Judgments

Hopkinson and others v Towergate Financial (Group) Ltd and other companies

[2018] EWCA Civ 2744

Court of Appeal, Civil Division

Underhill VP, David Richards LJ and Sir Patrick Elias

6 December 2018

Judgment

Joanna Smith QC and Matthew Hodson (instructed by **Lennons Solicitors** and **Freeths LLP**) for the **Appellants**

Gavin Kealey QC and George Spalton (instructed by **BLM Law**) for the **Respondents**

Hearing dates: 21 and 22 November 2018

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Approved Judgment

Lord Justice David Richards:

1. This appeal raises a point of construction of the indemnity provisions contained in a share sale agreement. In these proceedings, the purchaser and other **group** companies have made claims under the indemnity. The relevant defendants, who were the indemnifying parties under the agreement, contend that the prior notice of claims required under the indemnity provisions was not given. The defendants sought summary judgment in their favour dismissing the proceedings on that basis. The application was dismissed by Leggatt J (as he then was). The defendants appeal with permission granted by Flaux LJ.

2. The agreement, dated 5 August 2008, provided for the sale of the entire share capital of M2 Holdings **Limited** (the company) which, with its subsidiaries, carried on business providing **financial** advice to retail customers**.** The total purchase price was £9.9 million, comprising an initial payment of £5.94 million and deferred consideration of £3.64 million which has not yet

been paid. The maximum liability of the defendants under the indemnity is **limited** to the consideration received by them or on their behalf.

3. The parties entitled to the indemnity are the company and its subsidiaries and the purchaser and its subsidiaries. There are four named claimants, but it is accepted that the first-named claimant has no title to sue. The other claimants are the purchaser (now called **Towergate Financial** (East) **Limited**) and two other **group** companies which are entitled to the benefit of the indemnity and entitled to sue on it. I shall, for convenience, use the terms "claimants" and "defendants" to describe the parties, although the defendants are the appellants in this court.

4. The claim arises out of two reviews required by the **Financial** Conduct Authority under section 166 of the **Financial** Services and Markets Act 2000. The reviews relate, first, to schemes for the transfer of benefits out of defined benefit pension schemes and, second, to unregulated collective investment schemes, in each case marketed by the company to clients between December 2001 and December 2013 or (in the second case) January 2014. These reviews therefore include a period of some six and a half years when the company was owned by the vendors. The reviews have resulted in the payment of very significant amounts of compensation for mis-selling to clients dating from the vendors' period of ownership and there is a large number of claims still to be finalised. The first payment was made in January 2016. The amounts paid exceed the **limit** on the defendants' liability under the indemnity.

5. The disputed notice of possible indemnity claims was given in a letter dated 29 July 2015 (the notice). After referring to the agreement and to the reviews, the letter stated:

> *"*Those reviews are currently underway and have already resulted in the discovery of a number of cases where advice given to customers was not suitable which is likely to arise [sic] in a payment of redress being made to those customers. **Towergate Financial**'s position is that it is likely that further claims will be identified against **Towergate Financial** and that a number of those claims are likely to arise from business which was transacted by M2.*"*

6. The letter referred to the indemnity provision and continued: "The redress payments made as a result of the Section 166 reviews will fall within the scope of this clause and **Towergate Financial** will therefore be entitled to bring a claim against the Vendors and their spouses for an indemnity in accordance with the terms of clause 5.9 of the Agreement." It stated that the purpose of the letter was to give notice of the claim for an indemnity and that the companies concerned would seek to recover, in relation to each individual claim that arises, the amount of the excess under the company's professional indemnity policy at the date of the acquisition. It stated that 86 unregulated collective scheme transactions and about 1,300 transfers out of defined benefit schemes made before the sale of the company had so far been identified and that further cases might be identified.

7. Clause 5 of the agreement is headed Warranties and Indemnities. Clauses 5.1 to 5.8 contain warranties, and provisions related to those warranties, given by "the Warrantors" who are defined as the Vendors and "the Registered Holders". The detailed warranties are set out in schedule 3 (the Share Warranties) and in part 2 of schedule 4 (the Tax Warranties). Schedule 4 also contains, in part 3, the "Tax Covenant", whereby the Warrantors covenant to pay to the purchaser amounts equal to various tax liabilities to which the company or others may become subject.

