Case No: CL-2015-000912

Neutral Citation Number: [2017] EWHC 2330 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
7 Rolls Buildings, Fetter Lane
London EC4A 1NL

Thursday, 27 July 2017

BEFORE:

MR JUSTICE LEGGATT

BETWEEN:

TOWERGATE FINANCIAL (GROUP) LTD & OTHERS

Claimants

- and -

CLARK AND OTHERS

Defendants

JOANNA SMITH QC (instructed by Freeths Solicitors) and **MATTHEW HODGSON** (instructed by Lennons Solicitors) appeared on behalf of the **Claimants**
CHRISTOPHER BUTCHER QC and **GEORGE SPALTON** (instructed by BLM) appeared on behalf of the **Defendants**

JUDGMENT

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(Official Shorthand Writers to the Court)

1. MR JUSTICE LEGGATT: In this action the claimants are seeking a declaration that they are entitled to be indemnified against certain liabilities for professional negligence pursuant to an indemnity provision in a share purchase agreement. The defendants have applied for summary judgment on the ground that the claimants have failed to comply with a notice provision in the agreement with the result that they have no contractual right to make this claim.

2. The share purchase agreement is dated 5 August 2008 and was for the sale by the fifth and sixth defendants, Mr Hopkinson and Mr Howard, as trustees of certain trusts, to the claimants, as purchasers, of the entire issued share capital of M2 Holdings Limited, a company which provides financial services. The first and second defendants are Mr Hopkinson and Mr Howard in their personal capacities, and the second and fourth defendants are their wives. Those defendants were parties to the share purchase agreement for the purpose of giving indemnities under it.

3. The Hopkinson defendants and the Howard defendants are separately represented but they have joined forces today in making parallel summary judgment applications. The Howard defendants are represented by Ms Smith QC who has taken the lead in making oral submissions on the defendants' behalf. Mr Hobson has redeemed himself for the excessive length of his skeleton argument by the succinctness of his oral submissions.

4. The claim against the defendants is made under clause 5.9 of the share purchase agreement. That provides:

> "The vendors and their respective spouses undertake to indemnify the purchaser and/or the Group in full against all losses, liabilities, costs and expenses which the Group or the purchaser may suffer as a result of, or in connection with, any claim or claims for professional negligence including, but not limited to, claims or complaints arising from misselling."

5. The claim which the claimants are seeking to make in this action under that provision arises out of two reviews which are being conducted by the FCA under section 166 of the Financial Services and Markets Act, known as Skilled Person Reviews. They are, first, a review of advice given in relation to so-called enhanced transfer value schemes which resulted in clients of the business transferring their benefits out of defined benefit schemes during the period between 1 December 2001 and 29 January 2014. The second review relates to the promotion and sale of unregulated collective investment schemes and other unregulated schemes between 1 December 2001 and 31 December 2013. It will be apparent that both these reviews include within their scope sales made during the period before the sale purchase agreement was completed.

6. Clause 5.9 is part of a larger clause which is headed "Warranties and indemnities". That clause also contains, at clause 5.1, a warranty given by the vendors to the claimants that various statements set out in certain parts of schedules to the agreement were true and accurate.

7. The agreement, as in the case of many agreements of this kind, is elaborately drafted and contains an extensive definition section in clause 1. Amongst many other defined terms, the term "Warranties" is defined to mean "Share warranties and tax warranties". “Share warranties” and “tax warranties” are themselves defined terms, and are defined to mean warranties which are set out in relevant parts of the agreement.

8. The term "Claim" is also a defined term and is defined to mean "a warranty claim and/or a tax claim". A “warranty claim” is defined to mean "a claim for breach of any of the warranties", and a “tax claim” means "a claim under the tax warranties". It follows that the term “Claim”, as is it defined in the agreement, where it begins with a capital letter means a claim for breach either of the share warranties or the tax warranties and does not encompass other kinds of claim under the agreement.

9. Those other kinds of claim include a claim under the indemnity provision, clause 5.9. The distinction between claims for breach of warranty and liabilities under the indemnity provision runs through the agreement.

10. Clauses 5.10, 5.11 and 5.12 are all clauses which relate to the liability of the vendors and their respective spouses under the indemnity given in clause 5.9. Thus, clause 5.10 sets certain limits to those liabilities. Clause 5.11 provides that there will be no liability under clause 5.9 to the extent that certain matters have or have not been complied with. One of those matters, mentioned at 5.11.3, is where "liability arises or is increased by an involuntary act after completion or by any failure to comply with clause 5.12".

