Neutral Citation Number: [2020] EWHC 2101 (Comm)

Case No: CL-2019-000744

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

Mr Peter MacDonald Eggers QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) DODIKA LIMITED **(2) GEDALA LIMITED** **(3) LOGIN ESTABLISHMENT** **(4) LAYTONERA LIMITED** **(5) NINAZ LIMITED** **(6) ROMIH LIMITED** **(7) TARMEA7 LIMITED** **(8) ZETTA IQ LIMITED**	**Claimants**
- and -	
UNITED LUCK GROUP HOLDINGS LIMITED	**Defendant**

- -
- -

Alain Choo-Choy QC (instructed by **Taylor Wessing LLP**) for the **Claimants**
Matthew Hardwick QC (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing date: 11 June 2020

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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.

“Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 2:00 pm on 31 July 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge’s Clerk”

Mr Peter MacDonald Eggers QC :

Introduction

1. This is an application for summary judgment made by the Claimants on their Part 8 Claim seeking the release of the sum of US$50,000,000 (being a part of the purchase price) held in escrow pursuant to the terms of a Sale and Purchase Agreement dated 21st December 2016 ("the SPA") relating to the shares in Oufit7 Investments Limited ("Outfit7") between the Sellers and the Defendant (as Buyer). The Claimants are some of those Sellers.

2. Whether the funds in escrow can be released to the Sellers depends on the validity of a written notice of a Claim under the Tax Covenant in the SPA given on 24th June 2019 by the Defendant to the Sellers who were Warrantors under the SPA. If the notification provided by the letter dated 24th June 2019 ("the letter dated 24th June 2019") was invalid, because it did not comply with paragraph 2.1(b) of Schedule 4 of the SPA, the funds can be released to the Sellers. If the notification was valid, the funds can remain in escrow.

3. The Claimants therefore seek declarations essentially to the effect that (1) the letter dated 24th June 2019 failed to comply with the requirements of paragraph 2.1 (b) of Schedule 4 of the SPA, (2) the Claim under paragraph 2.1(a) of Schedule 7 of the SPA (the Tax Covenant), and the associated claim for costs and expenses incurred in connection with the claim under paragraph 2.2, are not enforceable pursuant to paragraph 2.1(b) of Schedule 4 of the SPA, and (3) the Defendant is obliged to give all necessary instructions and take all necessary steps forthwith to ensure the payment of the balance of the sums held in escrow to the Sellers.

4. The Defendant denies that the Claimants are entitled to the declaratory relief sought.

The SPA

5. By the terms of the SPA dated 21st December 2016, the Defendant purchased all of the issued shares in Oufit7 for the price of US$1,000,000,000.

6. Outfit7 was the holding company for a group of entities specialising in mobile device applications. Outfit7 had been founded by Mr Samo Login and Mrs Iza Login who had been the CEO and Deputy CEO of Outfit7 prior to the sale.

7. The Sellers of the shares in Outfit7 were various corporate and individual holders of shares and share options in Outfit7, and certain individuals as Managers. There were close to 200 Sellers.

8. The Claimants were certain of those Sellers who also acted as Warrantors under the SPA. There were other Warrantors who have not participated in these proceedings, because they have been dissolved, or are in liquidation, or have chosen not to participate.

9. By clause 2.1 of the SPA, it was agreed that each Seller would sell with full title guarantee and free from all encumbrances the shares in Outfit7. The consideration for the purchase of the shares was set out in clause 3 in the sum of US$1,000,000,000.

10. On Completion, the parties agreed that US$100,000,000 of the purchase price would be held in a Claims Escrow Account. It was agreed that the funds held in the Claims Escrow Account would be released in two tranches, each of US$50,000,000, the first on 31st December 2018 and the second on 1st July 2019 (being the next Business Day after the contractual date of 30 June 2019). However, the release of these funds could be halted in certain circumstances.

11. The SPA contained the following provisions:

> *"**INTRODUCTION***
>
> *The Sellers have agreed to sell, and the Buyer has agreed to buy, subject to the terms and conditions of this agreement, all of the issued shares in the capital of the Company as at Completion ...*
>
> ***AGREED TERMS***
>
> *1. **Definitions and interpretation***
>
> *1.1. Definitions*
>
> *In this agreement:*
>
> *...*
>
> *"**Claim**" includes a claim, action, proceeding or demand under or pursuant to this agreement ...*
>
> *"**Sellers' Representatives**" means Samo Login and Iza Login ...*
>
> *7. **Seller warranties***
>
> *...*
>
> *7.3 Each of the Warranties, the Tax Covenant and the Indemnities is given subject to any limitations, exceptions or exclusions expressly provided for in this agreement including those contained in schedule 4 ...*
>
> *20. **Miscellaneous***
>
> *...*
>
> *20.10 Each Seller irrevocably appoints the Sellers' Representatives (acting alone or jointly) to negotiate, determine and agree any matter between the Buyer and the Sellers (including, for the avoidance of doubt, the Buyer and all of the Warrantors alone) including to:*

(a) give or receive any notice or consent or make any agreement;

(b) take any other action in connection with such matters ...

SCHEDULE 4

Limitations

...

2. ***Time limits***

2.1 The rights of the Buyer in respect of:

(a) any Warranty Claim shall only be enforceable if the Buyer gives written notice to the Warrantors stating in reasonable detail the matter which gives rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof on or before the First Claims Escrow Release Date; and

(b) any Indemnity Claim or Claim under the Tax Covenant shall be enforceable if the Buyer gives written notice to the Warrantors stating in reasonable detail the matter which give rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof on or before the Second Claims Escrow Release Date ...

12. ***Contingent liability***

The Warrantors shall not be liable for any Warranty Claim or Claim under the Tax Covenant to the extent such liability is, at the time when written notice of the Warranty Claim or Claim under the Tax Covenant is given, contingent only or is otherwise not capable of being quantified and the Warrantors shall not be liable to make any payment in respect of such Warranty Claim or Claim under the Tax Covenant unless and until the liability becomes an actual liability or (as the case may be) becomes capable of being quantified. For the avoidance of doubt, this paragraph shall not operate to avoid liability under a Warranty Claim made in respect of a contingent liability where the Buyer has given notice of such Warranty Claim within the time limit specified in paragraph 2 ...

SCHEDULE 7

Tax Covenant

1. ***Definitions and interpretation***

1.1. In this schedule, unless the context requires otherwise:

…

*"**Event**" means any event, transaction (including the execution of, and Completion of, this agreement), action or omission;*

*"**Income, Profits or Gains**" means revenue profits, chargeable gains and any other similar measure by reference to which Tax is chargeable or assessed …*

*1.2 References to "**Tax Liability**" include not only a liability of a Group Company to make payment of Tax (an "**Actual Tax Liability**") but also …*

and so that the amount of the Tax Liability will be: (i) in the case of an Actual Tax Liability the amount of Tax payable by the relevant Group Company …

2. ***Covenant***

2.1 The Warrantors severally covenant to pay to the Buyer an amount equal to:

(a) any Tax Liability of a Group Company which has arisen or arises:

(i) in consequence of an Event which occurred on or before Completion; or

(ii) in respect of any Income, Profits or Gain which were earned, accrued or received on or before Completion or in respect of a period ending on or before the Completion Date …

2.2 The Warrantors covenant to pay to the Buyer an amount equal to any reasonable costs and expenses properly incurred by the Buyer and/or a Group Company in connection with any successful claim under this schedule …

3. ***Exclusions***

3.1 The covenants at paragraph 2 do not apply in respect of a Tax Liability of a Group Company, and the Warrantors will not be liable for any breach of the Tax

Warranties in respect of a Tax Liability, to the extent that ... [there follow exclusions (a) to (o)]

SCHEDULE 8

Provisions relating to the Claims Escrow Account

1. ***Definitions***

In this agreement:

...

*"**Claims Escrow Amount**" means the sum of US$100,000,000 to be credited to the Claims Escrow Account by the Buyer on Completion ...*

*"**Claims Escrow Claim**" means a Claim by the Buyer under this agreement notified to the Sellers in accordance with this agreement on or before the Claims Escrow Release Date;*

*"**Claims Escrow Release Date**" means either of the First Claims Escrow Release Date or the Second Escrow Release Date, as the context requires ...*

*"**First Claims Escrow Release Date**" means 31 December 2018 (or, if that is not a Business Day, the next Business Day after that) ...*

*"**Second Claims Escrow Release Date**" means 30 June 2019 (or, if that is not a Business Day, the next Business Day after that);*

2. ***Claims Escrow Account***

2.1 On Completion:

(a) the Buyer shall transfer the Claims Escrow Amount to the Claims Escrow Account ...

2.2 The following provisions shall apply in respect of the Claims Escrow Account:

(a) following Completion the Buyer and the Sellers' Representatives shall promptly give, or join in giving, all such instructions as re necessary to ensure the operation of the Claims Escrow Account, and the application of the Claims Escrow Sum and Related Interest in accordance with this schedule

4. ***Release of balance of Claims Escrow Sum***

First Claims Escrow Release Date

4.1 Subject to clause 4.3, there shall be paid on the First Claims Escrow Release Date to the Sellers' Solicitors' Bank Account the amount (if any) by which the Claims Escrow Sum exceeds US$50,000,000 less:

(a) the amount of all Claims Escrow Claims which have not then been finally determined;

(b) any amount which the Buyer has notified in accordance with paragraph 3.1 but which has not then been withdrawn from the Claims Escrow Account (which amount shall be paid to the Buyer); …

plus the Related Interest.

Second Claims Escrow Release Date

4.2 Subject to clause 4.3, there shall be paid on the Second Claims Escrow Release Date to the Sellers' Solicitors' Bank Account an amount equal to the Claims Escrow Sum less:

(a) the amount of all Claims Escrow Claims which have not then been finally determined;

(b) any amount which the Buyer has notified in accordance with paragraph 3.1 but which has not then been withdrawn from the Claims Escrow Account (which amount shall be paid to the Buyer); …

plus the Related Interest.

4.3 If a Claims Escrow Claim made by the Buyer in good faith has not been finally determined on or before:

(a) in respect of a Warranty Claim, the First Claims Escrow Release Date; or

(b) in respect of an Indemnity Claim or a Claim under the Tax Covenant, the Second Claims Escrow Release Date,

(i) if the Sellers' Representatives request for an opinion from Qualifying Counsel in accordance with the provisions of paragraph 4.4 and the Buyer and the Sellers' Representatives are in receipt of an opinion from a Qualifying Counsel that

concludes, on the balance of probabilities, that the Claims Escrow Claim is likely to be successful; or

(ii) if the Sellers' Representatives do not give written notice to the Buyer of their intent to request for an opinion from Qualifying Counsel on or before the relevant Claims Escrow Release Date,

then the amount standing to the credit of the Claims Escrow Account on the day prior to the relevant Claims Escrow Release Date which is equal to the amount of the Claims Escrow Claim shall remain in the Claims Escrow Account (in addition to, in the case of a Claims Escrow Claim not finally determined on or before the First Claims Escrow Release Date, any other amount retained in the Claims Escrow Account pursuant to paragraph 4.1) until such Claims Escrow Claim is finally determined in which case:

(c) if finally determined in favour of the Buyer, it shall be paid in accordance with paragraphs 3.1 and 3.2;

(d) if finally determined in favour of the Warrantors or the Sellers (as applicable), it shall be paid to the Sellers' Solicitors' Bank Account as soon as reasonably practicable …"

12. The SPA was expressed to be governed by the law of England and Wales (clause 21.1 of the SPA).

13. Completion took place on 28th December 2016.

The Slovenian Tax Authority investigation

14. On 23rd July 2018, the Financial Administration of the Republic of Slovenia ("the Slovenian Tax Authority") issued a decision initiating an investigation into the transfer pricing practices of Ekipa2 d.o.o. ("Ekip" or "Ekipa2"), a Group Company within the meaning of the SPA ("the Tax Investigation").

15. On 13th September 2018, the Slovenian Tax Authority required Ekip to provide various documents and information "*regarding [Ekip's] associates, scope and types of transactions therewith and the specification of arm's length pricing*" relating to its transfer pricing practices for the period from 1st January 2015 to 31st December 2017. The decision was sent to Ms Nana Slavnic (Outfit7's general counsel), Mrs Login (the Sellers' Representative) and Mr Boris Erzen (Outfit7's and Ekip's previous general counsel).

16. On 23rd October 2018, Ekip authorised KPMG to act as its agent in the Tax Investigation.

17. In response to the Slovenian Tax Authority's requests, on 17th December 2018, KPMG on behalf of Ekip produced a number of reports (including a "*Transfer Pricing Documentation Masterfile*") which were submitted to the Slovenian Tax Authority, which provided detailed information, including the organisational structure of the group, its transfer pricing policies, the group's activities and responsibilities, and detailed analysis (including benchmarking exercises) in relation to the position of Ekip in the "*country-specific*" reports for the years 2015, 2016 and 2017. The country-specific reports included information such as:

    (1) A description of Ekip's business, noting that all services provided by Ekip to group companies were performed on an operational level only.

    (2) An analysis of the relevant transactions, for example by reference to revenue figures for each type of transaction, relating to "*programming and maintenance of digital products*", "*marketing services*" and "*administrative services*" and the key terms of the contracts between Ekip and other Group Companies, concluding that Ekip would charge for its services based on actual costs incurred, increased by a factor of 1.15 (i.e. a 15% mark-up).

    (3) An analysis of Ekip's "*functions, risks and assets*", by reference to a matrix, describing which Group Companies provided "*operational*", "*control*" or "*management*" responsibilities for various functions, concluding that *"[b]ased on the functions performed, risks assumed and assets used Ekipa2 may be classified as a low risk routine service provider".*

    (4) An analysis of the selection of an appropriate transfer pricing method against which to evaluate the arm's length nature of the transfer prices used in Ekip's intra-group transactions, in accordance with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, concluding that the "*transactional net margin method*" was acceptable for use in evaluating the arm's length nature of the relevant transactions.

    (5) An economic analysis, benchmarking Ekip's profit margin on the related party transactions against independent companies performing similar activities, concluding that the transfer prices charged by Ekip to its group affiliates for the three categories of service described above (i.e. programming and maintenance of digital products, marketing services and administrative services) were compliant with the arm's length principle.

18. On 19th December 2018, Ms Slavnic informed Mrs Login and Mr Erzen about the submission of the documents by the deadline on 17th December 2018 and said that "*The answer probably cannot be expected this year*".

