Judgments

QBD, COMMERCIAL COURT

Neutral Citation Number: [2017] EWHC 2542 (Comm)

Case No: CL-2017-000050

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF

ENGLAND AND WALES

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Rolls Building, Fetter Lane

London, EC4A 1NL

Date: 13/10/2017

Before :

SIMON BRYAN QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between :
ZAYO GROUP INTERNATIONAL LIMITED — **Claimant**
- and -
(1) MICHAEL AINGER — **Defendant**
(2) DAVID CASTLEDINE
(3) MICHELLE COFFMAN
(4) ADRIAN HOWE
(5) SHEREE JAGGARD
(6) CHRISTOPHER SMEDLEY
(7) JONATHAN WATTS

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Hugh Norbury QC and Dan McCourt Fritz

(instructed by **Gibson, Dunn & Crutcher LLP**) for the **Claimant**

James Aldridge QC (instructed by **Hogan Lovells International LLP**) for the **Defendants**

Hearing dates: 19 and 20 July 2017

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Approved Judgment

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MR SIMON BRYAN QC (Sitting as a Deputy Judge of the High Court):

A. Introduction and Overview

1. The parties appear before the Court on the hearing of the application of the Defendants to strike out, and in the alternative for reverse summary judgment on, the claims brought against them by the Claimant Zayo Group International Limited ("Zayo"). Zayo resists such applications and also seeks permission to amend its Claim Form and its Particulars of Claim in response to certain criticisms made by the Defendants as to the measure of loss claimed in such statements of its case, which the Defendants assert are wrong in law as to the measure of loss allegedly recoverable.

2. The proceedings concern a share purchase agreement dated 15 May 2014 (the “SPA”), by which Zayo (which is a publicly traded company based in Colorado with European headquarters in London) purchased the entire issued share capital of Ego Holdings Limited (“the Company”) and its subsidiaries including Geo Network Limited ("Geo") from the Defendants and a third party, Alchemy Partners Nominees Limited ("Alchemy") a private equity fund. Geo provides a fibre optic network in the UK. The seven individual Defendants were the management of the Company (holding around 18% of the shares). Around 2% of the shares were held by lower level managers and around 80% of the shares were held by Alchemy. Management warranties were given by the Defendants in the SPA, but not by the lower level managers or Alchemy.

3. In late 2013 Alchemy and the Defendants offered Geo for sale by way of a competitive auction process. To facilitate that process, a virtual data room ("VDR") was set up to host confidential documents relating to Geo's business. Zayo decided to bid for Geo, and after it emerged as the preferred bidder Zayo was provided with exclusivity until 16 May 2014. It is the evidence of Mr Yost (General Counsel at Zayo) on this application that the VDR “*was limited in many respects. For example, significant agreements were missing and many other agreements were redacted. As a consequence, we relied heavily on summary explanatory notes provided for various sections of the due diligence*”. The VDR was not fixed and documents were continually uploaded until shortly before the SPA was executed. Mr Yost's evidence is that, “*The opportunity to ask questions and raise queries about documents disclosed at the last minute became much more limited.*”

4. Having emerged as the preferred bidder, Zayo was provided with exclusivity until 16 May 2014. On 9 May 2014 Zayo met with the Defendants and Alchemy in order to agree the principal deal terms. The SPA was executed on 15 May 2014.

5. Zayo's claim in these proceedings comprises four management warranty claims (the "Management Warranty Claims") as defined in paragraph 1 of Schedule 6 to the SPA arising out of alleged breaches of management warranties (the "Management Warranties") by the Defendants. The relevant ones for present purposes being as to accounts (Clauses 6.3, 6.5 and Schedule 5 Part 3 para 2). Those warranties (unlike others) were not qualified by the state of knowledge of each of the Defendants, and so all were equally liable for any breach of the accounting warranties (Clause 6.3), although they were subject to a fair disclosure exception (whether that exception is engaged is no longer before the Court on the application under consideration).

6. In relation to the Management Warranties:-

(1) Clause 6.3 of the SPA provided that:

“*Each Management Vendor warrants severally (but not jointly or jointly and severally) to the Purchaser so far as he is aware that each of the Management Warranties is true and accurate as at the date of this agreement*…”

(2) Clause 6.5 of the SPA provided that:

“*The Management Warranties:*

6.5.1 are qualified by reference to those matters Fairly Disclosed; and

6.5.2 save for the Management Warranties in paragraphs 1.6.2 and 1.6.3 of part 3 and part 4 of schedule 5, apply to each of the Subsidiaries as well as to the Company as if the word "Company" was defined to mean each of the Subsidiaries and the Company."

7. The Management Warranties alleged to have been breached by the Defendants are those contained in paragraph 2.1.1.3 and paragraph 2.2 of Part 3 of Schedule 5 to the SPA. In this regard:-

(1) By paragraph 2.1, the Management Vendors warranted that:

"*2.1.1 The Accounts and the consolidated audited accounts of the Group for each of the two preceding accounting periods:*

2.1.1.1 comply with the requirements of Companies Legislation;

2.1.1.2 have been prepared in accordance with international accounting standards within the meaning of EC Regulation No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards adopted from time to time by the European Commission; and

2.1.1.3 show a true and fair view of the state of affairs of the Group at the Accounts Date and of its profit or loss for the financial year ended on that date."

(2) By paragraph 2.2, the Management Vendors warranted that:

"*Having regard to the purpose for which the Management Accounts have been prepared, and after taking into account that the Management Accounts have been prepared in good faith with due care and attention and are not the subject of an independent audit, the Management Accounts do not materially overstate the assets or materially understate the liabilities and do not materially overstate the profits or materially understate the losses of the Group in respect of the period to which they relate.*"

8. The "Accounts" and "Management Accounts" referred to in paragraphs 7(1)-(2), above, were defined, respectively, as follows in the SPA:

"*the consolidated audited accounts of the Group for the accounting reference period which ended on the Accounts Date as set out in folder 3.1 in the Data Room*"

"*the unaudited consolidated accounts of the Group for the three month period ending 31 March 2014 (comprising a consolidated income statement and consolidated balance sheet)*"

9. The Management Warranty Claims asserted by Zayo consist of four claims (collectively the "Claims") and are referred to by the parties as (i) the NMC Claims, (ii) the Lift and Shift Claims, (iii) the H3G Claims and (iv) the Power Usage Overcharge Claims.

10. The SPA contained notification provisions requiring that any claims against the Defendants be notified to them within 18 months of the SPA (Schedule 6 para 3.2 to the SPA) i.e. by Sunday 15 November 2015. It is common ground between the parties that by virtue of various deeming provisions, the notifications had to be served by 5pm on Friday 13 November 2015. On that very day (i.e. the last day on which a notice could be served) Zayo attempted to serve each of the Defendants with a notice of claim dated 13 November 2015 (the "Notice of Claim"). It is common ground that Zayo managed to serve six of the Defendants by that time on that date. However, it is the Defendants' case that Zayo failed to serve Sheree Jaggard (the Fifth Defendant) within time, and that the consequence is not only that the claim against the Fifth Defendant was out of time with the result that the Fifth Defendant has no liability to Zayo, but also that none of the Defendants has any liability to Zayo in such circumstances.

11. The SPA also had a time limit for service of any proceedings which required them to be served within nine months of Notices of Claim (Schedule 6 paragraph 3.3) i.e. by Friday 12 August 2016. The present proceedings were issued on that day and were hand delivered to the Defendants' addresses for service later that day. There is an issue between the parties (which is not live on this application) as to whether Zayo complied with the requirement to serve within nine months in the context of the deeming provision in CPR 6.14 which would deem them served on Tuesday 16 August 2016.

12. As will be addressed in more detail in due course below, the notification provision in the SPA (Schedule 6 paragraph 3.2) required the notices of claim to "*be in writing and state in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail) and a reasonable estimate of the amount claimed, with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under this schedule 6.*" The proper construction of paragraph 3.2 of Schedule 6, and what is required of a notice of claim thereunder is very much in issue between the parties. The Defendants assert that the Notice of Claim (in their words*), "fell woefully short of compliance with such requirements"* and that as such no valid notice of claim was given, and any liability came to an end, on 13 November 2015.

13. The Management Warranty Claims asserted by Zayo in the Notice of Claim (i.e. the Claims) consist of the following four claims:-

(1) <u>The NMC Claims:</u> Claims relating to alleged inadequate accounting provision or reserves for two disputes between Geo and NMC. The loss alleged was the combined cost of settling that litigation in the sum of £1.35m. No split was made as between the two pieces of litigation. The Defendants say that there was no claim that there was a "diminution in value" of the shares purchased as a result of the alleged failure to make adequate provision;

(2) <u>The Lift and Shift Claims:</u> Claims relating to alleged lack of accounting provision or reserves for potential liability to "Lift and Shift" (i.e. relocate) fibre optic cables on two sites owned by two different third parties who had the potential ability to require such relocation under easements between them and Geo. The loss alleged was the combined cost of undertaking that relocation at both sites estimated at £468,997 plus applicable costs and expenses. No split was made as between those two separate sites/parties. The Defendants say that there was no claim that there was a "diminution in value" of the shares purchased as a result of the alleged failure to make provision;

(3) <u>The H3G Claims:</u> Claims relating to a dispute with H3G where it was alleged inadequate accounting reserve/provision for the cost of concluding the dispute had been made. The estimated alleged loss was said to be £219,000 plus the cost and expenses of defending such claims. It has subsequently transpired that this sum was the cost of settling the dispute (which settlement had occurred before the Notice of Claim). The Defendants say that there was no claim that there was a "diminution in value" of the shares purchased as a

result of the alleged failure to make provision.

(4)The Power Usage Overcharge Claims: Claims relating to alleged overcharging of various customers, allegedly because either (a) the customer agreements did not permit the invoicing of power usage charges or (b) no power usage meters were installed to justify the charging of power usage. The loss alleged was a “diminution in value of the shares” of an unspecified multiple of the alleged combined sum of £397,795.38 said to have been overcharged. No split was made as between overcharges for category (a) and category (b) above; no multiple was identified and no breakdown of when the alleged overcharges were said to have arisen was specified.

14. The Defendants make various criticisms of the Notice of Claim, the detail given in relation to each claim, and as to the amount, and nature of the amount, claimed. In this regard the Defendants assert, amongst other points, that the alleged inadequacy of the Notice of Claim lies in asserting loss in the form of sums paid by Geo to satisfy the liabilities of Geo which (Zayo says) were not reflected in the warranted accounts which the Defendants say is, in effect, a claim for an indemnity which the Defendants submit is not a reasonable estimate of the actual loss because (i) it is said none of the alleged liabilities had crystallised by the time of the SPA and the actual amount spent could not have been known at the date of the accounts, and (ii) the measure of loss in share warranty claims is, in shorthand, the "diminution in value" in the shares purchased not the amount ultimately paid (which it is said will be a different sum).

15. In this regard the Defendants also submit that regardless of the validity or otherwise of their criticisms of the Notice of Claim, the Claim Form and Particulars of Claim do not assert a diminution in value in the shares in the Company and rather seek, in effect, an indemnity for sums paid by Geo (sums which the Defendants say could never have been known at the time of the accounts which were warranted). The Defendants assert that the measure of loss claimed does not reflect the correct legal measure of loss and as such the associated claims should be struck out or reverse summary judgment granted.

16. On the day of the hearing Zayo served a draft Amended Claim Form and draft Amended Particulars of Claim which delete the claims for an indemnity and replace them with claims based on diminution in value of the shares, for which Zayo seeks permission at this hearing. The Defendants oppose permission being granted for a number of reasons including that such claims were not made in the Notice of Claim and that, as such, they cannot now be advanced.

17. The SPA also contained limits on the Defendants' liability for breaches of warranty. Those included deductibles, caps and apportionment. The Defendants point out that Zayo did not quantify any of these in the Notice of Claim. They also refer to the fact that the SPA contained an exclusion of liability where provision was made for a liability (Schedule 6 paragraph 5.1). In the case of the NMC Claims and the H3G Claims, provisions did exist in the accounts (albeit that Zayo asserts that they were inadequate). The Defendants assert that the mere existence of any provision relieves the Defendants of liability.

18. The Defendants also take a specific point in relation to the Power Usage Overcharges Claim. In relation to this, Zayo did assert a diminution in value claim in the Notice of Claim (albeit, says the Defendants, in inadequate terms), but in the Particulars of Claim Zayo did not assert a claim for diminution in value, but rather a claim for an indemnity, in relation to which the Defendants submit (i) that this is not the correct measure of any loss, and (ii) is not the claim notified in the Notice of Claim, and as such cannot therefore be pursued in the Particulars of Claim.

19. A further point is taken by the Defendants in respect of the Lift and Shift Claims, and the complaint that no provision was made in the accounts. The Defendants submit that this case is unsustainable because the

accounts were prepared in accordance with IAS37.14, which the Defendants say makes clear that provision is only required where there exists a present legal obligation. Whilst Zayo asserts that the Defendants knew that there might (or even might well) in due course be an obligation to third parties to undertake relocation works, there was (say the Defendants) no present legal obligation because such liability depended on those third parties having served notices under easements, and they had not done so as at the date of the accounts. The Defendants submit that in such circumstances there was no need (or basis) for any provision.

B. The Applications

20. On 3 April 2017 the Defendants issued an Application Notice seeking an order that Zayo's claim be struck out in whole or in part pursuant to CPR 3.4 and/or that there be summary judgment for the Defendants on the whole or on parts of Zayo's claim pursuant to CPR 24 on the basis that Zayo's Particulars of Claim disclosed no reasonable grounds for bringing their claims (alternatively some of them) and Zayo had no reasonable prospect of succeeding on its claims (alternatively some of them) because of the matters alleged at paragraphs 1 to 21 of the Application Notice.

21. The Defendants' application can be broken down into the following categories of complaint:-

(1) Those relating to service of the Notice of Claim, specifically whether there was effective service on the Fifth Defendant ("Ms Jaggard") before the deadline stipulated by paragraph 3.2 of Schedule 6, and if not what the effect of this was in relation to (a) the claim against Ms Jaggard and (b) the claims against all the Defendants (Paragraphs 1 to 4 of the Application Notice).

