Neutral Citation Number: [2008] EWHC 535 (Ch)

Case No: HC07C02168

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2008

Before :

MR JUSTICE BRIGGS

- -

Between :

LANGSTON GROUP CORPORATION

Claimant

- and -

CARDIFF CITY FOOTBALL CLUB LIMITED

Defendant

- -
- -

Mr Michael Driscoll QC and Mr Ciaran Keller (instructed by **Hextalls LLP, 28 Leman Street, London E1 8ER)** for the Claimant
Mr David Wolfson (instructed by **Nabarro, Lacon House, Theobald's Road, London WC1X 8RW**) for the Defendant

Hearing dates: 12th – 13th March 2008

- -

Approved Judgment

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

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MR JUSTICE BRIGGS

Mr Justice Briggs:

INTRODUCTION

1. This is an application for summary judgment under CPR Part 24 by Langston Group Corp ("Langston") as the holder of a nominal £24 million fixed rate unsecured redeemable loan notes issued by the defendant Cardiff City Football Club Limited ("the Club") pursuant to the terms of an Instrument dated 20th September 2004 ("the Instrument").

2. It is common ground that, if the Instrument continues to govern the terms for the redemption of Langston's loan then, on facts which are not in dispute, Langston is entitled to judgment for a sum in excess of £30 million. For present purposes, the precise amount due does not matter. But the Club maintains that the Instrument was varied by a written agreement which it made with Langston on 24th October 2006, and which is expressed in two linked documents to which I shall refer as "the Deed" and "the Variation". I shall refer to the agreement of which they form the two constituent parts as "the 2006 Agreement". It is also common ground that if the 2006 Agreement came into effect by the satisfaction of conditions to which it was expressed to be subject, and remains in effect, then nothing is due by the Club to Langston, and the present claim is liable to be dismissed.

3. Langston's case is that for two separate and distinct reasons the conditions to which the 2006 Agreement was subject were never satisfied and that thirdly, the 2006 Agreement has been discharged by an accepted repudiatory breach. Originally this summary judgment application was based upon the proposition that to none of those three separate grounds of challenge to the 2006 Agreement was there any realistic prospect of a defence. At an early stage in his submissions Mr Driscoll QC for Langston abandoned the repudiation ground as one which could justify summary judgment. It follows that the success or failure of this application turns entirely upon the question whether Langston's claim that the 2006 Agreement never became unconditional is the subject of a realistic (i.e. more than purely fanciful) defence.

4. Mr Driscoll submits that the only issues between the parties calling for resolution are questions of law and construction which are, on settled authority, inherently suitable for summary determination. The Club's defences are based upon rival submissions as to the true construction and application of the 2006 Agreement and, in one respect, upon an alternative claim for rectification of the Variation. The Club relies upon lengthy evidence (occupying several lever arch files) setting out what it claims to be the matrix of background fact relevant to the construction of the 2006 Agreement, and evidence as to the negotiations supporting its alternative claim for rectification. Mr Driscoll does not suggest that this evidence is inherently incredible, such that any part of it can properly be rejected without a trial. Nor does Langston proffer evidence of any different factual case, although it reserves the right to do so at any trial. Realistically therefore, Mr Driscoll accepts that in deciding whether the Club's evidence discloses a realistic prospect of defence, I should treat it as assumed facts. To the extent that it is admissible or relevant, Mr Driscoll submits that I can conclude on a summary basis that even on that assumption, it discloses no realistic defence.

5. I have reached the clear conclusion that this is not a case for summary judgment, because on the assumed facts the Club has a real prospect of a successful defence,

treating its alternative claim for rectification as part of that defence. It follows that it is unnecessary for me to address issues (if there any) as to quantum, and that I should express my reasons for my conclusion in a form which does not pre-judge the outcome of the relevant issues, once the facts have been fully deployed and tested at a trial.

THE ASSUMED FACTS

6. The central factor in the relevant background to the creation and, later, conditional variation of the loan relationship between Langston and the Club was the making between the Club and Cardiff City Council ("the Council") of a Conditional Development Agreement ("the CDA") on 13th February 2004. In the barest outline, the CDA provided the contractual framework for a scheme (referred to in varying forms by its parties as "the Project") for the development of a new football stadium in Cardiff together with a new athletics stadium, a sports centre to be called the House of Sport, a residential development and an associated retail development, all on land owned by the Council. From the perspective of the Club, the objective of the Project was the acquisition of a 150 year lease at a peppercorn rent of a new 30,000 seater stadium, in substitution for its much smaller and very old existing stadium, to be financed as to approximately 70% by the Council, in part from the profits to be derived from the associated retail development.

