Neutral Citation Number: [2020] EWHC 984 (Comm)

CL-2015-000912

Case No: CL-2015-000912

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 24 April 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) TOWERGATE FINANCIAL (GROUP) LIMITED **(2) TOWERGATE FINANCIAL (EAST) LIMITED** **(3) TOWERGATE FINANCIAL (EAST) HOLDINGS LIMITED** **(4) TOWERGATE FINANCIAL (EAST) INTERMEDIATE LIMITED**	**Claimant**
- and –	
(1) MR MITCHEL HOPKINSON **(2) MRS JOANNE HOPKINSON** **(3) MR MARK HOWARD** **(4) MRS TAMASIN HOWARD** **(5) MR MITCHEL HOPKINSON (As Trustee of: the Mark Howard Life Interest Settlement 2008; the Tamasin Howard Life Interest Settlement 2008; the Mitchel Hopkinson Life Interest Settlement 2008; the Joanne Hopkinson Life Interest Settlement 2008; the Ian Marshall Life Interest Settlement 2008; the Stanislow Bojarski Life Interest Settlement 2008 and the Gail Bojarski Life Interest**	**Defendant**

Settlement 2008)

(6) MR MARK HOWARD
(As Trustee of: the Mark Howard Life Interest Settlement 2008; the Tamasin Howard Life Interest Settlement 2008; the Mitchel Hopkinson Life Interest Settlement 2008; the Joanne Hopkinson Life Interest Settlement 2008; the Ian Marshall Life Interest Settlement 2008; the Stanislow Bojarski Life Interest Settlement 2008 and the Gail Bojarski Life Interest Settlement 2008)

(7) – (18) Various Individuals

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Gavin Kealey Q.C. and George Spalton instructed by **BLM LLP** for the **Claimants**
Joanna Smith Q.C. and Matthew Hodson instructed by **Lennons Solicitors** for the **First, Second** and **Fifth Defendants and Freeths LLP** for the **Third, Fourth and Sixth Defendants**

Hearing dates: 6, 7, 8 April 2020
Draft Judgment sent to parties: 22 April 2020

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 24 April 2020 at 14:00

Cockerill J:

Introduction

1. This is a trial of a preliminary issue on a point of construction. The issue relates to the meaning of indemnity provisions contained in a share sale agreement, the resort to these provisions having been caused by complaints of historic mis-selling of financial products. This trial, which is the third time that these provisions have been considered by the Courts, has been conducted remotely over two and a half days.

2. The issue is between the Claimants (companies in the Towergate Financial Group) on the one hand and the First, Second and Fifth Defendants ("the Hopkinson Defendants") and the Third, Fourth and Sixth Defendants ("the Howard Defendants") on the other. I will refer to the Hopkinson and Howard Defendants collectively as "the Defendants".

3. Pursuant to a share purchase agreement ("the SPA"), dated 5 August 2008, Mr Mitchel Hopkinson (Mr Hopkinson) and Mr Mark Howard (Mr Howard), as trustees of certain trusts, sold the entire issued share capital of M2 Holdings Limited ("M2") to Towergate Financial (East) Holdings Limited ("Towergate East") who is the Third Claimant. M2 is now known as Towergate Financial (East) Intermediate Limited and is the Fourth Claimant.

4. The SPA thus provided for the sale of M2 which, with its subsidiaries, carried on business providing financial advice to retail customers. The total purchase price was £9.9 million, comprising an initial payment of £5.94 million and deferred consideration of £3.64 million which has not yet been paid.

5. In this action, the Claimants are seeking a declaration that they are entitled to be indemnified against certain liabilities for professional negligence pursuant to an indemnity provision in the SPA. Alternatively, the Claimants seek damages. The liabilities and costs in question are potentially in excess of £50 million.

6. The First to Sixth Defendants are individuals who each agreed to give indemnities under the SPA. For the purposes of the analysis below, the group of persons who gave those indemnities has been called in argument before me "the Indemnitors", to distinguish them from a slightly different group of persons who gave warranties under the SPA – a point of some significance in argument.

