Neutral Citation Number: [2024] EWHC 867 (Comm)

Case No: CL-2023-000545

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 17/04/2024

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

ONECOM GROUP LIMITED **Claimant**

- and -

JAMES PALMER **Defendant**

- -
- -

Adam Sher and Leah Gardner (instructed by **Goodwin Procter (UK) LLP**) for the **Claimant**
Derrick Dale KC and Marcus Field (instructed by **Baker & McKenzie LLP**) for the **Defendant**

Hearing date: 17 January 2024
Draft judgment circulated: 15 April 2024

Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. Onecom Group Limited ("***Onecom***") sues for alleged breach of warranty by Mr Palmer in respect of a share purchase agreement entered into on 28 February 2021 (the "***SPA***"), under which Onecom purchased the entire share capital of F2P (Group) Ltd ("***F2P***") from Mr Palmer.

2. In this application, Mr Palmer applies to strike out Onecom's statement of case and/or for summary judgment pursuant to CPR 3.4(2)(a) and (b) and/or CPR 24.2. The main basis of the application is that Onecom's claims for breach of warranty (the "***Warranty Claims***") have been brought outside the contractually agreed limitation period and are therefore time-barred. They were issued on 8 September 2023 which, on Mr Palmer's case, was nearly nine months after the contractually agreed limitation period for such warranty claims expired. Mr Palmer also contends that Onecom is estopped from contending otherwise, and/or that these proceedings are an abuse of process, on the basis that Onecom Group knew (and had expressly stated to Mr Palmer that it knew) that its claim was time-barred by the date of issue.

3. Onecom's position is that a later limitation period applied under the provisions of the SPA, because the claim is based on liabilities that were contingent and not capable of being quantified; or, at least, that Onecom has a realistic prospect of succeeding on that point at trial. Further, Onecom says, Mr Palmer's estoppel and abuse arguments lack merit, and in any event raise material disputes of fact unsuitable for summary judgment. The abuse argument, moreover, depends on Mr Palmer succeeding on his limitation argument, and hence adds nothing to the analysis.

4. I have reached the conclusion, for the reasons which follow, that:

i) Onecom's claims are not time-barred (subject only to any conclusion reached at trial that Onecom is estopped from maintaining that position);

ii) Mr Palmer's estoppel argument is unsuitable for summary judgment and must proceed to trial;

iii) Mr Palmer's abuse of process argument has no merit; and

iv) Mr Palmer's applications for strike-out and/or summary judgment should therefore be refused.

(B) THE SHARE PURCHASE AGREEMENT

5. On 28 February 2021 (the "***Completion Date***") Mr Palmer and Onecom entered into the SPA for the sale by Mr Palmer to Onecom Group of the entire share capital of F2P (together with its subsidiaries, the "***Group*"**). The commercial target of the acquisition was various telecommunications services businesses ("***the Business***"), which were transferred to F2P by separate Business Transfer Agreements prior to the SPA. The businesses had been operated by 9 Group (Retail) Ltd and 9 Group (Partners) Ltd, and are referred to in some of the documents as "*9P&R*".

(1) The Consideration

6. The evidence indicates that the price to be paid by Onecom to Mr Palmer had been negotiated on an EBITDA multiple approach: in other words, valuing the Business based on its estimated future cashflows by applying an agreed multiplier to a figure agreed to reflect its sustainable earnings measured by reference to EBITDA (earnings before interest, taxes, depreciation and amortisation). The parties were unable to reach full agreement as to the appropriate EBITDA figure. Accordingly, an earn-out arrangement was used. That meant that, rather than the total consideration payable under the SPA being determined at the outset, there would be a period (the "***Earn-Out Period***"), which ran for 1 year from Completion, during which the actual performance of the Business would be evaluated. The earn-out mechanism was intended to protect both parties' interests and to incentivise Mr Palmer to achieve the forecast for the Business's financial performance that he had given Onecom.

7. Clause 3 of the SPA provided:

> "3 **Consideration**
>
> 3.1 In consideration of the sale of the Shares in accordance with the terms of this Agreement, the Buyer shall pay to the Seller an aggregate consideration of:
>
> (a) the Initial Consideration (as adjusted pursuant to clause 6); plus
>
> (b) subject to clause 3.3, the Holdback Amount; plus
>
> (c) any Earn-Out Consideration; plus

(d) the Deferred Consideration,

(the "Consideration")."

8. The Initial Consideration was £34,440,938, subject to possible adjustment under § 6 depending on the working capital as at the Completion Date. The Holdback Amount was £11,250,000 and the Deferred Consideration was £11,250,000. In addition, § 4.4(b) provided for the payment shortly after completion (which was simultaneous with exchange of the SPA) of a further £3,059,062. The Consideration excluding the Earn-Out Consideration accordingly totalled £60 million. The evidence indicates that that figure had been negotiated by applying an agreed multiplier of 9.16 to a 'last twelve month' EBITDA (for the period ending October 2020) of £6.52 million, which was rounded up to £6.55 million.

9. The effect of the Earn-Out provisions was that for every £1 by which the EBITDA in the Earn-Out Period, ending on 28 February 2022, exceeded £6.55 million, Onecom would pay Earn-Out Consideration of £11.11, up to a maximum of £15 million. As explained in Mr Palmer's "*Seller's Statement*" dated 23 September 2023 to the Independent Expert (to whom I refer later):

> "The EBITDA parameters by which the EOC was to be calculated were based on a forecast of 9P&R's financial performance, which was produced by the Seller pre-Completion and provided to the Buyer as part of its due diligence. The upper EBITDA threshold of £7.9 million, achievement of which would result in the full EOC being paid, was based on this forecast. The Buyer proposed that the EOC would be reduced by a multiple of £11.11 for each £1 that EBITDA fell below £7.9 million which meant that no EOC would be payable should EBITDA be £6.55 million or lower. The Parties agreed that this structure would incentivise the Seller to achieve the forecast. " (§ 2.3.6)

(2) Mechanism for determining Earn-Out Consideration

10. Schedule 9 of the SPA set out a procedure for determination of the Earn-Out Consideration. In summary, within 60 Business Days of the end of the Earn-Out Period Onecom was to prepare draft "*Earn-Out Accounts*", defined as "*unaudited consolidated accounts of the Company and the Subsidiaries representing the Earn-Out Period prepared in accordance with Schedule 9*" ("***Earn-Out Accounts***"). There would be a 30 Business Days period in which Mr Palmer could dispute the draft Earn-Out Accounts, and a further period of 5 Business Days in which the parties were to attempt to resolve matters in dispute. After that, the parties could refer outstanding matters in dispute ("***Outstanding Matters"***) for expert determination by "*Independent Accountants*" ("***IA***") (Schedule 9 § 1.6). The IA were to be an independent firm of accountants of international repute agreed between the parties, or appointed by means prescribed in the SPA. Schedule 9 §§ 3.5-3.8 provided:

> "3.5 The determination of the Independent Accountants shall be in writing and shall be delivered to the Seller and the Buyer. In giving its determination, the Independent Accountants shall state

> what adjustments (if any) are necessary, solely for the purposes of this Agreement, to the draft Earn-Out Accounts and the Earn-Out Statement in respect of the Outstanding Matters to comply with the requirements of this Agreement and to determine finally the Earn-Out Accounts and the Earn-Out Statement.
>
> 3.6 The Independent Accountants shall determine (using its own legal advice as appropriate) any question of the legal construction of this Agreement but only insofar as it is relevant to the determination of the Earn-Out Accounts and the Earn-Out Statement. If the Independent Accountants obtain legal advice, a copy of the advice and any instructions on which it is based shall be delivered to the Seller and to the Buyer.
>
> 3.7 The Independent Accountants shall act as an expert (and not as an arbitrator) in making any such determination which shall (in the absence of manifest error), be final and binding on the parties. In particular, without limitation, its determination of any fact which it has found necessary to determine for the purposes of its determination pursuant to this Schedule 9 is binding on the parties for all purposes.
>
> 3.8 The parties expressly waive, to the extent permitted by law, any rights of recourse to the courts they may otherwise have to challenge the Independent Accountants' determination."