7. The principal obligations of the Club under the CDA were to arrange as employer for the construction by contractors of the new athletics stadium, the new football stadium and the House of Sport. The principal obligations of the Council were to provide the bulk of the funding and to grant leases of the new football stadium and the House of Sport to the Club on substantial completion of the construction works. Those mutual obligations were however conditional upon the satisfaction of a large number of conditions, set out in the First Schedule to the CDA, by target dates set out in clause 4.1, in relation to most of which the Club was obliged to use its reasonable endeavours, and in relation to some of which such endeavours were to be applied jointly by the Club and the Council.

8. By clause 4.21 each of the Council and the Club were permitted to waive or vary any part of the Conditions, but only with the prior written consent of the other party. By clause 4.24 confirmation that a Condition (as defined) had been satisfied was to take the form of a specific written confirmation by a defined officer of the Council to a defined representative of the Club.

9. Clause 4 contained varying conditions triggered by satisfaction or, as the case may be, non-satisfaction by the target dates of different groups of conditions. Thus, non-satisfaction of some of them by the relevant target dates gave the Council a right to determine the agreement, whereas non-satisfaction of others merely gave the Council a right to determine the agreement only in respect of the part of the development to which those Conditions related. The target date for the satisfaction for most (but not all) of the Conditions was 31st December 2004 with a longstop date of 31st December 2005. Most of the target dates could be extended by agreement in writing between the parties.

10. Langston made its £24 million loan to the Club in two tranches of £22 million and £2 million respectively in October 2004, in exchange for loan stock certificates the terms

of which were regulated by the Instrument, and by Conditions of Issue attached to the certificates. The detailed terms do not matter for present purposes. In summary, the Instrument provided for the Stock to be repaid on 31st December 2011 at the rate of £1.30 for every £1 of Stock held with reduced rates for earlier redemption, and for interest to be payable at 7% per annum, by half yearly instalments in arrears, subject to accrual rather than payment for the first two years at the Club's option. The Conditions of Issue provided for events of default upon the happening of which the Stock was to become immediately redeemable. Failure to pay interest when due was a sufficient event of default, subject to certain procedural requirements which, although relied upon by the Club as not having been complied with by Langston, need no more detailed analysis.

11. Langston is a Panamanian company with corporate British Virgin Islands directors and offices in Switzerland. Notwithstanding the issues as to the extent of the background knowledge known to the parties and relevant to the construction of the 2006 Agreement, and the issue as to rectification, Langston has chosen not to identify either its ultimate beneficial owner or owners or the person or persons who ought to be regarded as its governing mind and will for the purposes of the transactions in issue. The Club's evidence discloses a real prospect that it will be established at trial that Langston's governing mind and will at all material times was that of a Mr Sam Hammam. He was until 20th October 2006 also a director of the Club and until December 2006 the majority beneficial owner of the Club through its parent company Cardiff City Holdings Limited and its majority shareholder Rudgwick Limited. The Club's evidence shows that Mr Hammam was actively involved in the management of the Club's affairs, and in particular its participation in the Project during the period prior to and including the negotiation of the 2006 Agreement.

12. It is common ground that Langston was also represented from time to time by a Swiss gentleman, Mr Phillippe Tischhauser, in particular in connection with the negotiation of the 2006 Agreement. Mr Tischhauser's role appears to have included the conduct of due diligence on behalf of Langston in relation to relevant aspects of the Club's affairs, in particular in connection with the Project.

13. By November 2005 the perception both of the Club and of the Council was that there was no prospect that the Club would, in accordance with its then existing business plan, be able to satisfy the Conditions by the then target dates, most of which were in December 2005. The result was that, if there was any prospect that the Project might be salvaged, it required the Club both to obtain from the Council a substantial extension of those target dates, and to produce a fresh business plan demonstrating its ability to perform its part in the Project, and in particular, its own financial viability. From then until late 2006, the Club worked upon a new business plan, in consultation with the Council and with Deloitte, while at the same time obtaining a series of extensions of time for satisfaction of the Conditions under the CDA, in order to keep alive the prospect of proceeding with the Project. The Council's perception, concurrent with Deloitte's advice, was that the Club could not be regarded as financially viable without a substantial reduction and postponement of its obligations to Langston under the loan notes. In that respect, the Council's requirements crystallised by the time of the meeting with the Club on 19th September 2006 as follows:

    (1) Repayment should be postponed to 2016 if required.

(2) £24 million should be written down to £15 million (in exchange for naming rights, to which I refer below).

(3) Interest should be simple and not compound.

(4) Non-payment of interest should not be an act of default.

(5) The Club was not to be at liberty to elect to pay interest or principal for ten years without the Council's approved.

(6) (7) …

(8) Interest should commence only upon the signing of a new agreement with Langston, with all historic interest written off.

