was that all four witnesses were straightforward. At no point did I form the impression that any were deliberately trying to deceive the Court and indeed on many issues their evidence was consistent. There are, as is typical in contractual disputes of this nature, differences of emphasis and interpretion which tend to reflect the viewpoint of their side of the litigation. In so far as such differences are or may be relevant, it is necessary to make certain factual findings.

Mr Bragg's Case

26. Mr Bragg contends that the resolution of the issues in this case is straightforward:

    (a) The Service Agreement contains, at clause 9, a clear statement of the circumstances in which Mr Price was entitled to payment of instalments of the Loyalty Bonus.

    (b) That entitlement ceased in the event of termination of his employment save in the limited defined circumstances in which Mr Price was a "Good Leaver".

    (c) Mr Price was not a "Good Leaver" within any of the criteria set out at Clause 9.5 of the Service Agreement.

    (d) Accordingly, on termination of his employment he ceased to have an entitlement to the reminder of his loyalty bonus;

    (e) In accordance with the terms of the Share Purchase Agreement, Anderson therefore became liable to repay to Mr Bragg that element of the retained Consideration that correspond to the unpaid loyalty bonuses.

27. On Issue 2, Mr Bragg does not accept that the sum of £140,00 payable pursuant to the Settlement Agreement reflected in part unpaid loyalty bonuses. But even if it did, he says that the payment was not and could not in fact be a payment of bonuses pursuant to the Service Agreement, because Mr Price was not a "Good Leaver". It was not open to Mr Price and ABL to agree a variation of this definition, and, even if it were, they did not in fact do so; nor could (or did) ABL unilaterally vary the Service Agreement pursuant to Clause 31.

28. Thus, however Mr Price and ABL thought the figure of £140,000 in the settlement agreement was made up, in fact, this was not a payment falling within the "Good Leaver" exception and the corresponding amount was therefore due for repayment by Anderson to Mr Bragg under the terms of the Share Purchase Agreement.

29. Thus Mr Bragg contends that the case fails on issues 2 and 3. On issue 1, he puts Anderson to proof but does not advance a positive case.

Anderson's case

30. Anderson says that, based on Mr Price's evidence below, issue 1 should clearly be resolved in its favour. I agree for reasons summarised below. It is not necessary to consider that case any further here.

31. On Issue 2, Anderson contends that it is clear that both Ms Murphy and Mr Price, in negotiating the Settlement Agreement, intended to include the outstanding loyalty bonuses within the settlement figure and that therefore this issue should be answered in its favour.

32. On issue 3, Anderson puts its case that Mr Price was entitled to the loyalty bonus on termination of his employment on three bases

    (a) Such entitlement was in accordance with the terms of his Service Agreement as varied by the Good Leaver Agreement and/or the Settlement Agreement.

    (b) Such entitlement was pursuant to or in accordance with the Service Agreement as varied pursuant to Clause 31 of the Service Agreement.

    (c) Such entitlement was in accordance with the Settlement Agreement and was thereby an entitlement to loyalty bonus pursuant to or in accordance with the Service Agreement within the meaning of the Share Purchase Agreement. As it is put in paragraph 64.3 the skeleton argument on behalf of Anderson:

        "*1. In this context, the phrases "pursuant to" and "in accordance with" mean "not in breach of" the Service Agreement; and*

        2. In circumstances where the Settlement Agreement was an agreement between the same parties as the Service Agreement, it cannot

> *sensibly be said that the Settlement Agreement was "in breach of" the Service Agreement."*

The point is worded slightly differently at paragraph 17(c)(i) of Anderson's Amended Defence to Counterclaim: *"On a proper construction of the Service Agreement, clause 9.5 does not contain an exhaustive list of the circumstances in which Mr Price would be treated as a Good Leaver. For example, Mr Price could be treated as a Good Leaver by agreement between the parties."* This formulation is probably apt to cover both arguments as to variation and as to the meaning of "*pursuant to"* and "*in accordance with*."

33. The determination of the first and second of these supposes that the reference in clause 3.3 of the Share Purchase Agreement to a Manager ceasing to have an entitlement to his or her share of the Retained Consideration *"in accordance with the provisions of the Service Agreement of a Manager"* is a reference to the Service Agreement as originally agreed with the relevant person or is a reference to the Agreement as might be varied from time to time.

34. Thus Issue 3 can usefully be broken down into the sub-issues identified above:

(a) On the true interpretation of the Share Purchase Agreement, is the reference to the Service Agreement of Mr Price (and other Managers) a reference to the agreement as originally entered into by him or to the agreement as varied from time to time? (Issue 3.1)

(b) Did the Good Leaver Agreement vary Mr Price's Service Agreement in respect of his entitlement to loyalty bonuses? (Issue 3.2)

(c) Did the Settlement Agreement vary Mr Price's Service Agreement in respect of his entitlement to loyalty bonuses? (Issue 3.3)

(d) Did ABL vary Mr Price's Service Agreement under Clause 31 in respect of his entitlement to loyalty bonuses? (Issue 3.4)

(e) Regardless of whether the Service Agreement was varied, was Mr Price by reason of the Settlement Agreement entitled to the loyalty bonus in a manner that is properly interpreted as being *"in accordance with the provisions of the Service Agreement?"* (Issue 3.5)

The evidence

35. It was common ground between Mr Bragg and the witnesses for the Defendant that Mr Bragg held the Managers in high regard. They had been involved in the success of ABL in the years preceding the sale of the business to Anderson. Mr Bragg would see the three of them socially, including, in Mr Price's case, going on skiing holidays together. Ms Murphy and Mr Price had given evidence that was supportive of Mr Bragg in litigation between him and a former co-owner of ABL in which Mr Bragg was accused of dishonesty.

