Neutral Citation Number: [2022] EWHC 2700 (Comm)

Case No: CL-2020-000598

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
(KING'S BENCH DIVISION)
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2022

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

TP ICAP LIMITED **(formerly known as TP ICAP plc)**	**Claimant/** **Respondent**
- and -	
NEX GROUP LIMITED	**Defendant/** **Applicant**

- -
- -

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

Hearing dates: 1 February 2022

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JUDGMENT

Robin Knowles J :

Introduction

1. The Defendant ("the Seller") and the Claimant ("the Purchaser") are parties to a Share Purchase Agreement dated 11 November 2015 as amended, restated and novated ("the SPA"). The SPA was for the sale and purchase of the entire issued share capital of ICAP Global Broking Holdings Limited, whose business ("the Voice Group Business" of the "Voice Group Companies") was in voice broking. Completion under the SPA was on 30 December 2016. The consideration exceeded £1 billion.

2. In this litigation the Purchaser advances claims against the Seller for alleged breach of warranties under the SPA. By the present application ("this Application") the Seller applies to strike out or for summary judgment on parts of the claim of the Purchaser. This Application follows an earlier application ("the First Application") decided by Calver J in May 2021 ([2021] EWHC 1375).

3. The litigation as a whole is due to be tried in late 2024. After the hearing of this Application I gave case management directions in June 2022, which were agreed, for preparation towards trial to continue pending the preparation and handing down of this judgment.

This Application

4. As summarised by Mr Joe Smouha KC and Mr Ciaran Keller for the Seller, this Application concerns the question whether certain of the Purchaser's claims for breach of warranty were the subject of a valid contractual notification. For this Application Mr Smouha KC frames the issue in these terms:

   > "… whether the Seller's pleaded Seller Warranty claims for breach of Warranty 9.2 and 10.3 were validly notified by [two] Notification Letters in compliance with the requirements of Schedule 5 to the SPA".

5. Seller Warranties were given by the Seller to the Purchaser by Clause 12.1 of the SPA. These warranted that, subject to exceptions, statements set out in Part 1 of Schedule 4 to the SPA were true at the date of the SPA and, so far as material, at Completion.

6. The warranted statement at paragraph 9.2 of Part 1 of Schedule 4 was as follows:

   > "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 […] 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."

7. By paragraph 1 of Schedule 23 to the SPA, when repeated on Completion the statement at paragraph 9.2 was deemed to have these words added:

> "… that, in each case, has or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)."

8. The statement at paragraph 10.3 of Part 1 of Schedule 4 was in these terms:

> "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."

9. The expression "so far as the Seller is aware", appearing in both paragraphs 9.2 and 10.3 was agreed to refer to the actual knowledge, having made reasonable enquiries, of 8 named individuals (see Paragraph 2 of Schedule 23 to the SPA).

10. The Seller Warranties (and any Seller Warranty Claim) were by Clause 12.3 subject to limitations and other provisions set out in Part 1 of Schedule 5. Paragraph 5.1 of Part 1 of Schedule 5 provided (so far as material to the Application):

> "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), …:
>
> …
>
> (b) on or before the second anniversary of Completion …"

11. By paragraph 5.2 it was provided that a Seller Warranty Claim notified in accordance with paragraph 5.1 was unenforceable against the Seller on the expiry of a particular period of time unless proceedings in respect of that Seller Warranty Claim had been properly issued and validly served on the Seller. The period of time provided by paragraph 5.2 was later extended by agreement to 18 September 2020, on which day the Claim Form was served.

The Law

12. There was no issue between the parties as to the approach to an application to strike out and for summary judgment, under CPR 3.4(2)(a) and CPR 24.2. The principles can be taken from Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) at [15] per Lewison J (as he then was).

13. This Application involves questions of the interpretation of a commercial contract and documents, and here too both parties correctly took the applicable principles from the decision of the Supreme Court in Wood v Capita Insurance Service Limited [2017] AC 1173; [2017] UKSC 24 per Lord Hodge. There was a difference of view whether the notification clauses in the present case are to be construed *contra proferentem* against the Seller if ambiguous, and if so with what consequence, but I will not in the event have to decide that on this Application.