11. Clause 5.12 is in the following terms:

> “Each of the persons giving the indemnity in clause 5.9 should be entitled to require the Purchaser or the Group at the expense of such person(s) to take all steps or proceedings as such person(s) may consider necessary in order to avoid, dispute, resist, mitigate, compromise, defend or appeal against any relevant claim which will if successful give rise to liability under clause 5.9 and the Purchaser shall act or shall procure that the Group shall act in accordance with any such requirements subject to the Purchaser and/or the Group being indemnified by such person(s) to the reasonable satisfaction of the Purchaser against all reasonable costs and expenses reasonably and properly incurred or to be incurred in connection with the taking of such steps or proceeding. To enable such person(s) to decide what steps or proceedings should be taken, the Purchaser shall disclose in writing to the Vendors and their respective spouses all relevant information and documents relating to any claim or prospective liability and give such persons and their professional advisers reasonable access during normal working hours to the personnel of the Group and to any relevant documents and records within its power and (if such person(s) so request) delegate entirely to them the conduct of any proceedings. Without limiting the above, neither the Purchaser nor the Groups shall make any admission of liability, agreement or compromise with any person, body or authority in relation to any claim which would or could give rise to liability under the indemnity in clause 5.9 without prior

> consultation with the vendors PROVIDED THAT neither the Purchaser nor the Group shall be required to take any action or pursue any claims to enforce recovery of any sums which would or could be expected in the reasonable opinion of the Purchaser to damage the goodwill of the Purchaser or the Group."

12. Clause 6 of the share purchase agreement is headed "Limitation on liability". That clause includes within it, amongst other things, at clause 6.5, "Limits on the liability of the vendors for Claims" – that is to say, limits on the liability of the vendors for claims for breach of any of the warranties – "or for a claim under the tax covenant". [**check**] That provision, as I read the agreement, is a counterpart in relation to warranty claims and claims under the tax covenant to clause 5.10, which establishes limits of liability in relation to the indemnity provision.

13. Clause 6.7 is the clause at the centre of today's argument and states as follows:

> "The Purchaser shall not make any claim against the Warrantors nor shall the Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing (specifying the details and circumstances giving rise to the Claim or Claims and an estimate in good faith of the total amount of such Claim or Claims) is given to all the Warrantors as soon as possible and in any event prior to:
>
> 6.7.1 the seventh anniversary of the date of this Agreement in the case of any Claim solely in relation to the Taxation Covenant;
>
> 6.7.2 the date two years from the Completion Date in the case of any other Claim; and
>
> 6.7.3 in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."

14. Also relied on in argument is clause 6.8, which reads as follows:

> "The liability of the Warrantors in relation to any Claim shall absolutely terminate (if that Claim has not previously been withdrawn, satisfied or settled) if legal proceedings in respect of that Claim containing full particulars of the nature and extent of it shall not have been properly issued and validly served on each Warrantors within nine months of the date of service of any notice under clause 6.7 PROVIDED THAT where the Claim in question relates to a contingent Liability such Claim shall not be deemed to have been withdrawn hereunder until the second anniversary of such Liability ceasing to be a contingent Liability."

15. Clause 6.7 refers in clause 6.7.3 to the seventh anniversary of the date of the agreement. That anniversary fell on 5 August 2015. Shortly before that date, the claimants sent a letter dated 29 July 2015 which they maintain was an effective notice, in accordance with clause 6.7, in relation to a claim under the indemnity in clause 5.9

to be indemnified in connection with liabilities which may in future accrue through the Skilled Person Reviews.

16. The defendants dispute the validity of the notice on two grounds. First, they submit that the notice was premature because no relevant claim under the indemnity in clause 5.9 could have been made at the time when the letter dated 29 July 2015 was sent. In those circumstances, they say, clause 6.7 did not permit the claimants to give notice of such a claim. Secondly, the defendants argue that the letter was not sufficiently specific to constitute a valid notice for the purpose of clause 6.7. I will not read out the letter dated 29 July 2015, but it is apparent from the terms of the letter that at the time when it was sent the claimants were not in a position to give details of any individual liabilities to third parties or claims by third parties for which they wished to seek an indemnity. The letter refers to claims that "are likely to arise from business which was transacted by M2" and to redress payments that are likely to be made or to require to be made in response to such claims.

17. The issues raised are therefore whether the claimants were entitled to give notice under clause 6.7 at the stage when they did and whether they have done so. Those issues depend on the correct interpretation of clause 6.7.