7. The First and Third Defendants gave their indemnities in their personal capacity, alternatively in their capacity as Trustees of the 'Trusts' (as defined in the SPA) and they are each, accordingly, also joined in that capacity as Fifth and Sixth Defendants respectively. The Second and Fourth Defendants are the wives of First and Third

Defendants respectively, and they gave their indemnities in their personal capacity.

8. There are other Defendants who are individuals who (it is alleged) were agents of the Second and Fourth Claimants, and provided financial advice and/or services to retail customers in their capacity as agents. They are not parties to this preliminary issue.

9. The maximum liability of the Indemnitors under the indemnity is limited to the consideration received by them or on their behalf.

10. The preliminary issue hearing was ordered by the Court with the consent of both parties because it concerns a narrow issue which is susceptible of disposing of the dispute entirely. That is because it is the Defendants' case that, on the true construction of the indemnity provisions any claim had to be notified to them "as soon as possible", and that was not done.

The claims giving rise to the indemnity claim

11. The claim under the indemnity provisions arises out of two 'Skilled Person Reviews' commissioned by the Financial Conduct Authority ("FCA") pursuant to section 166 of the Financial Services and Markets Act 2000 ("FSMA"). They concern:

    i) All advice given by Towergate Financial firms in relation to Enhanced Transfer Value ("ETV") schemes, which resulted in retail clients transferring their benefits out of a defined benefit scheme during the period from 1 December 2001 to 29 January 2014 (the "ETV Review"). This includes a review of advice provided by M2 prior to the "Completion" of the SPA;

    ii) The promotion and sales of Unregulated Collective Investment Schemes ("UCIS") and other unregulated schemes between 1 December 2001 and 31 December 2013, with the review taking into account the degree of customer detriment (the "UCIS Review"). Again, this includes a review of promotion and sales by M2 prior to the "Completion" of the SPA.

12. In essence, therefore, the reviews relate to schemes for the transfer of benefits out of defined benefit pension schemes and to unregulated collective investment schemes marketed by the company, including over a period of some six and a half years before the SPA.

13. The reviews have already resulted in the payment of very significant amounts of compensation for mis-selling to clients dating from the previous period of ownership. Further claims are still to be finalised. The first payment was made in January 2016.

The Notice

14. The disputed notice of possible indemnity claims was given in a letter dated 29 July 2015 ("the Notice"). That notice was, as will be immediately apparent, served a little before the seventh anniversary of the SPA. The events of the period leading up to this notice – and their significance - are considered separately below.

15. After referring to the agreement and to the reviews, the Notice stated:

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

16. The letter referred to the indemnity provision and continued: "*The redress payments made as a result of the Section 166 reviews will fall within the scope of this clause and Towergate Financial will therefore be entitled to bring a claim against the Vendors and their spouses for an indemnity in accordance with the terms of clause 5.9 of the Agreement*."

17. It stated that the purpose of the letter was to give notice of the claim for an indemnity and that the companies concerned would seek to recover, in relation to each individual claim that arises, the amount of the excess under the company's professional indemnity policy at the date of the acquisition. It stated that 86 unregulated collective scheme transactions and about 1,300 transfers out of defined benefit schemes made before the sale of the company had so far been identified and that further cases might be identified.

The relevant clauses of the SPA

18. The issue before me primarily concerns Clause 6 but necessarily also concerns Clause 5 of the SPA. The relevant terms within those clauses are defined in Clause 1, the Definitions and Interpretation Clause:

> "In this Agreement the following words and expressions shall (except where the context otherwise requires) have the following meanings: .....
>
> "Claim" means a Warranty Claim and/or a Tax Claim ...
>
> "Completion Date" means the date hereof ....