36. Further, Ms Murphy and Mr Morgan, though not Mr Price, had been included in discussions with him relating to a possible management buyout of ABL in around 2015/2016. Ultimately the plan for a management buyout foundered because the management team was not able to raise sufficient money to satisfy Mr Bragg's asking price.

37. In early 2017, Mr Bragg and Anderson began to negotiate the potential sale of ABL. By this time, Mr Bragg had made clear that he wanted to reward the Managers. Equally however Anderson wanted the Managers to remain in the business. It is clear that various means of paying the bonuses to the Managers was contemplated. As well as Mr Bragg's wish to ensure that Anderson did not profit from the early departure of the Managers and Anderson's desire to provide an incentive for loyalty on their part, other issues came into play including the tax implications of any scheme. Alternative suggestions included some kind of share option scheme and the possibility of using entrepreneurial tax relief. It would appear also to be the case from Ms Murphy's evidence that one factor in the discussion of the appropriate mechanism for the payment may have been that the value of ABL would have been enhanced by the intended bonus monies being left in the company at the time of sale and being paid out over a period of a few years. This would likely have been valuable to Mr Bragg in negotiating the sale price.

38. Mr Bragg's evidence was that he knew from the beginning of his negotiations with Anderson that they would not have been happy with him paying a lump sum by way of bonus to the Managers. He said that his accountants had made clear to him that no buyer would have been agreeable to the payment of a lump sum for the very reason that Anderson would not accept this, namely that it created a

situation in which it was easy for senior members of the management team to leave at the time of transition of ownership of the business, the very point when continuity was most needed. He disagreed with the statements of Mr Ward (paragraph 14) and Ms Murphy (paragraphs 11 and 12) that the requirement of payment over a period of time rather than a lump sum came specifically from Anderson. In any event, he wanted to ensure that, if the Managers did not receive the money because they left ABL before they had received the total of their bonuses, the balance of the money came back to him.

39. This difference is of no more than minimal relevance to this case. Whilst it may be in Mr Bragg's interest to contend that he knew from an early stage that payment was going to have to be deferred, he does not dispute that it was his primary intention that, in due course, the entirety of the loyalty bonuses be paid to the Managers and that repayment to him of any outstanding balance was only a secondary point, simply ensuring that Anderson should not benefit from any parting of ways between them and the Managers. In any event, both Ms Murphy and Mr Price gave evidence to the effect that, when they were first made aware of the potential for money to be paid out as bonuses, the proposal involved payment out over a number of years (see paragraph 11 in Ms Murphy's statement and paragraph 12 in Mr Ward's statement). Thus, even if there was a time when Mr Bragg contemplated the payment out of the bonuses as a lump sum, that idea cannot have been rejected any later than when he seriously started to negotiate with Anderson for the sale of ABL.

40. Again there is common ground in the evidence that Mr Ward took a lead on the employer's behalf in negotiating the terms of the new Service Agreements that were to take effect between the Managers and ABL following completion of the Share Purchase Agreement and that Ms Murphy took the lead for the employees.

41. It was clear from the evidence both of Mr Ward and Ms Murphy that the Managers believed that they should have their money up front, or at least paid over a short period of time, whereas that Mr Ward wanted a prolonged period over which the payments were deferred. Eventually they reached a compromise at payment over 3½ years. Further, there was negotiation as to which circumstances of termination of employment of the Managers would give rise to the right to payment of the money in any event. The Managers wished the money to be

payable in any circumstances other than termination of employment on the grounds of gross misconduct. This was not acceptable to Mr Ward because he was concerned that termination on other grounds such as underperformance should equally deprive the Managers of the right to the bonus, so as to ensure their loyalty to the business. As Mr Ward put it during cross examination, "*I did not want anyone to sit back – to take the money and not work.*" Ms Murphy's evidence was that, whilst she felt that the bonus should only be foregone in the case of termination of employment for gross misconduct, she was ultimately happy with the wording agreed because she had no intention of leaving the company. Her greater concern was to ensure that the position of the Managers was enhanced if ABL performed well. (That was achieved through the terms of clause 9.2 of the Service Agreement, referred to in passing above.)

42. On 18 May 2017, Ms Wendy Harrison of DLA Piper Solicitors (representing Anderson in the negotiations) sent to Ms Percival of BDO (accountants advising Mr Bragg) an email that appears at **DB2/101**, that includes within it the draft of clause 9 of the proposed new service agreements for the Managers relating to the payment of the loyalty bonuses following a discussion between the two of them. The draft of clause 9 is said to be sent "*for your information*" and it is not entirely clear whether Ms Percival asked for it or Ms Harrison volunteered it. In any event, the result was that Mr Bragg had access to the draft of clause 9 before entering into the Share Purchase Agreement.

43. On the next day, 19 May 2017, Ms Murphy and Mr Ward had a meeting at which the final terms of the Service Agreement were agreed. That agreement is evidenced by an email from Mr Ward on the morning of 20 May 2017 responding to a query from Ms Percival as to how things had gone with "Jackie" (i.e. Ms Murphy) the previous night and the succinct reply "sorted" (**DB2/191**).