(2) Those relating to the measure of the losses claimed, specifically (a) the measure of loss claimed in the Claim Form and Particulars of Claim in respect of the Claims (Paragraph 6 of the Application Notice), (b) the measure of loss claimed in relation to the NMC, Lift and Shift and H3G Claims in the Notice of Claim (Paragraph 5 of the Application Notice), and (c) the measure of loss claimed in the Notice of Claim and in the Claim Form and Particulars of Claim in respect of the Power Usage Overcharge Claims (paragraphs 8 and 10 of the Application Notice). This also gives rise to a consideration of Zayo's application for permission to amend the Claim Form and Particulars of Claim.

(3) Those relating to non-compliance with the requirements for the Notice of Claim in relation to alleged failures to state in reasonable detail the nature of the Management Warranty Claims and/or to state a reasonable estimate of the amount claimed (Paragraphs 5, 7-9, 11-14, 17, 19 and 21 of the Application Notice).

(4) Those relating to exclusion of liability where some provision was made in the accounts (NMC Claims and H3G Claims) (Paragraphs 15 and 20 of the Application Notice).

(5) In relation to the Lift and Shift Claims the IAS 37.14 point (Paragraph 18 of the Application Notice).

22. It will be seen that the first category of issues, namely those concerning notice, have the potential to be "knock-out" blows in favour of the Defendants if determined in their favour, rendering all other issues academic. The same is true in relation to a number of the other issues (for example, the measure of loss issues) if determined in the Defendants' favour.

23. The Defendants no longer pursue on this application the issue in relation to the NMC Claims as to

whether there was fair disclosure of the NMC Claims within the meaning of Clause 6.5.1 of the SPA (Paragraph 16 of the Application Notice) as they accept that this issue could give rise to factual issues not suitable for determination on an application for summary judgment or strike out.

C. Applicable Principles
(1) Strikeout and Summary Judgment

24. CPR 24.2 provides:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-

(a) it considers that-

(i) that claimant has no real prospect of succeeding on the claim or issue;

...; and

(b) there is no other compelling reason why the case or issue should be disposed of at trial."

25. CPR Part 3.4(2) provides:

"(2) The court may strike out a statement of case if it appears to the court-

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim."

26. The applicable principles on applications for summary judgment and on an application to strike out are well-known and were common ground between the parties. Indeed in this regard the parties provided me with an agreed note which I am satisfied reflects the applicable principles, and which I summarise below.

27. The CPR give the Court two distinct powers which may be used to achieve the summary disposal of issues which do not need full investigation at trial. The overlap between these powers is addressed in note 3.4.6 of the White Book on page 96.

28. The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that that claimant or defendant has no real prospect of succeeding on the claim or issue: CPR 24.2(a)(ii).

29. The Court may strike out a statement of case if (inter alia) it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim: CPR 3.4(2)(a).

30. In order to defeat the application for summary judgment it is sufficient for the respondent to show some

"prospect", i.e. some chance of success. The prospect must be "real", i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "real" means that the respondent has to have a case which is better than merely arguable – *ED&F Man Liquid Products Ltd v. Patel* [2003] EWCA Civ 472 at [8] per Potter LJ.

31. The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. "*The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality*" (*Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1 at [158] per Lord Hobhouse).

32. An application to strike out a statement of case under CPR 3.4(2)(a) should not be granted unless the court is certain that the claim is bound to fail – *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 at [22] per Peter Gibson LJ; *Barrett v Enfield LBC* [2001] 2 AC 550 at 557 per Lord Browne-Wilkinson.

(2) Issues of construction

33. Certain of the issues that arise turn on points of construction of the SPA - the most obvious example being those that relate to notice. On the first day of the hearing I invited the parties to consider whether, if I considered that I could finally determine any particular point of construction at this hearing, they would wish me to do so i.e. as a preliminary issue and on a balance of probabilities, rather than to the extent necessary to address the issues of summary judgment and strike out. On the second day of the hearing the parties confirmed to me that they were agreed that I should do so where I considered that appropriate. I consider this was a sensible agreement by the parties, and it accords with the practice of the Commercial Court to determine pure points of construction finally wherever possible, with the associated potential savings in time and costs that may result from such a course.

34. As to the applicable principles of contractual construction, there was once again much common ground amongst the parties. Mr Hugh Norbury QC, on behalf of Zayo, referred in particular to the commercial approach identified by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 501 at paragraphs [14] to [30], and the principle which he summarised as: where there are a variety of possible constructions of a contractual provision the Court should pick the construction which accords most closely with business common sense in the light of the relevant factual matrix.

35. Without detracting from the entirety of the matters identified in *Rainy Sky*, Mr Norbury referred, in particular, to paragraphs [21] to [23] of the judgment where Lord Clarke stated as follows:-

"21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

22 This conclusion appears to me to be supported by Lord Reid's approach in Wickman quoted by Sir Simon Tuckey and set out above. I am of course aware that, in considering statements of general principle in a particular case, the court must have regard to the fact that the precise formulation of the proposition may be

affected by the facts of the case. Nevertheless, there is a consistent body of opinion, largely collated by the Buyers in an appendix to their case, which supports the approach of the Judge and Sir Simon Tuckey.

23 Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in Co-operative Wholesale Society Ltd v. National Westminster Bank plc [1995] 1 EGLR 97 . The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in The Antaios (Antaios Compania Naviera SA v Salen Rederierna AB) [1985] AC 191 . After quoting the passage from the speech of Lord Diplock cited above, Hoffmann LJ said, at p 98:

"*This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement.*"

36. The interpretation of contractual provisions was, of course, further explored by the Supreme Court in *Arnold v Britton* [2015] AC 1619, to which I was referred by the parties, including in paragraphs [14] to [23] of the judgment of Lord Neuberger PSC (with whom Lords Sumption and Lord Hughes JJSC agreed).

37. In *Wood v Capita Insurance Services Limited* [2017] 2 WLR 1095 in the Supreme Court, to which I was also referred by the parties, counsel for Capita had argued in its written case that the Court of Appeal had fallen into error because it had been influenced by a submission by Mr Wood's counsel that the decision of the Supreme Court in *Arnold v Britton* had "rowed back" from the guidance on contractual interpretation which the Supreme Court gave in *Rainy Sky,* which he submitted had caused the Court of Appeal to place too much emphasis on the words of the SPA in that case and to give insufficient weight to the factual matrix. He did not have the opportunity to develop this argument before the Supreme Court as the court stated that it did not accept the proposition that *Arnold v Britton* had altered the guidance given in *Rainy Sky*. In his judgment Lord Neuberger stated that it was not appropriate in that case to reformulate the guidance given in *Rainy Sky* and *Arnold v Britton*, the legal profession having had sufficient judicial statements of this nature. However he stated (at [9]) that it might assist if he explained briefly why he did not accept the proposition that *Arnold v Britton* involved a recalibration of the approach summarised in *Rainy Sky*, stating as follows at paragraphs [10] to [15]:-

"10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997) , Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11 Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571 , para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14 On the approach to contractual interpretation, Rainy Sky and Arnold were saying the same thing.

15 The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

38. In the present case, and in relation to the issues of construction that arise, it matters not in my view, whether one starts from the text of the SPA, or its surrounding factual matrix. I readily accept that interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise, and where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

(3) The construction of notification clauses

39. The Defendants submit that notification requirements, including the provision of reasonable information about claims, are readily enforced by the Courts and that a failure to comply with the requirements of a notification clause render the notice invalid with the consequence that any liability lapses.

40. There are many authorities on the commercial purpose of notification clauses, and I was referred to a number of authorities in that regard by the parties including *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep. 423 (*"Senate Electrical*"), *Laminates Acquisitions v BTR Australia Ltd* [2003] EWHC 2540 (Comm) ("*Laminates"*), *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2016] All ER (D) 200 (May) ("*Teoco*"), *Ipsos S.A. v Dentsu Aegis Network Limited* [2015] EWHC 1171 (Comm) ("*Ipsos"*) and *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC (Comm) 78 (*"RWE Nukem"*).

41. It is necessary to be cautious about any general principles that are sought to be derived from such authorities for a number of reasons. First, observations made, or propositions identified by judges in such cases, of apparent general application, are set against the backdrop of the particular clause under consideration, and that is to be interpreted, so that even what may appear to be observations or propositions of general application may be coloured by, or indeed made by reference to, the particular language of the particular clause under consideration. Secondly, the wording of the clauses under consideration is different in each particular case (though there may be similarities in wordings or themes in the clauses under consideration). Thirdly, the context in which the notification issues arise, and the respect in which it is said there has been non compliance with a notification provision, may differ between the cases and this may be of relevance when construing the provision and considering any observations made. Fourthly the context in which judges have seen fit to opine on such clauses has differed, whether in relation to an issue of construction to be determined on balance of probabilities, or in the context of a strike out or summary judgment application.

42. Ultimately, every provision in a SPA has to be construed in accordance with its own wording, and the language of the clause in question. As Simon J said in *Ipsos* at para [16]:

"16 The starting point is the statement of Ward LJ in Forrest v. Glasser [2006] 2 Lloyd's Law Rep 392 at [24] in which, referring to the observations of Gloster J in RWE Nukem Ltd v. AEA Technology plc [2005] EWHC (Comm) 78 , he observed that the only true principles to be derived from the authorities is that every notification clause turns on its own wording."

43. Such observations have not discouraged advocates from citing authorities such as those referred to above in cases such as *Ipsos*, and indeed I have been taken to the various cases, and reliance has been placed upon them, in the present case. I have also been provided with a "Note on Authorities" by the Defendants, which identifies many of the authorities, quotes the relevant clause(s) under consideration, in those cases and seeks to draw together “Common Threads". The Note is useful in identifying authorities of potential relevance, but ultimately, I have had regard to the authorities themselves when considering whether any general principles can be identified.

44. In this regard, the observations that Simon J identifies in *Ipsos* have not restrained judges from making observations and identifying propositions that they derive from the authorities. There is nothing inappropriate in doing so provided that sight is maintained of the context in which any observations or propositions are made (and their applicability or otherwise to the clause under consideration), and the particular clause under

consideration is construed having regard to its own language, and with regard to its surrounding factual matrix and the terms of the contract as a whole.

45. For example in *Ipsos* itself Simon J went on to identify "four broad propositions" that he derived from the cases, stating at paragraphs [19] to [22] as follows:-

"19 First, §3.1 is an example of a common type of provision whose purpose is to debar claims which are not notified within a finite period. The commercial purpose includes ensuring that sellers know in sufficiently formal terms that a claim for breach of warranty is to be made, so that financial provision can be made for it. Such a purpose is not served if the notice is uninformative or unclear, see Stuart-Smith LJ in the Senate Electrical case at [90]. Stuart-Smith LJ went on to add, in the context of the particular wording in that case and a particularly uninformative notice, at [91]:

"*Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty.*"

"*20 Secondly, in construing such a notice the question is how it would be understood by a reasonable recipient with knowledge of the context in which it was sent, see the Laminates case at [29].*

21 Thirdly, the notice must specify that a claim is actually being made, see the Laminates case at [33], the notice:

…must make it clear that such a claim is being pursued whatever wording is used, rather than indicating the possibility that a claim may yet be made.

In this respect, there is a clear difference between a Claim Notice under §3.1 and the notice under §5.1.

22 Fourthly, in the present case (as in other cases) requirement of the notice of a claim is matched by a requirement for certain matters to be specified in the notice. The use of the word 'specifying' in §3.1 suggests very strongly that it is not sufficient that the matters referred to in (i)-(iii) may be inferred."

46. Equally in *Teoco* Richard Millett QC (sitting as a Deputy Judge of the High Court) identified the following legal principles that I do not understand to be disputed by the present parties, and which I consider to be of general application:-

"Construction of warranty claim notice provisions: the legal principles

25. I start with the helpful summary of the legal principles in this area contained in the skeleton argument of Mr Jarvis Q.C. and Mr George McPherson for the Purchaser, much of which I gratefully adopt, as follows.

