Neutral Citation Number: [2016] EWCA Civ 449

Case No: A3/ 2014/3147 & A3/2014/3150

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE BLAIR

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2016

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE BEATSON
and
THE RIGHT HONOURABLE LORD JUSTICE SALES

- -

Between:

STARBEV GP LIMITED	**Appellant/ Respondent**
- and -	
INTERBREW CENTRAL EUROPEAN HOLDINGS BV	**Respondent /Appellant**

- -
- -

Lord Grabiner QC & Mr Simon Colton & Miss Nehali Shah (instructed by **Allen & Overy LLP**) for the **Appellant**
Mr Ali Malek QC & Mr Richard Brent (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Respondent**

Hearing dates: 19th, 20th & 21st April 2016

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Approved Judgment

Lord Justice Longmore:

1. At the conclusion of the oral hearing, we indicated that we would in due course dismiss the appeals of both the parties on the principal issues in contention and that we would give our reasons at a later date. That indication meant that certain peripheral issues raised on the appeals did not arise and did not need to be determined. We now set out our reasons, to which each member of the court has contributed. It will be seen that our reasons are substantially the same as those given by the judge in his judgment, the clarity of which has enabled us to deal with the points argued comparatively briefly.

Introduction

2. The manufacture, distribution and sale of alcoholic liquors is big business. Companies which undertake these important tasks are sometimes highly profitable. As such they attract the attention of investment companies who hope, by buying and selling companies concerned with alcoholic liquors, to make considerable profits for their investors. If the price proposed by the buyer does not match the seller's expectation but the parties nevertheless want to do a deal, the seller may be persuaded to commit to the deal if it is able to secure some of the profit intended to be made from a re-sale made by the buyer at some future date. That means that part of the consideration is to be deferred. The right to participate in such profit is at the centre of the dispute between the parties to the present appeal; they refer to the right as the "Contingent Value Right" ("CVR").

3. The business which was the subject of the sale and purchase transaction in the present case in 2009 was a brewing business in Central and Eastern Europe owned by Interbrew Central European Holdings BV ("ICEH") which was itself a Dutch subsidiary of the global brewer, Anheuser Busch Inbev NV/SA ("ABI"), a Belgian company listed on the New York Stock Exchange. ICEH were the sellers of the business but ABI took an interest in the matter and were effectively sellers of the business as much as ICEH. They are interchangeable entities for the purpose of this appeal.

4. The buyer of the business was part of a structure, created for the purpose of the transaction, by private equity investment funds, advised and managed by CVC Capital Partners ("CVC"), a private equity firm. The structure includes a limited partnership registered in Jersey, Starbev LP ("Starbev"). The limited partners absorb funds managed by CVC. The actual buyer was Starbev SARL, a Luxembourg company indirectly owned by another Luxembourg company, Starbev Holdings SARL (known as "Caspian"), which is in turn owned by Starbev. Starbev and Caspian may, to some extent, be interchangeable entities for the purpose of understanding the deal. The effective dispute, however, is between Starbev/CVC and ABI/ICEH.

5. As expected, there was an on-sale of the business to an American brewer, Molson Coors. That took place in 2012. The sale price agreed between ICEH and Starbev/CVC on 14th October 2009 was €1.475 billion; the on-sale price agreed between Starbev/CVC and Molson Coors on 3rd April 2012 was €2.650 billion. On the face of it, therefore, one would expect that ICEH would be able, to some extent, to take advantage of the CVR it had under the sale agreement to Starbev.

6. The CVR is, however, a right of considerable complexity, because the Cash proceeds received by the Investor had to exceed concepts called the Investment Threshold and the Internal Rate of Return ("IRR") threshold. The Investment Threshold was a stepped threshold in the sense that, if the on-sale took place within 2 or 3 years of completion, the threshold was a lower threshold than if the on-sale took place after 2 or, as it may be, after 3 years after completion; therefore the earlier the on-sale happened, the lower the threshold and the greater the value of the CVR. The Investment Threshold itself depended on a concept called the Investment Amount which was the aggregate Cash investment in Starbev Interests made by the Investor (i.e. "the CVC Funds") and applied by Starbev in making the relevant acquisition. The Investment Threshold for the purpose of the CVR was:-

   i) 1.65 times the Investment Amount during the 2 years after completion;

   ii) 2.05 times the Investment Amount during the 3rd year after completion; and

   iii) 2.50 times the Investment Amount once the 3rd anniversary of completion was passed.

   Thus it was in Starbev's interest that the Cash proceeds of any on-sale should be received after the 3rd anniversary of completion, namely after 2nd December 2012.