(3) Warranties

11. Mr Palmer provided a number of warranties to Onecom, set out in SPA § 7 and Schedule 5, as at the date of the SPA (28 February 2021). These included certain warranties at Schedule 5 §§ 4.2 and 7.2 in respect of the Business and the "*Financial Information Files*" as at the Completion Date. The Financial Information Files were specified files and folders contained in a data room, made available to Onecom before it agreed to the SPA. Those warranties were to the effect that:

    i) the Business did not "*depend on the use of assets owned by or facilities or services provided by the Seller or the Seller's Group*" other than those sold under the SPA and certain related agreements (Schedule 5 § 4.2); and

    ii) the financial information and forecasts provided to Onecom pre-Completion were, *inter alia*, materially accurate and not misleading (Schedule 5 § 7.2).

12. The SPA provided a separate procedure and limitation period for the notification and bringing of a warranty claim by Onecom against Mr Palmer. This was set out in Schedule 7, which included the following provisions:

> "1 **Cap on liability**

1.1 The aggregate maximum liability of the Seller in respect of all and any Claims (excluding any costs and expenses in relation to any such claim) shall not exceed an amount equal to 50% of the Consideration actually received in the hands of the Seller (or which would be received were it not for the operation of clause 8).

1.2 Subject to paragraph 1.1 of this Schedule 7, the aggregate maximum liability of the Seller in respect of any claims under this Agreement (excluding any costs and expenses in relation to any such claim) shall not exceed an amount equal to 100% of the Consideration actually received in the hands of the Seller (or which would be received were it not for the operation of clause 8).

2 **Time limits for making Claims**

2.1 No Claim or Fundamental Warranty Claim may be made against the Seller unless written notice of such Claim or Fundamental Warranty Claim is served on the Seller giving reasonable details of such claim:

(a) in the case of a Tax Claim or Fundamental Warranty Claim, on or before the seventh anniversary of the Completion Date;

(b) in the case of a Business Warranty Claim, on or before the date falling 24 months after the Completion Date.

2.2 Any Claim shall be deemed to be withdrawn (if it has not been previously satisfied, settled or withdrawn) unless legal proceedings in respect thereof have been commenced within six months of the giving of written notice of such claim (or in the case of any such claim to which paragraph 4 below applies, the date on which such claim becomes an actual liability or becomes capable of being quantified).

3 **Threshold**

3.1 The Seller shall not be liable in respect of any Business Warranty Claim or Tax Warranty Claim unless the aggregate liability for all Business Warranty Claims and Tax Warranty Claims exceeds £750,000, in which case the Seller shall be liable for the entire amount and not merely the excess.

3.2 The Seller shall not be liable in respect of any individual Business Warranty Claim or Tax Warranty Claim unless the liability for such claim exceeds £75,000.

3.3 For the purposes of the limit set out in this paragraph 3.2, a number of Business Warranty Claims and Tax Warranty Claims

> arising out of the same subject matter, facts, events or circumstances shall be aggregated and form a single Claim.
>
> 4 **Contingent Claims**
>
> If any Claim is based upon a liability which is contingent only or not capable of being quantified, the Seller shall not be liable to make any payment in respect of such Claim (and nor shall the Buyer have any right to set off pursuant to clause 8 in respect of such Claim) unless and until the liability becomes an actual liability or becomes capable of being quantified. This is without prejudice to the obligation of the Buyer to give notice of a Claim and to issue and serve proceedings in respect of it whilst it remains contingent or not capable of being quantified.
>
> 5 **Right to remedy**
>
> The Seller shall not be liable for any Claim if the alleged breach which is the subject of the Claim is capable of remedy and is remedied to the satisfaction of the Buyer by the Seller within 30 days of the date on which the notice in paragraph 2.1 above is received by the Seller.
>
> …
>
> 9 **Mitigation**
>
> Nothing in this Agreement shall relieve the Buyer of its common law duty to mitigate its loss.
>
> 10 **No double recovery**
>
> The Buyer shall not be entitled to recover from the Seller more than once for the same damage suffered."

It is common ground between the parties that the second sentence of Schedule 7 § 4 is inconsistent with the final clause of § 2.2, and should be disregarded.

13. The term "*Claim*", used in Schedule 7, was defined to mean *"a Business Warranty Claim or a Tax Claim"*. A *"Business Warranty Claim"* was a claim for a breach of a *"Business Warranty"*, i.e. a warranty other than a "*Fundamental Warranty*" (as defined). Onecom's warranty claims are Business Warranty Claims.

14. Clause 8 of the SPA provided:

> "8 **Set off**
>
> 8.1 The Buyer shall be entitled to immediately and permanently deduct the amount of any Finally Determined claim under this Agreement from the Holdback Amount and/or the Earn-Out

> Consideration and/or the Deferred Consideration and the Buyer shall have no liability to pay such amount to the Seller.
>
> 8.2 If on the date upon which any of the Holdback Amount and/or the Earn-Out Consideration and/or the Deferred Consideration is due and payable to the Seller there is an Outstanding Claim, the Buyer shall be entitled to:
>
> (a) withhold from any amount so due an amount equal to the Estimated Liability or, if lower, the full amount of the amount due at that time (the "Reserved Sum"); and
>
> (b) defer payment of the Reserved Sum to the Seller until such time as the Outstanding Claim has become Finally Determined,
>
> and if the Buyer does make a withholding of the Reserved Sum in accordance with this clause 8.2, it shall immediately notify the Seller.
>
> 8.3 Where the provisions of clause 8.2 apply, the Buyer shall use reasonable endeavours to agree (for the purposes of this clause 8.3 only) the Estimated Liability in respect of the Outstanding Claim with the Seller as soon as reasonably practicable but failing such agreement within 14 days of notification by the Buyer to the Seller that it proposes to retain, or has retained, a Reserved Sum (or such longer period as the Buyer and Seller may mutually agree), the following procedure shall apply:
>
> …
>
> 8.5 Nothing in this clause 8 limits any other rights or remedies available to the Buyer to recover any amount due to it in respect of any claim under this Agreement or the other Transaction Documents against the Seller, whether for a breach of Warranty, a Tax Claim or otherwise."

15. "*Finally Determined*" was defined as:

> "(A) agreed by the Seller and the Buyer in writing both as to liability and (where relevant) quantum; or
>
> (B) determined by a duly appointed arbitrator or competent court both as to liability and (where relevant) quantum and, where relevant, the period for lodging an appeal has expired without an appeal having been lodged"

The *"Estimated Liability"* was defined as *"in relation to an Outstanding Claim, a genuine and bona fide estimate of the amount of the Seller's liability to the Buyer if the Outstanding Claim were to be resolved in the Buyer's favour, as agreed or determined in accordance with clause 8.3".* An *"Outstanding*

Claim" was defined as *"a bona fide Claim that has been validly notified by the Buyer to the Seller in accordance with this Agreement, but which has not become Finally Determined"*.

(C) EVENTS FOLLOWING COMPLETION OF THE SPA

16. On 27 March 2022 Onecom served draft Earn-Out Accounts. Mr Palmer on 10 May 2022 gave notice that he disputed the Earn-Out Accounts, identifying the disputes and setting out his own calculation. The parties were unable to resolve the disputes, and they were referred to the IA.

17. On 22 June 2022 Onecom served a timely notice under Schedule 7 § 2.1 ("***the Notice***") of eight claims for breach of warranty, including the claims pursued in the present proceedings. The four claims still pursued were, in brief outline, that:

    i) F2P's business required the services of the following individuals, whose employment costs were not disclosed or reflected in the Financial Information Files, namely:

        a) two billing employees, Mr Pamuk and Mr Mistry, whose annual compensation was £88,871 (including National Insurance and pension contributions) (the "***Billing Heads***" claim);

        b) a mobile product manager, Mr Simon Fort, whose annual compensation (including National Insurance and pension contributions) was £80,648 (the "***Mobile Product Manager***" claim);

        c) four software developers, whose annual compensation (including National Insurance and pension contributions) totalled £151,144 (the "***Software Development Resource***" claim); and

    ii) the gross profit of 9 Group (Retail) Ltd, a subsidiary of F2P, had been overstated by £42,505 in the Financial Information Files, allegedly by overstating the Gross Profit of the fixed line calls contained in the management accounts (the "***Fixed Line Call Revenue***" claim).