18. I was shown by Ms Smith QC this morning a number of authorities in which courts have considered the meaning of notice provisions in differently worded share purchase agreements. Interesting as those authorities were, consideration of them seemed to me only to confirm the validity of the statement made by Ward LJ in one of those cases called *Forrest & Ors v Glasser & Anor* [2006] 2 Lloyds Rep 392 at 398, where he said:

> "The only true principle to be derived from these authorities is the first proposition which Gloster J distilled from them in *RWE Nukem Ltd v AEA Technology Plc* [2005] EWHC 78 namely that 'Every notification clause turns on its own individual wording'."

19. Coming to the wording of this particular notification clause, clause 6.7, one question which has been debated is whether the word "Claim" where it appears in the main body of the clause has properly been given an initial capital letter and is therefore intended to be used in the sense in which the term "Claim" is defined in clause 1 of the agreement; or whether, as the defendants contend, the term "Claim" in this context should be interpreted as though the initial letter had been in lower case. The significance of this point is that, if "Claim" is being used in the defined sense, then the words in brackets in the main body of clause 6.7 apply only to warranty claims and tax claims and do not apply to a claim under the indemnity in clause 5.9, which is the kind of claim with which the notice here was concerned.

20. In answering this question, the starting point, as it seems to me, is that the court should assume, unless driven to a contrary conclusion, that parties who have entered into a professionally drafted agreement in which terms have been elaborately defined intend to use such terms in accordance with the definitions given.

21. The defendants point out that clause 1 says at the start that the following words and expressions shall, "Except where the context otherwise requires, have the following meanings". However, it is common ground that a court should only interpret a defined term as having a different meaning where it is required to do so. It seems to me, as I say, that that is not a conclusion which the court should come to lightly in construing an agreement of this type. The court should respect the freedom of the parties to define terms and should assume that they have used those terms in the manner defined.

22. That expectation is reinforced in this particular case by the fact that, throughout many clauses of the agreement at least, it is apparent that the distinction between claims with a capital C and claims with a small c has been carefully observed. To give just one example, clause 6.5 states: "The liability of each Warrantor in respect of any Claim or claim under the tax covenant, excluding costs, will be limited to the proportions set out below". It is clear that the term "Claim" in its first occurrence with a capital C must have been used here in accordance with the definition of the word "Claim" that I quoted earlier.

23. It is also clear that the distinction between "Claims" with a capital C and "claims" with a small c has been observed in clause 6.7 itself. In particular, in clause 6.7.3 the term "claim" begins with a small c as is appropriate where it is referring to a claim under the indemnity in clause 5.9. Clause 6.7.2, on the other hand, specifies a date two years from the Completion Date "in the case of any other Claim" (with a capital C). It is plain that the term "Claim" has correctly been given a capital C here as, had it been given a small c, this would have been inconsistent with 6.7.3.

24. It is right to say that in the course of argument today an anomaly has been detected in that, in clause 6.7.1, reference is made to the seventh anniversary of the date of the agreement in the case of any "Claim" (with a capital C) in relation to the tax covenant. In fact, as was reflected in clause 6.5 which I quoted earlier, claims in relation to the tax covenant do not fall within the definition of "Claim". It is apparent therefore that an error has crept in.

25. However, it does not seem to me that, based on that fact, I should conclude that the term "Claim" has been used incorrectly elsewhere within the clause, unless forced to that conclusion. In particular, I do not think that I should conclude that the references to "Claim or Claims" in the main body of clause 6.7 are intended to encompass claims under the indemnity in clause 5.9 unless such an inference is inescapable.

26. Three arguments have been deployed by the defendants to contend that it is necessary to interpret the term "Claim" where it appears in the main body of clause 6.7 as nevertheless encompassing claims under the indemnity in clause 5.9.

27. The first of those arguments is that the body of clause 6.7 as drafted does not make sense or requires words to be read in, unless the word "Claim" is intended to have been used with a small c. I am not persuaded by that argument. It seems to me to make perfectly good sense to read the clause as requiring the details and circumstances giving rise to "Claims" to be specified and an estimate in good faith of the total amount

of such "Claims" also to be specified where the relevant matter or thing is such a "Claim" as defined, but not otherwise.

28. The second argument put forward is that clause 6.8 is to be read together with clause 6.7, and that it is apparent that in clause 6.8, where the term "Claim" appears with a capital C, the word must in fact have been intended to refer to claims with a small c. This, it is said, drives an inference that the same broader use of the same term must have been intended in clause 6.7 as well.