7. One of the grounds of appeal in the present case is against the judge's decision in relation to the quantum of the Investment Amount, a dispute he decided in favour of Starbev. But there is a more substantial dispute in relation to the date of receipt of the cash proceeds from the on-sale to Molson Coors. Completion took place on 15th June 2012 and thus before the end of the third year from completion of the original sale on 2nd December 2009. Part of the consideration for the on-sale, however, was a Convertible Note for €500 million maturing on 31st December 2013 with various options for earlier realisation if Molson Coors' share price increased by more than 15%. On 13th August 2013 Starbev/CVC exercised the option of earlier realisation, receiving €466 million from that realisation on 3rd September 2013, more than three years after completion of the purchase from ICEH. Starbev/CVC accordingly paid to ICEH a figure calculated by reference to the higher threshold of 2.50. The figure of €466 million was made up of the Note's value of €510 million at the relevant time less a sum of €44 million which Molson Coors was entitled to withhold as security in respect of certain warranty claims in relation to the sale of the business. In due course, pursuant to a partial settlement, Molson Coors reduced its warranty claims and the security withheld in respect of them by paying Starbev on 14th January 2014 a further sum in respect of the purchase of the business. Starbev paid ICEH a further sum in respect of this receipt, again calculated by reference to the higher threshold of 2.50.

8. The idea that part of the consideration for the sale of the business to Molson Coors should be constituted by the €500 million Convertible Note came from a member of the Deal Team put together by CVC for the purposes of making recommendations to the CVC Investment Committee. That member was Mr Przemek Oblöj. The concept was colloquially referred to by members of the CVC Team as "PIG" which appears to be an acronym for Przemek's Idea of Genius.

9. There was, however, a problem because the CVR contained an Anti-Avoidance provision. In broad outline this provided that

i) any transaction made by Starbev/CVC resulting in receipts of value was to be deemed to be an Equity Return for the purpose of determining whether an Excess Return Payment was to be made; and

ii) any transaction resulting in receipts by the Investor structured or undertaken with the purpose of reducing payments due to ABI was to be deemed an Equity Return for the purposes of determining whether the Investment Threshold had been exceeded and/or whether an Excess Return Payment was required, albeit solely to the extent that the transaction reduced the amount of payments due under the CVR.

10. The judge decided that the Convertible Note fell within this anti-avoidance provision and that the relevant Investment Threshold was, therefore, 2.05 times the Investment Amount (i.e. the relevant multiplier at the date of the sale of the business to Molson Coors), not 2.50. If correct, that meant that Starbev had to pay ICEH about €129 million more than they had so far paid. Starbev now appeal this decision. The judge also decided that the Investment Amount included sums paid by Starbev as expenses leading to the sums invested by Starbev and applied by Starbev in acquiring Relevant Interests for the purpose of ascertaining the Investment Threshold. This part of the judge's ruling has the effect that the Investment Amount is greater and hence that the amount of the Excess Return Payment due from Starbev/CVC is accordingly diminished. ICEH in their turn appeal this decision.

The material clauses

11. By the definitions clause in clause 1.1 of the CVR:-

> "**"Determination Event"** means any payment by Starbev to the investor out of proceeds received from or in connection with (i) Distribution, (ii) Sale, (iii) Refinancing, (iv) Listing of any member of Caspian's Group and/or (v) a Winding-Up;
>
> **"Equity Return"** means the euro Equivalent of any Cash proceeds directly received by the Investor from a Determination Event (including, for the avoidance of doubt, any amounts withheld from the Investor to be paid to ABI as an Excess Return Payment) and any amount deemed to be so under clause 4.4.2 or 4.4.3;
>
> **"Excess Equity Return"** means any Equity Return (other than an Equity Return with respect to which an Excess Return Payment has already been made) (i) accruing, as of the relevant date of determination, on or after the date on which the Trigger Event has occurred and (ii) that is in excess of the Equity Return required for the Equity Return of the Investor to exceed both the IRR Threshold and the Investment Threshold. By way of illustration, if, on the date that both the IRR Threshold and the Investment Threshold are exceeded for the first time, the Internal Rate of Return upon a Determination Event is 30% and the Investment Threshold has been exceeded by €500million, the Excess Equity Return would represent the lower of (a) the

> Equity Return corresponding to the 5% excess of the Internal Rate of Return over the IRR Threshold and (b) €500million, and any Equity Return accruing after such date would also constitute an Excess Equity Return to the extent that the Equity Return continues to exceed the IRR Threshold."

