Neutral Citation Number: [2012] EWCA Civ 548

Case No: A3/2011/1951

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE QUEEN'S BENCH DIVISION (Commercial Court)
Mr Justice Blair
[2011] EWHC 1560 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2012

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE LLOYD
and
LORD JUSTICE AIKENS

- -

Between :

Georgi Velichkov Barbudev	**Appellant**
- and -	
Eurocom Cable Management Bulgaria Eood & Ors	**Respondent**

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- -

Mr John Wardell QC (instructed by **K&L Gates LLP**) for the **Appellant**
Mr Conall Patton (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondent**

Hearing date : 7th February 2012

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Approved Judgment

Lord Justice Aikens :

Synopsis

1. The question on this appeal is whether a "Side Letter" dated 12 April 2006, which was signed by the appellant, Mr Georgi Velichkov Barbudev, and on behalf of the first respondent, a Bulgarian corporation, is legally enforceable by Mr Barbudev. In order to explain how the question has arisen, it is necessary to set out some of the background, although it is not necessary to repeat many of the detailed findings of fact made by Blair J in his full and careful judgment[1] which was handed down on 17 June 2011 after a 7 day trial in May 2011.

2. Mr Barbudev is a Bulgarian businessman who built up a successful cable television and internet business in the Plovdiv area of south central Bulgaria in the years 1995-2004. The company was called Eurocom Plovdiv EOOD ("EP"). Mr Barbudev was the CEO and major shareholder. By 2004 EP had become the second largest cable company in Bulgaria and Mr Barbudev and the other shareholders decided to sell their interests in it. Several potential purchasers were interested, including the American company Rumford Alliance Ltd ("Rumford") and the Warburg Pincus Group, ("WPG") a private equity consortium, which included all three respondents.

3. By late 2005 there were competing offers to buy EP from Rumford and WPG. In November 2005 Mr Barbudev signed two "Term Sheets" with WPG, both of which were expressed to be governed by English law. The Term Sheet dated 27 October 2005 stated that EP would be sold to the third respondent, FN Cable Holdings BV. With some exceptions the terms of the sheets were stated not to be legally binding. One important exception, however, was that the EP shareholders were legally committed to deal only with WPG for an exclusivity period which would expire on 15 April 2006.

4. The judge found that from late 2005 Mr Barbudev made it clear to WPG that he wanted to reinvest some or all of the price he obtained for his EP shares in the new, WPG entity/EP merged business. That was an important issue for him.[2]

5. It was Mr Barbudev's case at the trial that on 12 December 2005 an agreement was reached in principle between him and Mr Robert Feuer, then an Associate of the second respondent, that Mr Barbudev would have a 10% participation in the proposed new combined business of Eurocom Cable Management Bulgaria EOOD, the first respondents ("ECMB"). Mr Barbudev said that this led him to sign a Declaration on 14 December 2005 that there were no other deals in prospect preventing those wishing to sell EP from selling to WPG or its nominated entity. This entity was always going to be ECMB, which had already bought another Sofia based operation called Eurocom Cable EAD.

6. From December 2005 there were negotiations on the terms of a Share Purchase Agreement ("SPA") between the shareholders of EP and WPG. There were also

[1] ***[2011] EWHC 1560 (Comm)***
[2] [22]

discussions on how Mr Barbudev's proposed stake in the new combined business was to be valued and how much he was to pay for it. By early March 2006 negotiations on the form and content of the draft SPA were well advanced. On 5 March 2006 Mr Barbudev emailed Mr Feuer asking for a draft of the contract for his purchasing 10% of the shares in the new entity. Mr Feuer replied on 7 March 2006 that an Investment and Shareholders Agreement ("ISA") would be prepared once the SPA had been agreed and signed.

7. Clause 6 of the draft SPA contained the conditions that had to be fulfilled before there could be a "Closing" of the SPA. Clause 6.1 provided:

> "*Closing shall be conditional on the following Conditions having been fulfilled or waived in accordance with this Agreement….(e) the Purchaser, [Mr Barbudev] (and if applicable any entity nominated by [Mr Barbudev] which is acceptable to the Purchaser) having legally, duly and validly executed the Investment Agreement conditional only upon closing".*

In the draft SPA the term "*Investment Agreement"* was defined as "*the investment and shareholder's agreement to be entered into between the Purchaser and [Mr Barbudev] in relation to the Investment".* The term "*Investment"* was defined as "*the €1,650,000 investment by George Barbudev in consideration for a combination of shareholder debt and registered share capital of the Purchaser which shall represent ten (10) per cent of the registered share capital of the Purchaser as at the date of the Investment Agreement".* It was accepted at the trial that, at some point, Mr Barbudev and WPG had agreed the figure of €1,650,000 as the price of Mr Barbudev's investment and 10% of the registered share capital as the extent of his investment.