19. On 23rd January 2019, the Slovenian Tax Authority made various requests for further documents, such as ledger data, service agreements, documents evidencing the legal ownership of various intellectual property rights in some of the group's key brands, information in respect of the employees of Ekip and Outfit7, and an explanation for the change in corporate structure, including "*establishing Outfit 7 Ltd. in Cyprus and Ekipa2, d.o.o., in Slovenia*", in 2010/2011. The request required the documents to be produced within 30 days and provided details as to why the Slovenian Tax Authority was making these requests. In this request, the Slovenian Tax Authority stated that:

"In the general documentation (masterfile) and in the specific or country-specific documentation, the Taxable Person claims and through a functional analysis states that the parent company Outfit7 Limited, UK, performs only "entrepreneurial functions", i.e. the most significant/essential entrepreneurial functions. Subject to clarifications provided by the Taxable Person, the lat[t]er performs only operational functions and is a low-risk routine service provider which operates on the operational level only. In addition, the documentation provided by the Taxable Person includes clarifications on the legal rights and obligations of the Taxable Person and its parent company or other affiliate in mutual transactions which are governed by business collaboration agreements.

In light of the foregoing, the tax authority shall, in this particular tax inspection case, verify the legal and operational basis which covers the functions of the Taxable Person and its parent company or other associates in their interactions and collaborations (i.e. controlled transactions) and the regulation method of controlled transactions both in terms of contractual obligations and amounts of compensation. In accordance with the above, the tax authority has thus called upon the Taxable Person in Points II and III of its request to provide it with all agreements and other operational and legal arrangements which give rise to rights and obligations, powers and functions of associates in controlled transactions.

As far as transfer pricing is concerned, the Taxable Person stated on page 11 of the general documentation (masterfile) provided thereby that the main fixed asset of the Outfit 7 Group was intellectual property (intellectual property rights or IPR) in the form of the Talking Tom and Friends characters and brands based thereon. As stated by the Taxable Person, the IPR are held by its parent company, Outfit 7 Limited, UK, which also recognises them as IPR intangible assets (patents, brands, copyright) or as final products (games and video content). In addition, the Taxable Person also stated that the main source of revenue of the Outfit 7 Group was the sales of software (games, direct royalties) and advertising space (indirect royalties).

As shown in the claims of the Taxable Person, the main source of revenue is the ownership of intangible assets in the form of IPR of various forms. The Taxable Person also claims that the legal owner of the above rights is its parent company Outfit 7 Limited, UK. Since the ownership of the IPR as the most important source of revenue of the Outfit 7 Group is also significant in terms of taxation, the tax authority called upon the Taxable Person in Points II, III and, in particular, in Point IV, to provide it with all agreements that clearly show the legal

ownership of the IPR. In Point IV of its request, the tax authority randomly selected four projects which in kind constitute mobile applications or computer games whose legal owner is, as claimed by the Taxable Person, its parent company Outfit 7 Limited, UK, namely Talking Tom Cat, Talking Tom 2, My Talking Tom and My Talking Tom 2. On the sample of the aforementioned products of the Outfit 7 Group, the tax authority seeks to verify in detail the legal ownership of both copyright in the form of a computer program and graphic design of the main character (Talking Tom), which the Taxable Person itself regards as the main character pertaining to intangible assets of the Outfit 7 Group in the form of IPR, in addition to the legal ownership and right of use of all models and brands arising from copyright material.

In its description of the various stages of individual projects in the general documentation (masterfile) regarding transfer pricing, the Taxable Person stated that its parent company Outfit7 Limited, UK, was in charge of strategic and other key decisions on the launch of the project, progress made on the project and final products of the project and provided the tax authority with the functions of persons managing and collaborating in the project, including their level of involvement in the project. The Taxable Person highlighted as a relevant circumstance the fact that the management (composed of the senior management of its Cyprus-based parent company Outfit 7 Limited, UK, whereby various individuals, in many cases, also hold roles in the subsidiary) confirmed all project implemented by the Taxable Person, whereby the senior management was actively involved in the project implementation project, made final decisions, made arrangements and approved all projects, whereby the senior management made all strategic decisions and directed the company. In the country-specific documentation, the Taxable Person provided the tax authority with numerous functions of the Taxable Person including key programming and video content creation, legal and marketing functions, that the Taxable Person supposedly performed on operational level only, whereas its parent company performed it on the controlling and management levels. Within the meaning of the presented mutual functions and roles, the Taxable Person drew up a functional analysis which (generally speaking) shows that all strategic (management) and controlling (supervision) and some operational functions were performed only by its parent company Outfit 7 Limited, UK. The Taxable Person also stated that it only performed operational functions and that it acted as an on-demand programming company …

In light of the foregoing, it is of essence for the tax inspection to establish which one of the parties in a controlled transaction

> *performs functions, uses fixed assets and assumes risks. In accordance therewith and subject to the aforementioned legal basis, the tax inspection shall verify the capacities and competences of Human Resources of affiliated judicial persons whose employees, as stated by the Taxable Person, perform operational, supervision or management (strategic) functions in controlled transactions. The Tax Authority shall also review the legal and operational bases that give rise to the contractual obligations of persons who actually perform various functions by reviewing employment or management agreements of persons who are actually involved in projects and perform the functions that the Taxable Person declared for each controlled transaction."*

20. On 24th January 2019, Mrs Login sent an email to Ms Slavnic stating that "*As far as I am aware, they are carrying out an inspection for E2 and not O7, so some questions are not appropriate ... Please send me the documentation for review before submitting it to the tax authorities*".

21. On 24th January 2019, Mr Peter Dolenc of Outfit7 sent an email to Ms Slavnic in respect of the Slovenian Tax Authority's requests. In reply, on the same day, Ms Slavnic requested that Outfit7 include Mrs Login (who was copied in the email) "*in any future communication regarding the financial inspection*".

22. On 4th February 2019, Ms Slavnic sent an email to Mrs Login attaching the documents sent to the Slovenian Tax Authority on 17th December 2018 and a copy of the Slovenian Tax Authority's decision on 23rd January 2019.

23. According to the first witness statement of Ms Slavnic dated 15th April 2020, at para. 31, at around this time, Mrs Login wanted to involve Ms Melita Kolbezen (who had acted as Outfit7's licensing expert during the period relevant to the Tax Investigation) to represent Mr and Mrs Login's interests, and she asked that Ekip co-operate with Ms Kolbezen in relation to the Tax Investigation.

24. On 15th February 2019, KPMG sent an email to the Slovenian Tax Authority informing them that Ekip had authorised Ms Melita Kolbezen to access the data and information regarding the Tax Investigation and requested that Ms Kolbezen be copied in the electronic correspondence. Ms Kolbezen had been granted a power of attorney for this purpose on 13th February 2019.

25. On 22nd February 2019, KPMG submitted the requested documentation to the Slovenian Tax Authority and informed Ms Slavnic, Mr Erzen, Mr Dolenc and Ms Kolbezen by email accordingly.

26. On 27th March 2019, the Slovenian Tax Authority provided a notice that it was extending its investigation to the periods between 1st March 2013 and 31st December 2014. The rationale for this decision included that "*the tax authority established that the selected transfer pricing method mentioned in the transfer pricing documentation was most likely not appropriate*" and that "*the tax authority suspects a reduction of tax liabilities as a result of non-payment of taxes owed*".

27. On 29th March 2019, KPMG requested access to the Slovenian Tax Authority's file and to be provided with clarification as to the circumstances behind the extension of the Tax Investigation, observing that "*The Tax Inspection Expansion Decision does not contain any other information or fact and circumstances regarding the grounds behind the expansion of the Tax Inspection by the Tax Authority and its opinion on the actual and legal circumstances subject to the documentation and information that it already has at its disposal (or regarding the grounds that these facts or circumstances, if they were to turn out to be true following the evidence-taking proceedings, could lead to the finding that the Taxable Person had reduced its tax liability as a result of non-payment of taxes owed)*".

28. On 31st March 2019, Ms Kolbezen sent an email to Mr Marko Mehle of KPMG expressing the view that the proceedings have been conducted too passively and thought that the taxpayer should be more pro-active.

29. On 5th April 2019, KPMG (including Mr Mehle), Ms Slavnic and Ms Kolbezen (as Ekip's authorised agent, according to Ms Slavnic's first witness statement, para. 42) attended a meeting with the Slovenian Tax Authority and inspected the Tax Investigation file. According to Ms Slavnic, at para. 43 of her first witness statement,

> *"During the meeting, we inspected the Investigation file, and confirmed that it did not include any documents not already in Ekipa2's possession. We also discussed the course of the Investigation, and the Tax Authority's decision to extend the Investigation with the inspectors. Ms Kolbezen was present for those discussions. We understood from our discussions at that meeting that the inspectors had concerns over Ekipa2's "functional analysis". In particular, we understood that they had concerns that, contrary to Ekipa2's analysis, Ekipa2 was involved in the development of intangible assets, and that, accordingly, the transfer pricing method Ekipa2 had used was inappropriate. The inspectors did not explain, however, the grounds for their concerns, or point to any specific aspects of Ekipa2's business / specific transactions that concerned them / that had led to the decision to extend the Investigation. They agreed to provide a written briefing after the meeting explaining the relevant facts and evidence underpinning their decision to extend the Investigation."*

30. On 11th April 2019, Mr Mehle of KPMG sent an email to Mr Dolenc and Ms Slavnic, with a copy to Ms Kolbezen, setting out an assessment of the duration of the Tax Investigation and the possibilities of a favourable successful resolution.

31. On 19th April 2019, the Slovenian Tax Authority wrote an Official Note stating that:

> *"The Taxable Person requested to be informed of relevant facts and evidence in the Tax Inspection in its written request subject to the Tax Authority's Tax Inspection Expansion Decision no. DT 0610-2686/2018-11-01314-09 of 27/03/2019 which served to extend the Tax Inspection of the Taxable Person to corporate*

tax for the period between 01/01/2013 and 31/12/2014. In the rationale of this decision and on the basis of documentation provided by the Taxable Person and data from tax accounting records and publicly-accessible data, the tax authority established that the selected transfer pricing method mentioned in the transfer pricing documentation was most likely not appropriate. Due to the likelihood that the transfer pricing method selected by the Taxable Person was not appropriate, the tax authority suspects a reduction of tax liabilities as a result of failure to pay taxes also in the period that the tax inspection under Decision No. DT 0610-2686/2018-1-01314-09 of 23/ 07/2018, does not include. As a result, the tax inspection shall be extended to the 2013 and 2014 financial year since this constitutes the only way of correctly establishing the facts regarding the functions and risks of the Taxable Person and estimated them in compliance with the arm's length principle."

As stated in the written request of the Taxable Person, the latter believes that the Tax Inspection Extension Decision did not contain any other information or fact and circumstances regarding the grounds behind the extension of the Tax Inspection by the Tax Authority and its opinion on the actual and legal circumstances subject to the documentation and information that it already had at its disposal (or regarding the grounds that these facts or circumstances, if they were to turn out to be true following the evidence-taking proceedings, could lead to the finding that the Taxable Person had reduced its tax liability as a result of non-payment of taxes owed).

During the meeting, the Taxable Person received a detailed clarification that the extension of the tax inspection was based on the suspicion that the Taxable Person had declared a too low tax liability as a result of non-payment of taxes owed in 2013 and 2014. The suspicion of the Tax Authority had arisen following the review of documentation provided by the Taxable Person during the Tax Inspection, in particular the review of the transfer price analysis showing functional analysis and of the provided service performance agreements showing the use of the cost-plus method. In the transfer pricing analysis, the Taxable Person claimed that it only performed operational programming services for its associate, whereas strategic decisions were supposedly made in the parent company Outfit7 Limited, UK, whose centre of management was based in Cyprus. As a result, this served as the grounds for the use of the cost-plus method in light of the costs incurred by the Slovenian Taxable Person as a result of management of its programming services. The Tax Authority explained that the provided functional analysis did not match the supporting documentation since the entire supporting documentation (employment agreements, service provision agreements, management and

> *project group meeting minutes, etc.) showed that the main activity of both associates was the development of intangible assets in the form of intellectual property, whereby both the parent company Outfit7 Limited and the Taxable Person, Ekipa2 d.o.o., significantly contributed to its generation, for which, in compliance with the Rules on Transfer Prices and guidelines of OECD, the use of one-sided methods, such as the cost-plus method, was not appropriate.*
>
> *The service performance agreements showed that the cost-plus method was used as of 2011. As a result, the Tax Authority suspects that the same method had been used prior to 2015 and, as such, a too low tax liability could have occurred in this past period as well. On the basis of the above, the Tax Authority extended the Tax Inspection to two permissible years: 2013 and 2014."*

32. On the same day, 19th April 2019, the Slovenian Tax Authority made further requests for information to be provided by Ekip, namely documentation regarding its associates, scope and types of transactions therewith and the specification of arm's length pricing and ledger data.

33. On 25th April 2019, an email was sent to Ms Kolbezen informing her that the Slovenian Tax Authority's decision had been posted on the "eDavki portal". Ms Kolbezen downloaded the demand from the portal and forwarded the email alert to KMPG two hours later (Ms Slavnic's first witness statement, para. 47).

34. On 26th April 2019, KPMG wrote to the Tax Authority, with a request to extend the deadlines for the provision of further documents, providing the additional authorisation of Ms Mojca Šircelj (who had been authorised by Ekip to act as an additional agent) and enquiring as to which "*documentation (such as the exact employment agreements, service performance agreements, management and project group meeting minutes), that the Taxable Person has provided during the Tax Inspection, show that the main activity of both associates is the development of intangible assets. In addition, if these intangible assets are in the form of intellectual property, it shall also provide substantive clarifications on the intellectual property that it had in mind and why it feels that the Taxable Person has been contributing to the generation of these intangible assets to the extent that allows for the conclusion that the transfer pricing method used by the Taxable Person is not appropriate, not to mention why it feels that this particular method is non-compliant with the Rules on Transfer Prices or OECD Transfer Pricing Guidelines*".

35. At about this time, according to Ms Slavnic's first witness statement (para. 57) and Mr Mehle's first witness statement dated 15th April 2019 (para. 22), there were discussions about Ekip's defence strategy involving Ms Šircelj and Ms Kolbezen.

36. On 15th May 2019, Mr Mehle sent an email to Ms Slavnic and Ms Kolbezen reporting on his conversation the previous day with one of the Tax Inspectors concerning the request made on behalf of Ekip on 26th April 2019. Mr Mehle reported that:

> *"So, yesterday (14/05) I spoke again to Cimerman, who told me that he and Šmigic had examined the request and decided not to respond to the request, and the reason that Cimerman gave for this was that they had already told us everything at the meeting anyway, that they had provided us with a fairly detailed notice, which in their opinion is more than enough at this point. He emphasized that they had no other documentation or basis than what we have already seen in the case file, which concluded the conversation. We believe that, by being unwilling to explain in writing and in sufficient detail the reasons and grounds for their position and their reasonable suspicion that there would be additional tax assessments for the periods of 2013 and 2014, the inspectors acted in conflict with the rules of procedure for conducting a tax inspection …"*

37. On 23rd May 2019, KMPG filed a further request for facts and evidence relating to the Tax Investigation with the Slovenian Tax Authority.

38. On 7th June 2019, KMPG submitted a petition to the Slovenian Tax Authority applying for an oral hearing regarding the Slovenian Tax Authority's failure to comply with its procedural duties.