18. The notified warranty claims that are no longer pursued included two further categories of alleged additional expenditure that Onecom said should have been taken into account in the assumed EBITDA from which the purchase price was calculated, referred to as the *"Bottomline Costs"* and the *"Union Street Costs"*. As noted later, Onecom did not pursue those claims after the IA found in its favour on the corresponding issues arising in the context of the Earn-Out calculation. The Notice also included two claims that Onecom subsequently withdrew and has not pursued.

19. The Notice addressed the quantification of Onecom's warranty claims as follows:

    "*Quantification of loss*

The damages to which Onecom is entitled as a result of the breaches listed above are those that will compensate it for the position it would have been if the warranties were true. Therefore, it is entitled to damages based on the difference between the price that it paid for the shares in the Company and what they are worth now given the warranty breaches.

As you are aware, Onecom valued the shares in the Company on the basis of a multiple of EBITDA at the time of acquisition. That multiple was 9.16 (which was based on the non-contingent EBITDA element), giving rise to the value that was ascribed. The impact of each of these breaches of warranty is to reduce the actual EBITDA of the Company by varying amounts. The table below lists these amounts and the multiple impact, leaving a grand total of £4,208,506, which reflects the value of Onecom's claim. We note that none of these claims on their own (or in total) fall below the de minimis provisions in schedule 7, clause 3 of the SPA.

Warranty Claim	**Financial Impact of Breach**	**Overall Estimated Liability (x9.16 multiple applied)**
1) Bottomline costs	£48,000	£439,695
2) Billing Services Employees	£96,432	£883,347
3) Union Street costs	£36,000	£329,771
4) Mobile Product Manager	£21,218	£193,539
5) Software Developer Resources	£137,723	£1,261,589
6) Fixed Line Call gross profit	£35,233	£322,748
7) Luton Property	£16,738	£153,325
8) Remuneration for A Cathcart and J Carroll	£68,174	£624,492
Overall Value of Claims	£459,429	£4,208,506

> You are therefore invited to make your proposals for the resolution of these claims. Given the nature of this letter and the issues contained within it, we require an acknowledgement of its receipt within 7 days and a substantive response within 21 days.
>
> Finally, we also wish to note that the facts that give rise to the above warranty claims in many cases also have a direct impact on the calculation of the Company's EBITDA, which plays an important part in the calculation of Mr Palmer's earn-out consideration and which is set to be determined as part of the process the Parties are currently undertaking before an Independent Accountant. In many cases Mr Palmer appears to have made efforts to artificially increase the EBITDA of the Company and its Subsidiaries, in order to boost the Earn-Out consideration.
>
> Our client will seek a remedy for Mr Palmer's actions in artificially inflating the value of the EBITDA of the Company through the Independent Accountant process. Should the Independent Accountant be unable to determine any element of any of the issues in question, then all of our clients rights to bring them through this forum are reserved."

20. Mr Palmer asserted in his skeleton argument that the Notice identified each claim without any caveats, limitations or reservations and claimed "*the precise sum*" of £4,208,506. It is sufficient to note at this stage that, as quoted above, the Notice in fact referred to "*Overall Estimated Liability*" and included express reference to some of the facts giving rise to the warranty claims also directly impacting the Earn-Out calculation.

21. On 2 August 2022 Mr Palmer responded to the Notice through his then-solicitors Hogan Lovells, saying, among other things, this:

> "Your letter gives brief particulars of a number of alleged breaches of warranty under the Agreement grouped under eight headings.
>
> Seven of the alleged breaches are matters that have already been asserted by your client as adjustments to EBITDA for the 9 Group business for the purposes of its draft Earn-Out Accounts served on 27 March 2022 (the "Draft EBITDA Adjustments").
>
> As far as we can tell, the only matter not raised in your client's draft Earn-Out Accounts is listed at paragraph 6 of your letter of 22 June, which you refer to as "Fixed Line Call gross profit" (the "Fixed Line Call Matter").
>
> Our client disputes all of the alleged breaches of warranty set out in your letter of 22 June and responds as follows in respect of the Draft EBITDA Adjustments ...

> **The Draft EBITDA Adjustments**
>
> Your client's draft Earn-Out Accounts include the Draft EBITDA Adjustments. As has already been explained in our client's Dispute Notice served on 10 May 2022 pursuant to Schedule 9 paragraph 1.3 of the Agreement, there is no valid legal or accounting basis for the EBITDA Adjustments to be incorporated into the Earn-Out Accounts.
>
> These matters have since been referred to the Independent Accountants, and specifically to Mr Richard Indge of Ankura Consulting (Europe) Limited, under the dispute resolution process provided for by paragraph 1.6 of Schedule 9 to the Agreement. The EBITDA Adjustments (including the question of the proper legal/accounting bases of the matters you raise) are now to be determined by the Independent Accountants.
>
> …"

Thus Mr Palmer, too, recognised the connection between matters underlying some of the warranty claims and those underlying the Earn-Out calculation.

22. On 15 September 2022 the Terms of Reference for the IA were finalised. Over 50 matters were referred to the IA, although some were later agreed between the parties or withdrawn via the exchange of submissions in the IA process.

23. Five of the Outstanding Matters referred to the IA were linked to Onecom's warranty claims, in the sense that they arose from the same categories of alleged additional expenditure. These were the Billing Heads, Mobile Product Manager, Software Development Resource, Bottomline Costs and Union Street Costs.

24. The IA process included a series of submissions by the parties. It is relevant to note the following points.

    i) Mr Palmer's *"Seller's Statement"* dated 23 September 2022 included this:

> "**Proposed Warranty Claim**
>
> The Independent Accountants should be aware that a large number of the "Earn-Out EBITDA Adjustments" are the subject of a separate proposed claim by the Buyer under the warranties. The Buyer's proposed claim under the warranties includes adjustment numbers 3, 4, 6, 7, 9, 10 and 14 (as listed in table 5.3 above) (see Appendix 28 and 29). Without prejudice to the below, the Seller reserves all of his rights, including to make further representations to the Independent Accountant should the Buyer bring a claim under the warranties in respect of these adjustments, including on the basis that any sums or benefits awarded to the Buyer would result in double recovery." (§ 5.5.4)

ii) Onecom's *"Buyer's Statement"* dated 1 December 2022 included the following:

> "**Warranty Claims**
>
> 4.45. As noted in the Seller's Statement, paragraph 5.5.4, the Independent Accountants should be aware that the Buyer issued a "Notice of Claim" to the Seller on 22 June 2022 for breaches of warranties under the SPA.
>
> 4.46. There is overlap in the nature of the items in dispute for the warranty claim and those included as Outstanding Matters for the Independent Accountants to provide their determination on. In particular, the following Outstanding Matters are also subject to a warranty claim:
>
> 4.46.1. Outstanding Matter 5(c) - Bottomline;
>
> 4.46.2. Outstanding Matter 5(d) and 5(e) - Remuneration of JC and AC;
>
> 4.46.3. Outstanding Matter 5(f) - costs of billing heads;
>
> 4.46.4. Outstanding Matter 5(g) - Union Street;
>
> 4.46.5. Outstanding Matter 5(i) - cost of mobile manager;
>
> 4.46.6. Outstanding Matter 5(h) - costs of developers; and
>
> 4.46.7. Outstanding Matter 5(i) - Luton property.
>
> 4.47. The Buyer requests that the Independent Accountants opine on these Outstanding Matters only insofar as they relate to the calculation of the Earn-Out Consideration and that no determination of fact is given that does not pertain to the Earn-Out Consideration calculation, such as the impact of such matters on Business before and after the EO Period. " (footnote omitted)

iii) Mr Palmer's *"Seller's Reply"* dated 24 January 2023, after referring to the above statements, said:

> " The Seller notes the position and requests that the IA issue its determination on the remaining warranty claims, including on any facts or circumstances relating thereto." (§ 2.8.3)

25. The IA delivered their report on 7 June 2023. They found against Onecom on the Billing Heads, Mobile Product Manager and Software Development Resource costs, on the basis that they did not require adjustment of the Earn-Out calculation based on the criteria adopted in the SPA.

