Neutral Citation Number: [2021] EWCA Civ 638

Case No: A4/2020/1644

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Peter MacDonald Eggers QC sitting as a Deputy Judge of the High Court
[2020] EWHC 2101 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 May 2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

- -

Between :

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

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Mr Matthew Hardwick QC (instructed by **Clifford Chance LLP**) for **the Appellant**
Mr Alain Choo-Choy QC (instructed by **Taylor Wessing LLP**) for **the Respondents**

Hearing date: 29 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 7 May 2021

Lord Justice Nugee:

Introduction

1. This appeal concerns the question whether a notice given by the buyer under a sale and purchase agreement in relation to a potential claim under a tax covenant complied with the requirements of the agreement.

2. The Appellant, United Luck Group Holdings Ltd, is the Buyer under a Sale and Purchase Agreement dated 21 December 2016 (**"the SPA"**) of the issued share capital of an English company called Outfit7 Investments Ltd (**"Investments"**). There were numerous Sellers, a number of whom were also Warrantors. This includes the Respondents. The Warrantors gave the Appellant a Tax Covenant under which they agreed to pay an amount equal to any Tax Liability of a Group Company arising (in summary) from pre-completion matters.

3. It was a condition of the Appellant being able to claim under the Tax Covenant that it give written notice by 1 July 2019 to the Warrantors stating *"in reasonable detail"* various things, including *"the matter which gives rise to such Claim"*. On 24 June 2019 the Appellant, by letter from its solicitors Clifford Chance LLP (**"the 24 June letter"**), gave (or purported to give) such a notice referring to an investigation which had been launched by the Slovene tax authority into the transfer pricing practices of a Group Company called Ekipa2 d.o.o. (**"Ekipa2"**).

4. The question is whether the 24 June letter complied with the requirements of the SPA, and specifically whether it stated in reasonable detail the matter giving rise to such a claim. The Respondents brought these proceedings by way of Part 8 claim seeking a declaration that it did not, and sought summary judgment to that effect. The application was heard by Mr Peter MacDonald Eggers QC sitting as a Deputy Judge of the High Court (**"the Judge"**). By his judgment dated 30 July 2020 at [2020] EWHC 2102 (Comm) (**"the Judgment"** or **"Jmt"**) he upheld the Respondents' contentions and by his Order dated 9 September 2020 he granted them summary judgment declaring that the 24 June letter failed to comply with the requirements of the SPA and various consequential relief.

5. The Appellant appeals with permission granted by Males LJ on 23 November 2020.

Facts

6. The facts have not yet been found but they are mostly documented and with one exception, there was little dispute of fact identified before us. On the material we were shown they can be summarised as follows.

7. The SPA is dated 21 December 2016 and governed by English law. By it the Appellant agreed to purchase the issued share capital in Investments for the sum of US$1bn. Investments is a holding company for the Outfit7 Group. The Group's business is primarily the development of apps for mobile phones, including an app called Talking Tom which has been very successful. These are free to download but monetized through advertising and purchasable add-ons. Investments has a direct subsidiary called Outfit7 Ltd, which is incorporated in the UK but has a tax residence in Cyprus. Outfit7 Ltd in turn has a number of subsidiaries, including Ekipa2, a

company incorporated in, and tax resident in, Slovenia, where the original business was founded in 2009.

8. The business was founded by Samo and Iza Login, who are husband and wife. Before the sale, they had been Chief Executive Officer and Deputy Chief Executive Officer respectively and both had operational roles, Mrs Login being responsible for finances, legal department, marketing and licensing. Although there were numerous Sellers under the SPA (most with small holdings), over 60% of the shares were held by the 3rd Claimant, a Liechtenstein entity then called Izzas Establishment (now called Login Establishment), which is understood to be a vehicle for Mr and Mrs Login's interests; and under the SPA the Sellers appointed Mr and Mrs Login to act as Sellers' Representatives to deal with any matter as between the Appellant as Buyer and the Sellers.

9. A small number of the Sellers acted as Warrantors. This included the Respondents. As well as giving warranties in the usual way, by cl 10 and sch 7 the Warrantors gave a Tax Covenant, which, so far as material, was in the following terms (sch 7 para 2):

> "**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 Gains which were earned, accrued or received on or before Completion or in respect of a period ending on or before the Completion Date.
>
> (b) [concerns Tax Liability where another person is primarily liable]
>
> 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."