44. Mr Bragg's evidence was that no further drafts nor the finalised Service Agreements was available to him before completion of the Share Purchase Agreement, notwithstanding the reference to an "Agreed Form" of such contracts which might be supposed to mean that a form was agreed before the SPA took effect. Mr Bragg stated that, prior to but on the morning of completion of the SPA, Mr Ward had telephoned him to say that everything was agreed with the Managers though not at that time signed. He had understood that the agreement

on the part of the Service Agreements that affected him, namely the terms of payment of the loyalty bonus, was as the text that had been emailed to him on 18 May 2017 as referred to above. Mr Bragg accepted that Mr Ward might have been right to say that it was clean copies rather than signed copies that were being awaited. In any event. Mr Bragg accepted that he had not asked to see finalised and executed copies of the agreements and had simply accepted that they would have been sent in due course to his solicitors as part of the "transaction bible."

45. Of course the fact that Mr Bragg had not seen the final version of the Service Agreements meant that he was not in a position to know whether Clause 9 was reproduced in the same form in the finalised Agreements. In fact, it was to all intents and purposes identical (although there was a slight change in paragraph cross-referencing due presumably to changes in other parts of the agreement).

46. Mr Ward's account of the state of documentation at the time of completion of the SPA was similar but not identical. He said he thought that he had spoken to Mr Bragg about this on the day before completion. He thought that the Service Agreements were signed by the Managers on the day of completion (with which Ms Murphy and Mr Price agreed), but these were not "clean" copies in that they contained track changes and Mr Ward said that he told Mr Bragg that he would get clean copies sent to him later.

47. There was some difference as to the extent to which the wording of clause 3.3 of the Share Purchase Agreement was a late piece of drafting. Mr Ward's evidence was that the mechanism for re-payment was "*a bit of an afterthought*" and that the clause was drafted late on by his solicitors. Certainly, the email from Ms Harrison dated 18 May 2017 at **DB2/101** referred to above appears to indicate that clause had not been drafted by that date.

48. Ms Murphy described how Mr Price's performance had declined as a result, she thought, of his ill health. She came to the view during 2019 that Mr Price was not able to fulfil his role in the company and she began to contemplate him leaving. She recruited a potential replacement then approached Mr Price about his leaving. To deal with this, she took advice from Mr John Bloor of EBS Law, a company who advise on employment law.

49. Mr Bloor emailed Ms Murphy on 27 September 2019, attaching a proposed letter containing potential terms for a settlement agreement. The email is at **DB3/662**, the letter at **DB3/665**. This letter which was in draft form only and did not contain figures, included the words "*Finally, I confirm that you will receive all outstanding payments of the sale bonus due to you.*"

50. Ms Murphy obtained a copy of Mr Price's Service Agreement then, on 28 November 2019, she handed to Mr Price a letter that had been drafted by Mr Bloor. The letter had been sent by Mr Bloor in draft under cover of an email (**DB3/696**) advising Ms Murphy to suggest that Mr Price read the letter outside of any meeting to avoid "*an emotional response*". The email goes on "*legally you are unable to put him under any pressure to accept the agreement. That said I am sure you could gently weave in during discussion at a subsequent meeting that an agreed exit, unlike dismissal due to performance and not being then considered a good leaver, would guarantee him a bonus.*"

51. A copy of the letter given to Mr Price appears at **DB3/698.** In summary, the letter expresses concern about Mr Price's performance and raises the possibility of a settlement agreement being negotiated "*to bring our relationship to an end.*" In default of such agreement, the possibility of using the disciplinary procedure to manage capability is raised.

52. Mr Price's case was that, by 2019, he was already thinking of leaving ABL on account of his health issues. His plan had been to work a further year, but he said that he saw benefits in Ms Murphy having a younger management team around her and he saw the offer of termination of his employment on the appropriate terms as an opportunity for him.

53. On the following day, 29 November 2019, Mr Price spoke to Ms Murphy, asking her to put the company's offer in writing. Her evidence is that she told Mr Price that the offer would include the payment of the outstanding bonus. In cross examination she said that she did not consider that Mr Price's employment might terminate in circumstances where he was not entitled to his bonus since he was never going to be dismissed on grounds of gross misconduct. She stated that she did not and would not have put to Mr Price what Mr Bloor had suggested in his email at **DB3/696** as to suggesting that termination on performance grounds

would affect his right to the bonuses since that would have been, in her words, to "*push him into a corner.*"

54. Ms Murphy was keen to know what Mr Price's expectations were in terms of an agreed payment figure on termination of his employment. She knew that he was entitled to his 6 months' notice pay and, as noted above, she believed that he was entitled to his outstanding loyalty bonus. The rest was, as she put it, "*up for grabs*."

55. As at the time of these negotiations, the evidence of Mr Price was that he had been paid £400,001 by way of instalments of the loyalty bonus, leaving £133,332 of the total £533,333. The figures are set out at paragraph 37 of Mr Price's statement and are supported by payslips. The figures were not challenged during the trial.