29. I do not accept the premise of this argument. Clause 6.8 can be read quite naturally as restricted to "Claims" with a capital C just in the way that it has been drafted. The effect of this reading is that the nine month period which is specified in the clause for bringing legal proceedings only applies in the case of "Claims" as defined and not in relation to claims under the indemnity in clause 5.9. Simply as a matter of language, there is nothing in clause 6.8 which requires any different reading.

30. That leads on, however, to the third argument advanced by the defendants. This argument is that, in terms of the commercial purpose of the clause, it does not make sense to draw any distinction, either in clause 6.7 or in clause 6.8, between "Claims" with a capital C, ie claims for breach of warranty, and claims under the indemnity in clause 5.9.

31. Again, I am unable to accept this argument. It seems to me to make perfectly good commercial sense, as Mr Butcher QC submitted, to draw such a distinction on the basis that, in the case of claims under the indemnity in clause 5.9, the purchaser may well at the time when notice is given not be in the position to specify details and circumstances, or to give an estimate in good faith of the amount of the claim, in the same way as it would be expected to do when making a claim for breach of warranty. Moreover, in relation to clause 6.8, it may be unreasonable to require the purchaser to bring proceedings within nine months if the situation is that no liability which can found a claim under clause 5.9 has yet arisen.

32. This point interrelates with the other ground of the defendants' application which I will come to shortly regarding the timing of the notice under this clause, but suffice it to say that, in terms of commercial purpose, it seems to me possible to give a sensible, or at least a not obviously nonsensical or unreasonable, commercial reading to clause 6.7 (and clause 6.8) without having to conclude that the parties have made a mistake in using the term "Claim" in the defined sense rather than in a broader sense.

33. I turn then to the timing issue. Here the submission made by Ms Smith QC on the defendants' behalf is that the relevant "matter or thing" of which notice must be given, where the notice is a notice that falls within clause 6.7.3 and is in relation to a claim under the indemnity, is a notice of such a claim. Furthermore, she submits that no claim under the indemnity can be made unless and until a claim is made against the purchaser by a third party.

34. If that were correct, then it would follow that the claimants were not in a position to give a notice under clause 6.7 at the time of the 29 July 2915 letter, because, so far as it

appears at least from that letter, there had at the time it was sent been no individual third party claims made against the claimants. I am not persuaded, however, that that interpretation of the agreement is correct. I see nothing in the language of the agreement which requires that a claim must be made by a third party against the claimants before notice can be given under clause 6.7.

35. It seems to me that, as a matter of general principle, no liability can arise under clause 5.9 to indemnify the purchaser unless and until not only has a claim for professional negligence of the relevant kind been made against the Group or the claimants, but such a claim has resulted in an ascertained liability or loss for which a liability to indemnify can arise.

36. It is not suggested by the defendants that a loss must actually have been incurred before notice of a claim under the indemnity in clause 5.9 can be given under clause 6.7. It is accepted by them that notice can be given at a time when there is only a potential liability – at least in the sense that no loss has actually been incurred for which an indemnity can be claimed.

37. That seems to me to be a realistic concession. It would make no sense, and indeed would seem highly unreasonable, to prevent the purchaser from giving notice of a claim under clause 6.7, and hence potentially of being able to make a claim under the indemnity provision, in circumstances where, for example, proceedings had been brought against it by a third party but no judgment had yet been given in those proceedings at the time when the seven year period expired.

38. However, once one accepts that it is not necessary in order to give a valid notice under clause 6.7 that a loss which gives rise to a right to be indemnified under clause 5.9 has been incurred, I cannot see anything in the language of clause 5.9 or otherwise which necessitates the conclusion that no notice can be given under clause 6.7 unless and until a claim for professional negligence has actually been made by a third party against the purchaser. Indeed, it seems to me that that can potentially introduce equally arbitrary results where, for example, a letter before claim might have been written on behalf of the third party which clearly intimated the intention to make a claim, but no claim had actually been made.

39. Ms Smith retorts that, if that line of argument is taken to its logical conclusion, clause 6.7 becomes totally open-ended. To take an extreme example, on the day after the share purchase agreement had been completed, the claimants could simply have given a notice under clause 6.7.3 that they intended to make a claim against the Warrantors in relation to any liabilities which they might incur resulting from claims for professional negligence of an unspecified kind which might in future be made against them by unknown third parties as a result of matters entirely unknown at the time.

40. I agree that such an open-ended notice must fall outside any reasonable interpretation of clause 6.7. However, whilst there may well be scope for argument about the exact point at which a notice may be given under clause 6.7, it seems to me that the clause can sensibly be interpreted as requiring notice as a precondition of making a claim once

there is an identifiable matter or thing which may give rise to a claim under the indemnity provision.