26. The IA found in Onecom's favour on the Bottomline Costs and Union Street Costs. For example, on the Bottomline Costs the IA referred to overhead costs incurred from a supplier to the Business, Bottomline, stated in Onecom's draft Earn-Out Account in the amount of £48,000. The IA noted that the main difference between the parties concerned whether the costs were to be borne by the Seller's Group under a Transitional Service Agreement referred to in the SPA, or whether they should have been recharged to 9P&R under the Business Transfer Agreements referred to in the SPA and were thus 9P&R's responsibility. The IA found in Onecom's favour, on the basis that:

> "… under the terms of the BTAs, the Buyer had a legal obligation to assume responsibility for the Bottomline contract at Completion. Therefore, while Bottomline continued to invoice the Seller's Group for these services, we consider that 9P&R had an obligation to pay these costs from Completion" (§ 6.2.39, footnote omitted)

As a result, the IA found, Onecom's draft Earn-Out Accounts rightly took account of this expense. Applying the 11.11x multiple for the Earn-Out Consideration calculation, referred to above, it resulted in an adjustment in Onecom's favour of £533,280. In substance, that reflected an extra expense of £48,000 per annum over an 11.11-year period. The 11.11x multiple used to calculate the Earn-Out Consideration was higher than the 9.16x multiple used to calculate the remainder of the Consideration for the sale. The adjustment in Onecom's favour on the Earn-Out Consideration thus more than covered any adjustment that Onecom could have achieved by its warranty claim in respect of the Bottomline Costs. Consistent with that outcome, Onecom dropped its warranty claim in respect of the Bottomline Costs and the Union Street Costs (to which the same point applied).

27. On the subject of the warranty claims, the IA said:

> "3.8.7 We have carefully considered the Parties' positions and we conclude that any warranty claims made by the Buyer do not affect the accounting treatment that should be applied in the Earn-Out Accounts using the Accounting Hierarchy.
>
> 3.8.8 Therefore, we only opine on the Outstanding Matters that are also pursued by the Buyer's warranty claim insofar as is necessary for the purpose of determining the Earn-Out Accounts and Earn-Out Consideration. Nothing in this Determination should be construed as a determination of facts pursuant to the Buyer's warranty claims."

28. Overall, the IA concluded that £4,849,083 was due to Mr Palmer by way of Earn-Out Consideration.

29. In the meantime, and before the IA had made their determination, Onecom sought Mr Palmer's agreement to an arrangement whereby proceedings in respect of its Warranty Claim would be deferred until 28 days after the IA Report. Responding to Mr Palmer's solicitors' letter of 2 August 2022 quoted

earlier, Onecom's solicitors (Goodwin Procter) said in a letter of 10 November 2022:

> "Pursuant to paragraph 2.2 of Schedule 7 of the SPA, our client has six months from the date the Notice was given in which to commence formal proceedings. As the Notice was served on your client on 22 June 2022, the current deadline for commencement of our client's formal warranty proceedings in 22 December 2022.
>
> However, we note the position taken in your 2 August Letter that the matters relating to EBITDA Adjustments contained in our client's Notice fall to be decided by the Independent Accountant. While we do not agree the extent to which you say these matters must be determined by Mr Indge, we do accept that some of his findings may impact upon the numbers underlying our client's warranty claims. With this in mind, our client would in the circumstances be prepared to wait until the conclusion of the Independent Accountant process before formally commencing any warranty claims (should they still be required).
>
> On that basis, we trust your client will agree to an extension of time for our client to commence any formal warranty proceedings beyond 22 December 2022. We suggest a new deadline be put in place of 28 days after the final determination of the Independent Accountant, which should give your client comfort that if he is to face a warranty claim, it will be brought swiftly and with the benefit of the Independent Accountant process having completed."

30. Mr Palmer's solicitors failed to respond to that letter, despite a chaser on 30 November 2022. That led Onecom's solicitor to write on 12 December 2022 stating that their *"failure to respond and agree an extension to the contractual limitation period makes litigation inevitable"*, and that proceedings would be issued unless Onecom's proposal was agreed by 14 December. On 13 December they provided a proposed form of side letter, which included the following proposed language:

> "2. As of the date of this Side Letter, the Parties are in the process of a determination by Independent Accountants of the Earn-Out Consideration owed to the Seller pursuant to Schedule 9 of the SPA ("IA Process"). The terms of reference commencing the IA Process were signed by the Parties on 15 September 2022.
>
> 3. On 22 June 2022, the Buyer served a written notice on the Seller of its claim for breach of warranty pursuant to paragraph 2.1 of Schedule 7 of the SPA ("Notice of Warranty Claim"). Pursuant to paragraph 2.2 of Schedule 7 of the SPA, the Buyer has six (6) months from date of service of the Notice of Warranty Claim in which to commence legal proceedings against the Seller, otherwise the claim shall be deemed to be withdrawn.

> 4. The Parties hereby agree and acknowledge that in accordance with Clause 21 of the SPA (Variation), paragraph 2.2 of Schedule of the SPA shall be varied as follows:
>
> > a. The Buyer shall have until 4pm on the seventh (7th) working day following final determination of the IA Process to commence legal proceedings in respect of the Notice of Warranty Claim; …"

31. Mr Palmer was willing to agree in principle that time should be extended until after the IA's determination, but only on condition that Onecom must then serve both its claim form and its Particulars of Claim within 7 days thereafter, a condition which Onecom was unwilling to accept.

32. In an email of 14 December 2022, Onecom's solicitors referred to 22 December 2022 (6 months from the Notice) as *"the existing contractual deadline"*.

33. In an email of 16 December 2022, Onecom's solicitors said:

> "Our client has warranty claims that it notified it wished to bring (as it is required to do), thus triggering the 6 month contractual limitation period. That notice comprised 8 pages of detailed analysis and basis for the claims. In response, on behalf of your client you provided what amounted to a bare denial, with no analysis other than an assertion that in respect of some of the claims you considered that they could only be brought by way of the Independent Accountant process. As we informed you in our letter dated 10 November 2022, that is not a position that our client agrees with. However, it does accept that the findings of the Independent Accountant may have an impact on some of our client's warranty claims.
>
> There is therefore the realistic possibility that the Independent Accountant's determination, which is due in a relatively short timeframe, could avoid the need for legal proceedings entirely (or at the very least narrow the parameters of the claim). It is with this objective in mind that our proposal was made. In response, your client has made clear that he has no desire to seek to avoid litigation and in fact wishes to bring it upon himself. Such a position is entirely contrary to the overriding objective of the CPR to deal with disputes justly and at proportionate cost. We suspect that you will have advised Mr Palmer of this and can only assume that he has chosen, for whatever reason, to ignore that advice. He will also no doubt have been advised of the potential consequences of doing so.
>
> It follows that Mr Palmer's proposal is rejected. As a result, our client will take the steps that are necessary to protect its own position."

34. In the absence of agreement, Onecom issued a claim form on 21 December 2022 (the *"**Old Claim Form**"*). The claim form stated that:

> "The Claimant's current best estimate of damage is £4,565,241".

35. On 29 March 2023, Onecom applied without notice for an extension until 21 August 2023 of the deadline for serving it, which was granted. The explanation of the circumstances set out the application notice included the following:

> "3. Pursuant to paragraph 2.2 of Schedule 7 of the SPA, the Claimant was required to commence legal proceedings within six months of the Claimant's Notice (i.e. by 22 December 2022).
>
> 4. In September 2022, the parties entered into a formal process pursuant to Schedule 9 of the SPA whereby an Independent Accountant will determine a dispute between the parties as to the Earn-Out Accounts prepared by the Claimant and adjusted by the Defendant. The date by which the Independent Accountant would make his final determination on the Earn-Out Accounts was unclear at the outset but estimated for February 2023.
>
> 5. On 2 August 2022, the Defendant's solicitors sent a letter in which they noted that certain matters contained in the Claimant's Notice fell to be determined instead by the Independent Accountant. While the Claimant disagreed with the matters the Defendant had referred to, it did accept that some of the Independent Accountant's findings may impact on its underlying warranty claim as set out in the Claimant's Notice.
>
> …
>
> 10. The Claimant continued to believe that extending the deadline by which it must commence proceedings pursuant to paragraph 2.2 of Schedule 7 of the SPA until after the Independent Accountant's determination was necessary to enable it to properly plead its warranty claim and/or to determine whether such a claim was required. Taking this approach would also ensure the parties did not incur any unnecessary time and costs in issuing and/or pleading a warranty claim if it was not required following determination of the dispute regarding the Earn-Out Accounts by the Independent Accountant. However, following the Defendant's refusal to extend that period, the Claimant was left with no choice but to issue proceedings on 21 December 2022, otherwise it would be precluded from bringing any warranty claim in the future once the Independent Accountant had given his determination.
>
> 11. The Claimant therefore issued its claim on 21 December 2022 in the Commercial Court, claiming damages for breach of warranty against the Defendant (as well as interest, further or other relief and costs).