8. However, clause 6.5 of the draft SPA provided that the condition precedent to the Closing that was set out in clause 6.1(e) could be waived by written notice from either the Seller or the Purchaser. From Mr Barbudev's point of view, the unconditional right of the Purchaser (ie. WPG) to waive the condition in clause 6.1(e) made that term valueless to him. If WPG could waive that condition, it would mean that the SPA would become effective, but Mr Barbudev would not have obtained an Investment Agreement by which he would invest €1.65 million in return for a 10% stake in the new business, which he was anxious to do. The judge found, at [33], that the existence of the "waiver" condition in clause 6.5 was unacceptable to him.

9. The question of whether the Purchasers should maintain the right to waive the condition in clause 6.1(e) was debated between the parties and their lawyers in the period until early April 2006. At [40] of his judgment, Blair J found that around 5 April 2006, when it was clear that an ISA would not be ready for signing at the same time as the proposed signing of the SPA, the idea of a Side Letter emerged in discussions between Mr Barbudev, Mr Feuer and Mr Yordan Naydenov, WPG's Bulgarian lawyer.

10. The Side Letter was drafted by Mr Paul Doris, a senior associate of Freshfields Bruckhaus Deringer LLP ("Freshfields"), who had been instructed to advise WPG on English and Dutch law aspects of WPG's acquisition of EP. Mr Doris was instructed by Mr Feuer to draft the Side Letter on 10 April 2006. Once Mr Feuer had approved the draft Side Letter, it was circulated, with other documents, on 12 April 2006.

The Side Letter was signed that day by Mr Barbudev, Mr Feuer, on behalf of ECMB and Mr Lorand Horvath, also on behalf of ECMB. All three men initialled each page of the document. However, the judge found that "*contrary to the submissions that have been made by the parties, there is no firm evidence that any of these individuals gave any particular thought to the legal effect of the proposed document".*[3]

11. At the trial there was an important dispute about what Mr Barbudev was told by Mr Feuer and (on Mr Barbudev's case) by Mr Horvath (who was the chief financial officer of the third respondent) in the course of a meeting which took place on the afternoon of 12 April 2006 in Zurich. It was alleged by Mr Barbudev that Mr Feuer gave him an oral assurance that the Side Letter was an additional agreement or contract between him and WPG giving him legal rights to invest in the purchaser company. Mr Barbudev further maintained that the Side Letter was presented as the solution to Mr Barbudev's concerns about the ability of WPG to waive signing of the ISA as a condition precedent to the closing of the SPA, which, as explained above, would enable WPG to prevent Mr Barbudev from obtaining his 10% investment in the new entity. Mr Feuer denied he gave any such assurance and Mr Horvath said that he had no recollection of Mr Feuer saying that the Side Letter was intended to protect Mr Barbudev's reinvestment.

12. At [49] of his judgment, Blair J found that neither Mr Feuer nor Mr Horvath gave Mr Barbudev any assurance that the Side Letter was like a separate contract, the purpose of which was to protect Mr Barbudev's right to invest in the combined business. But the judge also found that Mr Barbudev was not told that the Side Letter was not legally binding. He said:

> "*I am not satisfied that anything was said to him one way or the other as to [the Side Letter's] binding nature. I find that Mr Feuer used the Side Letter to reassure [Mr Barbudev] that the intention was that his investment would go ahead, and in the light of that Mr Barbudev signed the SPA, even though [WPG] retained the unilateral right to waive the requirement that the execution of the ISA was a precondition of the closing".*

13. The terms of the Side Letter are obviously central to the case and to this appeal. I have set the letter out in full in the Appendix to this judgment. Mr Barbudev's case at the trial was that the Side Letter constituted a contractual obligation on the part of all three respondents to execute an Investment Agreement, viz. the ISA, by which Mr Barbudev would invest €1,650,000 for 10% of the share capital of the reformed ECMB. However, the judge found that the second and third respondents were not parties to the Side Letter[4] and that conclusion is not appealed.

14. At the trial, it was argued for Mr Barbudev that, at all times after the Side Letter was signed, Mr Barbudev and the respondents regarded it as binding and that this was made clear by the fact that draft ISAs were circulated by Freshfields thereafter. The first was sent out on 9 May 2006 and further drafts followed. They contemplated Mr Barbudev investing in the revamped ECMB by paying €1,000,271 for 10% of the

[3] [40]
[4] [114]-[116]

share capital of the company and lending €649,729, making a total of €1,650,000. There were many other draft terms.