56. Mr Price's evidence of the meeting on 29 November 2019 was that he could not recall the issue of "Good Leaver" status being discussed. Subsequently, he said that he had calculated that he ought to be due the balance of his salary to the end of the month, (£3,482), 6 months' pay in lieu of notice (£35,000) and the balance of the unpaid bonuses (£133,332). He in fact wanted a full year's net salary of £45,000 (to take him to the end of 2020 when he was contemplating retiring in any event). The ultimate settlement agreement gave him his strict entitlement by virtue of clauses 3.1, 3.2, 3.3 and 3.4, with the addition under clause 3.2 of the further sum of £6,668. He was unable to explain where that figure had come from, although it would appear to reflect the difference between Mr Price's expectation of one years' net salary and the figure of 6 months' gross salary. (Since the 6 months' gross pay allowed in clause 3.4 of the settlement agreement was in fact subject to tax and national insurance, it might be thought that Mr Price did not in fact receive what he was anticipating and that he should have sought an additional payment which net of any tax payable on the compensation package reflected the difference between 12 months' net pay and 6 months' net pay. However, this is not relevant to the dispute between the parties). In any event, the total compensation package in the Settlement Agreement represented a figure with which he was happy.

57. During subsequent negotiations, the draft agreement at **DB4/8** was drawn up. This was apparently sent to Mr Price under cover of a letter of 16 December 2019 (**DB4/6**). It is not disputed to be a draft prepared by ABL and states the compensation payable to Mr Price for termination of his office to be £113,482, that is to say less than the amount of the outstanding bonuses. Counsel for Mr Bragg pointed to this as evidence of the fact that the payment of £140,000 was not intended to be payment of the loyalty bonuses. However, Ms Murphy's evidence was that the calculation in this draft was a mistake, in that it omitted the payment of £30,000 "free of tax and national insurance" referred to in clause 3.2 of this draft.

58. During the course of negotiations, the length of the restrictive covenants was discussed. These would, by the terms of clause 24 of the Service Agreement, have lasted for 12 months from the date of service of notice of termination of employment. Their length was reduced to 6 months by agreement. Other than this, Mr Price's expectations were close to the amount that Ms Murphy believed he was entitled to by strict contractual rights on termination of his employment without including any further compensation for termination of his employment. She was happy to agree to this. She set out her breakdown of the figure to be paid to Mr Price in a document at **DB4/97**. This included what she described as "*additional payment agreed between JM/JP"* of £10,150. This appears to be a grossed up figure equivalent to the figure of £6,668, being the difference between the outstanding bonus of £133,332 and the actual payment on termination by clause 3.2 of the Settlement Agreement of £140,000.

59. In his witness statement at paragraphs 62 and 63 of his statement, Mr Bragg stated that Anderson and/or ABL had "*engineered an exit*" of the Mr Price. In his statement at paragraph 63, he speaks of Anderson using "*my money … to entice Mr Price to leave the company immediately due to underperformance."* These were sentiments that he stood by in cross examination. Although this perception may be understandable in that at least in retrospect it appears that an attempt to use the retained consideration to fund the termination of Mr Price's employment was a convenient way to achieve his departure at minimal cost to ABL, his assertions do not advance the case beyond showing that there is more than one way to view what happened in the settlement negotiations.

60. It was put to Mr Ward in cross examination that there had been a number of mis-statements about issues relating to the loyalty bonus on behalf of Anderson during the litigation both on Anderson's original claim and following the amendment of Mr Bragg's defence to include this counterclaim:

(a) In a letter dated 15 January 2020 (**MB/199**), solicitors for Mr Bragg noted that Mr Price had ceased to be recorded as a director of ABL at Companies House and raised the question of whether his employment had terminated, giving rise to the obligation to repay part of the retained Consideration. In reply, solicitors for Anderson in a letter dated 16 January 2020 (**MB/200**) stated "*Mr Price agreed the terms of a new service contract and continues to be employed by the Company on an on-going basis…"* This in fact was incorrect, he having left the employment of ABL by then.

(b) In a letter dated 20 January 2020 (**MB/202**), Mr Bragg's solicitors pointed out that the reply of 16 January 2020 was inconsistent with a statement issued by ABL stating that Mr Price had left the business on 20 December 2019. Mr Bragg's solicitors replied by email dated 4 February 2020 (**MB/204**) that "*our client will continue to retain all of the Retained Consideration by way of set-off* (sc. in the claim original brought by Anderson against Mr Bragg that has now been discontinued) *in relation to its claim in these proceedings and, therefore, the change in status of Mr Price's employment has no impact on the basis on which our client holds such money."* It is notable that there is no reference here to suggest that the Retained Consideration had in fact been paid to Mr Price as loyalty bonus.

(c) In a letter dated 2 March 2020 at **MB/205** further clarifying Anderson's position, its solicitors stated, "*...we highlight the fact that the Severance Agreement was drafted and agreed on the basis that Mr Price would leave the Company as a "Good Leaver" and retain his full entitlement to any Loyalty Bonus and/or any other payments due to him by the Company. This decision reflects the fact that Mr Price was (a) under review for failing to meet his performance objective and that (b) he would very likely have been made redundant by the Company. Had the Company made Mr*

Price redundant, Mr Price would have been entitled to receive his full loyalty Bonus under clause 9.5.1 of the Service Agreement. Therefore, and in order to avoid the minimum 9 months of delay which would be caused by a redundancy process, the Company agreed that Mr Price could depart as a "Good Leaver" (and retain his full Loyalty Bonus) in exchange for resigning as a director." However, as Mr Ward acknowledged in his evidence (and Ms Murphy confirmed in hers), there was no question of Mr Price being redundant. By the time that his departure was being negotiated, a replacement had already been sought for him and in any event, the reason for wishing him to leave was his underperformance, albeit that both of them attributed this to health issues. Thus, the reference to redundancy was clearly incorrect.