14. In the particular context of notification clauses in a commercial contract, Mr Smouha KC referred to additional authority, starting with Senate Electrical Wholesalers v Alacatel Submarine Networks Ltd [1999] 2 Lloyd's Rep 423; [1999] EWCA 3534 (but see Bottin (International) Investments plc v Veson Group [2004] EWCA Civ 1368 at [52]). It is sufficient for this Application to refer to two of these decisions at appellate level, but keeping in mind always that the decisions are in the context of the contract language, notification language, and context under consideration in the particular case, and which are different from case to case in ways that may be very material.

15. The first is Stobart Group Ltd v Stobart [2019] EWCA Civ 1376. At [25]-[29] and [36]-[38] Simon LJ said:

> "The Court's approach to the construction of notices
>
> 25. The starting point for the construction of unilateral notices is the speech of Lord Steyn in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 (a case concerning a tenant's notice exercising a break clause in a lease) at 767G, in which he made clear a cardinal principle of construction:
>
>> "The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene."
>
> 26. At p.775E, Lord Hoffmann said this:
>
>> "When therefore, lawyers say that they are concerned, not with subjective meaning, but with the meaning of the language which the speaker has used, what they mean is that they are concerned with what he would objectively have been understood to mean.
>
> 27. In relation to what is admissible as the contextual scene or factual matrix, Lord Steyn added at 768B:
>
>> "The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation.

> That depends on what meanings the language read against the objective contextual scene will let in."

28. Lord Hodge's more recent synthesis of the proper approach to the construction of contracts in *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 at [10], with which the other members of the Supreme Court agreed, is to like effect:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement."

29. The reference to 'the parties' in this passage highlights a difference between a contract and a unilateral notice: in the latter case the court is not construing agreed words, it is construing words used by one party. Nevertheless, the approach to ascertaining meaning is similar: the words used in the 24 March 2015 letter and the context in which it was written are both relevant.

…

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

37. At [91] Stuart-Smith LJ went on to say:

> "It does not stop there. Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty. Thus, there is merit in certainty and accordingly, in our judgment the point taken by the appellants is not a matter of mere technicality and it is not without merit.

38. Furthermore, as Cooke J observed in *Laminates Acquisition Co v. BTR Australia Limited* [2003] EWHC 2540 (Comm) at [29] having referred to the speech of Lord Steyn in *Mannai Investments* (above) and the judgment of Stuart-Smith LJ in *Senate Electrical*:

> "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 as a technicality."

16. The second appellate authority is Dodika v United Luck Group Holdings Ltd [2021] EWCA Civ 638. At [32]-[35] Nugee LJ said:

> "32. Mr Choo-Choy submitted that the existing knowledge of the recipient of a notice could not affect the question whether the notice contained what it should contain. He said that whereas the *construction* of a unilateral contractual notice can be affected by the knowledge of the recipient (see the very well-known case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (***"Mannai"***)), the same was not the case when considering the question of *compliance* of a notice with the contractual requirements. He pointed out that Lord Steyn had said in *Mannai* at 767D:
>
>> "This is not a case of a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information."
>
> The clear implication from that is that if a contract does prescribe that certain information must be included, a notice which fails to do so will be invalid and it will be no answer to say that the recipient already knew it.
>
> 33. That I accept. Suppose for example a contract which entitled one party to give a notice in relation to one of several properties. If such a contract required the notice to specify the address and postcode of the property concerned, a failure to give the address and postcode in the notice would no doubt mean that the notice was not compliant, however much the recipient knew the address and postcode already. But if the contract did not require this, but merely required the notice to identify which property the notice was being given in relation to, then it might well be sufficient to refer to the property by name, or description, even in quite vague terms such as *"the London property"* or *"the premises I hold of you"*. On the authority of *Mannai* these would be sufficient to identify the property concerned if the reasonable recipient, circumstanced as the actual parties were, could be left in no doubt what property was being referred to.
>
> 34. So although I accept that the question of construction of a unilateral notice and the question of compliance of such a notice with contractual requirements are in principle different questions, I do not accept Mr Choo-Choy's submission that there is always a sharp distinction between the two, such that on the question of construction the knowledge of the recipient can be relevant but on the question of compliance such knowledge is irrelevant. *Mannai* shows that the information conveyed by a unilateral notice to the reasonable recipient is in principle capable of being affected by the background context, and that includes the knowledge that the actual recipient has; and such knowledge seems to me to be in principle capable of being relevant not only to the question of construction but to the question of compliance.
>
> 35. In the present case the SPA does not specify precisely what information the notice needs to contain; it simply requires the notice to state things *"in reasonable detail"*. What is reasonable must depend on all the

circumstances. In my view those circumstances must include in particular what is already known to the recipient…."

