Neutral Citation Number: [2017] EWHC 3014 (Comm)

Case No: CL-2016-000403

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2017

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

(1) FIRST NAMES (JERSEY) LIMITED **(2) FIRST NAMES GROUP LIMITED**	**Claimants**
- and -	
IFG GROUP PLC	**Defendant**

- -
- -

Andrew Blake (instructed by **Rosling King LLP**) for the **Claimants**
Nicholas Craig (instructed by **Fox Williams LLP**) for the **Defendant**

Hearing dates: 9-11 October 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles:

Introduction

1. The first Claimant ("FN Jersey") is a company incorporated in Jersey. Its business includes the provision of corporate and trust management services.

2. The clients of FN Jersey included Ignition Romanian Land Fund # 1 Limited ("Ignition"), also incorporated in Jersey. As a closed-end Jersey fund Ignition invested in land in Romania.

3. In the course of its business FN Jersey offered, as one of the services it provided to Ignition, to provide individuals to serve as directors of Ignition. This type of arrangement is common within the sector. It can have, I fear, implications for the nature of the governance that is brought to a company but here is not the place to debate that.

4. In the result, three employees of FN Jersey were duly appointed directors of Ignition. They served as directors of Ignition because that was required of them as employees of FN Jersey.

5. Their employment contracts contemplated that this was one of the things they would do for clients of FN Jersey. The typical arrangement in the sector would see FN Jersey remunerated by Ignition for a range of services and the services for which it received payment would include the work undertaken by the directors.

6. In time Ignition entered summary liquidation in Jersey. Its liquidator issued a claim against the three directors, alleging that they acted in breach of duty to Ignition in connection with an investment in Romania. FN Jersey takes the view that it is obliged to indemnify the three directors in connection with that claim. Consistently it is funding their defence of that claim. There is no question that the three directors acted in good faith towards FN Jersey.

7. The Defendant ("IFG") disagrees with the view taken by FN Jersey. IFG has a potential economic interest in the matter because it sold the parent of FN Jersey to the Second Claimant ("FN Group") and gave various indemnities to FN Jersey and FN Group and others under the relevant share purchase agreement ("the SPA"). I say potential economic interest because IFG's position in these present proceedings before the Commercial Court is that those indemnities do not engage, or that their terms have not been complied with.

8. The liquidator's case concerns events that pre-date the SPA. The SPA was dated 29 March 2012 and the sale under its terms completed on 4 July 2012. The consideration involved was of the order of £70 million.

9. This claim is brought under the Shorter Trials Scheme.

FN Jersey's indemnity obligations

10. It is agreed that the question whether FN Jersey is obliged to indemnify the three directors is a question of Jersey law.

11. I had the privilege of reading and hearing the expert evidence of two advocates of the Royal Court, Advocate David Wilson of Oben Law and Advocate Vicky Milner of Callington Chambers. I am grateful to them both for the assistance given. It was very clear that both sought to give their best independent expert opinion, in keeping with their duties as Advocates and their duties to this Court. Their independence was demonstrated by the fact that they were both prepared to revise views on further reflection. I hope they will allow me to record that their professionalism and courtesy when commenting on each other's opinion, in a session of the trial where evidence was given concurrently was exemplary.

12. In the result, the experts shared the opinion that an indemnity would be implied into the contracts of employment of the three directors with FN Jersey if that was necessary to ensure that those contracts were not futile, inefficacious or absurd.

13. I have no hesitation in concluding that that test is met. I respectfully regard as absurd the proposition that FN Jersey, having contracted to provide directors to Ignition, instructed its employees to serve as directors for Ignition, and arranged to charge Ignition for the work of those employees as directors, did not have an obligation to indemnify those employees in relation to the work undertaken, always assuming good faith towards FN Jersey. There is neither difficulty nor complexity in identifying the terms of the necessary implied indemnity: simply, an employee of FN Jersey required to serve as director of a client company and acting in good faith would be indemnified against costs, losses and liabilities incurred in the course of that directorship.

14. I accept the factual evidence of Mr Declan Kenny and of Ms Elaine Higgins, each of whom held senior positions with FN Group, and with IFG prior to the SPA, that without an indemnity FN Jersey would have no business. This illustrates how inefficacious or commercially unworkable the contracts of employment of the three directors would be without the implied indemnity. The evidence of Mr Kenny and Mrs Higgins is also amply sufficient to support the proposition that this is a case where there was a shared understanding in the sector that employees required by their employer to become directors of client companies would be indemnified.