39. Ekip was unsatisfied with the Slovenian Tax Authority's response to the petition (Ms Slavnic's first witness statement, para. 66-67). Accordingly, on 13th June 2019, KPMG issued an appeal in respect of its request for further clarification. In this appeal, KPMG stated that:

> *"… the Tax Authority should have provided clarifications to the Appellant, which support documentation (such as the exact employment agreements, service performance agreements, management and project group meeting minutes), that the Appellant has provided during the Tax Inspection, showing that the main activity of both associates is the development of intangible assets. In addition, if these intangible assets are in the form of intellectual property, it shall also provide substantive clarifications on the intellectual property that it had in mind and why it feels that the Taxable Person has been contributing to the generation of these intangible assets to the extent that allows for the conclusion that the transfer pricing method used by the Appellant is not appropriate, not to mention why it feels that this particular method is non-compliant with the Rules on Transfer Prices or OECD Transfer Pricing Guidelines. The fact that the Tax Authority obviously missed the fact, that, in its transfer pricing documentation, the Appellant did not use the cost-plus method, as referred to in the ON [Official Note], but the net margin method, renders its entire clarification even more unclear."*

40. In order to support the appropriateness of the transfer pricing method used by Ekip in its transactions with other group companies, KPMG noted that it had created a so-

called "*value chain analysis*" model, which sought "*to present the business model of the Group to the Tax Authority and provide additional arguments in favour of the Taxable Person's claims that it performs only "routine functions", does not assume any major business risks and is neither the legal nor economic owner of any significant intangible assets".*

41. On 20th June 2019, KPMG provided that "*value chain analysis*" to the Slovenian Tax Authority.

42. On 20th June 2019, the Slovenian Tax Authority requested further information, including (amongst other things) in relation to Ekip's employees, the project management and function performance of certain projects, and a presentation of changes of various functions as set out in the functional analysis of the transfer pricing documentation submitted for the 2013 and 2014 periods. In explaining the reasoning behind these requests, the Tax Authority once again said that the requests related to the Slovenian Tax Authority's assessment of the validity of the company's functional analysis (as presented to the Tax Authority) "*which (generally speaking) shows that all strategic (management) and controlling (supervision) and some operational functions are performed only by its parent company Outfit7 Limited, UK (or its legal predecessor). The Taxable Person also stated that it only performed operational functions and that it acted as an on-demand programming company"* and that the Tax Authority wished to *"establish which one of the parties in a controlled transaction performs functions, uses fixed assets and assumes risks"* and *"verify the capacities and competences of ... employees [who] perform operations, supervision or management (strategic) functions in controlled transactions. The Tax Authority shall also review legal and operational bases that give rise to contractual obligations of persons who actually perform various functions by reviewing employment or management agreements of persons who are actually involved in projects and perform the functions that the Taxable Person declared for each controlled transaction*".

The letter dated 24th June 2019

43. Following Completion of the sale under the SPA on 28th December 2016, on 28th December 2016, the Defendant arranged for the deposit of US$100,000,000 with the Escrow Agent (JPMorgan Chase Bank NA), creating the Escrow Account.

44. On 31st December 2018, the first tranche of US$50,000,000 was released to the Sellers.

45. However, the second tranche of US$50,000,000 has not yet been released, because on 24th June 2019, one week before the scheduled release date, the Defendant - through its solicitors Clifford Chance LLP - sent to the Warrantors a letter purporting to be a notice of claims under paragraphs 2.1(a) and 2.2 of Schedule 7 (Tax Covenant) of the SPA. In particular, the claim related to the Slovenian Tax Authority's investigation into Ekip's transfer pricing practices.

46. In the letter dated 24th June 2019, Clifford Chance LLP stated that:

> *"Dear Sirs*

CLAIMS IN RESPECT OF POTENTIAL TAX LIABILITY

We are instructed by United Luck Group Holdings Limited, the Buyer in a sale and purchase agreement dated 21 December 2016 relating to the issued share capital of Outfit7 Investments Limited (the "SPA"). We refer to the SPA and to an escrow agreement dated 28 December 2016 between the Buyer, Samo Login, Iza Login, and JPMorgan Chase Bank, N.A. (the "Escrow Agreement").

Defined terms in this letter shall have the meanings given to them in the SPA.

In accordance with clause 15 (Notices and other communications), paragraph 2 of Schedule 4 (Limitations) and paragraph 6.1 of Schedule 7 (Tax Covenant) of the SPA, we hereby give you written notice, as Warrantors, of Claims under the Tax Covenant of the SPA. Such claims relate to an investigation by the Slovene Tax Authority (the "Tax Authority") into the transfer pricing practices of Ekipa2 d.o.o. ("Ekip"), a Subsidiary Undertaking of the Company and a Group Company.

Tax Authority Claim

The relevant chronology of the Tax Authority investigation is as follows:

A. The Tax Authority initiated an investigation into Ekip's transfer pricing practices for the period 2015 to 2017 in July 2018.

B. In October 2018, Ekip appointed KPMG to advise it in respect of the Tax Authority investigation.

C. On 17 December 2018 and 22 February 2019, on the request of the Tax Authority, Ekip submitted information to the Tax Authority for the purposes of its investigation into the 2015 to 2017 period.

D. On 27 March 2019, following receipt of the requested information from Ekip, the Tax Authority extended its investigation to cover Ekip's transfer pricing practices for the period 2013 and 2014.

E. On 10 May 2019, on the request of the Tax Authority, Ekip submitted information to the Tax Authority for the purposes of its extended investigation.

F. The Tax Authority investigation remains ongoing.

G. To date, the Tax Authority has declined to issue a statement of motivation for its investigation.

The Tax Covenant

Pursuant to paragraph 2.1(a) of Schedule 7 (Tax Covenant) of the SPA, the Warrantors covenant to pay to the Buyer an amount equal to:

"any Tax Liability of a Group Company which has arisen or arises:

i. in consequence of an Event which occurred on or before Completion; or

ii. in respect of any Income, Profits or Gains which were earned, accrued or received on or before Completion or in respect of a period ending on or before the Completion Date".

Additionally, pursuant to paragraph 2.2 of Schedule 7 (Tax Covenant) of the SPA, the Warrantors covenant to pay to the Buyer an amount equal to:

"any reasonable costs and expenses properly incurred by the Buyer and/or a Group Company in connection with any successful claim under the Tax Covenant".

Written Notice of Claims under the Tax Covenant

The Buyer hereby gives written notice of claims against the Warrantors, under paragraph 2.1 (a) and paragraph 2.2 of Schedule 7 (Tax Covenant) of the SPA respectively, for:

A. an amount equal to any Tax Liability that the Tax Authority may impose on any Group Company following its investigation; and

B. the reasonable costs and expenses properly incurred by the Buyer and/or a Group Company in connection with any successful claim under paragraph 2.1(a) of Schedule 7 (Tax Covenant) described above.

The Buyer notes that the amount of any Tax Liability remains contingent on the outcome of the Tax Authority investigation and that it is not possible to quantify the potential Tax Liability or the Claims under the Tax Covenant at this stage.

The Claims Escrow Sum

> *The amount of the Claims Escrow Sum is to be paid in accordance with the terms of Schedule 8 (Provisions relating to the Claims Escrow Account) of the SPA.*
>
> *Pursuant to paragraph 4.2 of Schedule 8, on the Second Claims Escrow Release Date (30 June 2019), an amount equal to the Claims Escrow Sum shall be paid to the Sellers' Solicitors' Bank Account less the amount of all Claims Escrow Claims, including any Claims under the Tax Covenant, that have not been finally determined.*
>
> *Pursuant to the Escrow Agreement, the Escrow Agent shall release the Claims Escrow Sum only in accordance with the joint written instructions of the Buyer and the Founders, or pursuant to a Court order.*
>
> *In light of the above, there remain undetermined Claims under the Tax Covenant, which remain contingent on the outcome of the Tax Authority investigation and that are not possible to quantify at this stage. Accordingly, the Buyer does not intend to instruct the Escrow Agent to release any of the Claims Escrow Sum to the Sellers' Solicitors' Bank Account on the Second Claims Escrow Release Date.*
>
> *The Buyer reserves the right to seek in excess of the Claims Escrow Sum in any claim against any the Sellers and/or the Warrantors."*

47. On 27th June 2019, Taylor Wessing LLP, the Claimants' solicitors, served a notice on behalf of the Sellers' Representatives of their intention to request an opinion from Qualifying Counsel pursuant to paragraph 4.3 of Schedule 8 of the SPA.

48. On 8th July 2019, Taylor Wessing sent a substantive response to the letter dated 24th June 2019 on behalf of the Sellers' Representatives, who, in turn, were authorised to act on behalf of the Warrantors, explaining why the Claimants considered that the letter dated 24th June 2019 contained insufficient detail of the matter that gives rise to the notified claims and of the amount of those claims to be valid under paragraph 2.1(b) of Schedule of the SPA.

49. The parties agreed to defer the obtaining of an opinion from Qualifying Counsel until the issue of the validity of the letter dated 24th June 2019 was obtained, as that facility applied only in the event that the notification was valid.

The parties' submissions

50. Mr Alain Choo-Choy QC, on behalf of the Claimants, submitted that:

    (1) Unless and until the Defendant has given notice of a Claim (as defined in the SPA) in accordance with the terms of the SPA, the amount of such claim cannot be retained within the Claims Escrow Account on the relevant Claims Escrow Release Date.

(2) The usual principles of contractual interpretation apply to the construction of claims notification provisions, but the following general guidelines to construction emerge from the authorities:

(a) Every notification clause turns on its own individual wording (*Forrest v Glasser* [2006] EWCA Civ 1086; [2006] 2 Lloyd's Rep 392, para 24; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 16).

(b) The approach to construction is to determine objectively the parties' intentions by reference to the contractual language, taking into account the contract as a whole and the wider context (*Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, para. 10).

(c) In the context of contractual notification clauses requiring details or particulars of the grounds on which a claim is made, the clear commercial purpose includes that the vendor should know in sufficiently formal written terms that a particularised claim is to be made to enable the receiving party to make an informed assessment of the claim and take such steps as are available to them to deal with it, whether in relation to defending or settling the claim itself or notifying others in relation to it, such as insurers or accountants (*Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, para. 90; *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 29-30; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 19; *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376, para. 36).

(d) A notification provided in accordance with a contractual notification clause must be sufficiently certain so as to leave the receiving party in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is based (*Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, para. 91; *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 29; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 19; *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376, para. 37).

(e) The requirement of certainty is a paramount commercial consideration and a failure to observe the requirements of a contractual notification provision can rarely be dismissed as a technicality (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 29).

(f) Where the terms of the contractual notification clause are clear and have the effect of extinguishing or debarring claims, it follows that a compliant notice is "*a matter of importance*" and it is for the notifying party to establish compliance with the contractual notification clause

(*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 30).

(g) The language of the notification of a claim must be understood in the sense of the underlying facts, events or circumstances which constitute the factual basis of the claim notified (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 31; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 24).

(h) Where the contractual notification clause requires the provision of "*reasonable detail*" of the matter which gives rise to the claim notified, such detail is to be interpreted as adding something to the specification of the nature of the claim and the amount of the claim. The range of reasonable detail depends on the nature of the claim, but it is unlikely to amount to the level of detail required, after further investigation, in the legal proceedings to be issued after the notification of the claim (*Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 25).

(i) Where the reasonable detail to be provided relates to the amount of the claim, the notice should provide the detail sought "*however approximate any estimate would be*" (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 41).

(3) Applying these principles of interpretation to the contractual provisions under consideration in this case, the following points can be made:

(a) The language of paragraph 2.1(b) of Schedule 4 of the SPA makes it plain that in order that a Claim under the Tax Covenant (including any Claim under paragraphs 2.1(a) and 2.2 of Schedule 7) is enforceable, the requirements of a valid notice must be fulfilled as a condition precedent to such enforceability of the Claim.

(b) The "*reasonable detail*" required by paragraph 2.1(b) of Schedule 4 of the SPA to be provided within the notification means reasonable detail of the underlying facts, events and circumstances which constitute the factual basis for the Claim.

(c) Given the terms of the Warrantors' Tax Covenant, notice of a Claim under the Tax Covenant must, in accordance with paragraph 2.1(b) of Schedule 4, contain reasonable detail of the underlying facts, events and circumstances giving rise to or which may in future give rise to any Tax Liability on the part of a Group Company. This means that a compliant notice must identify the "*Event [or Events] which occurred on or before Completion*" in consequence of which a Group Company may incur a Tax Liability and/or "*any Income, Profits or Gains … earned, accrued or received on or before Completion or in respect of a period ending on or before the Completion Date*" in respect of which

the Tax Liability of a Group Company has arisen or may arise in future.

(d) A compliant notice under paragraph 2.1(b) of Schedule 5 must also (so far as reasonably practical) state the amount claimed and, where there is uncertainty as to the amount of the Claim, the notifying party must nevertheless give its best estimate (however approximate) of the amount of the Claim.

(4) Although it is common ground that the letter dated 24th June 2019 gave reasonable detail of the nature of the claim, the notification failed to provide reasonable detail of the other two matters referred to in paragraph 2.1(b) of Schedule 4, namely reasonable detail of "*the matter which gives rise to such Claim*" and "*(so far as reasonably practical) the amount claimed*".

(5) With respect to "*the matter which gives rise to such Claim*", the letter dated 24th June 2019 did not identify any of the underlying facts, events and circumstances giving rise to or which may give rise to any Tax Liability on the part of a Group Company:

(a) While the letter dated 24th June 2019 referred to the existence of the Tax Authority's investigation into the transfer pricing practices of Ekip, it is not the investigation itself which gives rise to any Tax Liability, but rather the underlying facts, events and circumstances that are the subject of the investigation.

(b) The letter dated 24th June 2019 provided no details of those underlying facts, events and circumstances, failing to give any details of any specific aspects or features of Ekip's transfer pricing practices during the relevant period, any specific transaction or transactions under investigation, the value or range of vales of the transactions under investigation or any other Group Company with which Ekip might have transacted.

(c) The letter dated 24th June 2019 provided no reasonable details or no details at all of the Event or Events occurring on or before Completion on 28th December 2016 in consequence of which, or of the Income, Profits or Gains earned, accrued or received on or before the Completion Date or in respect of a period ending on or before the Completion Date) in respect of which, any Tax Liability of a Group Company had arisen or might arise.

(d) In fact, in referring to Ekip's transfer pricing practices for the period from 2013 to 2017, the letter dated 24th June 2019 might potentially have referred to matters that occurred after the date of Completion.

(e) The Defendant was well able to give reasonable detail of the underlying facts, events and circumstances that might give rise to a Tax Liability on the part of Ekip. This was explained in some detail in the first witness statement of Mr Laurence Lieberman of Taylor

Wessing LLP, the Claimants' solicitors, dated 3rd December 2019, at para. 38-41.