> "Share Warranties" means the warranties contained in or referred to in clause 5 and schedule 3 …
>
> "Tax Claim" means a claim under the Tax Warranties …
>
> "Tax Warranties" means the warranties on the part of the Warrantors set out in part 2 of schedule 4 ….
>
> "Warranty Claim" means a claim for breach of any of the Warranties
>
> "Warranties" means the Share Warranties and the Tax Warranties
>
> "Warrantors" means the Vendors and the Registered Holders…
>
> 1.2.16 Any references to "indemnify" and "indemnifying" any person against any circumstances shall include indemnifying in full and holding him harmless from against all actions, costs, claims, demands, expenses and other liabilities which he may from time to time incur or suffer in connection with or arising out of such circumstances (including all payments, legal and other costs and expenses reasonably and properly incurred as a consequence of or which would not have arisen but for such circumstance)."

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

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

> "The Vendors and their respective spouses undertake to indemnify the Purchaser and/or the Group in full against all losses, liabilities, costs and expenses which the Group or the Purchaser Group may suffer as a result of or in connection with any claim or claims for professional negligence against the Group including but not limited to claims or complaints arising from mis-selling of mortgage endowment, pension transfer (contracting out), equity release and income drawdown products and

> policies which relate to actions by the Group at any time before Completion including for the avoidance of doubt all losses, liabilities, costs and expenses incurred in connection with compliance with the FSA under or in respect of the s.166 review conducted by the FSA in respect of the contract between the Group and Peugeot known as Project Picasso subject in all cases to the provisions of clause 5.10."

21. Clause 5.10 contains the monetary limits on liability under the indemnity (to the amount of the consideration received by each of them and by reference to their proportion of the shareholding) and Clause 5.11 contains other limits and exclusions, including for claims covered by, or which would have been covered by insurance, by reference to the cover in place at the time of the agreement.

22. Clause 5.12 provides:

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

23. Clause 6 is headed "Limitation on Liability". Clause 6.1 states that *"The Purchaser agrees that any Claim (and in respect of clause 6.4 and 6.5 only the Tax Covenant) shall be limited by the provisions of this clause 6 …"*

24. Clause 6.5 refers to "*Limits on the liability of the vendors for Claims or for a claim under the Tax Covenant*" and then sets out percentage shares. This appears to be a differently worded correlate, in relation to warranty claims and claims under the Tax Covenant, to Clause 5.10.

25. Central to the present preliminary issue is Clause 6.7:

> "The Purchaser shall not make any Claims against the Warrantors nor shall the Warrantors have any

> liability in respect of any matter or thing unless notice in writing of the relevant matter or thing (specifying the details and circumstances giving rise to the Claim or Claims and an estimate in good faith of the total amount of such Claim or Claims) is given to all the Warrantors as soon as possible and in any event prior to:
>
> 6.7.1 the seventh anniversary of the date of this Agreement in the case of any Claim solely in relation to the Taxation Covenant;
>
> 6.7.2 the date two years from the Completion Date in the case of any other Claim; and
>
> 6.7.3 in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."

26. Clause 6.8 provides:

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

27. Clause 6.9 outlines matters which do not give rise to warranty claims (disclosed matters, matters covered in the Management Accounts and so forth). Clause 6.10 provides for a notice to enable breaches of warranty to be remedied.

28. Clause 6.11 is a similar provision to Clause 5.9 – entitling the warrantors to require the purchaser to take *"all such steps or proceedings as such person(s) may consider necessary in order to avoid, dispute, resist, mitigate, compromise, defend or appeal against any Relevant Third Party Claim"* – that is against any third party claim which will or may give rise to a "Claim".

29. Clause 6.12 states that *"for the purpose of enabling the Warrantors to avoid, dispute, resist, mitigate, compromise, defend or appeal against"* any Relevant Third Party Claim, the purchaser is obliged to give written notice within 14 days of any Relevant Third Party claim

or *"any circumstances giving or likely to give rise to"* such a claim *"coming to its notice or to the notice of the Group"*.