(i) Every notification clause turns on its own wording: ***Forrest v Glasser*** *[2006] 2 Lloyd's Rep 392 per Ward LJ at [24]. The court is therefore required to construe the clause by focusing on the meaning of the relevant*

words in their documentary, factual and commercial context: ***Arnold v Britton*** *[2015] AC 1619 per Lord Neuberger at 1627G-H.*

(ii) A notification clause which imposes a contractual time limit on the bringing of claims is a species of exclusion clause. If necessary to resolve ambiguity, such a clause should be construed (like any other exclusion clause) narrowly. This is because parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect: ***Nobahar-Cookson v The Hut Group Ltd*** *[2016] EWCA Civ 128 per Briggs LJ at [18].*

(iii) The commercial purpose of a notification clause includes ensuring that sellers know in sufficiently formal terms that a claim for breach of warranty is to be made, so that financial provision can be made for it: ***Ipsos S.A. v Dentsu Aegis Network Ltd*** *[2015] EWHC 1171 (Comm) per Simon J at [19]. It follows that where such financial provision has already been made as part of the parties' bargain, there is a less compelling commercial rationale for requiring the notifying party to supply "chapter and verse" as to the nature of the claim being notified.*

(iv) In construing a notice of claim, the question is how it would be understood by a reasonable recipient with knowledge of the context in which it was sent: ***Laminates Acquisition v BTR Australia Ltd*** *[2004] 1 All ER (Comm) 737 per Cooke J at [29].*

(v) The notice must specify that a claim is actually being made (whatever wording is used), rather than indicating the possibility that a claim may yet be made: ***Laminates*** *at [33].*

(vi) Where a notification clause contains a requirement to specify "reasonable detail", what constitutes reasonable detail will depend on the nature of the Claim, bearing in mind that it is unlikely to have been the parties' intention, at the time of contracting, that the details to be provided should be as extensive as those that would be required, after further investigation, in the legal proceedings to be issued and served within six months of the notice: ***ROK Plc (in administration) v S Harrison Group Ltd*** *[2011] EWHC (Comm) per Richard Siberry Q.C. (sitting as a Deputy High Court Judge) at [67]; see also* ***Forrest v Glasser*** *per Ward LJ at [25].*

47. The authorities also, rightly in my view, identify that the commercial purpose of contractual notices in this area is that of commercial certainty, as is also referred to in *Teoco* at paragraph [27] by reference to what was said by Stuart-Smith LJ in *Senate* at [91]:

"*Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty.*"

48. In addition, as identified in *Teoco* (at [28]), by reference to what is said by Cooke J in *Laminates*, proper compliance with contractual notice requirements is not a technical or trivial matter. As Cooke J said in *Laminates* (at [29] and [30]):

"*29. ... Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be*

notified and a failure to observe their terms can rarely be dismissed on a technicality. The comments of Stuart-Smith LJ in Senate Electrical are apposite, in the context of a notice clause in a Share Sale Agreement requiring notice to set out "*such particulars of the grounds on which such claim is based as are then known to the Purchaser promptly … and in any event within 18 months*"*. He said:—*

"*The clear commercial purpose of the clause includes that the vendors should know … in sufficiently formal written terms that a particularised claim for breach of warranty is to be made so that they may take such steps as are available to them to deal with it … The commercial purpose may not be sensibly served if an uninformed and uninformative notice is given …*"

The notice provision here does not require "*particulars*" *of the grounds of claim for breach of warranty but some information relating to the claim, as set out in the paragraph, which can be seen as equivalent, or analogous to that required in Senate Electrical.*

30. The starting point here must be, regardless of the proviso dealing with the need for legal proceedings within a specific time, that the terms of the notice provision are clear in debarring claims which have not been notified within the required period. Thus the clause begins "*No claim … shall be brought … unless …*"*. A compliant notice is therefore a matter of importance.....Thirdly, the purpose of the notice provision, as essentially agreed by both parties is to ensure that BTR is provided with a warning of future legal proceedings against it under the Agreed Assurances with sufficient information and time to enable it to make enquiries, to make an informed assessment of the claim, decide what to do about it, take precautionary steps, (such as notification to insurers and preparation of defence material) make provision in its accounts or obtain withdrawal of the claim or satisfy or settle it before legal proceedings are issued...."*

49. As is addressed below, the clause that is under particular consideration in the present case is paragraph 3.2 of Schedule 6 to the SPA which provides:-

"No Management Vendor shall have any liability for a Management Warranty Claim except in circumstances where the Purchaser gives notice to the Management Vendors before the date that is eighteen months of Completion. The notice must be in writing and state in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail) and a reasonable estimate of the amount claimed, with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under this Schedule 6."

50. The proper construction of paragraph 3.2 is very much in issue between the parties, as discussed in due course below. However in relation to "*No Management Vendor shall have any liability for a Management Liability Claim"* such wording is similar to the words in paragraph 4 Schedule 4 in *Teoco* "*No Seller shall be liable for any Claim unless..."* in relation to which Richard Millet QC stated as follows at paragraph [33] and [34], statements which I consider to be equally apposite to paragraph 3.2:-

"33. ....It was intended as a gateway to liability on the part of the Seller. The parties agreed that in respect of Claims which did not comply, the Seller would have no liability. It was, as Cooke J said in ***Laminates*** *(at [29]), an important delineation of the Seller's liability. The parties placed on the Purchaser the onus of compliance and allocated the risk of non-compliance to the Purchaser."*

51. In *Teoco* the Deputy Judge went on to say at paragraph [34]:

"34. However, paragraph 4 is part of a series of limitations on the Purchaser's rights to claim damages for breach of the warranties in clause 9.1 of the SPA, hence the title to Schedule 4 "Seller Limitations". It is an exclusion clause that cuts down the Purchaser's rights. Accordingly, if and where it is ambiguous, it must be construed if not contra proferentem then narrowly. So the Purchaser must comply in order to render the Sellers liable, but in deciding what it must do by way of compliance the court should construe any ambiguous requirement in favour of the Purchaser, or at least narrowly."

52. Clause 3.2 in the present case is itself part of a series of limitations on Zayo's rights, Schedule 6 being itself titled, "Limitations on liability". To the extent that particular provisions are properly to be characterised as exclusion clauses, then if ambiguous they are to be construed if not *contra proferentem* then narrowly. So Zayo must comply in order to render the Defendants liable, but in deciding what it must do by way of compliance the Court should construe any ambiguous requirement in favour of Zayo, or at least narrowly.

53. A further point of comparison with other authorities is the reference in paragraph 3.2 to the notice stating, "*in reasonable detail the nature of the Management Warranty Claim"*, there being authority in relation to the phrase *"Reasonable details of the Claim*" that this is context specific and depends on the nature of the claim - *ROK plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm) in which Richard Siberry QC (sitting as a Deputy Judge of the High Court) stated at at [67]:

"67 The words "in reasonable detail" were presumably intended to add something to a requirement to specify the nature of the Claim and the amount claimed. It is impossible to define, in abstract terms, what would, or would not, constitute reasonable detail - though it is clear, as ROK submitted, that these words did not require ROK to give as much detail as possible in the light of available information. What constitutes reasonable detail will depend on the nature of the Claim, bearing in mind also that it is unlikely to have been the parties" intention, at the time of contracting, that the details to be provided should be as extensive as those that would be required, doubtless after further investigation, in the legal proceedings to be issued and served within six months of the notice."

In *Teoco* the judge concluded (at paragraph [35(iii)]) that "*Reasonable details"* do not need, in general terms, to be to the level of specificity required in Particulars of Claim, but there must at least be a clear identification of the Claim itself.

D. The evidence and Zayo's stance on the applications

54. In support of their application, the Defendants served a witness statement from the Sixth Defendant, Christopher Smedley (the former CEO of Geo Networks) dated 31 March 2017.A responsive witness statement, opposing the application, was served by Zayo from Christopher Yost (General Counsel at Zayo Group, LLC, the parent of Zayo) dated 18 May 2017. A second statement from Mr Smedley was served in reply on 18 June 2017. Much of the statement evidence went to the issue of fair disclosure (an issue that no longer forms part of the application). However, the statements also contain factual evidence as to the factual matrix to the SPA, the Claims, and the service of the Notice of Claim. I have read and had regard to the statements.

55. Zayo opposes the strike out and summary judgment application. Zayo submits that it cannot be shown that there is no real prospect of Zayo succeeding on the issues that are raised. It also denies that the construction sought to be placed on the various provisions of the SPA is the correct construction. It also submits that the issues concerning the adequacy of the Notice of Claim are by their nature unsuitable for summary determination having regard to the factual disputes in the proceedings. Zayo submits that the question of the sufficiency of the contents of the Notice of Claim can only be fairly decided in the light of the

knowledge of, and the disclosure given, by the Defendants, and that, *"Such matters, in common with the (subjective) knowledge of Zayo as at the date of the Claim Notice (likewise essential to an assessment of the Claim Notice's adequacy), are pre-eminently matters that required witnesses to give live evidence*". The Defendants deny that there is any such need for live evidence or that the issues that arise, when properly analysed, cannot be determined in the context of an application for strike out and summary judgment. The specific points taken by each party will be considered in the context of the issues that arise.

E. Notice Issues (Application Notice Paragraphs 1 to 4)

56. Paragraphs 1 to 4 of the Application Notice are expressed in these terms:

"1. (as regards the whole claim) as pleaded at paragraph 2.5(a) of the Defence the 5th Defendant was not notified of the claims in accordance with Schedule 6, paragraph 3.2 of the SPA. In the premises notice was not given to all Defendants as required by that paragraph, and none of them have any liability.

2. (as regards the whole claim) as pleased at paragraph 2.5(b) of the Defence, the 5th Defendant was not notified of the claims in accordance with Schedule 6, paragraph 3.2 of the SPA. In the premises no claim is or can be made against her. In the further premises and under Schedule 6 paragraph 3 of the SPA, no claim may be made against the other defendants because a claim is not made against her.

3. (as regards the whole claim), the 5th Defendant was not notified of the claims in accordance with Schedule 6, paragraph 3.2 of the SPA. In the premises, the claim against her was effectively released or satisfied by the Claimant, yet the Claimant did not purport to release or satisfy the remaining Defendants in breach of the Schedule 6 paraph 3 of the SPA. It should be treated as having done so and/or the remaining Defendants are entitled to be released on the same terms as the 5th Defendant, which is to say without any liability.

4. (as regards the claim against the 5th Defendant) as pleaded at paragraph 2.5(c) of the Defence, the 5th Defendant was not notified of the claims in accordance with Schedule 6, paragraph 3.2 of the SPA. In the premises notice was not given to her as required by that paragraph and she can have no liability."

57. A logical order to address these issues is to consider first whether the Fifth Defendant, Ms Jaggard, was notified of the claims in accordance with paragraph 3.2 of Schedule 6 to the SPA, and what the consequences of that for her are (paragraph 4 of the Application Notice and the first sentence of paragraph 2 of the Application Notice), before considering the remaining issues in relation to the consequences for all the Defendants.

58. It is convenient at this point to set out paragraphs 3, 3.2 and 3.3 of the SPA:

"*3. The liability of the Management Vendors in respect of any claim for any breach of the Management Warranties shall be several. No Management Warranty Claim shall be made against any Management Vendor in respect of facts or circumstances unless a claim is made against all Management Vendors who are liable in respect of the same facts or circumstances. For the avoidance of doubt, the liability of a Management Vendor in respect of any Management Warranty Claim may be released or satisfied only if the liability of all the Management Vendors who are liable in respect of the same facts or circumstances is released or satisfied on the same terms.*

...

3.2 No Management Vendor shall have any liability for a Management Warranty Claim except in circumstances where the Purchaser gives notice to the Management Vendors before the date that is eighteen months of Completion. The notice must be in writing and state in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail) and a reasonable estimate of the amount claimed, with reasonably sufficient details to allow the Management Vendors the ability to exercise their other rights under this schedule 6.

3.3 The liability of each of the Management Vendors in respect of any Management Warranty Claim shall terminate if proceedings in respect of it shall not have been commenced by being both properly issued and validly served on the relevant Management Vendor within the period of nine months from the date on which the Purchaser gives notice of such Management Warranty Claim to the relevant Management Vendor."

59. From the above, it will be noted that the first sentence of Clause 3.2 of Schedule 6 to the SPA provides that:

"No Management Vendor shall have any liability or a Management Warranty Claim except in circumstances where the Purchaser gives notice to the Management Vendors before the date that is eighteen months of completion."

60. This sentence has to be construed in two contexts:-

(1) The effect on a claim against a particular Management Vendor if notice is not given to that Management Vendor/Defendant (here the Fifth Defendant Ms Jaggard) before the date that is eighteen months after Completion.

(2) The effect on a claim against all other Defendants (Management Vendors) if notice is not given to one of the Management Vendors (here the Fifth Defendant Ms Jaggard) before the date that is eighteen months of Completion.

61. (2) is addressed in due course below. However, as to the former, it is rightly accepted by Zayo (at paragraph 57 of Zayo's Skeleton Argument and orally by Mr Norbury on behalf of Zayo) that the effect of this sentence in the SPA is that if notice was not given to Ms Jaggard in time then Ms Jaggard is not under any liability to Zayo. Accordingly in such circumstances, Zayo's claim against her would stand to be dismissed.

62. This is clearly so based on the ordinary and natural meaning of the words of the first sentence of paragraph 3.2 of Schedule 6 to the SPA reflecting the objective common intention of the parties. As with the words *"No seller shall be liable for any Claim unless"* in *Teoco*, these words are intended as a gateway to liability on the part of the vendor. The parties are agreed that in respect of claims which did not comply, the vendor would have no liability. It is as Cooke J said in *Laminates* (at [29]), an important delineation of the Seller's liability. The parties placed on the Purchaser the onus of compliance and allocated the risk of non-compliance to the Purchaser. Thus, whilst the first sentence is in the nature of an exclusion clause, it is clear and unambiguous and telling of only one meaning (in relation to the particular Management Vendor being served), namely that a Management Vendor is under no liability unless the Purchaser has given notice to that Management Vendor within the time specified (and in writing by virtue of the next sentence of paragraph 3.2). The effect on all Management Vendors is then a matter for separate consideration, as

addressed below.

Notice of the claim to Ms Jaggard

63. Accordingly, the first substantive question is was there notice within the meaning of paragraph 3.2 of Schedule 6 given to Ms Jaggard within the time specified? The burden of proof in that regard is upon Zayo - see *RWE Nukem* at paragraph [10(ii)] and *Laminates at para [30]*.

64. Whilst the circumstances in which service of the notice was attempted, and was ultimately effected on the various parties, could conceptually have been the subject of contested factual evidence, on analysis there is no dispute as to the relevant facts which are as follows.

65. Completion of the SPA was on 15 May 2014. The date eighteen months from Completion by which Notice of Claim had to be served by reason of paragraph 3.2 of Schedule 6 was therefore Sunday 15 November 2015. Under clause 12.1 of the SPA a notice served after 5pm on a business day is deemed served at 9am on the next business day. Thus, a Notice of Claim under paragraph 3.2 of Schedule 6 had to be served by 5.00pm on Friday 13 November 2015 if it was to be effective, and if it was not then any liability in respect of (at least) that Management Vendor came to an end.

66. The evidence of Mr Yost on behalf of Zayo on this aspect (which is not disputed) is that on the final date for service (13 November 2015) Zayo's solicitor Gibson Dunn arranged for service of the notices (in the form of the Notice of Claim) on the Defendants. Six motor cycle couriers attended at Zayo's lobby to collect and deliver the notices to the Defendants. The First to Fourth Defendants and Sixth and Seventh Defendants were all validly served before 5pm. A copy of the notice was also delivered to Macfarlanes (solicitors for (at least) Alchemy). It is not suggested by Zayo that delivery of a notice to Macfarlanes was delivery to any of the Defendants (as Mr Norbury confirmed during the course of the hearing).