I summarise those requirements from a note of that meeting prepared on behalf of the Club.

14. The Club's evidence requires me to assume that it was well understood by anyone concerned in the management of its affairs, including Mr Hammam and by anyone conducting a due diligence in relation to its affairs, including Mr Tischhauser, that without the Council's continuing support for the Project, the Club was likely thereafter to become insolvent, such that it would fail to pay more than a modest proportion of its debt to Langston, by way of dividend in a liquidation.

15. Langston was therefore faced with two unenviable alternatives, either to accept (subject to negotiation) the Council's terms for write-down and postponement of the loan, or to face the probability of a large default by the Club in the event that the Project did not proceed. Nonetheless, Langston may be assumed to have been reluctant unconditionally to accept a large capital write-down in the loan without some assurance that the Project would proceed with the Council's substantial financial support since, if the Project failed, Langston would stand to receive a smaller dividend in any liquidation from a written-down loan. On the assumed facts, those appear to have been the uncomfortable commercial realities of Langston's position at the time of the negotiation of the 2006 Agreement. The Council would not therefore be prepared to continue with the Project, a process which would by then necessarily have called for further extensions of time for satisfaction of the Conditions, or waiver of the Conditions, without being satisfied that Langston's loan had both been written-down and postponed. Langston's only practical solution to the danger of finding itself with a written-down loan and an insolvent club deprived of the benefit of the Project was to stipulate for the write-down and postponement to be conditional upon the Project proceeding, a term referred to in a letter from Mr Tischhauser on behalf of Langston to the Club on 12th September 2006 by the phrase "the City Council's approval of the project and its unconditionality".

16. Three other aspects of the commercial background to the 2006 Agreement must be mentioned. The first is that by September 2006 the Club had decided that, rather than be responsible itself for the construction of the Stadium and the other obligations to be performed in connection with the Project once "unconditionality" had been achieved, this would be delegated to a newly formed company jointly owned by the Club and its

development partner, and eventually known as Cardiff City Stadium Limited ("Devco").

17. The second is that it was apparent to all concerned with the Project that satisfying some of the Conditions, and in particular those relating to the completion of the new athletic stadium (set out in paragraph 2 of Part E in Schedule 1 to the CDA), would be unlikely to be achieved until, at the earliest, mid-July 2007. The third is that it had been decided that, instead of a 30,000 seater stadium, there would be built a stadium with 25,000 seats, but sufficient space to accommodate a further 5,000 seats in due course.

18. On the assumed facts, there is a real prospect that the Club will establish at trial that all three of these matters were known both to Mr Hammam and to Mr Tischhauser prior to the negotiation of the 2006 Agreement. For example, all three of them are at least mentioned in the version of the new business plan prepared by September 2006, through which Mr Tischhauser is alleged to have been taken in detail at the time. Furthermore, Mr Hammam was invited to, and did, appoint a nominee director on the Board of Devco.

19. I must now describe the terms of the 2006 Agreement in a little detail. As I have said it took the form of two linked documents, the Deed and the Variation, both made on 24th October 2006 between Langston and the Club.

20. The Deed contained the following material definitions:

"Development Agreement"	Means the Conditional Development Agreement dated 13th February 2004 and made between the Council (1) and the Company (2) (as varied from time to time)
"Instrument"	Means the Loan stock instrument created by the Company on 20th September 2004 constituting £30,000,000 in nominal value fixed rate unredeemable loan stock 2001 (as amended by a deed of variation to be entered in to the Stockholder and the Company in the

	form next hereto ("the Deed of Variation"));
"Satisfaction Date"	Means the date of satisfaction or waiver by the relevant parties of all the Conditions as defined in the Development Agreement.

21. By clause 2.2 of the Deed, the £24 million lent to the Club by Langston was split into £15 million, "to be held and repaid in accordance with the Instrument" (i.e. the Instrument as varied by the Variation), and £9 million which was to be interest free and repayable solely from income received by the Club from the exploitation of certain sponsorship rights in connection with the new stadium (called the Naming Rights), and written-off to the extent unpaid after ten years. The *quid pro quo* for Langston was expressed to be a one-off payment for £5 million to be paid by the Club if it achieved promotion to the FA Premier League.

22. Clause 2.3 required Langston simultaneously to enter into the Variation. Clause 2.6 provided as follows:

> "The payments and variation pursuant to clause 2.2 shall be conditional upon attainment of the Satisfaction Date on or before 31st May 2007. In the event that the Satisfaction Date is not attained by such date or the Development Agreement is otherwise terminated prior to such date this Agreement shall be of no further force or effect."

