Neutral Citation Number: [2021] EWHC 1375 (Comm)

Case No: CL-2020-000598

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

TP ICAP LIMITED	**Claimant / Respondent**
- and -	
NEX GROUP LIMITED	**Defendant / Applicant**

- -
- -

Richard Handyside QC and Alex Barden (instructed by **Allen & Overy LLP**) for the **Claimant/Respondent**
Joe Smouha QC and Ciaran Keller (instructed by **Latham & Watkins (London) LLP**) for the **Defendant/Applicant**

Hearing dates: 12-13 May 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was 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 is deemed to be 27 May 2021 at 10:30 am

Mr Justice Calver :

Background

1. There are two applications before the Court. The first is an application made by the Defendant, represented by Mr. Joe Smouha QC and Mr. Ciaran Keller, to strike out and/or obtain reverse summary judgment in respect of parts of the Claimant's claim in these proceedings ("the Defendant's Application"). The second is an application made by the Claimant, represented by Mr. Richard Handyside QC and Mr. Alex Barden, to amend the Particulars of Claim ("the Claimant's Application") (together, "the Applications").

2. The Applications arise in the context of a claim relating to two contracts which are both governed by English law:

    a) A Share Purchase Agreement dated 11 November 2015 for the sale and purchase of the entire issued share capital of ICAP Global Broking Holdings Limited, as amended, restated and novated by a Deed dated 16 August 2016 ("the Novation Deed"), and as further amended from time to time ("the SPA").

    b) An accompanying Tax Deed as amended and restated pursuant to the Novation Deed ("the Tax Deed").

3. The Claimant, then named Tullett Prebon plc, was the Purchaser under the SPA. It changed its name to TP ICAP plc on 28 December 2016, shortly before Completion under the SPA on 30 December 2016. On 8 March 2021, the Claimant re-registered as a private company and so its name changed once again, this time to TP ICAP Limited.

4. The Seller under the SPA was ICAP plc. Pursuant to the agreed acquisition process and the Novation Deed, the Defendant assumed the obligations and liabilities of the Seller.

5. ICAP plc and Tullett Prebon plc were formerly each engaged in, among other things, voice broking. Voice broking is a form of interdealer broking which takes place by telephone, as opposed to other forms of broking which are generally conducted through electronic trading platforms. Voice brokers connect buyers and sellers in markets for derivatives, commodities and other assets and instruments. The two voice broking businesses were effectively merged when Tullett Prebon plc acquired the voice broking business of ICAP plc ("the Voice Group Companies") under the SPA. Completion took place on 30 December 2016.

6. By clause 12.1 of the SPA, the Seller gave warranties to the Purchaser that, except as fairly disclosed to the Purchaser in the Seller Data Room or the Disclosure Letter, each of the statements set out in Part 1 of Schedule 4 to the SPA, defined (in Schedule 23) as "*Seller Warranties*", was true at the date of the SPA and, so far as material, would be true at Completion (by reference to the facts and circumstances as at that time). By clause 12.2 of the SPA, each of the Seller Warranties is separate and independent and, except as provided to the contrary in the SPA or the Tax Deed, is not limited by reference to any other Seller Warranty or by any other provision of the SPA or the Tax Deed. By clause 12.3 the Seller Warranties and any Seller Warranty Claim (defined as "*a claim by the Purchaser the basis of which is that a Seller Warranty is, or is alleged*

to be, untrue or inaccurate") are subject to the limitations and other provisions set out in Part 1 of Schedule 5.

7. There are strict time limits for notification of a Seller Warranty Claim (the position is different under the Tax Deed), which are set out in paragraph 5.1 of Part 1 of Schedule 5 as follows:

> "**5. TIME LIMITS**
>
> 5.1 The Seller is not liable in respect of a Seller Warranty Claim unless the Purchaser has given the Seller written notice of the Seller Warranty Claim (stating in reasonable detail the nature of the Seller Warranty Claim and, if practicable, the amount claimed), but without prejudice to the rights and obligations of the parties under the Tax Deed:
>
> (a) on or before the expiry of the relevant statute of limitation period in respect of those Seller Warranties set out in paragraph 22 (Taxation) of Schedule 4; and
>
> (b) on or before the second anniversary of Completion in respect of all other Seller Warranties." (i.e. 30 December 2018)

8. The Tax Deed contains further provisions in relation to the tax liabilities of the acquired business, including the circumstances in which the Seller would indemnify the Purchaser for tax liabilities incurred prior to the sale but only recognised after the sale[1].

9. The factual matters said to give rise to the claims are, broadly:

a) An investigation or enquiry by the US Commodities and Futures Trading Commission ("the CFTC")/the Financial Conduct Authority ("the FCA"), said to date back to 2015, in relation to the involvement of certain Voice Group Companies in certain swaps transactions and swaps trading activity related to bond issuances (defined in paragraph 16 of the Particulars of Claim as "the CFTC/FCA Matter").

b) Actual or threatened investigations, reviews, enquiries and proceedings by various German authorities, including the Frankfurt Prosecutor and the Cologne Prosecutor, and potential civil claims by Blackrock Asset Management Deutschland AG ("Blackrock"), Investec Bank plc ("Investec") and Warburg Bank ("Warburg"), in relation to the involvement of Voice Group Companies in "cum-ex" trading ("the Alleged Cum-Ex Conduct") of German securities (all of which matters are collectively defined in paragraph 23 of the Particulars of Claim as "the German Tax Matters").

The Claimant's claims

10. The Claimant brings claims under three heads (which shall be addressed in turn below), namely for:

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[1] The SPA provides expressly that the Seller shall not be liable in respect of a claim for breach of any warranty in Part 1 of Schedule 4 (whether a Seller Warranty Claim or a Tax Warranty Claim) to the extent that the matter or circumstance giving rise to that claim could be the subject of a claim under the Tax Deed: paragraph 1.1(b) of Schedule 5.

a) damages for breach of the Seller Warranties in paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, in respect of both (i) the CFTC/FCA Matter, and (ii) the German Tax Matters ("the Seller Warranties Claims").

b) damages for breach of the Tax Warranties in paragraphs 22.1, 22.3 and 22.9 of Part 1 of Schedule 4 to the SPA, in respect of the German Tax Matters ("the Tax Warranties Claims"); and

c) (i) a declaration that the Claimant would be entitled to a further indemnity under clauses 2.1(a), 2.1(g) and/or 2.1(h) of the Tax Deed in the future in certain circumstances; and (ii) an indemnity under clause 2.1(h) of the Tax Deed in relation to costs allegedly incurred in relation to the German Tax Matters ("the Indemnities Claims").

The Seller Warranties Claims

11. So far as the Seller Warranties Claims are concerned, the three relevant Seller Warranties contained in Part 1 of Schedule 4 of the SPA are:

a) Paragraph 9.1 which concerns breaches of laws and regulations, and provides:

> "No Voice Group Company, nor (in relation to the Voice Group Business) any member of the Seller's Group, nor, so far as the Seller is aware, any director, officer or employee of any member of the Seller's Group (in relation to the Voice Group Business) or any Voice Group Company (in each case, during the course of his duties), has contravened any applicable law or regulation which has in the preceding 18 months resulted or may result in any fine, penalty or other liability or sanction that, in each case, has or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)."

b) Paragraph 9.2, which concerns non-routine investigations, reviews and enquiries and provides:

> "No Voice Group Company, nor, so far as the Seller is aware, any director, officer or employee of any Voice Group Company nor (in relation to the Voice Group Business) any member of the Seller's Group or any director, officer or employee of any member of the Seller's Group, is or has in the preceding 18 months, been subject to any non-routine investigation, review or enquiry […] in each case by a Governmental Authority in relation to the Voice Group Business nor, so far as the Seller is aware, is any such investigation, review, enquiry, proceedings or process pending or threatened."

c) Paragraph 10.3, which concerns facts likely to give rise to litigation, and provides:

> "So far as the Seller is aware, there are no circumstances which would reasonably be expected to give rise to any litigation, arbitration or alternative dispute resolution proceedings by or against any Voice Group Company wherein the value of the claim in such proceedings exceeds £500,000."

The Defendant's Application

12. The Defendant's Application is made pursuant to CPR 3.4(2)(a) and/or CPR 24.2 to strike out and/or to obtain summary judgment in respect of parts of the claim. The

Defendant's Application is brought on a number of separate and freestanding grounds, which can be broadly summarised as follows:

a) First, whether various Seller Warranties Claims in the Particulars of Claim have been validly notified in accordance with the terms of the SPA by written notices:

   i. dated 20 December 2018 purporting to notify the Defendant of certain Seller Warranties Claims arising as a result of or in connection with an investigation by the CFTC entitled "*In the Matter of Swaps Trading Relating to Bond Issuances*" ("the CFTC Investigation Notification"). This is attached as Appendix 1 to this judgment.

   ii. dated 29 December 2018 purporting to notify the Defendant of certain Seller Warranties Claims arising as a result of or in connection with an investigation by the Attorney General's Office of Frankfurt relating to allegations of tax-related criminal offences in relation to the Alleged Cum-Ex Conduct ("the Tax Investigation Notification"). This is attached as Appendix 2 to this judgment.

b) Second, whether various claims brought have a real prospect of success on the true construction of the Seller Warranties, Tax Warranties and the Tax Deed.

13. Each of the individual grounds on which the Defendant's Application is brought is dealt with in turn below after a consideration of the relevant legal principles.

Legal principles relevant to the Defendant's Application

Strike out and summary judgment

14. For the purposes of the Defendant's Application, there is no material difference in the test to be applied to an application for strike out pursuant to CPR 3.4(2)(a) and that to be applied to an application for summary judgment pursuant to CPR 24.2. The relevant principles were classically summarised by Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) and I apply them to the issues arising on the Defendant's application in the present case. In the context of a defendant's application for strike out or alternatively summary judgment, Lewison J said at [15]:

> "…the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,

particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand 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 Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Proper construction of the SPA and Tax Deed

15. The applicable principles of construction, so far as the SPA and the Tax Deed are concerned, are well established and were summarised by the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] AC 1173. In interpreting the objective meaning of the language, the Court may rely on the tools of both textualism and contextualism. Where, as in this case, an agreement is sophisticated and complex and prepared with the assistance of skilled professionals, it is likely to be interpreted principally by textual analysis, see Lord Hodge SCJ at [13]:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by

> a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type."

16. Neither party contended in this case that there was any particular factual matrix which bore upon the proper construction of the relevant agreements (save only in one limited respect concerning the tax warranty in paragraph 22.9 of Schedule 4, Part 1 to the SPA) and the Court accordingly had all the material it required to decide these questions of construction on this application.

Notification of a claim

17. So far as the notification issues (in paragraph 12a(i) and (ii) above) are concerned, it is for the party bringing the claim, here the Claimant, to demonstrate that it has complied with the contractual notification requirement: *Laminates Acquisition Co v BTR Australia Limited* [2003] EWHC 2540 (Comm) per Cooke J at [30]; *RWE Nukem Ltd v AEA Technology Plc* [2005] EWHC 78 (Comm) at [10].

18. So far as the contractual notification requirement is concerned (here, paragraphs 5.1 and 5.2 of part 1, Schedule 5 to the SPA), it was observed by Simon J in *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm) at [16] that the starting point is the statement of Ward LJ in *Forrest v Glasser* [2006] 2 Lloyd's Rep 392 at [24] that:

> "…the only true principle to be derived from the authorities is that every notification clause turns on its own wording."

19. Nevertheless, consideration of such earlier decisions can be instructive, especially where the relevant contractual provision is in the same or substantially similar terms: *Dodika Ltd v United Luck Group Holdings Ltd* [2020] EWHC 2101 (Comm) at [99]. I address some of those earlier decisions below.

Defendant's Ground 1 – Inadequate written notice of the Seller Warranties Claims

20. As set out at paragraph 59 of the First Witness Statement of Jonathan Royston Holland dated 13 November 2020 made on behalf of the Defendant ("Holland 1"), under Ground 1 the Defendant sought to argue that the Claimant failed to give written notice within two years of Completion (i.e. by 30 December 2018) stating in reasonable detail or at all the nature of any of the Seller Warranties Claims. However, the Defendant made clear in its skeleton argument and before me that it no longer pursues Ground 1, and so I say no more about it.

Defendant's Ground 2 – The Tax Investigation Notification

The parties' submissions

21. Alternatively to Ground 1, under Ground 2 the Defendant contends that the Tax Investigation Notification failed to state in reasonable detail or at all the nature of a Seller Warranty Claim in relation to any matters *other than* an investigation by the Attorney General's Office of Frankfurt ("the Frankfurt Prosecutor") relating to various allegations of tax-related criminal offences ("the Frankfurt Investigation Matter") (paragraph 60, Holland 1). In particular, it is said that it failed to state in reasonable detail or at all the nature of a Seller Warranty Claim, in respect of:

    a) any investigation or action by the Public Prosecutor of Cologne (in relation to Bank Sarasin & Cie AG ("Sarasin"), certain US pension funds, Warburg, the Sheridan fund, any of the 27 complexes listed in Appendix 1 to the Particulars of Claim or any of the 39 counterparties referred to in the search and seizure order obtained by the Cologne Prosecutor on 1 July 2020 against ICAP Securities Limited ("ISL") ("the Cologne Order") or otherwise);

    b) potential civil claims brought by Blackrock against ISL, a Voice Group Company ("the Potential Blackrock Claim");

    c) civil claims brought by Investec against Link Asset and Securities Company Limited, a Voice Group Company ("the Investec Claim"); and

    d) potential civil claims brought by Warburg against ISL and others ("the Potential Warburg Claim").

22. The Defendant contends that none of those was mentioned at all. Nor could they have been in respect of at least the Cologne Order, the Potential Blackrock Claim, the Investec Claim, or the Potential Warburg Claim: those matters post-dated, or the Claimant's case is that it learned of those matters only after, the date of the Tax Investigation Notification.

23. Accordingly, it is said, the Seller Warranties Claims for breach of each of the warranties in paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 of the SPA have no real prospect of success insofar as they seek to rely on any such matters, other than the Frankfurt Investigation Matter.

24. Conceding this point, the Claimant agrees to limit its claim under seller warranties 9.1, 9.2 and 10.3 to the Frankfurt Investigation Matter and it maintains that that is what it sought to do by way of its draft Amended Particulars of Claim ("APOC"). In paragraph 18 of his first witness statement dated 12 February 2021, made on behalf of the Claimant, Mr. Lawson Miles Caisley ("Caisley 1") says as follows:

> "The Claimant accepts in that regard that, as per paragraph 60(a) of Mr Holland's witness statement (his "Ground 2"), the Cologne Matter, and the three civil claims in respect of the trading which is the subject of the Cologne Matter (by Blackrock, Investec, and Warburg) were not notified in those letters and that accordingly the claims in respect of those matters under warranties 9.1, 9.2 and 10.3 should not proceed as matters stand. However, the Claimant reserves its right to bring these claims in the future in the event that information comes to its attention that would entitle it to invoke Clause 12.4 of the SPA."

Discussion

25. The draft APOC which were served some 10 days after Caisley 1 are, I am told, intended to reflect this concession. However, the Defendant takes issue with the way in which the Claimant purports to address this point in its proposed APOC. Specifically the Defendant highlights paragraph 46A of the draft APOC, which states that the Claimant's Seller Warranties Claims are now:

> "limited to breaches in respect of… those of the German Tax Matters investigated by the Frankfurt Prosecutor and the tax offices supporting the Frankfurt Prosecutor, including actual or potential civil claims arising therefrom.*"* (emphasis added)

26. The "German Tax Matters" are defined in paragraph 23 of the draft APOC, which in turn refers to paragraphs 40 to 42 thereof, and the definition accordingly includes the matters set out in paragraph 21 above.

27. Mr. Smouha QC for the Defendant contends that this proposed amendment therefore impermissibly expands the scope of the Tax Investigation Notification beyond the investigation of the Frankfurt Prosecutor. In his oral submissions, Mr. Handyside QC for the Claimant realistically recognised the problems with the current draft APOC and said that once the court has ruled upon the notification issues the Claimant would go away and seek to plead again its case in this respect. I therefore address this topic in the context of the Claimant's application for permission to serve its draft APOC below.

