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Case No: RL-2018-000005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)

7 Rolls Building,
Fetter Lane
London EC4A 1NL

Date: 31 July 2020

Before :

MR JUSTICE ZACAROLI

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Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Claimants**
- and -	
(1) IGE USA INVESTMENTS LIMITED (FORMERLY IGE USA INVESTMENTS) (personally and in its capacity as a partner in GE Commercial & Consumer Finance Holdings Limited Partnership) **(2) GE CAPITAL INVESTMENTS (personally and in its capacity as a partner in GE Commercial & Consumer Finance Holdings Limited Partnership)** **(3) GE CAPITAL FINANCE** **~~(4) GE COMMERCIAL & CONSUMER FINANCE HOLDINGS LIMITED PARTNERSHIP~~** **(5) GE CAPITAL CORPORATION (HOLDINGS)** **(6) GE (HOLDINGS)** **(7) INTERNATIONAL GENERAL ELECTRIC (U.S.A.)**	**Defendants**

Philip Jones QC, Gareth Tilley and Barbara Belgrano (instructed by **the Solicitors for Her Majesty's Revenue and Customs**) for the **Claimants**
John Gardiner QC, John Brinsmead-Stockham and Thomas Bell (instructed by **PriceWaterhouseCoopers LLP**) for the **Defendants**

Hearing dates: 9 & 10 July 2020

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 ZACAROLI

Mr Justice Zacaroli:

Introduction

1. By the Finance (No.2) Act 2005, the UK introduced "Anti-Arbitrage Rules", designed to prevent tax avoidance through the exploitation of the tax treatment of 'hybrid' entities in different jurisdictions. Hybrid entities are those which are considered in some jurisdictions to have separate legal personality for tax purposes and in others to be tax transparent.

2. The defendants are entities in the GE group. I will refer to them, collectively, as "GE". GE approached HMRC in 2005 for clearance in relation to a number of transactions. One such transaction (entered into in 2004) concerned the investment by UK entities within the GE group in an Australian subsidiary (the "Australian Transaction"). On or about 21 December 2005, GE entered into two agreements with HMRC: a settlement agreement, concerning existing transactions, including the Australian Transaction (the "Settlement Agreement"), and a clearance agreement, concerning the ongoing treatment of various of GE's activities (the "Clearance Agreement").

3. From 2011 onwards, HMRC began to accumulate information concerning the Australian Transaction which, they claim, painted a different picture to that which had been presented to them during the course of the discussions seeking clearance in 2005 (the "Clearance Discussions"). After extensive discussions with GE, HMRC purported to rescind the Settlement Agreement in a letter dated 16 October 2018. The basis of the purported rescission was expressed to be material misstatements of fact and/or a failure to provide adequate disclosure.

4. On 23 October 2018, HMRC issued these proceedings seeking a declaration that the Settlement Agreement had been validly rescinded, and other declaratory relief. It is HMRC's contention that if the Settlement Agreement was validly rescinded it is able to recover the tax that arises upon the application of the Anti-Arbitrage Rules because the limitation period for raising discovery assessments against GE (being 20 years) has not expired.

5. On 22 October 2019 HMRC issued an application to amend the particulars of claim in the form of a draft amended particulars of claim served on GE ("APOC"). The proposed amendments delete all but one of the existing alleged representations, introduce two new representations and introduce for the first time a claim that the representations were made fraudulently. They also introduce a claim based on an implied term and a claim that the Settlement Agreement was a contract of utmost good faith.

6. On 31 January 2020, GE issued an application to strike out (or for reverse summary judgment in respect of) one sub-paragraph of the particulars of claim and one paragraph of the reply. The strike out (or reverse summary judgment) claim relates to the one representation in the existing particulars of claim which is not removed by the proposed amendments. GE contends that it discloses no reasonable grounds for bringing the claim, and that the claim has no real prospect of success.

7. Both applications were listed for hearing on 9 and 10 July 2020. The skeleton arguments, combined, ran to 115 pages, referring to numerous authorities (in an authorities bundle which extended to nearly 3000 pages) and the bundle of documents comprised over 2000 pages. Most of the hearing time was spent in describing the background to the Settlement Agreement and going through the details of the Clearance Discussions. On GE's part, this was in order to demonstrate that, on a proper understanding of the legal context and the factual background, the purported representations and the plea of fraud had no prospect of success.

The legislative context

8. The Anti-Arbitrage Rules came into force on 20 July 2005, during the course of the Clearance Discussions. The relevant provision was s.24 of the Finance (No. 2) Act 2005, which provided, so far as relevant, as follows:

> "(1) If the Commissioners for Her Majesty's Revenue and Customs consider, on reasonable grounds, that conditions A to D are or may be satisfied in relation to a transaction to which a company falling within subsection (2) is party, they may give the company a notice under this section.
>
> (2) A company falls within this subsection if—
>
> (a) it is resident in the United Kingdom, or
>
> (b) it is resident outside the United Kingdom but is within the charge to corporation tax.
>
> (3) Condition A is that the transaction to which the company is party forms part of a scheme that is a qualifying scheme.
>
> (4) Condition B is that the scheme is such that for the purposes of corporation tax the company is in a position to claim or has claimed an amount by way of deduction in respect of the transaction or is in a position to set off or has set off against profits in an accounting period an amount relating to the transaction.
>
> (5) Condition C is that the main purpose, or one of the main purposes, of the scheme is to achieve a UK tax advantage for the company.
>
> (6) Condition D is that the amount of the UK tax advantage in question is more than a minimal amount.
>
> …
>
> (9) Schedule 3 makes provision about what constitutes a qualifying scheme."

9. Condition C is the most relevant condition in this case. The meaning of "UK tax advantage" was explained in s.30(2):

> "For the purposes of this Chapter, a scheme achieves a UK tax advantage for a person if in consequence of the scheme the person is in a position to obtain, or has obtained—
>
> (a) a relief or increased relief from income tax or corporation tax,
>
> (b) a repayment or increased repayment of income tax or corporation tax, or
>
> (c) the avoidance or reduction of a charge to income tax or corporation tax."

10. Schedule 3 (which makes provision as to what constitutes a qualifying scheme) provides, by paragraph 2, as follows:

> "A scheme falls within this Part if a party to a transaction forming part of the scheme is a hybrid entity."

11. A hybrid entity is defined by Schedule 3, paragraph 3 as follows:

> "(1) An entity is a hybrid entity if—
>
> (a) under the tax law of any territory, the entity is regarded as being a person, and
>
> (b) the entity's profits or gains are, for the purposes of a relevant tax imposed under the law of any territory, treated as the profits or gains of a person or persons other than that person…"

12. Both parties placed considerable reliance on the guidance issued by HMRC in 2005 (drafts of which were shared with, and commented upon by, GE's solicitors). The following are the most salient points:

    i) In paragraph 2, it is stated that "[t]he deductions rules apply only where a scheme involving a hybrid entity or hybrid instrument increases a UK tax deduction or deductions to more than they would otherwise have been in the absence of the scheme";

    ii) By paragraph 8, HMRC will wherever possible give a decision whether any notice will be issued in respect of disclosed transactions, and "[t]he only circumstances where it will not be possible to give a clearance are those where the company seeking the clearance has not provided all the relevant information necessary for HMRC to come to a view as to whether the legislation is applicable";

    iii) By paragraph 14, there are six categories of "qualifying scheme", but all of them involve the use of a hybrid entity or a hybrid instrument. In

broad outline, the six categories involve circumstances in which there is a risk that either (1) two deductions are given in respect of the same expense or (2) a deduction is given but there is no corresponding taxable receipt;

iv) By paragraph 15, the "qualifying scheme" means the full structure of a funding arrangement using a hybrid entity or instrument, including all entities through which funds flow, "from initial source to ultimate use within a group of companies";

v) By paragraph 17, "[t]he question to be posed in each case is – what are the purposes of including the hybrid in the funding structure? Do they include a main purpose of creating a UK tax advantage, for example by characterising a transaction as debt where otherwise it would have taken the form of equity or would not have occurred at all? Or has using the hybrid simply created an overseas tax advantage but no UK tax advantage?";

vi) In relation to Condition C, and the question whether the main purpose or one of the main purposes of the scheme is to achieve a UK tax advantage, paragraph 22 states:

> "The existence of a UK tax deduction is not enough in itself to show that a scheme has a main purpose of obtaining a UK tax advantage. A tax advantage main purpose implies that in the absence of the scheme, tax deductions arising from the scheme would not have arisen at all, or would have been of a lesser amount. Hence it will be relevant to draw a comparison in order to consider whether, in the absence of the hybrid entity or instrument:
>
> - the transaction giving rise to the deduction would have taken place at all;
> - if so, whether it would have been of the same amount; and
> - made under the same terms and conditions";

vii) Paragraph 23 indicates that a comparison should be based on "equivalent arrangements that did not make use of any hybrid entities or instruments";

viii) Paragraph 25 states that in making the comparison, "it is important to remove only the arbitrage element created by the hybrid entity or instrument and not to alter other features in the arrangements. *The comparison should not be drawn on the basis of an assumption that real investment activity funded by the scheme would not have taken place without the arbitrage*" (emphasis added: as I explain below, GE places particular emphasis on this last sentence and the following example);

ix) Paragraphs 25 to 27 go on to give an example of the application of the Anti-Arbitrage Rules to an inward investment:

> "A loan of 1000 is made by a foreign parent company to its UK subsidiary, to be used solely to finance the building of a new factory. The loan is structured through a qualifying scheme within the meaning of the legislation and is made via a hybrid entity. The UK company gets a deduction for the interest it pays under the loan but, because of the scheme, the foreign parent also gets a foreign tax deduction for the same interest.
>
> In order to determine whether a UK tax advantage was a main purpose of the scheme, an appropriate comparison must be made. Given that in this case the loan was made for a clear non-tax purpose, i.e. the new factory, it is reasonable to suppose that the investment would have been made in the absence of the scheme. Consequently the appropriate comparison of the UK tax effect of the scheme would be where the same loan was made by the parent company but without the benefit of using a hybrid entity. If in this case the debt finance would have been made to a UK entity (or UK branch) on similar terms and conditions, the arbitrage legislation will not apply."

x) In this example, the comparison is between the actual arrangements and a "plain vanilla" loan on which the interest payments give rise to single tax deductions:

> "[i]f the loan would have been made in the same amount and under the same terms and conditions, the scheme does not have the obtaining of a UK tax advantage as one of its main purposes … If, on the other hand, the facts and circumstances indicate that the existence, amount or terms and conditions of a loan have been influenced by an arbitrage opportunity in a way that increases the UK tax deduction, and that this was a main purpose of a scheme exploiting the arbitrage, Condition C will have been met."

xi) Paragraph 32 refers to a case involving outward investment, noting that "arbitrage may arise where an equity investment is made in such a way that interest expense is taken into account in both the UK and another jurisdiction. As with inward investment, the question to be addressed is whether the arbitrage opportunity has affected behaviour in a way that reduces the amount of UK tax, in particular by increasing net interest deductions";

xii) HMRC, for their part, placed particular reliance on a passage in the examples annexed to the guidance, intended to assist companies in deciding whether their arrangements might fall within the Anti-Arbitrage Rules. In example two, dealing with an outward investment, part 3 describes a situation where it is assumed that the scheme is set up "solely in order to replace a loan that had previously been provided

> for an existing overseas subsidiary" where the scheme "did not result in any new funds being made available to the foreign subsidiary [and where] the foreign subsidiary already incurred an interest deduction because of the previous loan to a UK group company". The guidance goes on to draw the following conclusions so far as Condition C is concerned:
>
> > "the scheme lacks a commercial purpose because it does not make new funds available to a foreign subsidiary; and it did not have the purpose of creating a foreign tax deduction, because the same deduction already existed. It is therefore hard to avoid the conclusion that under these facts, the scheme is intended to create a deduction to match and therefore cancel the interest receipt arising in the UK under the previous arrangement."

13. Annex C to the guidance contains information concerning the procedure for obtaining clearance. Importantly, at paragraph 4, it is stated that "HMRC will consider itself bound by a clearance as long as: all the relevant facts are accurately given; and (where the clearance is given in advance of the execution of the relevant scheme) the scheme is executed in accordance with the proposals set out in the clearance application." By paragraph 7:

> > "Precisely what information and supporting material the application should contain will depend on the relevant facts and circumstances and on the nature of the clearance requested. It is not therefore possible to list the information required in all circumstances. Diagrammatic charts and step by step details of the transactions are particularly useful, together with explanations of the purposes of the scheme and reconciliation of how funds are used."

14. Among the "basic information" which the guidance indicates that HMRC would expect to receive in a clearance application, are:

    i) "a description of the flow of money within the scheme, including its sources and final destinations";

    ii) an "explanation of the purpose(s) of the scheme, including its commercial rationale"; and

    iii) identification of a suitable comparison to demonstrate either: (a) why in the absence of the arbitrage and the hybrid, both the amount of the transaction giving rise to the tax deduction, and its relevant terms and conditions would have been the same; or the amount of the additional tax deduction that arises through the use of the scheme."

The Australian Transaction

15. In total, GE's clearance application concerned 107 cross-border loans amounting to debt financing of approximately £21.2 billion. The Australian Transaction was one part of the application.

16. The material background to the Australian Transaction is that, in 2002, GE had acquired an Australian financial services business, the Australia Guarantee Company ("AGC"). The acquisition was made through an Australian holding company, GE Capital Finance Australasia Pty Ltd ("GECFA Asia"). In order to fund the acquisition (and to fund the repayment of existing third-party debt of AGC), GECFA Asia borrowed from entities that comprised GE's Australian cash pooling structure. Those cash pool loans were ultimately funded by GE's US treasury company, GE Capital Corporation ("GECC"), raising funds externally in the US.

17. The effect of the Australian Transaction was to transfer the ownership of the Australian businesses to the UK sub-group of GE (the "UK Sub-Group"). This was accomplished via a series of transactions which resulted in the first defendant, IGE USA Investments Limited ("IGE"), a member of the UK Sub-Group, acquiring an indirect holding in 52% of (newly issued) share capital of an Australian company, GE Finance Australia Pty Ltd ("GEFA"). In the final structure, GEFA owned various Australian assets, including GECFA Asia (the "Australian Sub-Group").

18. Leaving aside certain of the preparatory steps, the Australian Transaction involved the following steps, and the following flow of funds:

    i) GECC entered into daylight borrowing of AUS$4.9 billion (undertaken in separate tranches of approximately AUS$1.25 billion, with each tranche being circulated in series through the structure described below);

    ii) AUS$4.9 billion was transferred by GECC to a US holding company, GE Capital International Holdings Corporation ("GECIHC");

    iii) GECIHC loaned AUS$4.9 billion to a Luxembourg entity, GE Financial Services SARL, which loaned the same sum to IGE (the "SARL Loan");

    iv) IGE used the AUS$4.9 billion to capitalise another UK company, the third defendant GE Capital Finance ("GECF");

    v) GEFC loaned AUS$4.9 billion to an Australian limited liability partnership (the "Partnership Loan"), GE Commercial and Consumer Finance Holdings LLP (the "Australian LLP"), whose partners were: (1) IGE (as to 99%) and (2) another UK-based GE company called GE Capital Investments ("GECI") (as to 1%);

vi) The Australian LLP provided AUS$4.9 billion to another Australian entity, GE CF & CEF Holdings Pty Ltd ("GE CF & CEF") by way of equity funding;

vii) GE CF & CEF transferred AUS$4.9 billion to GEFA in exchange for newly issued shares in GEFA;

viii) GEFA loaned AUS$4.9 billion to GECFA Asia and its subsidiaries, enabling them to pay down their funding from the Australian cash pool, from where the same funds were transferred to GECC to enable it to repay the daylight borrowing.

The Settlement Agreement

19. The Settlement Agreement recorded the agreement between HMRC and GE relating to the application of the Anti-Arbitrage Rules to the funding of the Australian Transaction. It recorded that HMRC had expressed the view that the debt funding incurred in connection with the Australian Transaction may be subject to a Notice under Chapter 4 of the Finance (No.2) Act 2005.

20. Clause 4 provided that "GE has stated that it considers no Notice should be issued in relation to these matters, and has represented that it has made disclosure of all relevant facts in connection with the potential issue of a Notice…".

21. The effect of clauses 6 and 7 was that HMRC "in reliance on the information provided by GE" agreed not to issue a Notice in relation to the funding of the Australian Transaction, save that it would issue a Notice which would determine that interest on AUS$700 million of the SARL Loan would not be deductible. GE agreed not to contest that Notice.

22. By clause 10, HMRC separately agreed "again on the basis of the information provided by GE" that it would raise no challenge under paragraph 13 of Schedule 9 of the Finance Act 1996 to the deductibility of interest arising on any debt incurred in connection with the Australian Transaction. This related to the "unallowable purpose" provisions, now to be found in the Corporation Tax Act 2009.

23. By clause 14, GE confirmed to HMRC that it had "made adequate disclosure of the matters dealt with in [the Settlement Agreement] (and the underlying facts and circumstances)".

HMRC's case in outline

24. For the purposes of the Anti-Arbitrage Rules, the critical element in the structure described above is that the Australian LLP is a hybrid entity: it is transparent for UK tax purposes, but opaque for Australian tax purposes. As a consequence the (simplified) tax position, so far as the UK entities in the structure are concerned, was as follows:

i) IGE was entitled to a tax deduction on the interest paid under the SARL Loan;

ii) GECF obtained a tax receipt in the interest received from the Australian LLP under the Partnership Loan;

iii) IGE and GECI (as partners of the Australian LLP) were entitled to a tax deduction on the interest paid under the Partnership Loan on the basis that the Australian LLP is a transparent entity for UK tax purposes.

25. The result was a net tax deduction in the UK. In addition, the Australian LLP (as a separate, opaque entity under Australian tax law) was entitled to a tax deduction in Australia on the interest paid under the Partnership Loan.

26. HMRC contend that the net tax deduction in the UK was a "UK tax advantage" within the meaning of the Anti-Arbitrage Rules. They further contend that the Australian Transaction comprised a qualifying scheme (because it included a hybrid entity, the Australian LLP) which was entered into for the (or a) main purpose of achieving a UK tax advantage.

27. In the original particulars of claim, HMRC sought declarations that the Settlement Agreement (and, if necessary, the Clearance Agreement) had been rescinded for misrepresentation or non-disclosure (in breach of clauses 4 and 14 of the Settlement Agreement). There was no pleading of fraud.

28. All but one of the alleged representations have been removed by the proposed amendment and HMRC have confirmed that they will not seek to reintroduce them, whatever the outcome of the amendment application.

The misrepresentations in outline

29. The cross-applications for permission to amend and to strike out (or for summary judgment) relate to three paragraphs of the APOC and one paragraph in the Reply.

30. Paragraph 38(b) contains the first of two new proposed misrepresentations. Permission is sought to allege that over the course of the Clearance Discussions, the following false statement of fact was made, namely:

> "that:
>
> (i) the main reason(s) or main purpose(s) of the Australian Investment being funded by loans and held by the UK Subgroup were all genuine commercial reason(s)/purpose(s); and/or
>
> (ii) none of the main purposes of the Australian Investment being funded by loans and held by the UK Subgroup was to secure a UK tax advantage."