67. In relation to Ms Jaggard (the Fifth Defendant) the undisputed evidence is as follows. At 14.24hrs one of the six couriers arrived at 80 Hamilton Road London SW19 1JF with the Notice of Claim to be served on Ms Jaggard. This was the address for Ms Jaggard included at Schedule 1, Part 1 of the SPA. It was no longer Ms Jaggard's address on this date. Ms Jaggard had not notified another address (as was at least permitted by Clause 12.2 of the SPA, as quoted and addressed below).

68. The courier arrived at Ms Jaggard's address for service under the SPA (80 Hamilton Road), but at which she no longer resided, at 2.24 pm. The courier was told she had moved and no longer lived at the address, being told that she had moved to New Zealand. He left the house "*taking the notice with him*" and delivered it to the First Defendant (Michael Ainger) at 4.27 pm. It is accordingly not in dispute that the Notice of Claim was not left at Ms Jaggard's address for service at or before 5pm.

69. At 19.50hrs the courier returned to 80 Hamilton Road and left a copy of the Notice of Claim at 80 Hamilton Road. Zayo accepts that, *"[t]his fact is irrelevant to the question of whether Zayo effectively served the Claim Notice on Ms Jaggard (or should be deemed to have done so; Zayo places no reliance on it"* (footnote 16 to Zayo's Skeleton Argument). Equally irrelevant to the issues that arise is Zayo's reference in its Skeleton Argument to the fact that Ms Jaggard was soon aware of the Notice of Claim (Zayo refers to an email to the new occupant of 80 Hamilton Road dated 19 November 2015 in which Ms Jaggard's husband stated that, *"We know exactly what it [the Notice of Claim] is thanks as we were notified of it via Sheree's former colleagues.").* The issue is whether there was notice complying with Clause 3.2 and within the time there specified.

70. Mr Yost referred in his statement to Gibson Dunn having attempted to contact the occupant of 80 Hamilton Road on 13 November 2015 and also the individual courier involved, *"for the purpose of obtaining evidence on whether the occupant ever took the envelope from the courier or whether the courier ever placed in the envelope in a letter box or on the ground at the premises".* He states that he understood the courier had left the courier firm and could not be traced. He also stated that attempts had been made to contact the occupant of 80 Hamilton Road, but without success to date.

71. It was not suggested at the oral hearing, and there is no evidence before me, that the Notice of Claim was taken by the occupant or posted through the letterbox. On the contrary it is common ground that the courier left with the letter and delivered it to Mr Ainger. In such circumstances, it was rightly not suggested at the oral hearing that the matter should not be determined as a matter of construction (or on a summary judgment or strike out basis) due to any possibility of further evidence emerging in the future - given that the evidence that is before the court is that the Notice of Claim was not left by the courier and was taken away with him. Had the suggestion been pursued on Zayo's behalf that Ms Jaggard was served with the Notice of Claim before 5pm by reason of any such alleged matters the Defendants also relied upon further submissions set out at paragraphs 23 of their Skeleton Argument by way of rebuttal. However in the event no such suggestion was pursued by Zayo at the hearing, and it is not necessary to consider such matters.

72. What is required in relation to the provision of notices is set out at paragraph 12 of the SPA which provides, in relevant respects as follows:-

"*12.1 Any notice or other communication given in connection with this agreement shall be in writing and signed by or on behalf of the Party giving it and shall be served by delivering it by hand or sending it by special delivery (or international signed-for airmail, if the address for service is outside the United Kingdom) to the address and for the attention of the relevant party set out in clause 12.2 (or as otherwise notified by that Party under this agreement). Any such notice* ***shall be deemed to have been received***"

12.1.1 ***if delivered by hand (including by courier), at the time of delivery****;*

12.1.2 ***in the case of special delivery****, 24 hours from* ***the date of posting****;*

12.1.3 in the case of international signed-for airmail, five days from the date of posting.

provided that provided that if deemed receipt (but for this proviso) would have occurred before 9.00am on a Business Day, the notice shall be deemed to have been received at 9.00am on that day, and if deemed receipt (but for this proviso) would have occurred after 5.00pm on a Business Day, or on a day which is not a Business Day, the notice shall be deemed to have been received at 9.00am on the next Business Day. For the purpose of this clause, "Business Day" means any day which is not a Saturday, a Sunday or a public holiday in the place at or to which the ***notice is left*** *or sent.*

12.2 ***The addresses*** *of the Parties for the purposes of clause 12.1 are:*

12.2.1 In the case of each vendor:

12.2.1.1 ***the address*** *set out opposite its name in schedule 1, and*

12.2.1.2 with a copy to the Vendors' Solicitors (marked with reference SCZP/AYC/634141);...

...

*Or such other **address** in the United Kingdom as **may** be notified in writing from time to time by the relevant Party to the other Party for the purposes of this clause.*

*12.3 In proving such service, it shall be sufficient to prove that the envelope containing such notice was addressed to the address of the relevant Party set out in clause 12.2 (or as otherwise notified by that Party under this agreement) and **delivered either to that address** or **into the custody** of the postal authorities as a special delivery or airmail letter."*

(my emphasis)

73. It is readily apparent from the express language and provisions of Clause 12 above that I have emphasised (and in particular from the language of Clause 12.3) that notice is served (where a courier is used) by delivering the notice to the address (as opposed to personal service on the individual) where the notice is left, and I so find as a matter of the proper construction of Clause 12.

74. The Defendants submit, rightly in my view, that this can be achieved, where a courier is used, by (for example) leaving the notice at the address (by one means or another) such as posting it through the letter box, or pushing it under the door or leaving it with a person at the address. That is the ordinary and natural meaning of Clause 12 which is in no way ambiguous or capable (on its face) of any other meaning.

75. Furthermore, there is nothing uncommercial or unbusinesslike about such a construction. Indeed, certainty is promoted and the parties know where they stand. Delivery is effected, and a valid notice is given, where the notice is left at the property. In this regard, I consider the purpose of Clause 12 is to set out in clear terms how any notice is to be served, and what will amount to a valid notice under the SPA (including for the purpose of Clause 3.2 of Schedule 6, and the time limit contained therein). Such notice provisions are intended to assist the person who is obliged to serve the notice by offering them choices of mode of service which will be deemed to be valid service if they are complied with. This itself promotes certainty.

76. A consequence of this is that by the effecting of such service in according with Clause 12 the notice is likely to come to the attention of the Vendor served soon thereafter, and it is no doubt a purpose of the notice that, in the normal course of events, its contents are likely to be brought to the attention of the other party, but it does not follow that the contents will necessarily be brought to the attention of the other party. In this regard, I do not accept the submission of Mr Norbury on Zayo's behalf that the purpose of Clause 12 is to bring the document to the attention of the other party. It is quite possible that valid service in accordance with Clause 12 will not bring the Notice of Claim to the attention of the Vendor. For example, this may be so as a consequence of the deeming provision in Clause 12.1.2 whereby the notice is deemed to have been received 24 hours from the date of posting even if it is lost in the post and never arrives, or in circumstances where the notice is pushed through the letterbox by a courier, but the Vendor is away (or even, as is further addressed below, has changed address).

77. As has been noted in cases concerning notices in other areas (such as landlord and tenant notices) both statutory and contractual provisions may lead to the position that valid notice has been given even

though the intended recipient does not know of it. Thus, in G*alinski v McHugh* (1988) 57 P. & C. R. 359, 365 (a case quoted by Robert Walker LJ in *Blunden v Frogmore Investments* [2003] 2 P. & C. 84, 92 which was referred to by the Defendants) Slade LJ stated in the context of section 23(1) of the Landlord and Tenant Act 1927, its object:

"is not to protect the person upon whom the right to receive the notice is conferred by other statutory provisions. On the contrary, section 23(1) is intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be deemed to be valid service, even if in the event the intended recipient does not in fact receive it." (original emphasis)

78. On behalf of Zayo Mr Norbury accepted, in his oral submissions that, *"in the literal sense of "delivered" the notice wasn't delivered"* but he continued, *"I say that delivered has to be understood differently where there has been a failure to notify a change of address."* He summarised his arguments as follows:-

"It is Zayo's case, against the factual background, that the only valid contractual delivery was when the courier first attended Ms Jaggard's former home but did not physically hand over the claim notice and your Lordship asks: why is that valid? And I have three arguments which I will now develop.

First on the proper construction of the SPA, secondly because of an implied term that w[h]ere a notification address has not to be updated valid notice is given if ***a reasonable attempt to deliver*** *at the original address is made, and thirdly, arising out of the prevention principle, a more general implied term, by reason of which the attempt of giving notice was compliant with the SPA".*

(my emphasis)

79. These submissions track those set out in paragraphs 9D to 9G of the draft Amended Particulars of Claim, served on the morning of the hearing, and paragraphs 50 to 54 of Zayo's Skeleton Argument. The former provide as follows:-

"*9D. Further, a term was necessarily implied in the SPA that no Party would prevent another Party from performing their obligations under it (the "Prevention Principle Term").*

9E. On the true construction of clause 12.1 of the SPA together with Paragraph 3.2 of Schedule 6 to the SPA, if a Party fails to notify the other Party that their address for notification (their "Notification Address") has changed, the other Party discharges his obligation to give notice under Paragraph 3.2 of Schedule 6 ***by attempting to deliver*** *(whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under clause 12.2.*

9F. Alternatively, it is an implied term of the SPA necessary for business efficacy that, if a Party fails to notify the other Party that their Notification Address has changed, the other Party discharges his obligation to give notice under Paragraph 3.2 of Schedule 6 by attempting to deliver (whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under clause 12.2.

9G. Further or in the further alternative, by moving away from her Notification Address without informing the Claimant, Ms Jaggard acted in breach of the Prevention Principle Term. Zayo therefore complied with clause 12.1 of and paragraph 3.2 of Schedule 6 by attempting to deliver to Ms Jaggard's original address and / or Ms Jaggard is debarred from contending that notice under Paragraph 3.2 of Schedule 6 was not effectively

served upon her (further or alternatively from insisting that it should have been)."

(my emphasis)

80. Whilst it is submitted at paragraphs 50 to 54 of Zayo's Skeleton Argument:-

*"50.On the true construction of clause 12.1 together with paragraph 3.2 of schedule 6, if a Party fails to notify the other Party that their address for notification (their "**Notification Address**") has changed, the other Party discharges his obligation to give notice under paragraph 3.2 of schedule 6 by making a reasonable attempt to deliver (whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under clause 12.2. That was clearly done here: the courier was left with no realistic alternative but to take the documents away with him.*

51. This commercially compelling conclusion derives support from the following points.

(1) Pursuant to clause 12.1 the only permissible methods of service are delivery by hand or by special delivery (given that, pursuant to clause 12.2, the Notification Address must be in the United Kingdom). If Zayo had sought to deliver the Claim Notice to Ms Jaggard by special delivery, the letter would have been returned as a matter of course when the occupant said that Ms Jaggard had moved. It would be beyond question that effective notice had been given. It cannot be right that (as the Defendants suggest) the position is different where a private courier unsuccessfully attempts delivery as opposed to a postwoman.

(2) If delivery were attempted by hand at a Notification Address which was demolished, the interpretation for which the Defendants contend would require the courier to leave the (confidential and commercially sensitive) Claim Notice on the rubble of the former building in order for the notice to be effective. That is obviously wrong.

(3) Similarly, if a courier (or postman) were wrongly informed by an occupant of a Notification Address that the relevant Party no longer lived there, or if the occupant refused to accept physical delivery, what is the courier (or postman) to do? It cannot be right that they should try to force the Claim Notice into the occupant's hands.

52. In the alternative to paragraph 0 above, it is an implied term of the SPA necessary for business efficacy that, if a Party fails to notify the other Party that their Notification Address has changed, the other Party discharges his obligation to give notice under paragraph 3.2 of schedule 6 by attempting to deliver (whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under clause 12.2.

53. Further or in the further alternative, having failed to notify Zayo when she changed her Notification Address, Ms Jaggard cannot insist upon Zayo performing its obligation to deliver a notice to her under paragraph 3.2 of schedule 6. To put it another way, Ms Jaggard cannot rely upon her own to default (in failing to notify Zayo when she moved away) as a defence to Zayo's claim.

*54. This is because a term was necessarily implied in the SPA that no Party would prevent another Party from performing their obligations under it (the "**Prevention Principle Term**"): see Lewison on Interpretation of Contracts (6th edition) at 6-14; Multiplex Constructions (UK) Limited v. Honeywell Control Systems Limited (No. 2) [2007] EWHC 447 (TCC) at [47]. By moving away from her Notification Address without informing*

Zayo, Ms Jaggard acted in breach of the Prevention Principle Term. She is therefore debarred from contending that the Claim Notice was not effectively served upon her (or insisting that it should have been)."

81. Dealing first with the construction argument, it will be seen that it is only dealing with the situation where a Vendor, here Ms Jaggard, has not notified Zayo of a change of address. Zayo is accordingly seeking to isolate, and differentiate, one particular situation where a notice may not come to the immediate attention of a Vendor. I consider there are a number of problems with Zayo's construction of Clause 12, and I reject that construction:-

(1) Clause 12.1 does not provide that if a Party fails to notify the other Party that their address for notification (their “Notification Address”) has changed, the other Party discharges his obligation to give notice under Paragraph 3.2 of Schedule 6 by "attempting to deliver" or making a "reasonable attempt to deliver" (whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under clause 12.2. That is not a permissible construction of any part of Clause 12 based on the contractually agreed words that are used. Nor is there any ambiguity. The provisions of Clause 12 are clear and certain in their terms. Zayo's construction would require words to be inserted and in reality would need some form of term to be implied (as implicitly recognised with the alleged implied terms as addressed below).

(2) Any such construction is not a "commercially compelling construction" as alleged. It is not a commercial construction, it would not promote certainty and indeed it would cause uncertainty. What is a qualifying "attempt to deliver", how is that different to a "reasonable attempt to deliver” and what is a reasonable attempt to deliver? The parties would be left uncertain as to what was required to effect service in circumstances where certainty is a commercial imperative given the importance of knowing whether valid service has been effected (not least in the context of Clause 3.2 of Schedule 6).