(f) It is evident therefore that by the time of the letter dated 24th June 2019, the Defendant must have understood, at least in general terms, that the Slovenian Tax Authority was challenging Ekip's functional analysis, and in particular, whether Ekip was a "*low risk routine service provider*" performing operational functions only, or whether it in fact contributed to the generation of intellectual property, assumed business risks, and/or owned any significant intangible assets. This functional analysis is important in determining whether the transfer prices applied by Ekip to its transactions with other group companies (which, generally speaking, involved a mark-up of about 15% on the costs it incurred in providing services to group companies) was appropriate and consistent with the arm's length principle, or whether a different transfer pricing methodology should have been used, which may have had different consequences for intra-group pricing and, therefore, Ekip's corporation tax liability.

(g) It is not the Claimants' case that all of this detail had to be provided in order to render the letter dated 24th June 2019 a compliant notification, but the letter lacked reasonable detail, in fact any detail, relating to:

(i) The fact that the Slovenian Tax Authority was challenging Ekip's functional analysis and characterisation within the Group as a low risk routine service provider that performed operational functions only.

(ii) The Slovenian Tax Authority was asserting that Ekip significantly contributed to the generation of intangible assets in the form of intellectual property.

(iii) The Slovenian Tax Authority was challenging the appropriateness of Ekip's use during the years 2013 to 2017 of the cost mark-up in the transfer pricing of its transactions with other Group Companies.

(iv) The Slovenian Tax Authority had expressed the view that Ekip might, as a result of inappropriate use of the cost mark-up method, have incurred too low a tax liability during the said years.

(v) There was therefore a risk that the Slovenian Tax Authority would impose a Tax Liability on Ekip as a Group Company in consequence of its inappropriate use of the cost mark-up method and/or in respect of the Income, Profits or Gains earned, accrued or received by Ekip.

(6) With respect to reasonable detail of the amount claimed (so far as reasonably practical), the letter dated 24th June 2019 provided no details of any specific amount or range of amounts of the Tax Liability that might be covered by

paragraph 2.1(a) of Schedule 7, notwithstanding that Ekip's revenues and profits would have been known or accessible to the Defendant, and also failed to provide a best estimate, merely stating that it was not possible to quantify the amount of the Claim, but yet being able to cause the entirety of the US$50,000,000 tranche being retained by the Escrow Agent.

(7) The Defendant's reliance on the fact that this information had been given to the Sellers' Representatives earlier in 2019 was misplaced. The Claimants' knowledge is relevant to the interpretation of the letter dated 24th June 2019, but it cannot be relied on by the Defendant to supply data or details which the notification was required to include but omitted. In this case, the letter dated 24th June 2019 had the barest detail and if the Defendant's submission were correct, no detail would have been required at all in the notification, which cannot be right and is at odds with the requirements of the SPA. It is not sufficient for the receiving party of the notification to have to infer the relevant detail; it must be stated in the notification (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 45-46; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 22).

51. Mr Matthew Hardwick QC, on behalf of the Defendant, submitted that:

(1) There are three elements requiring notification under paragraph 2.1(b) of Schedule 4 of the SPA, namely (a) the matter which gives rise to the Claim, (b) the nature of the Claim, and (c) so far as reasonably practical, the amount claimed. With respect to each element, the notification must provide reasonable detail.

(2) It is common ground that the letter dated 24th June 2019 did provide adequate notice of the nature of the Claim. This is an important distinction from the deficient notices considered in the authorities.

(3) In *Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737; *ROK plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm); *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), the notices under consideration did not identify the relevant warranties relied upon. Indeed, in some of these decisions and in *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), the notice did not in fact make it clear that a claim was being made. This is an essential minimum requirement (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 33).

(4) As far as the amount of the claim was concerned, the letter dated 24th June 2019 made it clear that the Claim was for an amount equal to any Tax Liability and the reasonable costs and expenses incurred in connection with any successful claim, but noted that the amount of any Tax Liability remained contingent on the outcome of the Tax Authority investigation, so that it was not possible to quantify the potential Tax Liability or the claim under the Tax Covenant at that stage (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 33).

(5) As far as the matter giving rise to the claim was concerned, the letter dated 24th June 2019 provided adequate notification and provided sufficient details of the matter giving rise to the claim for the following reasons:

(a) The reference to "*matter giving rise to the Claim*" is simple and non-prescriptive. The simple non-technical answer is that "*the matter*" was the Tax Investigation into Ekip's transfer pricing practices.

(b) The letter dated 24th June 2019 identified that "*matter*" and provided a chronology of the key milestones in terms which were simple and clear in compliance with paragraph 2.1(b) of Schedule 4 of the SPA.

(c) In *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, the Court interpreted this formulation to mean "*the underlying facts, events or circumstances, which constitute the factual basis upon which the claim is posited*". This was approved by the Court in *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 23. However, this interpretation - which Mr Hardwick QC referred to as a "*gloss*" - should not replace the actual and simpler language which is used and so should be relied upon only as guidance. Further, the gloss "*the underlying facts, events or circumstances, which constitute the factual basis upon which the claim is posited*" uses the disjunctive "*or*" (not "*and*") so that only facts or events or circumstances underlying the claim need be identified in the notice and this should not be used to supplant the level of detail required which remains "*reasonable detail*". Paragraph 2.1(b) of Schedule 4 by referring to "*the matter*" plainly contemplates that there might be a single fact, event or circumstance.

(d) In this case, there is a single "*matter*" or "*event*" giving rise to the claim, namely the Tax Investigation, which was notified (see *Highwater Estates Ltd v Graybill* [2009] EWHC 1192 (QB)).

(e) The requirement of "*reasonable detail*" depends on the nature of the claim and it is unlikely to have been the parties' intention that the details should be as extensive as those that would be required, after further investigation, in subsequent legal proceedings (*Odebrecht Oil and Gas Services Ltd v North Sea Production Company Ltd* [1999] 2 All ER (Comm) 405; *ROK plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm); *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 25).

(f) The Tax Investigation was a lengthy and technical inquiry arising out of Ekip's transfer pricing policies and was not yet finished. There are some 200 pages of exhibits in evidence before the Court relating to the Tax Investigation. This complexity militates against the provision of detail. Given the key requirement of commercial certainty, a compliant notice under paragraph 2.1(b) of Schedule 4 would be served by identifying the Tax Investigation, the subject of the investigation (the

transfer pricing practices of Ekip) and the key milestones in the Tax Investigation.

(g) The notification clause should be interpreted and applied having regard to the requirement of commercial certainty, for example so that the receiving party can make financial provision for it (*Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 19). If, however, such provision has already been made as part of the parties' contractual bargain, there is a less compelling commercial rationale for requiring the notifying party to supply "*chapter and verse*" (*Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), para. 23(iii)). In this case, financial provision was made by the SPA by the creation of a Claims Escrow Account.

(h) It follows that commercial certainty or clarity is important but there should be no requirement of strict compliance which if applied inflexibly can lead to uncommercial results (*National Shipping Co of Saudi Arabia v BP Oil Supply Co* [2011] EWCA Civ 1127; [2012] 1 Lloyd's Rep 18, para. 61).

(i) A contractual provision imposing a time limit on notifying claims - with financial consequences for non-compliance - is a species of exclusion or exemption clause and must be construed narrowly, because the parties are not lightly to be taken to have intended to extinguish or reduce their rights and remedies arising from breaches of important contractual obligations without using clear words (*Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), para. 23(ii)).

(j) The interpretation of unilateral notices must be objective having regard to the relevant objective contextual background (*Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376, para. 25; Lewison *The Interpretation of Contracts*, (6th ed., 2015), updated by the second supplement in 2019, ch. 3, sect. 17).

(k) An important consideration is how the notification would be understood by a reasonable recipient with the knowledge of the context in which the notification was sent (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737; *Forrest v Glasser* [2006] EWCA Civ 1086; [2006] 2 Lloyd's Rep 392, para. 30; *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), para. 23(iv)). By contrast, the subjective intention of the parties and the Claimants' subjective understanding is irrelevant.

(l) In this case, the Tax Investigation was known (or such knowledge was reasonably available) to the parties and it would have affected the way in which the language of the notification would have been understood by a reasonable person. That is, a reasonable recipient with knowledge of the Tax Investigation would have understood to what the transfer pricing practices of Ekip was a reference and was well placed as the Defendant to make enquiries in respect of any aspect of the Tax Investigation chronology and an informed assessment of the claims.

(m) The evidence relied on by the Claimants, in particular the witness statements of Mr Lieberman, does not deal with or identify what aspects of the Tax Investigation were known to or reasonably available to the parties, in particular the Claimants. By contrast, Ms Slavnic's and Mr Mehle's witness statements and the exhibited documents fill the lacuna. In particular, it is evident that:

(i) Mrs Login was kept apprised of the developments in the Tax Investigation.

(ii) Mrs Login required Ms Kolbezen to be involved to represent Mr and Mrs Login's interests in connection with the Tax Investigation.

(iii) Ms Kolbezen was given access to the relevant documents and was actively involved in strategy discussions and attended important meetings.

(iv) Similarly, Ms Šircelj, formerly head of the Slovenian Tax Authority, had been appointed to represent Mr and Mrs Login's interests in the investigation.

(v) Ms Šircelj was actively involved in discussions concerning Ekip's defence strategy and was provided with all of KPMG's updates and Tax Authority notices.

(n) On a summary judgment application such as this, the Court should assume that Mrs Login, Ms Kolbezen and Ms Šircelj were aware of the above matters. In any case, this evidence has not been contradicted by any evidence served by the Claimants.

(o) With this knowledge, the reasonable recipient of the letter dated 24th June 2019 would have understood that (i) the nature of the Claim was for breach of the Tax Covenant, (ii) the amount of the Claim was at that time undetermined, and (iii) the matter which gave rise to the Claim was the still incomplete Tax Investigation into Ekip's transfer pricing practices, as to which the concerns of the Slovenian Tax Authority, which had been communicated to Ekip, were part of the known context.

(6) Accordingly, it is submitted that the application for summary judgment should be dismissed.

The application for summary judgment

52. The Claimants apply for summary judgment on their claim for declarations that the letter dated 24th June 2019 was not a valid or compliant notification under paragraph 2.1(b) of Schedule 4 of the SPA, that the Claim under the Tax Covenant is not enforceable, and that the second tranche of the funds held in escrow (US$50,000,000) can be released to the Sellers.

53. The application for summary judgment is made pursuant to CPR rule 24.2. By CPR rule 24.2(a)(ii) and (b), the Court may grant summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at a trial. This means that in order to avoid summary judgment, the Defendant's defence must have a realistic, and not merely a fanciful, prospect of success. The prospect of success may be analysed by scrutiny of the evidence before the Court at the hearing of the application for summary judgment.

54. At a hearing of a summary judgment application, the Court may determine issues of law or contractual construction which have the potential to dispose of the proceedings. In *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), at para. 15, Lewison, J summarised the principles governing the Court's approach to an application for summary judgment. As to the determination of a point of law or construction, Lewison, J said:

> *"... it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Limited v TTE Training Limited [2007] EWCA Civ 725."*

55. In *TFL Management Services Limited v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415; [2014] 1 WLR 2006, at para. 26-27, Floyd, LJ having quoted Lewison, J's approach, made the following additional observation:

> *"The court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action ... Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it*

> *does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; … Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy …"*

56. The Court must not conduct a "mini-trial" and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process (*Global Assets Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163, para. 27). If the Court considers that it is appropriate to deal with an issue of law or construction on a summary judgment application, any relevant disputed issues of fact should be assumed in favour of the person against whom summary judgment is sought (*Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm), para. 49(vi)).

57. If, on the determination of the point of law or construction (which might be a point which is well arguable by both parties), the Court determines that the Defendant has no real prospect of successfully defending the Claimants' claim and there is no other compelling reason for the disposal of the case at trial, the Claimants will be entitled to summary judgment. If, however, the Defendant has a real prospect of success or if there is a compelling reason for the matter to proceed to trial, the application for summary judgment should be dismissed.

The authorities

58. Counsel for the parties relied on a number of earlier decisions which were concerned with the interpretation and application of notification provisions under SPAs in connection with claims made under warranties or tax covenants. I will consider the principal authorities.

59. In *Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, a business was sold pursuant to a contract which contained a warranty as to the preparation of the business's management accounts. The contract provided that the vendor of the business would not be liable for breach of warranty "*Unless notice of it is given by the Purchaser to the Vendor setting out such particulars of the grounds on which such claim is based as are then known to the Purchaser promptly and in any event … within eighteen months of the completion date*" (clause 11.5.1). The management accounts reported a profit of some £9.7 million, which overstated the profits by approximately £1.7 million. In November and December 1991, meetings were held between the parties at which particulars of the purchaser's claim were provided. The purchaser sent a letter dated 26th December 1991 stating that the management accounts were "*manifestly inaccurate*" and that "*The purpose of this letter is to notify you for the purpose of clause 11.5.1 of the Agreement … that a substantial claim is likely to be made against STC for breach of warranties contained in the Agreement. We shall provide you with further details of the ground of this claim and of quantum in the near future*".

60. At first instance, the judge held that the notice was adequate for the purposes of the sale contract, holding that the purchaser orally provided such particulars of the grounds on which its claim was based as were then known at the meetings on 15th

November 1991 and 11th December 1991, and that the purchaser gave written notice promptly on 26th December 1991. Upon receipt of that notice, the vendor was well aware of the relevant particular bases of the claims to which the notice related.