31. I will refer to this as the "Main Purpose Representation". GE oppose this amendment on the basis that there is no prospect of establishing that the representation was made, or that it induced HMRC to enter into the Settlement Agreement or that it was made fraudulently.

32. Paragraph 38(e) of the existing particulars of claim contains a representation, also said to have been a false statement made during the Clearance Discussions, that

> "absent the hybrid opportunity the UK Subgroup would nevertheless have effected the Australian Investment (whether by borrowing in the UK to fund the acquisition of equity in an Australian company or at all)".

33. I will refer to this as the "Hybrid Opportunity Representation". GE oppose the application to amend to include further instances of when such a representation was made, and to include a plea that it was made fraudulently. GE also applies to strike out the claim based on the original pleading, on the basis that there is no prospect of establishing that the representation was made or that it induced HMRC to enter into the Settlement Agreement.

34. The second new proposed representation, pleaded in paragraph 38(h) of APOC is that GE "…had made disclosure of all relevant facts and matters in connection with the potential application of the Anti-Arbitrage Rules and/or the legislation relating to unallowable purpose in connection with the funding of the Australian Investment."

35. I will refer to it as the "Full Disclosure Representation". It is said to have been made by GE supplying the information that it did (thereby representing that this information consisted all such relevant facts and matters). It is also pleaded that by reason of clause 4 of the Settlement Agreement GE is estopped from denying that it made such a representation.

36. GE does not oppose the amendment to plead that the representation was made, and does not oppose the amendment to allege that the representation was false or that it induced HMRC to enter into the Settlement Agreement. It opposes, however, the application to amend to include the allegation that the representation was made fraudulently, that is with knowledge of its falsity or recklessness as to its truth.

37. GE additionally apply to strike-out paragraph 68(b) of the Reply. This responds to GE's plea that it would be inequitable to order rescission because of steps taken by GE in reliance upon the Settlement Agreement and Clearance Agreement. HMRC pleads, in paragraph 68(b), that GE was at fault in various respects, essentially repeating the allegations of deliberate omission to provide information. GE's objection is broadly the same as its objection to the proposed amendment in the APOC to include a plea of fraud.

Context in which representations were made

38. GE contends that there is no evidential basis for either of the representations alleged in paragraph 38(b) or 38(e). It contends that the primary facts pleaded by HMRC, from which it is to be inferred that the representations were made, are incapable of giving rise to those representations when the context in which they are said to have been made is properly understood.

39. It is common ground that anything said by Ms Martin and Mr Clark during the Clearance Discussions must be construed in the relevant context. The essential dispute in this regard between the parties can be boiled down to the following. GE contends that what was said by its own representatives must be interpreted in light of the case that GE was putting forward at the time as to the true meaning and effect of the Anti-Arbitrage Rules. HMRC contend that statements made on behalf of GE must be interpreted in light of HMRC's own case, advanced at the time, as to the true meaning and effect of the Anti-Arbitrage Rules.

40. In a general sense, it is obvious that the case being advanced by each side in the Clearance Discussions forms part of the background in which every statement made during those discussions falls to be construed. Whether any particular statement made on behalf of GE is coloured by its own case, or by HMRC's case, or both, however, depends on the precise circumstances in which the statement was made. I was taken at some length by both parties through a number of contemporaneous documents relating to the Clearance Discussions. Mr Jones QC highlighted certain elements, and Mr Gardiner QC highlighted others.

41. Before I turn to examine each alleged representation in the context of those documents, however, it is first important to summarise the case that was being advanced, respectively, by GE and by HMRC.

42. In very brief summary, the case which GE advanced at the time (and still maintains) was that the Australian Transaction did not involve any UK tax advantage, as that term was defined in the legislation, because it was able to point to an alternative transaction which did not include a hybrid entity, but which gave rise to the same UK tax deductions, that could have been undertaken and which it would have been objectively reasonable to undertake. As Mr Gardiner QC put it, it was all about identifying the appropriate comparator. The Anti-Arbitrage Rules constitute a targeted anti-avoidance rule, the target being the use of a hybrid entity or instrument. References in the legislation to the "purpose" of gaining a UK tax advantage are not, therefore, to any UK tax advantage, but only an advantage specifically derived from the use of a hybrid entity or instrument.

43. He relied in particular on the following elements of HMRC's guidance (found in paragraphs 17, 22, 23 and 25 of the guidance quoted above): the relevant question was identified as being "what are the purposes of including the hybrid in the funding structure?"; a comparison should be based on "equivalent arrangements that did not make use of any hybrid entities or

instruments" in order to consider what the position would have been in the absence of the hybrid entity; in making the comparison:

> "it is important to remove only the arbitrage element created by the hybrid entity or instrument and not to alter other features in the arrangements. The comparison should not be drawn on the basis of an assumption that real investment activity funded by the scheme would not have taken place without the arbitrage…"

44. Mr Gardiner QC stressed that it was not GE's case that the commercial purpose of the Australian Transaction was irrelevant. In his supplemental reply submissions, it was expressed as follows:

> "GE's case (both now and during the Clearance Discussions) was that the '*commerciality'* of the Australian Investment was relevant to whether or not the hypothetical comparator that GE was putting forward was '*objectively reasonable*' (HMRC's terminology). Importantly, however, in that context GE did not need to show that the Australian Investment (or the hypothetical comparator transaction put forward by GE) was undertaken for wholly commercial reasons and not motivated at all by tax considerations…" (emphasis in the original).

45. HMRC's case, on the other hand, was (and is) that once it is established that a scheme contains a hybrid, Condition C is satisfied if the main purpose, or one of the main purposes, of the scheme was to obtain a UK tax advantage. That is a question of fact. The function of the comparator is simply as a tool to assist in resolving that question of fact. HMRC's contention, expressed simply in its supplemental written submissions, is that:

> "without the hybrids being in the scheme there would have been no scheme at all under which the UK Subgroup acquired the Australian Investment. The relevant comparator was therefore no scheme at all under which the UK Subgroup acquired the Australian Investment. On this basis, the main or one of the main purposes of the scheme was obviously to achieve a UK tax advantage."

46. Mr Gardiner QC submitted that the dispute between GE and HMRC was one of law as to, among other things, the definition of "UK tax advantage", the role of the comparator in identifying whether a UK tax advantage existed and what the appropriate comparator was in the context of the Australian Transaction.

47. I am not asked to (and I am clearly not in a position to) resolve that question of law on this application. It is part of GE's submission in relation to the Main Purposes Representation and the Hybrid Opportunity Representation, however, that the statements made on its behalf (on which those representations are based) were expressions of opinion as to a legal conclusion

and for that reason alone they cannot have amounted to statements of fact for the purpose of founding a claim in misrepresentation.

Legal principles

48. Whether a representation has been made and, if so, its effect, are to be determined on an objective basis. In the case of an express representation, the question is what a reasonable person would have understood from the words used and the context in which they were used. In the case of an implied representation, the question is what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context: *IFE v Goldman Sachs* [2006] EWHC 2887 (Comm) (affirmed on appeal at [2007] EWCA Civ 811) per Toulson J at [50].

49. The answer to those questions "may depend on the nature and content of the statement, the context in which it was made, the characteristics of the maker and of the person to whom it was made, and the relationship between them": *Raiffeisen Zentralbank Osterreich AG v RBS plc* [2010] EWHC 1392 (Comm), per Christopher Clarke J at [82].

50. Where deceit is alleged against the representor, however, it will normally be necessary, in order to prove dishonesty, to establish that the representor understood the representation to have been made in the terms alleged by the claimant.

51. The test to be applied on an application for permission to amend a statement of case is the same as that to be applied on an application for summary judgment. It is necessary to show that the proposed amendment has a real, as opposed to a fanciful, prospect of success: *SPI North Limited v Swiss Post International (UK) Limited* [2019] EWHC 2004 (Ch) at [5]. The court must be careful to avoid conducting a mini-trial and it will consider the merits of the case only to the extent of determining whether it has sufficient merit to proceed to trial: *Slater & Gordon (UK) 1 Ltd v Watchstone Group plc* [2019] EWHC 2371 (Comm), at [37].

52. Fraud must be distinctly alleged and supported by sufficient particulars: *Three Rivers District Council v Bank of England (No.3)* [2003] 2 AC 1 at [185]-[186]. The pleading requirement was succinctly stated by Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [20], as follows:

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified,

> then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."

53. In any misrepresentation case, it is necessary to plead the facts and matters either said to constitute express representations or from which it is said the representations are to be implied. In addition, where it is pleaded that an oral statement was made (from which a representation is to be implied) and that the oral statement is to be inferred from other facts and matters, those other facts and matters must be clearly pleaded. In a case of fraud, this is particularly important. The party accused of fraud is entitled to know the underlying facts which are said by the claimant to have been, or to have given rise to, deliberately false statements.

54. Accordingly, I will concentrate on the facts and matters relied on in the existing and proposed pleading as giving rise to an express representation, an implied representation or an inference that something was stated orally on a particular occasion.

55. In some cases Mr Jones QC's submissions appeared to rely on evidence other than the matters pleaded as giving rise to particular representations. While the wider background is relevant as forming the context in which the particular statements relied on fall to be construed, I consider it is not open to HMRC to point to other matters in the evidence as giving rise to any other representation made on another occasion without making a formal application to amend to include such representations (accompanied by a proper draft of the proposed amendment).

56. Further, while I accept that it is not necessary to identify the precise words used in the case of a representation made orally, it is still necessary to plead the precise meaning (or gist) of what was actually said, from which the representation is to be inferred.