Defendant's Grounds 3 and 4 – No notification of claims under paragraph 9.1

The parties' submissions

28. In paragraph 60b of Holland 1, Mr. Holland states:

> "Paragraph 9.1 of Part 1 of Schedule 4 to the SPA provides that "*No Voice Group Company … **has contravened any applicable law or regulation**, which has in the preceding 18 months resulted or may result in any fine, penalty or other liability or sanction that, in each case, has or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)*" (emphasis added). An essential element of a claim that the warranty in paragraph 9.1 has been breached is that a Voice Group Company has contravened an applicable law or regulation. In that regard:
>
> > i. **Ground 3**. The Tax Investigation Notification states that the Claimant has become aware of facts and/or circumstances giving rise to one or more Seller Warranties Claims, including under paragraphs 9.1, 9.2 and 10.3, as a result of or in connection with one or more Underlying Claims arising from the Frankfurt Investigation Matter "*relating to various **allegations** of tax-related criminal offences*" (emphasis added) (para 3.1). It states in relation to the warranty in paragraph 9.1 that there was a non-routine investigation of a director and this was "*in connection with **alleged** contraventions of applicable law and/or regulation*…" (emphasis added) (para 6). It states that the Claimant "*may*" incur loss "*in the event of an adverse finding*" in respect of the Frankfurt Investigation Matter (para 10). It does not state anywhere that a Voice Group Company has breached any applicable law or regulation. Paragraph 12 states that the facts and circumstances set out (i) give rise to a Seller Warranty Claim under paragraphs 9.2 and 10.3, but, in contradistinction, (ii) only "*may*" also give rise to a Seller Warranty Claim under paragraph 9.1. It does not state that there is a Seller Warranty Claim under paragraph 9.1 or state in reasonable detail the nature of an actual Seller Warranty Claim in respect of paragraph 9.1 of Part 1 of Schedule 4, an essential element of which would be that there was in fact a breach. Accordingly, the claim for breach of the warranty in paragraph 9.1, insofar as it relies on notice having been given by

> the Tax Investigation Notification, in particular in respect of the Frankfurt Investigation Matter, has no real prospect of success.
>
> ii. **Ground 4**. The CFTC Investigation Notification states that the Claimant has become aware of facts and/or circumstances giving rise to one or more "*potential*" Seller Warranties Claims relating to the CFTC Matter (para 1.2). It states in relation to the warranty in paragraph 9.1 that the CFTC Investigation "*might*" result in a fine, penalty or other sanction. It states that the Claimant "*may*" incur loss "*in the event that a Governmental Authority makes an adverse finding in connection with the CFTC Matter*" (para 10). It does not state anywhere that a Voice Group Company *has* breached any applicable law or regulation. Paragraph 12 states that the facts and circumstances relating to the CFTC Matter (i) give rise to a Seller Warranty Claim pursuant to paragraphs 9.2, but, in contradistinction, (ii) only "*may*" also give rise to a Seller Warranty Claim under paragraph 9.1. It does not state that there "*is*" a Seller Warranty Claim under paragraph 9.1 or state in reasonable detail the nature of an actual Seller Warranty Claim in respect of paragraph 9.1 of Part 1 of Schedule 4, an essential element of which would be that there was in fact a breach. Accordingly, the claim for breach of the warranty in paragraph 9.1, insofar as it relies on notice having been given by the CFTC Investigation Notification, in particular in respect of the CFTC Investigation Matter, has no real prospect of success."

29. In oral submissions Mr. Smouha QC added that each of the two notifications does not give notice that any breach of any (identified) applicable law or regulation has resulted or may result in any fine, penalty or other liability or sanction that *has or would have a material adverse impact on the operation of the Voice Group Business taken as a whole* (in the context of a sale worth $1.5 billion), which he submits is also an essential element of a claim under paragraph 9.1.

30. The Defendant accordingly maintains that in order to give written notice of a Seller Warranty Claim in respect of paragraph 9.1 it was necessary for the Claimant to assert as a minimum that:

    a) A Seller Warranty Claim was being made under paragraph 9.1;

    b) A Voice Group Company had, or the Claimant alleged that it had, contravened an applicable law or regulation; and

    c) Any fine, penalty or other liability or sanction which had resulted or may result from any such contravention has or would have a material adverse impact on the operation of the Voice Group Business taken as a whole.

31. The Defendant argues that none of that was done in either the Tax Investigation Notification (Ground 3) or the CFTC Investigation Notification (Ground 4).

32. So far as point a) is concerned, the Defendant cites *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm) at [21] in support of the contention that a notification must specify that a claim is actually being made, rather than the possibility that a claim may yet be made. Accordingly, the Defendant maintains that no written notice was given for the purposes of paragraph 5.1 of Part 1 of Schedule 5.

33. In consequence, Mr. Smouha QC submits that paragraphs 53 and 54 of the Particulars of Claim should be struck out. Those paragraphs read as follows:

> "Paragraph 9.1

> 53. In relation to the underlying conduct which is the subject of the CFTC/FCA Matter and the German Tax Matters, and the Cum-Ex Conduct, the conclusions of the regulatory authorities and, where relevant, courts, have not yet been reached.
>
> 54. To the extent that regulatory investigations and/or court proceedings establish that some or all of the alleged wrongdoing took place, the Seller is also in breach of the warranty at paragraph 9.1 of Part 1 of Schedule 4 to the SPA, because Voice Group Companies and/or members of the Seller's Group had contravened applicable laws and/or regulations in a manner which, at the time of Completion, had the potential to result in a fine, penalty or other liability or sanction which would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)."

34. The Claimant takes issue with this. It contends that it is not barred from bringing claims under paragraph 9.1 if it does not, within the two year period, make a positive assertion that a Voice Group Company has actually breached any applicable law or regulation. It maintains that it is possible to notify a claim dependent upon a contingency. And so, whilst Mr. Handyside QC accepted that the Purchaser did not say in the Notification that there had in fact been an actual contravention of applicable law, he argued that nonetheless a reasonable recipient of the Tax Investigation Notice would understand that what was being said was that if the Frankfurt investigation concluded by finding that there *had been* a contravention of an applicable law or regulation then the Seller would be in breach of the warranty under paragraph 9.1. The nature of the claim was accordingly sufficiently notified.

35. Mr. Handyside QC referred to Schedule 5, Part 1, clause 8.1 in support of his submissions. That provides as follows:

> "**8. CONDUCT OF THIRD PARTY CLAIMS**
>
> 8.1 If a Seller Warranty Claim (other than a Seller Tax Warranty Claim) arises as a result of, or in connection with, a liability or alleged liability of a member of the Purchaser's Group or a Voice Group Company to a third party (an Underlying Claim), then until such time as any final compromise, agreement, expert determination or non-appealable decision of a court or tribunal of competent jurisdiction is made in respect of the Underlying Claim or the Underlying Claim is otherwise finally disposed of:
>
> (a) the Purchaser shall promptly give written notice to the Seller of the matter with respect to the Underlying Claim…"

36. Mr. Handyside QC submitted that a liability or alleged liability to a public prosecutor would amount to a liability to a third party within the meaning of this clause.

37. He further submitted that there are obvious reasons (which would have been obvious to the parties at the time of the SPA) as to why, post-SPA and post-Completion, the Claimant would not wish to assert positively, in the absence of regulatory or court findings, that Voice Group Companies – companies which it was acquiring – were guilty of breaches of the law or regulations. Any such assertion would be likely to be taken as an admission of wrongdoing by regulators and third parties, leading to penalties and/or civil claims. The Claimant says that that would be in neither the interests of the Purchaser nor the Seller, since the cost of such matters would (depending on the outcome of these proceedings) be spread between them. On this basis, the Claimant argues that the parties could not have intended that the Purchaser should be required to take that step of notifying the Seller of an actual (or alleged

actual) contravention of an applicable law in order to notify a valid warranty claim ("the jeopardy point").

38. In oral submissions, Mr. Handyside QC referred me to *ROK Plc v S Harrison Group Ltd* [2011] EWHC 270 on the issue of adequate notification. In *ROK*, the relevant notification clause was not dissimilar to the one in this case, providing:

> "5. 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):
>
> 5.1.1 in the case of a Claim made under the Tax Warranties or a claim under the Tax Undertaking, within the period of seven years beginning with the Completion Date; and
>
> 5.1.2 in the case of a Claim (other than in respect of the Tax Warranties) or a claim under the Indemnities, on or before 30 June 2009,
>
> and in the case of a Claim legal proceedings have been issued and served on the Vendor within six months of notification of the Claim."

39. On the issue of reasonable detail as to the nature of the claim, Lewison J noted in *ROK* at [61]:

> "The Notice Clause is, as ROK submitted, a relatively "*low threshold*" notice clause in comparison with some of the notice clauses that have been before the Courts. It requires written notice of the Claim which specifies, in reasonable detail, the nature of the Claim and the amount claimed. But it does not require details (or particulars) to be given of the grounds on which the Claim is based (as in *Senate Electrical*), or of the matter (*Laminates*) or event or circumstances (*Bottin*) which have given rise to the Claim, or of the specific matter(s) in respect of which the claim is made (*RWE Nukem, Curtis*). The parties have not provided for that degree of specificity (cf. Ward LJ's comments in para. 23 of his judgment in *Forest v. Glasser*). They have chosen an expression, "*the nature of the Claim*", which is more general and less prescriptive, as was recognised by Dyson J in *Odebrecht*, in contrasting the phrase "*nature of such breach*" with the detail of the breach."

Discussion

(i) The Tax Investigation Notification

40. The overarching question for the court is how each of these Notices would be understood by a reasonable recipient taking into account the relevant objective contextual scene: *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376 at [25], citing *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 767G.

41. As is stated in Lewison The Interpretation of Contracts (7th Edn), 12.134-12.135:

> "The required contents of a valid notice is a question of interpretation of the clause. Every notification clause turns on its own individual wording. Whether a valid notice has

> been given in time depends on the meaning of the notice, objectively interpreted, rather than on the subjective understanding of the parties.
>
> Although the usual principles applicable to the interpretation of notices will apply, the clause will nevertheless be treated as a limitation clause for that purpose. The clear commercial purpose of the clause includes that the person to whom the notification is given should know at the earliest practicable date in sufficiently formal written terms that a particularised claim for breach of contract is to be made so that he may take such steps as are available to him to deal with it. Thus the touchstone is "clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results". A compliant notification will usually refer to the contractual provision that has been broken. But the level of detail required will depend on the wording of the clause. Where the contract provided that "the nature of the Claim" be specified "in reasonable detail", it required, as a minimum, that the notice should identify the contractual provision under which the claim was said to arise. But where the contract merely required claims to be notified, no detail of the claim was required."

42. That the notification clause in paragraph 5.1 of Schedule 5, Part 1 is in the nature of a limitation clause is apparent from its wording: "*The Seller is not liable in respect of a Seller Warranty Claim unless the Purchaser has given the Seller written notice of the Seller Warranty Claim …*"

43. The Clause then goes on to specify the level of detailed required: "*stating in reasonable detail the nature of the Seller Warranty Claim and, if practicable, the amount claimed*". A "Seller Warranty Claim" is defined in the SPA as meaning "*a claim by the Purchaser the basis of which is that a Seller Warranty is, or is alleged to be, untrue or inaccurate*."

44. It follows that a determination as to the nature of what is required to be notified under paragraph 5.1 of Schedule 5, Part 1, is to be reached by reference to the terms of the actual Seller Warranty that one is construing, in this case paragraph 9.1 of Schedule 4, Part 1.

45. The Seller Warranty given in clause 9.1 of Schedule 4, Part 1 to the SPA, relevantly for present purposes, is that no Voice Group Company, nor so far as the Seller is aware, any director of a Voice Group Company, has contravened any applicable law or regulation which may result in any fine, penalty or other liability or sanction which would have a material adverse impact on the operation of the Voice Group Business (taken as a whole).

46. If the Claimant wishes to allege *that* Seller Warranty to have been untrue or inaccurate, it must state in reasonable detail the nature of the claim: that is, it must (i) describe the broad nature of the contravention of the law or regulation which it is alleged was not disclosed (identifying the relevant law/regulation), and (ii) make clear that as a result it is making a Seller Warranty claim.

47. Clause 9.1 focusses on the *past* contravention of an applicable law or regulation which may result in a fine. It covers a situation, therefore, where a Voice Group Company or member of the Seller's Group has contravened the law but has not yet been fined (including presumably a situation where the past contravention has not yet been discovered, or where the penalty has not yet been determined). Clause 9.2, in contrast, covers a case where a non-routine *investigation* has begun but it is not necessary for any contravention of the law to have occurred.

48. In support of his argument that it was permissible for the Claimant to notify circumstances which *may give rise* to a Seller Warranties Claim under paragraph 9.1, Mr. Handyside QC sought to rely upon paragraph 8.1 of Part 1 of Schedule 5. But I agree with Mr. Smouha QC that the purpose of notification under this clause – which is to enable the seller to be given the opportunity to be involved in or have conduct of the third party claim – is different from the paragraph 9, Schedule 4 warranties which concern compliance with laws and regulatory compliance and it is paragraph 5.1 of Schedule 5, Part 1 which is relevant to such warranties. Indeed, I do not consider that the language of clause 8.1 – which concerns *liability to a third party* – can sensibly be said to apply to a criminal case brought against a Voice Group Company by the Frankfurt Prosecutor. But even if the language is strained so as to apply to such a case, the underlying claim would still have to consist of an allegation that a contravention of an applicable law or regulation had occurred; it is not sufficient simply to notify within the relevant time limit that an unspecified contravention might occur at some point in the future.

49. Indeed, were it possible to notify a Seller Warranty Claim in such a way under paragraph 9.1, the time limit laid down by schedule 5, Part 1, clause 5.1(b) would be rendered redundant, as the Seller could always get around it by purporting to make a general notification of a Seller Warranty Claim prior to 30 December 2018 to the effect that "in so far as a contravention of an unspecified law (or even a specified law) is hereafter found in connection with a particular regulatory investigation to have occurred, then there is a breach of clause 9.1". That would rob the time limits clause of its purpose. The purpose of a time bar clause such as clause 5.1 was explained in *Laminates Acquisition Co v BTR Australia Limited* [2003] EWHC 2540 (Comm) per Cooke J at paragraphs 29-30:

> "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. Reliance was also placed upon the decision of the Court of Appeal in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks* [1999] 2 Lloyd's Reports 243, *Odebrecht Oil & Gas Services Ltd v North Sea Production Co Ltd* (an unreported decision of Dyson J of 10th May 1999) and on the House of Lords decision in A/*S Rendal v Arcos Ltd* (1937) 58 LLR 287 (and in particular the speeches of Lord Wright at page 291, 292 – 4 and Lord Maugham at pages 298 –299). I found these citations of limited help because 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, in the context of a notice clause in a Share Sale Agreement requiring notice to set 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 18 months". He said:-
>
> > "The clear commercial purpose of the clause includes that the vendors should know …… 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 ……. The commercial purpose may not be sensibly served if an uninformed and uninformative notice is given ……."

> 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… 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."

50. Were it possible to notify in such a way, then the commercial purpose of such a notification clause would be defeated, that purpose being to ensure that sellers know in sufficiently formal terms that a claim for breach of warranty *is* being made so that financial provision can be made for it: *Ipsos* at [19]. As Stuart Smith LJ stated in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyds Rep 423 at [91]:

> "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 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."

51. It is not legitimate simply to notify the possibility that a Seller Warranty Claim may be made at some point in the future under clause 9.1. The notification must make clear that such a claim is being lodged and pursued now, rather than indicating the possibility that a claim may be made at some point in the future. Contrary to the submission of Mr. Handyside QC, I consider that an analogous notification clause to clause 5.1 of Schedule 5, part 1 to the SPA was under consideration in *Laminates*, as is recited at [6] of Cooke J's judgment:

> "2. Time limits for bringing claims
>
> 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.
>
> ….

> PROVIDED that ... the liability of the Vendor in respect of such claim shall absolutely determine (if such claim has not been previously satisfied, settled or withdrawn) if legal proceedings in respect of such claim shall not have been commenced within 12 months of the expiry of the relevant limitation period referred to in (i), (ii) and (iii) above and for this purpose proceedings shall not be deemed to have been commenced unless they shall have been properly issued and validly served upon the Vendor."