8. Clause 5.9 contains the indemnity under which the purchasers claim in these proceedings:

"The Vendors and their respective spouses undertake to indemnify the Purchaser and/or the **Group** in full against all losses, liabilities, costs and expenses which the **Group** or the Purchaser **Group** may suffer as a result of or in connection with any claim or claims for professional negligence against the **Group** including but not **limited** to claims or complaints arising from mis-selling of mortgage endowment, pension transfer (contracting out), equity release and income drawdown products and policies which relate to actions by the **Group** at any time before Completion including for the avoidance of doubt all losses, liabilities, costs and expenses incurred in connection with compliance with the FSA under or in respect of the s.166 review conducted by the FSA in respect of the contract between the **Group** and Peugeot known as Project Picasso subject in all cases to the provisions of clause 5.10."

9. Clause 5.10 contains the monetary **limits** on liability under the indemnity and clause 5.11 contains other **limits** and exclusions, none of which is relevant to the present claims.

10. Clause 5.12 provides:

"Each of the persons giving the indemnity in clause 5.9 should be entitled to require the Purchaser or the **Group** at the expense of such person(s) to take all such steps or proceedings as such person(s) may consider necessary in order to avoid, dispute, resist, mitigate, compromise, defend or appeal against any relevant claim which will if successful give rise to liability under clause 5.9….To enable such person(s) to decide what steps or proceedings should be taken, the Purchaser shall disclose in writing to the Vendors and their respective spouses all relevant information and documents relating to any claim or prospective liability…."

11. Clause 6 is headed Limitation on Liability. Central to the present appeal is clause 6.7:

"The Purchaser shall not make any Claims against the Warrantors nor shall the Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing (specifying the details and circumstances giving rise to the Claim or Claims and an estimate in good faith of the total amount of such Claim or Claims) is given to all the Warrantors as soon as possible and in any event prior to:

6.7.1 the seventh anniversary of the date of this Agreement in the case of any Claim solely in relation to the Taxation Covenant;

6.7.2 the date two years from the Completion Date in the case of any other Claim; and

6.7.3 in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."

12. Clause 6.8 provides:

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

13. It is common ground that the giving of notice in accordance with clause 6.7.3 was a necessary pre-condition to any liability of the defendants under the indemnity in clause 5.9. The claimants' case is that by giving the notice contained in the letter dated 29 July 2015, which was before the seventh anniversary of the date of the agreement (5 August 2015), they com-

plied with clause 6.7.3. The defendants submit that they did not do so, on two grounds. First, the notice failed to provide any details of any claims under the indemnity, including an estimate of their value. Second, the notice was premature because no claims against the company, which if successful would trigger the indemnity, had been made. It is, the defendants say, a pre-condition to the giving of notice under clause 6.7 that such claims have been made.

14. The mainstay of the defendants' submission on the first ground is the passage in parenthesis in the opening part of clause 6.7: “specifying the details and circumstances giving rise to the Claims or Claims and an estimate in good faith of the total amount of such Claim or Claims”. They submit that these words (the bracketed words) apply to any notice given under clause 6.7, irrespective of whether it falls within sub-clause 6.7.1, 6.7.2 or 6.7.3. By their inclusion in the opening part, they must be taken to govern all that follows.

15. The initial difficulty facing the defendants in this construction is that the term “Claim” (and “Claims”) with a capital C is a defined term, meaning “a Warranty Claim and/or a Tax Claim”. “Warranty Claim” is defined to mean “a claim for breach of any of the Warranties” and “Warranties” are defined to mean “the Share Warranties and the Tax Warranties”. The definition of “Share Warranties” is “the warranties contained or referred to in clause 5 and schedule 3” and the definition of “Tax Warranties” is “the warranties on the part of the Warrantors set out in part 2 of schedule 4”. It is thus clear, as the defendants accept, that a claim under the indemnity in clause 5.9 is not a “Claim” as defined. Their case was, and remains, that the bracketed words should be construed as referring to any claim of a type specified in clause 6.7.1 to 6.7.3, whether or not it is a “Claim” as defined.