15. The three directors had written employment contracts with FN Jersey. Mr Nicholas Craig for IFG argued that those contracts are not unworkable without an indemnity, and that an indemnity could have been included expressly in those contracts or bargained for at the point when FN Jersey required the individuals to take the directorships. I do not accept the first point for reasons just given. The remaining points are not wrong, but they do not meet the basis on which the indemnity is to be implied in the present case.

16. The presence of insurance arranged by FN Jersey and required by the Jersey Financial Services Commission was also referenced, though the subject was not fully evidenced and developed at trial. On the material before me it did not provide an answer to the case for implying an indemnity. The interests of clients rather than those of the employee may underlie requirements for insurance. If anything the presence of insurance arranged by the employer reinforces the obviousness of the point that employers in this sector and not their employees will ultimately shoulder the

consequences where employees are required by their employers to take directorships in client companies.

17. In the circumstances it is no surprise to find that the Articles of Association of FN Jersey, although not a contract between the three employees and their employer, as Mr Andrew Blake for FN Jersey and FN Group properly accepts, provide as follows:

> "27 (1) Every Secretary agent servant and employee of [FN Jersey] shall be indemnified by [FN Jersey] against and it shall be the duty of the Directors out of the funds of [FN Jersey] to pay the costs charges losses liabilities damages and expenses which any such person may incur in the course of the discharge by him of his duties as Secretary agent servant or employee of [FN Jersey] as the case may be provided that this indemnity shall not be applicable in circumstances where any such person has incurred such costs charges losses liabilities damages and expenses through his own fraud wilful misconduct or gross negligence."

18. It was argued for IFG that this provision in the Articles was concerned only with vicarious liability. I do not accept that it is so limited, on its terms. It was argued that an indemnity would not make sense where an employee of FN Jersey performing his or her duty to Ignition as a director of Ignition did something that was adverse to the interests of FN Jersey as his or her employee. But the example simply shows what FN Jersey must be taken to have accepted as a consequence of requiring its employee to become a director of a client company. Far from the indemnity not making sense, the example shows it to be the more obviously necessary.

19. It is also no surprise to find that, on the evidence of Mr Kenny which I accept, it is the policy of FN Jersey to indemnify those it requires to be directors of client companies. Mr Craig argues that a policy does not equal a legal obligation, but in my assessment the policy reflects the legal obligation.

20. I should add that there was some discussion of Article 77(1) of the Companies (Jersey) Law 1991, which provides:

> "Subject to paragraphs (2) and (3), any provision, whether contained in the articles of, or in a contract with, a company, or otherwise, whereby the company or any of its subsidiaries or any other person, for some benefit conferred or detriment suffered directly or indirectly by the company agrees to exempt any person from, or indemnify any person against, any liability which by law would otherwise attach to the person by reason of the fact that the person is or was an officer of the company shall be void."

The Article does not in my judgment assist or apply to the context in hand. We are not here concerned with indemnifying against a liability which the law would attach to the three directors by reason of the fact that they were officers of FN Jersey. The discussion also engaged Article 77(2)(b) and (d) but I need not go into those provisions.

IFG's indemnity obligations

21. The next issue is whether IFG is in turn obliged under the SPA to indemnify FN Jersey or FN Group. In the case of FN Group, the indemnity sought is in respect of diminution in the value of its interest in FN Jersey to the extent that FN Jersey itself is not indemnified by IFG.

22. Clause 8 of the SPA is in these terms, so far as material:

> "8.1 Subject to clause 8.2, the Seller undertakes with effect from Completion, on demand, to indemnify, and to keep indemnified the Buyer and each member of the Buyer's Group against all losses and liabilities (including reasonable legal and other professional fees and costs) which may be suffered or incurred by any of them and which arise directly or indirectly in connection with or in relation to the following matters (to the extent that they relate to or are connected with or arise in respect of Client Business): any litigation, arbitration or other dispute resolution process, or administrative or criminal proceedings or any investigation or enquiry by any Authority arising from facts, matters or circumstances existing prior to Completion.
>
> 8.2 The Buyer shall use and shall procure each member of the Buyer's Group uses its reasonable endeavours to mitigate its loss in respect to any claim pursuant to clause 8.1 or clause 8.4 and any claim pursuant to clause 8.1 or clause 8.4 shall be subject to the relevant provisions of Schedule 5.
>
> …"