61. Further, at paragraph 19 of the Amended Defence to Counterclaim (which was signed by Mr Ward on behalf of Anderson on 6 July 2020), it is stated that, on 29 November 2019, Ms Murphy and Mr Price came to an agreement in the terms identified at paragraph 15 above. However, this is said to be inconsistent with Ms Murphy's statement (especially paragraph 44) and Mr Price's statement (paragraph 28), neither of which support the entering into of a contract as to Mr Price having Good Leaver status.

62. Thus, Mr Bragg contends that Anderson has repeatedly given inaccurate accounts of the circumstances of Mr Price's departure, on the basis of material that must have come from Mr Ward, and the account given on its behalf by him now should not be trusted.

63. Mr Ward accepted that he played a role in dealing with the litigation although during 2020 he has stood down as CEO of Anderson and been replaced by a Mr Andrew Jameson. He suggested that some of the errors may have been due to misunderstandings by Anderson's solicitors as to the true state of affairs.

64. I draw the following conclusions from the evidence in so far as there are disputed (or unadmitted) facts that are relevant to the determination of the case:

    (a) I accept Mr Bragg's evidence that by the time that any serious negotiations were taking place with Anderson, he knew that the immediate payment of a bonus to the Managers on sale of the business was not likely to be

acceptable to Anderson and that therefore a requirement on his part to this effect would have put the sale of his shareholding in ABL at risk.

(b) I accept the evidence of Mr Ward that clause 3.3 of the SPA was incorporated into the contract at a late stage.

(c) Whilst Mr Bragg had some interest in ensuring that the Managers were paid the bonuses and always intended that the money not be retained by Anderson (as Mr Ward acknowledges), I accept the evidence that Mr Bragg showed relatively little interest in the negotiation of the Service Agreements. So long as the terms of the SPA ensure that the loyalty bonuses were repaid to Mr Bragg in the event of the Managers losing entitlement to them, he had no interest in the terms on which they might lose entitlement. After all, he had left the negotiations in the hands of Mr Ward and the Managers who might each be expected to protect their own interests.

(d) I accept the evidence of Mr Ward, Ms Murphy and Ms Price that the Service Agreements were signed by the Managers on the day of completion of the Share Purchase Agreement. The terms upon which they signed contained substantially the same version of Clause 9 as had been sent in draft to Mr Bragg earlier that week.

(e) I accept Mr Price's evidence that, in his own calculations of the compensation that he required for an agreed termination of his employment, he expected to recover the outstanding elements of the loyalty bonus offered by Mr Bragg, namely £133,332.

(f) I equally accept Ms Murphy's evidence that, in her negotiations with Mr Price and in her calculations of potential figures, she assumed that Mr Price was entitled to the outstanding payment of loyalty bonus. Mr Bloor clearly understood this to be so (see his draft letter at **DB3/665** and his email of 27 September 2019), and Ms Murphy's own contemporaneous documents showing her calculating the payment due to Mr Price on termination.

(g) However, in the meeting of 29 November 2019, there was no discussion as to whether Mr Price was to leave on "good leaver" status. Neither he nor

Ms Murphy asserted that this had been discussed between Mr Price and anyone on behalf of ABL. Both Ms Murphy's and Mr Price's evidence is consistent with the assumption that Mr Price was entitled to the outstanding loyalty bonus in the circumstances of termination of his employment that they were contemplating. Given they each made this assumption, it was not necessary for them to discuss the issue nor is it surprising that they did not.

(h) Further, I can find no other evidence that the question of Mr Price's "Good Leaver" status was discussed. Again this is unsurprising given the assumption on the part of each of them that it was not in question.

(i) I accept Ms Murphy's evidence that the draft agreement at **DB4/8** involved a calculation error and is not to be taken as an indication that ABL was contemplating a situation in which Mr Price received less than the outstanding amount of the loyalty bonus on termination.

(j) I accept Ms Murphy's evidence that she played no part in suggesting that the termination of Mr Price's employment was on the grounds of redundancy. She said that she had given information to Mr Ward for the purpose of instructing solicitors.

(k) It seems likely then that Mr Ward must have had at least some involvement in providing instructions to Anderson's solicitors, including on the various issues where Anderson's case has been misstated. However, it is not possible to go further into this issue without either a waiver of privilege (which has not occurred) or by what might be speculation as to what went on. Ultimately it is unnecessary to decide whether Mr Ward deliberately misstated matters or whether the mistakes flow either from other people misstating the position or a misunderstanding by some or all of the people involved.

Discussion

Issue 1 - What payments were actually made to Mr Price before and after the termination of his employment

65. Based on Mr Price's uncontradicted evidence, I have no hesitation in concluding that £401,000 was paid to him by way of loyalty bonus prior to the Settlement

Agreement being agreed and that there was an outstanding £133,332 of the original intended figure of £533,333.

Issue 2 – Were the payments made to Mr Price after the Settlement Agreement sums retained by the Anderson group at the request of Mr Bragg to be paid by the Company to the Managers as loyalty bonuses?

66. On issue 2, for reasons identified above, I accept that both Ms Murphy and Mr Price believed, in conducting their negotiations in respect of the Settlement Agreement, that Mr Price was entitled to be paid the outstanding part of the loyalty bonus. To that extent, I would resolve issue 2 by finding that the payments made after termination of Mr Price's employment were calculated to include the balance of the retained consideration that was to be paid to Mr Price as loyalty bonuses.