> 12. In its claim form, the Claimant set out that its current best estimate of damage is £4,565,241. However, as noted above, the Claimant is currently unable to determine the exact value of its claim due to the ongoing dispute between the parties regarding the Earn-Out Consideration owed to the Defendant in the Independent Accountant process."

36. The skeleton argument filed on behalf of Mr Palmer asserted that Onecom's application *"was posited on the basis that there was an actual liability on Mr Palmer's part to pay the sum claimed in the Warranty Claim"*. That is plainly wrong, since § 12 quoted above made clear that the sum claimed, stated in the claim form to be a 'best estimate', could not be determined precisely until the outcome of the IA process. The skeleton argument also asserted that Onecom *"failed to disclose the existence of the limitation period to [the court] in the Extension Application"*, and leading counsel for Mr Palmer repeated that point twice in his oral submissions. Given the contents of §§ 3 and 10 of the application notice, quoted above, that contention is untenable.

37. As noted earlier, the IA's report was issued on 7 June 2023 and concluded that approximately £4.8 million was due to Mr Palmer by way of Earn-Out Consideration.

38. By a letter of 20 June 2023, Onecom's solicitors indicated that, in the light of the IA Report, "*Onecom Group has now been able to quantify its claims for breach of warranty against you at £3,111,426*", providing a breakdown. Onecom claimed to be entitled to set that sum off, pursuant to SPA § 8, against the Earn-Out Consideration and certain other sums due to Mr Palmer.

39. A letter of 23 June 2023 from Onecom's solicitors, in the course of summarising previous events, included the statements that *"[p]aragraph 2.2 of Schedule 7 of the SPA only required Onecom Group to "commence formal proceedings" by the required date, not to serve particulars of claim";* and *"[a]gain we note that Mr Palmer had no right to demand service of the claim form by 22 December 2022, as the paragraph 2.2 of Schedule 7 of the SPA only required Onecom Group to "commence formal proceedings" by that date"*.

40. On 2 August 2023, Onecom served the Old Claim Form on Mr Palmer together with Particulars of Claim, claiming damages for breach of warranty stated to amount to £3,326,619. The Particulars of Claim set out Onecom's case on causation, loss and damage as follows:

> "37. Onecom has suffered loss as a consequence of the breaches of warranty set out above, and is entitled to damages to put it in the position it would have been in had the warranties been true – i.e. damages to reflect the difference between the value of the Company as acquired and the value of the Company if the warranties had been true (being the price which Onecom in fact agreed to pay Mr Palmer to acquire the Company).

> 38. Without prejudice to its right to plead further following disclosure and/or expert evidence, Onecom's loss falls to be calculated as follows:
>
> (1) The consequence of the breaches of warranty was that the LTM [last twelve months] EBITDA figure used to calculate the non-contingent consideration payable by Onecom to Mr Palmer to acquire the Company (as set out above at paragraph 9) was materially inaccurate.
>
> (2) In particular, the true value of the Company would have been calculated using a LTM EBITDA figure which was reduced by:
>
> (a) £88,871 in respect of breaches of warranties relating to the Billing Heads addressed at paragraphs 14 to 19 above;
>
> (b) £80,648 in respect of breaches of warranties relating to the Mobile Product Manager addressed at paragraphs 20 to 25 above;
>
> (c) £151,144 in respect of breaches of warranties relating to the software development resource addressed at paragraphs 26 to 32 above; and
>
> (d) £42,505 in respect to the breach of warranty relating to fixed line call revenue addressed at paragraphs 33 to 36 above.
>
> (3) Applying the 9.16 EBITDA multiplier, the value of the Company given the warranty breaches was £3,326,619 lower than if the warranties had been true.
>
> 39. The Claimant is accordingly entitled to and claims damages in a sum to be assessed, but presently believed to be £3,326,619."

Because Onecom had not succeeded in persuading the IA to make any adjustment to the Earn-Out Consideration in relation to any of the categories of additional expenses referred to above (and, in the respect of the Fixed Line Call Revenue, had not sought to do so), there was, in the event, no need to give credit for any such adjustment.

41. Mr Palmer on 9 August 2023 applied to set aside the extension order on the basis that there was no proper foundation for it (since Onecom had not explained why it had not effected or could not have effected service of the Old Claim Form), and/or on the basis that Onecom had (allegedly) provided materially incomplete information.

42. The set-aside application was listed for hearing on 9 November 2023. However, Onecom on 8 September 2023 issued a further claim form ("***the New Claim Form***"), which, instead of stating that its "*best estimate*" of damage was £4,565,241, stated that *"the Claimant suffered loss and damage presently assessed in the sum of £3,326,619, and accordingly claims damages of*

£3,326,619 to put it in the position in which it would have been had the Defendant properly performed the SPA". Thus the New Claim Form reflected the up to date position, following the IA's report, as set out in the Particulars of Claim. On 11 September 2023, Onecom served the New Claim Form, Particulars of Claim in the same form as those served on 2 August 2023, and notice of discontinuance of the claim commenced by the Old Claim Form, under cover of a letter explaining its approach as follows:

> "2. Onecom Group Limited ("Onecom Group") accepts that as a result of discontinuing these proceedings Mr Palmer is entitled to his costs of the proceedings, to be subject to assessment if not agreed. Would you please provide a schedule of your costs for Onecom Group's consideration in the hope that the parties can reach agreement on the amount of costs payable.
>
> 3. Whilst Onecom Group does not accept the substantive arguments made in relation to the extension of time for service of the claim form in CL-2022-000685, it has become clear that the Set Aside Application will ultimately be little more than an expensive distraction from the key issues between the parties, which concerns the validity of Onecom Group's underlying claims for breach of warranty. In particular, even if the Set Aside Application were to be successful, that would not prevent it from issuing fresh proceedings in circumstances where it remains within time to do so. This is because the relevant contractual time limit for advancing its claims (in accordance with paragraph 2.2 of Schedule 7 of the SPA) is 7 December 2023, being 6 months from 7 June 2023 (the date the report of the Independent Accountant was released to the parties), which was the date whereby Onecom Group's claims became non-contingent or capable of being quantified within the meaning of paragraph 4 of Schedule 7.
>
> 4. In those circumstances, Onecom Group has decided that the pragmatic course is to discontinue (accepting the usual costs consequences) and to reissue and serve fresh proceedings."

43. Whilst Mr Palmer castigates this as being *"an extraordinary volte face"*, if Onecom is correct as to the construction and effect of the relevant contractual provisions, then the change of course was logical, and was liable to save the costs of an unnecessary contested application.

44. On 9 October 2023, Mr Palmer served his present application. The application did not contain any particulars of the alleged estoppel or of abuse of process, so Onecom served a Request for Further Information, to which Mr Palmer responded on 23 October 2023.

(D) PRINCIPLES: SUMMARY JUDGMENT AND STRIKE-OUT

45. CPR r3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court that:
>
> (a) the statement of case discloses no reasonable grounds for bringing or defending the claim; or
>
> (b) the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".[1]

46. CPR r24.3 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if –"
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

47. In *The LCD Appeals* [2018] EWCA Civ 220, the Court of Appeal quoted with approval the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94:

i) the court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 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 § 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* § 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

[1] White Book 2023 at pp. 90-114.

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 3;

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. 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; and

viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so, he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.