15. The judge rejected the submission that Mr Joseph Schull (Managing Director of Warburg Pincus International) and Mr Feuer, on behalf of the three respondents, proceeded on the basis that the two "key terms" set out above were "set in stone" and would be enforceable by Mr Barbudev whatever the final structure of the ISA. In the judge's view, what followed the signing of the Side Letter was a negotiation only.[5]

16. The Closing under the SPA took place at EP's offices in Plovdiv on 6 and 7 July 2006. A waiver of the condition of signing the ISA as a pre-condition to the closing of the SPA was also signed on behalf of ECMB and Mr Barbudev. The wording of the waiver stated:

> "*[ECMB] and [Mr Barbudev] shall continue their negotiations for the determination of the structure and the entering into an investment agreement immediately after the Closing with a view of having the said agreement executed as soon as reasonably possible".*

17. But there were delays in executing an ISA. The judge found (at [64]) that WPG's enthusiasm for Mr Barbudev's participation in the venture waned during 2006. There was also a difficult problem about ECMB's possible liability for withholding tax: see [65]. The judge found that, from November 2006, the drafting of the ISA "*went to sleep"*: [68].

18. Finally, on 24 April 2008 there was a meeting in the offices of ECMB in Sofia, which was attended by Mr Barbudev, his lawyer Dr Thomas Winkler, Mr Stefan Neytchev (a major shareholder in EP), Mr Horvath, Mr Petyo Staykov, the CEO of ECMB, Mr Naydenov and others. Neither Mr Schull nor Mr Feuer were present. There were negotiations, mostly in Bulgarian, about the terms of a document which would, ostensibly, settle outstanding matters. The final version, as in the original draft, was headed "Final Settlement". The first three clauses dealt with outstanding payments under the SPA.

19. The final version of this document contained a clause 5 which provided:

> *"The Seller confirms that once the payments identified in the preceding clauses 1 – 3 have been made all of the obligations (of payment or otherwise) of the Purchaser [ie. ECMB] towards the Seller under the [SPA] shall be fully performed and neither the Seller nor any other Party shall have any claim of any nature against the Purchaser whatsoever under the [SPA] or otherwise".*

20. Blair J noted (at [78]) that Mr Barbudev's own evidence was that it was for him to decide what to do and that he read the wording of clause 5 for himself and he decided that it did not extinguish his rights. The judge concluded (at [78]) that whilst Mr Barbudev made it clear he was not happy signing what became known as the "Final Protocol", nothing was done by either Mr Horvath or Mr Naydenov which could reasonably be taken as giving the impression that they agreed with Mr Barbudev that the Final Protocol was not intended to impact on his rights under the Side Letter.

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[5] [54]

21. The Final Protocol was duly signed on 24 April 2008. Nothing much then happened until May 2009, when Mr Barbudev heard that WPG intended to sell ECMB. Mr Barbudev arranged to meet Mr Schull and Mr Feuer at the WPG offices in London on 19 May 2009, but it was made clear to him that he would get nothing. Mr Barbudev's solicitors wrote a letter making a claim in June 2009. ECMB was sold in October 2009. The present proceedings were begun by Mr Barbudev in January 2010 in which he claimed damages for the loss he said he had sustained as a result of the respondents' failure to honour the terms of the Side Letter. This led to the trial before Blair J in May 2011.

The arguments before the judge and his conclusions concerning the Side Letter

22. As already noted, before the judge it was argued on behalf of Mr Barbudev that he was given an oral assurance before he signed the Side Letter to the effect that it was intended to protect his right to invest in the new enterprise, ECMB. It was said that this assurance meant either that the contract evidenced by the Side Letter was partly in writing and partly oral or that there was a collateral contract to that contained in the Side Letter. The respondents argued that there was no oral assurance and that the Side Letter was not intended to create binding legal relations between the parties to it; it was, at best, a Letter of Comfort pending the conclusion of the proposed ISA. The respondents also argued that the Side Letter was, on its proper interpretation, only an "agreement to agree" which was unenforceable. Lastly, the respondents argued that the Side Letter was not a sufficiently complete and certain contractual agreement to be effective.