52. On the question of whether it was possible to bring a contingent claim under such a clause, Cooke J held at [33]:

> "Thus, on any view, a notice which complies with paragraph 2 must make it clear that such a claim is being pursued whatever wording is used, rather than indicating the possibility that a claim may yet be made as a paragraph 3 notice would do. This does not mean that a claim cannot be in respect of a future contingency. A notice could make it plain that a claim was now being made in respect of a breach of Warranty, if for example some third party claim proved to be well founded, whilst it was currently denied that such a claim had any basis. The important feature is however that the notice should make it clear that a claim is being lodged, not that it might subsequently be lodged." (emphasis added)

53. Simon J observed to like effect in *Ipsos* (which concerned a notification clause in similar terms to paragraph 5.1 of Schedule 5, Part 1) at [21] and [36] that "*A general notification that a claim might be brought at some time in the future would not be sufficient*".

54. In the present case the Tax Investigation Notification (at Appendix 1) is carefully worded with precise definitions:

    a) Clause 3.1 refers to Seller Warranties Claims as a result of or in connection with one or more underlying claims arising from an investigation by the Attorney General's Office of Frankfurt (the Frankfurt Prosecutor) relating to various allegations of tax-related criminal offences (the Frankfurt Investigation Matter).

    b) Clause 3.2 refers to a Seller Warranty Claim under paragraph 5.1 of Part 1 of Schedule 5 to the SPA in connection with the Frankfurt Investigation Matter (the Frankfurt Investigation Seller Warranty Claim).

    c) Clause 4 then sets out the background to the Frankfurt Investigation Seller Warranty Claim (i.e. the claim under paragraph 5.1). That makes clear that an investigation into alleged offences of aiding and abetting tax evasion by Rafael Roth Financial Enterprises GmbH ("Rafael Roth") had been initiated by the Frankfurt Prosecutor against a director of ISL, Edward Tyler Bowen (and others), and the Frankfurt Prosecutor had notified its intention to impose an administrative fine and a disgorgement of proceeds in connection with that Investigation. "The Investigation", as defined, is into Mr. Tyler Bowen in respect of his conduct concerning Rafael Roth. But if proven against him, ISL would be liable to an administrative corporate fine under section 30 German Act on Regulatory Offences ("ARO") and disgorgement of the proceeds under sections 73ff of the

German Criminal Code. As Mr. Leisner, a German law expert, explains in his unchallenged first witness statement of 8 April 2021[2]:

(i) A corporation may become subject to an administrative penalty under section 30 of ARO if an executive of the company conducts a criminal act in his function as executive by violation of an obligation of the legal entity or with the result or intention of an enrichment of that entity.

(ii) A corporation may be ordered to surrender any profits "obtained" as a result of an individual's criminal offence under section 73ff of the German Criminal Code.

Nonetheless, the Investigation remains one into Mr. Tyler Bowen's conduct and the criminal offences which are alleged are alleged against him.

d) Under clause 4.2 a letter was attached to the Notice "*for reference*". That is the letter stamped as received on 27 December 2018. The heading of the letter refers to "*Investigation proceedings against Bowen and others*" and then states "*here: initiation of an administrative offence procedure*". The letter then states:

> "In the aforementioned investigation proceedings, we inform you that in this proceeding, for criminal offences, inter alia, in which former company director of [ISL], Edward Tyler Bowen is suspected… namely of aiding and abetting simple and particularly severe tax evasion … by Rafael Roth…. against which [ISL] is liable to the imposition of an association fine pursuant to section 30… as well as confiscation of the proceeds of crime from offenders pursuant to sections 73…"

e) In clause 5 of the Tax Investigation Notification the Claimant sets out the text of each of paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, and then in clause 6 the Claimant states as follows:

> "It is apparent that (i) in relation to paragraph 9.2 of Part 1 of Schedule 4 to the SPA a director of a Voice Group Company was the subject of a non-routine investigation, review or enquiry, (ii) in relation to paragraph 9.1 of Part 1 of Schedule 4 to the SPA this was in connection with alleged contraventions of applicable law and/or regulation which may result in a fine, penalty or other liability or sanction, and (iii) in relation to paragraph 10.3 of Part 1 of Schedule 4 to the SPA there were at the relevant times circumstances which would reasonably be expected to give rise to litigation, arbitration or alternative dispute resolution proceedings against a Voice Group Company."

f) The Tax Investigation Notification concludes at clause 12 as follows:

> "Accordingly, the facts and circumstances relating to the Frankfurt Investigation Matter set out at paragraph 4 above give rise to a Seller Warranty Claim against the seller pursuant to paragraphs 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, and may give rise to one or more Seller Warranties Claims pursuant to paragraph 9.1 of Part 1 of Schedule 4 to the SPA (and potentially other Seller Warranties)". (emphasis added)

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[2] Despite its volume, minimal reference was made by the parties to the German law evidence filed in these proceedings, including in relation to Ground 3.

55. I agree with Mr. Smouha QC that the letter draws a deliberate and clear distinction in clause 12 between the claim in respect of 9.2 and 10.3 ("*give* rise to a Seller Warranty Claim") and the claim in respect of 9.1 ("*may* give rise to one or more Seller Warranties Claims"). The Purchaser is telling the Seller that the matters set out in paragraph 4 of the letter *may give rise* to a claim by the Purchaser against the Seller under paragraph 9.1, and potentially to other claims against the Seller by it. But they do not yet give rise to such a claim. The letter is telling the Seller that the Purchaser *is* making claims against it under paragraphs 9.2 and 10.3, as opposed to paragraph 9.1.

56. This is consistent with the wording in clause 6(ii) of the Tax Investigation Notification: "*in relation to paragraph 9.1 of Part 1 of Schedule 4 to the SPA this was in connection with alleged contraventions of applicable law and/or regulation which may result in a fine, penalty or other liability or sanction.*" (emphasis added). The reference to "*this*" is a reference to the non-routine investigation of the director (Tyler Bowen), which "*was in connection with alleged contraventions of applicable law and/or regulation*". Those contraventions are set out in paragraph 4.1 and are alleged against Mr. Tyler Bowen. No contravention of any applicable law or regulation is alleged against a Voice Group Company or member of the Seller's Group and I reject Mr. Handyside QC's submission that the Tax Investigation Notification should be read as asserting a contravention by both Mr. Tyler Bowen and ISL[3]. The Tax Investigation Notification could easily have said that were it intended but it does not do so. Those contraventions of criminal law by Mr. Tyler Bowen may give rise to an administrative corporate fine and/or disgorgement of the proceeds of crime by ISL in connection with the Investigation against Mr. Tyler Bowen, but the contraventions of the criminal law are by him, not ISL. It is no doubt for this reason that the letter concludes in paragraph 12 that so far as paragraph 9.1 of Schedule 4, Part 1 is concerned, "*the facts and circumstances relating to the Frankfurt Investigation Matter… may also give rise to one or more Seller Warranties Claims pursuant to [that paragraph]*". The notice is not making it plain that a claim was now being made in respect of a breach of paragraph 9.1; rather it is notice that a claim might subsequently be lodged under clause 9.1 arising out of the facts and circumstances of the Investigation into Mr. Tyler Bowen.

57. Contrary to Mr. Handyside QC's submission, I do not consider that this conclusion is altered by the terms of the attached letter of the Frankfurt Prosecutor, where again the emphasis is on the investigation of Edward Tyler Bowen for criminal offences (aiding and abetting tax evasion by Rafael Roth). In any event, it is from the terms of the Tax Investigation Notification itself that a reasonable recipient would gain his understanding of what was being alleged, and that puts the attached letter into context.

58. Indeed, it is notable the pleaded case in this respect, contained in paragraphs 53-54 of the draft APOC, is unable to say which laws the Voice Group Companies and/or members of the Seller's group are alleged to have contravened.

59. It is also the case, as Mr. Smouha QC submitted, that the Tax Investigation Notification fails anywhere to state that any fine, penalty or other liability or sanction which had resulted or may result from any contravention of any applicable law or regulation *has or would have a material adverse impact on the operation of the business of the Voice*

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[3] There is no suggestion in the Notification that the Seller was aware of the director's contraventions. In order for it to have made such a case, the Purchaser would have had to identify one of the individuals specified in paragraph 2 of Schedule 23 to the SPA and it did not.

Group Companies taken as a whole. Unless that is so, there is no breach of the Seller Warranty in paragraph 9.1. I do not consider that it is sufficient to contend, as Mr. Handyside QC did, that the Seller should simply infer this important part of the warranty from the fact of the Tax Investigation Notification *per se*. If that were right, all that a purchaser would be required to do in order to satisfy paragraph 5.1 of Schedule 5, Part 1, would be to simply state in its Notification "I make a claim under 9.1". That the fine/penalty or other liability would have a material adverse impact on the operation of the Group is a necessary and important element of the nature of the claim under 9.1. Importantly, it tells the Seller that this is a very substantial claim for which it must make provision. Moreover, the reason that it is not mentioned in the Tax Investigation Notification is, no doubt, precisely because the Purchaser is not yet making a Seller Warranty Claim in respect of paragraph 9.1; is not yet identifying any contravention of an applicable law or regulation by a Voice Group Company; and accordingly is unable as yet to put forward any case that such a contravention has or would have a material adverse impact on the operation of the business of the Voice Group Companies taken as a whole.

60. Finally, so far as the jeopardy point is concerned, I agree with Mr. Smouha QC that there is nothing in this point. If for the Purchaser's own commercial reasons it does not wish to allege a contravention, that is a matter for it. But it must recognise that the consequence of that decision will be that it has failed to give a valid notice under the SPA in relation to paragraph 9.1 of Schedule 4, Part 1.

(ii) The CFTC Notification

61. In my judgment, the CFTC Notification is also not a valid notification of a Seller Warranty Claim under paragraph 9.1 of Schedule 4, Part 1.

62. It is right to note that the CFTC Notification begins as follows:

> *In accordance with paragraph 5.1 of Part 1 of Schedule 5 to the SPA, we hereby give notice to the Seller of a Seller Warranty Claim against the Seller under certain of the Seller Warranties pursuant to the terms of the SPA (including without limitation the warranties contained at paragraphs 9.1, 9.2 and 10.3 of Part **1** of Schedule 4 to the SPA) as a result of, or in connection with the CFTC Matter (the **CFTC Seller Warranty Claim**).*

63. That would, if taken in isolation, suggest that a Seller warranty Claim was being made under paragraph 9.1.

64. However, the Notification then sets out in some detail in paragraph 4 the CFTC investigation into swaps trading relating to bond issuances, referring to various requests for information made by the CFTC of Voice Group Companies. That is followed by a reference (in clause 5 of the CFTC Notification) to paragraphs 9.1, 9.2 and 10.3 of Schedule 4, Part 1, followed by the following wording in clause 6:

> "It is apparent that (i) in relation to paragraph 9.2 of Part 1 of Schedule 4 to the SPA, there was an existing and/or threatened and/or pending investigation, review or enquiry by the CFTC, (ii) in relation to paragraph 9.1 of Part I of Schedule 4 to the SPA this related to conduct in the preceding 18 months and might result in a fine, penalty or other sanction, and (iii) in relation to paragraph 10.3 of Part 1 of Schedule 4 to the SPA there were circumstances which would reasonably be expected to give rise to litigation, arbitration or alternative dispute resolution proceedings against a Voice Group Company."

65. It can be seen that in relation to paragraph 9.1, the CFTC Notification does not refer to any contravention of an applicable law or regulation, but rather refers merely to the fact that the CFTC investigation which was underway related to "*conduct*" in the preceding 18 months (which might result in a fine, penalty or other sanction).

66. Clauses 9 and 10 of the CFTC Notification then state:

> "9. As matters are still ongoing, the Purchaser is unable at this stage to quantify accurately the liability resulting from the CFTC Matter. The Purchaser has, however, already incurred costs and expenses (including without limitation legal costs) in connection with the CFTC Matter amounting to approximately £1,250,000 and expects to continue to incur costs and expenses.
>
> 10. Further, in the event that a Governmental Authority makes an adverse finding in connection with the CFTC Matter, the Purchaser may also incur loss as a result of:
>
> 10.1 any fine, penalty or other liability or sanction imposed by a Governmental Authority in connection with such finding; and/or
>
> 10.2 any Claim brought against the Purchaser (or any of its Subsidiaries) by a client or counterparty of a Voice Group Company in connection with such finding or in connection with the facts and circumstances that led to such finding."

67. Again, these two paragraphs make clear that the investigation is continuing and no adverse finding against the Company has yet been made; and no contravention of any law or regulation is referred to. As a result the Purchaser makes no mention at all of any alleged material adverse impact on the operation of the business of the Voice Group Companies (taken as a whole) and it can only point to relatively trivial losses. Again, that is an important part of the notification requirement under paragraph 5 of Schedule 5, Part 1 which is missing from this Notification.

68. This is no doubt why the following conclusion is reached in clause 12:

> "Accordingly, the facts and circumstances relating to the CFTC Matter set out at paragraph 4 above give rise to a Seller Warranty Claim against the Seller pursuant to paragraph 9.2 of Part 1 of Schedule 4 to the SPA, and may also give rise to a Seller Warranty Claim pursuant to paragraphs 9.1 and 10.3 of Part 1 of Schedule 4 to the SPA (and potentially other Seller Warranties)." (emphasis added)

69. As is stated above, if the Claimant wishes to allege the Seller Warranty in paragraph 9.1 of Schedule 4, Part 1 to have been untrue or inaccurate, it must state in reasonable detail the nature of the Seller Warranty Claim: that is, it must describe the broad nature of the contravention of the law or regulation which is alleged was not disclosed (identifying the relevant law/regulation), and make clear that as a result it is making a Seller Warranty Claim. The CFTC Notification does not do that.

70. Mr. Handyside QC submitted that what this Notification was telling the Seller was that "*the nature of the claim here is that, it has come to our attention that your conduct is being investigated in the context of suspected breaches of law and regulation. We are making a claim against you under paragraph 9.1 on a contingent basis. If the regulator makes findings against you, you will be in breach and you will be liable.*"

71. I do not consider that that is the correct, objective reading of the CFTC Notification. As I put to Mr. Handyside QC in argument[4], what of a case where an investigation has begun but there is not yet any suggestion that the Seller is in breach of any law or regulation. In that case he accepted that the Purchaser cannot simply say "*Well, there is conduct here and that might result in a contravention of applicable law and so you should have disclosed it under 9.1*". He accepted that in such a case there would have to be a claim made under one of the other warranties (presumably 9.2). But that is this case.

72. In my judgment, if one asks the question how would the CFTC Notification be understood by a reasonable recipient with knowledge of the context in which it was sent, it would clearly be understood as a notification under clause 9.2, referring as it does in some detail to the CFTC non-routine investigation, but, when clause 3 is read together with clauses 6, 9, 10 and 12, it would not be understood that the Purchaser was also making now a Seller Warranty Claim under paragraph 9.1 because there had been a contravention of an applicable law or regulation; rather, it was notifying the fact that an investigation was underway into the conduct of Voice Group Companies which might result in a fine, penalty or other sanction, but whether it would or not and whether any law or regulation had been contravened was not yet known.

73. It is not open to the Claimant to seek to evade the strict time limits in clause 5.1 of Part 1 of Schedule 5 to the SPA by notifying in this way so far as paragraph 9.1 of Part 1 to Schedule 4 to the SPA is concerned.

74. In the light of my findings on Grounds 3 and 4, it follows that paragraphs 53-54 of the Particulars of Claim should be struck out as disclosing no reasonable cause of action.

Defendant's Ground 5 – No notification under paragraph 9.2

75. The Defendant's point under Ground 5 is a short one. It submits that the Claimant failed to make a valid notification of a Seller Warranty Claim under paragraph 9.2 of Part 1 of Schedule 4 ("the Investigations Warranty") on the basis of a non-routine investigation, review or enquiry (by the Attorney General's Office of Frankfurt) in the preceding 18 months into a Voice Group Company (as opposed to a director, officer or employee of a Voice Group Company).

76. The significance of the distinction between a director, officer or employee having been subject to a non-routine investigation, review or enquiry as compared to a Voice Group Company itself being subject to such an investigation is that the Investigations Warranty in respect of the former (i.e. directors, officers, employees) was given subject to the qualification of the Seller's awareness. By contrast, the Investigations Warranty in respect of a Voice Group Company itself is not subject to the Seller's awareness.