16. The Judge rejected the first ground of the defendants' application, and held that the bracketed words, properly construed, were confined to “Claims” as defined. The Judge's starting point was that “the court should assume, unless driven to a contrary conclusion, that the parties who have entered into a professionally drafted agreement in which terms have been elaborately defined intend to use such terms in accordance with the definitions”. Echoing as it does Lord Hodge's observation in *Wood v Capita Insurance Services **Ltd*** [2017] UKSC 36, [2017] AC 1173, at [13] that some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals, I would agree that this is indeed the right starting point for any well-drafted provision in such an agreement.

17. While the share sale agreement is elaborate and clearly prepared with professional assistance, it cannot be said that the particular clause in issue, clause 6.7, was well-drafted nor that, as drafted, it fits well with related provisions elsewhere in the agreement. Its deficiencies will become clear in the course of this judgment. The least significant is that it refers to “the Warrantors” without any recognition that, as regards the indemnity under clause 5.9, it is not the Warrantors (as defined) but the Vendors and their respective spouses who are liable under clause 5.9. The Vendors and their spouses are among “the Warrantors”, so no doubt that phrase is properly construed as meaning, in relation to the indemnity, “such of the Warrantors as have given the indemnity under clause 5.9”.

18. More significantly, the Judge identified during the hearing below that clause 6.7.1 contains what all parties and the Judge agreed was an error, by referring to “Claim” with a capital C in connection with “the Taxation Covenant”. “The Taxation Covenant” is not a defined term nor does it appear elsewhere in the agreement. At the hearing below, it was assumed, reasonably enough on the face of it, that it was intended to be a reference to the Tax Covenant and that clause 6.7.1 was concerned with claims under “the Tax Covenant”. Because the definition of Claims (with a capital C) does not include claims under the Tax Covenant, the reference to Claims in clause 6.7.1 was therefore taken to be an error.

19. The significance of this lay not just in the making of these errors, thereby casting doubt on the reliability of a purely textual analysis of clause 6.7. The parties agreed that the bracketed words applied to a Claim under the Tax Covenant as referred to in clause 6.7.1. Ms Smith QC for the defendants is therefore right to submit that it follows on this basis that the word "Claim" in the bracketed words is *not* being used strictly in accordance with its definition. The Judge does not mention this submission and it is not clear that it was made to him.

20. Before both the Judge and us, Ms Smith pointed to a further difficulty for the claimants in the language of clause 6.7. The opening words cover two situations: first, the "Purchaser shall not make any Claim against the Warrantors"; and, second, "nor shall the warrantors have any liability". Both are then qualified by the words "in respect of any matter or thing unless notice in writing of the relevant matter or thing", immediately followed by the bracketed words. The words "nor shall the Warrantors have any liability" are capable of covering, among other things, claims under the indemnity. As Ms Smith submits, the bracketed words would appear to apply to any notice given under clause 6.7. If that is right, the defendants succeed on their first ground of appeal.

21. The claimants submitted, and the Judge agreed, that the bracketed words should be construed as applying only when the relevant matter or thing is a Claim (to which clause 6.7.1 or 6.7.2 applies). This is a plausible reading of the opening part of clause 6.7 but only if it has already been decided that the bracketed words are referring only to Claims to which clauses 6.7.1 or 6.7.2 apply. As the defendants submit, it is a reading that adds in words such as "specifying, in the case of a Claim". Read without any pre-conception of the intended scope of the bracketed words, they more naturally suggest that they govern the entirety of what follows.

22. A further difficulty arises with the time **limits** imposed by clause 6.7, as they do not readily fit with the time **limits** applicable to claims under schedule 4. Part 1 of schedule 4 contains definitions applicable to that schedule. "Tax Warranty" is defined as any warranty set out in part 2 of the schedule, "Tax Covenant" means any covenant set out in part 3 of the schedule and "Tax Claim" means a claim under any Tax Warranty or the Tax Covenant. Paragraph 3 of part 4 of schedule 4 imposes a time **limit**, with immaterial exceptions, in these terms: "No claim shall be admissible and the Warrantors shall not be liable in respect of any Tax Claim unless details of the Tax Claim have been notified in writing to the Warrantors, by noon on the 7th anniversary of Completion".

23. Thus, while under clause 6.7.2, notice of any Claim (i.e. any claim under the Share or Tax Warranties) was to be given within two years from completion, schedule 4 allowed seven years for notice of any claim under the Tax Warranties.