23. I have already mentioned one of the two subsidiary arguments before the judge, viz. whether the second and third respondents were parties to the Side Letter. The second was whether, on the assumption that the Side Letter constituted a legally enforceable agreement, the Final Protocol of 24 April 2008 released ECMB from any obligation that it may have had to allow Mr Barbudev to invest in the new ECMB entity. On the latter point the judge held that the arguments on construction were "finely balanced" but found for Mr Barbudev.[6] This issue only becomes relevant on this appeal if Mr Barbudev succeeds on the question of whether the Side Letter is an enforceable contract, to which at least the first respondent was a party.

24. On the issues concerning the status of the Side Letter, the judge held: (1) The agreement between the parties was contained solely in the written terms of the Side Letter. It was not contained partially in that document with the addition of some other, oral, terms.[7] (2) He could not see that an agreement could be intended to create legal relations *"if it is unenforceable in its entirety".* So the answer on the question of whether the parties intended to create legal relations by the Side Letter depended on the other two key issues, viz. whether the parties had, by the Side Letter, created more than an unenforceable "agreement to agree" and, if so, whether

[6] [128]
[7] [88]

the contract had sufficient certainty.[8] (3) On the correct construction of the Side Letter itself, the agreement between the parties was that Mr Barbudev was to have the opportunity to invest on terms to be agreed which would be set out in an ISA, which the respondent parties agreed to negotiate with Mr Barbudev in good faith. That constituted an "agreement to agree" which was unenforceable.[9] (4) The agreement to negotiate in good faith extended also to the price to be paid by Mr Barbudev and the percentage he was to acquire.[10] (5) Although the parties had agreed in principle on the key terms of price and percentage before 27 February 2006, that prior agreement was not conclusive. The terms of the Side Letter (in its surrounding circumstances) demonstrated that the parties had not actually reached agreement.[11] (6) The Side Letter was an agreement to negotiate an "Investment Agreement", viz. an investment and shareholders agreement, or ISA. The Side Letter did not contain essential terms that would be required for a shareholders' agreement of this kind.[12] (7) Various matters remained unagreed and continued to be so, as identified by the judge in [108]. The result was that Mr Barbudev could not invoke the Side Letter as a complete and enforceable agreement because essential terms for an ISA were not addressed by it.[13] (8) It followed from the judge's conclusion that the Side Letter was only an agreement to agree and was too uncertain to constitute a binding contract that, on his reasoning, the parties could not have intended to enter into legal relations: see (2) above.

The arguments of the parties and the issues arising on the appeal

25. Mr John Wardell QC, who appeared on the appeal on behalf of Mr Barbudev, submitted that the judge fell into a fundamental error of approach by considering the effect of the Side Letter by reference only to its terms. He failed to see the Side Letter in its commercial context, which was the existence of the "waiver" provision in clause 6.5 of the SPA and its importance to Mr Barbudev. If clause 6.5 had not been present, then Mr Barbudev would effectively have had a contractual right to invest in the merged ECMB before the SPA could be closed, by virtue of clause 6.1(e) of the SPA. Mr Wardell asked, rhetorically, why would Mr Barbudev make his position worse by agreeing to a Side Letter which had no legal effect whatsoever? He submitted that all the key terms were agreed before 12 April 2006 and continued to be agreed thereafter. That was clear from the correspondence.

26. Mr Wardell also submitted that the judge erred in concluding that Mr Feuer did not give an oral assurance to Mr Barbudev before he signed the Side Letter. Mr Wardell submitted that this was not an attack on a finding of primary fact by the trial judge but a question of an analysis of the evidence, particularly that of Mr Horvath and Mr Barbudev, as well as the inherent probabilities. Mr Wardell realistically recognised that this had to be a secondary submission to his main one on the effect of the Side Letter itself.

27. In the event we did not call for oral argument from Mr Patton, appearing for the respondents. His written submission was that the judge was correct to hold that the

[8] [96]
[9] [103]
[10] [103]
[11] [103]
[12] [107]
[13] [108]

Side Letter was unenforceable for the three reasons that the judge gave and that the appeal should be dismissed for those reasons. As a fall back, the respondents also submitted that the judge erred in his conclusion on the effect of the Final Protocol of April 2008. Their case was that, on its true construction, it did extinguish any rights Mr Barbudev may have had.

28. There are, therefore, four, or possibly five, issues for this court to consider. Logically the first issue is whether the judge erred in concluding that Mr Feuer did not give Mr Barbudev an oral assurance before Mr Barbudev signed the Side Letter. The appellant's case was that this assurance was to the effect that the Side Letter was a solution to Mr Barbudev's concerns about clause 6.5 of the SPA terms and that the Side Letter was like a separate contract to protect his right to invest in the new merged business. If that issue succeeds, then it would amount to a collateral contract and could be relied on by Mr Barbudev. If it fails then the second issue is whether the parties intended to create legal relations by virtue of the Side Letter, set in its commercial surroundings. The third issue concerns the nature of the Side Letter, in its context: was it an "agreement to agree" or was it an enforceable contract giving Mr Barbudev rights to purchase a stake in the merged ECMB? Fourthly, if the Side Letter was, in principle, a binding contract giving Mr Barbudev such rights, was it nevertheless unenforceable because of uncertainty of terms?