77. The Defendant contends that certain parts of the Claimant's claim impermissibly proceed on the basis of valid notification of a Seller Warranty Claim relating to a non-routine investigation, review or enquiry *into a Voice Group Company*, and that the Claimant's claim in this regard should be struck out or summarily dismissed. Specifically:

[4] Transcript, Day 2/p. 75

a) Paragraph 47 of the Particulars of Claim alleges that in breach of the warranty in paragraph 9.2 (i) the Voice Group Companies, and/or (ii) directors, officers and/or employees of the Voice Group Companies, members of the Seller's Group, and or directors, officers and/or employees of members of the Seller's Group, had been subject to a non-routine investigation, review or enquiry.

b) No distinction is drawn for these purposes between the matters relied on in paragraph 47(a) (which relate to the CFTC/ FCA Matter) and paragraph 47(b) (which relate to the German Tax Matters).

c) Paragraph 47(b) states that the German authorities had commenced investigations or enquiries into cum-ex trading involving Rafael Roth, HypoVereinsbank Munich/London AG ("HypoVereinsbank") and Sarasin, "*including as set out in paragraphs 28 to 30 above*".

d) Paragraph 29, as referred to, states that as part of his investigation the Frankfurt Prosecutor made enquiries "*in respect of or relating to various employees of the Voice Group Companies*", but the Claimant then inserts in parenthesis "*(and thus those Voice Group Companies themselves)*".

e) Paragraph 49 sets out the Claimant's case under paragraph 9.2 in relation to both the CFTC/FCA Matter and the German Tax Matters "*Insofar as liability under paragraph 9.2 was qualified by reference to the Seller's awareness*".

78. Mr. Smouha QC submits that the parenthesis in paragraph 29 of the Particulars of Claim – "*(and thus those Voice Group Companies themselves)*" – is an illegitimate device to get around the difficulty that the investigation was into Mr. Tyler Bowen and not a Voice Group Company. I agree. As Mr. Smouha QC rightly points out, if it were the case that any investigation into an employee of a Voice Group Company was also necessarily an investigation into a Voice Group Company itself, then the additional element of knowledge in paragraph 9.2 ("*so far as the Seller is aware*") would never come into play. It is one thing to warrant this on behalf of the Voice Group Companies; it is quite another matter to warrant this on behalf of all of the employees in a worldwide organisation without the additional requirement of knowledge on the part of the company.

79. Despite the defective plea of the Claimant, the real issue here is whether or not the Tax Investigation Notification, read objectively, was a notification of a non-routine investigation into a Voice Group Company.

80. The Defendant's point is simple: clause 4.1 of the Tax Investigation Notification defines the Investigation as being an investigation into Edward Tyler Bowen and others ("the others", whom the Claimant pleads consist of natural persons, appear to have been two brokers at ISL: see paragraph 29 of the Particulars of Claim). It was not an investigation into ISL. Clause 6 of the Tax Investigation Notification further makes clear that the investigation was into the director and not the company itself.

81. The Claimant's response is that this ignores clause 4.2 of the Tax Investigation Notification, when read together with the attached letter of 19 December 2018 from the Frankfurt Public Prosecutor's Office. Mr. Handyside QC submits that the combined effect of these two features makes clear that the investigation proceedings cover not only Mr. Tyler Bowen but also ISL itself because the prosecutor was proposing to

impose a fine on ISL and confiscate the proceeds of crime. In these circumstances it is impossible to say that ISL is not the subject of the investigation, particularly where the director was acting on behalf of the company.

82. In my judgment Mr. Smouha QC is right about this:

    a) Clause 4.1 of the Tax Investigation Notification specifically defines the Investigation as being the investigation of Edward Tyler Bowen;

    b) Whilst clause 4.2 refers to the Prosecutor's intention to impose on ISL a fine and disgorgement of proceeds in connection with the Investigation, it is not the company which is the subject of the Investigation: it is Mr. Tyler Bowen.

    c) The matter is put beyond doubt by clause 6 of the Tax Investigation Notification, which, after reciting the terms of paragraph 9.2 of Schedule 4, Part 1 (which contains a distinction between an investigation of the company and an investigation of a director), states in clear terms that "*In relation to paragraph 9.2 of Part 1 of Schedule 4 to the SPA a director of a Voice Group Company was the subject of a non-routine investigation, review or enquiry…*" (emphasis added). That is what is being notified. Indeed, it is presumably because the pleader realised that this is how the notification letter is clearly framed, that he decided to insert the parenthesis in paragraph 29 of the Particulars of Claim in an attempt to get around this difficulty.

83. It follows that the Claimant's claim in this respect, contained in paragraph 47 of the Particulars of Claim (as well as the parenthesis in paragraph 29), should be struck out.

Defendant's Ground 6 – No allegation of breach under paragraphs 9.1, 22.1 and 22.9

The parties' submissions

84. Under Ground 6, the Defendant contends that the three pleaded claims for damages made pursuant to paragraphs 9.1, 22.1 and 22.9 of Part 1 of Schedule 4 of the SPA are unsustainable as they do not allege any breach of warranty. The point the Defendant seeks to make is that it is an essential element of a claim for damages for breach of contract that there has been a breach of contract, but none of these three claims alleges a breach of warranty. Each is instead put on the basis that *if* and "*to the extent that*" indeterminate findings are made in investigations and/or court proceedings at some point in the future there *would* be a breach.

85. So far as the claim in respect of the Seller Warranty in paragraph 9.1 of Part 1 of Schedule 4 is concerned, that is pleaded in paragraphs 53 and 54 of the Particulars of Claim which I have already held should be struck out. It follows that this argument does not arise.

86. Had it arisen, the Defendant notes that the Claimant's pleaded case is that:

    (i) In relation to the underlying conduct, which is the subject of the CFTC/FCA Matter and the German Tax Matters, the conclusions of the regulatory authorities and courts have not yet been reached.

(ii) It is alleged only that if and "*to the extent that*" the regulatory investigations and/or court proceedings ultimately establish that some or all of the alleged wrongdoing took place that the Seller would be in breach of warranty.

(iii) There is no pleaded allegation that the Seller is actually in breach of warranty.

87. So far as the claim in respect of the Tax Warranty in paragraph 22.1 of Schedule 4, Part 1 is concerned, that is pleaded in paragraph 55 of the Particulars of Claim. The Defendant notes that the Claimant's pleaded case is merely that if and "*to the extent that*" regulatory investigations and/or court proceedings ultimately establish that as a result of the German Tax Matters a Voice Group Company was liable (i) to Taxation[5] in the 3 years preceding the giving of the warranties for which it had not made appropriate payment etc., or (ii) to pay a penalty, surcharge, fine or interest in connection with Taxation for that period, then the Seller would be in breach. There is no pleaded allegation that the Seller is in breach.

88. So far as this claim is concerned, the Claimant states in paragraph 8 of its skeleton argument and footnote 4 that it no longer pursues its claim for damages for breach of the Tax Warranty in paragraph 22.1 (paragraph 55 of the Particulars of Claim) and accordingly this should be struck out. This is also relevant to Ground 7 of the application.

89. Finally, so far as the claim in respect of the Tax Warranty in paragraph 22.9 of Schedule 4, Part 1 is concerned, which is pleaded in paragraph 57 of the Particulars of Claim, the Defendant notes that the Claimant's pleaded case is that in relation to the Alleged Cum-Ex Conduct, the conclusions of the regulatory authorities and, where relevant, the courts have not yet been reached and if and "*to the extent that*" they ultimately establish that the Alleged Cum-Ex Conduct had as a main purpose or effect the avoidance or evasion of a liability to Taxation, the Seller would be in breach. Again, there is no pleaded allegation that the Seller is actually in breach.

90. The Defendant refers to the fact that the Claimant has, by a proposed amendment to the first sentence of paragraph 57 of the Particulars of Claim, sought to add an allegation of actual breach in relation to the third claim (in respect of the Tax Warranty in 22.9). It accepts that this is legitimate. However, the Claimant still maintains in the second and third sentences of the proposed amended paragraph 57 a freestanding case claiming damages for breach of warranty without alleging any actual breach and that, it submits, is illegitimate.

91. The Defendant contends that the only claim made in respect of each of these three warranties is for damages (see paragraphs 64 to 66 of the Particulars of Claim) and that since the Claimant's case at its highest is that the Seller may or may not be in breach, depending upon whether certain contingencies occur in the future, each of these aspects of the Claimant's pleaded case falls to be struck out or summarily dismissed.

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5 "Taxation" is defined in the SPA as meaning "*all forms of taxation, duties, imposts and levies, whether of the United Kingdom or elsewhere, including income tax (including income tax or amounts equivalent to or in respect of income tax required to be deducted or withheld from or accounted for in respect of any payment), corporation tax, advance corporation tax, capital gains tax, inheritance tax, VAT, Environmental Tax, customs and other import or export duties, excise duties, stamp duty, stamp duty reserve tax, stamp duty land tax, National Insurance and social security or other similar contributions, and any interest, surcharge, penalty or fine in relation thereto*".

92. The Claimant said very little about Ground 6 in its skeleton argument and instead relied upon its arguments on notification in respect of grounds 3 and 4. However, Ground 6 raises arguments which are independent of the notification arguments, and in his oral submissions, Mr. Handyside QC made the following points:

    a) So far as paragraph 9.1 is concerned (and paragraphs 53-54 of the Particulars of Claim), the Claimant's argument depends upon it being open to notify under the terms of the SPA on a contingent basis, and if that is so, the Claimant should be entitled to initiate proceedings on a contingent basis.

    b) The Purchaser must issue and serve proceedings within 12 months of notifying the Seller Warranty Claims: paragraph 5.2 of Schedule 5, Part 1 to the SPA.

    c) It follows that if the parties envisage that there could be a contingent notification they must have been taken to have contemplated that the proceedings might need to be commenced on a contingent basis.

    d) If there is no positive plea of misconduct by the time of the trial, the claim will fall to be dismissed. There obviously has to come a time when the purchaser must make a positive case that can be determined at trial.

    e) Similar considerations arise in relation to the Tax Warranty at paragraph 22.9 (paragraph 57 of the Particulars of Claim), save that because this is a Tax Warranty, there is a longer period of notification, namely on or before the expiry of the relevant statute of limitation period for the relevant Tax Warranty: paragraph 5.1(a) of Schedule 5, Part 1.

    f) If a claim can be notified on a contingent basis but cannot be pleaded on a contingent basis, the Purchaser will be precluded from bringing the claim unless it is in a position to plead an actual breach of the Tax Warranty within 12 months of notification. Accordingly, he would be better off not having notified at all and delaying the notification. That is most unlikely to be what the parties intended.

Discussion

93. I accept Mr. Smouha QC's submissions in respect of Ground 6. The time limits in paragraph 5 of Schedule 5, Part 1 are mandatory. The Purchaser must decide when to notify and having been notified, a Seller Warranty Claim is subject to a one year cut off period for the issuing and service of proceedings under paragraph 5.2. That is the commercial deal that the parties have struck which affords them certainty (particularly the Seller), and the Purchaser cannot seek to get around those agreed time limits by notifying and then pleading "contingent claims" in the sense of claims which have not yet arisen and which may never arise.

94. So far as Mr. Handyside QC's point (f) above is concerned, there is no need to notify "contingently" the tax warranty claim because such a claim is only subject to the relevant statute of limitation in respect of that claim. It follows that once a Tax Warranty Claim arises, at that point the Purchaser notifies it and then it has 12 months under paragraph 5.2 to issue and serve its claim. There is no difficulty. What it cannot do is notify a Tax Warranty Claim before the claim has actually arisen, and then complain that the 12-month period has expired before it is able to plead an actual breach of the warranty. That is a situation of its own making which arises as a result of its own illegitimate attempt to evade the agreed time limits in paragraph 5.

95. It follows that paragraphs 53-54; 55 (conceded) and 57 should be struck out for this reason (53-54 have been struck out in any event).

Defendant's Ground 7 – the Tax Warranty in paragraph 22.1 of Part 1 of Schedule 4

96. Under Ground 7, the Defendant contended that on its true construction the Tax Warranty in paragraph 22.1 is engaged only in respect of the liability of a Voice Group Company for Taxation or to pay a penalty, surcharge, fine or interest in connection with a liability of the Voice Group Company to Taxation. Accordingly, it was said, a case that regulatory investigations and/or court proceedings might establish that as a result of the German Tax Matters and/or the Alleged Cum-Ex Conduct a Voice Group Company was liable to Taxation or a penalty, surcharge, fine or interest in connection with Taxation in the 3 years preceding the giving of the warranty has no real prospect of success in any event insofar as it relies on:

    a) First, the "*potential civil claims*" pleaded in paragraph 23 of the Particulars of Claim, cross-referring to the Investec Claim, the Potential Blackrock Claim and the Potential Warburg Claim pleaded in paragraphs 40 to 42.

    b) Second, liability to disgorge profits or pay fines under ARO, as pleaded in paragraph 27(f) of the Particulars of Claim.

    c) Third, the "*civil claims*" by "*clients, counterparties and other persons involved in the planning and/or execution of the transactions*" based on the German Civil Code pleaded in paragraph 27(h) of the Particulars of Claim.

97. The Defendant noted that the warranty in paragraph 22.1 is concerned with (i) the liability of a Voice Group Company, not any other person, (ii) for Taxation or a penalty, surcharge, fine or interest in connection with Taxation, (iii) in the preceding 3-year period. Paragraph 22.1, it was argued, is concerned with the actual tax position of the Voice Group Company at the date of the SPA, not liability in civil proceedings or for a fine at an indeterminate point in the future (even if by reference to matters prior to the SPA).

98. As regards the "*potential civil claims*" pleaded in paragraph 23 in particular, the Defendant argued that the Claimant faces an insurmountable timing difficulty since:

    a) The Claimant's own evidence is that the Investec Claim relates to cum-ex trades carried out in 2010, considerably more than 3 years prior to the SPA.

    b) The Claimant's pleaded case is that the Potential Blackrock Claim relates to matters that are said to concern Market Participant Arrangements with a Voice Group Company in June 2008 and March 2010, considerably more than three years before the SPA.

    c) The Claimant's own evidence is the Potential Warburg Claim relates to cum-ex transactions between 2007 and 2011, considerably more than three years before the SPA.

99. In the light of this case, Ground 7 is conceded by the Claimant and accordingly it is accepted that paragraph 55 of the Particulars of Claim falls to be struck out.

Defendant's Ground 8 – the Tax Warranty in paragraph 22.3 of Schedule 4

100. Paragraph 22.3 of Part 1 of Schedule 4 to the SPA ("the Tax Investigations Warranty") provides as follows:

> "No Voice Group Company is or has in the past three years been involved in any dispute or non-routine audit, review or investigation in relation to Taxation with a Taxation Authority nor, so far as the Seller is aware, is likely to become involved in such a dispute, audit or investigation."

The parties' submissions

101. So far as this ground is concerned, the Defendant's case originally had two limbs:

a) The first was that the pleaded claim for breach of the paragraph 22.3 Tax Warranty in paragraph 56 of the Particulars of Claim was unsustainable insofar as it sought to rely on investigations other than by a Taxation Authority[6]. The Claimant has sought by the proposed amendments in the draft APOC at paragraph 56 to plead new allegations to the effect that the investigations involved multiple additional tax offices. As a result, the Defendant says that it accepts that "*the breadth and imprecision of the amendment makes it difficult to untangle the pleading on a summary basis*" and so this argument is no longer pursued by it.

b) The second limb remains live. The Defendant maintains that a breach of the Tax Warranty in paragraph 22.3 requires a Voice Group Company to have been involved in a non-routine audit, review or investigation with a Taxation Authority *in relation to the Taxation of a Voice Group Company* (not the Taxation of a third party). It is said that that is not alleged in paragraph 56, which cross-refers to and relies upon the matters in paragraphs 28 and 29 of the Particulars of Claim, and so the breach claim under paragraph 22.3 should be struck out.

102. More particularly, the Defendant submits as follows:

a) The simple issue is whether the "*non-routine audit, review or investigation in relation to Taxation with a Taxation Authority*" for the purposes of paragraph 22.3 (i) is required to be in relation to Taxation of a Voice Group Company or (ii) whether it relates to Taxation of anyone at all. The Defendant contends that it is clearly the former.

b) The warranty is focussed on the involvement of a Voice Group Company. The words "*involved in*" are broad, as are "*any dispute, non-routine audit, review or investigation*". The limiting words are "*in relation to Taxation with a Taxation Authority*". The reference to a Taxation Authority indicates that what is contemplated is a non-routine audit, review or investigation into the Voice Group Company's own tax affairs.