The Preliminary Issues and the litigation backdrop

30. The following preliminary issues have been ordered and are now before me:

    i) On the proper construction of Clause 6.7 of the SPA, with respect to the provision of notice of claims made under the indemnity in Clause 5.9, is there a condition precedent as to the time by which such notice must be given?

    ii) If, on its proper construction, Clause 6.7 of the SPA imposes a condition precedent as to the time by when such notice must be given, what is that time? In particular;

        a) Is it "*prior to…the seventh anniversary of the date of the SPA*" or,

        b) Is it "*as soon as possible*" and

        c) If the latter, what is the circumstance, happening or event that triggers the commencement of the period encompassed by "*as soon as possible*" and how soon thereafter must notice be given?

    iii) Did the Claimants comply with any condition precedent as to the time by when such notice must be given in accordance with the proper construction of Clause 6.7 of the SPA?

31. It is common ground that the giving of notice in accordance with Clause 6.7.3 was a necessary pre-condition to any liability of the Defendants under the indemnity in Clause 5.9. The Claimants' case is that by giving the notice contained in the letter dated 29 July 2015, which was before the seventh anniversary of the date of the agreement (5 August 2015), they complied with Clause 6.7.3. The Defendants submit that the Claimants did not so comply, because the notice was not given "*as soon as possible*".

32. This argument was described by Mr Kealey QC for the Claimants as being "*deliciously ironic*" given that the First – Sixth Defendants had previously applied for reverse summary judgment on the claim as being hopeless, on two bases.

33. The primary basis was that the Indemnity Notice given by the Claimants on 29 July 2015 was invalid because notice under Clause 6.7 in relation to a claim under the indemnity in Clause 5.9 could only validly be given if and when an actual claim is made against the purchaser by a third party; and, when the Indemnity Notice was given on 29 July 2015 in respect of the two Skilled Person Reviews, (as was

common ground) no relevant such third-party claim had been made. Therefore, the primary argument was in effect the direct opposite of what is now argued, because the Defendants were saying that the claim was premature.

34. The secondary basis was that the Claimants had failed, in accordance with the requirements of the parenthetical words of Clause 6.7, to specify in their notices "*the details and circumstances giving rise to the Claim or Claims and an estimate in good faith of the total amount of such Claim or Claim*".

35. The Defendants' application was dismissed at first instance by Leggatt J and subsequently by the Court of Appeal. I need not cover those decisions in any detail, because they are to be found at *Towergate Financial Group v Clark* [2017] EWHC 2330 (Comm) and *Hopkinson & Ors v Towergate Financial (Group) Ltd & Ors* [2018] EWCA Civ 2744; and because the specific portions of those judgments which were said to be relevant will be discussed in some detail below.

36. In essence, both held that:

    i) There was no requirement for a claim to have been made against the purchaser for notice to be validly given;

    ii) The words in parentheses in Clause 6.7 (which related to Claims with a capital C, as defined in Clause 1.1 SPA) did not apply to the giving of notice under Clause 6.7.3 in relation to indemnity claims.

37. It has been drawn to my attention that the current issue was at least adverted to during the course of that round of the litigation. The Defendants submitted in the course of argument that, if the Claimants' interpretation of Clause 6.7.3 was correct then the Claimants could not possibly succeed in establishing that notice had been given "*as soon as possible*", because there was no reason why they could not have notified the Defendants of the 2014 Reviews when they were themselves first notified of them.

38. At that stage (as I shall explain in more detail below) the Claimants certainly appeared to assume, if not to formally accept, that the words "*as soon as possible*" applied to an indemnity claim under Clause 5.9. However, Leggatt J took the view, urged on him by the Claimants, that the matter would require further factual evidence, and the question did not resurface in the Court of Appeal.

39. The Claimants now take a different view on the issue of construction. It has rightly not been suggested that they are not entitled to do so.