The misrepresentations: preliminary observations

57. A central theme of Mr Jones QC's submissions was that HMRC were not provided with the full picture by GE during the Clearance Discussions. In particular, they were not told during the Clearance Discussions of the circular nature of the funding for the Australian Transaction, and were not told anything of the destination of the funding beyond its injection as equity funding into the Australian Sub-Group. Their view is that the daylight borrowing and the transfer of funds in a circle through the structure described above indicates that there was either no commercial purpose to the Australian Transaction or at least that one of the main purposes was to obtain a UK tax advantage.

58. This is of direct relevance to the various causes of action (existing and proposed) that are based directly on GE's alleged failure to provide full disclosure. For the reasons I develop below, I have concluded that each of these causes of action (to the extent that the amendments are not already agreed), including in relation to deliberate non-disclosure, should be permitted to go to trial.

59. It is of limited, if any, relevance, however to the other pleaded misrepresentations. In this regard, as I explain below, I reject the broad submission by HMRC that because the allegedly undisclosed information would have been relevant to HMRC's decision (based on its view of the Anti-Arbitration Rules) it *must* be the case that GE had at some point or other made the Main Purpose Representation or the Hybrid Opportunity Representation. This is too simplistic an approach, which fails to pay any regard to the precise context of the relevant statements made by GE.

60. In considering whether HMRC have met the burden of identifying with sufficient particularity the facts and matters from which the alleged representations can be inferred, the following preliminary observations are pertinent.

61. First, insofar as the representations are sought to be added by amendment, they are being introduced some 14 years after the relevant events. They were evidently not understood by HMRC (or at least by those formulating the claim on behalf of HMRC) to have been made when the claim was first formulated in 2018. That alone gives reason to be cautious in accepting pleaded assertions unless supported by at least some cogent evidence.

62. The need for caution is increased when, as HMRC unsurprisingly acknowledge in circumstances where it is 15 years since the relevant events, the case is not based upon the recollection of witnesses, but on inferences to be drawn from the contemporaneous documents (and inherent probabilities).

63. This is therefore not a case where the evidence adduced in support of the representations will be tested by cross-examination at trial, or where HMRC are dependent on obtaining disclosure to support their case. Whether representations were made and in what terms they were understood and relied upon are matters expected to be within HMRC's own knowledge, and thus capable of being presented at this interlocutory stage in support of the amendment. Certainly in so far as it depends on the inference to be drawn from the contemporaneous documents, therefore, the court is likely to be in as good a position now as it would be at trial to consider whether there is a real prospect of establishing whether representations were made.

64. Second, the need for clear pleading of the facts and matters from which inferences are to be drawn in support of the alleged representations is particularly important where, as here, those representations relate to compliance with highly technical statutory provisions.

The Main Purpose Representation

65. The Main Purpose Representation is said to have been made in a number of ways. First, it is said to have been made expressly (as the true effect of) or impliedly in the following passage from an email dated 16 August 2005 from Mr Roy Clark (GE's UK tax director at the relevant time) on behalf of GE to Mr Ken Almand of HMRC:

> "Australia: we can talk about this more on Thursday but we do not believe that it is right to approach the Australian investment on the basis that it does not 'belong' in the UK and so funding costs should be disallowed in full. We have explained that this was a commercial investment by the group as a whole and thus an attractive one for the UK subgroup. We have also explained that, because of the regulatory position, there may well be other such acquisitions in the future…".

66. In order to determine whether it is possible to infer from this email the representation that the main purpose(s) of the Australian Transaction were all genuine commercial reasons and/or that none of the main purposes were to secure a UK tax advantage, it is necessary to understand the relevant context to it, as follows:

i) The argument that GE was advancing (as I have summarised above) is apparent from its letter to HMRC dated 13 June 2005 seeking clearance for multiple transactions. At paragraph 2, it referred to the majority of the debt having been drawn to fund assets acquired for "purely commercial reasons". Paragraph 3, however, stated that "from time to time there have been some borrowing incurred to fund dividends or to facilitate internal restructurings." The Australian Transaction fell within this second category. The clear implication was that it had not been entered into for purely commercial reasons.

ii) The clearance letter continued: "Such loans have been made under terms that would have been incurred on plain vanilla debt, in amounts and circumstances where the loans could also have been made in the absence of the hybrid entity status of any entity in the chain." GE was here, therefore, not saying that the loans *would* have been made in the absence of a hybrid, but that they *could* have been (albeit *had* they been, they would have been on similar terms).

iii) This was also made clear in the explanatory note accompanying the diagram for the Australian Transaction enclosed with the clearance letter:

> "In evaluating the investment decision, the UK Group could have chosen to borrow in the UK to fund the Australian operations with debt in a manner that did not involve hybrid entities. In such case, the economic effect of the deduction would reside in Australia (because the UK would have both a deduction and an offsetting inclusion, while Australia would be

> left with a deduction). However, in light of the parity of rates between the UK and Australia (both 30%) and certain tax incentives available in Australia, **it is reasonable for a worldwide group to choose to borrow in the UK and fund an investment in Australia with equity** … In such a case, a UK deduction would be available in the absence of any hybrid scheme. The effect of the Australian hybrid entity is to maintain the same UK tax result arising from an equity investment in Australia, while also allowing a deduction to reduce offshore tax in Australia. Again we conclude the legislation should have no application here." (emphasis added)

iv) HMRC's contrary view is encapsulated in their briefing note for, and the note of, a meeting with GE on 26 July 2005. In the briefing note, their concern was stated as follows:

> "[the Australian Transaction] is being funded by equity from UK – who are borrowing from US. Thus there is a net deduction in the UK. By using the scheme the UK is achieving a UK tax advantage. The comparator would be the US investing in Australia without UK involvement at all. In that situation there would be no UK deduction."

v) In the meeting note, HMRC are recorded as having said to GE that they "…did not like the Australian structure because they think that the transaction would not have taken place absent the hybrid opportunities."

vi) That was repeated in an email from Mr Almand to Mr Clark stating HMRC's view that "in the absence of a substantial commercial reason for the Australian acquisition to be held by the UK group, we conclude that the investment by the UK would not have been made at all in the absence of the arbitrage opportunity." It was that email to which Mr Clark's email of 16 August 2005 was a reply.

67. In my judgment, it is impossible to spell the alleged representation out of Mr Clark's email of 16 August. It certainly did not *expressly* say anything about the main purpose(s) of the Australian Transaction. The only express reference to "commercial" purpose was a reference to the original investment in Australia in 2002.

68. Further, I do not see how a statement either (i) that <u>all</u> the main purposes were commercial ones or (ii) that <u>none</u> of the main purposes was to gain a UK tax advantage can be spelled out of it. The challenge posed by Mr Almand's email had been to demonstrate "a substantial commercial reason" for the Australian acquisition. That, in turn, was a response to GE's contention, set out in the clearance letter, that the Australian Transaction <u>could</u> have been funded without a hybrid, and that it was <u>reasonable</u> for GE as a worldwide group to choose to borrow in the UK and fund an investment in Australia with equity.

69. HMRC's contention is that because Condition C requires that the main purpose or one of the main purposes of the scheme is to achieve a UK tax advantage, that is necessarily what GE would have been trying to persuade HMRC of, and that was therefore exactly what Mr Clark was saying in the email. I accept, however, Mr Gardiner QC's submission that the context in which this email was sent demonstrates that it falls to be construed in light of the legal position that GE was advancing. In that context, I do not think that there is a real prospect of establishing that the Main Purpose Representation was implied by the email.

70. Second, the representation is said to have been made orally by Roy Clark and/or Jan Martin (senior US tax counsel with responsibility for the overall tax position of the GE group in various countries), as the true effect of "equivalent statements made orally" during the Clearance Discussions.

71. There are no particulars provided as to when these alleged oral statements were made, what words were used, or the gist of what was said on a particular occasion. Nor is there any pleading as to the context in which the oral statements were made, save that they were made during the Clearance Discussions. The only particulars given, therefore, are that the statements were "equivalent" to the email from Mr Clark. In that case, I must assume that the gist of what was said, to be derived from the particular context of each unspecified occasion, was the same as that to be implied from Mr Clark's email. Since I have rejected the prospect of establishing that the email gave rise to the Main Purpose Representation, it follows for the same reasons that there is no real prospect of establishing that the Main Purpose Representation was also made in equivalent statements made orally on other occasions.

72. Third, the Main Purpose Representation is said to have been the effect of oral statements by the same person(s) that "the reasons for the UK Subgroup holding the Australian Investment were for banking and/or regulatory purposes." HMRC rely on a single document as particulars in support of this plea, being an undated manuscript file note made by Mr Preece of HMRC, at some point *after* the Settlement Agreement on being briefed about it by Mr Almand, which states:

> "Australian acquisition – under UK. Again, said banking in UK is main factor for using UK. Accepted their view."

73. A statement that banking in the UK was "main factor", even if this was shorthand for "the main factor", is not an express representation either that it was the only main reason or purpose for the transaction or that all the main purposes or reasons were commercial ones, or that none of the main purposes was to obtain a UK tax advantage. HMRC's after-the-event internal note reveals nothing of the context in which GE made the statement summarised in the note. If such a statement were to be implied, given (as I have already indicated above) GE was advancing in the Clearance Discussions its own interpretation of technical statutory provisions which did not imply anything other than it would have been objectively reasonable to undertake the Australian Transaction without the use of a hybrid entity, it would be necessary to plead either the written document which contained the statement

being referred to, or the circumstances in which GE made any oral statement, from which the representation is said to have been implied. No such particulars are given and HMRC are not in a position to adduce evidence from a witness who recalls such a statement being made. It is not enough to show that on HMRC's view of the legislation GE would have had to persuade them that none of its main purposes were to obtain a UK tax advantage.