This contains a number of defined terms but it is not necessary to set out the definitions here and I will refer to them so far as appropriate below.

10. By sch 4 para 2 it was provided as follows:

> "**2 Time limits**
>
> 2.1 The rights of the Buyer in respect of:
>
> (a) [concerns Warranty Claims]
>
> (b) any Indemnity Claim or Claim under the Tax Covenant 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 before the Second Claims Escrow Release Date."

The Second Claims Escrow Release Date was 1 July 2019.

11. Completion took place on 28 December 2016. Under escrow arrangements, the detail of which it is not necessary to set out, $100m of the consideration was held in escrow in effect to meet claims among other things under the Tax Covenant (to be released in two tranches, each of $50m, on pre-agreed dates). It is common ground between the parties that the effect of para 2.1(b) of sch 4 is to create a condition precedent to any liability under the Tax Covenant, with the practical consequence that if the Appellant has duly given a notice which complies with the requirements of para 2.1(b), the second $50m tranche will remain held in escrow, but if it has not, it will be released to the Sellers.

12. From July 2018 the Slovene tax authority (Finančna uprava Republike Slovenije or in translation the Financial Administration of the Republic of Slovenia) (**"the Tax Authority"**) conducted an investigation into Ekipa2. Mr Matthew Hardwick QC, who appeared for the Appellant, took us in some detail through the course of the investigation between 23 July 2018 when it was launched to 24 June 2019 when the 24 June letter was written. It is not necessary for the purposes of this judgment to set it all out, but it can be summarised as follows:

    (1) On 23 July 2018 the Tax Authority formally decided to conduct a tax inspection of Ekipa2, the subject-matter of the investigation being Ekipa2's corporate tax for the period 1 January 2015 to 31 December 2017.

    (2) In September 2018 the Tax Authority indicated that it required documentation relating to transfer pricing.

    (3) In October 2018 Ekipa2 retained a Slovene KPMG firm (**"KPMG"**) to act for it in the investigation, and in December 2018 KPMG submitted an analysis of Ekipa2's transfer pricing to the Tax Authority. This indicated that Ekipa2 provided services (initially software development but later broadened to include other services) almost exclusively to Group companies, and did so on the basis of a 15% uplift on costs; KPMG concluded that Ekipa2 should be classified as a low risk routine service provider and that on that basis the transfer prices it charged were compliant with the arm's length principle.

    (4) In February 2019 KPMG submitted further material in response to a request from the Tax Authority.

    (5) In March 2019 the Tax Authority decided to extend the investigation to cover the calendar years 2013 and 2014. The formal decision letter included the following:

> "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."

(6) KPMG requested access to the Tax Authority's file. That was granted and the inspection took place at a meeting on 5 April 2019. The file did not however contain any documents not already in Ekipa2's possession. KPMG also asked to be informed of relevant facts and evidence in the tax inspection. That led to the Tax Authority supplying an Official Note on 19 April 2019. This included the following:

> "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."

(7) KPMG took the view that that was not very informative and on 26 April 2019 filed a request for further clarification, but on 14 May 2019 they were told by the tax inspectors that they would not be responding to the request as they had told KPMG everything at the meeting and provided them with a fairly detailed notice.

(8) On 23 May 2019 KPMG filed a second request for facts and evidence; and on 13 June 2019 an appeal was lodged by lawyers acting for Ekipa2.

(9) On 20 June 2019 the Tax Authority required provision of further documentation. In its letter the Tax Authority made the point that it was inaccurate to suggest that it had reached any specific conclusions; the investigation was still ongoing and no factual or legal conclusions had been

made.

That was how matters stood at 24 June 2019 when the 24 June letter was sent.