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6 "Taxation Authority" is defined in the SPA as meaning "*HM Revenue and Customs or any other taxing or other authority (whether within or outside the United Kingdom) competent to impose, administer or collect any Taxation*".

c) It is difficult to see in what circumstances a Voice Group Company would be involved in a "*non-routine audit*" in relation to Taxation with a Taxation Authority in relation to the tax affairs of others.

d) The Seller was selling, and the Purchaser was acquiring, the Voice Group Companies. There is no commercial reason for a warranty that a Voice Group Company had had no involvement in a dispute, non-routine audit, review or investigation in relation to the tax affairs of others, including the personal tax affairs of employees or the tax affairs of entirely unrelated third parties, for information gathering or other purposes.

e) The Seller warranted in paragraph 22.3 not only that no Voice Group Company had been involved in such a dispute, non-routine audit, review or investigation in relation to Taxation with a Taxation Authority, but also that, so far as the Seller is aware, no Voice Group Company is "*likely*" to become involved in such a dispute, audit or investigation. That would be a surprising warranty to give in relation to the tax affairs of others for similar reasons.

f) That interpretation is supported by paragraph 22 more broadly. All of the other Tax Warranties are focussed on the tax position of the Voice Group Company itself: its liability to tax, whether it has filed its returns, charges on its assets for Taxation, its tax status, its tax residence, where it is registered for VAT, etc.

103. The Claimant's response to this ground takes paragraphs 22.3 and 22.9 of Schedule 4, Part 1 together. The Claimant submits as follows:

a) The Seller contends that as a matter of construction those provisions only apply where a Voice Group Company is the primary taxpayer, although the Seller's formulation of where they do and do not apply (paragraph 99 and paragraph 106) is vague and does not appear to contemplate the obvious point that matters may relate to the Taxation position of <u>both</u> the Voice Group Company and a third party (e.g. a participant in trades).

b) The fundamental point, which the Seller ignores, is that the wording of the provisions, including the definition of "*Taxation*", does not support any such construction.

c) The Tax Investigations Warranty covers investigations etc. "*in relation to Taxation*".

d) The Tax Schemes Warranty (in paragraph 22.9) simply refers to the Voice Group Company having "*participated in*" a transaction, scheme or arrangement with the purpose or effect of evasion or avoidance, or which is liable to be re-characterised or treated as unenforceable for "*Taxation*" purposes.

e) The definition of "*Taxation*" in the SPA, covering "*all forms of Taxation*" etc is <u>not</u> limited to taxation of any particular person (whether the particular Voice Group Companies, the business of the Voice Group Companies generally, clients etc.).

f) Accordingly, the clear meaning of the words is that these warranties cover tax investigations and tax schemes in relation to Taxation generally, not only Taxation of the Voice Group Companies themselves.

g) Further, the definition of "*Taxation*" also includes liabilities to fines, penalties etc., not just the payment of tax itself – i.e. liabilities which can arise (in addition to joint and several liability) even where the taxpayer is another party.

h) As the Seller itself contends (para 99(a)), the warranty is broad and the key "*limiting words*" are Taxation and Tax Authority. Yet those "*limiting words*" selected by the parties do not contain the central limitation for which the Seller contends.

i) If the parties had wanted to limit the effect of the warranties to the Voice Group Companies' own tax position, they could readily have done so either via the definition of Taxation or in the individual warranties. Notably, the Tax Payment Warranty (paragraph 22.1) does refer to Taxation for which the Voice Group Company "*has become liable to pay, deduct… etc*". The same approach is not adopted in paragraphs 22.3 and 22.9.

j) That is the end of the inquiry. But in any event those provisions make commercial sense. There are good commercial reasons why the protection afforded to the Purchaser by the Tax Investigations Warranty and the Tax Schemes Warranty would not be limited to the Voice Group Companies' own taxation, and would also cover situations where the Voice Group Companies under the Seller's ownership had involved themselves in schemes relating to other people's tax position which are said to be abusive. Such conduct would expose the business under the Purchaser's control to both financial liabilities and reputational damage.

k) The Seller's approach at paragraphs 99 and 103 is to ignore the words and contend that its interpretation must be right because it would prefer a different commercial outcome. The essence of its argument is that because the parties could have limited the provisions to the tax affairs of the Voice Group Companies, and that alternative approach could have made commercial sense (i.e. would have been advantageous to the Seller) that is what they must have done. But that is not the correct approach at all, particularly in respect of a detailed and professionally drafted contract (see *Wood* (*supra*) at [13]).

l) The contention (for example at 99(d) of the Defendant's skeleton argument) that such a liability would be "*surprising[ly]*" wide is just another iteration of the same point. It also assumes that any limitation of the scope necessarily arises from re-writing the definition of Taxation rather than giving effect to the proper interpretation of what it means to "*participate in*" a scheme.

m) It is not clear how the Seller's approach would actually seek to rewrite the warranty, because it is not easy (either commercially or linguistically) to draw the line at which the Seller hints but does not define. It is easy to envisage legal systems in different jurisdictions imposing tax liabilities in varying ways on persons who participate in tax schemes as brokers or advisers, irrespective of whether those persons are the primary taxpayers. The German system of joint and several liability is but one example of this.

n) Further, the Seller's attempt to buttress its construction arguments by reference to the scope of the other Tax Warranties (paragraphs 99(e) and 100(f) of the Defendant's skeleton argument) is misconceived. First, the fact that the different warranties are drafted differently, and some refer to the Voice Group Companies'

own position alone while others do not, only serves to highlight the point that paragraphs 22.3 and 22.9 are in the latter category. Second, clause 12.2 of the SPA expressly provides that each of the Seller Warranties is separate and independent and, absent express provision to the contrary, is not limited by reference to any other Seller Warranty. That is also the answer to the Seller's point about whether or not there are "*gaps*" – this is not the relevant inquiry. It is contemplated that there will or may be overlaps.

o) In any event, even if the Court were with the Seller on their construction of these provisions, because they are limited to "*Taxation purposes of a Voice Group Company*", the present claims would still be valid, as the relevant matters could lead to the imposition of joint and several liability for tax, a fine and/or a penalty on the Voice Group Companies. So as a strike out point, the Seller's argument does not get it anywhere even if it were correct (which it is not).

Discussion

104. Although (as can be seen) the parties advance an array of points about this issue of construction, in my judgment it is relatively straightforward and I accept the Claimant's submissions. Clause 22 contains essentially two different types of Tax Warranty, namely those which concern the taxation position solely of a Voice Group Company and those which concern the taxation position of a Voice Group Company and a third party. As the Claimant submits, this is not at all commercially surprising. The Voice Group Companies are concerned in the business of voice broking for their clients. It is unsurprising that tax warranties (such as paragraph 22.9) should therefore be given to cover situations where those companies had involved themselves in avoidance/evasion schemes relating to the taxation affairs of third parties. Disputes with Taxation Authorities as to the legitimacy of such schemes might very well expose the business under the Purchaser's control to both financial liabilities and reputational damage.

105. Paragraph 22.3 is also clearly concerned with something out of the norm so far as taxation matters are concerned. There must be a *dispute* with or *non-routine* audit/review/investigation by a Taxation Authority. In a case where a Voice Group Company is likely to become involved in such a dispute or non-routine audit/review/investigation, that is qualified by the Seller's awareness. It follows that I reject the Defendant's suggestion that this is a surprising warranty. In order for the warranty to bite, the Seller must (i) be aware that (ii) it is likely to become involved in (iii) a dispute or non-routine audit in relation to Taxation with a Taxation Authority. There seems to me to be nothing commercially surprising about the giving of such a warranty based upon the Seller's knowledge, particularly since the relevant knowledge is narrowly circumscribed by reference to the named individuals in paragraph 2 of Schedule 23 to the SPA.

106. Moreover, where the SPA wishes to make clear that the warranty is concerned with the taxation of a Voice Group Company it makes that clear: see for example paragraph 22.1 ("*which it has become liable to pay*"; "*which it has become liable to account*") and paragraph 22.2 ("*as it is required to make*"; "*served on it*"; "*and any other requirements lawfully made of it*"). In contrast, paragraph 22.3 merely refers to a Voice group Company being "*involved in*" any dispute (and not "*subject to*"), which is a much broader concept. It would have been open to the draftsperson to draft this clause as follows, but they did not:

> "No Voice Group Company is or has in the past three years been involved in any dispute or non-routine audit, review or investigation [of it] in relation to Taxation with a Taxation Authority nor, so far as the Seller is aware, is likely to become involved in such a dispute, audit or investigation [of it]."

107. This construction is fortified by the definition of Taxation in Schedule 23 of the SPA, which is very broad and is not limited to Taxation of a Voice Group Company. Mr. Handyside QC rightly points out the importance of textualism when considering a sophisticated, professionally drawn contract such as the SPA: see *Wood v Capita* (supra). There is no need or warrant to read limiting words into the warranty.

108. As Mr. Handyside QC argued, the Defendant's attempt to buttress its construction arguments by reference to the scope of the other Seller Tax Warranties is misconceived. The fact that other of the warranties refer expressly to the Voice Group Companies' own tax position alone, whereas others do not serves to underline the deliberate difference between these two categories of warranty. In any event, by clause 12.2 of the SPA, each of the Seller Warranties is separate and independent and, except as provided to the contrary in the SPA or the Tax Deed, is not limited by reference to any other Seller Warranty or by any other provision of the SPA or the Tax Deed. So the fact that other of the warranties only deal with the tax position of a Voice Group Company does not undermine the construction that I consider to be correct, i.e. that the Tax Warranties in paragraphs 22.3 and 22.9 apply to the tax position of a third party as well.

109. It follows that I do not strike out the paragraph 22.3 claim in paragraph 56 of the Particulars of Claim.

Defendant's Ground 9 – the Tax Warranty in paragraph 22.9 of Schedule 4

Parties' submissions

110. Similar arguments apply to the Tax Warranty in paragraph 22.9 of Schedule 4 which reads as follows:

> "No Voice Group Company has participated in any transaction, scheme or arrangement of which the or a main purpose or effect is the avoidance or evasion of a liability to Taxation or which could be re-characterised or treated as unenforceable for Taxation purposes."

111. A claim in respect of this warranty is advanced in paragraphs 57-58 of the draft APOC. As regards paragraph 22.9 (the Tax Schemes Warranty), the claim relates to two aspects of the Alleged Cum-Ex Conduct. The Claimant contends in the APOC that: (i) tax avoidance (at least) was the or a main purpose or effect of the conduct; and (ii) the transactions could be re-characterised or treated as unenforceable for Taxation purposes.

112. The Defendant explains that its case in this regard has two limbs, both of which raise essentially the same point as under Ground 8, that the Tax Warranties relate to the Taxation of Voice Group Companies.

113. The first limb only arises if Ground 6 fails. It relates to paragraph 57 of the Particulars of Claim. A breach of the Tax Warranty in paragraph 22.9 requires a Voice Group Company to have participated in a transaction, scheme or arrangement of which a main purpose or effect was the avoidance or evasion of a liability to Taxation of a Voice

Group Company (not a liability to Taxation of a third party). Whilst I do not agree that paragraph 22.9 requires a Voice Group Company to have participated in a transaction, scheme or arrangement of which a main purpose or effect was the avoidance or evasion of a liability to Taxation of a Voice Group Company and not a liability to Taxation of a third party, since I have found that Ground 6 succeeds this point does not arise for determination (I add only that the first sentence of the draft APOC of Claim does not suffer from the same defect as the second and third sentences thereof and it would therefore survive such a challenge).

114. The second limb relates to paragraph 58 of the Particulars of Claim and *does* arise for determination. The Defendant makes two points:

    a) Essentially the same point, that a breach of the Tax Warranty in paragraph 22.9 on the basis that a Voice Group Company participated in a transaction, scheme or arrangement which could be re-characterised or treated as unenforceable for Taxation purposes requires that the transaction, scheme or arrangement could be re-characterised or treated as unenforceable for the purposes of the Voice Group Company's tax and not that of a third party.

    b) In any event, the potential civil claims (Investec, Blackrock, Warburg) would not result in any re-characterisation or retreatment for Taxation purposes and the claim made on that basis (via the "German Tax Matters" definition) should be dismissed.

Discussion

115. So far as the first point (a) is concerned, I reject the Defendant's submission. Paragraph 22.9 is broadly worded and the same reasoning of the court applies as applies in the case of paragraph 22.3. It would have been open to the draftsperson to word the clause in the following way, but they did not do so:

> "No Voice Group Company has participated in any transaction, scheme or arrangement of which the or a main purpose or effect is the avoidance or evasion of a liability to Taxation [by it] or which could be re-characterised or treated as unenforceable for [its] Taxation purposes."

116. In order for paragraph 22.9 to bite, the Voice Group Company must have participated in a transaction, scheme or arrangement whose main purpose is the avoidance/evasion of a liability to Taxation. I consider it not at all commercially surprising that such a warranty should be given by the Seller. If a Voice Group Company *participates* in a scheme whose *main purpose* is tax avoidance/evasion, regardless of whether it concerns the tax affairs of a Voice Group Company itself or a third party, there is an obvious exposure of the business under the Purchaser's control to both financial liabilities and reputational damage and it is neither unreasonable nor surprising that the burden of disclosure of such a scheme should fall upon the Seller under the SPA. If the main purpose of the scheme is tax avoidance/evasion, any claim by the participating Voice Group Company that it did not realise that fact might be viewed with a degree of scepticism and in any event thought to be undeserving of much sympathy.

117. So far as the second point (b) is concerned (that the potential civil claims (Investec, Blackrock Warburg) would not result in any re-characterisation or retreatment for Taxation purposes and the claim made on that basis (via the "German Tax Matters" definition) should be dismissed), the Claimant says that it does not understand the point

being made, as the relevant issue is whether the cum-ex transactions in which the Voice Group Companies allegedly participated "could" be re-characterised or treated as unenforceable for Taxation purposes. The answer to this question does not depend upon whether any claims of Investec, Blackrock or Warburg "would" result in transactions being so re-characterised or treated. Mr. Handyside QC submitted that the cum-ex transactions into which the Voice Group Companies purportedly entered or participated *are* capable of being characterised or treated as unenforceable for taxation purposes (i.e. they *could* be), and that this is illustrated by the German Court decision referred to in Mr. Leisner's witness statement, paragraph 53 (which, however, does not relate to a Voice Group Company).

118. In the light of the Claimant's clarification, it does not seem to me therefore that this point requires any determination from the court and it is certainly not suitable for summary determination in any respect.