74. In HMRC's skeleton it is suggested that there are eight sources of evidence that demonstrate it is overwhelmingly likely the Main Purpose Representation was made orally, the gist of which are that: (1) Mr Almand was told to focus on the commercial reasons for the Australian Transaction in discussions; (2) the correct application of the rules required the Clearance Discussions to cover the purposes of the scheme; (3) Mr Clark's email of 16 August 2005 adverted to discussing the purposes of the Australian Transaction being held under the UK Subgroup at the coming meeting; (4) an email from Mr Edge to Mr Clark of 29 September 2005 referring to a meeting with Mr Almand on another client, where Mr Almand had focussed on "just the commercial reasons for establishing a European holding company"; (5) Mr Whitehouse's evidence that Mr Almand stated that he found meetings to be more persuasive and usually involved providing more background information than would be included in a paper application; (6) Ms Martin's evidence in judicial review proceedings that the meetings were used to add detail; (7) statements by Ms Martin in that same evidence that Mr Clark made reference in meetings with HMRC to the fact that AGC was regarded as a good commercial investment and that GE had its largest regulated consumer lending business in the UK, to the fact that AGC was primarily a consumer lending business, and to the UK banking licence; and (8) the inherent probability that if the topic was discussed, GE would have been saying that all the main purposes were commercial and not tax driven.

75. These eight points show that there were multiple discussions between GE and HMRC, that the topics discussed included the purpose or purposes of the Australian Transaction and that statements by GE relevant to that topic were made. None of them, however, is inconsistent with the inference that whatever GE said was in the context of its case that it would have been objectively reasonable to undertake the transaction without use of a hybrid entity given factors such as the synergy between the businesses of AGC and the UK Subgroup and the UK banking licence. In circumstances where it is not suggested that witness evidence at trial would point to specific occasions, or specific context, which would support the inference that the Main Purpose Representation was made, I consider that there is no real prospect on the basis of the proposed pleading to conclude that the Main Purpose Representation would be established at trial. That is particularly so in the context of the case in fraud, where GE and its witnesses are entitled to know with precision what false statements they are said to have made.

76. In their supplemental written submissions in reply, HMRC contend that, if the Court is not willing to permit the pleaded amendments, then HMRC should at least be permitted to amend to allege a representation that the acquisition by the UK Subgroup of the Australian investment was a commercial investment

and that the main reason was because of the UK banking licence/regulatory position. They contend that if that representation was permitted, then it would inevitably be followed by a further subparagraph to the effect that implicit in it was a representation that the main reason for acquiring the Australian investment was because of the UK banking licence/regulatory position and that none of the main purposes was to secure a UK tax advantage. I do not think that such a pleading would overcome the difficulties I have mentioned in paragraph 73 above, but in any event I agree with GE's response that if HMRC wished to plead a further, different representation then it would have to do so by a properly formulated application accompanied by a draft pleading, and not by way of written reply submissions after the conclusion of the hearing.

77. Given my conclusion on the prospect of the Main Purpose Representation being established, I need not address GE's alternative submissions to the effect that there is no real prospect of showing that it induced HMRC to enter into the Settlement Agreement or that it was made fraudulently.

The Hybrid Opportunity Representation

78. The Hybrid Opportunity Representation is said to have been made on various occasions.

79. First, it is said to have been made expressly (as the true effect of) or impliedly in the passage from the letter dated 13 June 2005 from Mr Clark to Mr Almand that I have set out in full at paragraph 66(iii) above.

80. This was in the original pleading and is therefore the subject of GE's strike-out application, not the application for permission to amend.

81. There is no prospect of establishing that the Hybrid Opportunity Representation was made *expressly* in this letter. The letter states only that GE "could" have chosen to undertake the Australian Transaction in the UK without the use of a hybrid entity. Nor do I consider there is a real prospect of inferring the Hybrid Opportunity Representation from this passage. As I have noted above, the letter encapsulated the legal position being adopted by GE, namely that it *could* have undertaken the Australian Transaction without a hybrid entity, that it would have been an objectively reasonable thing to do, and that it would have given rise to the same net tax deduction in the UK. It was not part of GE's case that GE *would* have undertaken the Australian Transaction without using a hybrid entity.

82. It is no answer to this that GE appreciated that on HMRC's case the relevant question was whether GE *would* have undertaken the Australian Transaction using the UK Subgroup at all without a hybrid entity. GE was – at this stage in the Clearance Discussions – not attempting to provide a factual answer within the parameters of HMRC's view of the legislation, but was advancing its own alternative interpretation of the law. Accordingly, as with the Main Purpose Representation, the reasonable recipient of the representation would have understood what GE said within the context of the legal position it was adopting.

83. Second, it is alleged (also in the original pleading) to have been made expressly (as the true effect of) or implied in a statement that it is to be inferred was made orally at a meeting on 15 June 2005, to the effect that the UK Sub-Group "would have funded investments (including the Australia Investment) even without the opportunity to obtain a UK tax advantage through the use of a hybrid". This is said to be inferred from a note of that meeting sent by Ms Martin which stated: "And there's always the – we would debt fund without hybrids aspect – which they (particularly Diane) appeared to accept". (The reference to "Diane" is to Diane Hay of HMRC).

84. It is important to note, first, that this comment was made before the discussion at the meeting had turned to the Australian Transaction (which occurred four hours into the meeting). Second, this meeting occurred just two days after the letter from Mr Clark of 13 June 2005 in which GE made the point (as noted above) that it *could* have entered into the transaction without a hybrid entity and that this would have been commercially reasonable. In light of those two points, and noting that the only evidential basis for the representation being made orally at the meeting is this passage in the meeting note (it being unsupported by recollection of any witness as to what occurred at the meeting), I consider that there is no real prospect of inferring that a person at the meeting would have reasonably understood GE to have stated that the Australian Transaction would have been entered into without the hybrid element.

85. Third, it is alleged (again in the original pleading) to have been made expressly (as the true effect of), or impliedly, in the same passage in the email from Mr Clark to Mr Almand upon which the representation in paragraph 38(b) is based. I cannot see any real prospect of this being established. Nothing in that email contains anything like an express statement of the alleged representation and, for largely the same reasons as I have given above for rejecting the contention that the Main Purpose Representation can be inferred from the passage in the email, I do not think that the Hybrid Opportunity Representation can be inferred from that passage.

86. Fourth, it is alleged to have been made expressly (as the true effect of) or implied in a statement made on behalf of GE at a meeting with HMRC on 26 July 2005. In the note of that meeting taken by Mr Edge of Slaughter & May (GE's solicitors) Mr Almand is recorded as having said that "HMRC did not like the Australian structure because they think the transaction would not have taken place absent the hybrid opportunities." It is then recorded that "there was a long discussion about the UK banking licence and the fact that the UK had encouraged international holding structures. More overseas acquisitions might be made through the UK in the future. Australia had just been the first. It was also pointed out that the question posed was had the hybridity of the debt been the determining point – if the UK would have borrowed to buy anyway, that was not the case."

87. HMRC rely in particular on the final sentence in this extract of the note of the meeting. GE contends that this is not a statement that GE would have entered into the Australian Transaction in the absence of the hybrid opportunity; instead, it was simply a statement that in the relevant hypothetical comparator

transaction of the UK Subgroup acquiring the Australian Investment without the involvement of hybrid entities, the UK Subgroup would have used the same method of financing (borrowing), so that the UK tax outcome would have been the same. This, submitted Mr Gardiner QC, was consistent with GE's argument throughout the Clearance Discussions that the hypothetical comparator transaction should not disregard the fact that the UK Subgroup had purchased the Australian investment (which I understood to be shorthand for its case that provided GE *could* have done so and that it would have been objectively reasonable to do so, then the comparator should include the UK Subgroup acquiring the Australian investment with borrowing).

88. In contrast to the statements I have already dealt with above, said to have given rise to the alleged representations, I do not think that this statement is necessarily to be construed in the light of the case being advanced by GE. In the statements already dealt with it was clear that GE was meeting HMRC's case by putting forward its own legal position as to the nature of the comparator transaction. Here, however, it is at least arguable that GE was answering HMRC's case (that the transaction would not have taken place in the UK without the hybrid opportunity) by assuming it to be the correct legal analysis and answering it directly. Although the language is not entirely clear, because it is only said "*if*" the UK would have borrowed anyway, a reasonable person at this meeting could have understood GE to have said that, on the assumption it was correct to ask whether the hybridity of the debt was the determining point, the UK Subgroup would have borrowed to buy even without the hybrid opportunity.

89. Accordingly, I conclude that there is a real prospect of establishing that the Hybrid Opportunity Representation was implicitly made at the meeting on 26 July 2005. That is not to say that, upon a fuller analysis of the note of the meeting at a trial, where the judge would be steeped in the details of the Clearance Discussions to an extent that is not possible on an application such as this, a different inference will not be drawn from the meeting note. It is sufficient at this stage, however, to conclude that it is a real possibility that the representation can be inferred from the meeting note.

90. Fifth, the Hybrid Opportunity Representation is said to have been made by conduct, by Mr Clark supplying the Australian Partnership accounts. This was not pressed in argument. I can see no basis upon which the provision of the accounts gave rise to the representation.

91. Sixth, it is alleged that it is to be inferred "from the same facts and matters" that the representation was made orally during the Clearance Discussions, most likely on 26 July 2005, 18 August 2005 and/or 4 November 2005. I have already accepted the possibility that the representation was made on 26 July 2005. As to the latter two dates, there are no particulars provided save that (at paragraph 33) it is pleaded that there was a meeting on 18 August 2005 and that it was HMRC's position at that meeting that (among other things) there was no commercial reason for the Australian Transaction to be made by the UK Subgroup, and that (at paragraph 37) it is pleaded that there was a meeting on 4 November 2005. In the absence of evidence of recollection by someone at those meetings that the representation was made, or that some other

statement was made from which the representation might be implied, it is incumbent on HMRC to plead at least some facts and matters from which an appropriate inference could be drawn. The absence of such matters leads me to conclude, therefore, that there is no real prospect of establishing that the Hybrid Opportunity Representation was made on these occasions.