(3) Fundamentally, it is based on a mis-construction of Clauses 12.1 and 12.2 and is actually inconsistent with express terms of Clause 12. It is simply wrong to talk of an "attempt to deliver" or a "reasonable attempt to deliver" whether by hand or by special delivery. Clause 12 expressly caters for what is delivery in each case. Clause 12.1 expressly addresses, and makes plain, that in the case of special delivery notice is deemed to have been received 24hrs from the date of posting (i.e. there is valid service 24 hrs from the date of posting, and regardless of what happens thereafter in relation to the notice in terms of whether it is physically delivered, lost in the post or refused delivery). Attempts to deliver, or reasonable attempts to deliver, simply do not come into it in the context of special delivery. Equally in relation to delivery by a courier, it is plain from the provisions of Clause 12 that I have already emphasised above, that notice is served by delivering the notice to the address where the notice is to be left (as opposed to personal service on the individual). Once again attempts to deliver, and reasonable attempts to deliver, simply do not come into it - delivery is effected simply, and with certainty, by leaving the notice at the address which can easily be achieved e.g. by posting the notice through the letter box.

(4) The proposed construction is based, at least in part, on a reliance on the final words of Clause 12.2, which provide that the addresses of the Parties for the purposes of clauses 12.1 are either those specified in Clauses 12.2.1 and 12.2.2 "or such other address in the UK as **may** be notified in writing from time to time by the relevant Party to the other Party for the purpose of this clause" (my emphasis). The word used is "may" not must, and the language is therefore permissive not mandatory. There is no obligation in Clause 12.2 which it can be said has been breached by Ms Jaggard. Indeed Mr Norbury (realistically) conceded in his oral submissions that the words are permissive, *"There is then below 12.2 and above 12.2 the **permissive** requirements in relation to notification of a change of address. **I don't say that in and of itself "may" means "must"** there but your Lordship will see how I put that in relation to the implied term. But in effect the failure to notify a change of address is a breach"* (my emphasis). The fact that Ms Jaggard did not notify a change of address is not a breach of Clause 12.2. It is purely permissive if Ms Jaggard wishes to notify a change of address. If she does not the notice provisions of Clause 12 work perfectly well, not least because

they are not directed at personal service, but rather special delivery (with its deeming provision) or delivery by courier to the address (neither of which require Ms Jaggard to be physically present at the address or even still resident at the address). If Ms Jaggard chooses not to notify another address she bears the risk that a valid notice may be delayed in coming to her attention, but it does not affect the validity of the notice.

(5) As there was no obligation upon Ms Jaggard to notify Zayo when she changed her Notification Address, Ms Jaggard was entitled to insist upon Zayo performing its obligation to deliver a notice to her under paragraph 3.2 of Schedule 6. Equally there was no default on Ms Jaggard's part in not notifying Zayo she had moved away, and so no question arises of any application of any principle that a party cannot rely on their own default.

(6) The proposed construction, in reality, would require the existence of an implied term, and that such term be breached. The points made are addressed below, but in short it is not an implied term of the SPA necessary for business efficacy that, if a Party does not notify the other Party that their Notification Address has changed, the other Party discharges his obligation to give notice under paragraph 3.2 of Schedule 6 by attempting to deliver (whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under Clause 12.2. Such a term is not necessary whether for business efficacy or otherwise, does not meet the requirements for an implied term, and is in any event inconsistent with the express terms of Clause 12.2 (which is fatal to the implication of any such term). Equally to the extent that the "Prevention Principle Term" or any similar term might be implied in the SPA, any such term would not be applicable on the facts, and was not breached, and Ms Jaggard was not debarred from contending that the Notice of Claim was not effectively served on her.

82. As for the points relied upon by Zayo at paragraph 51 of its Skeleton Argument that are said to support its construction:-

(1) It is said (correctly) that pursuant to clause 12.1 the only permissible methods of service are delivery by hand or by special delivery (given that, pursuant to clause 12.2, the Notification Address must be in the United Kingdom). It is then posited that if Zayo had sought to deliver the Notice of Claim to Ms Jaggard by special delivery, the letter would have been returned as a matter of course when the occupant said that Ms Jaggard had moved, yet it would be beyond question that effective notice had been given. Zayo then submits that it cannot be right that the position is different where a private courier unsuccessfully attempts delivery as opposed to a postwoman. This entirely misses the point. In the context of special delivery notice is deemed to have been received 24hrs from the date of posting. Delivery for the purpose of Clause 12.2 has nothing to do with the postwoman attempting to deliver - delivery has already taken place. Equally there is no reason for (and no comparable situation in relation to) a private courier attempting unsuccessfully to deliver. All the courier needs to do is leave the letter at the address. Any distinctions between special delivery and use of a courier are expressly catered for in Clause 12 and are a consequence of the express language of Clause 12.

(2) It is submitted that if delivery were attempted by hand at a Notification Address which was demolished, the interpretation for which the Defendants contend would require the courier to leave the (confidential and commercially sensitive) Notice of Claim on the rubble of the former building in order for the notice to be effective, and Zayo submits that that is obviously wrong. In fact that is right, even when tested on such an extreme scenario. Clause 12 is directed at delivery to the address (see Clause 12.3, *"delivered either to that address"*) and is directed to the place at which the notice is left (see Clause 12.1, "*the place at or to which the notice is left or sent"*). Once one appreciates that delivery by a courier under Clause 12 is directed at delivery to the address or place, then delivery takes place by leaving the notice at that location - it ought to matter not if the building had been demolished. The case of *Blunden v Frogmore Investments Ltd,* to which I have already referred, concerned the service of a notice under the Landlord and Tenant Act 1954 in the context of demised premises inaccessible due to bomb damage. One member of the Court of Appeal (Robert Walker LJJ) considered that notice was validly served by it being affixed to the door of the demised premises

even though the premises were inaccessible to the tenant (Carnwarth and Schiemann LJJ finding it not necessary to decide whether that was valid service). The case turns on its own facts, but it illustrates the importance of the application of the statutory or contractual language, and highlights the possibility that a compliant statutory or contractual notice may not reach the attention of the intended recipient and yet be valid.

(3) Zayo asks if a courier (or postwoman) were wrongly informed by an occupant of a Notification Address that the relevant Party no longer lived there, or if the occupant refused to accept physical delivery, what is the courier (or postwoman) to do? Zayo submits that it cannot be right that they should try to force the Notice of Claim into the occupant's hands. Once again this misses the point. What the courier is to do in the context of Clause 12 is leave the notice at the address - for example by posting it though the letterbox or pushing it under the door. It matters not what the postwoman does, as deemed delivery has already taken place.

83. Turning then to the alleged implied terms. The requirements for the implication of contractual terms are well-established and do not require re-stating (for a recent review and summary of the applicable principles see the judgment of Lord Neuberger PSC in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2016] A.C. 742 at [16] – [21]).

84. The first of Zayo's alleged implied term is an implied term of the SPA said to be necessary for business efficacy that, if a Party fails to notify the other Party that their Notification Address has changed, the other Party discharges his obligation to give notice under paragraph 3.2 of schedule 6 by attempting to deliver (whether by hand or by special delivery) a compliant notice to the Notification Address for the relevant Party identified under clause 12.2.

85. The first point is that such a term is not necessary for business efficacy, and fails any test of necessity. It cannot be said that without such a term the contract would lack commercial or practical coherence. Clause 12 works perfectly well without it, setting out, as it does, a clear regime for delivery by special delivery or by courier. Secondly, it is based on the misconception that the Vendor is required to notify a change of address when there is no such requirement (as has already been addressed above). Thirdly, it fails to have regard to the express terms of Clause 12.2 which clearly set out how delivery is to take place and the methods of delivery are not dependant on the presence or otherwise of the Party at the address (and whether they are temporarily or permanently absent). Fourthly, it is uncertain in its ambit - what is required by way of an attempt? Fifthly, it is inconsistent with the express terms of Clause 12 which require (in the context of a courier) that the notice be left at the address which is itself fatal to the implication of any such term. For each and every one of those reasons no such term is to be implied and I so find as a matter of construction.

86. Zayo also seeks to rely on the principle that, in general, a term is necessarily implied in a contract that neither party will prevent the other from performing their obligations under it (which it refers to as the "prevention principle term") - see Lewison *on Interpretation of Contracts (6th edition)* at 6.14 and the cases there cited. There is no dispute that such a term will generally be implied into a contract, just as where performance of a contract cannot take place without the co-operation of both parties it is implied in a contract that co-operation will be forthcoming - see *Lewison on Interpretation of Contracts (6th edition)* at 6.15 and *Mackay v Dick* (1881) 6 App. Cas. 251, 263.

87. However, neither such implied term is of any assistance to Zayo. As to the former, Ms Jaggard did nothing to prevent Zayo from performing its notice obligation under the SPA. Zayo could validly serve Ms Jaggard without her notifying Zayo of any change of address and regardless of whether she was or was not present at the address or was away from the address temporarily or permanently. Equally the giving of notice did not require the co-operation of both parties, and there was no requirement that Ms Jaggard cooperated in any particular way, or notify Zayo of her change of address.

88. By moving away from her Notification Address without informing Zayo, Ms Jaggard did not act in breach of any such implied terms, and she is not debarred from contending that the Claim Notice was not effectively served upon her, as Zayo has contended. There was, in short, no breach of any such term, and nothing that could impact upon the construction of Clause 12 that I have found in relation to delivery by courier where what was required was that the notice be left at the address, which did not occur by 5pm on 13 November 2015.

89. Accordingly, for the reasons that I have identified above, and on the basis of my findings as to the proper construction of Clause 12, as applied to the undisputed facts in relation to what took place as identified above, I find that the Notice of Claim was not served upon Ms Jaggard in accordance with the provisions of Clause 12 by 5pm on 13 November 2015. It is common ground that in such circumstances, and applying paragraph 3.2 of Schedule 6, Ms Jaggard has no liability to Zayo, and I so find. Consequent upon such finding the claim against Ms Jaggard is dismissed. I have determined the matter as a matter of construction, but had I determined the matter on the basis of strike out and summary judgment I would have found that the Particulars of Claim disclosed no reasonable cause of action and should be struck out and that Zayo had no real prospect of succeeding on this issue which is determinative.

The consequences of non-service on Ms Jaggard

90. It will be recalled that the first sentence of paragraph 3.2 of Schedule 6 provides:-

"3.2 No Management Vendor shall have any liability for a Management Warranty Claim except in circumstances where the Purchaser gives notice to the Management Vendors before the date that is eighteen months of Completion."

91. The Defendants draw attention to the fact that paragraph 3.2 provides that "no Management Vendor" (singular) shall have any liability except where the Purchaser gives notice to the "Management Vendors" (plural). The Defendants submit that the ordinary and natural meaning of these words (and the contra-distinction between the use of the singular and the plural) is that a failure to notify *all* the Management Vendors (i.e. Management Vendors plural) means that none of them have any liability ("No Management Vendor" singular). In contrast, Zayo submits that the true construction is that a failure to notify a Management Vendor of a Management Warranty Claim only relieves that Management Vendor of liability.

92. "Management Vendors" are defined in paragraph 1.2 of the SPA as *"the Vendors other than Alchemy"*, whilst the "Vendors" are defined as "Alchemy and the Management Vendors"). However, the counter-parties to Zayo (defined as the "Purchaser") in the SPA are *"The PERSONS whose names and addresses are set out in part 1 of Schedule 1 (the "Vendors")",* and it is clear enough, therefore, that the Vendors are the persons whose names and addresses are set out in part 1 of Schedule 1, which is itself entitled, "The Vendors") and are Alchemy and the seven Defendants in this case.

93. I consider that the ordinary and natural meaning of the first sentence of paragraph 3.2 is that contended for by the Defendants, namely that no Management Vendor shall have any liability for a Management Warranty Claim except in circumstances where the purchaser gives notice to the Management Vendors plural (namely the seven named persons in Schedule 1 to the SPA). I do not consider that there is any ambiguity in the clause, or that the *contra proferentem* principle, if applicable, would lead to any different interpretation having regard to the first sentence of paragraph 3.2 viewed firstly on its face and then (as must be done) in the context of the other provisions of paragraph 3 and the surrounding factual matrix which I

address in due course below.

94. I reject the suggestion that it would be necessary to insert the word "all" before Management Vendors for the first sentence of paragraph 3.2 to have the meaning proposed by the Defendants. The clause has that meaning without the need to insert the word "all". It can be tested by substituting for the "Management Vendors" the "persons whose names and addresses are set out in part 1 of schedule 1" (the seven Defendants and Alchemy) so that it reads "No management Vendor shall have any liability for a Management Warranty Claim except in circumstances where the Purchaser gives notice to the [persons whose names and addresses are set out in part 1 of schedule 1]" where the contra-distinction of these words in the plural to the opening words no "Management Vendor" (in the singular) is even more apparent. In any event, to the extent that one would read in the word "all" before "Management Vendors" that would be doing no more than giving effect to the obvious objective common intention of the parties as reflected in the words they used.

95. In contrast, Zayo's construction would require that there be substituted for the "Management Vendors" (plural) the words "that Management Vendor" (singular), which does violence to the clause and is not what the clause provides for. Zayo's interpretation is not the natural commercial interpretation (as Zayo alleges at paragraph 60(2) of its Skeleton Argument) nor does this interpretation make obvious sense viewed in isolation, still less having regard to paragraph 3 as a whole (as must be done when construing the words of the first sentence of paragraph 3.2 which on ordinary principles of contractual construction are not to be construed in isolation but with regard to the entirety of the contractual provisions and the surrounding factual matrix).

96. I consider that the Defendants' construction, which reflects the ordinary and natural meaning of the first sentence of paragraph 3.2, is strongly supported by a consideration of that sentence in the context of paragraph 3 as a whole, and in particular the second sentence of paragraph 3 which, it will be recalled, provides:

"No Management Warranty Claim shall be made against any Management Vendor in respect of facts or circumstances unless a claim is made against all Management Vendors who are liable in respect of the same facts or circumstances"

This is described by the Defendants as the, "sue one, sue all clause" or perhaps more accurately, "claim against one, claim against all".