12. The Investment Amount, the Investment Threshold and the IRR Threshold are defined as follows:-

> "**"Investment Amount"** means the aggregate Cash investment in Starbev Interests made by the Investor and applied by Starbev in acquiring Relevant Interests at the SPA Completion, but excluding any Cash investment by the Investor in respect of Starbev Interests allocated to or actually sold to management of Caspian.
>
> **"Investment Threshold"** means:
>
> (a) at any time after SPA Completion up to and including the date falling two years after SPA Completion, an amount equal to 1.65 times the Investment Amount;
>
> (b) at any time after the date falling two years after SPA Completion up to and including the date falling three years after SPA Completion, an amount equal to 2.05 times the Investment Amount; and
>
> (c) at any time after the date falling three years after SPA Completion, an amount equal to 2.5 times the Investment Amount.
>
> **"IRR Threshold"** means the amount required (as described in the definition of Internal Rate of Return), at any point in time, to give the Investor an IRR greater than or equal to 25% with respect to the Investment Amount."

13. As regards the IRR Threshold, clause 1.1 further defines **"Internal Rate of Return"** or **"IRR"**. This was the:-

> "internal rate of return per annum received by the Investor in the aggregate with respect to the Investment Amount, taking into account:
>
> (a) as outflow at the time of the SPA Completion, the Investment Amount; and
>
> (b) as inflows … [essentially, all relevant payments made to the CVC Funds].
>
> Subject to clause 14, the parties shall calculate IRR in good faith by applying Microsoft Excel's XIRR function, or a substantially similar application or function, to the cashflows described above, with returns calculated on a daily basis but compounded annually."

14. Clause 4.1 of the CVR provides:-

> "**4. Terms and conditions of the Contingent Value Right**
>
> **4.1 Payments**
>
> 4.1.1. If a Determination Event occurs and the euro Equivalent of the Cash proceeds received by the Investor in connection with such Determination Event (together with the euro Equivalent of all previous Cash proceeds received by the Investor in connection with prior Determination Events) exceeds both (i) the Investment Threshold and (ii) the IRR Threshold (a **"Trigger Event"**), then Starbev shall pay to ABI an amount in euro equal to the product of (a) 40% and (b) the Excess Equity Return at that date (such amount, an **"Excess Return Payment"**). Thereafter, if the Investor receives any further Excess Equity Return, Starbev shall pay to ABI an Excess Return Payment equal to the product of 40% and such Excess Equity Return.
>
> …
>
> **4.4 Anti-Avoidance**
>
> 4.4.1. It is the intention of the parties hereto that ABI shall be entitled to participate in the return, whether directly or indirectly, of Cash proceeds received by the Investor and derived from the Relevant Interests on the basis set forth in this Agreement.
>
> 4.4.2. In accordance with clause 4.4.1, any transaction between the Investor and/or its Affiliates and any member of Caspian's Group other than a Follow-On Investment that results in payments to or receipt of value by the Investor or any of its Affiliates … shall be deemed to be an Equity Return for the purposes of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required.
>
> 4.4.3. Without prejudice to clauses 4.4.1. and 4.4.2., any other transaction that is structured or undertaken that results in payments to or receipt of value by the Investor and/or its Affiliates, with the purpose of reducing payments due to ABI hereunder, including
>
> (a) a Reorganisation;
>
> (b) an issue of shares, other securities (including convertible securities) or instruments or any other Equity Interest other than on arm's length terms or at less than at Fair Market Value;

> (c) the sale or transfer of assets by Caspian's Group to the Investor or one of its Affiliates other than on arm's length terms, and/or
>
> (d) any other transactions that are made between a member of the Caspian Group and the Investor or one of its Affiliates other than on arm's length terms,
>
> shall each be deemed to be an Equity Return for the purposes of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required, in each case, solely to the extent that such transaction has reduced the amount of the payments due hereunder."

15. The constituent elements of this clause which are of primary relevance not so far set out are as follows:-

> "**"Cash"** means coin or currency of any jurisdiction, immediately available funds, treasuries, certificates of deposit, eurodollar time deposits, short-term repurchase obligations, highly rated commercial paper, money market funds or other cash equivalents;
>
> **"Investor"** means the CVC Funds;
>
> "**Relevant Interests"** means the interests (including Equity Interests) in Caspian held by Starbev or, directly or indirectly, by the Investor …
>
> **"Starbev"** means Starbev LP; …
>
> **"Determination Event"** means any payment by Starbev to the Investor out of proceeds received from or in connection with (i) Distribution, (ii) Sale, (iii) Refinancing, (iv) Listing of any member of Caspian's Group and/or (v) a Winding-up."

16. It is also relevant to note that Trigger Event in clause 4.1.1 is defined as occurring when the Cash proceeds received by the CVC Funds on a Determination Event exceed both the Investment Threshold and the IRR Threshold. Also, there is a lengthy definition of the Affiliates of the CVC Funds (i.e. the Investor), and it is not in dispute that this includes Starbev.