(E) ANALYSIS

(1) Limitation

48. The first basis on which Mr Palmer seeks summary judgment and/or strike out is sought is that the Warranty Claims are time-barred pursuant to the contractual limitation regime set out in the SPA. He states that *"[t]his is a short point of construction which is dispositive of the pleaded claims and is therefore eminently suitable for summary determination"*.

49. There are two main strands to Mr Palmer's argument.

50. The first is that the provisions of Schedule 7 §§ 2.2 and 4 providing for deferral of any Seller's liability, and of the deadline for starting proceedings, in respect of contingent or unquantifiable warranty claims apply only to warranty claims based on a liability on the part of the F2P Group, i.e. a liability of the company being sold or one of its subsidiaries. He submits that that was not the case in

relation to any of the four warranty claims. The Billing Heads, Mobile Product Manager and Software Development Resource claims related to costs attributable to individuals who were not employed by the F2P Group, and it had no liability for their salaries or any associated costs. Nor did the fact (if fact it were) that 9 Group's Retail's profit was overstated in the Financial Information Files mean that 9 Group Retail had any liability that it should not have had. The relevant allegation against Mr Palmer is that F2P was worth less as at the date of the SPA than if the warranties were true: but not that the F2P Group itself had some undisclosed liability (whether contingent, unquantifiable or otherwise) that would give rise to a claim. The same applies to the Fixed Line Call Revenue claim.

51. I do not accept those submissions. The key provision, on Onecom's case, is the last phrase of Schedule 7 § 2.2:

> "2.2 Any Claim shall be deemed to be withdrawn (if it has not been previously satisfied, settled or withdrawn) unless legal proceedings in respect thereof have been commenced within six months of the giving of written notice of such claim (or in the case of any such claim to which paragraph 4 below applies, the date on which such claim becomes an actual liability or becomes capable of being quantified)." (my emphasis)

52. The words "*such claim*", which appear twice in the passage in parentheses, clearly refer to the same thing as the words *"such claim"* immediately before the parentheses and the words *"Any Claim"* at the start of § 2.2. They refer to the warranty claim, of which the Buyer has given written notice to the Seller. The passage in parentheses accordingly (and, in my view, obviously) applies to warranty claims which, when notified to the Seller, are not yet actual liabilities (i.e., necessarily, liabilities of the Seller to the Buyer) and/or are not yet capable of being quantified, but which later become actual claims and capable of being quantified. If the word "*liability*" in § 2.2 referred not to the Seller's liability to the Buyer for the breach of warranty, but instead to an underlying liability of the F2P Group, then *"such claim"* (i.e. the warranty claim) could never *"become[] an actual liability"* and the clause would make no sense.

53. Further, the passage in parentheses in § 2.2 goes hand in hand with § 4, to which it cross-refers. The words *"based on a liability which is contingent only or not capable of being quantified"* in § 4 refer to the same thing as the similar language in § 2.2., namely to a liability of the Seller to the Buyer for breach of warranty that has not yet become actual, or has not yet become quantifiable.

54. That approach has the further merit of giving the word *"liability"* the same meaning as in §§ 1.1, 1.2, 3.1, 3.2 and 5, viz the Seller's liability for breach of warranty. It also avoids the need to imply the words *"of the Company"* or *"of F2P"* into § 4 after the word "*liability*", as Mr Palmer's approach would require. A contrast may be drawn with Schedule 6, containing tax covenants, which specifically defines the term *"Liability to Taxation"* as referring to a tax liability of a Group Company: which suggests that the parties would be likely to have defined the word "*liability*" in § 4 in some similar way had Mr Palmer's approach been correct.

55. Moreover, Mr Palmer's approach would lead to the arbitrary result that the Seller would become liable, and the Buyer would have to commence proceedings, for warranty claims that remained contingent or unquantifiable, unless they happened to relate to a liability of the F2P Group. It is hard to see any logical basis for such a distinction. A further objection to Mr Palmer's approach is that it is unclear whose liability would count: would it, for example, have to be a liability of F2P itself, or would a liability of one of its subsidiary companies suffice?

56. Finally on this point, I note for completeness that, as Onecom pointed out, a very similar clause was construed in the same way, i.e. as referring to the liability of the warrantor to the warrantee, in *Dodika v United Luck Group Holdings* [2020] EWHC 2101 (Comm): see §§ 2, 11 (quoted § 12 of Schedule 4) and 94.

57. The second strand of Mr Palmer's argument is that none of Onecom's Warranty Claims was, at any relevant stage, anything other than an actual claim and capable of being quantified. He contests Onecom's position, which is that:

    i) the Billing Heads, Mobile Product Manager, Software Development Resource claims (together, the "***Overlapping Claims***", adopting for convenience the terminology used by Onecom in its submissions) were contingent on the outcome of the IA determination, for similar reasons to those applicable to the Bottomline Costs and Union Street Costs (see § 26 above), and

    ii) the Fixed Line Calls claim was also contingent, because by itself it fell below the lower limit of £750,000 in Schedule 7 § 3.1, and so became an actual claim only in the event that there were sufficient actual and quantifiable Overlapping Claims to take the aggregate claim over that threshold.

58. Mr Palmer's objections to that approach may be summarised as follows.

    i) The Overlapping Claims were actual quantifiable claims, and all the relevant facts were known to Onecom, from the outset.

    ii) There was an actual claim because, by the time the Notice was given (16 months after Completion) Onecom on its case already had incurred actual losses due to the need to pay for the services to which the Overlapping Claims related.

    iii) That is shown by the fact that Onecom did in fact quantify those claims, down to the nearest pound, prior to the IA report, in the Notice and in the Old Claim Form.

    iv) The Warranty Claims have nothing to do with the EBITDA for the Earn-Out Period. They concern whether the Group was as it was warranted to be by Mr Palmer on 28 February 2021 (the date as at which the warranties were given), whereas the Earn-Out process related to the position during the subsequent year.

v) The suggestion that there was any risk of double recovery, were the warranty claim not to await the outcome of the IA process, is a "*mirage*". The Earn-Out Determination is not concerned with compensating Onecom Group for a loss, but rather with fixing the amount of additional consideration due to Mr Palmer (which the parties had agreed would be linked to the EBITDA for the Earn-Out Period). As such, the Earn-Out Determination, regardless of the conclusions which the IA reached, would not have affected the quantum of any damages that Onecom may be entitled to recover in the present proceedings.

vi) Even if the Earn-Out Determination had related to an alleged breach of a warranty impacting the EBITDA of the Group during the Earn-Out Period, there would still have been no double recovery because the nature of the alleged breach was completely different, viz. the alleged inaccuracy of the EBITDA of the Group during the Earn-Out Period rather than the alleged diminution in its value as at 28 February 2021. Thus, whilst it may be true in general terms that both warranties and earn-outs concern value, what matters for present purposes is that they relate to the value of different things.

vii) There is no question of any potential 'gain' to be offset against the warranty claim: the Earn-Out Consideration simply reflects the price for which the parties have contracted. Moreover, the breach of warranty does not 'cause' any adjustment to the Earn-Out Consideration such as to make it appropriate to take the adjustment into account in calculating the loss caused by Onecom by any breach of warranty.

viii) Schedule 7 § 10 expressly addresses the possibility of double recovery, but contains no suggestion that it can affect how the dispute resolution processes set out in the earlier provisions of Schedule 7 are to operate.

ix) Even if there were any question of credit having to be given, it could be given in whichever process (the warranty claim or the Earn-Out Consideration calculation) came second. It would not make the warranty claim in any way contingent on the outcome of the Earn-Out Calculation.

x) Even if any credit had to be given in the context of the Warranty Claims, that would not make the claims contingent: it would merely amount to an adjustment. It is not necessary, in order for a claim to be actual and quantifiable within Schedule 7, to know how it will ultimately be quantified at the end of the dispute: it is enough to be able to make an assessment or estimate of it. An analogy can be drawn with the set-off provision in SPA § 8 (quoted earlier) allowing set-off of an *"Estimated Liability"* i.e. a genuine and bona fide estimate.

xi) The SPA contains separate mechanisms for warranty claims and for the Earn-Out Consideration calculation. Nothing in the SPA suggests that the operation of the latter can make a warranty claim contingent or unquantifiable. That would give the Earn-Out mechanism a priority which it does not have under the contract.

xii) Onecom's approach would mean that no warranty claim could ever be regarded as actual or quantifiable unless the Earn-Out Consideration had been worked out, which would amount to a rewriting of the contract.

xiii) Onecom's approach would also delay the point at which the Seller would know what claims, issues and potential exposures it faced pursuant to potential warranty claims.

xiv) The parties' earlier conduct of the matter, taking the limitation deadline to be 6 months from the Notice, showed what they understood to have been intended.