97. The clear and obvious meaning of this sentence is that no Management Warranty Claim can be made against any one Management Vendor unless a claim is made against <u>all</u> the Management Vendors who are liable in respect of the same facts and circumstances which is entirely consistent with, and supportive of, the construction of the first sentence of paragraph 3.2 as being that no Management Vendor shall have any liability for a Management Warranty Claim except in circumstances where the Purchaser gives notice of a claim to <u>all</u> the Management Vendors.

98. Zayo suggests that it makes no commercial difference to any single Management Vendor whether or not another Management Vendor is served. But that suggestion does not bear examination. It was clearly important to the Management Vendors that if one of them was sued they were all sued, even though (as the first sentence of paragraph 3 makes clear) the liability of the Management Vendors in respect of any claim for any breach of the Management Warranties was several. There are obvious potential commercial reasons why each Management Vendor would want all Management Vendors to be sued, for example to make sure that there was a disincentive to sue if Zayo was still employing some of them but not others, to make sure that Zayo could not pick and choose just the weaker financially of the Management Vendors, or to ensure

that those who would have the knowledge needed for the defence of any claims were themselves defendants and had the incentive therefore to assist in the defence of the claims.

99. Zayo also seeks to suggest that the Defendants' interpretation of the first sentence of paragraph 3.2 (whereby unless a claim is made against all Management Vendors no Management Vendor shall have any liability for a Management Warranty Claim) is not consistent with the language of paragraph 3.3 of Schedule 6 which it will be recalled provides:-

"The liability of each of the Management Vendors in respect of any Management Warranty Claim shall terminate if proceedings in respect of it shall not have been commenced by being both properly issued and validly served on the relevant Management Vendor within the period of nine months from the date on which the Purchaser gives notice of such Management Warranty Claim to the relevant Management Vendor."

Zayo submits that this provision, and the reference to "the relevant Management Vendor" suggests that particular Management Vendors may be sued without all Management Vendors having to be sued.

100. The short answer to this point is that there are some types of warranty claims (not those advanced in these proceedings) which are knowledge based, in which case Zayo might have had to go against some only (whether or not it would be wise for them to do so). That does not mean, however, that Zayo does not have to give notice of the claim to all the Management Vendors under the first sentence of paragraph 3.2.

101. In the above circumstances I am satisfied, and find as a matter of construction, that the ordinary and natural meaning of the first sentence of paragraph 3.2 is that contended for by the Defendants, namely that no Management Vendor shall have any liability for a management Warranty Claim except in circumstances where the purchaser gives notice to the Management Vendors plural (namely the seven named persons in Schedule 1 to the SPA). Accordingly, as Ms Jaggard was not validly served no Management Vendor (i.e. none of the Defendants) is under any liability to Zayo. Consequent upon such finding the claim against each of the Defendants is dismissed. I have determined the matter as a matter of construction, but had I determined the matter on the basis of strike out and summary judgment I would have found that the Particulars of Claim disclosed no reasonable cause of action and should be struck out and that Zayo had no real prospect of succeeding on this issue which is determinative in relation to each Defendant.

102. On that basis, it is not strictly necessary to consider two subsidiary arguments advanced by the Defendants. The first is that the second sentence of paragraph 3 of Schedule 6 (as quoted above) must be read as meaning that since a claim cannot and is not being made against Ms Jaggard, even though she was liable as much as the other Defendants, no claim may be made against any Defendant. Again, I consider that this accords with the ordinary and natural meaning of the second sentence of paragraph 3. Against this Zayo submits that Zayo is making a "claim" against Ms Jaggard and the position is simply that Ms Jaggard has a defence that is not available to any other Management Vendor - it is said the claim need not be a "successful" claim. The short answer to this is that the relevant claim is a "Management Warranty Claim" which is defined in Clause 1 of Schedule 6 as "*any claim by the Purchaser in respect of any breach of the Management Warranties*", and thus a Management Warranty Claim is not a suit or set of proceedings it is an assertion of a claim. In the present case, applying the second sentence of paragraph 3, a claim was made by Notice of Claim against six of the Management Vendors but a claim was not made by serving notice against Ms Jaggard. Therefore, no claim can be made against all the Management Vendors. Accordingly, I find that the second sentence of paragraph 3 is an alternative basis on which no claim can be made against all the Defendants (including the other six Defendants), and that all the Defendants are entitled to have the claim dismissed against them for this further reason.

103. The second subsidiary argument of the Defendants is made by reference to the final sentence of paragraph 3 which it will be recalled provides:-

"For the avoidance of doubt, the liability of a Management Vendor in respect of any Management Warranty Claim may be released or satisfied only if the liability of all the Management Vendors who are liable in respect of the same facts or circumstances is released or satisfied on the same terms."

104. The Defendants submit that the purpose of this clause is that having started action against (all) Management Vendors, it is not open to Zayo to settle with, or give up against, some only of them, precisely because it would circumvent the intent of the sue one, sue all clause. It is further submitted that in order that a construction is placed upon the contract which would prevent Zayo from being able to circumvent the intent of paragraph 3 by simply electing not to service notice of claim on their preferred Management Vendors, it should be held that a non-service of a notice of claim which operates to relieve a Defendant of liability under paragraph 3.2 is a release of liability caught by Clause 3. As such the other Defendants are entitled to an equal release and the claims against them should fail (see paragraph 3 of the Application Notice).

105. The short answer to this point is that a non-service of a notice of claim which results in the Defendant not having any liability (by virtue of the wording of the first sentence of paragraph 3.2) is not a "release" of liability or "satisfaction" of liability for the purpose of the last sentence of paragraph 3, the relevant Defendant is simply under no liability. Accordingly, this point would not have assisted the Defendants had I been against the Defendants on the proper construction of the first sentence of paragraph 3.2 and the second sentence of paragraph 3.

106. In the light of my above findings which have led to the dismissal of the claims the other applications that the Defendants make are academic. I will, however address them as they have been fully argued before me.

F. The Proper Construction of the Second Sentence of Paragraph 3.2

107. Before turning to the next set of issues (those concerning the measure of loss) it is first appropriate to address the issue as to what is the proper construction of the second sentence of paragraph 3.2 and what that sentence requires of the notice. It will be recalled that this provides:-

"The notice must be in writing and state in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail) and a reasonable estimate of the amount claimed, with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under this schedule 6."

108. Perhaps surprisingly the parties were in disagreement as to how this sentence was to be construed. The Defendants submitted that the notice must be in writing and state:

(a) in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail) and

(b) a reasonable estimate of the amount claimed,

(c) with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under this Schedule 6.

109. In contrast Zayo submitted that the notice must be in writing and state (to the extent that the Purchaser is aware of such detail):

(a) in reasonable detail the nature of the Management Warranty Claim; and

(b) a reasonable estimate of the amount claimed,

In each case with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under this Schedule 6.

110. It will be seen that the effect of Zayo's construction would be that the words at the end (after the comma in the sentence) apply to all that has gone before. Zayo submits this assists as to what the reasonable detail in (a) and reasonable estimate in (b) means - Zayo says it is reasonably sufficient detail to allow the Management Vendors the ability to exercise their other rights under Schedule 6. Thus, they say that the purpose of the notice prescribed by paragraph 3.2 of Schedule 6 is to "allow the management Vendors the ability to exercise their other rights", and Zayo points out that in the present case there are no other rights to be exercised under Schedule 6 (which the Defendants accept). Zayo submits that the Defendants' complaints regarding the Notice of Claim have no commercial or practical significance and it is said they are purely formalistic and made in a vacuum.

111. The Defendants' riposte is that if Zayo's interpretation is right the clause is commercially meaningless (yet one should normally strive to give commercial meaning and effect to clauses in commercial contracts) and the Defendants' construction gives it a purpose which is that parts (a) and (b) on the Defendants' construction require the Defendants to be given in reasonable detail the nature of the claim and a reasonable estimate of the amount claimed which are perfectly standard requirements of notification clauses under SPAs the purpose of which is to give the recipient advance warning so that the recipient can investigate the claim and work out whether there is anything in it, so that the recipient can settle it, set aside money or take steps to come up with an amount to pay if there is anything in it.

112. The starting point is the language of the second sentence itself. It is capable of only one construction in my view, and that is the construction advocated by the Defendants. This is based upon, and tracks precisely, the structure, and words, of the sentence itself, and in the order, and with the punctuation, used. If one then tests whether this gives a commercial and businesslike construction to the clause it clearly does - the recipient must have reasonable details of the nature of the Management Warranty Claim (which is qualified to the extent that the Purchaser is aware of such detail) and he must have a reasonable estimate of amount of the amount claimed for the purposes identified by the Defendants - such matters are standard requirements of notification clauses such as those to be found in the cases I have already referred to, and reflect the commercial purpose of such clauses. The present clause also requires that there must also be reasonably sufficient details in order to allow the Management Vendor to exercise any other rights they may have under Schedule 6, but that does not detract from the requirements that have gone before. A further point to note is that the language is that of objective reasonableness.

113. In contrast, Zayo's construction does violence to the language, structure, and punctuation that appears in the second sentence of paragraph 3.2. The words "to the extent the Purchaser is aware of such detail" (emphasis added) clearly only qualify the words, "state in reasonable detail the nature of the

Management Warranty Claim" (emphasis added) rather than all that follows after "the notice must be in writing". The words after the comma are clearly separated from what goes before by the comma, and do not apply to what has gone before. To achieve the construction it seeks Zayo has to add the words "in each case" before continuing, "with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under this schedule 6" yet these words are not in the clause and there is no warrant for reading them in. What is more, if one then tests Zayo's construction, the clause is commercially meaningless as has already been identified - there are, in the present case, no rights that can be exercised under Schedule 6 which would be protected by the provision of reasonable detail of the claim and reasonable estimates of the amount claimed.

114. In the above circumstances I am satisfied, and find, that the proper construction of the second sentence of paragraph 3.2 is that advocated by the Defendants namely that the notice must be in writing and state:

(a) in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail), and

(b) a reasonable estimate of the amount claimed,

(c) with reasonably sufficient details in order to allow the Management Vendors the ability to exercise their other rights under Schedule 6.

G. Measure of Loss Claimed

115. A number of the applications concern aspects of the measure of loss claimed, specifically (a) the measure of loss claimed in the Claim Form and Particulars of Claim in respect of the Claims (Paragraph 6 of the Application Notice) (b) the measure of loss claimed in relation to the NMC, Lift and Shift and H3G Claims in the Notice of Claim (Paragraph 5 of the Application Notice), and (c) the measure of loss claimed in the Notice of Claim and in the Claim Form and Particulars of Claim in respect of the Power Usage Overcharge Claims (paragraphs 8 and 10 of the Application Notice). Such issues also give rise to a consideration of Zayo's application for permission to amend the Claim Form and Particulars of Claim.

116. It is well established, and not disputed by Zayo (see paragraph 77 of Zayo's Skeleton Argument), that the measure of loss for breach of warranty as to shares in a share sale and purchase agreement is the difference in value between (1) the value of shares purchased if the warranties had been true (usually, but not necessarily, the price paid), and (2) the actual value of the shares (i.e. in the light of the breach of warranty) – see, for example, *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB) where Popplewell J stated as follows:

"*The measure of loss for breach of warranty in a share sale agreement is the difference between the value of the shares as warranted and the true value of the shares: Lion Nathan Ltd. V C-C Brothers Ltd; [1996] 1 WLR 1438, 1441F-H, Eastgate Group Ltd v Lindsey Morden Group Inc [2002] 1 WLR 446.*"

117. In the Claim Form and the Particulars of Claim it is asserted in relation to the NMC Claims, the Lift and Shift Claims and the H3G Claims, that Geo had paid monies (see paragraphs 17, 25 and 31 of the

Particulars of Claim). It is then asserted that Zayo is entitled to seek damages in those sums (paragraphs 18, 26 and 32 of the Particulars of Claim) – in effect Zayo is claiming an indemnity in respect of the loss suffered not by it but by Geo. The Particulars of Claim do not in fact claim that Zayo has suffered a loss, still less that such loss is reflected in a diminution in value of the shares. Nor do they allege that what was actually spent is a reasonable estimate of the diminution in net asset value (quite apart from the potential difficulty for Zayo that the sums paid were paid by Geo).

118. Mr Norbury, in his oral submissions, realistically accepted that the loss claimed in the Claim Form and Particulars of Claim in respect of these three claims was "legally-misconceived". That is clearly right. The sums claimed do not reflect the measure of loss for breach of warranty in a share sale agreement. Nor, importantly, were they claimed as representing the diminution in value of the shares. Accordingly, the Particulars of Claim prima facie stand to be struck out as disclosing no reasonable grounds for bringing the claim, or on the basis that Zayo has no real prospect of success in advancing such loss claims. In this regard, it is to be noted that in the draft Amended Particulars of Claim these claims are now advanced on the basis of alleged diminution in value, and the previous claims based on sums paid by Geo Networks are struck through (i.e. abandoned).

119. Zayo's riposte is to submit that loss is not necessary to constitute a valid cause of action, and that Zayo would have a claim for nominal damages. However, the short answer to that point is that there are provisions in the SPA that limit what the Purchaser is entitled to recover by reference to deductibles and aggregates. In this regard paragraphs 2.1 and 2.2 of Schedule 6 provide as follows:-

"*2.1 there shall be disregarded for all purposes (including the application of the threshold in paragraph 2.2) any single Management Warranty Claim (and, for these purposes, a number of Management Warranty Claims arising out of the same or similar subject matter, facts, events or circumstances may be aggregated and form a single Management Warranty Claim) in respect of which the amount which the Purchaser would otherwise (but for the provisions of this para 2.1) be entitled to recover would be less than £50,000 (excluding interest, costs and expenses);*

"*2.2 subject to paragraph 2.1, the Purchaser shall not be entitled to recover any amount in respect of a Management Warranty Claim unless the amount Recoverable, when aggregated with all other amounts Recoverable for Management Warranty Claims, exceeds £437,500 (excluding interest, costs, and expenses), in which event only the excess over the Deductible (excluding interest, costs and expenses) will be recoverable by the Purchaser and not the whole amount.*"

120. Thus, absent claims which exceed the deductible and in total exceed £437,500 there is no sustainable cause of action. In any event, even had a claim for nominal damages been available, that would not have been a reason to decline to strike out the offending paragraphs that claim loss on a basis that is wrong in law. Such a claim should not be allowed to proceed.