Starbev's appeal

17. We heard argument on Starbev's appeal first and will consider it first. It turns essentially on the following phrases in clause 4.4.3 of the Anti-Avoidance clause:-

    i) any transaction that is structured or undertaken "with the purpose of reducing payments" due to ABI; and

ii) "solely to the extent that such transaction has reduced the amount of the payments due hereunder".

18. The on-sale to Molson Coors was indubitably a "transaction" within clause 4.4.3. Starbev argued below that reduction in payments due to ABI had to be the "sole" purpose in order to fall within the clause while ICEH argued as part of its case that such reduction only needed to be "a" purpose of the relevant transaction. The judge rejected both these arguments and decided that reduction in payments due to ABI had to be the "dominant" purpose. He then decided on the basis of the evidence which he heard that reducing the payments due to ABI was indeed the dominant purpose of the transaction, because Starbev had deliberately structured the sale to Molson Coors mainly to achieve that effect by making the agreement for the Convertible Note part of the total consideration. Whether Starbev exercised the put option in the Note or awaited its maturity, the sum realisable from the Note only became due more than 3 years after completion of sale by ICEH/ABI; the dominant purpose of so agreeing was to ensure that the Investment Threshold would only be reached when 2.5 times the Investment Amount had been exceeded. This was Mr Oblöj's Idea of Genius.

19. The judge accepted that the purpose of the Note was partly to avoid part of the purchase price being deferred as security for any claims for breach of warranty (which would otherwise have been uselessly tied up or "dead money") and partly to enable Starbev to take some advantage of any rise of more than 15% in the share price of Molson Coors which was itself tied to the put option available to Starbev, but he nevertheless held that the dominant purpose of the Molson Coors transaction, structured as it was, was to reduce payments to ABI.

20. The judge further recognised that the sale to Molson Coors, being made with the dominant purpose of reducing payments due to ABI, was to be "deemed to be an Equity Return" for the purposes of clause 4.4.3 "solely to the extent that such transaction has reduced the amount of the payments due under clause 4.4". He held (paras 270-2) that the extent by which sums due to ABI had been reduced was the value of the Note less the amount in fact finally held back in due course by Molson Coors as at January 2014 in relation to claims for breach of the warranties in the Sale Agreement.

21. At the start of the oral argument Starbev maintained three grounds of appeal in relation to these decisions of the judge:-

i) as argued below, the reduction of the payments due to ABI had to be the "sole" purpose for structuring the receipts from Molson Coors by use of the Convertible Note;

ii) if "dominant" purpose was sufficient, the judge had been wrong on the evidence to decide that it was the "dominant" purpose; and

iii) there was no Equity Return for the purpose of clause 4.4.3 because without the Convertible Note no deal would have been done with Molson Coors in the first place; alternatively that since the amount which Molson Coors negotiated as a retention amount as security for breach of warranty claims at the time when the sale was agreed was €150 million that sum rather than the lesser sum

actually retained in the end by Molson Coors should be deducted from the deemed Equity Return.

ICEH, in its turn, maintained its original position before the judge that it was sufficient for reduction of sums payable to ABI to be "a" or "a substantial" purpose, whilst arguing in the alternative in support of the judge's conclusion on this issue.

22. In the course of opening Starbev's appeal, Lord Grabiner QC accepted that, since Starbev's second ground of appeal under this head depended on challenging the judge's factual conclusions after he had heard the relevant witnesses giving their evidence, the ground was not likely to succeed and he did not pursue it. That led in turn to Mr Ali Malek QC not pursuing ICEH's argument that "a" or "a substantial" purpose was sufficient. Lord Grabiner still maintained, however, that on the true construction of clause 4.4.3 reduction of payments due to ABI had to be the "sole" purpose.

"Sole" purpose?

23. Lord Grabiner submitted that the Contingent Value Right was not like a partnership or a trust where the partners or trustees had to have regard to the interests of persons other than themselves. Starbev had complete freedom to regard only its own interests and could make any agreement with an intended purchaser, including an agreement that consideration was to be deferred for any (or indeed no) reason. He then pointed to the specific examples given in clause 4.4.3 itself of transactions structured or undertaken with the purpose of reducing payments to ABI and pointed out that they referred to transactions on less than arm's length terms or at less than a Fair Market Value. He invoked principles of English taxation law and of European abuse of rights of law where, he submitted, the right principle was that a transaction which avoided tax would not be struck down by the courts as an artificial transaction if it had any proper commercial purpose. In this connection he referred us to UBS AG v Revenue & Customs Commissioners [2016] UKSC 13; [2016] 1 WLR 1005, a case in the Supreme Court about bankers' bonuses, and Revenue & Customs Commissioners v Pendragon [2015] UKSC 37; [2015] 1 WLR 2838, a case likewise in the Supreme Court where dealers sought to avoid paying VAT by structuring a series of artificial transactions which were said to infringe the doctrine of abuse of rights in European law. He also relied on a clause in the CVR submitting disputes arising from it to be resolved by one of the big 4 firms of accountants: how could an accountant however distinguished, asked Lord Grabiner, be expected to resolve a dispute about the nature of the purpose required for clause 4.4.3, let alone determine whether a purpose was a dominant purpose or not?