61. The Court of Appeal disagreed with the judge's decision and held that the notice was not compliant. At para. 90-91, Stuart-Smith, LJ said:

> *"83. We cannot accept the Judge's reasoning as to the construction of the letter. While it is true, as Mr Field submitted, that the letter was plainly intended to be a notice pursuant to cl. 11.5.1, it patently failed to meet the requirements of that clause. Of the three passages to which Mr. Field draws attention, only the words "further details" even begin to support the contention that the letter is to be understood as making reference to some previous communication of grounds. However, in our view, those words are far more readily explicable as being a reference to the assertion in the first sentence of the quoted passage that the management accounts were materially inaccurate and did not take into account certain matters that they should have been taken into account. Reading the three paragraphs together, we see no answer to the appellants' contention that the reference to the provision of particulars is prospective rather than retrospective and that there is nothing whatever to support the notion that what had passed at the meetings was incorporated. Indeed, coming as it did so soon after the meeting of Dec. 11, it seems to us that this letter - which we are told was professionally drafted - was couched in language designed not to refer to what had passed at the meetings: a conclusion that would be consistent with the stance adopted by the plaintiffs as to the meetings having been without prejudice.*
>
> *84. In any event we cannot accept that, even if it could be said that the letter implicitly incorporated a reference to the meetings, this would have constituted compliance with the clause. This is because in our view it is plain that the clause requires that the grounds known to the purchaser shall themselves be set out in writing. We have already said that this would allow incorporation of another document but we cannot accept that it could be satisfied by a bald reference to an earlier oral exchange.*
>
> *85. Our conclusion is that the Judge was wrong to hold that Senate had complied with cl. 11.5.1. It follows that, unless Senate can make good its alternative argument (raised in the amended respondent's notice) to the effect that the clause imposed no obligation to give written notice of facts and matters which were already known to the vendors. Senate's claim should have failed by reason of their failure to give proper notice of their breach of warranty claim. That requires a consideration of the authorities to which we were referred."*

62. After consideration of the authorities in connection with the submission that no notice was required by clause 11.5.1 of matters already known to the vendor, Stuart-Smith, LJ said at para. 90-91:

> *"90. … As we have already pointed out, the Judge defined the purpose in these terms, to which we now add our emphasis:*
>
> > *The clear commercial purpose of the clause includes that the vendor should know at the earliest practicable date in sufficiently formal written terms that a particularised claim for breach of warranty is to be made so that they may take such steps as are available to them to deal with it.*
>
> *We agree. He also suggested that:*
>
> > *The commercial purpose may not be sensibly served if an uninformed and uninformative notice is given at the earliest conceivable moment.*
>
> *The implication, with which we agree, is that the notice should be informative.*
>
> *91. It does not stop there. Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty. Thus there is merit in certainty and accordingly, in our judgment the point taken by the appellants is not a matter of mere technicality and it is not without merit."*

63. In *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, the claimant (Laminates) commenced proceedings against the defendant (BTR) for breach of warranties in a Share Sale and Purchase Agreement (SPA) dated 16th March 1998, under which Laminates acquired BTR's shareholding in FM Holdings Inc and its subsidiary companies ("Formica"). The principal business of Formica was the manufacture of high-pressure laminates (HPL). The SPA included a time limit on the notification of claims in Schedule 8, paragraph 2 which provided that:

> *"2. No claim … shall be brought against the Vendor in respect of any Agreed Assurances … unless the Purchaser shall have given to the relevant Vendor written notice of such claim specifying (in reasonable detail, to the extent that such information is available at the time of the claim) the matter which gives rise to the claim, the nature of the claim and the*

> *amount claimed in respect thereof (detailing the Purchaser's calculation of the loss thereby alleged to have been suffered by it or the relevant member of the Purchaser's Group): ... on or before 31 March 2000."*

64. On about 12th April 1999, Formica Corporation received a subpoena to produce documents to the US Department of Justice in connection with a Grand Jury Antitrust Investigation into price fixing in the US HPL market during the period 1st January 1994 to 1st April 1999. The Department of Justice suspected that some of the four competitors in the HPL market in the US were involved in price fixing arrangements. Formica had the second largest market share of these four entities. The subpoena served upon Formica required it to produce a large range of documents relating to HPL pricing, price announcements and any actual possible or proposed agreements, whether implemented or not, in connection with that subject matter. Formica instructed US lawyers to represent it. The investigation was concluded without any charges being brought. As at 31st March 2000, the deadline for a notice under paragraph 2 of Schedule 8, the Department of Justice and Grand Jury investigations were in process but no criminal indictment nor civil proceedings had been commenced. However, from June 2000, civil suits were commenced against Formica alleging that the price charged for HPL rose steadily during the period from 1994 onwards without any correlation with any rise in the manufacturers' cost of the component materials. The Court was prepared to infer that allegations of price fixing had been made against Formica in the Department of Justice Investigation.

65. On 28th March 2000, Laminates sent a letter to BTR stating that

> *"Notice of Claims*
>
> *... In accordance with paragraph 3(A)(i) of Schedule 8 (Limitations on liability) of the Share Sale and Purchase Agreement between BTR Australia Limited and Laminates Acquisition Co. dated 16 March 1998 (the "Agreement"), we notify you of the claims on the attached list.*
>
> *We further notify you that these may result in claims under the Agreed Assurances.*
>
> *All terms used in this letter, unless otherwise defined, shall have the same meaning as defined in the Agreement."*

66. The letter enclosed a schedule of claims made by third parties against Formica except for a reference to "*claims previously noticed*" under which appeared a reference to "*US DOJ*". Under the heading "*Claim type*" appeared "*Grand Jury Investigation*". The status was described as "*pending*" and the costs to date were listed as $1,236,610.63. All the other items in the list were third party claims which had not been previously notified.

67. Although the letter dated 28th March 2000 referred to paragraph 3(a) of Schedule 8, Laminates maintained that it was effective notice under paragraph 2 of Schedule 8.

68. On a trial of a preliminary issue, Cooke, J said at para. 29-31:

> *"29. I was referred to Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 and encouraged to adopt the more flexible approach to construction of Notices than had previously been the case in the light of the Judgments of Lord Steyn at pages 767–8 and Lord Hoffmann at pages 779-780. The question is how this notice would be understood by a reasonable recipient with knowledge of the context in which it was sent ... each notice clause has to be construed for itself and in the light of the commercial context in which it is found and the commercial purpose it is intended to serve. Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be notified and a failure to observe their terms can rarely be dismissed on a technicality. The comments of Stuart-Smith LJ in Senate Electrical are apposite ... The notice provision here does not require "particulars" of the grounds of claim for breach of warranty but some information relating to the claim, as set out in the paragraph, which can be seen as equivalent, or analogous to that required in Senate Electrical.*
>
> *30. The starting point here must be, regardless of the proviso dealing with the need for legal proceedings within a specific time, that the terms of the notice provision are clear in debarring claims which have not been notified within the required period. Thus the clause begins "No claim ... shall be brought ... unless ...". A compliant notice is therefore a matter of importance. Secondly, since the clause provides for conditions precedent to the liability of BTR under the Agreed Assurances, it is for Laminates to establish, as a matter of fact, compliance with those conditions precedent, although, because this is an exclusion clause, the usual principles which apply to construction of exclusion clauses apply when interpreting the clause itself. Thirdly, the purpose of the notice provision, as essentially agreed by both parties is to ensure that BTR is provided with a warning of future legal proceedings against it under the Agreed Assurances with sufficient information and time to enable it to make enquiries, to make an informed assessment of the claim, decide what to do about it, take precautionary steps, (such as notification to insurers and preparation of defence material) make provision in its accounts or obtain withdrawal of the claim or satisfy or settle it before legal proceedings are issued. These purposes can essentially be garnered from the proviso to paragraph 2 and the overall structure and content of paragraph 2 in the light of paragraph 3 of the Schedule and the SPA as a whole. To do any of these things necessitated some particularisation of the claim made by Laminates.*

> *31. Paragraph 2 of Schedule 8 has gone to some lengths to set out the requirements for a Notice to be valid, failing which, "no claim ... shall be brought against the vendor". The requirements are as follows:—*
>
> *i) There must be a notice of a claim against BTR in respect of a Warranty or an Agreed Assurance - see the words "such claim".*
>
> *ii) It must be a claim in writing - "written notice".*
>
> *iii) The Notice must specify "the matter which gives rise to the claim". This must mean the underlying facts, events or circumstances, which constitute the factual basis upon which the claim is posited.*
>
> *iv) The Notice must specify "the nature of the claim". The parties agree that this must mean notification of what is being claimed and the basis of it by reference to the SPA - namely the form and substance of the claim.*
>
> *v) The Notice must set out the "amount claimed". This specifically requires a calculation on the part of Laminates of the loss which is allegedly suffered.*
>
> *These last three elements in the Notice are qualified by the passage in parenthesis which states that these matters have only to be specified "in reasonable detail, to the extent that such information is available at the time of the claim". This brings in two further inter-relating factors, namely, the concept of reasonableness and Laminates' knowledge."*

69. Cooke, J then went on to apply this approach to construction to the case at hand and said at para. 35-36:

> *"35. When regard is then had to the other requirements of paragraph 2, in my judgment the letter of 28 March 2000 makes no attempt to comply with the terms of the clause, leaving aside for one moment the question of the extent of the information available to Laminates at the time of the claim.*
>
> *36. The only information supplied in relation to "the matter which gives rise to the claim" is to be found in the list attached to the letter, in the subpoena enclosed with an earlier letter and in the restricted "update" of October 22nd, 1999, to which "Claims previously noticed" in that list might have been intended to refer. In essence, BTR had been informed that the Department of Justice had instituted an investigation into price fixing activities, from which it could be assumed that the Department suspected that there was a price fixing arrangement which operated between 1994 and 1999, the*

> *parties to which and the terms of which remained wholly unspecified."*

70. As to the amount of the claim to be identified in the notice, Cooke, J said at para. 41:

> *"41. It was argued by BTR that for adequate notice to be given of "the matters giving rise to the claim" now being pursued in the Particulars of Claim under paragraph 10(D) of Schedule 7, the letter has to specify not only the price fixing Agreement alleged, but the potential consequences in the shape of past and future costs of the investigations, Formica's potential liability to fines, penalties and costs in criminal proceedings, and to damages and costs in civil proceedings, should any such be brought. This I do not accept, but in my judgment such information was required in connection with "the amount claimed" and the "Purchaser's calculation of the loss thereby … suffered" however approximate any estimate would be, or at the very least information which set out the potential heads of loss. There was nothing to stop Laminates from setting out its losses in the manner adopted in paragraph 50 of the Re-Amended Particulars of Claim."*

71. Finally, Cooke, J considered (at para. 42-46) what expert evidence might be required to inform the Court as to what a reasonable recipient would have known upon receipt of the notice:

> *"42. I heard expert evidence from both parties which explored the question of what BTR would be expected to understand, as a reasonable recipient of the information supplied by Laminates, with the benefit of advice from US Antitrust Counsel. I find that on receipt of the various pieces of information which were given by Laminates to BTR, BTR would know that the Department of Justice had an informed suspicion that Antitrust violations had occurred, that Formica was a potential target of such price fixing or anti-competition allegations and that, in all probability, at some time after 28th December 1999 it would know that one of the other four major competitors was not such a target. Additionally, on receipt of the totality of this information, BTR would know that there was a risk of criminal prosecution of Formica and a risk of civil litigation involving treble damage suits against it. There was a difference between the experts as to the degree of risk involved — as to whether such litigation was almost inevitable or not. A substantial number of Grand Jury Investigations do not lead to prosecution — the percentage which do is highly variable from year to year. If a company is indicted, there is a strong likelihood that civil liability suits will follow and if there is a conviction, it is almost certain that this will take place. Without a prosecution, however, the question of civil suits, launched by an opportunistic plaintiffs' antitrust Bar appears largely to*

depend upon the obtaining of knowledge of a Grand Jury price fixing investigation. BTR, it is accepted, might have anticipated but could not have known that the Investigation would be the subject of public disclosure by Formica in its 10-Q and 10-K reports and even with such disclosure, it could not be said that civil litigation was inevitable. On the basis of the evidence which I heard from the experts, it appears to me that BTR might well have expected disclosure to be made and that there was, at the very least, a good chance of treble damages civil litigation then being pursued.

43. The experts agreed that on the information provided BTR could form no judgment on whether or not there was any real prospect of liability in respect of any allegations of Antitrust or anti-competitive practices. Thus the purpose of notice under the clause was not met. BTR could not even begin to assess the position and take any steps of the kind referred to in paragraph 30 of this Judgment.

44. In the context of what BTR could be expected to know, it seems to me that Laminates' expert is right in saying that once the 10-Q and 10-K disclosures were made in November 1999 and 27th March 2000, the prospect of civil litigation was high because the HPL market was small, consisting of four players, because one player had been eliminated as a target by the Department of Justice, because Formica was the second largest player and because there were $1billion worth of sales per annum in that market. Regardless of any proper basis for a claim, Formica would be seen as a ripe target by the entrepreneurial, contingency fee opportunist Antitrust Bar in the USA.

45. This is however, in my judgment, nothing to the point. Whatever assumptions or judgments BTR might make with the benefit of advice from US Antitrust counsel, the question is still whether or not the terms of paragraph 2 of Schedule 8 were met in the shape of the notices which were given. It was not for BTR to make judgments about the matter giving rise to the claim, the nature of the claim or the amount claimed - it was for Laminates to give notice with the required degree of specificity. What BTR might think, having received the subpoena and perhaps obtaining knowledge of disclosure of Formica's and other's Securities Filings is irrelevant when notice in writing was required with the specific elements to which paragraph 2 of Schedule 8 refers. Laminates did not claim against BTR for a price fixing arrangement as a breach of Warranty 10(D), giving the information required by paragraph 2 of Schedule 8 .

46. Given the absence of any of this information and the need for Laminates to establish compliance with the conditions

> *precedent, it is for Laminates to show that the qualification given by the passage in parenthesis in paragraph 2 applies and that it has furnished in reasonable detail, to the extent that information was available to it, the information which paragraph 2 requires …"*

72. In *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm), the Court was concerned with the sale of a nuclear engineering business under a contract which provided that "*the Vendor will be under no liability in respect of any Claim unless written particulars of such Claim (giving details of the specific matter as are available to the Purchaser in respect of which such Claim is made) have been given to the Vendor within a period of 24 months from the date of Completion*". Gloster, J reviewed the authorities, including *Laminates Acquisition Co v BTR Australia Ltd* and *Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd*, and summarised the law as follows:

> *"10. From these cases the following propositions can be distilled.*
>
> *i) Every notification clause turns on its own individual wording.*
>
> *ii) In particular due regard must be had to the fact that where such notification clauses operate as a condition precedent to liability (as in this case) it is for the party bringing a claim to demonstrate that it has complied with the notification requirement in that it gave proper particulars of its claims and did give those specific details as were available to it (see paragraph 30 of the judgment in the Laminates Acquisition case).*
>
> *iii) That wording must, however, be interpreted by reference to the commercial intent of the parties; that is to say, the commercial purpose that the clause was to serve. In a case such as this "the clear commercial purpose of the clause includes that the vendor should know at the earliest practical date in sufficiently formal written terms that a particularised claim for breach of warranty is to be made so that they may take such steps as are available to them to deal with it"; in other words "that the notice should be informative"; see per Stuart-Smith L.J. in Senate Electrical at paragraph 90, citing with approval (and with his emphasis) from the decision of May J at first instance.*
>
> *iv) Where the clause stipulates that particulars "of the grounds on which a claim is based" are to be provided:*
>
> > *"Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor*

is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the claim"

(per Stuart-Smith LJ in Senate Electrical at paragraph 91)

v) In all cases it is important to consider the detailed claim being made in terms of both the breach complained of and the remedy being sought, to ensure that it was a claim which was properly notified.

11. In this case the language of the notification clause is slightly different from that in the clauses dealt with in both the Senate Electrical and Bottin cases in that the particulars required by paragraph 2.4 of Schedule 9 of the Agreement are not particulars of the matters giving rise to the claim relied upon but, rather, particulars of those claims themselves, including "details of the specific matter as are available to the Purchaser in respect of which such Claim is made". In my judgment what has to be notified in relation to any particular claim in the present case will largely depend on the nature of the Claim, the facts known to the vendor at the date of the notice, and whether it is realistic to put any monetary quantification on the amount claimed. I do not think one can lay down too rigid a formula for ascertaining what precise particulars or details have to be notified; the answer is that it will all depend. However, consistent with Mr. Rowley's submissions, I would expect that a compliant notice would identify the particular warranty that was alleged to have been breached; I would expect that, at least in general terms, the notice would explain why it had been breached, with at least some sort of particularisation of the facts upon which such an allegation was based, and would give at least some sort of indication of what loss had been suffered as a result of the breach of warranty, or, in other words, in the language of paragraph 1 of Schedule 9, some sort of description of the "liability for breach of the Warranties" that it was alleged that AEAT had incurred."