23. By clause 1.2 of the SPA a number of terms were given meanings "unless otherwise specified or the context otherwise requires". In particular, by clause 1.2.15:

> "… references to "indemnity" and "indemnifying" any person against any liability or circumstance include indemnifying it and keeping it harmless from all actions, claims, demands and proceedings from time to time made against that person and all losses, damages, payments, costs and expenses (including reasonable legal costs and expenses) made, suffered or incurred by that person as a consequence of or which would not have arisen but for that liability or circumstance;"

Further, clause 1.5 provided:

> "In construing this agreement general words shall not be given a restrictive meaning because they are followed by particular examples and the words "include(s)", "including" or "in particular" shall be deemed to have the words "but without limitation" following them."

24. Schedule 5 provides, so far as material and under the heading "Limits on the Seller's Liability":

> "1. Effect of this Schedule
>
> 1.1 In accordance with its terms, the provisions of this Schedule 5 shall limit and/or reduce the liability of the Seller and restrict the remedies available to

the Buyer in respect of Claims or Fundamental Warranty Claims or Indemnity Claims or Competition Indemnity Claims.

…

2. Amount of Liability

…

2.3 The Seller shall not be liable for any Indemnity Claim or Competition Indemnity Claim unless the liability of the Seller in respect of that claim is in excess of £500,000 (provided that claims arising out of the same or related subject matter shall be aggregated and treated as a single claim for this purpose)

Notice and Time Limits

3.1 The Seller shall not be liable for any Claim or Indemnity Claim or Competition Indemnity Claim and any Claim or Indemnity Claim or Competition Indemnity Claim shall be wholly barred and unenforceable unless written notice of such Claim or Indemnity Claim or Competition Indemnity Claim (specifying in reasonable detail, to the extent such information is available at the time, the event, matter or default which gives rise to the Claim or Indemnity Claim or Competition Indemnity Claim and an estimate of the amount claimed) has been notified to the seller by the Buyer:

3.1.1 in the case of any Claim under the Warranties (but excluding the Tax Warranties) or Indemnity Claims or Competition Indemnity Claim, on or before the date that is 24 months after Completion; and

3.1.2 …

3.2 The liability of the Seller in respect of a particular Claim (which for the purposes of this paragraph 3.2 excludes a claim under the Tax Warranties or the Tax Covenant) or Indemnity Claim or Competition Indemnity Claim, notified under paragraph 3.1 above shall cease and the Claim or Indemnity Claim or Competition Indemnity Claim (if it has not been previously satisfied, settled or withdrawn) shall be deemed to have been withdrawn and become fully barred and unenforceable unless legal proceedings in respect of such Claim or Indemnity Claim or Competition Indemnity Claim have been commenced by being both properly issued and validly served on the Seller within 4 months of the giving of such notice or, where paragraph 3.3 applies, four months after the relevant contingent liability or unquantified liability becomes an actual liability or quantified liability (as relevant) (provided that any Claim or Indemnity Claim or Completion Indemnity Claim notified with respect to a contingent liability shall be deemed to have been irrevocably withdrawn at the expiry of 24 months after the expiry of the time period set out in paragraph 3.1.1 if such contingent liability or unquantified liability has not become an actual liability or quantified liability (as relevant) by such date.

3.3 If any Claim (which for the purposes of this paragraph 3.3 excludes a Claim under the Tax Warranties or the Tax Covenant) or Indemnity Claim or

> Competition Indemnity Claim, arises by reason of some liability which, at the time the Claim or Indemnity Claim or Competition Indemnity Claim is notified to the Seller, is contingent only or otherwise not capable of being quantified, then the Seller shall not be under any obligation to make any payment in respect of such breach or claim unless and until such liability ceases to be contingent or becomes capable of being quantified, as the case may be, provided that this paragraph shall only operate to postpone the liability of the Seller and shall not operate to avoid a Claim or Indemnity Claim or Competition Indemnity Claim which is made in accordance with and within the applicable time limits specified in paragraph 3.1."

25. Written notice purporting to be in accordance with Schedule 5 was given dated 30 June 2014. At that date the liquidator of Ignition had not commenced litigation against the three directors. No estimate of amount was given in the written notice.