24. We were not persuaded by any of these submissions. In the first place, while it is no doubt true that in general terms Starbev retained its freedom to act in its own interests, that freedom is to some extent restrained by the terms of its agreement with ICEH. Clause 4.4.3 is clear enough in providing that any transaction structured or undertaken with the purpose of reducing payments to ABI/ICEH is to be deemed an Equity Return for the purpose of deciding whether the Investment Threshold is exceeded. To the extent that the clause applies, Starbev's freedom to act solely in accordance with its own interests has to be regarded as restricted.

25. Secondly, the particular examples of transactions which will (or are likely to) reduce payments made to ABI are not all transactions on other than arm's length terms or at less than a Fair Market Value. One contemplated event is "a Reorganisation" which looks not to the terms of a transaction at all but a rearrangement of Starbev's or its Affiliates' corporate structure. The examples are, in any event, introduced by the word "including"; that may not in itself exclude what is colloquially known to lawyers as the ejusdem generis rule, but the rule is in fact excluded in terms by clause 1.2 of the CVR.

26. Thirdly, even if it is right in a taxation context to say that an artificial arrangement whereby tax is avoided will not be struck down by the courts if the arrangement has a commercial purpose and that, therefore, for the purpose of what we might compendiously call the Ramsay doctrine (W.T. Ramsay Ltd v Inland Revenue Commissioners [1979] 1 WLR 974, HL), tax avoidance has to be the sole purpose of the arrangement, such a proposition is an imperfect and unpersuasive analogy. As between the state and a resident in the state (at any rate in England) a resident is usually allowed to do anything except that which is expressly prohibited. It would therefore not be surprising that, if a prohibition is defined by reference to a purpose, that purpose would be a "sole" purpose. But we seriously doubt that it is, in any event, right to define the principle as widely as Lord Grabiner would wish. In the VAT case of Pendragon on which he chiefly relied it is true that Lord Sumption (para 7) cited a decision of the Grand Chamber of the Court of Justice of the European Union in relation to abuse of rights, Halifax Plc v Customs & Excise Commissioners [2006] Ch. 387, in which it had been found as a fact that two subsidiaries of Halifax had been interposed in a series of prearranged transactions for the sole purpose of Halifax avoiding tax. It was not therefore surprising that when the Grand Chamber came to deliver its opinion it stated (para 69):-

> "application of Community rules cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law."

27. When, however, it came to the operative part of his opinion (with which the others members of the court agreed) Lord Sumption pointed out there were two main difficulties about applying the principle of abuse of law to tax avoidance schemes. The first was what was meant by "normal commercial operations". Then in para 12 he said this:-

> "The second difficulty which arises from the application of the principle of abuse of law to tax avoidance is that of concurrent purposes. Tax avoidance schemes are rarely directed exclusively to tax avoidance. It is difficult to conceive of a scheme, other than a fraudulent one, which achieved absolutely nothing but a tax advantage. They are usually directed to achieving a commercial purpose, such as the provision of the call centres in the Halifax case, in a way which avoids a tax liability that would otherwise be associated with it. The potential for abuse consists in the method chosen to achieve the

> commercial purpose. In Ministero dell'Economia e delle Finanze v Part Service Srl (Case C-425/06) [2008] STC 3132, the consideration payable by the lessee under a leasing transaction was artificially split between two contracts, one with the lessor and the other with an associated company of the lessor. The latter contract was structured so as to qualify as an exempt financial contract under Italian law, so as to reduce the amount chargeable to VAT. The transactions had a legitimate commercial purpose, namely the leasing of the cars, but the method of achieving that purpose was held to be open to challenge if "the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue": para 45. This conclusion seems to do no more than make explicit something which is implicit in the Halifax tests. Identifying the "essential aim" in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. As Advocate General Maduro observed in a passage from (point 89) of his opinion which was in terms approved by the court (para 75), the taxpayer's choices must be "at least to some extent, accounted for by ordinary business aims". The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage."

This passage shows the difficulty with the concept of a "sole purpose" as being the determinative factor for the purpose of abuse of rights and Lord Sumption's references to the "principal aim" and the "essential aim" of the transaction are, to a large extent, supportive of Blair J's decision that the purpose has to be the dominant purpose rather than the sole purpose. In the event, therefore, Pendragon does not assist Lord Grabiner's argument.