24. Mr Kealey QC, appearing before us for the claimants, sought to meet at least some of these difficulties by developing a submission that, contrary to the position taken by all parties before the Judge, the reference to "Claims" in clause 6.7.1 was not an error but was intended to refer to Claims as defined. Mr Kealey informed us that this argument had occurred to him two days before the hearing, by way of explanation for the absence of any application for permission to serve a respondent's notice taking the point and of any supplemental skeleton argument dealing with it. The first Ms Smith knew of it was when Mr Kealey made his oral submissions. We directed Mr Kealey to serve a short skeleton argument on the point and gave Ms Smith the opportunity of addressing us orally on it the following afternoon. We reserved the question whether we would give permission for this new point to be taken at such a late stage. For the reasons that follow, I consider that it is a bad point and I would refuse permission for it to be taken.

25. Mr Kealey submitted that the words "any Claim in relation to the Taxation Covenant" mean any Tax Warranty Claim that could also be the subject of a claim under the Tax Covenant. He pointed out that most, if not all, of the provisions of the Tax Covenant have their

equivalents in the Tax Warranties. Paragraph 3 of part 3 of schedule 4 provides that the purchaser "shall in its absolute discretion decide whether to make a claim under the Tax Covenant, the Tax Warranties or both", subject to paragraph 2 of part 4 which provides that there cannot be double recovery under the Tax Covenant and the Tax Warranties.

26. This reading would align the period within which notice of such claims had to be given with the 7-year period provided by schedule 4. However, as Mr Kealey accepted, there were Tax Warranties with no equivalent in the Tax Covenant. Any claim under any such Tax Warranty would therefore be "any other Claim" under clause 6.7.2 with a two-year period for giving notice. There would accordingly be a conflict between clause 6.7.2 and schedule 4. To meet this point, Mr Kealey submitted that this conflict was avoided by construing the definition of "Tax Claim" in schedule 4 ("a claim under any Tax warranty or the Tax Covenant") as meaning a claim that could be brought under both the Tax Warranty and the Tax Covenant. In my judgment, this is an impossible interpretation of the definition. The words "under any Tax Warranty *or* the Tax Covenant" are in my view clearly disjunctive.

27. I also consider that Mr Kealey's interpretation of "any Claim in relation to the Tax Covenant" is far-fetched. When combined with the conflict between the time **limits** in clause 6.7 and schedule 4, I am satisfied that it is wrong.

28. Returning from the diversion to deal with Mr Kealey's late case, his principal submission was that, whether he was right or wrong on that point, the bracketed words did not apply to claims under the indemnity. The choice of the capitalised Claim(s) in four places in those words was deliberate, as was the use of the lower case "claim" in clause 6.7.3.

29. As set out above, the content and structure of clause 6.7 provides some real support for the defendants' case. Moreover, it is a badly drafted provision and it is unwise to proceed on an assumption that its language has been chosen with care.

30. It does not, however, necessarily follow that the word "Claim" in the bracketed words is to be read as extending to an indemnity claim under clause 5.9, as referred to in clause 6.7.3. It is necessary to pay close regard to the context in which clause 6.7 appears and to its purpose. I should mention that the parties are agreed that there are no facts arising from the circumstances in which the agreement was made that assist in construing clause 6.7.

31. Ms Smith pointed first to clause 6.8. Clauses 6.7 and 6.8 are to be read together, as imposing a two-stage time **limit**: first, under clause 6.7, notice has to be given of a possible claim within prescribed time **limits** and, second, under clause 6.8 legal proceedings must be commenced within the time **limits** that it prescribes. The intended linkage is made clear by the requirement for proceedings to be issued and served "within nine months of the date of service of any notice under clause 6.7". Ms Smith submitted that in these circumstances "Claim" in clause 6.8 should be read as covering any Claim or claim to which clause 6.7 applied.

32. The Judge rejected this submission. He held that clause 6.8 could be read quite naturally as restricted to "Claims" as defined just in the way it has been drafted. Further, he considered that it might be unreasonable to require the purchaser to bring proceedings within nine months, if the situation were that no liability which could found a claim under clause 5.9 had yet arisen. This latter point does not take account of the proviso to clause 6.8 which in the case of a Claim relating to a "contingent Liability" (not a defined term, despite the upper case "L") extends the time **limit** for bringing proceedings to two years after the liability ceases to be contingent. I note in passing that this too is a badly drafted provision, referring to such a Claim not being deemed to be have been "withdrawn" as opposed to "absolutely terminate", the opening phrase in clause 6.8 and the apposite phrase to be used here.