29. The potential fifth issue, concerning the construction and effect of the Final Protocol, only arises if we allow the appeal on the effect of the Side Letter.

The Law

30. The legal principles to be applied to these issues are not in doubt. On the issue of whether the parties intended to create legal relations, the leading case is now ***RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Co KG.***[14] The court has to consider the objective conduct of the parties as a whole. It does not consider their subjective states of mind. In a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it and it is a heavy one.[15]

31. If, as I conclude below, the agreement is found to be wholly in writing (which must be a question of fact), then the exercise of construction is a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person (ie. one with all the background knowledge reasonably available to the parties in the situation that they were in) would have understood the parties to have meant. The court must have regard to all the relevant circumstances and, in a business context, it should prefer the construction that is more consistent with business common sense.[16]

32. On the question of an enforceable contract or not, it is for the parties to decide at what stage they wish to be contractually bound. To use the vivid phrase of Lord Bingham (as Bingham J) the parties are "masters of their contractual fate".[17] They can agree to

[14] ***[2010] 1 WLR 753:*** particularly at [45] per Lord Clarke of Stone-cum-Ebony JSC
[15] ***Edwards v Skyways [1964] 1 WLR 349*** at 355 per Megaw J.
[16] See in particular: ***Rainy Sky v Kookmin Bank [2011] 1 WLR 2900*** at [21] per Lord Clarke of Stone-cum-Ebony JSC.
[17] ***Pagnan Spa v Feed Products Limited [1987] 2 Lloyd's Rep 601*** at 611.

be bound contractually, even if there are further terms to be agreed between them.[18] The question is whether the agreement is unworkable or fails for uncertainty. However, where commercial men intend to enter into a binding commitment the courts are reluctant to conclude that such an agreement fails for uncertainty.[19]

Issue One: Was there an oral assurance?

33. Contrary to the submission of Mr Wardell, in my view this is an issue of primary fact which the judge had to decide principally on the oral evidence of the witnesses, but put in the commercial context. Mr Wardell criticised the finding at [49] of the judgment because he said that the judge failed to take account of the fact that Mr Horvath said that he was not particularly paying attention at the time. Bearing in mind that the judge had concluded that he could not place much weight on Mr Feuer's evidence,[20] but that he found Mr Barbudev generally reliable,[21] Mr Wardell submitted that the judge's conclusion was against the weight of the evidence.

34. I do not agree. The judge's conclusion was based almost entirely on his appreciation of the oral evidence of the witnesses: Mr Feuer, Mr Horvath and Mr Barbudev. At the trial the parties made detailed submissions on the reliability of the various witnesses. It was the judge's task to assess their evidence both generally and on particular issues. The judge did find Mr Barbudev generally reliable but he specifically pointed out that he could not accept his evidence on every issue. One of those was obviously whether he was given a specific assurance by Mr Feuer before the Side Letter was signed. On that issue the judge preferred the evidence of Mr Horvath, who was accepted as being an honest witness. The judge must have taken account of the submission of Mr Wardell that Mr Horvath was not really paying attention at the time.

35. This is a finding of primary fact by the judge. This court is very reluctant indeed to overturn such a finding, particularly when based upon oral evidence of witnesses the judge heard and saw and we have not. To overturn it the appellant has to demonstrate that the judge's conclusion resulted from a fundamental error concerning the evidence; that his conclusion was not possible on the evidence or that it was unreasonable. I am not satisfied that any of those tests can be met in this case, despite the cogent submissions of Mr Wardell. There was material in the cross-examination of Mr Horvath by Mr Wardell that could found the conclusion that the judge reached.[22]

36. I therefore reject the appellant's submission on this issue.

Issue Two: Intention to create legal relations

37. On this issue, I respectfully disagree with the judge. Mr Wardell pressed us to consider this issue in the commercial context of the history of the SPA, both before