73. In *Forrest v Glasser* [2006] EWCA Civ 1086; [2006] 2 Lloyd's Rep 392, an investment syndicate purchased shares in GW Ltd pursuant to two separate agreements; the sellers provided a number of warranties that the audited accounts gave a true and fair picture of the assets, liabilities, commitments and profits of GW Ltd as at the end of 31st December 1999, and also that the accounts had been prepared

in accordance with generally accepted accounting principles. Clauses 6.3 and 6.4 of the agreements provided that:

> *"6.3 Any Claim by the Subscribers:*
>
> *6.3.1 which shall not have been notified in writing to the Company on or before the third anniversary of the Completion Date, or the sixth anniversary in the case of matters relating to Taxation; and*
>
> *6.3.2 in respect of which court proceedings have not been issued and served on the Warrantors within 12 months of the date of notification of such claim to the Company (except that the time limits shall not apply in respect of Claims arising from fraud or wilful misconduct or wilful concealment by the Warrantors, the Company or any of its officers or employees) shall be deemed to have been waived.*
>
> *6.4 Without prejudice to the provisions of clause 6.3 hereof, the Subscribers will notify the Company and the Warrantors in writing as soon as reasonably practicable after the date upon which the Subscribers became aware of a Claim against the Warrantors, such notification to be in sufficient detail to enable the Company and the Warrantors to identify the Claim and to respond to it."*

74. Following the failure of GW Ltd, the purchaser's solicitors sent letters to the sellers dated 24th November 2003 stating that:

> *"We hereby give notice on behalf of the [appellants], of their intention to make a claim against you ...*
>
> *The claim arises out of the fact that the management accounts of [GW Ltd] dated 31 October 2000 and provided to our above named clients by you. . . were not in accordance with the warranties given in clause 5 of the Subscription Agreement dated 24 November 2000 and paragraph 5 of schedule 2 thereto and as repeated in clause 5 and schedule 4 of the Agreement for the Acquisition of part of the issued shared in Glasser Whitley Limited dated 2 January 2001.*
>
> *We shall be writing to you further in due course, however, the purpose of this letter is formally to notify you of the claim."*

75. The judge at first instance held that the notice was inadequate, because it lacked sufficient detail. For this purpose, where the letter did not refer to earlier correspondence between the sellers and the purchasers where the purchasers had set out details of the potential claim, that earlier correspondence could not be taken into account.

76. The Court of Appeal allowed the appeal and held that clause 6.3.1 (which was a time bar provision) and clause 6.4 (which was not a time bar provision) were independent and that a notification of a bald claim without particulars was valid under clause 6.3.1. It was therefore unnecessary to consider the judge's decision to exclude consideration of the earlier correspondence. Nevertheless, the Court of Appeal considered this issue and held that the judge erred in excluding such correspondence from consideration. At para. 30, Ward, LJ said:

> *"In my respectful judgment the fact that the letters did not incorporate the preceding correspondence and e-mails and did not refer to them is neither here nor there. The recipient will have read the notification letters against the background of what had gone before them. That is the context. That context has to be considered in order to decide what a reasonable recipient would understand when he read the letter. In my judgment the judge was wrong to exclude consideration of the antecedent correspondence."*

77. Ward, LJ then went on to consider whether the earlier correspondence contained sufficient particulars and held that it did. At para. 31-32, Ward, LJ said:

> *"31. Assuming I am wrong in my conclusion that no particulars of the claim need be specified in the notice, then the antecedent correspondence makes it plain what claim is being asserted …*
>
> *32. Against that background any reasonable recipient of the solicitor's letters would have understood that the appellants were notifying a claim under the warranty clause. The recipients would have had, moreover, sufficient information to identify the warranty concerned and the particular inaccuracies to which the complaint related. When the proceedings were launched, the particulars of claim identified the same inaccuracies, namely work in progress and over-stated creditors. Thus the respondents had all the information they needed by November 2003 to know the nature of the claim made against them and to prepare to meet a claim in respect of work in progress and overstated creditors. They could safely close their books on any other claim. If I were in any previous doubt about it, there is an ample sufficiency of information in the antecedent exchanges for the letters of 24 November to constitute valid notification pursuant to clause 6.3.1."*

78. In *Highwater Estates Ltd v Graybill* [2009] EWHC 1192 (QB), shares in a wedding and function business had been sold. The Buyer alleged that the Seller had misrepresented the number of bookings which had been made. The question was whether the claim had been adequately notified, having regard to the relevant notice clause which provided that "*The Vendor shall not be liable for a Claim unless it receives from the Purchaser written notice of the Claim stating in reasonable detail the matter giving rise to the Claim and the nature and amount of the Claim*". At para. 36, HH Judge Waksman QC (as he then was) adopted the principles set out by

Gloster, J in *RWE Nukem Ltd v AEA Technology plc* and then considered the adequacy of the notice. At para. 40-43, the judge said:

> "*40. In my view the clause here required the prior notice to state whether a claim was being made in misrepresentation by express reference to that cause of action. That is especially so where the notice on its face is clearly confining itself to claims for breach of the warranties …*
>
> *41. Mr Berragan contends that the simple reference to the failure to state that the correct number of bookings was 87 (and not 150-200) was sufficient. In relation to this clause I disagree. It may have constituted the "matter" giving rise to the claim but the clause does not stop there. The "nature" of the claim must surely require a reference to the type of claim it is. In many cases the claim may be a straightforward breach of warranty and then no doubt what is required is a reference to the relevant warranty broken, how broken and so on. But the Notification Clause here specifically contemplates misrepresentation claims as well. Such claims are different from warranty claims for the reasons given above. And that is especially so where a fraud claim is being made. It would be absurd to suggest that notice of this should not be given. The riposte that it is not required here because Mrs Graybill would realise from what was said in the letter that since she knew the correct figures, it would be said that she knowingly or recklessly made the Wedding Statement, is no answer. The vendor needs to know what he faces in sufficient detail to enable him to deal with it properly. In my judgment even within the confines of the "matter giving rise to the Claim" there should have been a reference to the statement being made negligently or fraudulently (albeit that the burden in relation to reasonable care rests upon the Defendant) and reliance, but if I am wrong about that, such matters should unquestionably have been included under the rubric of the "nature" of the claim. A vendor's approach to a claim (and the legal advice given) is very likely to differ depending on whether it is a "straight" breach of warranty claim or the more complex claim in misrepresentation.*
>
> *42. I agree that it is not necessary for a Claim Letter to go into as much detail as a Particulars of Claim might need to do. But that does not render the Claim Letter sufficient here …*
>
> *43. Given that the commercial purpose of such clauses is to enable the vendor to know in sufficient detail what he is up against (not least because it might then enable the parties to settle without recourse to litigation) I cannot see how a claim letter which confines itself to breaches of warranty without any reference to misrepresentation at all, can comply with the Notification Clause here.*"

79. In *ROK plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm), the purchaser (ROK) of shares in a "design and build" construction company sued the vendor (SHG) for breach of warranties in the sale and purchase agreement (SPA) relating to cost value reconciliations (CVR Warranty) relating to the company's projects and cost and profit forecasts (Profit Forecast Warranty). SHG denied the breaches of warranty, but in any event argued that ROK's claims should be struck out because the letter did not give adequate written notice of its claims in accordance with the requirements of the SPA. Paragraph 5 of Schedule 7 of the SPA provided that:

> *"The Vendor is not liable for a Claim or a claim under the Tax Undertaking or the Indemnities unless the Purchaser has given the Vendor notice in writing of the Claim or the claim under the Tax Undertaking or the Indemnities, specifying in reasonable detail the nature of the Claim or claim under the Tax Undertaking or the Indemnities and the amount claimed (based in each case on the information then available to the Purchaser) ...".*

80. On a trial of a preliminary issue, Mr Richard Salter QC (sitting as a deputy High Court judge) said at para. 62-64, 67 and 72:

> *"62 The commercial purpose of the Notice Clause must be judged by reference to the language used by the parties, and having regard to the nature of and background to the transaction. It is clear that the intention was to ensure that SHG, and Mr Harrison, were informed if there were any Warranty Claims (and/or claim(s) under the Tax Undertaking or the Indemnities), and if so, of the nature and potential quantum of such Claim(s) (and/or claim(s) under the Tax Undertaking or the Indemnities), within the specified time-limit, so that they were, at least, put on notice that SHG was exposed to, and might (if proceedings were commenced) have to defend, such claims, so that they had to ensure that the Warranty security was maintained in accordance with clause 6.7 of the SPA, and with the result that SHG could not close its files on the transaction. It would, however, not be correct to approach the construction of the Notice Clause with any preconception that, for example, the parties must have intended that a notice would enable SHG immediately to identify and embark on a detailed investigation of each package in respect of which figures in the June CVRs allegedly made insufficient allowance for anticipated costs. SHG would have received the Letter in the knowledge that, if any Claim thereby notified was to be pursued, proceedings in respect of such Claims would have to be issued and served within six months, and that detailed particulars of any such Claims would have to be given in those proceedings.*
>
> *63 In my judgment the stipulation that "the nature of the Claim" be specified "in reasonable detail" requires, as a*

minimum, that the notice should identify the contractual provision under which the Claim is said to arise. It would not, in my judgment, have been sufficient for a notice to state simply, "ROK hereby notifies you that it has a Claim for breach (or breaches) of Warranty (estimated at £x)". Nor would it be sufficient for it to assert facts without identifying the Warranty relied on as giving rise to a Claim in respect of those facts. As clause 6.4 of the SPA expressly provides, the Warranties are "separate and independent" warranties, and each separate Claim under a Warranty must therefore be notified.

64 Thus I reject ROK's submission that the Letter, which did not mention the Profit Forecast Warranty, constituted sufficient notice of its pleaded Claim for breach of that Warranty. The fact that the grounds now relied on in the Letter as supporting the Claim under the CVR Warranty are in substance the same as those relied on as supporting the Claim under the Profit Forecast Warranty is not enough. The letter gave no indication to SHG that there might also be a claim under the Profit Forecast Warranty, and so did not satisfy the commercial purpose of notifying SHG of the nature of one of the Claims now pleaded against it.

67 The words "in reasonable detail" were presumably intended to add something to a requirement to specify the nature of the Claim and the amount claimed. It is impossible to define, in abstract terms, what would, or would not, constitute reasonable detail - though it is clear, as ROK submitted, that these words did not require ROK to give as much detail as possible in the light of available information. What constitutes reasonable detail will depend on the nature of the Claim, bearing in mind also that it is unlikely to have been the parties' intention, at the time of contracting, that the details to be provided should be as extensive as those that would be required, doubtless after further investigation, in the legal proceedings to be issued and served within six months of the notice ...

72 In my judgment, this informative Letter (with its accompanying schedules) did provide reasonable detail of the nature of ROK's Claim for breach of the CVR Warranty, and the amount of that Claim (and in doing so satisfied the commercial purposes identified in para. 62 above). SHG was thereby notified, not only of ROK's allegation of breach of the CVR Warranty, but also of the alleged factual basis for that Claim, of the global figure then claimed, and of the likely maximum amounts that would be claimed in respect of individual packages. The fact that the Claim has since been refined, with the particularisation of individual packages and

> *alleged shortfalls in CVR allowances (and the recognition of the limitation to SHG's maximum liability), does not detract from the validity of the Letter, which I find comfortably satisfied the requirements of the Notice Clause with respect to ROK's Claim for breach of the CVR Warranty …"*

81. In *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), the purchaser (Ipsos) sued the seller (Aegis) for breach of the seller's warranties in a sale and purchase agreement. The seller relied on the time limitation clause which provided that:

> *"3.1 No Seller Warranty Claim, … Indemnity Claim … shall be brought against the Seller unless (and the Seller shall only have liability in respect of any such Claim if) the Purchaser shall have given to the Seller written notice of such Claim … (a 'Claim Notice') specifying in reasonable detail: (i) the matter which gives rise to the Claim; (ii) the nature of the Claim; and (iii) (so far as is reasonably practicable at the time of notification) the amount claimed in respect thereof (comprising the Purchaser's good faith calculation of the loss thereby alleged to have been suffered) …"*

82. On a summary judgment application, Simon, J began by identifying four broad propositions applicable to such provisions. First, its commercial purpose is to debar claims which are not notified within a finite period and to ensure that the seller knows in sufficiently formal terms that a claim for breach of warranty is to be made, so that financial provision can be made for it; such a purpose is not served if the notice is uninformative or unclear (para. 19). Second, in construing such a notice the question is how it would be understood by a reasonable recipient with knowledge of the context in which it was sent (para. 20). The third proposition is not relevant for present purposes. As to the fourth proposition, Simon, J said (at para. 22-24):

> *"22. Fourthly, in the present case (as in other cases) requirement of the notice of a claim is matched by a requirement for certain matters to be specified in the notice. The use of the word 'specifying' in §3.1 suggests very strongly that it is not sufficient that the matters referred to in (i)-(iii) may be inferred.*
>
> *23. The notification provisions in the Laminates case were in similar terms to those in the present case. Thus §2 in Schedule 8 of the contract in the Laminates case was substantially similar to § 3.1 of Schedule 5 in the present case; and there were similarities between the 'Conduct of Litigation' notice in §3 in the Laminates case and §5 of the SPA in the present case.*
>
> *24. In the course of his judgment Cooke J at [31] considered the need to specify the matter which gives rise to the claim, the nature of the claim and the amount claimed.*

> *The notice must specify 'the matter which gives rise to the claim'. This must mean the underlying facts, events and circumstances, which constitute the factual basis on which the claim is posited … the notice must specify 'the nature of the claim'. The parties agree that this must mean notification of what is being claimed and the basis of it by reference to the SPA – namely the form and substance of the claim … the notice must set out the 'amount claimed'. This specifically requires a calculation on the part of [the purchaser] of the loss which is allegedly suffered.*
>
> *The Judge noted, in that case as in this, that the obligation in the Claim Notice included a requirement of 'reasonable detail'."*

83. In *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), the purchaser acquired two companies from the sellers, under a share purchase agreement (SPA). The SPA contained a number of warranties relating to the tax liabilities of the acquired companies, and a tax covenant by which the sellers put aside a sum to cover undischarged tax liabilities. Schedule 4 of the SPA included the following provisions:

> ***"4. Notice of Claims***
>
> *No Seller shall be liable for any Claim unless the Purchaser has given notice to the Seller of such Claim setting out reasonable details of the Claim (including the grounds on which it is based and the Purchaser's good faith estimate of the amount of the Claim (detailing the Purchaser's calculation of the loss, liability or damage alleged to have been suffered or incurred)).*
>
> ***5 Time limits for Claims***
>
> *5.1 No Seller shall be liable for any Claim unless the Purchaser has given notice of such Claim in accordance with paragraph 4, as soon as reasonably practicable after the Purchaser Group becomes aware that the Purchaser has such a Claim, and in any event on or before 31 July 2015."*

84. In February 2015, the purchasers wrote to the sellers purporting to notify them of claims, which they described as "*either Warranty claims or Tax claims*", arising from potential tax liabilities in Brazil and the Philippines. The letter, which made general reference to the general warranties and the tax warranties, did not specify the particular warranties that might have been breached, nor particularise the facts alleged to constitute the breaches. A further letter in June 2015 gave detail of the potential tax exposure, but again failed to identify the warranties purportedly breached.