13. Mr Hardwick also showed us evidence that from an early stage in the investigation Mrs Login was kept informed of its progress, being copied into the documents submitted, and appointing first a Ms Melita Kolbezen (who had been the Group's licensing expert at the relevant time), and then a Ms Mojca Šircelj (who was the former head of the Tax Authority), to represent her and her husband's interests. I need not trace the detail of their involvement as Mr Alain Choo-Choy QC, who appeared for the Respondents, accepted that it should be assumed for summary judgment purposes that the Respondents had full knowledge of the course of the investigation. He made it clear that if the matter went to trial, the questions both as to what knowledge Mrs Login and her representatives did have, and whether that was to be attributed to (all) the Respondents, would give rise to triable issues; but for summary judgment purposes we are asked to assume that the Respondents had such knowledge.

14. On 24 June 2019 the Appellant by its solicitors Clifford Chance LLP sent the 24 June letter to each of the Warrantors, including the Respondents. After referring to the SPA it said:

> "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."

It then set out, under the heading "Tax Authority Claim" a brief chronology of the Tax Authority investigation. I need not set it all out. The only references to the substance of the investigation were as follows:

> "A. The Tax Authority instituted an investigation into Ekip's transfer pricing practices for the period 2015 to 2017.
>
> …
>
> 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."

Otherwise it simply refers to the appointment of KPMG, the submission by KPMG of information on the request of the Tax Authority, the fact that the investigation remained ongoing and the fact that the Tax Authority had declined to issue a statement of motivation for its investigation. Then after setting out the Tax Covenant it continued:

> "**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."

I need not set out any more of the letter.

The Judgment

15. On 3 December 2019 the Respondents issued a Part 8 claim form claiming a declaration that the 24 June letter failed to comply with the requirements of para 2.1(b) of sch 4 of the SPA in that it both failed to give reasonable details of the matter giving rise to the claim and also failed to set out, in so far as reasonably practical, the amount claimed, and on 4 February 2020 they applied for summary judgment. The application was heard by the Judge on 11 June 2020 and he handed down the Judgment on 30 July 2020.

16. After having referred to the facts, the parties' submissions and a number of authorities where similar clauses have been considered, the Judge began his decision at [90] of the Judgment. At [103] he recorded that it was common ground that the 24 June letter provided reasonable detail of *"the nature of the Claim"*. At [104]-[107] he considered the question whether it provided reasonable detail of the amount claimed. That turned on whether it was reasonably practical to quantify the claim, and he concluded that he was not in a position to determine whether it was or not. There was therefore a triable issue and summary judgment could not be given on this ground (Jmt at [107]). There has been no challenge before us to this conclusion.

17. At [108]-[115] he then considered whether the 24 June letter gave reasonable details of the matter giving rise to the claim. At [112] he concluded that the *"matter"* was not, as the Defendant (ie the Appellant) suggested, the tax investigation, but the underlying facts, events or circumstances on which the claim was based. At [115] he concluded that the 24 June letter did not give reasonable detail of these matters, as follows:

> "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[s] 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"*."

18. He therefore concluded that the Claimants were entitled to summary judgment (Jmt at [123]) and by his subsequent Order dated 9 September 2020 made declarations that the 24 June letter failed to comply with the requirements of para 2.1(b) of sch 4 to the SPA as a result of failing to provide reasonable details of the matter which gave rise to the claim, and that the Defendant was required to take steps to release the sums in escrow, subject to a stay which he granted pending any appeal.

Grounds of Appeal

19. The Appellant advances four Grounds of Appeal, which can be summarised as follows:

(1) The Judge erred in concluding at Jmt [115(5)] that the reasonable recipient would say he was uncertain or did not know; the reasonable recipient, with knowledge of the tax investigation, would have known precisely what the letter was referring to.

(2) The purpose of notification was served by the 24 June letter.

(3) There was no failure to identify facts unearthed during the tax investigation.

(4) Adequate details were given of the *"matter giving rise to such Claim"*, not least because that was the tax investigation, and sufficient details of that were given.

20. These Grounds of Appeal are structured to address each of the Judge's reasons for his conclusion in Jmt [115]. But I think the issues raised by the appeal can more simply be addressed by considering two questions:

(1) What is the *"matter which gives rise to such Claim"*? Although this forms part of the Appellant's Ground 4, it logically comes first as until the *"matter"* has been identified, one cannot sensibly consider whether reasonable details have been given of it.

(2) Did the 24 June letter state that matter *"in reasonable detail"*?