67. I have some doubt that it can in fact be right to say that the payments made "*were*" the relevant part of the retained consideration rather than "*were intended to represent"* or "*were calculated to include"* the relevant part of the retained consideration. It was contended on behalf of Anderson that I should make the finding that they "*were"* that figure, which seems to imply a proprietary approach to the monies. However, that is an unhelpful formulation of the finding in that it risks mistaking subjective (albeit mutual) intent with a finding of fact that might later make its way into the case through the back door in interpretating of the definition of contractual payments.

Issue 3.1 - On the true interpretation of the Share Purchase Agreement, is the reference to the Service Agreement of Mr Price (and other Managers) a reference to the agreement as originally entered into by him or to the agreement as varied from time to time?

68. Anderson contends that there were two manners in which Mr Price's Service Agreement might be varied:

    (a) By the mutual agreement of the parties;

    (b) By ABL exercising its power to vary unilaterally under Clause 31

    In either event, such variation might have the effect of varying the terms in which payment became due to Mr Bragg under clause 9 of the Service Agrement.

69. Mr Bragg on the other hand contends that, whilst a consensual contractual variation might be effective as between Mr Price and ABL:

    (a) Such variation would have no bearing on the definition of "Good Leaver" since that was fixed by the term of the original Service Agreement and could thereafter only be varied with the consent of Mr Bragg;

    (b) In any event, Clause 31 is ineffective to permit unilateral variation.

70. The first part of this issue involves consideration of the proper construction of the reference to "Service Agreements" in "the Agreed Form" in clause 1.1 of the Share Purchase Agreement. The "Agreed Form" means "*the form approved and for identification purposes initialled by or on behalf of the Seller and Purchaser.*" In fact, no initialled form of the document was ever approved. However, since the initialling of the document was only a means of identifying the document, it does not seem to me that on the true construction of the contract it could be said that the absence of an initialled document means there was no "Agreed Form" of Mr Price's Service Agreement.

71. Mr Bragg was aware that an agreement was negotiated by Ms Murphy (on behalf of all the Managers including Mr Murphy) and ABL. Furthermore he saw part of the draft of that agreement and took no issue with it. He knew that the existence of such Service Agreements was a central part of the Share Purchase Agreement and that it would not take place unless the Managers entered into such agreements and Mr Ward told him that Service Agreements had been agreed. In those circumstances, the proper way to give effect to the Share Purchase Agreement so as to accord with the need for it have meaning that accords with commercial common sense it is to interpret the Agreed Form of Mr Price's Service Agreement as being the form in which Mr Price and Mr Ward signed the agreement. Neither party has suggested any other interpretation of the Share Purchase Agreement.

72. The second matter to consider on this issue is the effectiveness of a variation of the Agreed Form of Mr Price's Service Agreement for the purpose of the Share Purchase Agreement. Mr Bragg says that the Service Agreement could no longer be "approved" within the meaning of the Share Purchase Agreement if it was varied without his knowledge or consent. Anderson on the other hand contend that, since a contract can always be varied by consent, the Agreed Form must

have meant the form originally signed by the parties, but as varied from time to time.

73. The difficulty with Anderson's interpretation of this clause is that either:

(a) the word "approved" is entirely superfluous, because the Agreed Form is that which is agreed by the parties from time to time, regardless of whether Mr Bragg knew of still less accepted the variation; or

(b) it means "approved at the time that the Share Purchase Agreement was entered into, but otherwise as might be varied by the parties to that agreement."

74. The first construction is unattractive because it renders redundant the definition of "Agreed Form"– a service agreement "in the Agreed Form" would always be the Service Agreement as it existed from time to time and therefore there would be no need to refer to or define an "Agreed Form" at all. The second construction, whilst at least affording some significance to the words of definition of the Agreed Form, in fact involves importing a qualification to the definition which is not implicit in the language in a context where there is in fact no ambiguity in the definition itself. Nor does this proposed construction have any necessary root in commercial common sense – if anything, commercial common sense would point in the other direction, namely that, if Mr Bragg was entitled to approve the terms of the Service Agreements at the outset in so far as they bore on his right to be repaid the Retained Consideration, he should be entitled to approve or veto any variation to them. It is true that part of the commercial context was that Mr Bragg did not show considerable interest in the detail of the Service Agreements and thus might have been indifferent to variations to the terms of those agreements. But he did ask for and see the drafting of clause 9 of the Service Agreements and it cannot be assumed that if he had known of an intention to vary clause 9 he would necessarily have been indifferent to it.

75. For these reasons, I do not accept either basis for the construction put on the meaning of the Agreed Form of the Service Agreement for which Anderson contends. I am satisfied that on their true construction, the words "*in the form approved ... by or on behalf of the Seller and Purchase"* mean, in accordance with the natural use of those words, the form approved at the time that the Share

Purchase Agreement was entered into, which, as I have indicated above, must be taken to be the form signed by Mr Price and Mr Ward.

76. The second point raised by Anderson's argument is that Clause 31 gave a unilateral right in ABL to vary the service Agreements. On its face, Clause 31 does indeed have that effect.