17. At [46] in the same authority Popplewell LJ said the following, in a short concurring judgment that should be read in full:

> "Thirdly, and as a result of the first two aspects, it would have served no commercial purpose to have set out in the 24 June letter the further limited and generic detail available. The purpose of a notice clause such as that in schedule 4 para 2(b) of the SPA is to enable the recipient to make such inquiries as it is able, and would wish, to make into the factual circumstances giving rise to the claim, with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; to participate in the tax investigation to the extent desirable or possible with a view to influencing the outcome; and to take into account the nature and scope of the claim in its future business dealings, whether by way of formal reserving or a more general assessment of the potential liability. As Mr Choo-Choy accepted, the additional detail available, if included in the 24 June letter, would not have advanced any of these purposes. I balk at a conclusion that the level of detail provided in a notice of this sort fell short of what was required as reasonable, that is to say was unreasonably deficient, when the additional level of detail said to have been required would not have furthered any of the commercial purposes for giving such a notice. What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable."

The Notification Letters

18. The Notification Letters are dated 20 and 29 December 2018. The first concerned an investigation by the US Commodities Futures Trading Commission ("CFTC") entitled "In the Matter of Swaps Trading Relating to Bond Issuances". The second of the two Notification Letters concerned an investigation by a Frankfurt prosecutor into a named director of a Voice Group Company.

19. In relation to the statement at paragraph 9.2, the Re-Amended Particulars of Claim allege at paragraphs 47 and 48:

> "47. In breach of the warranty at paragraph 9.2 of Part 1 of Schedule 4 to the SPA, as regards the CFTC/FCA Matter the Voice Group Companies and/or members of the Seller's Group, and as regards the ISL Director Investigation (referred to below) a director and/or officer and/or employee of the Voice Group Companies had within the 18 months prior to the giving of the Seller Warranties (i) at the date of the SPA (in respect of the ISL Director Investigation) and/or (ii) at the date of Completion (in respect of the CFTC/FCA Matter and/or the ISL Director Investigation) been subject

to non-routine investigation, review or enquiry which could include the imposition of any risk mitigation or other remediation plans or requirements, disciplinary or enforcement proceedings or other formal process (whether judicial, quasi-judicial, of a regulatory, supervisory or enforcement nature or otherwise), by a Governmental Authority in relation to the Voice Group Business. In this regard, by the date of Completion:

a. At least IGDL and, it is to be inferred, IEL, ICAP Energy LLC, ICAP Energy Limited, ICAP Capital Markets LLC were the subject of investigation or enquiry by the CFTC/FCA.

b. The Frankfurt Prosecutor had commenced an investigation into the ISL Director in respect of his conduct concerning Rafael Roth ("the ISL Director Investigation").

48. Each of the (i) CFTC/FCA Matter and (ii) the ISL Director Investigation was a non-routine investigation, review or enquiry (or a series of several such matters) and was liable to lead to the consequences specified in paragraph 9.2. This includes the consequences specified in paragraph 9.2 in the form in which that warranty was given at Completion (see paragraph 9 above). In support of its case that the CFTC/FCA Matter and the ISL Director Investigation was each a non-routine investigation, review or enquiry which may include the imposition of remediation plans or requirements or a disciplinary or enforcement proceeding or formal process "that, in each case, has or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)", the [Purchaser] relies upon the facts and matters referred to in paragraphs 20 and 46a above."

Grounds 1 to 3 of this Application

20. The SPA required the Seller to give "written notice of the Seller Warranty Claim" and "stating in reasonable detail the nature of the Seller Warranty Claim and, if practicable, the amount claimed".

21. When Calver J was dealing with paragraph 9.1 for the purpose of the First Application, he said in a Note 3 to paragraph 56 of his judgment:

> "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."

22. Mr Smouha KC says that the position is the same here: the notification fails to state that any of the 8 individuals had any knowledge of the investigation.