What was the "matter" giving rise to the Claim?

21. The choice here is between (i) the underlying events, facts or circumstances (as the Judge held at Jmt [112] and as Mr Choo-Choy submitted) or (ii) the fact of the tax investigation, as Mr Hardwick submitted as part of his argument under Ground 4. In my judgment, the Judge was right on this point.

22. I can state my reasons quite shortly. *"Claim"* is a defined term. It is defined to include *"a claim, action, proceeding or demand under or pursuant to this agreement"*. In the present context it means a claim under the Tax Covenant. A claim under the Tax Covenant is necessarily a claim that the Warrantors are liable to pay an amount under either para 2.1 or para 2.2 of sch 7 to the SPA, and since there can be no liability for costs and expenses under para 2.2 unless there is a successful claim under the schedule, that means that there must be a liability under para 2.1. For present purposes para 2.1(b) can be ignored as it is not suggested that this is a case of secondary liability, and the 24 June letter only relies on para 2.1(a) (and para 2.2). For there to be a claim on the covenant in para 2.1(a) there must be a Tax Liability that has arisen or arises either (i) in consequence of an Event which occurred before Completion or (ii) in respect of any Income, Profits or Gains which were earned, accrued or received on or before Completion.

23. In those circumstances it seems to me to be plain that the *"matter which gives rise to"* a claim under the Tax Covenant is a reference to the underlying pre-Completion facts giving rise to a Tax Liability. There must either have been an Event before Completion (Event being defined in wide terms to mean any *"event, transaction … action or omission"*) or there must have been Income, Profits or Gains earned, accrued or received for a pre-Completion period. That is the factual basis for the claim under the covenant, and it is that which *"gives rise to such Claim"*, and the *"matter"* of which details must be given in the written notice.

24. There was some discussion at the hearing of what it would be essential to plead in a statement of case alleging a claim under the Tax Covenant. That would no doubt depend (see below) but it is difficult to see that it would ever be possible to plead such a claim if it did not set out the underlying factual matters which were alleged either to constitute a pre-Completion Event which gave rise to a Tax Liability, or to mean that there were Income, Profits or Gains for a pre-Completion period which gave rise to a Tax Liability.

25. Mr Hardwick submitted that one would also have to plead the course of the tax investigation. I can see that that might be so, or at any rate that it might be necessary to plead the outcome of the investigation. It would undoubtedly be necessary to aver that the relevant matters had given rise to a Tax Liability. By para 1.2 of sch 7, references to Tax Liability include a liability of a Group Company to make payments of Tax (in which case the amount of the Tax Liability is the amount of Tax payable); and by para 1.1 Tax is defined to mean any form of tax *"collected, or assessed by, or payable to, a Tax Authority … together with all related fines, penalties, interest, charges and surcharges."* It might be possible in some circumstances to plead that there was *"tax … payable"*, and hence a Tax Liability, without reference to any investigation at all; but if the tax payable depended on an assessment by the Tax Authority, or if it included penalties or interest, it would be necessary to plead the assessment, or the circumstances giving rise to the liability for penalties and interest, as the case may be. Depending on the terms of the relevant tax legislation, that might very well require the investigation to be pleaded, or at any rate the outcome of it.

26. But it is unnecessary to consider these points further. Mr Hardwick may well be right that the *"matter which gives rise to a Claim"* in the present case included the fact that the Tax Authority had decided to investigate Ekipa2's tax affairs. But it does not follow that it is confined to that and for reasons I have already given I do not think it

can be. What gives rise to the Tax Liability is not the mere fact that there has been an investigation, but the underlying matters that took place before Completion, that is the transfer pricing practices adopted by Ekipa2. As the Judge put it (Jmt at [112(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."

27. I agree and I would dismiss Ground 4 of the appeal insofar as it relies on the *"matter"* being solely the fact of the tax investigation.

Was the matter stated "in reasonable detail"?

28. I have not found this question so straightforward. The 24 June letter does not say very much about the underlying facts giving rise to the potential tax liability. As set out above (paragraph 14) it referred to an investigation by the Tax Authority *"into the transfer pricing practices of [Ekipa2]"*, at paragraph A. to the investigation *"into [Ekipa2's] transfer pricing practices for the period 2015 to 2017"*, and at paragraph D. to the Tax Authority having extended its investigation *"to cover [Ekipa2's] transfer pricing practices for the period 2013 and 2014."* No further detail was given of the underlying matters.