28. In the earlier case of Hayes v Willoughby [2013] UKSC 17 and [2013] 1 WLR 935 Lord Sumption had occasion to consider the meaning of the word "purpose" in the Protection of Harassment Act 1997 which by section 1(1) prohibited a person from pursuing a course of conduct amounting to harassment. Section 1(3) provided that subsection (1) did not apply to a course of conduct if the person who pursued it shows

> "(a) that it was pursued for the purpose of preventing or detecting crime."

The Supreme Court held that the word "purpose" did not inject a wholly subjective concept because the conduct had to be at least rational (which in that case it was not). The Divisional Court had held that the purpose had to be the "sole" purpose before it could be relied on. But Lord Sumption did not agree, saying (para 17):-

> "A person's purposes are almost always to some extent mixed, and the ordinary principle is that the relevant purpose is the dominant one."

In our opinion Blair J was entitled to rely on this expression of opinion to hold that the word "purpose" in clause 4.4.3 was indeed to be construed as the dominant purpose.

29. There is the further consideration, which follows from Lord Sumption's dictum, that if the purpose is interpreted to mean "the sole purpose" the mischief at which clause 4.4.3 is aimed is liable to be subverted; if Starbev were permitted to say that sole purpose was the requisite purpose it would be all too easy for the anti-avoidance provision to be itself avoided. Thus the interpretation proposed by Starbev is not at all plausible as the objective meaning of the clause in this contractual context.

30. Lord Grabiner's fourth point, that it would be unlikely that the parties intended a firm of accountants to be required to consider the dominant purpose of the on-sellers in the Contingent Value Right agreement, seriously underestimates the qualities of senior accountants. The only question of law is the meaning of purpose; that is a question on which an accountant could, if he or she felt doubtful, take advice and, if they did not, could be corrected, if they erred in law, for manifest error. Nor is there any reason to suppose that they would find the question whether the purpose was, in fact, the dominant purpose, a particularly difficult question to answer. No doubt they might not receive evidence in quite the way Blair J did but that would be a matter for them. Accountants have to resolve issues of fact in the course of their professional activities just as much as judges do.

31. We would therefore uphold Blair J on dominant purpose and now turn to consider whether there is to be a deemed Equity Return and, if so, whether the sum of €150 million falls to be excluded from it.

Deemed Equity Return: (1) No Deal?

32. Once it is held that a transaction has been structured or undertaken with the dominant purpose of reducing payments due to ABI, that transaction is deemed to be an Equity Return for the purpose of determining whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required. It is therefore nothing to the point that the sale to Molson Coors of the business might not or would not have taken place if the Convertible Note had not been agreed. The judge (para 267) made the tentative finding that if there had been no Convertible Note "the deal could have been rejected by the Investment Committee" and the further finding that the main reason for the deal not going ahead without the Note was that, without the Note, the CVR would have become operative on the date of completion with Molson Coors thus causing Starbev to have to pay out €129 million more than they would otherwise have to. The judge then considered whether it was legally relevant to ask whether the deal would have been made without the Note and decided that it was not. As he put it, it cannot have been envisaged that the independent accountants, pursuant to clause 14.1 of the CVR, should perform a counterfactual enquiry into what might have taken place had events been other than they in fact were, i.e. on the hypothesis that there was in fact no deal between Starbev and Molson Coors. The effect of the deeming provision was that it was intended that only an arithmetical exercise should take place. We agree; that is the whole point of the deeming provision in the context of clause 4.3.3.

(2) "Solely to the extent that such transaction has reduced the amounts of the payments due hereunder"

33. Lord Grabiner submitted that as at the date of completion Molson Coors always intended to retain the sum of €150 million from the price as security for breach of warranty claims. Therefore the transaction did not reduce the amount of payment due to ABI/ICEH by €500 million but only by €350 million.

34. The short answer to this contention is that the amount eventually agreed (or unilaterally set aside by Molson Coors) for breach of warranty claims was considerably less than this. Although that amount must be be left out of account in working out the deemed Equity Return and hence the quantum of the Excess Return Payment due from Starbev since Starbev has not received it, the amount relevant in working out the deemed Equity Return and the quantum of the Excess Return Payment has been reduced by considerably less than the whole €150 million, contrary to Lord Grabiner's contention. Under clause 4.4.3 there is a deemed Equity Return which includes the sums in fact received from Molson Coors in respect of its acquisition of the business, and that is deemed to be so for the purposes stated. Those purposes include determination of the Internal Rate of Return and whether the Investment Threshold has been exceeded, and with the objective of avoiding reduction of payments due to ABI/ICEH. There is no other mechanism in the CVR for doing this other than by treating the delayed receipts in issue as though they were received when the business was sold to Molson Coors and the judge was right to interpret clause 4.4.3 so as to bring them into account in this way.