23. The principal effect of the Variation was by clause 2.2.6 to entitle the Club to postpone repayment of the Loan until 31st December 2016 (subject to earlier repayment with the Council's consent) and, by clause 2.2.16 to provide that the stock should be interest free until 1st March 2007 and thereafter carry interest which the Club was entitled to accrue rather than pay until redemption, subject to earlier repayment with the Council's consent.

24. Clause 2.2 of the Variation provided for these effects to be achieved by way of variation of the Instrument. The relevant part of clause 2.2 for present purposes is as follows:

> "The parties hereto agree that the Instrument shall be automatically varied on and with effect (without further notice or action on behalf of any party) from attainment of satisfaction of the Conditions (as defined in the Conditional Development Agreement dated 13th February 2004 and made between the County Council of the City and County of

> Cardiff and the Company) ("the Development Agreement") as follows:"

25. Then the relevant effects are achieved by specific provisions for variation of the Instrument, including those which I have summarised in clauses 2.2.6 and 2.2.16. Clause 2.3 of the Variation provides as follows:

> "This Deed of Variation is conditional on attainment of the satisfaction of the Conditions (defined as aforesaid) on or before 31st May 2007. In the event that such satisfaction is not attained by such date or the Development Agreement is otherwise terminated prior to such date this Deed of Variation shall be of no further force or effect such that the Instrument shall remain in its current format."

26. A comparison of the language of those two documents reveals the following relevant differences between them. First, whereas in the Deed the CDA is defined in a form which includes its condition "as varied from time to time", the CDA is not referred to or defined in the Variation in terms which make any reference to it being varied. The second is that whereas in the Deed, its condition precedent in clause 2.6 could be satisfied by satisfaction or waiver of the Conditions in the CDA (see the definition of "Satisfaction Date") in clause 1.1), in the Variation the condition precedent was expressed to be achieved only from "attainment of satisfaction of the Conditions", with no reference to waiver. Nonetheless, both the Deed and the Variation included provision for each of them to cease to be of effect if the CDA was terminated before 31st May 2007.

27. Thus, the combined effect of the Deed and Variation was to provide in substance for the write-down and postponement of repayment of Langston's loan in accordance with the Council's demands. The write-down was achieved by the Deed, and the postponement of payment of both principal and interest was achieved by the Variation.

28. Although those two different consequences were in terms of language expressed to be subject to differently worded conditions, the assumed facts suggest that it was no part of the negotiating objective either of the Council, of Langston, or of the Club that circumstances might arise in which the condition for the write-down was satisfied, but the condition for the postponement not satisfied, for example because the conditions of the CDA in its original form were waived rather than satisfied. On the contrary the evidence, including a witness statement from the draftsman of the two documents, a partner in the Club's solicitors, is that the 2006 Agreement was drafted in the form of two separate documents for technical reasons having nothing to do with their substantive terms, and that the draftsman's intention was to provide for the 2006 Agreement to become unconditional in precisely the same circumstances that the CDA itself became unconditional, provided that this occurred by 31st May 2007. This evidence is of course inadmissible for the purposes of construction of the 2006 Agreement, but would lie at the heart of the determination of a claim for its rectification.

29. Once the Club had persuaded the Council and Deloitte of the viability of its new business plan, and of its own financial viability, assisted by the terms of the 2006 Agreement with Langston, the Council and the Club entered into a further substantial

variation of the CDA by deed dated 22nd December 2006 ("the CDA Variation"). Its main purpose was to substitute Devco for the Club as the obligor in relation to most, but by no means all of the Club's obligations under the CDA. Some obligations were thereafter to be shared between the Club and Devco and others, such as the obtaining of detailed planning permission were to remain with the Club alone. All the benefits of the CDA remained with the Club, including in particular the obtaining of a brand new football stadium largely funded by the Council. The assumption of the Club's obligations by Devco was summarised in the second recital to the CDA Variation as follows:

> "The Club has agreed that Devco shall carry out the development (as defined in the Agreement) on its behalf and Devco has agreed to enter into this Deed of Variation."

The CDA Variation was expressed in terms of no less than 82 specific individual alternations to the CDA itself under the general rubric at the beginning of clause 1:

> "The Agreement shall henceforth be varied and take effect as if:"

Clause 2 then provided that:

> "Save as hereby varied the Agreement shall continue in full force and effect in all respects."