59. I reject those submissions.

60. First, it is a misconception to suggest that there is no connection between, or risk of double counting arising from, the subject-matter of the Warranty Claims and the Earn-Out Consideration calculation. It is true that they consider F2P's position at different times, a year apart. However, both are directed at the valuation of the Group, based on an EBITDA figure projected forward for a period of about a decade. If the Group has an undisclosed ongoing overhead, such as those to which the Overlapping Claims relate, then it will affect the Group's value both at Completion and at the end of the Earn-Out Period. If the additional overhead costs £z per annum, then a successful warranty claim will in principle entitle the Buyer to a price reduction of £z x 9.16, applying the multiple which the parties used to calculate the fixed element of the Consideration for the sale, reflecting the ongoing value reduction arising from the additional overhead. If the additional overhead is also taken into account as a factor relevant to the Earn-Out Consideration, then in principle it will lead to a price reduction of £z x 11.11, applying the multiple which the parties agreed to use in the Earn-Out calculation: again reflecting the ongoing value reduction arising from the additional overhead. If the Seller were to benefit from both adjustments, then it would have achieved a double price reduction equivalent to the first 9.16 years of the additional overhead, which would be wholly unjustifiable. Accordingly, Mr Palmer was correct in his position during the Earn-Out process to say there was a risk of double counting – see § 24.i) above – and wrong to suggest now, somewhat surprisingly, that that is a "*mirage*". Further, the position regarding the Bottomline Costs (see § 26 above) provides a clear illustration of this point.

61. Onecom's position also gains support from evidence it filed from Mr Huitson-Little, an expert forensic accountant with substantial experience of the transaction-related disputes. His evidence is to the following effect:

i) The essential exercise of valuation in a situation like this is to value the future cashflows of the Business. This is done using an existing number (the EBITDA at a particular point) as a proxy or estimate of the "*sustainable earnings of the business (i.e. the expected annual earnings of the business each year going forward)"* and then applying an agreed multiple to that number.

ii) Earn-out mechanisms are used as a means of addressing uncertainty as to that future performance, allowing the "*sustainable earnings*" used as the foundation of the value calculation to be re-assessed at the end of the Earn-Out Period.

iii) When assessing the diminution in value caused by a breach of warranty which is based on an ongoing cost (as opposed to a one-off effect on cash flow), the diminution would commonly be assessed using a 'multiples' approach – i.e. because the effect of the breach is to change the assumption about the level of future sustainable earnings.

iv) The risk of "*double counting any effects on value*" is particularly acute where there is an earn-out mechanism, such that (as part of that process) adjustments are (also) made to the estimated level of future sustainable earnings on account of the presence of the same cost.

It is precisely such reasons that justify (a) Mr Palmer's concerns, expressed during the IA process, about double counting and (b) Onecom's decision to drop the Bottomline and Union Street warranty claims after they resulted in adjustments to the Earn-Out Consideration.

62. Secondly, the problem cannot be solved by suggesting that credit can be given in whichever process (the warranty claim or the Earn-Out calculation) comes second. The Earn-Out provisions set out fixed rules that the IA has to apply, and contain no provisions for reduction depending on the outcome of any warranty claims. They are not a loss calculation as such. It follows that double counting can be avoided only in the context of the Warranty Claims, which are a loss calculation, in the sense that the Buyer has to demonstrate what loss it has suffered as a result of the breach of warranty.

63. Thirdly, in assessing damages for breach of warranty it is necessary to apply the compensatory principle, by comparing the Buyer's actual position, given the breach of warranty, with the position it would have been in absent that breach: i.e. *"the same situation with respect to damages as if the contract had been performed*" (*Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 § 43, quoting *Robinson v Harman* (1848) 1 Exch 850, 855; and *One Step (Support) v Morris-Garner* [2018] UKSC 20, [2019] AC 649 §§ 31-36). If the breach has also led to an offsetting benefit to the claimant, then that should be taken into account (see, e.g., *Fulton Shipping Inc of Panama v Globalia Business Travel* [2017] UKSC 43, [2017] 1 WLR 2581 § 30, holding the relevant question to be *"whether there is a sufficiently close link between the two [i.e. the benefit and the loss] and not whether they are similar in nature… The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation"*; see also *One Step* § 36, referring to the claimant's "*actual situation*"; A Burrows, "*Remedies for Torts, Breach of Contract and Equitable Wrongs"* (2019) at pp 190-191; and A Kramer, *"The Law of Contract Damages"* (3rd edn, 2022) at § 1-49).

64. Fourthly, in a simple case where the price paid for purchase of a company is fixed once and for all by the time of completion, the basic measure of loss will simply be the actual value of the company as at completion and the value it

would have had as at that date but for the breach (see, e.g., *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB), [2014] Bus LR 1338 § 14; *The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3482 (QB) § 180(1)). In such cases, it will generally be unnecessary to consider subsequent events. However, the position may be different where the consideration is subject to subsequent adjustment, as was recognised by Popplewell J in *Ageas* at § 50 ("*There was no provision, as there is sometimes is in such agreements, for any post-acquisition adjustment of the price based on subsequent trading performance*"), and implicitly by Blair J in *Hut Group* at § 184 ("*In a share purchase agreement involving a once and for all exchange of consideration, the party which receives the business or a shareholding in the business assumes the risks, or the rewards, of its subsequent performance or failure to perform*").

65. Fifthly, in the present case, the breaches of warranty alleged in relation to the Overlapping Claims would have led to an offsetting benefit (exceeding the size of the relevant Warranty Claims, given the applicable multiples) if Onecom had succeeded in persuading the IA that they should be taken into account in the Earn-Out Calculation. Those offsetting benefits would have been closely linked to the breach of warranty, and would have had to be taken into account when deciding what, if any, loss Onecom had suffered as a result of that breach. Further, there is no suggestion that in advancing the Overlapping Claims before the IA Onecom was acting otherwise than in good faith.

66. Sixthly, in those circumstances, Onecom's Warranty Claims for the Overlapping Claims were neither actual nor capable of quantification before the outcome of the IA process was known. A claim for breach of warranty is a claim for damages for loss, the assessment of which necessarily involves knowing both the claimant's actual position (given the breach) and the counterfactual position (absent the breach). Here, Onecom's actual position, in terms of the price it had to pay for F2P, could not be known until the IA report was produced. I disagree with Mr Palmer's suggestion that the outcome of the Earn-Out process would result, at most, in a mere 'adjustment' that could be ignored for the purposes of the Warranty Claims provisions in Schedule 7. It was fundamental to the calculation of any Warranty Claim, so far as concerned the Overlapping Claims, because one half of the essential comparison was unknown until the IA reported. Under the agreed contractual mechanism, the IA's conclusion as to the Earn-Out Consideration would be final and binding. If the IA had made the adjustments Onecom was seeking in relation to the Overlapping Claims, then Onecom would have had no Warranty Claims at all against Mr Palmer in respect of those matters; and nor would it have had any claim regarding the Fixed Line Call Revenue, since the threshold for any warranty claim would not have been reached. In those circumstances, it accords with the natural meaning of Schedule 7 § 4 to conclude that the Warranty Claims were neither actual claims nor capable of being quantified until the IA reported, and a reasonable commercial person would construe Schedule 7 § 4 in that way.

67. Seventhly, the approach set out above would not mean that all warranty claims remained contingent or unquantifiable pending determination (by agreement or by the IA) of the Earn-Out Consideration. That would be the case only for warranty claims that, like the Overlapping Claims, were based on facts also

affecting the Earn-Out Calculation. It would not apply to other types of claim, such as the Fixed Line Call Revenue claim. Nor would it result in unacceptable delay or uncertainty. The Buyer still had to serve notice of any warranty claim under Schedule 7 § 2.1, and – in the event that the parties were unable to agree the Earn-Out Consideration – the IA process was designed to provide a relatively swift and conclusive determination of it.