Defendant's Grounds 10 and 11 – declaratory relief under the Tax Deed and Indemnity in relation to costs

119. Grounds 10 and 11 concern claims under the Tax Deed.

120. They concern paragraphs 59-62 of the Particulars of Claim as follows:

> **"Claim under the Tax Deed**
>
> 59. Any liability of any Voice Group Company to make a payment of any sum by way of tax (for example, by way of accessory liability or joint debtor status under the German Fiscal Code) and/or by way of any interest, penalty, surcharge or fine in relation to the CumEx Conduct and/or arising from the German Tax Matters, is an Actual Taxation Liability within the meaning of that term in the Tax Deed.
>
> 60. Pursuant to Clause 2.1(a) of the Tax Deed, the Defendant is obliged to indemnify the Claimant in respect of any such liability arising from the Cum-Ex Conduct and/or the German Tax Matters, in that: a. it is a result of Transactions occurring before Completion; and/or b. insofar as it relates to profits, it is in respect of profits earned before Completion; and/or c. in respect of such liability incurred in any prior accounting period, it relates to a period ended on or before Completion.
>
> 61. Pursuant to Clause 2.1(g) of the Tax Deed, the Defendant is obliged to indemnify the Claimant in respect of any such liability arising from the Cum-Ex Conduct and/or the German Tax Matters, in that it is chargeable directly or primarily against, or arises directly or primarily in consequence of or by reference to something done by a person other than a Group Company, namely the activities of the relevant clients/counterparties, and would not have arisen but for the relationship between the relevant Group Company (being the relevant Cum-Ex VGC) and that person (being the clients/counterparties).
>
> 62. Pursuant to Clause 2.1(h) of the Tax Deed, the Defendant is obliged to indemnify the Claimant in respect of the costs and expenses reasonably incurred by the Claimant and/or Group Companies in connection with the Taxation Liability allegedly arising as a result of the Cum-Ex Conduct and/or the German Tax Matters, including in relation to avoiding, resisting or settling such Taxation Liability and in successfully taking or defending any action under the Tax Deed."
>
> (emphasis added)

121. The relevant provisions of the Tax Deed for the purposes of Grounds 10 and 11 are accordingly:

> "2.1 The [Defendant] covenants with the [Claimant], subject to the following provisions of this deed, to pay to the [Claimant] […] an amount equal to:
>
> (a) any Actual Taxation Liability of any [Voice] Group Company […] which arises:
>
> (i) as a result of any Transaction or Transactions occurring on or before Completion (other than an Actual Taxation Liability arising in respect of profits earned after Completion as a result of any such Transaction or Transactions); or
>
> (ii) in respect of any profits earned on or before Completion; or
>
> (iii) in respect of any period ended on or before Completion; or
>
> […]
>
> (g) any Actual Taxation Liability of a [Voice] Group Company or a member of the Purchaser's Group that:
>
> (i) is chargeable directly or primarily against, or arises directly or primarily in consequence of or by reference to anything done by, any other person other than a [Voice] Group Company or a member of the Purchaser's Group; and
>
> (ii) would not have arisen but for the relationship, at any time before Completion, of a [Voice] Group Company with such a person as is described in clause 2.1(g)(i) above; and
>
> (h) costs or expenses reasonably and properly incurred by the Purchaser or a [Voice] Group Company in connection with (i) a Taxation Liability […] or in connection with any action taken in avoiding, resisting or settling any such Taxation Liability […] or (ii) in successfully taking or defending any action under this deed […]"

122. "Actual Taxation Liability" is defined in clause 1.1 of the Tax Deed as meaning "*a liability to make a payment of, or on account of, Taxation*." "Taxation" is very widely defined and includes all forms of taxation. It follows that there must be an *actual* liability to make a tax payment.

Parties' submissions

123. In summary, the Claimant contends that:

a) Under clause 2.1(a), the Claimant is entitled to an indemnity in respect of liabilities arising from the Alleged Cum-Ex Conduct and German Tax Matters where they arise from transactions occurring before Completion (i.e. the cum-ex trades), profits earned before Completion (i.e. any profits on those trades) and/or in respect of any liability incurred in a prior accounting period ending before Completion.

b) Under clause 2.1(g), the Claimant is entitled to an indemnity for liabilities arising from the Alleged Cum-Ex Conduct and German Tax Matters because they arise

from something done by someone other than a Voice Group Company and which would not have arisen but for the relationship between the relevant Voice Group Company and the third party. Specifically, they arise from the actions of other parties to the trades in not paying tax or reclaiming tax, and would not have arisen but for the Voice Group Companies' trading/client relationship with those parties.

c) Under clause 2.1(h), the Claimant is entitled to an indemnity in respect of the costs and expenses reasonably incurred in relation to the liabilities, including avoiding, resisting or settling such liabilities.

124. The Defendant's objection in Ground 10 to the declaratory relief in paragraphs 59-62 of the Points of Claim has two limbs:

a) The first is that a claim for declaratory relief that *if in the future* there is an Actual Taxation Liability for the purposes of the Tax Deed the Claimant will be entitled to an indemnity in accordance with the terms of the Tax Deed would fail and should not be permitted. Paragraphs 59-62 do not plead any actual liability under the Tax Deed. They are just statements of what the Tax Deed says.

b) The second is that a claim for an indemnity and declaratory relief in respect of costs, for which it is common ground that the Defendant is not liable unless relevant costs exceed £10 million, fails and should be struck out in circumstances where on the Claimant's own evidence the costs at their highest are only £5.9 million.

125. The Defendant suggests that the Claimant in fact accepts the prematurity of these pleas, and that no Actual Taxation Liability has crystallised (Claimant's Skeleton para 86). That paragraph of the Claimant's skeleton argument reads as follows:

> "Alternatively, if the Court were against the Purchaser on Ground 10, the Court should either (a) stay the Tax Deed claims, or (ii) if they were to be struck out, make clear that the Tax Deed claims were being rejected as premature and not as a matter of substance – since on any view the Purchaser should be entitled to make such claims as and when an Actual Taxation Liability crystallises."

126. In oral submissions, Mr. Handyside QC stated that he accepted that "*for there to be an Actual Taxation Liability under the Tax Deed there must in fact be a liability which has come home to roost,*" and that is reinforced by clause 3.1(a) of the Tax Deed, which refers to payment of an Actual Taxation Liability within clauses 2.1(a) and 2.1(g) having to be made on the date which is five business days prior to the date on which payment is due. He accepted that "*we don't say that an Actual Taxation Liability has yet arisen*."

127. Instead, Mr. Handyside QC submitted that the claim that the Claimant seeks to bring is a claim for:

a) An indemnity in respect of amounts actually incurred by the time of judgment, both in terms of principal liabilities – Actual Taxation Liabilities – as well as costs and expenses under 2.1(h); and

b) Declaratory relief as to the Purchaser's entitlement to indemnification in respect of the Alleged Cum-Ex Conduct and German tax liabilities to the extent that further liabilities are established against the Voice Group Companies after trial.

128. Mr. Handyside QC submits that, since other issues concerning the German Tax Matters are going forward to trial, the court should allow paragraphs 59-62 to go forwards as well. He asks the following rhetorical questions:

> "Why, for example, can't the court decide whether the types of liabilities that are sought to be imposed under the investigations and the proceedings which have already been intimated would amount to an Actual Taxation Liability such that the Purchaser would be entitled to an indemnity in respect of any such liabilities as are established? And why shouldn't the court be able to declare now that the actions that the Purchaser or other group company take or has taken or are taking now to avoid those liabilities fall within the scope of the costs indemnity under paragraph 2.1(h)? Those are matters which the court could decide at a trial and we say it could usefully and should usefully decide at a trial… Why should and how can the court rule out now the possibility that the court will consider that declaratory relief should appropriately be granted having regard to the full facts as they appear at trial?"

Discussion

129. I accept Mr. Smouha's submission in respect of the declaratory relief sought in paragraphs 59-62 of the Particulars of Claim. Since no Actual Taxation Liability has yet arisen and therefore no cause of action has yet arisen, the plea is premature. Paragraph 46 of the Particulars of Claim reinforces this point, as there the Claimant pleads only that "*The German Tax Matters and the Cum-Ex Conduct had, at the date of Completion, and continue to have, the potential to result in fines, penalties or other liabilities that were very substantial*" (emphasis added).

130. The problem with the approach of the Claimant to these issues is tied up with the way in which it has pleaded its case in this respect. As pleaded, it is too vague for the court to make any useful declaration. That is no doubt precisely because no Actual Taxation Liability has yet arisen. It would not be right to compel the Defendant to have to go to trial to meet these issues in their currently pleaded state which is vague and imprecise. For example, the plea that the Defendant is obliged to indemnify the Claimant in respect of any Actual Taxation Liability arising from the Alleged Cum-Ex Conduct and/or the German Tax Matters takes the reader back to paragraphs 22 and 23 of the Particulars of Claim. In those paragraphs are listed a whole variety of investigations of different tax offices and public prosecutors' offices in relation to a whole variety of clients and counterparties, as well as various potential civil claims. In those circumstances the reader might very reasonably ask: what is the Actual Taxation Liability relied upon?

131. The same objection applies to the claim for costs and expenses in paragraph 62 of the Particulars of Claim in respect of clause 2.1(h) of the Tax Deed.

132. Nor do I consider it appropriate to allow these premature claims (which may never arise) to go forward simply on the basis that there are some other claims going forward in this action. Moreover, as Mr. Smouha QC pointed out, claims under the Tax Deed, if they exist, should be straightforward: if there is an Actual Taxation Liability which is identified, there is a liability to indemnify, whereas the Seller Warranty Claims are more complex. There is no justification for allowing premature Tax Deed claims to piggy-back on the Seller Warranty Claims.

133. I should clarify that, despite my ruling on this part of the application, it remains open to the Claimant to plead claims under the Tax Deed once (if) they have arisen and once

they can be properly particularised. But as they stand, paragraphs 59-62 of the Particulars of Claim are premature and inadequately pleaded and so they should be struck out. Indeed, Mr. Smouha QC realistically accepted that if the Claimant is able to plead some useful issues which the court could decide hypothetically in relation to Actual Taxation Liabilities then the position *might* be different, but the Claimant has not done that.

134. It follows that Ground 11, which concerns the claim for an indemnity under the Tax Deed in relation to costs, accordingly does not arise. Had it arisen, in view of the factual issues which arise, as well as issues of joint and several liability under German law, I would not have considered this ground to be suitable for summary judgment for the reasons set out in paragraphs 87-91 of the Claimant's skeleton argument.

The draft Amended Particulars of Claim

135. Finally, the Claimant has an application before the Court to amend its Particulars of Claim. That is opposed in part by the Defendant, in particular in relation to paragraphs 46A and 23.

136. In paragraph 46A of the draft APOC it is pleaded as follows:

> "**Breaches of Warranty**
>
> 46A In relation to the warranties given under paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, the Claimant's claims are limited to breaches in respect of the CFTC/FCA Matters and those of the German Tax Matters investigated by the Frankfurt Prosecutor and the tax offices supporting the Frankfurt Prosecutor, including actual or potential civil claims arising therefrom."

137. To seek to understand this plea requires the reader to look back at the definition of "German Tax Matters". That takes one to paragraphs 22 and 23 of the APOC:

> "22. The German Tax Matters (as defined below) relate to the underlying conduct of Voice Group Companies and members of the Seller's Group in relation to cum-ex trading of German securities (the "**Cum-Ex Conduct**"), being that, at least:
>
> a. One or more Voice Group Companies (the "**Cum-Ex VGCs**"), including at least ICAP Securities Limited ("**ISL**"), The Link Asset and Securities Company Limited ("**Link**"), ICAP Corporates LLC, Linkbrokers Derivatives LLC, and members of the Seller's Group (being at least ICAP plc) (i) approved and/or (ii) carried out or participated in cum-ex trades, including by acting as short seller and/or as broker in matching the trade of cum-ex participants.
>
> b. One or more Voice Group Companies and/or members of the Seller's Group were involved in planning such transactions and/or sharing the profits.
>
> 23. The Claimant is presently aware of reviews, enquiries, investigations and/or proceedings by relevant authorities involving (i) the German Federal Tax Office and various regional tax offices and investigation groups, (ii) the Public Prosecutor of Frankfurt, ~~and~~ (iii) the Public Prosecutor of Cologne and (iv) the Public Prosecutor of Munich, in relation to cum-ex trading involving Rafael Roth Financial Enterprises GmbH ("**Rafael Roth**"), HypoVereinsbank Munich/London AG ("**HypoVereinsbank**"), Seriva Vermoegensvewaltungs GmbH ("Seriva"), 27 clients/counterparties or groups (referred to as "complexes") as listed in Appendix 1, and 39 counterparties referred to in the

> Cologne Order (referred to at paragraph 39 below) and Varengold Verwaltungsgesellschaft AG ("Varengold"), CACEIS (a custodian bank) and 3 investment funds (the "AVANA Funds") and others as referred to at paragraph 29B below. It has also been notified of potential civil claims as set out in paragraphs 40 to 42 below. The matters referred to in this paragraph are referred to herein as the "**German Tax Matters**."

138. It follows that the German Tax Matters as pleaded in the APOC include not only investigations and proceedings of the Public Prosecutor of Frankfurt but also of the Public Prosecutor of Cologne and the Public Prosecutor of Munich, and involving Rafael Roth, HypoVereinsbank, Seriva, Varengold and AVANA Funds, as well as "*potential civil claims*".

139. The potential civil claims pleaded in paragraphs 40 to 42 include claims by Investec, Warburg and Blackrock, which claims appear to post-date 30 December 2018, as follows:

> "40. On 20 March 2020, Investec Bank plc ("Investec") made an application in Germany for the initiation of extrajudicial dispute resolution proceedings against Link. This application related to a liability of CACEIS, a custodian bank, to the German tax authorities in relation to EUR 155m of tax reclaims (plus EUR 69m of interest) allegedly arising from cum-ex transactions carried out with the support of Investec and Link. The application noted that CACEIS was asserting claims against Investec in the same amount, and asserted that insofar as such claims were well-founded, Link would be liable to Investec in respect of them. On 25 September 2020, Investec also filed third party notices of claim against ISL and Link in relation to two sets of litigation proceedings in the Munich Regional Court between (among others) (i) CACEIS and Varengold; and (ii) CACEIS and the AVANA Funds, contending that if certain third parties succeeded in claims against Investec, Investec would have claims against ISL and Link based on adjustment between joint and several debtors, the law governing unjust enrichment, and tort.
>
> 41. In March 2019, Blackrock Asset Management Deutschland AG ("Blackrock") notified claims against ISL allegedly arising from cum-ex transactions. In a draft Tolling Agreement, Blackrock described such claims, which were also notified on behalf of its legal predecessors INDEXCHANGE Investment AG and Barclays Global Investors (Deutschland) AG. These claims relate to Market Participant Agreements with ISL dated 3 June 2008 and 31 March 2010 relating to exchange-traded funds ("ETFs") managed by Blackrock and its predecessors. Blackrock contends that during the creation of these ETFs, ISL was involved in the creation of ETF units which contained shares being, or to be, traded on a cum-ex basis. Blackrock contends that the tax authorities and/or third parties may seek to hold Blackrock liable, and that it would have claims against ISL in respect of any claims by the authorities or by third parties.
>
> 42. On 23 September 2020, Warburg Bank issued a press release announcing that the Frankfurt Court had concluded that Warburg Bank was jointly and severally liable with the custodian bank, Deutsche Bank, in connection with certain cum-ex transactions. The press release set out Warburg Bank's position that other parties, including ISL, were involved in planning the transactions and had achieved very substantial profits from them. It said that claims were now being pursued vigorously against such parties. Warburg Bank's German lawyers, Raue, issued a similar statement. Further:
>
> a. By a letter of 2 December 2020, M.M Warburg & Co Gruppe GmBH and Warburg Bank notified claims against ISL arising from alleged cum-ex trading. Their letters referred to a confiscation order from the Bonn Court in the sum of EUR 176.7m

and tax assessments from the Hamburg tax office in the sum of EUR 157.9m, and asserted potential recourse claims against ISL in respect of these amounts.

b. By a letter of 2 December 2020, Warburg Invest Kapitalanlagegesellschaft mbH notified claims against ISL arising from alleged cum-ex trading. Its letter referred to acting on behalf of funds, one of which had received a notice of liability from the Federal Central Tax Office of EUR 60.8m, and another which had received tax refunds from the Federal Central Tax Office in the amount of EUR 48.8m, and asserted potential recourse claims against ISL in respect of these amounts.

c. On 19 January 2021 Bloomberg reported that "Warburg" had filed a claim at a court in Hamburg naming ISL and Link as defendants in relation to transactions where the lender had paid an additional EUR 111m to the tax authorities."

140. This is, therefore, extremely confusing.

141. Mr. Handyside QC in oral submissions explained that the purpose of pleading matters in this way was to first set out in paragraph 23 all of the investigations which might give rise to claims not only under the Seller Warranties but also under the Tax Warranties and under the Tax Deed, and then to cut the width of that paragraph down in paragraph 46A by limiting the claims under the Seller Warranties in paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the German Tax Matters (as defined) investigated by the Frankfurt Prosecutor and the tax offices supporting the Frankfurt Prosecutor, including actual or potential civil claims arising therefrom.

142. However, whilst that may have been the intention, it is not what the draft APOC apparently says. The reader is driven to look in a number of different paragraphs of the pleading in an attempt to understand the plea (46A; 22-29; 29A-29C; 39A; 40; 41; 42) and even then it is unclear what the precise nature of the claim might be. Moreover, the potential civil claims which fall within the definition of "German Tax Matters" in paragraph 23 and which are then referred to in paragraphs 40-42 do not, or at least do not all arise out of the German Tax Matters investigated by the Frankfurt Prosecutor which are referred to in paragraph 46A. Indeed, it is wholly unclear what "*actual or potential civil claims arising therefrom*" are being referred to in paragraph 46A of the draft APOC.