23. At Paragraph 49 of its Re-Amended Particulars of Claim the Purchaser states:

> "Insofar as liability under paragraph 9.2 was qualified by reference to the Seller's awareness (i.e. in relation to investigation, review or enquiry into the conduct of directors and/or officers and/or employees of the Voice Group Companies and/or of members of the Seller's Group which is not attributable to the relevant corporate entities), the [Purchaser]'s case will be that it is to be inferred that one or more of the relevant individuals identified in paragraph 2 of Schedule 23 to the SPA was so aware, to the extent that 21 such directors, officers, or employees were identified in the communications relating to the CFTC/FCA Matter and/or the ISL Director Investigation described above and/or were consulted by the Seller's advisers in relation to the warranties given in the SPA. …"

24. The statement of case continued that this is "a proper inference in circumstances where" 9 points applied. These were:

> "a. The Seller had been notified of the relevant regulatory activity long before the date of Completion.
>
> b. These were evidently serious matters.
>
> c. ICAP had self-reported to the FCA and the CFTC.
>
> d. Stuart Wexler and David Mazzuco (at the relevant time both of whom were senior in house counsel employed by the Seller and were directly involved in the negotiation of the SPA) were regularly copied on correspondence relating to the CFTC/FCA Matter.
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> e. A document preservation notice in relation to the CFTC/FCA Matter had been circulated internally on 10 February 2016.
>
> f. David Ireland (at the relevant time the Head of Group Finance employed by the Seller, who is an individual identified in paragraph 2 of Schedule 23 of the SPA) was from at least 2011 copied on correspondence relating to legal proceedings, regulatory requests and investigations relating to alleged cum-ex trading by ISL with Rafael Roth and HVB.
>
> g. Duncan Wales (at the relevant time the General Counsel of ICAP plc), and Damian Morris (at the relevant time EMEA General Counsel of ICAP plc) oversaw the HMRC Production Order process (and were both directly involved in the negotiation of the SPA). Mr Wales had been personally involved in the authorisation of cum-ex trading.
>
> h. From December 2011 to October 2014, ISL was a party to civil litigation in Germany and England relating to matters arising from cum-ex trading.
>
> i. Given the size of the transaction, it is properly to be inferred that the Seller investigated (either itself or via its advisers investigating and reporting back to the identified individuals) with the appropriate departments and individuals within the Seller's Group to ascertain what non-routine contact there had been with governmental authorities in the relevant period, that such investigations identified the contacts referred to herein and that such

> contacts were reported to or raised with the individuals identified in paragraph 2 of Schedule 23 of the SPA."

25. Mr Smouha KC points out that none of the 9 points, nor the inference they are said to support was mentioned in the Notification Letters. He continues that it was an important part of the parties' commercial bargain that formal written notice would be given within a strict timeframe of any Seller Warranty claim, and the parties expressly agreed that a valid notification must state in reasonable detail the nature of the claim. Unless the notice provided reasonable detail of the nature of the claim, he argues, the Seller was not in a position even in a general sense to assess the prospects of liability for breach on that claim or to take appropriate steps in relation to that claim. Drawing on Dodika (above) at [46] Mr Smouha KC describes as an essential purpose of the notice clause and the requirement as to its content that it enables the recipient to make appropriate inquiries and take steps to gather or preserve evidence to assess the merits of the clam and deal with it appropriately.

26. Without any notification of the Purchaser's contention as to the details of the - critical - awareness element of the alleged breach, the Seller would be hampered in that regard, argues Mr Smouha KC. He submits that it is not for the receiving party to make judgments as to the nature of the claim, but for the notifying party to give notice with the required degree of specificity informing the receiving party in sufficiently formal written terms of the nature of the claim that is being made.

27. As its "Ground 2" of the Application, the Seller makes what Mr Smouha KC terms "essentially the same point" in relation to the first Notification Letter concerning the CFTC investigation. The Seller's contention is that the presence of the qualification "so far as the Seller is aware" means that "in order to provide a valid notification stating in reasonable detail the nature of a claim on the basis, the [Purchaser] had to identify the individual(s) specified in paragraph 2 of Schedule 23 alleged to have had the relevant knowledge".