77. Mr Budworth on behalf of Mr Bragg however contends that such an interpretation is not consistent with dicta of Lord Woolf in Wandsworth LBC v D'Silva [1997] 12 WLUK 171; [1998] IRLR 193. Having determined the appeal on the basis that the Employment Tribunal had been wrong to find found that a Code of Practice on Staff Sickness was binding on the employer, the Court of Appeal in that case considered briefly and obiter the employer's alternative argument that it was entitled to vary the code pursuant to a contractual term that provided "*From time to time variations in your terms and conditions of employment will occur, and these will be separately notified to you or otherwise incorporated in the documents to which you have reference.*"

78. In this respect, Lord Woolf stated:

"*The general position is that contracts of employment can only be varied by agreement. However in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition the Court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If therefore the provisions of the case which the Council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the counsel* (sic) *contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result.*"

79. In my judgment, the terms of Clause 31 are clear to give ABL a unilateral power to vary. Further the variation proposed (changing of the definition of Good Leaver status) is one that is favourable rather than unfavourable to the employee. Thus, on the face of it, as between ABL and Mr Price, ABL was entitled to vary the contract in this respect.

80. Further, since for the reason set out above, Mr Bragg must be taken to have approved the actual form of the Service Agreement entered into by Mr Price, it seems to me that the objection to the right to vary consensually cannot be taken – Mr Bragg has agreed to the Share Purchase Agreement making reference to obligations in a Service Agreement which might themselves be varied without his consent.

81. It would be natural enough to object that my conclusions above create an inconsistency between the right of the parties to vary the Service Agreement in a way that affects the Share Purchase Agreement by mutual consent (which is not permitted); and the right to vary with similar effect by unilateral notice (which is permitted). One might if anything think that variation by mutual consent was more likely to be acceptable. However, this is my reading of the unambiguous language used within these contracts.

82. Mr Budworth for Mr Bragg raises an issue about the obligation, when there is a variation of certain particulars of a contract of employment, to give a written statement of that change, pursuant to Section 4 of the Employment Rights Act 1996. I have been shown no authority to suggest that, where a written statement is not given, what would otherwise be an effective variation is in fact ineffective. I agree with Mr Harman's submission that, whilst such notice required by statute, its absence does not render a nullity what would otherwise be an effective variation of contractual terms at common law.

83. A separate issue arises as to the giving of notice in an unilateral variation pursuant to clause 31 of the Settlement Agreement. Such a variation requires contract notice by the very terms of Clause 31. The effect of the failure to give notice was not argued before me and it is not necessary for me to determine the issue in light of my determination of Issue 3.4 below.

Issue 3.2 - Did the Good Leaver Agreement vary Mr Price's Service Agreement in respect of his entitlement to loyalty bonuses?

84. This issue presupposes that there was such a thing as the "Good Leaver Agreement". However, as identified above, the evidence of both Ms Murphy and Mr Price is that they did not at any stage discuss Mr Price's status on leaving and in particular whether he was a "Good Leaver".

85. Accordingly, for the court to conclude that there was such a thing as the Good Leaver Agreement, it would have to be satisfied that the court can infer from the conduct of the parties an offer and an acceptance in the context of an intention to create (or vary) legal relations. In the general run of things, such intent is to be judged objectively (see paragraph 2-171 of Chitty on Contracts). Neither of the exceptions identified by Chitty applies here and I am accordingly satisfied that the court must look for objective evidence of the existence of an intention to create such an agreement.

86. No conduct has been identified, the effect of which might be said to be consistent with objective intention to vary. Indeed, on the evidence before the court, neither Ms Murphy nor Mr Price had a subjective intention to vary the Service Agreement. Of course, the lack of subjective intention would not defeat Anderson's argument if the presence of objective intention was shown, but Anderson is not able to point to anything beyond the evidence that each of Ms Murphy and Mr Price were calculating the sums payable on termination of Mr Price's contract of employment to sums that he would not in fact be entitled to pursuant to the Service Agreement unless the Service Agreement were varied. I therefore conclude that Anderson does not show the existence of an agreement to vary the definition of Good Leaver status in the Service Agreement.

87. In any event, given my finding on issue 3.1, even if there was a Good Leaver Agreement that had the effect of varying the Service Agreement as between Mr Price and ABL, this would not affect the obligation to repay Mr Bragg given my finding on issue 3.1.

Issue 3.3 - Did the Settlement Agreement vary Mr Price's Service Agreement in respect of his entitlement to loyalty bonuses?

88. The argument that the Settlement Agreement varied the Service Agreement suffers from some though not all of the same problems as the argument at Issue 3.2. In this case, it is clear that there was an intention to create legal relations. Further, given that clause 4.15 purports to vary the Service Agreement as to the terms of the restrictive covenants, it cannot be said that there was no intention, objectively expressed, to vary the Service Agreement.

89. However, it does not follow that, simply because the Settlement Agreement varies one part of another contract, that on its proper construction it should be taken to vary another part of that contract. This remains a matter of contractual interpretation.

90. The first difficulty for Anderson in this respect is that the Settlement Agreement does not at any point refer to the concept of loyalty bonuses or retained consideration. This is not a case where there can be said to ambiguity in the language of the Service Agreement giving rise to rival meanings. Thus the concept of commercial common sense has little if any part to play.

91. Indeed, if anything, the stance taken by Anderson might be more akin to the circumstance in which the court is asked either to rectify the agreement or to imply a term. Anderson does not take either of these lines of argument for reasons that I can well understand, but absent some kind of ambiguity, I struggle to see how arguments as to the construction of the Settlement Agreement can give rise to the solution that they seek.