26. Given the acceptance by FN Jersey of its liability to indemnify the three directors, there is no, and need not be any, litigation between FN Jersey and the three directors. What is material, and is the case, is that the liability of FN Jersey to indemnify is a liability incurred which arises directly or indirectly in connection with litigation brought by the liquidator, and that litigation is litigation that arises from facts, matters or circumstances existing prior to Completion.

27. That litigation was potential when written notice was given, but I see no reason why on the true construction of Clause 8.1 and Schedule 5 that should be insufficient. Of course that is a separate matter to when the obligation on IFG to pay would arise; for that there would need to be litigation rather than potential litigation. Mr Craig refers to the language used for warranties given under the SPA, and especially Commercial Warranties 7 and 19, to support a contrary view. However I do not consider these assist in construing the indemnity under Clause 8.1, which exists apart from and additionally to the warranties that were negotiated.

28. It was open to FN Jersey to take the view, at the time of giving written notice, that the potential was there whether or not the liquidator had indicated that litigation was a possibility. Mr Craig argues that circumstances were no different then than as at the date when the SPA was concluded. Even if that was the case, Clause 8.1 and Schedule 5 apply in accordance with their terms. But in fact circumstances were different because the liquidator had been in contact with the three directors. And that contact followed earlier notification to Ms Higgins on 17 July 2013 that it was possible that the liquidator may seek to bring a claim against the three directors.

29. Mr Craig suggests Clause 1.2.15 of the SPA assists a slightly broader argument that something must be done by those who claim to be indemnified. I do not consider that this assists IFG. The reference to claims and losses are to claims against and losses suffered by FN Jersey. On the evidence, there is no question that the three directors have sought indemnification from FN Jersey. No more is needed in that respect.

30. There is no absolute requirement for an estimate of amount to be given in the written notice. The requirement, under paragraph 3.3 of Schedule 5, is that the written notice specify in reasonable detail "to the extent such information is available at the time" an estimate of the amount claimed. Paragraphs 3.2 and 3.3 recognise that the liability may be "contingent only or otherwise not capable of being quantified". "Contingent"

is used without technicality in the SPA, and in contrast to a liability that has become "actual".

31. Mr Craig submits that the phrase "the extent such information is available at the time" qualifies only the requirement for information about "the event, matter or default which gives rise to the … Indemnity Claim" and not the requirement for "an estimate of the amount claimed". I respectfully disagree, both on a reading of the wording and because commercial sense supports its application to the estimate too. The submission that it is in the nature of an "estimate" that it does not need reasonable detail is also one that I, respectfully, cannot accept.

32. Mr Craig argued that the parties cannot have intended that notice be given of claims that did not satisfy the requirement for a value exceeding £500,000 and the requirement to insert an estimate ensured that excluded claims were not notified. I do not agree that the parties would contemplate that written notice would not be given unless and until they could be accompanied by an estimate that the value exceeded £500,000. The £500,000 figure simply concerns the level at which IFG would become liable.

33. I am able to accept Mr Craig's point that even where it is not possible initially it may become possible to give an estimate of an unquantified liability, and that there can be commercial value in this happening – Mr Craig gave the example of enabling provision to be made in accounts. As I have said, I do not accept that at the time the written notice was given that it had become possible. There is no suggestion that information was held back by FN Jersey or FN Group. For the period next following the written notice, Paragraph 3.3 of Schedule 5 makes clear that where the notified claim is "contingent only or otherwise not capable of being quantified" the liability of IFG to indemnify is postponed "until such liability ceases to be contingent or becomes capable of being quantified", but is not avoided.

34. The relevant liability to indemnify (i.e. here, the liability of FN Jersey to the three directors) in due course became actual rather than contingent. This occurred when the liquidator brought his claim. At the same time the Order of Justice (the Jersey claim form) sufficiently revealed the value of the claim. I cannot accept Mr Craig's argument that the contingency is the outcome of that litigation rather than the commencement of that litigation. The conclusion of that litigation is not the point at which FN Jersey's obligation to indemnify the three directors is relevantly engaged.

35. The liquidator brought his claim on 2 March 2016. The present proceedings in the Commercial Court were commenced on 29 June 2016, that is (as required) within 4 months of the liability of FN Jersey to the three directors becoming actual.

Conclusion

36. On the arguments before me FN Jersey and FN Group succeed. It having been agreed between Counsel at the trial that questions of declaratory relief would be best addressed when this judgment is handed down, I will discuss with Counsel how best to reflect the conclusion I have reached in an Order.