85. Mr Richard Millett QC (sitting as a deputy High Court judge) struck out the purchasers' claim in part on the ground that the letters did not constitute notices as required by the SPA. At para. 23, Mr Millett QC said:

"I start with the helpful summary of the legal principles in this area contained in the skeleton argument of Mr Jarvis Q.C. and Mr George McPherson for the Purchaser, much of which I gratefully adopt, as follows.

(i) Every notification clause turns on its own wording: Forrest v Glasser [2006] 2 Lloyd's Rep 392 per Ward LJ at [24]. The court is therefore required to construe the clause by focusing on the meaning of the relevant words in their documentary, factual and commercial context: Arnold v Britton [2015] AC 1619 per Lord Neuberger at 1627G-H.

(ii) A notification clause which imposes a contractual time limit on the bringing of claims is a species of exclusion clause. If necessary to resolve ambiguity, such a clause should be construed (like any other exclusion clause) narrowly. This is because parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect: Nobahar-Cookson v The Hut Group Ltd [2016] EWCA Civ 128 per Briggs LJ at [18].

(iii) The commercial purpose of a notification clause includes ensuring that sellers know in sufficiently formal terms that a claim for breach of warranty is to be made, so that financial provision can be made for it: Ipsos S.A, v Dentsu Aegis Network Ltd [2015] EWHC 1171 (Comm) per Simon J at [19]. It follows that where such financial provision has already been made as part of the parties' bargain, there is a less compelling commercial rationale for requiring the notifying party to supply "chapter and verse" as to the nature of the claim being notified.

(iv) In construing a notice of claim, the question is how it would be understood by a reasonable recipient with knowledge of the context in which it was sent: Laminates Acquisition v BTR Australia Ltd [2004] 1 All ER (Comm) 737 per Cooke J at [29].

(v) The notice must specify that a claim is actually being made (whatever wording is used), rather than indicating the possibility that a claim may yet be made: Laminates at [33].

(vi) Where a notification clause contains a requirement to specify "reasonable detail", what constitutes reasonable detail will depend on the nature of the

> *Claim, bearing in mind that it is unlikely to have been the parties' intention, at the time of contracting, that the details to be provided should be as extensive as those that would be required, after further investigation, in the legal proceedings to be issued and served within six months of the notice: ROK Pic (in administration) v S Harrison Group Ltd [2011] EWHC (Comm) per Richard Siberry Q.C. (sitting as a Deputy High Court Judge) at [67]; see also Forrest v Glasser per Ward LJ at [25]."*

86. An appeal against this decision was dismissed ([2018] EWCA Civ 23; [2018] BCC 339). Newey, LJ said (at para. 21, 27-29):

> *"21. As was recognised on both sides, "Every notification clause turns on its own individual wording" (per Gloster J in RWE Nukem Ltd v AEA Technology plc [2005] EWHC 78 (Comm), at paragraph 10, endorsed by the Court of Appeal in Forrest v Glasser [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep 392, at paragraph 24). Reference to previous decisions can still, however, be of some assistance. In the present case, the authorities to which we were taken included Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd [1999] 2 Lloyd's Rep 423 and Nobahar-Cookson v The Hut Group Ltd [2016] EWCA Civ 128, as well as the RWE Nukem case …*
>
> *27. Coming back to the case before us, on balance I agree with the Judge that the February and June Letters failed to satisfy the requirements of paragraph 4 of schedule 4 to the SPA because they did not identify the particular warranties and provisions of the Tax Covenant on which the Brazil and Philippines Claims were based. I accept Mr Fealy's submission that the "setting out" of the "grounds" of a claim that paragraph 4 called for meant that the legal basis of the claim had to be identified. It is not inconceivable that, exceptionally, that could have been achieved without mentioning a warranty or other provision in terms (if, say, recitation of the relevant facts had unequivocally indicated a specific warranty). Having regard to the decision of the House of Lords in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, it is also possible to imagine circumstances in which reference to the wrong warranty would not have invalidated a notice (if a reasonable recipient would not have been misled by the error and would have understood which warranty the Purchaser was intending to rely on). In general, however, it seems to me that "setting out" the "grounds" of a claim required explicit reference to particular warranties or other provisions. Moreover, the present case was not one in which either the Purchaser erroneously referred to the wrong warranty or the facts unequivocally pointed to a specific*

> *warranty. To the contrary, there was real scope for doubt, as is borne out by Mr Rakison's evidence, about which provisions were thought by the Purchaser to be relevant. It was doubtless to keep the Purchaser's options open that the February and June Letters were framed in the wide way they were, but the result is that they cannot be said to have identified particular warranties and other provision or, hence, the "grounds" on which the Brazil and Philippines Claims were based. As the Judge said, the "omnibus reference to Warranty Claims or Tax Claims" was not good enough. The phrase will have included the relevant warranties and other provisions, but, since it also encompassed a multitude of other possibilities, it did not serve to identify the "grounds" of the claims.*
>
> *28. These conclusions are consistent with the importance of certainty which the Court of Appeal recognised in the Senate Electrical case (see paragraph 22 above) and with Gloster J's expectation in the RWE Nukem case that, in the context of the clause at issue before her, a "compliant notice would identify the particular warranty that was alleged to have been breached" (see paragraph 23 above). Further, I do not think that either the contra proferentem principle or schedule 6 to the SPA lends any real support to Mr Jarvis' contentions. With regard to the former, it appears to me that the "tools of linguistic, contextual, purposive and common-sense analysis" lead to the conclusion that, in general at least, it was incumbent on the Purchaser to specify the material warranties or other provisions, and the mere fact that an opinion subsequently obtained from a barrister might include reference to warranties or other provisions does not strike me as significant.*
>
> *29. In short, it seems to me that, by failing to identify the particular warranties and other provisions on which the Brazil and Philippines Claims were based, the February and June Letters did not comply with the requirements of paragraph 4 of schedule 4 to the SPA. It follows that the Judge's order was correct."*

87. In *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376, the purchaser acquired the issued share capital in a company, pursuant to a share purchase agreement, which contained a covenant under which the respondents were to pay certain of the company's tax liabilities. Paragraph 6.3 of Schedule 4 of the SPA provided that:

> *"The Vendors shall not be liable in respect of a Tax Claim unless the Purchaser has given the Vendors written notice of such Tax Claim (stating in reasonable detail the nature of such Tax Claim and, if practicable, the amount claimed) on or before the seventh anniversary of Completion in respect of such Tax Claim unless a Tax Authority is [un]able to assess the*

> *Company in respect of the Liability to Taxation or other liability giving rise to the relevant Tax Claim because of fraudulent conduct."*

88. Shortly before the deadline, the purchaser wrote to the vendor indicating a potential liability to tax on the part of the company and asking them whether they wished to have "*conduct of discussions with HMRC in relation to the claim*". The vendor argued that the letter was not a valid notice. The Court of Appeal accepted this argument. At para. 36, Simon, LJ said:

> *"The final principle which emerges from the cases is that, although every notification provision is likely to turn on its own wording, see for example Ipsos SA v. Dentsu Aegis Network Ltd [2015] EWHC 1171 (Comm) and the cases referred to at [16], the purpose of notification in this type of contract is to make clear in sufficiently formal terms that a claim is being made against the vendors, see also Senate Electrical Wholesalers Ltd v. Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd) [1999] 2 Lloyds L.R 423, at [90]."*

89. There are other decisions of the Court which have some bearing, but the essential principles associated with the construction and application of notification provisions in connection with claims for breach of warranty or under a tax covenant under sale and purchase agreements are explained in the above decisions.

Decision

The SPA provisions

90. Paragraph 2.1 of Schedule 7 of the SPA sets out the Claimants' Tax Covenant in these terms:

> *"2.1 The Warrantors severally covenant to pay to the Buyer an amount equal to:*
>
> *(a) any Tax Liability of a Group Company which has arisen or arises:*
>
> *(i) in consequence of an Event which occurred on or before Completion; or*
>
> *(ii) in respect of any Income, Profits or Gain which were earned, accrued or received on or before Completion or in respect of a period ending on or before the Completion Date …"*

91. The Tax Covenant is engaged when a Tax Liability arises (a) in consequence of an Event (meaning any event, transaction, including the execution of, and Completion of, this agreement, action or omission) or (b) in respect of any Income, Profits or Gains

(as defined) were earned, accrued or received on or before Completion or in respect of a period prior to Completion, i.e. 28th December 2016.

92. Paragraph 3 of Schedule 7 then provides for a number of exclusions in respect of which the Tax Covenant at paragraph 2 does not apply in respect of a Tax Liability of a Group Company, meaning that the Warrantors will not be liable for any breach of the Tax Covenant as outlined in the exclusions.

93. Paragraph 2.1(b) of Schedule 4 of the SPA provides that

> *"2.1 The rights of the Buyer in respect of:*
>
> *(a) …*
>
> *(b) any Indemnity Claim or Claim under the Tax Covenant shall be enforceable if the Buyer gives written notice to the Warrantors stating in reasonable detail the matter which give rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof on or before the Second Claims Escrow Release Date"*

94. Paragraph 12 of Schedule 4 recognises that the Claimants' liability for a Claim might only be contingent at the date of the notice, without affecting the validity of the notice, but the Claimants will not be liable under the Tax Covenant "*unless and until the liability becomes an actual liability or (as the case may be) becomes capable of being quantified*".

95. Compliance with paragraph 2.1(b) is a condition precedent to the enforcement of any Claim under the Tax Covenant (cf. *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 30). This means that if no valid notice was served by 1st July 2019 (being the next Business Day after the Second Claims Escrow Release Date) or if a notice was served but did not contain reasonable detail of (a) the matter which give rise to the Claim, (b) the nature of the Claim and (c) so far as reasonably practical, the amount claimed, the Claim will not be enforceable. Moreover, in the absence of a valid notification, there will be no Claims Escrow Claim, which is defined to mean "*a Claim by the Buyer under this agreement notified to the Sellers in accordance with this agreement on or before the Claims Escrow Release Date*". Thus, without adequate notification, the Claims Escrow Amount cannot be retained in the Claims Escrow Account.

96. The validity of the notification provided by the letter dated 24th June 2019 is therefore critical.

The approach to interpretation of the notification provision and the notification

97. In construing paragraph 2.1(b) of Schedule 4 of the SPA, ordinary principles of contractual interpretation should be borne in mind, whereby the Court seeks to divine the parties' objectively determined contractual intention by reference to the language used in the contract as understood having regard to the commercial purpose of the provision and the factual context in which the agreement was made (*ROK plc v S*

Harrison Group Ltd [2011] EWHC 270 (Comm), para. 62). Being a provision which imposes a time limit on the making of Claims under the Tax Covenant, and thereby having the effect of extinguishing any otherwise existing cause of action if not complied with, any ambiguity should be resolved in favour of the Defendant, but that presupposes that there is a genuine ambiguity (*Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), para. 25(ii); *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128; [2016] 1 CLC 573, para. 18).

98. That said, the notification provision is based on the desirability of commercial certainty, in the application of and compliance with the provision (*Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, para. 91). The certainty finds resonance in allowing the receiving party to know to what Claim it is exposed and whether, in a case such as this, the funds held in escrow may be released (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 29). The benefit of commercial certainty, however, does not itself denote a strict, inflexible application of the provision (*National Shipping Co of Saudi Arabia v BP Oil Supply Co* [2011] EWCA Civ 1127; [2012] 1 Lloyd's Rep 18, para. 61, which concerned notification in the different context of a charterparty demurrage claim). In a provision such as that in paragraph 2.1(b) of Schedule 4, the need for flexibility is recognised by the obligation upon the notifying party only having to include in the notice a reasonable level of detail, but a notice bare of any meaningful detail would not suffice.

99. Each contractual provision must be interpreted having regard to the particular language, structure and context of the contract of which the provision forms a part (*RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm), at para. 10(i); *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), para. 23(i)). One must therefore be careful not to place too rigorous a reliance on the interpretation offered in other cases. Nevertheless, consideration of such earlier decisions can be instructive (*Teoco UK Ltd v Aircom Jersey 4 Ltd* [2018] EWCA Civ 23; [2018] BCC 339, para. 21), especially where the relevant contractual provision is in the same or substantially similar terms. This may well be on the assumption that those drafting the contract deliberately adopted a settled formulation into their own contract to achieve some certainty, taking into account such earlier authorities.

100. In construing the notification contained in the letter dated 24th June 2019, the Court must adopt similar principles of interpretation to the construction of a contract, having regard to what a reasonable recipient would have understood by the terms of the notification taking into account the actual knowledge of the Claimants or their representatives, in particular Mrs Login, Ms Kolbezen and Ms Šircelj (see *ROK plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm), para. 35; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 20). For the purpose of the current application, I am prepared to assume that Mrs Login, Ms Kolbezen and Ms Šircelj were aware of the matters which the Defendant alleges. Of course, if summary judgment is refused, the issue of their knowledge may have to be tried.

The validity of the notice in the letter dated 24th June 2019

101. The point of construction and law in this case is one which the Court is able to determine. It is not sufficiently complex or evolving to lead the Court to defer consideration of the issue until trial. Accordingly, it is a point which can be resolved

on a summary judgment application, subject to consideration of the issue concerning the knowledge of the Sellers' Representatives on which the Defendant relies. I address this issue below.

102. As Mr Hardwick QC observed, the "*key battleground*" concerned the question whether the letter dated 24th June 2019 provided reasonable detail of the "*matter which gives rise to the Claim*".

103. This is because it was common ground that the letter dated 24th June 2019 provided reasonable detail of the nature of the Claim.

104. As to whether reasonable detail of the amount of the claim (as far as reasonably practical) was required, the letter dated 24th June 2019 stated that "*The Buyer notes that the amount of any Tax Liability remains contingent on the outcome of the Tax Authority investigation and that it is not possible to quantify the potential Tax Liability or the Claims under the Tax Covenant at this stage*". There is no evidence before the Court that the Defendant was in fact in a position to quantify the Claim. At para. 44 of his first witness statement, Mr Lieberman stated that "*more could have been done by the Defendant to attempt to quantify any potential liability*", but little more was said. Mr Choo-Choy QC submitted that in that event the Defendant should have put forward its best estimate and to this extent relied on the decision of Cooke, J in *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 41.