40. However, one point of significance does arise from the Court of Appeal's judgment – and that is the constraints which it places upon

me in construing the clause. The Defendants submit that I am bound by the following findings:

i) The bracketed words in Clause 6.7 do not apply to a claim under the indemnity at Clause 5.9 (paragraph [41]);

ii) Clause 6.8 does not apply to an indemnity claim under 6.7.3 (paragraphs [31]-[42]);

iii) The words "*any matter or thing*" encompass circumstances that may arise, such as the 2014 Reviews, which "*create the real possibility or probability of successful mis-selling or similar claims that will, if successful, lead to indemnity claims. Such circumstances naturally fall within the words 'any matter or thing' that may in its turn lead to a liability under the indemnity, but they may well occur at a stage when it would be impossible to provide the information required by the bracketed words*" (paragraph [42]);

iv) The words "*any matter or thing*" are "*wide enough to include matters or things which precede the making of a claim against the company*" paragraph [50]; and include both prospective and contingent claims;

v) The words "the Warrantors" in Clause 6.7 are properly construed as meaning in relation to the indemnity, "*such of the Warrantors as have given the indemnity under Clause 5.9*" (paragraph [17]).

41. Those propositions were not disputed by the Claimants. They however point to (and placed considerable emphasis on) another part of the judgment, paragraph [39], which draws a distinction between the purposes of Clauses 5.12 and Clause 6.7.3 thus:

> "But the purposes of the two provisions are distinct. The provision of information under clause 5.12 is to enable the indemnifiers to take steps to avoid or mitigate the claim that, if successful, will give ride to an indemnity claim. By contrast, the purpose of clause 6.7.3 is to impose a time limitation on claims under the indemnity."

They say that I am bound by that finding.

The factual matrix evidence

42. The Defendants have served two witness statements which are said to deal with the factual matrix: one from Mr Hopkinson and one from Mr Howard. The statements set out the background to the SPA, their understanding as to its terms and their views on the July Letter. The Claimants elected not to cross-examine either witness but made

submissions as to the relevance and admissibility of their evidence at the hearing.

43. The Defendants accepted that the subjective views of these gentlemen as to the meaning of the SPA and the conduct of the negotiations are inadmissible in construing the SPA and should not have formed part of those statements. However, it was submitted that some portions of their evidence provided useful, relevant and admissible context for the SPA.

44. The pleaded factual matrix is as follows:

    i) First, that there was a real chance of claims being made under the proposed indemnity provisions in the SPA (not least because of the existing 2007 Review referred to above as Project Picasso). This is not in issue.

    ii) Second, that it was appropriate and necessary to limit the potential for such claims given that they would be made against Mr and Mrs Hopkinson and Mr and Mrs Howard personally; and

    iii) Third, that it would be important for the Indemnitors to have proper notice of any claims so as to enable them, if desired, to seek to influence their outcome.

45. I accept that the statements could be admissible to this extent only – and not where they stray, as they do, considerably beyond this, extending into statements as to the maker's subjective view as to the construction of the relevant provisions.

46. It has of course for some years been made clear in paragraph C1.3(h) of the Commercial Court Guide that: *"Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should specifically set out in its statement of case each feature of the matrix which is alleged to be of relevance."*

47. Plainly these statements stray considerably beyond the pleaded case, and are to that extent inadmissible. It may be that some portions of the statements are unobjectionable and genuinely set out admissible factual matrix evidence. However, I share the doubt presciently expressed in the Defendant's skeleton argument: "*this is not a case where there is any real need to resort to the factual matrix for the purposes of construction*." I have not found it necessary to look at either statement for the purposes of what follows.

Issue 2: the time by which notice is to be given and trigger

48. The parties each lodged lengthy skeleton arguments, and I heard oral argument from each side over the course of over two court days.

Plainly no summary can do adequate justice to those detailed and highly skilful submissions.

49. In bare essentials the cases advanced were as follows.

50. The Claimants' primary case is that in relation to indemnity claims under Clause 5.9, Clause 6.7 only imports a requirement that notice is given of the matter or thing "*on or before the seventh anniversary*", not "*as soon as possible*".