35. This matter was dealt with by the judge in para 16 of a second judgment delivered on 21st August 2014 nearly 4 months after his main judgment. He said that the deemed Equity Return was to be calculated by reference to the amount of the Note less what was in fact withheld by Molson Coors, not by reference to the upper limit of what Molson Coors could have withheld. The effect of the deeming provision is to consider the position in terms of relevant sums in fact received by Starbev as a result of the redemption of the Note; it is the actual not the potential position that applies. Again, we agree with the judge, because otherwise Starbev would in fact be benefiting from the avoidance which it had procured.

36. Starbev also made the point that when the Note was redeemed, there was an upside resulting from the increase in the Molson Coors share price of about €10 million (see para 254 of the judgment) for which Starbev should not be accountable to ICEH. But this was part of Starbev's receipts resulting from the redemption of the Note and is, therefore, part of the Excess Equity Return. In any event, Lord Grabiner made clear in the course of argument that the decision on this particular sub-issue stood or fell with his argument about "No Deal" with which we have already dealt.

37. For these reasons Starbev's appeal must be dismissed and we now turn to ICEH's appeal in relation to the Investment Amount.

The calculation of the Investment Amount

38. ICEH's appeal relates to two sums which the judge held should be included in the calculation of the Investment Amount, thereby reducing the amount of the Excess

Return Payment. The definition of Investment Amount and the key definitions of the relevant terms used in that definition are set out above. The two sums in dispute are:

i) a sum of about €20.4 million in respect of certain fees paid by Starbev to third party advisers in relation to the acquisition of the business. The fees were originally to have been paid by Caspian, but in the event CVC/Starbev arranged for them to be invoiced to and paid by Starbev because Starbev as a Jersey entity would not have to pay VAT in respect of the fees, whereas Caspian as a company in Luxembourg would have had to; and

ii) a sum of about €15.3 million in respect of amounts owed by Caspian to third party advisers for financial, corporate and debt advisory services in relation to the acquisition of the business which were discharged by Starbev and recharged to Caspian pursuant to the terms of an agreement between them dated 10 December 2009. In return for paying these debts of Caspian, Starbev received certain instruments referred to as D PECs (preferred equity certificates) issued by Caspian. It is common ground that the D PECs are Equity Interests and hence count as Relevant Interests as referred to in the definition of Investment Amount.

39. The sums in question were paid out of the resources of Starbev which were available to it by reason of the funding of Starbev by the aggregate Cash investment by the Investor (the CVC Funds) in Starbev Interests. The critical issue in relation to both sums is whether they were "applied by Starbev in acquiring Relevant Interests at the SPA Completion". In our view the judge was right to hold that they were.

40. As to the €20.4 million, ICEH accepted that if it had been paid by Caspian out of funding provided by Starbev it would properly have been taken into account in calculating the Investment Amount, but the fact that it was paid by Starbev itself made all the difference and meant that it could not be. Starbev, on the other hand, submitted that on the proper construction of the definition of Investment Amount it made no difference that the fees had been paid by Starbev; the payment represented sums applied by Starbev "in acquiring" Relevant Interests (i.e. the Relevant Interests in Caspian) which were a necessary part of the costs of such acquisition.

41. The judge found that it was part of the factual matrix of the CVR that everybody knew that there would be transaction fees of this kind and that they would be borne out of the investment amount provided by the CVC Funds: para. 79. There is no appeal against that finding. The judge also held that the transaction costs were just as much part of the cost of acquiring the business as the price and that there was no commercial logic to a construction of the definition of Investment Amount which sought to exclude such sums from it: para. 100. We agree.

42. Contrary to the contention of ICEH the judge correctly found that no part of the wording of that definition would be redundant on Starbev's case, since this phraseology would operate to exclude from the Investment Amount sums applied after completion, or for another purpose (e.g. to purchase another business or other assets, such as a chain of public houses, which might complement the business being acquired from ICEH), or which were not applied at all: para. 84. If any of these things had occurred then, absent use of this language (or agreement on some other limiting obligation to be imposed on Starbev), they would have served to increase the value of

the Investment Amount and hence would have reduced the sums payable to ICEH by way of an Excess Return Payment.

43. The judge also rejected arguments of ICEH based on clause 3 of the CVR. Clause 3.1 of the CVR provides that "Immediately following the SPA Completion, Starbev shall procure that Caspian promptly provides ABI with details of the Investment Amount". ICEH submitted that this shows that the parties intended that the calculation of the Investment Amount should bring into account only fees paid by Caspian, and not fees paid by Starbev itself, which would not be known to Caspian.