33. While the proviso would fit well the case of a claim under the indemnity, it is fair to say that it is capable of applying to a Warranty Claim. For example, the Share Warranty in paragraph 16.1 of part 1 of schedule 3 deals with outstanding claims against the company and "any deficiencies or defects or breaches of contract" which could result in a claim against the company. A claim for breach of this warranty can fairly be said to be one which "relates to a contingent Liability". Further, clauses 6.11 and 6.12 expressly contemplate third party claims against the company which, if successful, would result in a Warranty Claim, and give the Warrantors the right to require, at their expense, steps to be taken to avoid, dispute or defend any such third party claims. Third party claims, unless and until established, are contingent liabilities of the company.

34. While Ms Smith's submissions on clause 6.8 have force, they necessarily involve saying that "Claim" should be read as "Claim or claim", the very issue arising for decision under clause 6.7.

35. Ms Smith points also to clause 1.1, which contains the definitions and includes the standard exception of "where the context otherwise requires". It would therefore be permissible, in compliance with clause 1.1, to read "Claim" in the bracketed words as extending to claims under the indemnity, but only if required by the context, and that of course is the issue.

36. Mr Kealey relies on other provisions and factors as demonstrating that the bracketed words should not be construed as applying to claims under the indemnity.

37. First, there is a good commercial reason for distinguishing between Warranty Claims and Tax Covenant claims on the one hand and indemnity claims on the other. The Judge accepted this submission and said:

> "It seems to me to make perfectly good commercial sense, as Mr Butcher QC submitted, to draw such a distinction on the basis that, in the case of claims under the indemnity in clause 5.9, the purchase may well at the time when notice is given not be in the position to specify details and circumstances, or to give an estimate in good faith of the amount of the claim, in the same way as it would be expected to do when making a claim for breach of warranty."

38. Second, Mr Kealey relies on clause 5.12 which entitles the indemnifiers to require the provision of all relevant documents and to require the purchaser of the company to take all steps that they might consider necessary to avoid as well as to dispute any claim that might give rise to a liability under the indemnity. In order that they can take advantage of these rights, the indemnifiers need to be given notice of matters or things that might give rise to claims. Mr Kealey submitted that the notice requirement under clause 6.7 fulfilled this purpose, and compliance would often be at a time when the detail required by the bracketed words could not be given.

39. In my judgment, this submission is not sustainable. Clause 5.12 itself imposes the necessary obligation on the purchaser: "To enable such person(s) to decide what steps or proceedings should be taken, the Purchaser shall disclose in writing to the Vendors and their respective spouses all relevant information and documents relating to any claim or prospective liability…" It is true to say that the provision of information under clause 5.12 and the giving of notice of any matter or thing that may give rise to an indemnity claim are linked in the sense that they may be achieved by a single notification. But the purposes of the two provisions are distinct. The provision of information under clause 5.12 is to enable the indemnifiers to take steps to avoid or mitigate the claim that, if successful, will give ride to an indemnity claim. By contrast, the purpose of clause 6.7.3 is to impose a time limitation on claims under the indemnity.

40. Mr Kealey also relies on the rest of clause 6 and the repeated and consistent use of "Claim" in the defined sense. Where reference is also made to any other type of claim, it is made clear. Clauses 6.4 and 6.5 refer to Claims and "claims under the Tax Covenant". Seen in this context, he submitted that it is difficult to conclude that this pattern of use was abandoned in clause 6.7.

41. While, as I have indicated, Ms Smith has raised some powerful arguments and it is not appropriate to approach the issue on the basis that clause 6.7 is carefully drafted, I have come to the conclusion that the bracketed words do not extend to a claim under the indemnity. There is force in Mr Kealey's submission about the consistent use of "Claim" in clause 6 which makes it difficult to think that it has been abandoned in clause 6.7. Moreover, even if clause 6.7.1 is wrong to refer to a claim under the "Taxation Covenant" as a Claim, there is still internal consistency in clause 6.7 in the use of Claim even if it is inconsistent with the definition.