92. In any event, even if the concept of commercial common sense could be invoked that does not point unambiguously in the direction of interpreting the Settlement Agreement in a way that varies the Service Agreement. The Settlement Agreement is a typical contract of compromise. Whilst it varies parts of the employment contract relating to the post termination conduct of the employee which, absent a repudiatory breach by the employer which has been accepted by the employee, continue to bind him following termination, but in other respects it discharges the contractual obligations under the Service Agreement and puts in place alternative obligations as to the payment of compensation.

93. There is no commercial common sense that means that it ought to be seen as varying the terms under which monies are due under the Service Agreement itself. As far as Mr Price was concerned, there was no need to vary the Service Agreement so as to bring the circumstances of the termination of his employment within the "Good Leaver" definition, because ABL had in any event agreed to pay a sum equivalent to the outstanding loyalty bonus as part of the terms of settlement. Anderson's desire to interpret the Settlement Agreement in a manner that varies the Service Agreement does not arise from anything inherent to its relationship with Mr Price, but rather from the terms of the Share Purchase Agreement, which does not appear to have been in anyone's contemplation when the Settlement Agreement was being negotiated.

94. Again, given my finding on issue 3.1, even if the Settlement Agreement was effective to vary the Service Agreement as between Mr Price and ABL, this would not affect the obligation to repay Mr Bragg.

Issue 3.4 - Did ABL vary Mr Price's Service Agreement under Clause 31 in respect of his entitlement to loyalty bonuses?

95. As I indicated at Issue 3.1 above, it was open to ABL unilaterally to vary the definition of "Good Leaver" within the meaning of the Service Agreement and for that variation to affect rights and liabilities under the Share Purchase Agreement. However, Anderson's argument that ABL in fact varied the Service Agreement is in unarguable.

    (a) As I have noted, no notice was given of variation. I have held open above the significance of this to the contractual effect of a purported variation, but the lack of such notice deprives Anderson of the argument that such notice amounts to objective evidence of intention to vary the agreement.

    (b) There is no other evidence that ABL sought to exercise the power unilaterally to vary the Service Agreement. Paragraphs 92 and 93 above apply with equal force to the purported unilateral variation as they do to the purported variation by mutual consent. There is no evidence, whether objective or subjective, of an intention to vary the agreement, nor was such variation needed to achieve the end of the negotiations between ABL and Mr Price, namely the termination of his employment.

Issue 3.5 - Regardless of whether the Service Agreement was varied, was Mr Price by reason of the Settlement Agreement entitled to the loyalty bonus in a manner that is properly interpreted as being "in accordance with the provisions of the Service Agreement."

96. Anderson's contention in this respect is that it was unnecessary to vary the Service Agreement in order for it to show that Mr Price was entitled to the loyalty bonus in accordance with his Service Agreement. Accordingly it cannot be said that Mr Price "*in accordance with the provisions of* [his] *Service Agreement*" ceased "*to have any further entitlement to all or any of the retained consideration.*"

97. The argument in this regard turns on the contention that "*in accordance with the provision of"* means *"not in breach of"* the Service Agreement. However this again is a forced use of language in a situation where in truth there is no ambiguity in the language used. The right to "Good Leaver" status is not defined in terms of whether or not the employee is leaving ABL's employment in breach of their contract of employment. It is true that, in certain circumstances where the departure is not in breach of the contract, such as where the termination is on certain defined health grounds, "Good Leaver" status is granted. But it would equally not be a breach of the contract of employment for Mr Price to have given notice of termination of his contract of employment pursuant to clause 18.1 of the contract. However, no one suggests that he would be entitled to "Good Leaver" status in such circumstances.

98. It is only if the employee brings himself within the defined "Good Leaver" status that the bonus is payable. I therefore see no scope to construe the Share Purchase Agreement in any way other than providing for repayment of outstanding bonus to Mr Bragg where Mr Price terminates his employment and does not have "Good Leaver" status, whether as originally defined or, to the extent that amendment of the original Service Agreement is effective as set out above, as amended.

<u>A final comment</u>

99. I note Anderson's plea that the outcome that I reach is not what Mr Bragg intended nor is it what Mr Bragg would have wanted but for the fall out between Anderson and him that gave rise to the original breach of warranty claim.

Anderson may well be right to summarise the situation between the parties in the following way:

(a) Mr Bragg's primary aim with the Retained Consideration was to reward the Managers;

(b) Anderson sought to ensure in negotiating the Settlement Agreement that, on termination, Mr Price was entitled to the full loyalty bonus;

(c) That intention was effected by the terms of the Settlement Agreement in that the bonuses were made to Mr Price.

100. But equally, there is force in Mr Bragg's point that it was not open to Anderson to use the retained consideration to negotiate a settlement with Mr Price. It would be speculation now to assume that, but for other aspects of the dispute between Mr Bragg and Anderson, this payment to Mr Price would have been uncontroversial.

101. The simple fact is that Anderson failed to ensure that the payments were made in a manner that gave effect to what they now say was their intention. The Court cannot step in to rectify that failure.

Conclusion

102. In conclusion, for the reasons set out above, I am satisfied that, in the circumstances of the termination of his employment, Mr Price ceased to have any further entitlement to the balance of the Retained Consideration in accordance with the provisions of his Service Agreement because his employment was not terminated in circumstances in which he was deemed to be a "Good Leaver." It follows that Anderson was obliged to repay the balance of the retained Consideration to Mr Bragg and Mr Bragg is entitled to judgement to that effect.

103. At the time of handing down judgment, the parties have no been able to agree the terms of a confidential order. Accordingly, I adjourn consideration of consequential matters to a date to be fixed.