[18] ***RTS Flexible Systems*** case (supra) at [48]
[19] ***Hillas v Arcos Ltd (1932) 147 LT 503*** at 514 per Lord Wright.
[20] [46]
[21] [10]
[22] See Day 5 page 191 lines 11-17

and after the Side Letter was signed. I agree that the issue of whether the parties intended to create legal relations is to be examined in the light of all the surrounding circumstances. But I do not need to go that far to reach my conclusion; it is very clear from the terms of the Side Letter itself that the parties intended to create legal relations. For a start, it was drafted by Freshfields. Secondly, its language is that of legal relations; see eg. the wording of the second paragraph and that of the third, starting "in consideration of you agreeing to enter into….". Thirdly, the reference to the ***Contracts (Rights of Third Parties) Act 1999*** and the agreement that the letter would be governed by and interpreted in accordance with English law all point to an intention to create legal relations between the parties. Fourthly, the parties clearly intended that the confidentiality agreement in the letter would be contractually enforceable between them, whatever might be the status of other parts of the letter.

38. But that conclusion does not necessarily assist Mr Barbudev. The parties can have intended to create legal relations between themselves but it does not follow that the effect of the Side Letter is that it created a legally enforceable contract giving Mr Barbudev the right to purchase a 10% stake in the new, merged business for €1,650,000. The court has to go on to examine the nature of the legal relations that were actually created. To take an obvious example: two parties may orally agree to sell and purchase some land and in doing so may well have intended to create legal relations. But such a contract would be unenforceable in the absence of an agreement in writing.[23] So the court has to analyse carefully the nature of any agreement which the parties have reached, at least ostensibly, in order to see whether it constitutes an enforceable contract.

Issue Three: the nature of the Side Letter in its context: was it an "agreement to agree" or an enforceable contract?

39. At the trial it was Mr Barbudev's case that there was a partly oral and partly written agreement. In support of this the claimant had pleaded reliance on the alleged oral assurance given by Mr Feuer and also on the fact that Mr Barbudev had told Mr Feuer that he was willing to pledge the shares in ECMB that he was to purchase to ING bank so as to assist in satisfying the terms of a loan agreement between that bank and the purchaser of the shares in EP.[24] The judge rejected the first argument and I have concluded that he was right to do so. On the pledge, Mr Wardell accepted the judge's findings at [52] that there was a brief discussion about the pledge at the time the Side Letter was signed on 12 April 2006 but that it was only on 21 April 2006 that Mr Barbudev finally agreed to pledge his shares and Mr Doris of Freshfields was so informed. Mr Wardell also accepted that this meant that the question of a share pledge did not form part of any concluded agreement with the Side Letter.[25] However, Mr Wardell says that it is important to take account of the circumstances in which the pledge of the shares was sought as this shows the nature of the agreement created by the Side Letter and the judge failed to appreciate the importance of that fact.

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[23] For an example of a commercial contract where the judge held that the parties intended to create legal relations but the contract was not enforceable, see ***Dhanani v Crasnianski [2011] 2 All ER (Comm) 799.***
[24] See [52] and [85] of judgment.
[25] Judge's finding at [87]

40. In my view the judge was plainly correct to conclude that any agreement between the parties was solely contained in the Side Letter, for the reasons that he gave at [88] of his judgment, which are persuasive and cannot be attacked on the facts.

41. Accordingly, the effect of the Side Letter has to be determined by its terms, albeit in the commercial context in which the Side Letter is placed. I accept that the context was that: (1) Mr Barbudev wished to buy a 10% stake in the new, merged business and he wished to spend €1.65 million in doing so and (2) that position was safeguarded by the terms of clause 6.1(e) of the proposed SPA, but that would be fatally undermined if ECMB exercised its right to "waive" that condition using clause 6.5 of the proposed SPA; so that (3) Mr Barbudev wished to find a means of safeguarding his position so he would be able to exercise his right to buy a share in the new, merged business and that (4) safeguarding this right was important to him.

42. I therefore accept that it was Mr Barbudev's intention to have a binding agreement in the Side Letter that contractually safeguarded his right to purchase a 10% stake. The question is whether he succeeded in this. That necessarily involves a close examination of the terms of the Side Letter itself, set against the commercial background which I have summarised.