29. Mr Choo-Choy said that the obligation to state the matter in reasonable detail required more than that. His submission was that a compliant notice would have set out the following:

    (1) What Ekipa2 had in fact done. This would include reference to the fact that its transfer pricing, consisting of a 15% mark-up, had been based on the assertion or assumption that it was a low-risk service provider across its entire services, and that it did not itself contribute to the creation of intellectual property rights or engage in entrepreneurial activity.

    (2) The position of the Tax Authority. This would have referred to the fact that the Tax Authority, in the light of the documentation provided, had taken the position that Ekipa2 was not just a provider of operational services but a joint contributor to the generation of the intellectual property which was the central asset of the Group.

30. In answer to a question from Popplewell LJ as to how such a notice would make the Respondents better off, Mr Choo-Choy accepted that on the facts of this case (as they are assumed to be at this stage, that is that Mrs Login and her representatives had full knowledge of the details of the tax investigation, and that such knowledge could be attributed to all the Respondents) he could not think how it would have made any difference to the Respondents. But he said that that was not the point. Notification clauses of this type served a particular purpose and whether that had any practical impact in a particular case did not affect what such a clause required.

31. I agree that in principle the terms of such a clause have to be complied with, whether or not it is possible to say in any particular case that this serves any purpose. But the

acceptance by Mr Choo-Choy that it would have served no useful purpose for the 24 June letter to have included the matters he said it should have done does invite careful scrutiny as to whether this was really required. If he is right, the letter fails to qualify as a compliant notice for failing to spell out what both parties already knew in full detail. Since the purpose of such a notice is *prima facie* to provide information to the Warrantors, that is a conclusion that I think we should be slow to reach. It would mean that the 24 June letter was a non-compliant notice not because it failed to inform the Warrantors of anything that they needed to know, but because it failed to go through the ritual of setting out things that they already knew.

32. Mr Choo-Choy submitted that the existing knowledge of the recipient of a notice could not affect the question whether the notice contained what it should contain. He said that whereas the *construction* of a unilateral contractual notice can be affected by the knowledge of the recipient (see the very well-known case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (***"Mannai"***)), the same was not the case when considering the question of *compliance* of a notice with the contractual requirements. He pointed out that Lord Steyn had said in *Mannai* at 767D:

> "This is not a case of a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information."

The clear implication from that is that if a contract does prescribe that certain information must be included, a notice which fails to do so will be invalid and it will be no answer to say that the recipient already knew it.

33. That I accept. Suppose for example a contract which entitled one party to give a notice in relation to one of several properties. If such a contract required the notice to specify the address and postcode of the property concerned, a failure to give the address and postcode in the notice would no doubt mean that the notice was not compliant, however much the recipient knew the address and postcode already. But if the contract did not require this, but merely required the notice to identify which property the notice was being given in relation to, then it might well be sufficient to refer to the property by name, or description, even in quite vague terms such as *"the London property"* or *"the premises I hold of you"*. On the authority of *Mannai* these would be sufficient to identify the property concerned if the reasonable recipient, circumstanced as the actual parties were, could be left in no doubt what property was being referred to.

34. So although I accept that the question of construction of a unilateral notice and the question of compliance of such a notice with contractual requirements are in principle different questions, I do not accept Mr Choo-Choy's submission that there is always a sharp distinction between the two, such that on the question of construction the knowledge of the recipient can be relevant but on the question of compliance such knowledge is irrelevant. *Mannai* shows that the information conveyed by a unilateral notice to the reasonable recipient is in principle capable of being affected by the background context, and that includes the knowledge that the actual recipient has; and such knowledge seems to me to be in principle capable of being relevant not only to the question of construction but to the question of compliance.