30. A main issue on this application is whether as Langston contends the CDA Variation gave rise to a termination of the CDA, within the meaning of clause 2.6 of the Deed and clause 2.3 of the Variation, or merely a variation of it, as the Club contends. I do not pre-judge that issue by describing the deed dated 22nd December 2006 as the "CDA Variation". That is merely a reflection of its own title, namely "Deed of Variation of a Conditional Development Agreement…"

31. From January until the end of April 2007 the Club, Devco and (to the limited extent relevant) the Council worked towards the satisfaction of the Conditions in the form as altered (to use a neutral word) by the CDA Variation. It is nonetheless common ground that the Conditions had not been satisfied in full by the end of April. In particular, the conditions relating to the House of Sport had not been satisfied. The parties did not even attempt to satisfy those original conditions in the CDA which had been altered or removed in the CDA Variation. For example they worked towards the design and preparation for the construction of a 25,000 seater rather than a 30,000 seater football stadium, and made no attempt to complete the athletics stadium within that four month time-frame, paragraph 2 of Part E of Schedule 1 to the CDA having been removed by clause 1.73 of the CDA Variation.

32. On 3rd May 2007 Mr Geoffrey Shimell, a solicitor in the Council's legal department, sent an email to Mr Emyr Evans "the Council's Officer" as defined for the purposes of clause 4.24 of the CDA. It began as follows:

> "Under clause 4.24 of the Development Agreement, discharge of the pre-conditions is to be confirmed by written confirmation

> from yourself to Peter Ridsdale. The position with discharge of the pre-conditions (as varied) is as follows–"

33. There followed fourteen short paragraphs setting out the respects in which the conditions had either been or were about to be satisfied, or respects in which although not strictly satisfied, the position was deemed to be satisfactory for the Council's purposes. No reference was made to the House of Sport Conditions and the email concluded as follows:

> "If you are agreeable to unconditionality being acknowledged, subject to all appropriate documentation and funds being received in advance, would you please confirm by your response to this email. I will then hand this to Peter Ridsdale as a formal acknowledgement of unconditionality, once that event has occurred."

Peter Ridsdale was then the director of the Club with primary responsibility for the Project.

34. Mr Evans replied just under 20 minutes later with the following short email:

> "I confirm my agreement to progress to unconditionality subject to the documentation and funding, referred to in your email, being in place."

35. In a witness statement relied upon by the Club, Mr Shimell said that, in relation to the House of Sport Conditions, they were not regarded by the Council as "an impediment to reaching unconditionality in respect of the rest of the Project because the necessary £3.5m was covered by the Project finance paid or due to the Account which was controlled by the Council. As with the other conditions which might be said not to have been strictly satisfied, the Council took a decision that it would disregard them so far as necessary. As I have said, the Council's strategic objectives had been met and it was happy to confirm unconditionality in the 3rd May email".

36. On the assumed facts, the Council and the Club held a completion meeting on 4th May at which a series of documents was signed, including the Deed of Grant, by which the Council committed itself to the funding of the Project. On 18th May the Council wrote to the Club's auditors in the following terms:

> "Further to your email please take this letter as confirmation from Cardiff Council that the Leckwith Development Agreement went unconditional on Friday 4th May 2007."

The Club's audited accounts later confirmed that this had occurred, as a post-balance sheet event.

THE ISSUES

37. On those assumed facts, Langston maintained that the 2006 Agreement never became unconditional, so that it lapsed on 31st May 2007, on two separate and distinct grounds. The first is that because the CDA Variation was in substance, albeit not in

form, a novation, it necessarily constituted a new agreement replacing the CDA itself, so that the CDA 'terminated' within the uniform meaning of that word in the 2006 Agreement.

38. The second ground advanced on behalf of Langston is that, even if the CDA was not thereby terminated, its Conditions were neither satisfied nor waived by 31st May 2007. Alternatively, if they were waived by that date, for the purposes of complying with the condition to the Deed, they were not satisfied for the purposes of complying with the condition to the Variation.

39. Mr Driscoll submitted that the issues raised by these two contentions were purely issues of law and construction, inherently suitable for summary determination without a trial. For his part, Mr Wolfson maintained on behalf of the Club first that the issue raised by the first contention depends in part upon a difficult and unresolved question of law, and in part upon an appreciation of the meaning of 'terminated' in the 2006 Agreement which depends upon relevant factual background which cannot be fully identified in advance of a trial. As to the second point, Mr Wolfson makes the same point about the relevant background, but claims rectification in the alternative, if the construction of the Variation contended for by Langston were to be preferred. I shall take the two issues in turn.

40. In support of Langston's first contention, Mr Driscoll makes three short points. First, he submits that wherever one party is substituted for another as the obligor in relation to any obligation under a contract, that substitution takes place by way of novation, rather than variation. Secondly he submits that a novation necessarily discharges the old contract and replaces it with a new one, so that the old contract is thereby terminated. Thirdly, he submits that there is no reason to give the word "terminated" in the 2006 Agreement other than that ordinary meaning.

41. For his first two submissions Mr Driscoll relied upon the general principles as to the nature and effect of novation set out in paragraphs 19-085 to 19-087 of Chitty on Contracts (29th Edition) at page 1201.