43. The key paragraph in the Side Letter is the one under the heading "Investment Agreement". The "Purchaser", viz. ECMB, agrees, in consideration of Mr Barbudev entering into the SPA and signing the "Transaction Documents"[26] that it will "*offer you the opportunity to invest in the Purchaser on the terms to be agreed between us which shall be set out in the Investment Agreement and we agree to negotiate the Investment Agreement in good faith with you…".* The paragraph then sets out what terms "*without limitation"* shall be included in the Investment Agreement. The chief term is that Mr Barbudev "..*shall invest an aggregate amount of not less than €1,650,000 in consideration for a combination of shareholder debt and registered shares which shall represent 10% of the registered share capital of the Purchaser on the date of the Investment Agreement".*

44. In my view this Side Letter is, without doubt, no more than an "agreement to agree". It is an agreement to offer Mr Barbudev "*the opportunity to invest in the Purchaser on the terms to be agreed between us".* That is not the language of a binding commitment and no amount of taking account of the commercial context and Mr Barbudev's concerns and aims can make it so. Moreover, the next phrase makes it clear that the terms of the Investment Agreement are not agreed; they are to be negotiated "…*in good faith with you".*

45. I accept that particular terms are then set out, but even those are not certain. The first is that Mr Barbudev will invest an aggregate amount of "…*not less than €1,650,000…'* leaving open the possibility that it will be more; a point which, presumably, was to be the subject of the future negotiations in good faith. Mr Wardell emphasised that, in the subsequent draft ISAs, the sum was never changed, nor was the 10% stake. But, as Mr Patton pointed out in his written submissions, those facts cannot assist in the proper construction of the Side Letter. Moreover, as Mr Patton also pointed out, the question is whether either side could certainly have changed the figures. In my view they could have increased either Mr Barbudev's

[26] As defined in the SPA

percentage stake and the monetary amount, even if they could not have lowered them.

46. Mr Wardell accepted that if the Side Letter is no more than an "agreement to agree" then it constitutes an unenforceable agreement between the parties. That is clear from many authorities, not least the House of Lords decision in ***Walford v Miles.***[27] This conclusion necessarily means that Mr Barbudev's appeal must fail. However, as we heard argument on the issue of certainty of terms I will express my conclusion on that point as well.

Issue Four: certainty of terms

47. The Side Letter contemplates the negotiation, in good faith, of terms to be set out in an "Investment Agreement", which term meant, according to the SPA, an "investment and shareholders' agreement", to be entered into between Mr Barbudev and the Purchaser (ECMB). As the judge pointed out,[28] Mr Barbudev and ECMB were not contemplating a simple sale of a certain number of shares in the new, merged, business, for a certain price. They were contemplating an agreement that would determine the relationship between one shareholder in a Bulgarian private stock company who had a large majority of shares (in the region of 90% but perhaps less) and a minority shareholder, Mr Barbudev.

48. So the question is whether the Side Letter contained sufficient agreed terms to make an investment and shareholders agreement workable and sufficiently certain. In [108] of the judgment, the judge identified six matters which, in his view, needed to be agreed before an investment and shareholder agreement would be sufficiently certain so as to be workable. He described them as "*.essential terms for an ISA"* which were not dealt with in the Side Letter and that failure to have those agreed meant that the Side Letter was too uncertain to be an enforceable contract.

49. Mr Wardell submitted that the judge asked himself the wrong question. He argued that the judge erred because he compared what was in the Side Letter with the later drafts of the ISA that were produced, which dealt with these six matters that the judge identified which the Side Letter did not. Mr Wardell submitted that the question was whether the Side Letter itself was sufficiently certain in its terms and no regard should be taken of subsequent turns of negotiation.

50. In my view the judge was right to ask the question: what was it that the parties contemplated at the time of the Side Letter? That determined what needed to be agreed between the parties to have a contract that was sufficiently certain. Although a simple share sale agreement for an agreed percentage of shares at an agreed price could have been contemplated, I agree with the judge that it was not what the parties intended. They intended that Mr Barbudev would have an "*opportunity to invest in the Purchaser"* on terms to be set out in an investment and shareholder agreement which would regulate relations between the two sets of shareholders. It must also be remembered that Mr Barbudev was to remain as a manager of EP. The ISA had to deal with what might happen to his shares if he was a "good leaver" or a "bad leaver". Identifying the minimum sum of investment and the minimum amount of shares and

[27] ***[1992] 2 AC 128.***
[28] [107]

shareholder debt was insufficient to create certainty as to the proposed relations between the parties. The details of other critical matters, such as when and how Mr Barbudev could be bought out or get out of his investment had to be agreed. The fact that "tag along" and "drag along" provisions were mentioned in the Side Letter demonstrates that the parties had appreciated that the agreement to be negotiated consisted of more than a simple sale of a certain number of shares at an agreed price.

51. Mr Wardell showed us a manuscript note by Mr Doris of a meeting between Mr Barbudev and Mr Feuer on 5 June 2006 which dealt with the proposed ISA amongst other things. The note shows that there were detailed discussions on precisely how Mr Barbudev could exercise a "put option" to get the purchasers to buy him out and how the purchaser could exercise a "call option" to buy out Mr Barbudev. There also appears to have been discussion of the "tag along" and "drag along" provisions. All those had to be in place so as properly to regulate the relationship between Mr Barbudev as a minority shareholder. That note simply illustrates the point that there remained many crucial matters that were not agreed in the Side Letter which had to be agreed before there could be a sufficiently certain contract which was in the form of an ISA, which is what the parties contemplated.