143. In consequence, I refuse the Claimant permission to make the proposed amendments to paragraphs 46A and 23 in their current form (which may also have knock-on consequences for paragraphs 40, 41 and 42 etc.).

144. Finally, I should like to thank counsel and the solicitors for both parties for the clarity and succinctness of their respective arguments in view of the myriad of issues with which these applications were concerned. I shall leave to it the parties to agree the form of an order which reflects my findings in this Judgment.

Appendix 1

CFTC Investigation Notification

TP ICAP plc
2 Broadgate
London EC2M 7UR
United Kingdom

+44 (0)20 7200 7000
tpicap.com

From: TP ICAP plc (the **Purchaser**)

To: NEX Group Limited (the **Seller**)
2 Broadgate
London EC2M 7UR

For the attention of: Stuart Wexler

Copy: Steven Fox
Clifford Chance LLP

20 December 2018

Dear Sirs

Notice of Seller Warranty Claim pursuant to paragraph 5.1, Part 1, Schedule 5 to the SPA

1. We refer to:

   1.1 the sale and purchase agreement dated 11 November 2015 between the Purchaser and ICAP plc (**ICAP**) for the sale and purchase by us of the entire issued share capital of ICAP Global Broking Holdings Limited, as amended, restated and novated by a deed of amendment, restatement and novation dated 16 August 2016 between the Purchaser, ICAP and the Seller, and as further amended on 12 October 2016 and on 2 December 2016 (the **SPA**);

   1.2 our notice of facts and/or circumstances giving rise to one or more potential Seller Warranty Claims pursuant to paragraph 8.1 of Part 1 of Schedule 5 to the SPA (**Paragraph 8.1**) dated 25 July 2017 relating to a Commodity Futures Trading Commission (**CFTC**) Investigation entitled 'In the Matter of Swaps Trading Relating to Bond Issuances' (the **CFTC Matter**); and

   1.3 our updated notice of facts and/or circumstances giving rise to one or more potential Seller Warranty Claims pursuant to Paragraph 8.1 dated 8 August 2018 in relation to the CFTC Matter.

2. Capitalised terms used in this letter and not otherwise defined shall have the meaning given to them in the SPA.

3. In accordance with paragraph 5.1 of Part 1 of Schedule 5 to the SPA, we hereby give notice to the Seller of a Seller Warranty Claim against the Seller under certain of the Seller Warranties pursuant to the terms of the SPA (including without limitation the warranties contained at paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA) as a result of, or in connection with the CFTC Matter (the **CFTC Seller Warranty Claim**).

4. An overview of the background to the CFTC Seller Warranty Claim is as follows:

4.1 On or about 23 November 2015, ICAP Global Derivatives Limited (**IGDL**) self-reported to the CFTC following an internal review of a swaps trade in July 2015. The activity in question involved swaps transactions that were handled by IGDL on behalf of TD Bank and the ICAP Reuters screen commonly known as 19901. The CFTC has since incorporated the matter into the CFTC's own investigation entitled: "In the Matter of Swaps Trading Relating to Bond Issuances".

4.2 In response to that report, on 18 December 2015 the CFTC made a verbal request for information from IGDL, and, thereafter, made several additional requests for information. IGDL has responded to those requests.

4.3 The CFTC, as part of the CFTC Matter, has also inquired about the icapusdbasis screen, a screen which received input during certain periods from ICAP Europe Limited (**IEL**) and during other periods from IGDL. On or about 2 August 2016 the CFTC first asked about the icapusdbasis screen and requested tick data for the screen.

4.4 Attached for your reference is a letter dated 16 June 2016 from the CFTC relating to the TD Bank trade, and an e-mail communication dated 17 March 2017 from the CFTC relating to IEL's icapusdbasis screen.

4.5 On 16 August 2017, the CFTC requested that ICAP Energy LLC produce Basis Swap trade and tick data for the period from 1 May 2017 to 2 June 2017, and audio communications between ICAP Energy LLC Basis Swap brokers and certain banks on 24 May 2017.

4.6 On 19 October 2017, the CFTC requested that IGDL produce medium term USD interest rate swap data for the period from 2 October 2013 to 30 September 2017, and USD basis swap trade data for the period from 1 January 2016 to 30 September 2017.

4.7 On 25 October 2018, the CFTC requested from ICAP Capital Markets LLC and ICAP Energy LLC additional information regarding icapusdbasis and 19905 for several months in 2013, 2014 and 2015.

4.8 On 20 November 2017, the Financial Conduct Authority sent a notice of requirement on behalf of the CFTC to ICAP Europe Limited. Please see attached for your reference a copy of this notice of requirement.

4.9 On 19 January 2018, 9 May 2018, and 23 July 2018, the CFTC requested from IGDL additional information regarding USD medium and basis swap trade data, e-communications and/or audio files for specific dates in 2013, 2014, 2015, 2016, 2017 and/or 2018.

4.10 On 19 January 2018 and 12 February 2018, the CFTC requested from ICAP Capital Markets LLC and ICAP Energy LLC additional information regarding USD medium term and basis swap trade and tick data, e-communications and/or audio files for specific dates in 2013, 2014, 2015 and/or 2016.

4.11 On 24 July 2018, the CFTC requested from ICAP Capital Markets LLC and ICAP Energy LLC additional information regarding (i) USD medium term and/or basis swap e-communications and audio files from specific dates in 2014 and 2016, and (ii) Canadian dollar interest rate swap trade and tick data from March 2013, and all communications between any broker that brokered Canadian dollar interest rate swaps and a certain bank on 12 March 2013.

4.12 On 12 October 2018, the CFTC requested from ICAP Energy LLC and ICAP Capital Markets:

(a) for the period of 29 May 2018 to 19 June 2018, all audio recordings reflecting communications between a former ICAP Capital Markets LLC broker (who is now a current ICAP Energy LLC broker) (the **Relevant Broker**) and any person associated with ICAP Energy LLC or any of its affiliates concerning: (i) pricing screens or the reasons why any customer of ICAP Energy LLC or any of its affiliates is trading (including but not limited to communications concerning issuances, pricings, or deals), and (ii) the CFTC Matter or any investigation of trading in the swap markets; and

(b) for the period of 1 January 2015 to the present, all electronic communications between the Relevant Broker and any person that contained certain terms.

4.13 On 6 November 2018, IGDL received a *Subpoena Duces Tecum* requesting:

(a) all audio communications of specified brokers with or concerning identified market participants, and all electronic communications of the specified brokers with or concerning the identified participants for specified dates during the period of April 2015 to July 10, 2018;

(b) a complete list of names of the brokers associated with trading data in USD medium term and basis swaps from 2013 to the present; and

(c) trade data for USD medium term swaps from 2014 and 2015, and USD medium term swap and basis swaps for the period from 24 July 2018 to 31 October 2018; and

(d) tick data for USD medium term swaps for the period from 24 July 2018 to 31 October 2018.

5. Pursuant to paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, the Seller provided the following assurances to the Purchaser by way of Seller Warranties:

9.1 No Voice Group Company, nor (in relation to the Voice Group Business) any member of the Seller's Group, nor, so far as the Seller is aware, any director, officer or employee of any member of the Seller's Group (in relation to the Voice Group Business) or any Voice Group Company (in each case, during the course of his duties), has contravened any applicable law or regulation, which has in the preceding 18 months resulted or may result in any fine, penalty or other liability or sanction that, in each case, has or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole).

9.2 No Voice Group Company, nor, so far as the Seller is aware, any director, officer or employee of any Voice Group Company nor (in relation to the Voice Group Business) any member of the Seller's Group or any director, officer or employee of any member of the Seller's Group, is or has in the preceding 18 months, been subject to any non-routine investigation, review or enquiry (and on the basis that routine investigations, reviews or enquiries include: (i) thematic reviews, (ii) periodic or routine regulatory visits and assessments, (iii) enquiries regarding Seller Group filings (for example suspicious transaction reports and financial filings) and (iv) follow-up

enquiries regarding the registration of approved persons which do not relate to matters of fitness and propriety, but excluding in each case all non-routine investigations arising out of the findings of any routine investigation), which may include, or may have included, the imposition of any risk mitigation or other remediation plans or requirements, or any disciplinary or enforcement proceeding or formal process (whether judicial, quasi-judicial, of a regulatory, supervisory or enforcement nature or otherwise), in each case by a Governmental Authority in relation to the Voice Group Business nor, so far as the Seller is aware, is any such investigation, review, enquiry, proceedings or process pending or threatened.

10.3 So far as the Seller is aware, there are no circumstances which would reasonably be expected to give rise to any litigation, arbitration or alternative dispute resolution proceedings by or against any Voice Group Company wherein the value of the claim in such proceedings exceeds £500,000.

6. It is apparent that (i) in relation to paragraph 9.2 of Part 1 of Schedule 4 to the SPA, there was an existing and/or threatened and/or pending investigation, review or enquiry by the CFTC, (ii) in relation to paragraph 9.1 of Part 1 of Schedule 4 to the SPA this related to conduct in the preceding 18 months and might result in a fine, penalty or other sanction, and (iii) in relation to paragraph 10.3 of Part 1 of Schedule 4 to the SPA there were circumstances which would reasonably be expected to give rise to litigation, arbitration or alternative dispute resolution proceedings against a Voice Group Company.

7. No notice of, or information relating to, the CFTC Matter was provided to us or to our advisers in the Seller Data Room, nor was the CFTC Matter disclosed in the Disclosure Letter, nor included in the Litigation Schedule or Indemnified Proceedings Schedule to the SPA.

8. We note that one or more affiliates of the Seller have been involved in the events giving rise to the CFTC Seller Warranty Claim from July 2015 to date, and accordingly were or ought to have been aware at or about 23 November 2015 (or earlier) of facts and circumstances that would or would be likely to constitute a breach of certain of the Seller Warranties.

9. As matters are still ongoing, the Purchaser is unable at this stage to quantify accurately the liability resulting from the CFTC Matter. The Purchaser has, however, already incurred costs and expenses (including without limitation legal costs) in connection with the CFTC Matter amounting to approximately £1,250,000 and expects to continue to incur costs and expenses.

10. Further, in the event that a Governmental Authority makes an adverse finding in connection with the CFTC Matter, the Purchaser may also incur loss as a result of:

10.1 any fine, penalty or other liability or sanction imposed by a Governmental Authority in connection with such finding; and/or

10.2 any Claim brought against the Purchaser (or any of its Subsidiaries) by a client or counterparty of a Voice Group Company in connection with such finding or in connection with the facts and circumstances that led to such finding.

11. For the reasons stated at paragraphs 10.1 and 10.2 above, the Purchaser may incur further liability, costs and expenses in amounts that cannot currently be quantified.

12. Accordingly, the facts and circumstances relating to the CFTC Matter set out at paragraph 4 above give rise to a Seller Warranty Claim against the Seller pursuant to paragraph 9.2 of Part 1 of Schedule 4 to the SPA, and may also give rise to a Seller Warranty Claim pursuant to paragraphs 9.1 and 10.3 of Part 1 of Schedule 4 to the SPA (and potentially other Seller Warranties).

13. In the meantime, we reserve all our rights including, without limitation, our right to commence legal proceedings or to take any other steps of whatsoever nature to enforce any of our rights and remedies against the Seller, whether arising out of or in connection with the SPA, the Transaction Documents or more generally.

14. In accordance with clause 18.2 of the SPA, we are sending this notice to the Seller:

    (a) by post, to the Seller's postal address; and

    (b) by email, to the email address given for the Seller (and Steven Fox at Clifford Chance LLP).

15. We should be grateful if you would confirm receipt of this notice to Philip.Price@tpicap.com and Stephen.Goulet@tpicap.com.

Yours faithfully,

for and on behalf of

TP ICAP plc

U.S. COMMODITY FUTURES TRADING COMMISSION
140 Broadway
New York, New York 10005
Telephone: (646) 746-9700
Facsimile: (646) 746-9938

Division of
Enforcement

June 16, 2016

BY EMAIL

Greg Compa
ICAP Global Derivatives Limited
1100 Plaza Five
Jersey City, New Jersey
07311-4996

Re: Request for Documents/Information

Dear Mr. Compa:

The Division of Enforcement ("Division") of the Commodity Futures Trading Commission requests that ICAP Global Derivatives Limited (and any of its predecessors, parents, subsidiaries, affiliates, offices, or divisions, collectively referred to herein as "ICAP") produce the following documents and information to my attention at the Commodity Futures Trading Commission, 140 Broadway, 19th Floor, New York, NY 10005:

- ICAP trading data for trading in swaps spreads from January 1, 2013 through May 31, 2016.
- Brokertec data for trading in 10-year U.S. Treasuries for July 21 and 23, 2015
- Brokertec data for trading in 7-year U.S. Treasuries for February 3-5, 2015

Documents should be produced consistent with the attached *CFTC Data Delivery Standards*. As noted in the *Data Delivery Standards*, we can provide instructions for the production of materials via secure FTP. If you have any questions regarding this request, or if you would like to arrange for the production of materials via secure FTP, please contact me at (646) 746-9881 or Stephen Painter at (646) 746-9815.

Sincerely,

/s/
Alejandra de Urioste
Trial Attorney

From: Geanuleas, Gabriella [mailto:GGeanuleas@CFTC.gov]
Sent: Friday, March 17, 2017 11:51 AM
To: Brandt, Shari; Devlin, Paul
Subject: RE: ICAP

Shari,

As discussed this morning, below is what we are planning to request via the FCA. Let's discuss once you've had a chance to review.

- All communications (whether in the form of electronic message, text message, email, audio recording, or otherwise) (1) from July 9, 2012 to July 13, 2012 between Mike Nichols and Mike McDonnell; (2) from July 9, 2012 to July 13, 2012 between Mike Nichols and any other person concerning (a) Morgan Najar, (b) HSBC or HSBC traders, (c) a bond offering for the Japan Bank of International Cooperation ("JBIC"), (d) any trading related to the JBIC bond offering, or (e) the function or control of the ICAPUSDBASIS screen; or (3) from 11:00am EDT (3:00pm UTC) to 12:30pm EDT (4:30pm UTC) July 11, 2012 between Mike Nichols and any other person.

Thanks,

Gabriella

From: Geanuleas, Gabriella
Sent: Friday, March 17, 2017 10:24 AM
To: 'Brandt, Shari'; Devlin, Paul
Subject: ICAP

Shari and Paul,

Do you have time for a brief call this morning?

Thanks,

Gabriella Geanuleas
Trial Attorney
U.S. Commodity Futures Trading Commission Division of Enforcement
140 Broadway, 19th floor
New York, New York 10005
E: ggeanuleas@cftc.gov<mailto:ggeanuleas@cftc.gov>
T: (646) 746-9887
F: (646) 746-9939

To: ICAP Europe Limited
2 Broadgate
London
EC2M 7UR

Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London
E14 5HS

Tel: +44 (0)20 7066 1000
Fax:+44 (0)20 7066 1099
www.fca.org.uk

NOTICE OF REQUIREMENT

TAKE NOTICE: The Financial Conduct Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (the "**FCA**") requires the production to it of information or documents of a description specified herein.

RELEVANT PROVISIONS

This requirement is made under section 165(1) and 165(5) of the Financial Services and Markets Act 2000 ("**FSMA**"). The FCA may exercise the power conferred by section 165 of FSMA at the request of an overseas regulator by virtue of section 169(1)(a) of the same.

REASON

The FCA has received a request for assistance from the U.S. Commodity Futures Trading Commission ("**CFTC**"), an overseas regulator within the meaning of sections 169(13) and 195(3) of FSMA.

The FCA is satisfied that the request should be acceded to having regard in particular to section 169(4) of FSMA.

REQUIREMENT

ICAP Europe Limited "**ICAP**" is required to produce to the FCA at 25 The North Colonnade, Canary Wharf, London E14 5HS:

1. For the period 9 July 2012 to 13 July 2012 inclusive, all written communications that contain the following terms: bond, pricing, deal, Japan, JBIC, HSBC, hk, Morgan, Najar, ICAPUSDBASIS, McDonnell, ICAU, manual, and "over!d!" between:

    a. Stuart Taplin and any other person; and
    b. Richard Hayes and any other person.