35. In the present case the SPA does not specify precisely what information the notice needs to contain; it simply requires the notice to state things *"in reasonable detail"*. What is reasonable must depend on all the circumstances. In my view those circumstances must include in particular what is already known to the recipient. Let me take an example. Mr Choo-Choy said that the 24 June letter should have referred to the fact that Ekipa2 charged a mark-up of 15% in its transfer pricing arrangements. But (on the assumed facts) the Respondents already knew that perfectly well. So when the 24 June letter referred to *"the transfer pricing practices of [Ekipa2]"* the Respondents knew what those practices were, including the fact that they involved a 15% mark-up. Was this a detail that was reasonably required to be included in the circumstances? I do not think it was. Adding it into the 24 June letter would not have conveyed any new or different information to the Respondents, or identify anything they could not identify for themselves. It might be different if any of the Respondents did not know what Ekipa2's transfer pricing practices had been in the relevant period. In that case there might be a much stronger case that the requirement to state the matter giving rise to the claim in reasonable detail required an explanation of Ekipa2's practices; but to require it in circumstances where the Respondents already knew exactly what they were seems to me to elevate the requirement to state matters in reasonable detail into empty formalism.

36. What then of the submission that the 24 June letter should have given more explanation of the position of the Tax Authority? Mr Choo-Choy said that what the notice was required to explain was not just what Ekipa2's transfer pricing practices were but what was wrong with them, as it was that that gave rise, or might, depending on the outcome of the investigation, give rise, to a Tax Liability. He accepted that the Tax Authority had made it clear on 20 June 2019 that it had not reached any final conclusions (see paragraph 12(9) above), but said that was nothing to the point. He placed particular reliance on the Official Note of 19 April 2019 (paragraph 12(6) above) which indicated that the basis on which a claim might arise was that:

> "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".

Those were details, he said, which should have been included.

37. I have not found this question entirely easy. Reading the 24 June letter as a whole, with its reference to the Tax Authority's investigation into Ekipa2's transfer pricing practices and its claim for the amount of any Tax Liability that the Tax Authority might impose following its investigation, I think the letter sufficiently conveys the information (even to a recipient who knew nothing of the course of the investigation) that the Tax Authority was investigating whether the prices charged by Ekipa2 for the services it provided other Group companies were inappropriately low, and might impose a Tax Liability if it concluded that they were.

38. The remaining information is why the Tax Authority took the view that the prices charged might be too low. It is fair to say that the 24 June letter does not really give any information about that at all. The question is whether it needed to in order to

satisfy the requirement to state the matter in reasonable detail. What is reasonable must, as I have said, depend on all the circumstances. That includes in the present case the (assumed) fact that the Respondents knew all about the details of the course of the investigation, including the fact that the Tax Authority had declined to give chapter and verse for its suspicions that the transfer pricing adopted by Ekipa2 was inappropriately low, and indeed had several times resisted KPMG's attempts to obtain any further detail. I admit to having real doubts about this, but I understand that the Vice-President and Popplewell LJ are both of the view that in those circumstances it was unnecessary for the 24 June letter to say more than it did, and I am, with some hesitation, persuaded that that is the better view. It was in effect inevitable, given the basis on which Ekipa2 justified charging the prices it did as a low risk service provider, that the Tax Authority's challenge to that must be based, at a high level of generality, on the suggestion that Ekipa2 played a more valuable role in the Group's business of developing valuable intellectual property rights than that would suggest, and where the Respondents are assumed to have actually known that to be the case, I conclude that the letter did not need to contain any more detail than it did.

39. In my judgment therefore the 24 June letter did state the matter giving rise to the Claim in reasonable detail. In the light of that conclusion it is not necessary to address the specific Grounds of Appeal. Nor have I found it necessary to consider the authorities. We were shown a number of decisions, mostly at first instance, in which similar clauses have been considered, but none of them seemed to me to be determinative of the points raised in the present case.

40. In those circumstances I would allow the appeal, set aside the Judge's Order and dismiss the application for summary judgment.

Lord Justice Popplewell:

41. I agree that the appeal should be allowed for the reasons given by Nugee LJ. I add a brief concurring judgment to explain in my own words why I have reached that conclusion with less hesitation than he.