121. I am satisfied that the Particulars of Claim disclose no reasonable grounds for the bringing of the claim in relation to the loss claimed and accordingly were the claims not dismissed in any event due to the findings I have made in relation to service of the Notice of Claim, I would strike out the Particulars of Claim. If necessary I also consider that Zayo had no real prospect of success on such claims and as such the Defendants would be entitled to summary judgment in relation to the loss claim as advanced in the Particulars of Claim.

122. Zayo submits, however, that I should give permission to amend the Particulars of Claim to advance claims which are based on a diminution in value. That application does not in fact arise given the findings I

have made, and relief I have granted, on the basis that there was no valid service on Ms Jaggard with the consequences that I have found in relation to all Defendants. However, leaving all such points to one side, and considering the application on the basis that such points did not apply, the short answer (as will become readily apparent when considering the measure of loss claimed in the Notice of Claim as addressed below), is that the claims in the Notice of Claim in relation to the NMC Claims, the Lift and Shift Claims and the H3G Claims were not advanced on a diminution in value basis, but rather as claims for sums said to have been paid by Geo Networks. Accordingly any amended Particulars of Claim, claiming on a diminution in value basis would not be the claim that was advanced in the Notice of Claim and so would fall foul of the first sentence of paragraph 3.2 of Schedule 6, no such claim having been brought within eighteen months of Completion. I refuse Zayo permission to amend the Claim Form and Particulars of Claim in the respects sought, first because of the findings I have made in relation to service and the consequences of the same having regard to the provisions of the SPA, and secondly because such claims are not arguable, given that no such loss claim was advanced in the Notice of Claim.

123. The Power Usage Overcharge Claims falls into a different category, but the result is the same. A claim based on diminution in value was advanced in the Notice of Claim, but that was not the claim advanced in the Particulars of Claim, which was a claim for an indemnity. The point is academic as Zayo no longer pursues the claim for an indemnity (as was confirmed in Zayo's Skeleton Argument), but such claim discloses no reasonable ground for bringing that claim, first as it is not the claim advanced in the Notice of Claim (and so falls foul of the effect of paragraph 3.2 of Schedule 6), and secondly because the measure of loss claimed is wrong in law (Application Notice paragraph 10). Accordingly the Particulars of Claim in relation to the Power Usage Overcharge Claims would stand to be struck out. Further, it would not be an appropriate case to grant permission to amend the Claim Form and Particulars of Claim in relation to the Power Usage Overcharge Claim in the context of the findings I have made in relation to service of the Notice of Claim and the consequences of the same, and in such circumstances I refuse the application for permission to amend the Particulars of Claim in that regard as well.

H. The Measure of Loss and Reasonable Estimate in the Notice of Claim

124. It will be recalled that the second sentence of paragraph 3.2 of Schedule 6 to the SPA provides (amongst other matters) that a Notice of Claim must be in writing and state in reasonable detail the nature of the Management Warranty Claim (to the extent the Purchaser is aware of such detail) and "a reasonable estimate of the amount claimed". The Defendants submit that the claims that were advanced by Zayo in the Notice of Claim in relation to the NMC Claims, the Lift and Shift Claims and the H3G Claims on the basis of amounts paid by Geo Networks which it totalled and then claimed itself (on the final page of the Notice of Claim) were not a reasonable estimate of the amount claimed, as they did not even assert that Zayo had suffered a diminution in value of the shares it had purchased (the correct measure of loss for any alleged breach of the Management Warranties), still less attempt to quantify the loss on such basis by identifying what earnings measure was to be used, what multiplier was to be applied, and by how much it was alleged the earnings measure ought to fall by reason of the breach of warranty.

125. I have already addressed why I consider that the words "a reasonable estimate of the amount claimed" are a separate requirement (and as such separate from the requirement to state in reasonable detail the nature of the claim). Equally in relation to the words that qualify such latter requirement i.e. "to the extent the Purchaser is aware of such detail" these do not (as alleged by Zayo at paragraphs 70 and 71 of its Skeleton Argument) qualify that requirement by reference to Zayo's subjective knowledge. The terms of the second sentence of paragraph 3.2 are objective. The words in brackets simply qualify what needed to be stated as to the nature of the claim by reference to what knowledge the Purchaser has – in other words he is not required to state the detail as to the nature of the claim beyond that which he has knowledge of.

126. I reject the suggestion that the qualifying words in brackets "disposes – at least for the purposes of

the Application - of the Defendants' complaints that the [Notice of Claim] failed to state "*a reasonable estimate of the claim*" (Zayo's Skeleton paragraph 71). First, the requirement to state a "reasonable estimate of the amount claimed" is a separate requirement to stating in reasonable detail the nature of the Management Warranty Claim and the words of qualification relate to the latter, and those words of qualification do not apply to the reasonableness of the estimate as a matter of the language and proper construction of the second sentence of paragraph 3.2 of Schedule 6. Secondly, Zayo chose consciously to advance its claim in relation to the NMC Claims, the Lift and Shift Claims and the H3G Claims on the basis of amounts paid by Geo which it totalled and then claimed itself (on the final page of the Notice of Claim). It cannot have been ignorant of the possibility of a claim based on diminution in value of the shares given that, in contrast, in relation to the Power Usage Overcharge Claims, it did advance its claim on the basis of diminution in value. Thirdly, there is no suggestion that Zayo would not have been able to have advanced a claim on the basis of diminution in value in relation to the NMC Claims, the Lift and Shift Claims and the H3G Claims in the context of such knowledge as it had, if it had chosen to do so. Indeed it clearly could have done so – as is reflected not only in the claims sought to be advanced in the draft Amended Particulars of Claim but also in the arguments advanced by Mr Norbury in relation to the issue as to a "reasonable estimate".

127. Thus, Mr Norbury submitted that:-

"…*the diminution in value in this case for the three claims was that the diminution in value in this case for the three claims where this complaint is made was a net asset value diminution value rather than a question of EBITDA and multiples, and in those circumstances, the difference between the provision made and what was actually eventually spent in relation to that liability is a perfectly reasonable estimate of the diminution in net asset value, because without any other information one can assume that the best estimate at the time provision was made was what the expenditure proved to be, in the absence of any other information.*"

Zayo could have claimed on that basis in the Notice of Claim, but it did not do so. Instead it claimed for an indemnity based on the losses said to have been incurred by Geo.

128. There was some debate before me as to whether an estimate that is based on a measure of loss that is wrong in law can ever be a reasonable estimate. I do not consider it appropriate to rule upon that hypothetical question. All clauses have to be construed in context and I can see no utility in expressing views which might be of wider application than the present case.

129. On the facts of this case, I do not consider that the Notice of Claim contains a reasonable estimate of the amount claimed in respect of the NMC Claims, the Lift and Shift Claims and the H3G Claims. Whether or not this is a point of general application in every case, the sums claimed are based on sums paid out rather than the impact of the breach of the Management Warranties upon the value of shares purchased and so they are not based on the correct measure of loss. That does not amount to a reasonable estimate on the facts of this case (in circumstances where Zayo was alive to the difference between a claim based on diminution in value and a claim for an indemnity, and chose to advance the latter). This is not a technical point – the failure to estimate the loss by reference to the correct measure of loss engages the commercial purpose of such notification clauses - the Defendants would not be in a position to estimate their liability on the basis of the loss claimed should they wish to put monies aside or pay a particular claim or reach a settlement on a particular claim (see *Ipos* at [19] quoting from *Senate Electrical* at 90).

130. Furthermore, the claims are effectively claims for repayment of sums paid out, and paid out not by itself but by Geo. As such that does not amount to a reasonable estimate of the amount recoverable for the breach of Management Warranties. Yet further, even if the claims had been advanced as claims for diminution in value (which they were not) they would have been lacking information on such matters as what provision it was alleged should have been made for the alleged breaches, and with what impact on

maintainable earnings, and with what impact on value. Equally whilst there is an assertion in the Notice of Claim that the accounts failed to make adequate provision in relation to NMC, Lift and Shift and H3G the Notice of Claim fails to set out what it is alleged such provision should have been (see paragraph 7 of the Application Notice).

131. This Notice of Claim accordingly failed to provide a reasonable estimate of the amount claimed, and so did not comply with the requirements of the second sentence of paragraph 3.2 of Schedule 6 with the result that any liability which the Defendants might otherwise have had for them came to an end. Accordingly Zayo has no real prospect of succeeding on such claims and had the claims in the action not been dismissed in relation to the service issues I would have granted summary judgment in the Defendants' favour on the reasonable estimate issue in relation to the NMC Claims, the Lift and Shift Claims and the H3G Claims.

132. I consider that there was no reasonable estimate of the Power Usage Overcharges Claim either but for different reasons (see paragraph 9 of the Application Notice). Whilst it does purport to advance a claim by reference to a “diminution in value” it did not provide any numerical estimate at all, talking instead of “a material diminution in value” and then later of “the applicable multiple of £397,795.38” without identifying what the outcome of the multiplication exercise resulted in, in circumstances where (a) Zayo could not properly have formed the view that such sums amounted to £397,795.38 given that the Particulars of Claim assert that their estimate was in the region of £120-£130,000 (see paragraph 21(a) of the Application Notice), and (b) in circumstances where the Particulars of Claim make clear that the alleged overcharges were spread over six years (see paragraph 9 of the Application Notice). Equally Zayo failed to say in the Notice of Claim what the accounts should have provided (see paragraph 8 of the Application Notice). On any view the Defendants would not be in a position to estimate their liability on the basis of the loss claimed should they wish to put monies aside or pay the claim or reach a settlement on the claim.

133. The Notice of Claim accordingly failed to provide a reasonable estimate of the amount claimed in relation to the Power Usage Overcharges Claim, and so did not comply with the requirements of the second sentence of paragraph 3.2 of Schedule 6 with the result that any liability which the Defendants might otherwise have had for such claim came to an end. Accordingly Zayo has no real prospect of succeeding on such claim and had the claim in the action not been dismissed in relation to the service I would have granted summary judgment in the Defendants' favour on the reasonable estimate issue in relation to the Power Usage Overcharges Claim.

I. Other Allegations Re: Reasonable Estimate of Loss and Reasonable Details of the Claim

134. There are further points made in the Application Notice in similar vein in relation to the alleged lack of a reasonable estimate or an alleged failure to give reasonable details of the nature of the Management Warranty Claim. Zayo says that the latter in particular involves contested issues of fact rendering the points unsuitable for determination on a summary judgment basis or giving rise to compelling reasons as to why there should be a trial for the purpose of CPR 24.2(b). The Defendants in response submit that, on analysis, the points made by the Defendants do not depend on contested issues of fact rendering them unsuitable for summary judgment, and that each point, considered individually does not turn on contested issues of fact.

135. Given the findings that I have made on service and the consequences of the same, and the findings that I have made on the issues already addressed above on various other paragraphs of the Application Notice, I do not consider there is any utility in addressing these further points at great length. I will however set out my findings on such matters and my reasons for the same:-

(1) Zayo did not, in the Notice of Claim address the consequences of applying the deductible and the

apportionment between Defendants (see paragraphs 2.2 and 3.1 of Schedule 6 and Schedule 1 Part 1) or between claims (some of which might succeed or fail). The Defendants submit that in such circumstances the Notice of Claim did not provide the recipients of the Notice of Claim with a reasonable estimate of the amount being claimed against them (and each of them). I would not have given summary judgment or struck out the claim in relation to that allegation, as I consider that Zayo would have had a real (more than merely arguable) case that the failure to address such matters did not (in of itself) mean that the estimates were (for that reason) not a reasonable estimate. The point is academic in the light of my other findings.

(2) In relation to the NMC claims the Defendants submit that it was not reasonable for Zayo to provide an estimate for the NMC claims which did not distinguish between the two different claims being made (paragraph 12 of the Application Notice). I consider that the fact that the Notice of Claim did not distinguish between the two claims being made does mean that it is not a reasonable estimate – it is a further reason why what was claimed in relation to the NMC Claims was not a reasonable estimate. Not only was an inappropriate measure of loss claimed (claiming an indemnity for sums paid out by Geo), but by putting a possible combined settlement of two claims together, the Defendants were not in a position, had they decided that they wanted to admit and pay a claim based on one of the NMC pieces of litigation, to know how much to pay in respect of that claim. I consider that that is a further reason why Zayo failed to provide a reasonable estimate of the amounts claimed, rendering the Notice of Claim invalid for this further reason.

(3) A similar point is made in relation to the Lift and Shift Claims (paragraph 17 of the Application Notice). These were two distinct alleged obligations to relocate works yet the claim was for the combined sum of the two. The sums were paid separately (and so this is not a case of a combined settlement as was the case in relation to the NMC claims). Once again if the Defendants had wanted to pay one of the claims but not the other they would not have been in a position to know how much to pay. I consider that that is a further reason why Zayo failed to provide a reasonable estimate of the amounts claimed, rendering the Notice of Claim invalid for this further reason.

(4) I am of the same view in relation to the Power Usage Overcharge Claims (the subject-matter of Application Notice para 21(b)). Zayo alleges that two different types of overcharge occurred. Once again as there was no differentiation between the two alleged categories of overcharge the Defendants were not in a position to ascertain how much was claimed in respect of each and were not in a position, were they so minded, to pay one claim but not the other.