51. The Claimants contend that, as a matter of the language, the final phrase of Clause 6.7 ("*as soon as possible and in any event prior to*") is not apt to and does not form part of Clause 6.7.3. They rely on a number of "errors" in the clause:

    i) The reference to Warrantors and notice to all Warrantors, because "the Warrantors" meant the Vendors and the Registered Holders: the latter group would not be affected by third-party claims which might fall under the Clause 5.9 indemnity.

    ii) A tautology in the language of Clause 6.7 and Clause 6.7.3: "*and in any event prior to [...] in relation to [a Clause 5.9 claim] on or before the seventh anniversary*".

    iii) Further, the Claimants contend that Clauses 6.7 and 6.7.3 do not set out a point from which "*as soon as possible*" should be counted for the purposes of an indemnity clause, and reading in such a starting point would amount to a rewriting which was impermissible in the context of a condition precedent / notice clause.

52. As to the contractual context and commercial purpose of Clause 6.7, 6.7.1, 6.7.2 and 6.7.3, the Claimants submitted that:

    i) There was no commercial justification for "*as soon as possible*" being a condition precedent with regards to indemnity claims. This was because enabling the Indemnitors to take steps for their own protection in relation to third-party claims was the purpose of Clause 5.12, not Clause 5.9.

    ii) It was not open to the Defendants to argue that Clause 6.7 and 6.7.3's purpose was to forewarn the Indemnitors of third-party claims, in light of the Court of Appeal Decision (at [39]), which concluded that protecting the Indemnitors was the purpose of Clause 5.12, and the purpose of Clause 6.7.3 was to provide a limitation period.

53. The Defendants submitted that the clause was in the end perfectly clear:

i) "*The Purchaser shall not make any Claim against the Warrantors*" is a reference to the warrantors in relation to Tax/Warranty Claims.

ii) "*Nor shall the Warrantors have any liability in respect of any matter or thing*" encompasses the Tax Warrantors and the other Warrantors, and the subset of those Warrantors who have given indemnities in relation to Clause 5.9 (in reliance on the Court of Appeal Decision at [17]).

iii) The words in brackets in Clause 6.7 only refer to Claims as defined in Clause 1.1 (so do not apply to claims under the Clause 5.9 indemnity). Therefore, "*unless notice in writing is given of a relevant matter or thing is given to all the Warrantors*" means that notice must be given to "*those of the warrantors relevant for each subsection (Clause 6.7.1, 6.7.2 and 6.7.3)*".

iv) "*As soon as possible*" is immediately after the final reference to "the Warrantors", so must explain when those Warrantors should be notified.

54. In this context, the Defendants submitted that Clause 6.7.3 cannot and should not be divorced from Clause 6.7 upon which it depends for its meaning and sense. The Defendants contend that the tension between "prior to" and "on or before" does not make the wording of Clause 6.7.3 unclear. They also submitted that the use of the word "and" between Clause 6.7.1, 6.7.2 and 6.7.3 makes clear that all three provisions are connected.

55. Finally, the Defendants contended that it is tolerably clear from which point the "*as soon as possible*" proviso starts running: the time when there is an identifiable matter or thing in relation to which a claim under the Clause 5.9 indemnity may arise (by reference to Leggatt J at [40]-[41] and the Court of Appeal Decision at [50]).

56. So far as concerned commercial purpose and contextual meaning it was the Defendants' case that:

i) While Clauses 6.7.3 and 5.12 have distinct purposes (limitation of liability, and protection/forewarning of the Indemnitors, respectively), as determined by the Court of Appeal at [39], the Court of Appeal did not determine the purpose of the words "*as soon as possible*" in Clause 6.7.

ii) There is a confluence of purposes between Clause 5.12 and 6.7.3: this is supported by the Court of Appeal's acknowledgment that both may be fulfilled by a single notification.

iii) The fact that the parties incorporated early warning provisions into Clause 5.12 does not necessarily mean that they intended for Clause 6.7.3 to have no such function, pointing to similar provisions to Clause 5.12 which they contended existed in relation to Clause 6.7.1 (Tax Claims) and Clause 6.7.2 (Warranty Claims) (Clause 6.12 and 6.11).