42. For the reasons explained by Nugee LJ, I agree that the *"matter which gives rise to such claim"* comprises the facts and circumstances which would or might give rise to the tax liability. The 24 June letter would reasonably have been understood by a recipient who was wholly unfamiliar with the investigation by the Tax Authority, or of Ekipa2's business practices, as advancing a claim on the basis that Ekipa2 would or might be held liable by the Tax Authority to pay unpaid tax, which was a liability which arose from the inappropriate application of its transfer pricing practices to transactions for goods or services between it and other companies within the group. Mr Choo-Choy suggested that *"transfer pricing practices"* was confined to meaning simply the methodology employed. In my view it would reasonably be understood by any recipient of the 24 June letter as including the application of that methodology in a way which had resulted in an underpayment of tax.

43. That is an identification of the matter giving rise to the claim, albeit at a high level of generality. The question is whether it includes sufficient detail to amount to *"reasonable detail"*. There are three particular aspects of the present case which, in combination, persuade me that it does in the context in which the 24 June letter was sent.

44. First, the level of further detail available, although greater than that contained in the 24 June letter, was still at a high level of generality. In substance what Mr Choo-Choy submitted was missing was (a) detail of the transfer pricing methodology used by Ekipa2 and (b) the criticism by the Tax Authority that the use of that methodology was inappropriate because it was falsely based on Ekipa2 occupying a routine operational role, whereas Ekipa2 was involved in the development of the intangible assets of the group in the form of the intellectual property, and it contributed to the generation of such assets as one of its main activities. The Tax Authority had not identified which transactions suffered from this erroneous treatment, or what aspect of Ekipa2's business rendered this categorisation of its role a false one. It had not identified any facts or documents on which it based the criticism that the role claimed by Ekipa2 was a false one. It was not suggested by Mr Choo-Choy that the Appellants should have provided a level of detail which was greater than that which had been identified by the Tax Authority. There is no doubt that the additional detail which had been so identified could have been included in the letter, either by way of summary, or incorporation by reference to other documents. However, this additional available detail was of a generic and limited nature.

45. Secondly, this additional detail was known to the Respondents, or rather must be assumed to have been known to them for the purposes of the present argument arising on a summary judgment application. I would not, therefore, answer the question posed by the Judge in paragraph 115(5) in the same way as he did. A reasonable recipient with the (assumed) knowledge of both parties, if asked *"on the basis of what general facts is the claim being made?"*, would answer that he *did* know that it included the limited additional detail which it is suggested was necessary. It included what Ekipa2's transfer pricing practices were, and which were put before the Tax Authority in the form of KPMG's reports; and the generic criticisms made by the Tax Authority of Ekipa2's claimed role within the group which were being relied on as rendering the methodology inappropriate so as to result in underpayment of tax, insofar as such criticisms had been identified in the relatively few documents or oral communications from the Tax Authority which addressed them, including in particular the Official Note of 19 April 2019 on which Mr Choo-Choy placed especial reliance. To the extent that the hypothetical recipient with the Respondent's (assumed) knowledge would have remained ignorant or uncertain beyond that additional level of detail, the ignorance or uncertainty was the result of the generic nature of the criticisms which had thereto been expressed by the Tax Authority, not a failure by the Appellants to provide "reasonable detail", being detail which was unavailable to them.

46. Thirdly, and as a result of the first two aspects, it would have served no commercial purpose to have set out in the 24 June letter the further limited and generic detail available. The purpose of a notice clause such as that in schedule 4 para 2(b) of the SPA is to enable the recipient to make such inquiries as it is able, and would wish, to make into the factual circumstances giving rise to the claim, with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; to participate in the tax investigation to the extent desirable or possible with a view to influencing the outcome; and to take into account the nature and scope of the claim in its future business dealings, whether by way of formal reserving or a more general assessment of the potential liability. As Mr Choo-Choy accepted, the additional detail available, if included in the 24 June letter, would not have advanced any of these

purposes. I balk at a conclusion that the level of detail provided in a notice of this sort fell short of what was required as reasonable, that is to say was unreasonably deficient, when the additional level of detail said to have been required would not have furthered any of the commercial purposes for giving such a notice. What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable.

Lord Justice Underhill:

47. I agree that this appeal should be allowed for the reasons given by Nugee LJ, save that, as he says, I felt no real hesitation about the aspect which he considers at paragraph 38 of his judgment. As to that, I respectfully agree with Popplewell LJ's judgment.