28. In relation to paragraph 10.3, the Re-Amended Particulars of Claim allege at paragraphs 50 to 52:

> "50. In breach of the warranty at paragraph 10.3 of Part 1 of Schedule 4 to the SPA, the Seller was aware that there were circumstances which would reasonably be expected to give rise to litigation, arbitration or alternative dispute resolution proceedings by or against any Voice Group Company wherein the value of the claim would exceed £500,000.
>
> 51. The circumstances of the conduct relating to each of (i) swaps and interest rates which are the subject of the CFTC/FCA Matter (as at Completion) and (ii) the ISL Director Investigation (as at the date of the SPA and/or at Completion), particularly when coupled with the existence of regulatory investigations which were likely to bring those matters to light, were such that they would reasonably be expected to give rise to litigation including with (a) regulators/authorities, and/or (b) trading counterparties, and/or (c) clients and/or (d) other parties, in relation to any

or all of (i) sanctions and penalties, and/or (ii) losses suffered and gains made and/or (iii) contribution or third party liabilities. In relation to cum-ex trading, litigation had already occurred involving HVB and RFE and it was reasonable to expect that other litigation against ISL would occur. Given the scale of the relevant conduct, it was highly likely that the amounts in dispute in such litigation would exceed £500,000.

52. The foregoing paragraphs in relation to the relevant circumstances and the knowledge of relevant individuals named in the SPA are repeated."

29. As its "Ground 3", the Seller makes what Mr Smouha KC terms "essentially the same point", that (again) the presence of the qualification "so far as the Seller is aware" means that "in order to provide a valid notification stating in reasonable detail the nature of a claim on that basis, the [Purchaser] had to identify the individual(s) specified in paragraph 2 of Schedule 23 alleged to have had the relevant knowledge".

30. In passing, narrower points are made by the Seller: that the Notification of the CFTC Investigation says that the facts and circumstances "may" give rise to a claim, and that there is no statement that the value of any such claim exceeded £500,000. However these are not in themselves the foundation of this Application.

31. For the Purchaser, Mr Richard Handyside KC and Mr Alex Barden argue that Paragraph 5.1 of Part 1 of Schedule 5 required the nature of the claims to be stated, not every element of the cause of action. As for the requirement of "reasonable detail", they argue that the Notification Letters are to be read against the background of what was already known to the Seller.

32. In my judgment it is first valuable to keep in mind the distinction between a requirement that something be the case and a requirement to state that that requirement is met.

33. Then there is Calver J's Note 3 to his judgment on the First Application. That is perfectly helpful if taken as an expression of what would be expected, but I do not believe it is to be taken as a finding on the point now in issue on the Application. If it was to be taken in that way, it is obiter and, respectfully, I am not bound to follow it. The question of Seller awareness was not raised or argued before Calver J.

34. The fact is that the Seller's argument requires more than the SPA states in terms. The SPA does not say that the names of the individuals said to have knowledge have to be identified in a notification. It might add little to do so, as even on the Seller's case the Purchaser would comply if, in good faith, it listed all eight as alternatives. It is arguably obvious, when a notification is given of what it is said the Seller was aware, that it is talking about awareness as defined in the SPA.

35. The Seller's argument may have greater quality, but for this the Court would need to understand why the context required the names. The Seller says the Purchaser does not plead matters of factual matrix, but it may be that it is the

Seller that needs that matrix rather than the Purchaser. Either way, the trial is the place for the matrix to be understood.

36. Mr Smouha KC invokes the importance of commercial certainty and commercial purpose. But I do not, at least at this stage, see that these lead to the conclusion that the names of one or more or all of the 8 individuals should have been set out.

Ground 4 of this Application

37. The Seller's Ground 4 on this Application is that the Notification Letters fail to state that the investigations referred to in relation to the warranted statement at paragraph 9.2 of Part 1 of Schedule 4 "had or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)."

38. The Notification Letters say at paragraph 6:

> "It is apparent that (i) in relation to paragraph 9.2, there was an existing and/or threatened and/or pending investigation, review or enquiry by the CFTC"; and
>
> "It is apparent that (i) in relation to paragraph 9.2 a director of a Voice Group Company was the subject of a non-routine investigation, review or enquiry".

39. Paragraphs 9 to 11 of the first Notification Letter are in these terms:

> "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."