42. As to the first submission, I accept that, in relation to a particular contractual obligation, the substitution of one obligor for another can take place only by novation (save perhaps in the case of a contract in which, from the outset, the obligee authorises such a substitution in advance). But it does not seem to me necessarily to follow that where a particular obligation is novated in that way by substitution of one obligor for another, the conclusion must be that a large and complex contract containing other obligations which are not so novated must be treated as having itself been terminated by novation and replaced by a wholly new contract. I put to Mr Driscoll the example of a contract between A and B containing ten distinct obligations owed by B to A. The substitution with A's consent of C for B as obligor in relation to one of those provisions, leaving the other nine unaffected as between A and B did not seem to me obviously a case of novation of the entire contract. Mr Driscoll submitted that it was, but he could offer no authority in point.

43. The extracts from Chitty to which I have referred are concerned, in purely general terms, with simple novation where, in the A B example above C is substituted for B in all respects. The nearest authority which counsel could find for present purposes was Saunders v. Ralph [1993] 2 EGLR 1, in which the tenant of an agricultural

holding added his son by agreement with the landlord as a joint tenant. The question later arose, for the purpose of the application of the succession provisions in the Agricultural Holdings Act 1986 whether this had occurred by way of variation of a continuing tenancy, or by way of surrender by father and re-grant to father and son jointly.

44. In concluding that the original tenancy had merely been varied rather than surrendered, Jowitt J said this, at page 3:

> "There is no doubt that if parties wish to bring another person into their contractual arrangement this can be achieved by rescission of the old contract and formation of a new one. It must often happen that contracting parties, especially businessmen, do wish to bring in a further party to their arrangement. If this is something which simply cannot be achieved by variation of the existing contract, I would have expected to find authority which says so. The researches of counsel and those researches I have been able to make have failed to reveal any support of this proposition."

Later, at page 4 he said:

> "The proposition that a new party can be added only by novation (in the case of a tenancy by surrender by operation of law and re-grant) seems to me to smack of artificiality rather than principle."

45. Earlier on page 4 Jowitt J drew assistance from Morris v. Baron & Co [1918] AC 1, in which, in relation to a contract for a sale of goods, the question was whether it had been varied or rescinded by a subsequent agreement. At page 19 Viscount Haldane had said:

> "What is, of course, essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting."

46. As Mr Driscoll rightly points out, Morris v. Baron did not involve the introduction of any new party at all, and although Saunders v. Ralph did, the introduction took place only by way of addition of the son as a joint tenant, rather than by way of substitution for his father. In the present case Devco was undoubtedly substituted for the Club in relation to most but by no means all of the Club's obligations under the CDA, so that neither of those two cases is directly applicable to the present facts. Nonetheless, to the extent that the 'intention' test laid down in Morris v. Baron is of any application to party substitution cases, it seems to me that the parties to the CDA Variation went out of their way in its drafting to demonstrate their own intention that it should take effect by way of variation rather than replacement of the CDA. It was so described, every alteration was identified as a variation, and the CDA was stated otherwise to remain in full force and effect, by clause 2.

47. In my judgment the question whether the addition of a new party to an agreement, and its substitution as obligor for an existing party in respect of some, but not all of that party's obligations under the contract gives rise to a determination of the old contract and its replacement with a new one is not susceptible of a single doctrinaire answer, applicable for all purposes. It will always be relevant to know for what purpose the question needs to be answered. In Morris v. Baron it mattered because of provisions akin to the Statute of Frauds in section 4 of Sale of Goods Act 1893. The question was whether the original contract could be rescinded by a merely oral contract for the same goods on different terms. In Saunders v. Ralph the question mattered because if the addition of the son as a joint tenant operated by surrender and re-grant he was a first successor within the meaning of the Agricultural Holdings Act, with adverse consequences for the grandson. In the present case the question is whether the addition of Devco and its substitution for the Club in relation to some but not all of the Club's obligations terminated the CDA for the purposes of the 2006 Agreement. Rescission, surrender and termination are three distinct although related concepts serving different purposes.

48. If which I doubt there is any single doctrinal principle governing all those contexts, I consider that it is likely that the 'intention' test identified in Morris v. Baron and applied in Saunders v. Ralph should be extended to cases of partial rather than total substitution of a new party in relation to the obligations of the existing party. If that principle is applicable to cases of partial substitution, then it seems to me that the intention that there should be no more than a variation of the CDA, clearly manifested in the CDA Variation, puts the issue beyond doubt, in favour of the Club.