41. On any view, for the reasons I have indicated, it seems to me that the reference to a claim under the indemnity in clause 6.7.3 must encompass a prospective claim under the indemnity, at least in so far as there may as yet be no right to recover under the indemnity because no loss has been incurred. Once one accepts that the relevant matter or thing is not an actual claim under the indemnity, it seems to me that the best interpretation of the clause is that it is intended to denote a matter or thing which may give rise to such a claim. It therefore cannot be concluded on a summary judgment application that the notice given in this case was premature.

42. A third issue was raised today by the defendants as an alternative case based on the words "as soon as possible" in clause 5.7. It was said that, if it be correct that – as the claimants maintain – their notice was given in time, then there is no apparent reason why they could not have given a similar notice several months earlier once they learnt about the two Skilled Person Reviews. Thus, it is argued that notice was not given as soon as possible and, for that alternative reason, no claim can now be made.

43. I do not consider that this is a point which I can decide today for two reasons. First, because of the late stage at which it arose, the arguments of construction in relation to the words "as soon as possible" have not been fully developed. In particular, Mr Butcher QC has drawn attention to the case of *AIG Europe (Ireland) Limited v Faraday Capital Limited* [2007] Lloyds IR 267. This case involved the construction of a clause in an insurance policy which made it a condition precedent to any liability under the policy that "[t]he reinsured shall upon knowledge of any loss or losses which may give rise to a claim advise the reinsurers thereof as soon as is reasonably practicable, and in any event within 30 days". Mr Justice Morrison held that, on its correct construction, that clause did not impose two different conditions precedent, one to give notice as soon as reasonable practicable and the other to give notice within 30 days, but only one such condition, namely, the 30 day requirement. Mr Butcher QC wishes to argue that a similar interpretation should be given to clause 6.7. Ms Smith takes issue with that and says that a different interpretation should be adopted, particularly in the circumstances where the requirement here involves a period not of 30 days but of seven years.

44. I do not consider that that argument has been developed, nor that it has been possible to develop it, within the scope of the hearing today to a point where I can decide that question. There is, in any event, a second reason why I do not consider that the argument based on the meaning of "as soon as possible" can be dealt with on an application for summary judgment, at least on the state of the evidence currently before the court.

45. This is that the question whether notice has been given "as soon as possible" raises, on any view, a question of fact, and the relevant evidence is not before the court. The claimants have pleaded at paragraph 40(A)(2) of their reply to the defence of the first, second and the fifth defendants that notice was given as soon as "meaningful and/or useful details of the indemnity claim which the claimants intend to and/or would make could be given". That assertion of fact may or may not turn out to be sustainable, but it

is not something which the court is in a position to go behind for today's purposes. For that reason too, I do not consider that that additional argument is one which is capable of resolution today.

46. The result is that I am not persuaded that the claim in this action has no real prospect of success, and the applications for summary judgment must therefore be dismissed.

[After hearing argument on consequential matters)

47. In assessing costs, there is always a distinction to be drawn between costs which the losing party should be required to pay and costs which may have been reasonably incurred from the successful party's point of view (for example, having the advantage in this case of instructing Mr Butcher QC) but which are not necessarily recoverable on assessment. The test for this purpose, in my view, is to ask what would reasonably competent representation have required, not necessarily the excellent standard of representation that the actual solicitors and counsel may have provided.

48. It does seem to me that, in the context of a one day summary judgment argument on a point of construction, the amount recoverable on a summary assessment must fall somewhere significantly below the level claimed by the claimants – not only in regard to their counsels' fees but also for their solicitors' work – and I also consider that the witness evidence served on all sides for this hearing was unnecessary. I certainly would not have contemplated awarding anything like the sum £98,000 which the defendants have incurred in costs, if they had been successful. I consider that a figure of £55,000 will be a reasonable and proportionate sum to order in respect of the claimants' costs. Payment must be made within 21 days.

49. As regards permission to appeal, I am not sure that Ms Smith QC is right to accept that the test for permission to appeal is identical with the test for resisting summary judgment. What is a realistic prospect of success on appeal from a refusal to grant summary judgment may be different from what is a realistic prospect of success in deciding whether or not to grant summary judgment. Anyway, I am not going to give permission to appeal because I have formed a clear view on the issues raised and I do not think that the test of showing a real prospect of success on appeal is satisfied. As it is not objected to, the time for filing a notice of appeal will be extended as requested.

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This transcript has been approved by the Judge