92. Given that I have concluded that one of the pleaded examples of the Hybrid Opportunity Representation (that pleaded by way of proposed amendment in paragraph 38(e)(iiiA) of APOC) stands a real prospect of success, I turn to consider GE's second basis of opposition to the amendment, namely that there is no realistic prospect of establishing that HMRC were induced to enter into the Settlement Agreement in reliance on it.

93. GE's case in this regard is based on HMRC's reaction immediately following the meeting on 26 July 2005, and continuing for some weeks thereafter. In assessing the credibility of the allegation that HMRC relied on the alleged representation, it is again important to note that HMRC are not in a position to adduce evidence from witnesses who can recall the statement being made (and thus relied on) at any stage. HMRC's immediate response was contained in an email from Mr Almand to Mr Clark dated 2 August 2005. He said:

> "Australia acquisition: in the absence of a substantial commercial reason for the Australian acquisition to be held by the UK group, we conclude that the investment by the UK would not have been made at all in the absence of the arbitrage opportunity…"

94. It was this that prompted the email from Mr Clark of 16 August 2005 which (for the reasons I have set out above) I consider to have encapsulated GE's legal position that it was objectively reasonable for the UK Subgroup to have acquired the Australian investment.

95. HMRC thereafter maintained that view for at least two months. Their briefing note of 17 August 2005 stated the Australian investment "…may have been 'an attractive investment for the group' but that does not mean there is a significant and convincing purpose for the UK to acquire the Australian assets." The note continued: "Also, the only reason that it was an 'attractive one for the UK group' was because of the tax benefits arising from the scheme." Mr Almand repeated HMRC's view, that there was no commercial reason for the acquisition to be made in the UK, at the meeting with GE on 18 August 2005. In the clearest rejection of any suggestion that GE might have entered into the transaction in the absence of a hybrid entity, HMRC's file note dated 8 September 2005 states:

> "The comparator here is <u>not</u> borrowing without a hybrid (plain vanilla loan) because the transaction would not have taken place at all absent the hybrid hence none of the interest expense would have been incurred." (emphasis in the original)

96. This was communicated to GE in HMRC's formal letter of 22 September 2005 refusing clearance in respect of the Australian Transaction:

> "As discussed at our meetings, we are not satisfied that the scheme did not have a main purpose of achieving a UK tax advantage."

97. These documents establish beyond question that, certainly as at 22 September 2005, if GE did make a representation that the Australian Transaction would have occurred without the use of the hybrid entity, HMRC either had not heard it or did not believe it. This suggests that HMRC cannot have been induced by the representation even if it was made.

98. HMRC rely on the principle that it is sufficient, in order to establish a claim in misrepresentation, to show that the representation was a "contributing cause" to HMRC's decision to enter into the Settlement Agreement: see *Zurich Insurance v Hayward* [2017] AC 142, per Lord Clarke at [33], quoting the following statement of Lord Hoffmann in *Standard Chartered Bank Ltd v Pakistan National Shipping Corpn Ltd (Nos 2 and 4)* [2003] 1 AC 959 at [15]:

> "if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known that it was false, it does not matter that he also had some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid."

99. As is evident from that passage in Lord Hoffmann's speech, the principle is concerned with multiple parallel contributing causes. The question in this case, however, is whether there is a real prospect of HMRC establishing that by the date of the Settlement Agreement the alleged representation made orally at a meeting some five months earlier continued to have any influence on HMRC at all.

100. The one thing that is clear is that HMRC changed their mind at some point between 22 September 2005 and 21 December 2005. The only two matters pleaded in the context of the Hybrid Opportunity Representation relevant to that period are: the allegation that the Hybrid Opportunity Representation was repeated orally on 4 November 2005 and the file note made by Mr Preece sometime after the Settlement Agreement which refers to Mr Almand having told him that HMRC accepted GE's view that "banking in UK is main factor". I have rejected the first as lacking particulars and/or evidential foundation. The second does not constitute a repetition of the Hybrid Opportunity Representation, for the reasons I have given above (and, if it did, then that would suggest that HMRC's decision was influenced by *that* representation not one made some four months previously which HMRC had rejected at the time).

101. This is an area where the fact that HMRC's case is based on inferences to be drawn from the documents and inherent probabilities, rather than evidence of witnesses' actual recollection, is important. It is also relevant to bear in mind that the Settlement Agreement involved a compromise, with GE accepting that interest on AUS$700,000,000 owed by IGE would not be deductible. Whether HMRC had in mind, when reaching this compromise, what was said by GE at the meeting on 26 July is a matter entirely within HMRC's knowledge. HMRC cannot, however, point to a recollection to that effect of anyone involved on their behalf in the Clearance Discussions.

102. In their skeleton argument, HMRC made the point (in relation to reliance) that it is important to draw a distinction between a clearance (where the onus is on the taxpayer to put their cards face up on the table) and an inquiry, where a taxpayer is required to provide information only when asked or where they know or suspect something is wrong with their tax affairs. While this is relevant to the various causes of action premised upon GE's failure to give full disclosure (addressed below), it does not help with respect to the specific question whether HMRC relied on any representation made on 26 July 2005.

103. In light of these considerations, I conclude that the prospect of establishing reliance on the alleged representation on 26 July 2005 is too speculative to give rise to a real prospect of it being established at trial. It is unnecessary, therefore, to address GE's other objections to this pleading.

The Full Disclosure Representation

104. Given that GE does not oppose the amendment to plead the Full Disclosure Representation, or that it was false or that it induced HMRC to enter into the Settlement Agreement (although I record that GE strenuously denies these matters) for the purposes of the applications before me (but only for that purpose), I must assume that:

    i) GE represented that it had given full disclosure of all relevant facts and matters in connection with the potential application of the Anti-Arbitrage Rules and/or the legislation relating to unallowable purposes in connection with the funding of the Australian Transaction;

    ii) The representation was false, in that information which might reasonably be regarded as material was not disclosed; and

    iii) The representation induced HMRC to enter into the Settlement Agreement.

105. The primary facts upon which it is alleged that Ms Martin and/or Mr Clark knew the representation to be false include the following:

    i) The seniority of the roles held by Ms Martin and Mr Clark and their significant experience and expertise in relation to tax affairs generally and in relation to GE in particular;

ii) Their actual knowledge of the terms of HMRC's draft guidance, given that Mr Edge (who had communicated with HMRC on GE's behalf in relation to the draft guidance) had discussed it with them;

iii) The content of that guidance, including the requirement that the details of the scheme provided should include the description of the flows of money and its final destination, and an explanation of the commercial purposes of the scheme; and

iv) The fact that Ms Martin and Mr Clark had full knowledge of the details of, and of all material facts and matters relating to, the Australian Transaction, in particular the circular flow of funds *and* that the same was not disclosed to HMRC.

106. It is important to distinguish the task I need to perform, which is whether the primary facts relied on to support the allegation of fraud point on balance more towards fraud then negligence, from the question whether the primary facts are likely to be established on the evidence at trial. The latter point is relevant at the amendment/strike-out stage only if I am satisfied that there is no real prospect of the facts being established at trial.

107. It is also important to distinguish the core primary facts from matters which, though pleaded, are properly regarded as either peripheral facts or evidential support for the primary facts. Thus, in relation to the Full Disclosure Representation, the case in fraud depends on establishing that Ms Martin and/or Mr Clark either knew (or were reckless as to) the following facts (where those facts are assumed to be true for the purposes of this application): (1) a representation had been made to HMRC that all material information had been provided; (2) that representation was untrue because information that might reasonably be regarded as material had not been provided.

108. In my judgment, the pleaded primary facts as to the central involvement of Ms Martin and Mr Clark in the Australian Transaction and the Clearance Discussions are sufficient (if established at trial), when added to the facts I need to assume in light of the consent to the pleading of a non-fraudulent Full Disclosure Representation, to tilt the balance in favour of a finding of knowledge of these matters.

109. One of the principal themes of Mr Gardiner QC's submissions, that the case must be looked at through the lens of GE's own contentions as to the requirements of the legislation, is at least arguably irrelevant to the Full Disclosure Representation. If so, it follows that in representing that it had given disclosure of all relevant facts, such facts were those relevant to either side's interpretation of the law (as opposed to only those facts which would be relevant assuming GE's view of the law was correct). HMRC's view, that the comparator was no transaction at all, since it would not have taken place without the hybrid element, and that they were not satisfied that the scheme "did not have a main purpose of achieving a UK tax advantage" was made clear on numerous occasions. As Mr Jones QC put it, if GE wanted to get clearance they needed to "fight on the battle field" of HMRC's choosing and,

at a minimum, disclose information relevant to the position adopted by HMRC.

110. The parties' submissions on this issue covered a number of other matters which it was said demonstrated deliberate withholding of information. HMRC relied in particular on the following matters: what GE told the Australian tax office in 2013, namely that the main purpose of streaming income through the UK was "to gain a tax advantage in the UK not Australia"; a diagram *not* disclosed by GE in the Clearance Discussions, which highlighted (with "exploding star" shapes) the triple-dip element of the transaction; an extract of a board minute of IGE provided by GE to HMRC, as compared to the full minute containing much fuller details, which was not provided; structure diagrams that were disclosed by GE, purporting to show an equity investment in Australia as the final step in the transaction, as compared to detailed step plans which revealed the circularity of funds and which were not disclosed. I do not find it necessary to lengthen this judgment by a detailed consideration of these matters. The matters referred to by HMRC were not relied on as specific representations, but were said to support HMRC's case in fraud generally and deliberate non-disclosure in particular.