68. Eighthly, it is unclear how, on Mr Palmer's approach, the process would sensibly operate. Suppose, for example, that the only warranty claim had related to the Bottomline Costs. Onecom's primary position would have been that it had no warranty claim at all, because it was entitled to an adjustment to the Earn-Out Consideration that would more than eliminate any loss resulting from the corresponding breach of warranty. On Mr Palmer's approach, Onecom would nonetheless have been obliged to notify the Bottomline Claim as a warranty claim, and commence proceedings within the ensuing 6 months, despite the fact that it might turn out to have no claim at all. The alternatives then would have been (a) a stay of the proceedings pending the outcome of the IA process, or (b) proceeding with a claim that might result in double recovery in the event that Onecom obtained judgment before the IA had reported. Alternative (a) would achieve nothing as compared to the position that applies if Onecom's construction of Schedule 7 is correct (i.e. that the proceedings can be deferred on the basis that the claim remained contingent and/or unquantifiable), but would waste costs and court time. Alternative (b) would be even more wasteful, and have the potential of the unacceptable outcome where the Buyer recovered twice for the same loss. It follows that Onecom's approach not only fits the natural meaning that a reasonable commercial person would attribute to the relevant part of Schedule 7; it also leads to the outcome most consistent with business common sense.

69. Ninthly, the set-off provision in SPA § 8 does not assist Mr Palmer. They would not prevent the buyer making a double recovery pursuant to a warranty claim and the Earn-Out Consideration calculation. Further, they tend to count against Mr Palmer's interpretation of Schedule 7 § 4. If the parties had intended that the ability to make a mere estimate of the quantum of a warranty claim would make it actual and quantifiable, then one might reasonably expect the parties to have said so in terms similar to their provision for "*Estimated Liabilities*" in the context of set-off.

70. Tenthly, the statement in Schedule 7 § 10 that the Buyer shall not be entitled to recover more than once for the same damage points, if anything, in favour of Onecom's construction, which is the only effective and practicable way to avoid double recovery in circumstances such as those of the present case.

71. Eleventhly, insofar as the parties' subsequent conduct could have any relevance, the Notice made clear that the figures put on the Warranty Claims were estimates, and acknowledged a connection with the Earn-Out Consideration calculation process. The Old Claim Form similarly referred to a 'best estimate' of the claim, and the extension application also made clear the link with the Earn-Out process, as did Onecom's correspondence. It is true that Onecom appears for a period to have taken the view that it was nonetheless subject to a strict 6-month time limit for commencing proceedings, but that was at most a

(temporary) subjective view of no relevance to the proper construction of the provisions.

72. For these reasons, I conclude that (subject only to the possibility of an estoppel), Onecom's claims are not time-barred.

(2) Estoppel

73. Mr Palmer puts forward an alternative argument that Onecom is estopped by representation and/or by convention from denying that its Warranty Claims were neither contingent nor incapable of being quantified, by repeated representations (and the parties' common understanding) that the limitation period in respect of the Warranty Claims expired on 22 December 2022. Mr Palmer alleges that, in the correspondence referred to in §§ 29, 30, 32, 33 and 39 above, Onecom took the unequivocal and unqualified position that it had to commence proceedings by 22 December 2022. According to the skeleton argument filed on behalf of Mr Palmer, he relied on those communications in various ways, including when deciding to serve a statutory demand on Onecom on 10 July 2023.

74. It is notable that there is no witness statement before the court from Mr Palmer on this point, and the witness statement served by his solicitor on this application does not state in terms that reliance was placed on any alleged representation or common understanding. In a Further Information response, with a statement of truth signed by Mr Palmer's solicitor stating that Mr Palmer believes its contents to be true, it is said that:

> "Without waiving any privilege, the Defendant relied upon the representation and stance taken in the Warranty Notice and correspondence and/or the common understanding in reaching his assessment that there were no valid warranty claims, his approach to the various disputes between the parties and the investments he made between 22 April 2023 and 11 September 2023. Further, or alternatively, the Defendant relied upon the representation and stance taken in the Warranty Notice and correspondence and/or the common understanding when he expended time and legal costs in seeking to contest the value assigned by the Claimant to its alleged claims."

75. As to inequitability, the Response states:

> "The chronology set out in the Witness Statement makes clear why it would be inequitable for the Claimant to resile from the representation it made in the Notice and/or the common understanding, and that this would cause material prejudice to the Defendant. The Claimant should not be permitted to rely on the allegedly quantifiable and non-contingent nature of its alleged claims to try to obtain a favourable decision from the IA to reduce the Earn-Out Consideration due to the Defendant (for the period after Completion, see paragraph 21 of the Witness Statement), but then to contend in these proceedings (purely in

> the interests of improving its limitation position) that the same alleged claims did not become contingent or quantifiable until after the completion of the IA Report. Further, or alternatively, the Claimant should not be permitted to put the Defendant to the trouble and considerable cost of contesting the quantum of the alleged claims for approximately a year following the date of the Warranty Notice on the basis that such claims are quantifiable and non-contingent, only for the Claimant to reverse its position and argue that the alleged claims had not arisen or had no quantifiable value throughout that period. It would accordingly be inequitable for the Claimant to be permitted to resile from the representation it made in the Warranty Notice and/or the common understanding."

76. I have significant doubts about the viability of Mr Palmer's estoppel arguments:

i) Having regard to the parties' dealings as a whole – including the contents of the Notice itself, correspondence such as Onecom's solicitors' letter of 10 November 2022 in which they referred to a potential link between the Earn-Out calculation and the proposed Warranty Claims, and the reference in their letter of 20 June 2023 to Onecom having "*now"*, i.e. following the IA report, been able to quantify its claims – it is at least debatable whether Onecom took any unequivocal position (bearing in mind also that, as Onecom's solicitor states in his evidence, any prudent solicitor faced with a limitation argument would seek to preserve the position for their client on the worst-case basis).

ii) Such evidence as is currently before the court as to reliance is vague.

iii) It is questionable whether Mr Palmer could really be said to have relied on the position taken by his counterparty, Onecom, on a point when he had his own advice (*a fortiori* when he has taken the position on this application that Onecom's current position is so hopeless as to be abusive).

iv) The case on inequitability as set out in the passage quoted above also appears questionable. Taking the second sentence of that passage, for example, it is hard to see how there was any inconsistency between (a) arguing for adjustments to the Earn-Out Consideration based on the Overlapping Claims and (b) contending that any warranty claim arising from the same matters was (for the reasons I discuss earlier) contingent on the outcome of that Earn-Out process and hence not yet an actual quantifiable claim.

77. In any event, it is clear that all these matters would require examination at trial in the light of the evidence, and are unsuitable for summary judgment, and counsel for Mr Palmer in his oral submissions did not seek to argue the contrary. Certainly, Mr Palmer is not entitled to summary judgment on them in his favour on the evidence currently before the court.

(3) Abuse of process

78. Mr Palmer submits that:

i) it is an abuse of process to issue proceedings knowing that one does not have a valid claim (citing *Pickthall v Hill Dickinson LLP* [2009] EWCA Civ 543 §§ 14-15);

ii) Onecom did not suggest before 11 September 2023 that its Warranty Claims might be contingent or incapable of quantification;

iii) Onecom must therefore have believed that they were actual and quantifiable;

iv) it follows that, when Onecom issued is claim on 8 September 2023, it knew it was time-barred; and

v) issuing the claim was therefore an abuse of process.

79. I have concluded that Onecom's claims are not time barred (subject to any conclusion at trial that Onecom is estopped from maintaining that position). There is no reason to doubt that the contents of Onecom's letter of 11 September 2023 reflected its belief as to the legal position, genuinely held since (at the latest) three days previously when it issued the New Claim Form. The abuse argument is in my view entirely without merit.

(F) CONCLUSION

80. For all these reasons, Mr Palmer's applications lack merit and must be dismissed.