The second Notification Letter contained much the same language, but omitting the second sentence of paragraph 9 and referring to the Frankfurt investigation rather than the CFTC investigation.

40. In his judgment on the First Application, Calver J at paragraph 59 addressed a separate argument on the warranted statement at paragraph 9.1 of Part 1 of Schedule 4. In the course of this he said (the emphasis is in the original):

> "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 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."

41. However in relation to the different matters before him for decision, Calver J drew attention to this point:

> "Moreover, the reason that it is not mentioned in the Tax Investigation Notification is, no doubt, precisely because the Purchaser is <u>not</u> 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."

42. At paragraph 67 of his judgment on the First Application, still addressing the warranted statement at paragraph 9.1, Calver J went on to say of paragraphs 9 and 10 of the Notification Letters:

> "… 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."

43. On this Application, Mr Smouha KC accepts that the wording of the paragraphs 6 of the Notification Letters are "consistent with a claim for breach of Warranty

9.2 as at the date of the SPA", but says that is because there is no material adverse impact element for a claim for breach as at that date, whereas it is essential for a claim as at the date of completion.

44. He argues that in relation to the second Notification Letter the contention of the Seller is "particularly inapt" because "there is no explanation how" an investigation into a director had or might have had a material adverse impact on the operation of the Voice Group Business taken as a whole.

45. This last point certainly goes too far, in my judgment. I can see nothing in the SPA that requires an explanation of how an investigation had an impact to be included in a Notification Letter, such that without such an explanation the Notification Letter would be ineffective.

46. But let me revert then to the short underlying point made by the Seller's Ground 4, that a failure to state that the investigations "had or would have a material adverse impact on the operation of the Voice Group Business (taken as a whole)" renders the Notification Letters ineffective. I give due weight to the observations of Calver J although he was not dealing with the point argued in this Application. The difficulty I have is that adding the statement for which the Seller contends would do no more than set out the applicable text of paragraph 9.2 (i.e. the text as extended by paragraph 1 of Schedule 23 to the SPA). With reference to the approach taken by Popplewell LJ in Dodika (above) the statement would not have advanced any of the commercial purposes for giving notice. The decision of the Court of Appeal in Dodika was not cited to Calver J, again because he was not dealing with the point argued in this Application.

47. What is required by paragraph 5.1 of Part 1 of Schedule 5 is rather that "… the Purchaser [give] the Seller written notice of the Seller Warranty Claim"; "stat[e] in reasonable detail the nature of the Seller Warranty Claim" and, "if practicable, [state] the amount claimed". In oral argument Mr Smouha KC pressed for a conclusion that each constituent element of the claim needed to be alleged if the notification was to be valid.

48. The Purchaser gave written notice of Seller Warranty Claims under paragraph 9.2. For the terms of that paragraph 9.2 the parties had the SPA, which provided for paragraph 9.2 to have additional wording at Completion. The written notice stated "the nature" of the Seller Warranty Claims, which were the presence and consequences of the CFTC investigation and the Frankfurt investigation. The Purchaser said in the Notification Letters that it was unable at that stage to quantify the liability resulting, when it was only required to state the amount claimed "if practicable". The additional wording that paragraph 9.2 had at Completion would mean that the Claims would fail if they did not have a material adverse impact on the operation of the Voice Group Business (taken as a whole). The failure to state that does not strike me as meaning that the nature of the Claims was not stated. Whether the investigations gave rise to good Seller Warranty Claims, on their merits, and of sufficient worth, and of sufficient impact, is part of the determination of the Claims rather than part of the notification of Claims. It is for trial.

49. One additional point was made on behalf of the Seller to the effect that only by seeing reference to material adverse impact in the Notification Letters would one know whether the Claim was for breach of a warranted statement as at the date of the SPA or as at Completion. I was not impressed by this point. If, as the point suggests, the letters allowed for a claim at both dates the Purchaser was entitled to put that forward. It is a separate matter, not for this Application, whether the claim would lack merit at one or other date.

Conclusions

50. I am not satisfied that the Purchaser's case, in the respects challenged, is unarguable and I do not take the view that the Purchaser has no real prospect of succeeding on the claim or issue. In the circumstances discussed and for the reasons given, I decline to strike out or grant summary judgment on this Application. Unless compromised, the case should proceed to trial.