111. GE, for its part, placed particular reliance on the fact that, in the part of the IGE board minute that was disclosed, it was revealed that the funding for the Australian Transaction was to be used to refinance existing internal debt. The fact that the IGE board minute revealed more of the overall picture than HMRC's submissions appeared to accept, however, does not mean that there is no arguable case that material information was not disclosed. As I have mentioned, GE's consent to the pleading of case in non-fraudulent misrepresentation (in respect of the Full Disclosure Representation) suggests there is a more than fanciful case that at least some material information was not disclosed. Moreover, refinancing (as referred to in the IGE minute) does not necessarily imply the type of circular daylight funding which in fact took place.

112. As I have already indicated, once it is established that the primary facts (if found at trial) are sufficient to found an allegation of fraud, per Flaux J in *JSC Bank of Moscow v Kekhman* (above), the court is not concerned with whether the evidence at trial will or will not establish fraud, unless it could be shown that the prospects of success were no more than fanciful. As to that, it would not be appropriate to say anything more than that on the basis of the materials I have been shown, and resisting the temptation to enter upon a mini-trial of the issue, I am not satisfied that the prospects are merely fanciful.

Limitation

113. By s.35(1) of the Limitation Act 1980, any new claim made in the course of an action shall be deemed to be a separate action and to have been commenced on the same date as the original action.

114. By s.35(3) however, except as provided in s.33 or by rules of court, the court shall not allow a "new claim" (other than an original set-off or counterclaim) to be made in the course of any action after the expiry of any limitation period in respect of that new claim.

115. By the operation of s.35(4) and (5) and CPR 17.4, a party may add a new claim after the expiry of any limitation period provided that it arises out of the same or substantially the same facts.

116. It is common ground that the proposed amendment to plead a claim for rescission on the ground of fraudulent misrepresentation is a new claim within the meaning of s.35 of the Limitation Act 1980 and CPR 17.4, and that the new claim, involving allegations of fraud, does not arise out of the same or substantially the same facts as the current one (see, for example, *Paragon Finance Plc v Thakerar & Co* [1990] 1 All ER 400, per Millett LJ at p.418).

117. In these circumstances, the burden lies on HMRC to establish that GE does not have an arguable case on limitation which will be prejudiced by the new claim, where the relevant date for calculating the limitation period is the date when the amendment is actually made: *Paragon Finance* (above), at p.440. If there is a reasonably arguable defence, then HMRC must be left to bring the new claim by a separate action (thus preserving in favour of GE any arguable limitation defence).

118. HMRC's claim is principally for declaratory relief. Relevant to the claim in misrepresentation, they claim a declaration that the Settlement Agreement has been validly rescinded, or a declaration that the Settlement Agreement is void or is liable to be set aside, and a declaration that they are entitled to recover from GE tax liabilities that would otherwise have been settled under the terms of the Settlement Agreement. (The same relief is claimed, if necessary, under the Clearance Agreement.)

119. The pleading does not identify whether the declaration as to the rescission of the Settlement Agreement is sought at common law or in equity. HMRC explained in their skeleton, however, that the claim is framed in three ways: (1) a declaration that the rescission was validly effected at common law; (2) a declaration that the rescission was effective in equity; and (3) an order effecting rescission in equity.

120. Insofar as the declaration for fraudulent misrepresentation is sought at common law, HMRC contend that there is no applicable limitation period (save that there is a six year period running from the date that rescission was effected by way of self-help, for bringing claims arising as a result of the rescission). GE does not dispute this, but instead contends that it has cast-iron defences to any claim at common law. It does not, however, rely upon these defences in opposition to the amendment. Accordingly it is common ground that limitation is not a bar to the amendment to plead fraud insofar as HMRC's claim is based on declaratory relief at common law.

121. Insofar as HMRC's claim is based in equity, GE contends that the six-year time period for a claim based on the tort of deceit is to be applied by analogy.

122. Section 36 of the Limitation Act 1980 provides that various limitation periods under the Act:

> "…shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940."

123. GE contends that the position in this case is the same as that in *Molloy v Mutual Reserve Life Insurance Company* (1906) 94 LT 756. In that case, the plaintiff claimed a declaration that an insurance policy entered into by him with the defendant was induced by fraudulent misrepresentation, rescission of the policy, an account of payments made by him under the policy and payment of the sum found due on taking the account. The Court of Appeal held that the claim was barred because, even though there was no statutory bar to a claim for rescission (being a claim for equitable relief), the six-year limitation period that applied to a claim for damages in the tort of deceit applied by analogy.

124. For HMRC, however, Mr Jones QC submitted that it is important, in understanding the effect of this decision, to appreciate the nature of the relief sought, notably that it was a claim to recover the sums paid under the policy by way of a claim for rescission of the policy in equity. It was, he said, because the relief sought was the recovery of money paid under the policies that it was appropriate to apply by analogy the limitation period for the common law action for damages for deceit. He referred, in support of this, to the following passages in the judgments:

i) Collins MR, at p.760, described the plaintiff's action as one "…for fraudulent misrepresentation. It might have been an action for damages at law on that footing. As a matter of fact it was an action claiming the relief which I have read from the claim";

ii) Romer LJ, at p.761-2:

> "In a case where a fraud has been committed, the defrauded person may have two remedies. He may have an action for damages at common law; or he may have, possibly, in a case like the present, an equitable remedy for rescission of contract. If he brings his action at common law he has to take care that he is not met by the plea of the Statute of Limitations, which would be a good plea in answer to his claim, though based on fraud, if he knew all the main relevant circumstances on which his claim in respect of the fraud was based more than six years before action brought. Now, if instead of bringing his action at law, he seeks the equitable remedy, it is true that the Statute of Limitations does not directly apply. But it applies indirectly, for

> it is settled law that where it is only a question of the remedy and you come into equity with a case such as I am considering for the purpose of getting equitable relief, then the equity of the court acts by analogy to the Statute of Limitations, and will not allow the plaintiff to succeed if his action is brought more than six years after knowledge of the facts has been acquired by him which justify his coming to the court."

125. *Molloy* was followed in two subsequent first instance cases. In *Oelkers v Ellis* [1914] 2 KB 139, the plaintiff claimed to set aside certain transactions (on the basis they were induced by fraud) and to recover moneys paid in respect of them. Horridge J cited the above quoted passage from Romer LJ's judgment in *Molloy* to conclude that the limitation period for the common law claim in deceit applied, so that the claimant had six years from the date he acquired knowledge of the relevant facts to bring the claim, and the claim was therefore not statute barred. In *Armstrong v Jackson* [1917] 2 KB 822, the plaintiff similarly sought (and was granted) rescission of a transaction and recovery of amounts paid. The only reference to the Limitation Acts was at p.830-831, where McCardie J said: "If, however, he delays his claim to rescission until after the lapse of six years from his discovery of the fraud, then the Court will (apart from any other point) act by analogy to the Statute of Limitations and refuse to grant relief: see *Oelkers v Ellis*."

126. HMRC relied for their part on *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2016] EWHC 3342 (Ch) ("*PAG*"), where Asplin J, at [257] to [258] held that there was no limitation period applicable to a claim for rescission for misrepresentation, citing s.36 of the Limitation Act 1980 and the decision of the Court of Appeal in *P&O Nedlloyd BV v Arab Metals Co (No2)* [2007] 1 WLR 2288.

127. In *P&O Nedlloyd* the relevant issue was whether a claim for specific performance of a contract was subject to any limitation period, in particular the six-year limitation period under the Limitation Act 1980 in respect of claims for breach of contract. There was no consideration of the position in relation to claims for rescission. At [43], Moore-Bick LJ said:

> "It is not surprising that equity should apply by analogy the limitation periods applicable to claims at law for an account and for damages for breach of duty, whether in contract or tort, to claims for an account and for equitable compensation. In each case the same facts give rise to a claim, whether at law or in equity, and the same kind of relief is obtainable."

128. He contrasted this with specific performance, where there was no comparable relief available in the common law courts, and the facts needed to support a claim were not in all respects the same as those necessary to support a claim for breach of contract.

129. Grant and Mumford, Civil Fraud, Law Practice and Procedure (Sweet & Maxwell), at para 25-030, point out the tension between *Molloy* and *PAG*. It is there said that *Molloy* was referred to Asplin J in *PAG*, and that one might infer that she regarded it has having been superseded by *P&O Nedlloyd*. The point was dealt with very briefly in *PAG*, and it is not possible to discern whether, and if so on what basis, Asplin J considered that *Molloy* could be distinguished. For that reason I will consider the issue afresh, without regard to the *PAG* decision.

130. In my judgment, HMRC's arguments are to be preferred. The question is whether, having regard to the nature of the claim made in the particular case, the same facts give rise to a claim in law in respect of which the same kind of relief is obtainable (adopting the words of Moore-Bick LJ in *P&O Nedlloyd* quoted above), and to which a statutory limitation period applies. In *Molloy*, Romer LJ identified the equivalent common remedy as "an action for damages". Collins MR similarly noted that the equivalent common law action to that claimed in equity was "an action for damages at law". I accept Mr Jones QC's submission that it was the fact that the claimant sought to recover money or property as a consequence of rescission that justified adopting the limitation period applicable to the common law claim of deceit. The two first instance cases that followed *Molloy* do not take the matter further. They simply followed *Molloy* in similar circumstances, where the claim was to set aside a contract to recover payments made under it.

131. That is likely to be the case in relation to many claims for rescission of a contract, because the claimant will normally require an order of the court to recover sums paid under the contract in addition to the declaration or order as to rescission itself. The distinguishing feature of this case is that HMRC do not need, and do not ask for, an order of the court to recover the tax said to be due (if the Settlement Agreement is set aside), and its right to recover the tax is not subject (yet) to any statutory time bar. Accordingly, unlike in *Molloy*, the only remedy sought is declaratory relief.