44. The judge was right to reject this contention. As he pointed out at para. 94 the distinction sought to be drawn between Caspian and Starbev was of little practical substance, since Starbev would be the owner of Caspian and in procuring that Caspian provide ABI with details of the Investment Amount it could simply furnish Caspian with the relevant information. We would add that the practical significance of the distinction between Caspian and Starbev in this regard is further diminished by clause 3.4 of the CVR, which provides that Starbev is to notify ABI of the occurrence of a Determination Event (i.e. an on-sale by CVC/Starbev) in relation to which an Excess Return Payment might be due and that it is Starbev (not Caspian) which is to "provide detailed calculations (with supporting documents and records) of IRR and any Excess Return Payment, and the basis for such calculations."

45. The judge also correctly rejected the contention of ICEH that clause 3.5.1 of the CVR supported ICEH's interpretation of the definition of Investment Amount: para. 95. Clause 3.5.1 provides that Starbev shall send to ABI "not less than three months after the end of the relevant financial year of Caspian, a copy of its annual report and accounts …". Since the accounts were to be provided annually, without reference to whether a Determination Event had occurred or not, it could not be said that this was directed to the provision of material information for calculation of the Investment Amount or any Excess Return Payment. Rather, as the judge said, it is reasonable to infer that the objective was to enable ABI to see how the business was developing, in circumstances in which it might have a right to payments in the future depending on the price achieved by ABI/ICEH in any on-sale. Accordingly, it provides no guidance for the proper interpretation of the definition of Investment Amount.

46. In the end, as the judge observed, the question on this part of the case resolves into a relatively simple point. As a matter of ordinary language, fees necessarily incurred in acquiring the business (and which everyone appreciated would have to be incurred in order to acquire the business) can naturally be described as amounts "applied … in acquiring" the Relevant Interests which represented the business; and in a context in which there is no commercial logic to a construction that seeks to exclude such sums from the Investment Amount it is appropriate to give the words that meaning, as Starbev submits.

47. As to the second sum in issue, amounting to about €15.3 million, we again agree with the judge's conclusion. The judge gave two possible analyses to arrive at the conclusion that this sum should be included in the calculation of the Investment Amount. We consider that the judge's first analysis, at paras. 115-116, as we understand it, is straightforward and correct. It was necessary for Caspian to engage advisers as it did as part of the overall arrangements for CVC/Starbev to acquire the business and they would have to be paid for ultimately by using the investment funds

provided by CVC. As in relation to the €20.4 million, Starbev was put in funds by means of the CVC Funds' aggregate Cash investment in Starbev Interests, which enabled it to make the payments to Caspian's advisers under the recharge arrangement with Caspian. The resources so made available to Starbev were applied by it in acquiring Relevant Interests at the SPA Completion (including specifically, in this case, the D PECs, but also the other Relevant Interests representing the business). Although we heard argument about whether the entry by Starbev into the recharge arrangement with Caspian involved the expenditure of Cash (as defined) by Starbev, the definition of Investment Amount only uses the concept of Cash in giving the amount of the investment of CVC Funds in Starbev Interests. The definition does not require that Starbev should itself expend or apply the resources it has been provided with by means of that investment by way of an outlay in the form of Cash. It simply requires that Starbev has applied its resources (as so provided) in acquiring Relevant Interests, which it has done.

48. We also agree with the judge's alternative analysis (para. 117), that the payment of money to the third party advisers involved the application by Starbev of the Cash investment which it had received from the CVC Funds; that this payment was in the form of Cash; and that Starbev thereby acquired a Relevant Interest in Caspian in the form of a debt owed by Caspian to Starbev, as recognised in the recharge agreement, which was in turn repaid by the issue of (i.e. was used to acquire) the D PECs, which also were Relevant Interests. Where Caspian had, by the recharge agreement, assumed a debt obligation to Starbev, we can see no reason why that should not qualify as an "interest … in Caspian" so as to fall within the wide definition of "Relevant Interests" in the CVR. It was in the contemplation of the parties that entities in the corporate structure devised to acquire the business or in the business itself could be funded by debt as well as by equity, as is indeed a familiar commercial reality, and such debt obligations were in other places in the CVR treated as interests in those entities. For example, this occurs in the definition of Starbev Interests and in clause 4.2.1 of the CVR, which in dealing with the topic of Follow-On Investments refers to ABI having "no right of participation with respect to any Cash payment to the Investor from any other investment by the Investor or its Affiliates, whether in the form of debt or equity, in Caspian or any other member of Caspian's Group." Thus either by direct acquisition under the recharge arrangements of Relevant Interests in the form of a debt due from Caspian, or by the less direct acquisition of D PECs pursuant to those arrangements, Starbev applied Cash in acquiring Relevant Interests at the SPA Completion.

Conclusion

49. For all these reasons we dismiss the appeals of both Starbev and ICEH in relation to the principal issues in dispute and the order of the court will declare accordingly. There is no need for us to consider other points in the appeals which, in light of our determination of those principal issues, do not arise.