(5) The subject matter of paragraphs 13 and 14 of the Application Notice involve an allegation that the Notice of Claim gave what is said to be a misleading impression of the claims being made against Geo by NMC as they stood as at the date of the Notice of Claim and, as such, reasonable detail of the claim was not stated. It is said that it was unreasonable to state the claim in the way Zayo did because it is said that to do so was misleading. The assertion was that NMC had made demands for £2.77m and £2.2m on the respective claims. The Defendants submit that by the time of the Notice of Claim letter (and prior to settlement of the claims by Zayo for the sums which are now claimed from the Defendants and which were said to be reasonable estimates of the amount due in the Notice of Claim) (a) it was clear that the alleged demand for £2.2m was by way of a counterclaim to a claim by Geo Networks for defective work (which was not mentioned in the Notice of Claim) and (b) the claims actually advanced by NMC were for £1,630,000 and £370,975. It is said that in the absence of those points, the amount claimed (£1,350,000 against an asserted £4,990,000) might have encouraged some sort of payment, whereas (undisclosed in the Notice of Claim), NMC's claims were for £2,000,000 but Geo also had its own claim for defective work, and as such a payment of £1,350,000 might seem a lot. The Defendants submit that the impression given was a misleading one and cannot amount to reasonable detail of the nature of the claim. I consider that there is some considerable force in the Defendants' criticisms of the detail of what was stated in Notice of Claim in the respects identified. However what amounts to reasonable detail is context specific (see *ROK* at [67]) and a question of degree, and I would not have given summary judgment or struck out the claim in relation to that allegation, as I consider that Zayo would have had a real (more than merely arguable) prospect of establishing at trial

that it had given reasonable detail of the nature of the claim. The point is academic in the light of my other findings.

(6) The Defendants also submit that the Notice of Claim failed to provide reasonable detail of the nature of the H3G claim (paragraph 19 of the Application Notice). First, it is said that there was no indication of what amounts were being claimed by H3G, nor on what basis beyond a reference to "amounts that had not yet been invoiced" with the result that the Defendants could not have known what was the basis of the amount estimated as a loss (£219,000). Secondly, Zayo did not state that the sum claimed represented an amount for which Geo Networks had already settled its dispute with H3G rather than a "preliminary estimate" as it was described. Thirdly, Zayo claimed a sum of £219,000 whereas it now claims the sum of £262,800. The difference appears to relate to a failure to claim VAT in the Notice of Claim. It is said that this is no excuse for providing a wrong figure for the amount claimed, and that it was unreasonable to assert a claim to £219,000 when (had it been entitled to claim an indemnity) the claim should have been for the full amount. I consider that there is some force in the Defendants' criticisms of what was stated (and not stated) in the Notice of Claim in the respects identified. However I would not have given summary judgment or struck out the claim on this basis, as I consider that Zayo would have had a real (more than merely arguable) prospect of establishing at trial that it had given reasonable details of the nature of the claim and a reasonable estimate of the claim. The point is academic in the light of my other findings.

J. Exclusion of Liability where Provision Made in the Accounts

136. There is a short point of construction, which can be finally determined on the merits upon a consideration of paragraph 5.1 of Schedule 6 of the SPA which relates to the NMC Claims and the H3G Claims, and concerns the fact that some provision was made for these claims in the accounts (as is common ground) but Zayo asserts that the provision that was made was insufficient (paragraphs 15 and 20 of the Application Notice).

137. Paragraphs 5 and 5.1 of Schedule 6 of the SPA provides:

"*5 No Management Vendor shall have any liability in respect of any Management Warranty Claim:*

5.1 to the extent that provision or reserve in respect of the liability or other matter giving rise to the claim in question was made in the Accounts, which could be reasonably demonstrated from the audit papers and other books and records of the Group."

138. The Defendant submit that paragraph 5.1 of Schedule 6 of the SPA excludes any liability for cases in which provision had been made in the accounts for such liability, and that on a proper construction that exclusion operates whenever there was a provision regardless of whether the provision was or was not adequate. The Defendants state (at paragraph 53 of their Skeleton Argument) that the pure language of paragraph 5.1 taken in isolation might give rise to ambiguity as to whether the meaning is that IF there is a provision there is no liability (as they submit is the natural and correct meaning), or, as Zayo submits, the meaning is that there is no liability for such sums as are provisioned for but there is liability for sums over and above the actual provision which should have been provisioned, relying upon the words "to the extent that" which might suggest that the clause is intended simply to state that the only liability will be for sums "unprovisioned for".

139. The Defendants submit that paragraph 5.1 has to be construed against the whole contractual background (as is clearly right). They say that it goes without saying that if a provision is made for £100,000,

and should have been made for £1,000,000, Zayo cannot claim for £1,000,000 but only for £900,000. They submit that if that is what is being stated then this gives no commercial purpose to the clause as it is, as they put it, a re-statement of the “blindingly obvious”. In contrast (say the Defendants) the clause has an obvious and real commercial purpose if it means that no claim can be brought if a provision is made. The clause flags up that a provision has been made for a potential claim, it is a case of “buyer beware” – the Purchaser is put on notice that something has been provisioned, and provisioning is by its very nature an exercise in estimation and judgment since it is dealing with an unknown sum which will only be determined in the future. It is then over to the Purchaser to investigate, if it wishes, and then form a view on what impact it has on the valuation of the business. In other words, the clause places the risk on the Purchaser in such circumstances as to whether the provision will be sufficient. It is submitted that not only is this a perfectly commercially sensible interpretation, it is the only possible explanation for the existence of the clause.

140. In contrast, Zayo submits that the Defendants' construction is inconsistent with a natural reading of paragraph 5.1, and that the words “to the extent that” mean what they say: the Management Vendors' liability in respect of a liability for which an inadequate provision is made is reduced by the amount of that provision. Zayo also points out that the Defendants' construction would mean that if any provision is made in respect of a liability then no Management Warranty Claim can be sustained however great the liability. Zayo submits that this would be commercially absurd and would mean that the Management Vendors escaped liability if (in the absence of fraud) they made a provision of £1 in respect of a £10 million liability. It recognises that its construction of paragraph 5.1 is to state the blindingly obvious, but it is pointed out that contractual provisions are often confirming points for the avoidance of doubt, and indeed there are examples in the SPA, such as paragraph 9 of Schedule 6 which provides that the Management Vendors shall not be liable for any Management Warranty Claim to the extent that the subject matter of the Management Warranty Claim has been or is made good or is otherwise compensated for.

141. Ultimately the proper construction of paragraph 5.1 is a short point of construction and it does not bear over analysis. The starting point is that it is an exclusion clause and if ambiguous it is to be construed if not *contra proferentem* then narrowly. Here there are two possible meanings, and one of them represents the correct construction i.e. that which reflects the objective common intention of the parties – it is that construction that the Court should identify. Both parties accept, and indeed urge, that where (as in this case) there are alternative possible constructions of a contractual provision the Court should pick the construction which accords most closely with business common sense in the light of the relevant factual matrix (as identified in the authorities addressed above).

142. The context of this paragraph is the sale and purchase of the shares of a company in which certain warranties are given, but the extent to which claims can then be made is regulated and circumscribed by the provisions of Schedule 6 (which is headed “limitations on liability”) and which go to cut down the liability that the vendors might otherwise have. As Mr Aldridge pointed out in his oral submissions, rightly in my view, part of that context is that the amount of a provision to be made in accounts for an as yet unknown quantum of liability is a matter of judgment and can be a source of significant debate as to whether in the circumstances it is adequate or not, and a vendor may wish to limit his liability in respect of that as yet unknown quantum of liability and pass the risk for some possible outlay, where some form of provision has been made (that could reasonably be demonstrated from the audit papers and other books and records of the Group) to the purchaser.

143. I consider that paragraph 5.1 is just such a provision, and to so construe it accords most closely with business common sense. It transfers risk to the Purchaser by putting them on notice about the potential outlay. Having been put on notice (“buyer beware” as the Defendants put it in their Skeleton Argument) the Purchaser can then decide whether they are satisfied with the provision or whether they want to seek warranties in relation to particular provisions or whether they want to seek to reduce the price, all as part of the contractual negotiations. So construed, paragraph 5.1 limits the Vendors' liability, but in a manner that is entirely consistent with the commercial context, and gives paragraph 5.1 substance and content and is the

construction that most closely accords with business common sense.

144. Furthermore, the words “to the extent” are perfectly capable of carrying the same meaning as the word “if”, and such a meaning is a natural meaning of those words, and one that accords with commercial common sense and how the provision would have been perceived by the parties or a reasonable person in the position of the parties (i.e. objectively) as at the date the SPA was made (see *Arnold v Britton* at [19]). The present case is not one of true ambiguity – placed in its documentary, factual and commercial context the meaning of the words is ultimately clear. A reasonable person having all the background knowledge which would have been available to the parties would have understood the parties to be using the language in the contract to mean that if a provision or reserve was made in respect of the liability or other matter giving rise to the claim in question the Vendors would have no liability.

145. In contrast, the meaning ascribed to paragraph 5.1 by Zayo would (as Zayo accepts) be a statement of the blindingly obvious and not in any real sense an exclusion or limitation of liability. Whilst it is true that the SPA (and indeed Schedule 6) does contain provisions which could be described as confirming points for the avoidance of doubt, this really would be a provision that was so obvious that it went without saying and such a construction would serve no commercial purpose and would not be the construction which accords most closely with business common sense. Furthermore, the example given by Zayo to test the commerciality of the Defendants' construction is artificial, and neither reflects reality, nor has regard to the purpose of the paragraph. As to the former, it is inherently unlikely that there would ever be a provision of a very small amount such as £1. But more fundamentally, and as to the latter, the very fact of the making of a provision (whatever its size) puts the Purchasers on notice as to the possible future outlay, and it is then up to the Purchasers what they wish to do in terms of whether they are satisfied with the provision (and content to take the risk) or whether they want to seek specific warranties, or whether they want to seek to reduce the price, all as part of the contractual negotiations.

146. In the above circumstances I find that, as a matter of construction of paragraph 5.1 of Schedule 6 to the SPA, if a provision or reserve in respect of a liability or other matter giving rise to a claim was made in the Accounts then no Management Vendor has any liability in respect of that claim. As provision was made in the Accounts in relation to the subject matter of the NMC Claims and the H3G Claims, those claims would stand to be dismissed had all claims not been dismissed in any event in the context of the service issues in relation to the Notice of Claim that have already been addressed.

K. The Lift and Shift Claims and IAS 37.14

147. A discrete point arises in relation to the Lift and Shift Claims. Zayo alleges that provision should have been made in the accounts for costs of relocation works at Tortworth and Hopetoun where the Defendants were aware that there might be a liability to counterparties to easements who, for example, might want to develop their land and be entitled to demand that Geo Networks relocate their fibre optic cables.

148. The Defendants submit that even assuming that a potential liability was foreseen (the Defendants say it was not) no provision was required, as accounts show a true and fair view if they comply with their own Accounting Standards (and in the present case the accounting warranties stipulated that they were prepared in accordance with IFRS).

149. In this regard IAS 37.14 provides:

“*Provisions*

14 A provision should be recognised when:

(a) an entity has a present obligation (legal or constructive) as a result of a past event;

(b) it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation, and

(c) a reliable estimate can be made of the amount of the obligation.

If these conditions are not met, no provision shall be recognised."

150. In the present case the Defendants submit that it was a pre-condition to a present liability that the counterparties to the easements had served a notice under clause 8.1 of those easements, and, in the event, they had not done so by the time of the warranted accounts, whether the Statutory Accounts (to 31 December 2013) or the management accounts (to 31 March 2014). The Hopetoun notice was served on 3 July 2014, and the Defendant's case is that no notice has, as yet, been served in relation to Tortworth to this day. The Defendants submit that in the absence of an existing liability no provision should have been made and accordingly Zayo's Lift and Shift Claims must fail.

151. In contrast, Zayo submits that the interpretation of accounting standards is not a simple process, and that it is not a question of legal interpretation but a question of judgment for the accountant which requires accountancy expertise. IAS 37 itself contains a number of guidance paragraphs in relation to what amounts to “present obligation” and “past events”. It is submitted that this in itself renders the matter unsuitable for summary determination of the issue. In relation to IAS 37.4 it is said that it is not a simple process to apply the terms of the standard to the Hopetoun and Tortworth liabilities. It is Zayo's case (which Zayo says must be accepted for the purposes of this application) that, on the evidence, Geo was aware of liabilities that were considerably more likely than not to be payable, and that in such circumstances a provision should be made under IAS37.14. In any event, says Zayo, if the Defendants are right, then what they have shown is that Hopetoun and Tortworth potential obligations should have been dealt with as a contingent liability in the Accounts. The Defendants' riposte on contingent liabilities is that under IN19 an entity is simply obliged to disclose a contingent liability by the giving of a narrative, rather than by making a provision in the Accounts. It appears that, in the event, in January 2015 Geo paid £394,465.20 in respect of Tortworth and in around May 2015 Geo paid £98,607.60 in respect of Hopetoun.

152. The proper interpretation and application of accounting standards, including IAS 37.14, is ultimately a matter of the construction and application of those accounting standards by the Court, so I do not accept Zayo's submission that the interpretation of accounting standards is a question of judgment for an accountant, and that accountancy evidence will always be needed. Expert accountancy evidence would, however, be admissible, and is likely to assist a Court where issues arise as to how the accounting standards are to be applied to the particular facts. An application for summary judgment may not be the best forum for resolution of issues involving accounting standards, where there is the potential for a difference of view as to whether a provision should be made, though cases could arise where the application of accountancy standards was straight-forward, and the associated issues capable of summary determination.

153. I consider that there is some considerable force in the Defendants' submissions in relation to the construction and application of IAS 37.14 (and the cumulative requirements contained therein) and it might

well have been the case that the Defendants would have been be successful in those arguments had the claims proceeded to trial and not been dismissed. However, on balance, I consider that a trial judge would be far better placed to apply the facts of the present case to the accounting standards (potentially with the benefit of expert accountancy evidence) than a judge on a reverse summary judgment application, forming but one of many applications, others of which are determinative in any event. I do not consider that it can be said that Zayo would have no real prospect of success on this issue which involves the application of accountancy standards (the import of which is not agreed) to factual scenarios where the parties are not in agreement as to what such factual scenarios demonstrate, in liability terms, for the purpose of those accounting standards. Accordingly, I would not have granted reverse summary judgment or struck out the Lift and Shift Claims based on this point. The point is academic in the light of my other findings.

154. I would hope that the parties will be in a position to agree an Order reflecting my judgment including as to the incidence of costs, but if any issues remain outstanding I will hear argument from the parties on the handing down of the judgment.