132. In those circumstances, there is an obvious and direct analogous action at common law, namely the claim for a declaration as to the validity of the rescission effected at common law. It is common ground (as I have already noted) that there is no limitation period applicable to such action at common law. The fact that the common law claim is brought in the same action, based on the same facts said to give rise to the equitable equivalent, reinforces the conclusion that the appropriate analogy in this case is the common law claim for declaratory relief. Accordingly, I consider that there is similarly no limitation period applicable to the equitable claims made by HMRC in this case.

133. Mr Gardiner QC submitted that in view of the fact that there was Court of Appeal authority (*Molloy*) apparently to the contrary effect, I should conclude that there was at least an arguable limitation defence. The issue, however, is a pure one of law capable of being resolved either way on this application. My conclusion on the issue puts an end (subject only to an appeal) to the argument.

Discretion to permit a pleading of fraud at this stage

134. GE contends that even if the fraud plea is not barred by limitation, the court should exercise its discretion to refuse the amendment for six reasons: (1) the representations are insufficiently particularised; (2) it does not sit well for HMRC to allege fraud when fraud was not mentioned once during the 8-year enquiry; (3) the internal decision to rescind the Settlement Agreement expressly disavowed fraud; (4) the lack of tenable reason for pleading fraud at this stage suggests that the reason is tactical expediency; (5) HMRC's own fraud investigation unit (the "FIS") concluded there was insufficient evidence to warrant a criminal investigation; and (6) HMRC's conduct in relation to the disclosure of documents relating to the referrals to FIS was far below the standard the court expects of a litigant.

135. I am not persuaded, on the basis of these reasons to exercise my discretion against allowing the amendment.

136. The lack of particularisation relates to the Main Purpose Representation and the Hybrid Opportunity Representation, neither of which will proceed to trial for other reasons. As to the second, third, fourth and fifth reasons, the fact that HMRC may have refrained from asserting or pleading fraud when they felt that it was not necessary to do so, but now do so only because it is necessary in order to overcome defences raised by GE, ought not to preclude them from doing so. These points may provide forensic fodder for GE's case on the strength of the fraud allegation and/or for arguments in relation to costs if the claim fails, but they do not in my judgment provide a strong enough reason to deny the amendment. As to the point relating to FIS, it was in any event faced with a different and more targeted question to that posed by the Full Disclosure Representation or the claims based on deliberate non-disclosure and its opinion is not relevant. Finally, and without embarking on a detailed examination of the circumstances of the disclosure application, I do not think that HMRC's conduct in resisting disclosure of the FIS documents or the reasons presented in support of it, justify refusing an amendment if (as I have found) the amendment otherwise ought to be permitted.

Contract of Utmost Good Faith and Implied Term

137. I deal with these two matters together, because – in circumstances where there is already a pleaded contractual obligation to provide "adequate disclosure of the matters dealt with in [the Settlement Agreement] (and the underlying facts and circumstances)" – these are pleaded solely in order to provide an alternative route to setting aside the Settlement Agreement on the grounds of GE's alleged failure to disclose material information.

138. In particular, HMRC wish to plead these alternative causes of action in case they fail in their primary argument that the express contractual provision in the Settlement Agreement as to disclosure is a condition, breach of which entitles HMRC to terminate the Settlement Agreement, or that it is an innominate term giving rise to an entitlement to terminate the Settlement Agreement depending on the seriousness of the breach.

139. By the first proposed amendment HMRC seek to add a claim that the Settlement Agreement is a contract of utmost good faith. By the second proposed amendment they seek to add a claim that there was an implied term in the Settlement Agreement to the effect that:

> "HMRC was entitled to rescind, alternatively terminate, the Settlement Agreement in the event that IGE had failed to give full disclosure of any material fact relating to the Settlement Agreement."

140. The first raises a further pure point of law, on which there is no direct authority. Mr Jones QC contended that the point is arguable, in light of the following statement as to the position as a matter of public law in connection with applications to HMRC for clearance of particular transactions by Bingham LJ in *R v Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 WLR 1545, at 1569:

> "The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law: *Reg. v. Attorney-General, Ex parte Imperial Chemical Industries Plc.* (1986) 60 T.C.1 , 64G, *per* Lord Oliver of Aylmerton. … No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the revenue is of a less formal nature a more detailed inquiry is in my view necessary. If it is to be successfully said that as a result of such an approach the revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would in my judgment be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say "ordinarily" to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the revenue the ruling sought. It is one thing to ask an official of the revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered

> and, indeed, whether it is appropriate to give a ruling at all. Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification."

141. He submitted that a taxpayer that seeks to enter into a settlement agreement with HMRC in the context of an application for clearance should be under the same duty to put all its cards face up on the table.

142. Mr Gardiner QC submitted that the claim is hopeless because it is well established that a compromise agreement (i.e. an agreement that constitutes "the settlement of a dispute by mutual concession or 'a coming to terms, or arrangement of a dispute, by concessions on both sides'", citing Foskett on Compromise, 9th ed., at 1-01) is not a contract of utmost good faith. He cited *Turner v Green* [1895] 2 Ch 205, 208 and *Bell v Lever Bros Ltd* [1932] AC 161, 232.

143. Mr Gardiner QC also cited *Baghbadrani v Commercial Union Assurance Co Plc* [2000] Lloyd's Rep IR 94, where His Honour Judge Gibbs QC, sitting as a deputy High Court Judge, at p.118-119 was "inclined to think" that a compromise of an insurance dispute was not itself a contract of utmost good faith, notwithstanding that the insurance contract itself was such a contract.

144. The relevant effect of a contract being of the utmost good faith is that it gives rise to a duty of disclosure. Indeed, the issue in the three cases cited was whether the party to the settlement agreement had a duty to disclose information (it being pointed out by Chitty J in *Turner v Green* that mere silence as regards a material fact, in the absence of a duty of disclosure, was not a ground for rescission). That is not relevant here, because the contract itself contained an obligation to provide adequate disclosure (in the form of a confirmation by GE that it had done so).

145. Although this raises a pure point of law, Mr Jones QC submitted that it is one that I ought not to decide at this interlocutory stage, on the grounds that in a developing area of the law it is desirable that such development takes place on the basis of actual facts found at trial: see, for example, *Mosley v News Group Newspapers Ltd* [2008] EWHC 234.

146. I accept that submission for three linked reasons. First, the category of contracts that are of the "utmost good faith" kind is not closed and the question whether it should be extended to a contract such as the Settlement Agreement in this case is one that is best determined at a trial where the full context of the contract is explored. Second, there was very little oral argument addressed to this issue, the parties using most of their allotted time in the two-day hearing to deal with other matters, and I do not consider it is the best use of court time, or an appropriate way to determine such a point, to do so on the basis principally of the written materials at this interlocutory stage. Third, where, as here, there is already a claim for breach of an express term to provide full disclosure and the question whether breach of that term entitles HMRC to terminate the contract will be addressed in any event, I consider that

this additional argument seeking the same outcome ought to be determined at the same time.

147. In relation to the proposed amendment to add a claim based on an implied term, GE's opposition is based principally on the ground that a term cannot be implied where it would contradict an express term, namely clause 14 of the Settlement Agreement.

148. Clause 14 provides that "GE confirms to HMRC that it has made adequate disclosure of the matters dealt with in this letter (and the underlying facts and circumstances)". I do not accept that the proposed implied term would be inconsistent with it. The term sought to be implied relates only to the consequences of a failure to give adequate disclosure, upon which clause 14 is silent.

149. GE also contends that the proposed implied term fails the test of necessity, relying on similar arguments to those relating to the utmost good faith amendment. While I have considerable doubts whether the implied term adds anything to the existing claim that the express term was a condition or innominate term, such that breach of it entitled HMRC to terminate the contract as a matter of law, I think that the point is arguable and, for broadly the same reasons as I have given in relation to the utmost good faith point, it would not be a sensible use of court time to seek to reach a final conclusion on the issue now. Accordingly, I will allow the amendment without prejudice to either side's argument as its validity as a matter of law.

Conclusion

150. For the above reasons, I refuse the application to amend in respect of paragraphs 38(b) and 38(e) of APOC and I will strike out the existing pleading in paragraph 38(e) of APOC. I will otherwise permit the amendments sought by HMRC insofar as they are not already agreed between the parties. Specifically, the permitted amendments include those in which HMRC seeks to introduce allegations of deliberate non-disclosure, fraud in respect of the Full Disclosure Representation, a claim that the Settlement Agreement is a contract of utmost good faith (paragraphs 49B and 53(ca) of APOC) and the claim for breach of an implied term (paragraphs 48 and 49 of APOC).

151. As to paragraph 68(b) of the Reply, I refuse the application to strike it out. To a large extent this follows from my conclusion in relation to the amendments to the APOC to add allegations of deliberate failure to disclose material information. In GE's skeleton argument, a separate point is taken that paragraph 68(b) of the Reply is a free-standing plea that is lacking in sufficient particulars. I do not accept this: there can be no real doubt as to which parts of the APOC are being referred to by the cross-reference made in paragraph 68(b)(ii).

152. The overall result is that, while I have rejected the attempts to infer many years after the event that specific positive representations could be implied from limited references in the contemporaneous documents, the essential allegation which lay at the heart of Mr Jones QC's submissions – that GE

failed to disclose the complete picture, and that it did so deliberately – will be permitted to go to trial on the various alternative legal bases asserted by HMRC. I stress that, beyond the conclusion that there is a sufficient pleading for this purpose, and that the prospects of success cannot be shown to be fanciful on an interlocutory application such as this, I say nothing about the merits of the claims of deliberate non-disclosure or fraud.