49. It is however unnecessary for me to decide that abstract question because, on the assumed facts, I consider that the Club has a real prospect of establishing at trial that the effect upon the CDA brought about by the CDA Variation was not a 'termination' within the meaning of that word in the 2006 Agreement, however it is analysed as a matter of strict doctrine. I have already described what, on the assumed facts, appears to have been the "genesis and objectively the aim of the transaction" constituted by the 2006 Agreement. I take the passage which I have quoted from the speech of Lord Wilberforce in Prenn v. Simmonds [1971] 1 WLR 1381 at 1385. It was to reduce an amount and postpone repayment of a loan on condition that the Project for the construction of a new football stadium for the Club contemplated by the CDA went ahead rather than foundered.

50. For the reasons which I have given, both the Club and the relevant governing minds of Langston (Mr Hammam and Mr Tischhauser) knew before making the 2006 Agreement that Devco was to take over the Club's responsibility for the construction of the new stadium. Far from causing the Project to founder, the CDA Variation merely implemented by way of contract that which had been in the contemplation of all the parties before the 2006 Agreement was made. To treat the CDA Variation as bringing about a 'termination' of the CDA within the meaning of the 2006 Agreement would on the assumed facts be to give rise to precisely that kind of commercial absurdity which modern principles of purposive construction require to be remedied, if necessary, by doing appropriate violence to the language. As Lord Diplock put it in The Antaios [1985] AC 191:

> "… if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts

> business common-sense, it must be made to yield to business common-sense…."

51. In my judgment therefore, the first contention by which Langston seeks to establish that the 2006 Agreement never came into effect is vulnerable to a real prospect of a successful defence. On the assumed facts, I would go further and conclude that the CDA was not terminated by the CDA Variation, but Langston must be at liberty to establish at trial if it can that the relevant factual background to the making of the 2006 Agreement is otherwise than appears from the assumed facts, and Mr Wolfson has not suggested that I should finally decide this issue at this stage.

52. I turn therefore to the second of Langston's contentions, namely that the Conditions in the CDA were neither satisfied nor, in relation to the Deed, waived by 31st May 2007. It is as I have said common ground that the Conditions, even in their amended form as the result of the CDA Variation, were not fully satisfied by that date, such that, if it happened at all, the CDA became unconditional only by a combination of satisfaction and waiver of Conditions by the Council.

53. Mr Driscoll's first and most wide-ranging point (since it applied both to the Deed and the Variation) is that the Conditions were not waived either. He put this on three grounds. First, they were not waived in accordance with the procedure for waiver set out in clause 4.21 of the CDA, which required the prior written consent, originally of the Club and, after December 2006 of Devco, before any valid waiver by the Council. 'Waiver' in the Deed must, so Mr Driscoll submitted, mean waiver in accordance with the terms of the CDA. Furthermore, since for example the House of Sport Conditions were not uniformly for the benefit of the Council, waiver required the Club's, or Devco's consent in any event, as a matter of general law, regardless of clause 4.21 of the CDA.

54. In my judgment the assumed facts, including the handing over of Mr Evans' email, the completion meeting on 4th May, the execution of the Deed of Grant and the confirmation of unconditionality by the Council to the Club's auditors taken together, manifestly afford a real prospect that the Club will establish that there was a waiver of all the Conditions, with the Club's enthusiastic consent (having regard to the benefits which it stood to obtain) by 31st May. While I agree with Mr Driscoll that the evidence falls short of demonstrating any prior written consent from the Club or Devco, in my judgment 'waiver' in the 2006 Agreement is to be purposively construed, so that any form of waiver sufficient to render the CDA unconditional by the end of May 2007 would suffice for the purpose of satisfying the condition expressed in clause 2.6 of the Deed.

55. In World Online Telecom Ltd v. I-Way Ltd [2002] EWCA Civ 413 Sedley LJ giving the leading judgment in the Court of Appeal said that the question whether parties could waive conditions in a contract otherwise than in accordance with a procedure laid down in that contract was, as a matter of English law, sufficiently unsettled to be unsuitable for summary determination. I gratefully adopt that conclusion. For practical purposes, the waiver issue may usefully be tested in the present case by asking whether, on the assumed facts, the Council could have resisted a claim by the Club, heard on 31st May 2007, that the CDA had become unconditional. Viewed that way, it seems to be eminently arguable that it could not have done so, which is sufficient for present purposes. It follows from that conclusion that in my judgment

the Club has a real prospect of establishing a defence to a claim under the Instrument, based upon the contention that at least the Deed had become unconditional by that date.

56. Mr Driscoll's final argument was that even if effective for the purposes of the Deed, a waiver of conditions under the CDA was insufficient for the purposes of the Variation both because the Variation referred to the CDA in its original form and because the condition was defined in terms of satisfaction alone, rather than satisfaction or waiver.