42. Most important, however, is the consideration that this construction accords with commercial common sense. As the Judge held, it makes perfectly good commercial sense to distinguish between Warranty Claims and indemnity claims in terms of the level of detail that can sensibly be given. Many circumstances may arise, as have in the present case with the FCA inquiries, that create the real possibility or probability of successful mis-selling or similar claims that will, if successful, lead to indemnity claims. Such circumstances naturally fall within the words "any matter or thing" that may in its turn lead to a liability under the indemnity, but they may well occur at a stage when it would be impossible to provide the information required by the bracketed words.

43. I have reached this conclusion on the assumption, favourable to the defendants, that the reference to "Claim" in clause 6.7.1 is a mistake. However, I do not in fact consider that it is a mistake, but this is not for the reason advanced by Mr Kealey which I have rejected for the reasons given earlier. In my judgment, there is an error in clause 6.7.1 but it does not lie in the use of the word "Claim". It lies in the use of the words "Taxation Covenant". As earlier observed, it is not a defined term nor is it used elsewhere in the agreement. At first sight, the obvious way of reading those words so as to correct the mistake is as a reference to the Tax Covenant. It is a simple and short amendment to one word. But, it necessarily means that the reference to Claim is an error and it creates an irreconcilable conflict with the time **limits** in schedule 4.

44. This leads me to think that the correction by way of interpretation is to be made in a different way. In *Chartbrook **Ltd** v Persimmon Homes **Ltd*** [2009] UKHL 38; [2009] 1 AC 1101 at [25] Lord Hoffmann said:

> "What is clear from these cases is that there is not, so to speak, a **limit** to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

45. In my judgment, once clause 6.7 is read in the context of the whole agreement, it is clear that the reference to the "Taxation Covenant" was intended to be a reference to the Tax Warranties. It cannot sensibly be supposed that the parties intended, by means of clause 6.7, to reduce by five years the time allowed by schedule 4 for giving notice of a claim under the Tax Warranties. This interpretation, by means of correction of an obvious error, avoids any such conflict. It also means that there is no error in the use of Claim with a capital C in the bracketed words.

46. It is speculation, but I suspect that the difficulties in the construction of clause 6.7 stem from the addition of clause 6.7.3 in an existing and probably standard form draft of clause 6.7, without working through the drafting consequences of this addition.

47. For the reasons given above, I would therefore reject the first ground of appeal.

48. The second ground is that, on a proper construction of clause 6.7, a notice of any matter or thing relevant to an indemnity claim cannot be given unless and until a claim has been made against the company that, if successful, would lead to a liability under the indemnity. At the date of the notice in July 2015, no claims arising out of the FCA reviews had yet been made. The defendants, however, accept that notice can be given before such a claim has been established, so crystallising a liability under the indemnity.

49. The defendants rely, first, on the words in clause 6.7.3 “in relation to a claim under the indemnity”. I am unable to see how those words assist the defendants. They do not refer to a claim by a third party against the company but to a claim against the indemnifiers. Their purpose is simply to specify that, in the case of an indemnity claim, notice must have been given of the relevant matter or thing within seven years of the date of the agreement.

50. The defendants also seek support from the reference in clause 5.12 to the obligation of the purchaser to provide all relevant information and documents relating to “any claim or prospective liability”. The defendants point to the absence from clause 6.7 of any reference to “prospective liability”, but I fail to see how that assists them when clause 6.7 requires only notice of any “matter or thing”, words which on any view are wide enough to include a prospective liability. That those words are wide enough to include matters or things which precede the making of a claim against the company is made clear by clauses 6.11 and 6.12 to which I have earlier referred.

51. The second ground of appeal has, in my view, no basis in the terms of the agreement and should also be rejected.

52. On both grounds of appeal, Ms Smith referred us to a number of authorities on claims notice provisions in share sale agreements. Like the Judge, I have not found them to be of any assistance in the construction of this particular provision and, like the Judge, and Ward LJ in *Forrest v Glasser* [2006] EWCA Civ 1086; [2006] 2 Lloyds Rep 392 at [24], I would simply repeat the observation of Gloster J in *RWE Nukem **Ltd** v AEA Technology plc* [2005] EWHC 78 that “Every notification clause turns on its own individual wording”.

53. For these reasons, I would dismiss the appeal.

Sir Patrick Elias:

54. I agree.

Lord Justice Underhill:

55. I also agree.