2. For the period 9 July 2012 to 13 July 2012 inclusive, all written communications concerning (a) HSBC or HSBC traders, (b) bond offerings or trading related to

bond offerings, or (c) the function or control of the ICAPUSDBASIS (ICAU) screen, between:

a. Stuart Taplin and any person at ICAP; and
b. Richard Hayes and any person at ICAP.

3. All audio communications:

a. From 9 July 2012 to 12 July 2012 inclusive concerning (a) HSBC or HSBC traders, (b) bond offerings or trading related to bond offering, or (c) the function or control of the ICAPUSDBASIS (ICAU) screen, between:
   i. Stuart Taplin and any other person; and
   ii. Richard Hayes and any other person.

b. From 11:30am EDT to 12:30pm EDT on 11 July 2012, for:
   i. Stuart Taplin; and
   ii. Richard Hayes

(collectively referred to as the "**Information**").

ICAP is required to provide the Information to the FCA by email or in electronic format (e.g.CD/DVD or USB device). In the latter case, two encrypted copies in native format are required.

ICAP is also required to produce a signed certificate of authenticity in relation to the information in the form set out in the Appendix.

ICAP is required to produce the Information no later than 6 December 2017.

The information in this Notice of Requirement remains confidential in the hands of ICAP and is subject to the restrictions contained in section 348 of FSMA and the exceptions permitted by section 349. Disclosure other than in accordance with these restrictions and exceptions is a criminal offence under UK law.

Signed: Dated:

20.11.17

Dan Turner
Enforcement and Market Oversight Division

For and on behalf of the Financial Conduct Authority

CERTIFICATE OF AUTHENTICITY OF BUSINESS RECORDS

I, the undersigned, _____ confirm that to the best of my
(Name, Position Held)
knowledge and belief:

(1) The records produced are true and accurate copies of originals in the custody of the business;

(2) The records are produced in compliance with a Notice of Requirement which was served on _____ by the U.K. Financial Conduct Authority ("FCA") on _____;
(Name of Bank/Firm)
(Date)

(3) The business made or kept the originals in the ordinary course of business and as a regular business practice;

(4) The originals were made at, or near, the time of the occurrence of the transactions they record, by a person who either had knowledge of those transactions or received the information from a person with such knowledge; and

(5) I am aware that providing false or misleading information to the FCA in response to a Notice of Requirement or falsifying, concealing, destroying or otherwise disposing of a relevant document, is an offence, as set out in sections 177(3), (4) and (5) of the Financial Services and Markets Act 2000, with penalties that include, for a breach of s.177(3) (falsification, destruction, etc. of documents) or s.177(4) (provision of false or misleading information), on summary conviction, a fine or up to six months' imprisonment; or, on conviction on indictment, a fine or up to two years' imprisonment or both.

_____

_____
(Name) (Date)

Appendix 2

Tax Investigation Notification

From: TP ICAP plc (the **Purchaser**)

To: NEX Group Limited (the **Seller**)
2 Broadgate
London EC2M 7UR

For the attention of: General Counsel, EMEA and Asia Pacific and Group General Counsel

Copy: Steven Fox
Clifford Chance LLP

29 December 2018

Dear Sirs

Notice of Underlying Claims and Seller Warranty Claim pursuant to paragraphs 5.1 and 8.1, Part 1, Schedule 5 to the SPA

1. We refer to the sale and purchase agreement dated 11 November 2015 between the Purchaser and ICAP plc (**ICAP**) for the sale and purchase by us of the entire issued share capital of ICAP Global Broking Holdings Limited, as amended, restated and novated by a deed of amendment, restatement and novation dated 16 August 2016 between the Purchaser, ICAP and the Seller, and as further amended on 12 October 2016 and on 2 December 2016 (the **SPA**).

2. Capitalised terms used in this letter and not otherwise defined shall have the meaning given to them in the SPA.

3. We hereby give notice to the Seller:

   3.1 in accordance with paragraph 8.1 of Part 1 of Schedule 5 to the SPA,that we have become aware of facts and/or circumstances giving rise to one or more Seller Warranty Claims against the Seller under certain of the Seller Warranties pursuant to the terms of the SPA (including without limitation the warranties contained at paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA) as a result of, or in connection with, one or more Underlying Claims arising from an investigation by the Attorney General's Office of Frankfurt (the **Prosecutor**) relating to various allegations of tax-related criminal offences (the **Frankfurt Investigation Matter**); and

   3.2 in accordance with paragraph 5.1 of Part 1 of Schedule 5 to the SPA, of a Seller Warranty Claim against the Seller in connection with the Frankfurt Investigation Matter (the **Frankfurt Investigation Seller Warranty Claim**).

4. An overview of the background to the Frankfurt Investigation Seller Warranty Claim is as follows:

   4.1 In connection with an investigation commenced by the Prosecutor in 2012 relating to alleged tax evasion, the Prosecutor initiated an investigation into Edward Tyler Bowen and others suspected of aiding and abetting simple tax evasion and severe tax evasion under Section 370 para. 1, 3 no. 1 German Tax Act [*AO*], 8 para. 1, 2, 31 para. 1 sentence 1 German Corporate Tax Act [*KStG*], 20 para. 1 no. 1, 36 para. 2 no. 2 German Income Tax Act [*EStG*], 25 para. 2, 27 para. 1, 53 German Criminal Code [*StGB*] of Rafael Roth Financial Enterprises GmbH (Capital Gains Tax 2007/2008) (the **Investigation**).

   4.2 On 27 December 2018, ICAP Securities Limited received a letter from the Prosecutor dated 19 December 2018 (the **Letter**) stating the Prosecutor's intention to impose on ICAP

Securities Limited in connection with the Investigation (i) an administrative corporate fine under Section 30 of the German Administrative Offence Act and (ii) a disgorgement of the proceeds of the relevant acts under Sections 73ff. of the German Criminal Code in conjunction with Section 316h sentence 1 Introductory Law to the Criminal Code . A copy of the Letter is enclosed for reference.

5. Pursuant to paragraphs 9.1, 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, the Seller provided the following assurances to the Purchaser by way of Seller Warranties:

9.1 *No Voice Group Company, nor (in relation to the Voice Group Business) any member of the Seller's Group, nor, so far as the Seller is aware, any director, officer or employee of any member of the Seller's Group (in relation to the Voice Group Business) or any Voice Group Company (in each case, during the course of his duties), has contravened any applicable law or regulation, which has in the preceding 18 months resulted or may result in any fine, penalty or other liability or sanction that, in each case, has or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole).*

9.2 *No Voice Group Company, nor, so far as the Seller is aware, any director, officer or employee of any Voice Group Company nor (in relation to the Voice Group Business) any member of the Seller's Group or any director, officer or employee of any member of the Seller's Group, is or has in the preceding 18 months, been subject to any non-routine investigation, review or enquiry (and on the basis that routine investigations, reviews or enquiries include: (i) thematic reviews, (ii) periodic or routine regulatory visits and assessments, (iii) enquiries regarding Seller Group filings (for example suspicious transaction reports and financial filings) and (iv) follow-up enquiries regarding the registration of approved persons which do not relate to matters of fitness and propriety, but excluding in each case all non-routine investigations arising out of the findings of any routine investigation), which may include, or may have included, the imposition of any risk mitigation or other remediation plans or requirements, or any disciplinary or enforcement proceeding or formal process (whether judicial, quasi-judicial, of a regulatory, supervisory or enforcement nature or otherwise), in each case by a Governmental Authority in relation to the Voice Group Business nor, so far as the Seller is aware, is any such investigation, review, enquiry, proceedings or process pending or threatened.*

10.3 *So far as the Seller is aware, there are no circumstances which would reasonably be expected to give rise to any litigation, arbitration or alternative dispute resolution proceedings by or against any Voice Group Company wherein the value of the claim in such proceedings exceeds £500,000.*

6. It is apparent that (i) in relation to paragraph 9.2 of Part 1 of Schedule 4 to the SPA a director of a Voice Group Company was the subject of a non-routine investigation, review or enquiry, (ii) in relation to paragraph 9.1 of Part 1 of Schedule 4 to the SPA this was in connection with alleged contraventions of applicable law and/or regulation which may result in a fine, penalty or other liability or sanction, and (iii) in relation to paragraph 10.3 of Part 1 of Schedule 4 to the SPA there were at the relevant times circumstances which would reasonably be expected to give rise to litigation, arbitration or alternative dispute resolution proceedings against a Voice Group Company.

7. No notice of, or information relating to, the facts and circumstances giving rise to the Frankfurt Investigation Matter was provided to us or to our advisers in the Seller Data Room, nor were the relevant facts and circumstances disclosed in the Disclosure Letter, nor were they included in the Litigation Schedule or in the Indemnified Proceedings Schedule of the SPA.

8. We note that one or more affiliates of the Seller have been involved in the events giving rise to the Frankfurt Investigation Seller Warranty Claim from 2012, and accordingly were or ought to have been aware of facts and circumstances that would or would be likely to constitute a breach of certain of the Seller Warranties.

9. As matters are still ongoing, the Purchaser is unable at this stage to quantify accurately the liability resulting from the Frankfurt Investigation Matter.

10. Further, in the event that there is an adverse finding in respect of the Frankfurt Investigation Matter, the Purchaser may also incur loss as a result of:

    10.1 any fine, penalty or other liability or sanction imposed by the court, tribunal, arbitrator or Governmental Authority in connection with such finding; and/or

    10.2 any Claim brought against the Purchaser (or any of its Subsidiaries) by a client and/or counterparty of a Voice Group Company in connection with such finding or in connection with the facts and circumstances that led to such finding.

11. For the reasons stated at paragraphs 10.1 and 10.2 above, the Purchaser may incur further liability, costs and expenses in amounts that cannot currently be quantified.

12. Accordingly, the facts and circumstances relating to the Frankfurt Investigation Matter set out at paragraph 4 above give rise to a Seller Warranty Claim against the Seller pursuant to paragraphs 9.2 and 10.3 of Part 1 of Schedule 4 to the SPA, and may also give rise to one or more Seller Warranty Claims pursuant to paragraph 9.1 of Part 1 of Schedule 4 to the SPA (and potentially other Seller Warranties).

13. The purpose of this notice is:

    13.1 to notify you of a Seller Warranty Claim, pursuant to paragraph 5.l of Part 1 of Schedule 5 to the SPA;

    13.2 to notify you of the matter with respect to one or more Underlying Claims, pursuant to paragraph 8.l (a) of Part 1 of Schedule 5 to the SPA;

    13.3 to provide you with information and documents in relation to one or more Underlying Claims, pursuant to paragraph 8.1(c) of Part 1 of Schedule 5 to the SPA; and

    13.4 to request that you consult with us in relation to the conduct of one or more Underlying Claims, pursuant to paragraph 8.l(d) of Part 1 of Schedule 5 to the SPA.

14. In the meantime, we reserve all our rights including, without limitation, our right to take any steps of whatsoever nature to enforce any of our rights and remedies against the Seller, whether arising out of or in connection with the SPA, the Transaction Documents or more generally.

15. In accordance with clause 18.2 of the SPA, we are sending this notice to the Seller:

(a) by courier, to the Seller's postal address; and

(b) by email, to the email address given for the Seller (and Steven Fox at Clifford Chance LLP).

We should be grateful if you would confirm receipt of this notice to Philip.Price@tpicap.com and Stephen.Goulet@tpicap.com.

Yours faithfully,

for and on behalf of

TP ICAP plc

Generalstaatsanwaltschaft Frankfurt am Main
- Eingreifreserve -

HESSEN

EINGANG
27. DEZ. 2018

Generalstaatsanwaltschaft Frankfurt am Main · 60256 Frankfurt am Main

ICAP Securities Ltd.
Zweigniederlassung Frankfurt
Stephanstr. 14-16
60313 Frankfurt am Main

Aktenzeichen: **7 ER 105/18 – 1111 Js 24212/18**

Dst.-Nr.: 0223
Bearbeiter/in: Justizangestellte Damerau
Durchwahl: (069) 1367-8394
Fax: (069) 1367-6997
E-Mail: eingreifreserve@gsta.justiz.hessen.de

Datum: 19.12.2018

Betr.: Ermittlungsverfahren gegen BOWEN und andere
hier: Einleitung eines Ordnungswidrigkeitenverfahrens

Sehr geehrte Damen und Herren,

in dem vorbezeichneten Ermittlungsverfahren teilen wir Ihnen mit, dass in dem vorliegenden Verfahren u.a. wegen Straftaten, derer der frühere Company Director der ICAP Securities Ltd. Edward Tyler BOWEN (§ 30 Abs. 1 Nr. 1 OWiG) verdächtig ist, nämlich der Beihilfe zur einfachen und zur besonders schweren Steuerhinterziehung gem. §§ 370 Abs. 1, 3 Nr. 1 AO, 8 I, II, 31 I1 KStG, 20 I Nr. 1, 36 II Nr. 2 EStG, 25 II, 27 I, 53 StGB der Rafael Roth Financial Enterprises GmbH (Kapitalertragsteuer 2007/2008), gegen die ICAP Securities Ltd. die Verhängung einer Verbandsgeldbuße nach § 30 OWiG a.F. sowie die Einziehung von Taterträgen nach §§ 73 ff. StGB i.V.m. Art. 316h S.1 EGStGB in Betracht kommt.

Ein entsprechendes Bußgeldverfahren wurde unter dem oben genannten Aktenzeichen eingeleitet.

Es besteht Gelegenheit, gemäß §§ 444 Abs. 2 S. 2, 426 Abs. 1 StPO hierzu jetzt oder zu einem späteren Zeitpunkt Stellung zu nehmen.

Mit freundlichen Grüßen

Dr. Weinbrenner
Staatsanwalt

Beglaubigt
Damerau
Justizangestellte

Public Prosecutor's Office Frankfurt am Main
- Intervention Reserve -

[emblem:]
HESSEN

[stamp:]
RECEIVED
27 DEC. 2018

Frankfurt am Main General Public Prosecutor's Office - 60256 Frankfurt am Main

ICAP Securities Ltd.
Frankfurt Branch Office
Stephanstr. 14-16
60313 Frankfurt am Main

File reference: **7 ER 105/18-1111 Js 24212/18**
Office no.: 0223
Processed by: Damerau, Court Clerk
Extension: (069) 1367-8394
Fax: (069) 1367-6997
Email address: eingreifreserve@gsta.justiz.hessen.de

Date: 19/12/2018

Subject: Investigation proceedings against BOWEN and others
here: Initiation of an administrative offence procedure

Dear Sir or Madam,

In the aforementioned investigation proceedings, we inform you that in this proceeding, for criminal offences, inter alia, in which the former company director of ICAP Securities Ltd. Edward Tyler BOWEN is suspected (Section 30 para. 1 no. 1 OWiG (*Ordnungswidrigkeitengesetz* [Administrative Offences Act]), namely of aiding and abetting simple and particularly severe tax evasion pursuant to Sections 370 para. 1, 3 no. 1 AO (*Abgabenordnung* [Tax Code]), 8 I, II, 31 11 KStG (*Körperschaftsteuergesetz* [Corporation Tax Act]), 20 I no. 1, 36 II no. 2 EStG (*Einkommensteuergesetz* [Income Tax Act]), 25 II, 27 I, 53 StGB (*Strafgesetzbuch* [Criminal Code]), by Rafael Roth Financial Enterprises GmbH (capital gains tax 2007/2008), against which ICAP Securities Ltd. is liable to the imposition of an association fine pursuant to Section 30 OWiG (old version) as well as confiscation of the proceeds of crime from offenders pursuant to Sections 73 StGB in conjunction with Art. 316h p. 1 EGStGB (*Einführungsgesetz zum Strafgesetzbuch* [Introductory Act to the Criminal Code]).

Corresponding fine proceedings were initiated under the above reference number.

In accordance with Sections 444 para. 2 sentence 2, 426 para. 1 StPO (*Strafprozeßordnung* [Code of Criminal Procedure]), there is an opportunity to comment on this now or at a later point in time.

Best regards,

Dr Weinbrenner
Public Prosecutor

Certified
[signature]

Damerau
Court Clerk

[seal:] GENERAL PUBLIC PROSECUTOR OF FRANKFURT AM MAIN - 39