57. As an argument based purely on construction, this submission is not without force. Had the Variation stood alone, the court might easily have assumed that satisfaction included waiver and that references to the CDA meant references to its form as at May 2007, including any relevant Variations. But plainly the Variation must be construed in conjunction with the Deed, whereupon the difference in language between the two, in both those respects, points *prima facie* to an intention that each condition should have a distinct and different scope, such that waiver should be insufficient for compliance with the condition to the Variation.

58. But again it seems to me that, on the assumed facts, the relevant background and the genesis and purpose of the 2006 Agreement, objectively ascertained, point strongly in the opposite direction. Ignoring for present purposes the negotiations for the 2006 Agreement between the Club and Langston, on the basis that they are inadmissible for the purposes of construction, it is nonetheless still apparent that both the Club and the relevant governing minds of Langston (Mr Hammam and Mr Tischhauser) knew and intended that the genesis and objective of the 2006 Agreement was to be that it should take effect if, but only if, the CDA went unconditional by the end of May 2007. It is impossible to discern any rational commercial purpose for including conditions in the Deed and the Variation which, because of their different effect, could lead to the outcome that Langston's loan was written-down because the CDA went unconditional, but that postponement of payment was not achieved. Both the write-down and the postponement were indissoluble parts of an objective designed to ensure that the Club had the financial viability to pursue the Project if the CDA became unconditional.

59. Furthermore, when it is borne in mind that the Variation was a document prescribed by the Deed for giving effect to an intention expressly stated (by the combined effect of clauses 2.2, 2.3 and the definition of "Instrument") in the Deed that, once unconditional, the £15 million could be repaid only in accordance with the Instrument as varied by the Variation, it seems to me that the structure of the two documents is such as to point away from any possibility that the parties intended that the written-down amount of £15 million should be repayable in accordance with the Instrument in its original form.

60. It therefore does little violence to the language of the Variation to treat its reference to the CDA as shorthand for the CDA as varied, and its reference to satisfaction of the Conditions of the CDA as shorthand for satisfaction or waiver of those Conditions. To the extent that violence to the language is required, it seems to me well arguable on the assumed facts that it is justified by reference to Lord Diplock's dictum in The Antaios, any other conclusion producing what appears to me to be a commercial absurdity.

61. Mr Driscoll tried hard to persuade me that there was reason for the use of a narrower condition in the Variation, because the postponement of payment represented a burden to Langston altogether greater than the write-down of the loan from £24 million to £15 million. Again, I disagree. On the assumption that, without the Project, the Club would be likely to become insolvent, the real disadvantage of Langston committing itself to the 2006 Agreement in circumstances where the Project might not proceed was constituted by the reduction, rather than the postponement of the debt. It is the reduction which would reduce the quantum of its claim as an unsecured creditor in the Club's liquidation.

62. Again, it is unnecessary for me to decide this question of construction beyond the conclusion that the Club's case in relation to it stands a real prospect of success. On the assumed facts I would expect the Club to succeed, but again, Langston must be at liberty to establish at trial that the true facts are otherwise than those which for present purposes Mr Driscoll accepts that I must assume. Again, Mr Wolfson did not suggest otherwise.

63. That is not in any event the end of the matter, because of the Club's alternative claim for rectification designed, if necessary, to add the word "waived" to the condition in clause 2.3 of the Variation. On the assumed facts, there appears to have been little contentious negotiation of the 2006 Agreement, but the evidence submitted by the Club does include Mr Tischhauser's letter to Mr Ridsdale dated 12th September 2006 which includes the following statement:

> "As mentioned earlier, the condition precedent for the renegotiation of the terms should be subject to the City Council's approval of the Project and its unconditionality. I trust that these comments can be taken into account in the amendments and will be acceptable to all the parties."

64. Earlier in the same letter Mr Tischhauser had stated that he was authorised by Langston to confirm that, promptly upon reception of those amendments, Langston would be pleased to "finalise" the document subject to the Club's answers on the points then mentioned, including that which I have quoted.

65. There is no evidence on the assumed facts that this approach to conditionality was ever renegotiated, and no reason in the absence of any further evidence why it should not be inferred that such remained Langston's intention until the execution of the 2006 Agreement in the form drafted thereafter by the Club's solicitors. The evidence of the draftsman, of course yet to be tested, is that it was no part of his brief to exclude waiver of condition as a legitimate means of achieving unconditionality of the CDA, and that he did not by omitting the word 'waiver' in the Variation intend any such consequence. It follows that in my judgment, there is on the assumed facts a sufficient basis for the conclusion that the Club has, if necessary, a real prospect of obtaining the remedy of rectification which it seeks.

CONCLUSION

66. For the reasons given, this is plainly not a case for summary judgment. Langston's application is therefore dismissed.