52. Accordingly, I agree with the judge's conclusion, at [108], that Mr Barbudev cannot invoke the Side Letter as a complete and enforceable agreement, because the essential terms for what the parties contemplated, viz. an investment and shareholder agreement, were not dealt with in the Side Letter. So even if, contrary to my view, the Side Letter was more than an "agreement to agree" it was not sufficiently certain to be an enforceable contract.

Conclusion and disposal

53. For these reasons, although I disagree with the judge on the issue of the intention of the parties to create legal relations, I agree with him that the Side Letter is not an enforceable contract. I would therefore dismiss this appeal.

Lord Justice Lloyd

54. I agree.

President of the Queen's Bench Division

55. I also agree.

Appendix

The Side Letter of 12 April 2006

Private and Confidential

EUROCOM CABLE MANAGEMENT BULGARIA EOOD
24 Patriarch Evtimii Blvd
Sofia
1000
Bulgaria

Georgi Barbudev
3, Z. Stoyanov str
4000 Plovdiv
Bulgaria

12 April 2006

Dear Georgi

Project Fair
We refer to the proposed acquisition of the entire registered capital of Eurocom Plovdiv EOOD pursuant to a sale and purchase agreement dated on or around 12 April 2006 between Tracer (software) Europe B.V. (the ***Seller***), Eurocom Cable Management Bulgaria EOOD (the ***Purchaser***), and the Warrantors (as such term is defined therein) (the ***Agreement***). Save as otherwise defined herein, words and expressions defined in the Agreement shall have the same meanings in this letter.

Investment Agreement
In consideration for you agreeing to enter into the Proposed Transaction and to sign the Transaction Documents, the Purchaser hereby agrees that, as soon as reasonably practicable after the signing of the Agreement by all Parties, we shall offer you the opportunity to invest in the Purchaser on the terms to be agreed between us which shall be set out in the Investment Agreement and we agree to negotiate the Investment Agreement in good faith with you. Such terms shall include, without limitation, the following:

1. you shall invest an aggregate amount of not less than €1,650,000 in consideration for a combination of shareholder debt and registered shares which shall represent ten (10) percent of the registered share capital of the Purchaser on the date of the Investment Agreement;
2. we shall use reasonable commercial endeavours to obtain debt financing, where reasonably practicable, for the purpose of making further acquisitions and, in turn, to enable the shareholders of the Purchaser from time to time to make financial savings; and
3. tag along and drag along provisions which are customary for a transaction of this nature shall be included in the Investment Agreement.

Management Contract
We also agree that you shall be offered the opportunity to continue as the manager of the Company on the terms and basis set out in the Management Agreement from the Closing Date.

Confidentiality

The existence and terms of this letter are strictly confidential and we and you agree not to disclose the existence or terms of this letter (other than with the prior written consent of the other party hereto) to any individual, body corporate, company partnership, fund, joint venture, trust or any other entity or organisation, other than to its legal advisers or to the extent required by law or any government or regulatory authority (in which case the relevant party shall inform the other party hereto in writing prior to such disclosure, unless prohibited by law o otherwise from doing so) or, in the Purchaser's case, to any member of the Purchaser's Group.

For the avoidance of doubt, the terms of this letter shall not prevent the Purchaser or any of its Affiliates or Connected Persons or any of their respective Representatives from referring to or producing this letter in any dispute resolution or legal proceedings.

General

No person who is not a party to this letter shall have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms.

This letter shall be governed by, and interpreted in accordance with, English law and the courts of England shall have exclusive jurisdiction to settle any disputes arising under or in connection with this letter.

This letter may be executed in any number of counterparts, but will not take effect until each party has executed at least one counterpart. Each counterpart will constitute an original, but all the counterparts together will constitute a single agreement.

Please confirm your agreement to the terms of this letter by signing the enclosed copy and returning it to us.

Yours sincerely,

…… ……

Robert Feuer Loránd Horvath

for and on behalf of for and on behalf of
EUROCOM CABLE MANAGEMENT EOOD **EUROCOM CABLE MANAGEMENT EOOD**

Acknowledged and Agreed:

SIGNED by) Signature
GEORGI VELICHKOV BARBUDEV)
) Name:_____

Date: 12 April 2006