105. The amount of the Claim is an important consideration, not least because if the Claim was for a sum which was less than US$50,000,000, the Sellers should not be deprived of the balance of the escrow amount. Nevertheless, if it is not possible to quantify the Claim, I do not see how the Defendant could be required to state more than was said in the letter dated 24th June 2019. In addition, paragraph 2.1(b) of Schedule 4 - unlike the notification clause in *Laminates Acquisition Co v BTR Australia Ltd* - qualified the obligation to identify the amount of the Claim with the words "*so far as reasonably practical*", meaning that if it was not reasonably practical to quantify the Claim, no amount need be stated in the notification. This is consistent with paragraph 12 of Schedule 4 which recognises that the Claimants' liability for a Claim might still be contingent and that the Claimants will not be liable "*unless and until the liability ... becomes capable of being quantified*".

106. The notification provision, therefore, does not require an estimate to be stated, no matter how rough it might be, in circumstances where it is not reasonably practical to identify the amount of the Claim. In that event, the absence of an estimate of itself would not render the notification in the letter dated 24th June 2019 invalid or non-compliant.

107. Therefore, the issue whether it was reasonably practical to quantify the Claim is a triable issue, meaning that the Defendant currently has a real prospect of success on this issue. I am not able to determine whether or not it was so reasonably practical. Therefore, the absence of any statement of amount of the Claim in the letter dated 24th June 2019 does not permit the Court to grant summary judgment on this ground.

108. The question remains whether the letter dated 24th June 2019 was compliant because it did not provide reasonable detail of the "*matter giving rise to the Claim*", the central subject of dispute between the parties.

109. In support of their defence that the letter dated 24th June 2019 contained sufficient detail of the "*matter giving rise to the Claim*", the Defendant's case is in essence that:

(1) The "*matter*" was the Tax Investigation into Ekip's transfer pricing practices.

(2) The letter dated 24th June 2019 identified that "*matter*" and provided a chronology of the key milestones in terms which were simple and clear. The meaning would have been obvious to a reasonable recipient.

(3) The knowledge of Mrs Login, Ms Kolbezen and Ms Šircelj meant that the Claimants would have understood what the "*matter*" was, because:

(a) They were kept apprised of the developments in the Tax Investigation.

(b) They were given access to the relevant documents, including all of KPMG's updates and Tax Authority notices, and were actively involved in strategy discussions and attended important meetings.

110. The Claimants' case is that the letter dated 24th June 2019 lacked reasonable detail of the "*matter giving rise to the Claim*", essentially for the following reasons:

(1) It was not the Tax Investigation itself which gives rise to any Tax Liability, but rather the underlying facts, events and circumstances that were the subject of the Tax Investigation. Accordingly, a simple reference to the Tax Investigation in the notification was not sufficient; paragraph 2.1(b) of Schedule 4 required the notification to contain reasonable detail of the underlying facts, events and circumstances giving rise to or which may in future give rise to any Tax Liability on the part of a Group Company.

(2) The letter dated 24th June 2019 provided no details of those underlying facts, events and circumstances, failing to give any details of any specific aspects or features of Ekip's transfer pricing practices during the relevant period, any specific transaction or transactions under investigation, or the value or range of values of the transactions under investigation or any other Group Company with which Ekip might have transacted.

(3) No detail was provided of the Event or Events occurring on or before Completion on 28th December 2016 in consequence of which, or details of the Income, Profits or Gains earned, accrued or received on or before the Completion Date or in respect of a period ending on or before the Completion Date in respect of which, any Tax Liability of a Group Company had arisen or might arise.

(4) As the Tax Investigation went beyond the Completion Date, it was incumbent on the Defendant to identify the relevant practices, transactions, Events which occurred, or Income, Profits or Gains which accrued, prior to that date.

(5) The letter dated 24th June 2019 was not a compliant notification, because it lacked reasonable detail, in fact any detail, of the matter giving rise to the Claim, relating to the Slovenian Tax Authority's challenge to the characterisation of Ekip as a low risk routine service provider that performed operational functions only, asserting that Ekip significantly contributed to the generation of intangible assets in the form of intellectual property, and its challenge to the cost mark-up in the transfer pricing of its transactions with other Group Companies.

111. In *Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, para 90-91, Stuart-Smith, LJ said that the notification clause in that case contemplated that "*the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint*" (see also *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376, para. 36). In that case, the notification provision was cast in slightly different terms, but I do not necessarily think that the framing of the notification must be so clear. I think it is merely a matter of interpreting the language of the notification on an objective basis and asking simply whether or not reasonable detail of the factors required to be notified have been notified.

112. In my judgment, on a fair reading of paragraph 2.1(b) of Schedule 4 of the SPA, the "*matter giving rise to the Claim*" refers to the facts, events or circumstances on which the Claim is based (i.e. the factual basis of the Claim). In other words, the notification must provide sufficient or reasonable detail of the circumstances on which the Defendant relies in support of or to make good its Claim. I reach this conclusion for the following reasons:

(1) The recipient of this notification would want to know, at least in general terms, the three cardinal elements of any enforceable contractual claim, the facts, events or circumstances giving rise to the claim (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 31(iii)), the identification of the cause of action (namely the contractual provisions which are alleged to be breached), and the amount of the claim; in other words, the factual basis, the legal basis and the quantum of the Claim.

(2) The words "*giving rise to*" indicate that the relevant fact or matter is one on the basis of which the Claim can be formulated. The Claim itself would not be based on the existence of a Tax Investigation, but on the factual reasons why a Tax Liability accruing before Completion has accrued or might accrue. As Gloster, J said in *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm), at para. 11, *"I would expect that, at least in general terms, the notice would explain why it had been breached, with at least some sort of particularisation of the facts upon which such an allegation was based".*

(3) The purpose of the notification is to inform the receiving party of what facts unearthed during the Tax Investigation are relied on by the notifying party in support of its Claim for breach of the Tax Covenant (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 45). That is, the Defendant must indicate by means of the notification what facts are relied on in support of the Claim and the allegation

that the Claimants are liable for breach of the Tax Covenant. It is not sufficient that the relevant facts relied on by the notifying party are to be inferred by the receiving party (*Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 22).

(4) The information in the notification must also allow the receiving party to determine, with the benefit of legal or tax advice, at least in general terms whether the facts as alleged in fact give rise to or might contingently give rise to liability for breach of the Tax Covenant. In particular, the receiving party will need to be in a position to assess, even if only on a preliminary basis, if it is or may well be liable under the Tax Covenant, taking into account for example whether the relevant Tax Liability arises in respect of Events, etc after the date of Completion or whether one of the exclusions referred to in paragraph 3 of Schedule 7 applies.

(5) The purpose of the notification is to enable the recipient party to deal with the Claim, whether it is by undertaking further investigations, seeking clarifications, participating or participating further in the Tax Investigation itself, notifying third parties (such as insurers, accountants or witnesses), accessing archived documents, obtaining legal or tax advice, and/or making an assessment of the Claim and inquiring into potential defences (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 30; *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm), para. 10(iii)). I do not consider that the sole purpose of the provision is to enable the receiving party to make financial provision for the notified claim and it follows that further information might be required to serve other purposes (cf. *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 19; *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] EWHC 1074 (Ch), para. 23(iii)). The provision of the facts, events or circumstances - in reasonable detail - would achieve the larger purpose of dealing with the Claim.

113. There is no ambiguity in this provision which requires resolution in favour of the Defendant.

114. The requirement of "*reasonable detail*" translates into an obligation of the notifying party to provide sufficient information so that the receiving party, acting reasonably, knows what matter (facts, events or circumstances) gives rise to the Claim being made or contingently made (as well as the nature of the Claim and, if reasonably practical, the amount of the Claim). It does not require any further detail or a higher degree of particularity, such as may be found in a pleading or written submission in legal proceedings (*Odebrecht Oil and Gas Services Ltd v North Sea Production Company Ltd* [1999] 2 All ER (Comm) 405; *ROK plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm), para. 67). If, however, the notice is uninformative or unclear so that the reasonable recipient is left in ignorance or uncertainty as to the nature, basis and (if reasonably practical) quantum of the Claim, it will not have served its purpose and will not be valid (*Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 19).

115. In my judgment, the letter dated 24th June 2019 did not give adequate notice in that it did not provide reasonable detail of "*the matter which give rise to such Claim*", because:

(1) There was no indication in the letter dated 24th June 2019 of the facts, events or circumstances giving rise to the Claim under the Tax Covenant. There was only a statement that the claims notified "*relate to an investigation by the Slovene Tax Authority ... into the transfer pricing practices of Ekipa2*". This is not a statement of the requisite details explaining the facts on the basis of which the Claim is made or contingently made. Such a statement is required by the notification clause.

(2) I do not consider that the reference to a Tax Investigation or a Tax Investigation into Ekip's "*transfer pricing practices*" by itself constitutes notification of the matter giving rise to the Claim. The mere existence of the Tax Investigation, without more, does not serve the purpose of informing the Claimants of the matter giving rise to the Claim. At best, the existence of the Tax Investigation reveals that a Claim might eventuate, but any reference to the Tax Investigation would not explain, or even identify, the basis of the Defendant's Claim. As Cooke, J said in *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, at para. 45:

> "*It was not for BTR to make judgments about the matter giving rise to the claim, the nature of the claim or the amount claimed - it was for Laminates to give notice with the required degree of specificity. What BTR might think, having received the subpoena and perhaps obtaining knowledge of disclosure of Formica's and other's Securities Filings is irrelevant when notice in writing was required with the specific elements to which paragraph 2 of Schedule 8 refers*."

(3) The letter dated 24th June 2019 did not identify what facts unearthed during the Tax Investigation were being relied on by the Defendant in support of its Claim for breach of the Tax Covenant. In presenting a Claim, the Defendant will have reviewed the Tax Investigation and will have formed (or at least would be expected to have formed) a view as to which of the facts emerging from the Tax Investigation it relied on in support of its Claim. Without any indication of what those facts were in the relevant notification, the Sellers would be none the wiser. Unless such facts were identified, the Sellers were not in a position, even in a general sense, to assess the prospects of liability for breach of the Tax Covenant (having regard to, for example, the temporal limits of or the exclusions applicable to the Tax Covenant) or otherwise to deal with it (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 43).

(4) If the letter dated 24th June 2019 were to provide reasonable detail of the facts, events or circumstances giving rise to the Claim for breach of the Tax Covenant, it should have provided details, for example, of the particular features of Ekip's transfer pricing practices during the relevant period or specific transactions, the Event or Events which occurred on or before

Completion in consequence of which, and/or any Income, Profits or Gains earned, accrued or received on or before Completion or in respect of a period ending on or before the Completion Date in respect of which, the Tax Liability of a Group Company has arisen or may arise in the future. Mr Choo-Choy QC suggested a number of matters which could have been referred to in the notification which could have given rise to the Defendants' Claim. There may well have been additional or other matters on which the Defendant relied in support of its Claim. There was no such information in the letter dated 24th June 2019.

(5) If asked on the basis of what general facts the Defendant's Claim was being made, a reasonable recipient reading the letter would say "*I am not certain*" or "*I do not know*".

The relevance of the knowledge of Mrs Login, Ms Kolbezen and Ms Šircelj

116. Mr Hardwick QC on behalf of the Defendant argued that the Claimants' Representatives, Mrs Login, Mr Kolbezen and Ms Šircelj, were aware of the Tax Investigation and that on receipt of the letter dated 24th June 2019 the Claimants would have been aware of the matter giving rise to the Claim under the Tax Covenant; it would have been obvious.

117. The issue about the Claimants' knowledge began, at least before the hearing, on an assumption by the Claimants that the Defendant was arguing that the requirement of a notice is rendered redundant if the subject-matter of the notice was already known to the Claimants. If such an argument had been advanced, I would have rejected it because of the express requirements of paragraph 2.1(b) of Schedule 4 of stating in reasonable detail the matter giving rise to the Claim. However, that was not the argument which the Defendant was advancing. The Defendant's case was and is that in order to interpret the letter dated 24th June 2019, the Court must take into account what the Claimants or their representatives knew. That is a thoroughly orthodox submission and has the benefit of being an accurate statement of the law (*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 29; *Teoco UK Ltd v Aircom Jersey 4 Lt*d [2016] EWHC 1074 (Ch), para. 25(iv)).

118. Mr Choo-Choy QC's response to this was that whatever knowledge the Claimants might have had about the Tax Investigation cannot supply and rectify the want of reasonable detail required by paragraph 2.1(b) of Schedule 4 of the SPA in the letter dated 24th June 2019.

119. In this case, the mere reference in the letter dated 24th June 2019 to the Tax Investigation into Ekip's transfer pricing practices does not import by reference the entirety of the Slovenian Tax Authority's comments and allegations, even if they were known to the Claimants' representatives, because paragraph 2.1(b) of Schedule 4 required the Defendant to state in reasonable detail the "*matter giving rise to the Claim*", meaning that whatever grounds are relied on by the Defendant must be set out in a written notification (*Senate Electrical Wholesalers v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, para. 84, 90-91; *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 45-46; *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), para. 22).

No such grounds were identified in the letter dated 24th June 2019. The recipient of the letter could reasonably expect that the notification would include some identification of the matters which were the subject of the Slovenian Tax Authority's notices or discussions with the Slovenian Tax Authority or even the strategy discussions between KPMG and the Sellers' Representatives, which were relied on by the Defendant in support of its Claim.

120. It might be said in response that the compendious reference to the fact that the Claim relates to "*an investigation by the Slovene Tax Authority ... into the transfer pricing practices of Ekipa2*" incorporates all such notices and discussions which were the subject of the Tax Investigation as the factual basis of the Claim (all of which was known to the Sellers' Representatives) and would have been understood as such by a reasonable recipient. However, that would not do, because there must be some indication in a compliant notification of how the Claim arises out of the facts identified. There was no such indication. A similar argument had been made and rejected in *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737, para. 45-46 and *Highwater Estates Ltd v Graybill* [2009] EWHC 1192 (QB), para. 41.

121. This case therefore stands in contrast to the facts in *Forrest v Glasser* [2006] EWCA Civ 1086; [2006] 2 Lloyd's Rep 392, where the buyers had particularised their potential claim in earlier correspondence between the purchasers and vendors prior to the notification. In the present case, there was no such prior correspondence whereby the Defendant had identified the factual basis of its Claim.

122. Accordingly, even on the assumption that the matters alleged to be known to Mrs Login, Ms Kolbezen and Ms Šircelj were in fact known, in particular knowledge of the exchanges between the Slovenian Tax Authority and KPMG, the letter dated 24th June 2019 did not state in reasonable detail the matter giving rise to the Claim sufficient to render the notification compliant with the requirements of paragraph 2.1(b) of Schedule 4 of the SPA.

Conclusion

123. For the reasons explained above, the Claimants are entitled to summary judgment in their favour on their Part 8 Claim, because, on the true construction of paragraph 2.1(b) of Schedule 4 of the SPA, the Defendant has no real prospect of successfully defending the claim, and there is no other compelling reason for the disposal of the case a trial.

124. I will discuss the form of the order to be made with counsel. I am grateful to both counsel for their excellent submissions.