57. The Claimants' secondary case is that, even if the words "*as soon as possible and in any event*" do apply to a claim under the indemnity in Clause 5.9, they do not create a separate condition precedent which must be fulfilled, because they are insufficiently certain in the context of the degree of certainty required for a condition precedent.

58. In this connection, the Claimants placed reliance upon my judgment in *Denso Manufacturing UK Ltd v Great Lakes Reinsurance UK Ltd* [2017] EWHC 391 (Comm) and (rather more impressively) those of Clarke LJ in *Zurich v Maccaferri* [2016] EWCA Civ 1302, Briggs LJ in *Nobahar-Cookson v Hut Group* [2016] EWCA Civ 128 and Lord Hodge in *Impact Funding v AIG* [2017] AC 73.

59. Specifically however, the Claimants rely on *AIG Europe v Faraday* [2007] 2 Lloyd's Rep IR 267, in which Morison J found that a provision requiring notice to be given "*as soon as is reasonably practicable and in any event within 30 days*" imposed a condition precedent limit of 30 days, because "*as soon as is reasonably practicable*" would have been too unworkable, ambiguous and unfair on the notifying party. Further, the Claimants contend that there is another analogy with *AIG Europe*: one factor in that case was the uncertainty on the starting point of "*as soon as possible*" (which was "*upon knowledge of any loss or losses which may give rise to a claim*").

60. The Defendants contend that *AIG Europe* can be distinguished, as it concerned an insurance contract on standard terms rather than an individually-negotiated SPA and had a shorter time limit (30 days), which could be mistaken by a reasonable businessman for a more specific expression of the "*as soon as reasonably practicable*" requirement. Alternatively, the Defendants contend that *AIG Europe* was wrongly decided, in light of more recent authorities on contractual construction.

61. The Defendants' suggestion is that I adopt the approach in *Springer v University Hospitals of Leicester NHS Trust* [2018] EWCA Civ 436 a case which concerned construction of a CPR practice direction: that an obligation to inform "*as soon as possible and in any event within seven days of entering into the funding arrangement*" required the party to inform within seven days *and* as soon as possible, if that was earlier than seven days.

Discussion- Issue 2

Part A: one condition or two?

62. There was, in essence, agreement on the first issue. The parties both accept that the clause incorporates some form of condition precedent. The dividing line between them is whether, as the Defendants submit, it is a dual condition (as soon as possible/7 years) or whether, as the Claimants contend, it is a single condition (7 years).

63. So the main issue can be stated thus: in addition to the requirement that the notice be given on or before the seventh anniversary of the date of the SPA, is there also a requirement that it must be given "*as soon as possible*"?

64. The backdrop against which this plays out is the relevant law. The authorities as to contractual construction generally can be taken as read. I was referred to the recent trilogy of classic cases: (i) *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; (ii) *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and (iii) *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. There was no issue between the parties as to the principles that those cases laid down.

65. The focus of the argument was more on the authorities as to exclusion clauses and conditions precedent. In particular, there was a dispute over those authorities which state that although such clauses where clear will be honoured, where there is ambiguity and/or lack of clarity, that will be construed against the person seeking to rely on the exclusion or condition precedent.

66. Perhaps the key citation is that of Briggs LJ in the *Nobahar-Cookson* case:

> "[9] … it is well settled that contractual limitation periods for the notification or bringing of claims are forms of exclusion clause. …
>
> [16] Recent decisions about exclusion clauses have continued to affirm the utility of the principle that, if necessary to resolve ambiguity, they should be narrowly construed, including in relation to commercial contracts.
>
> [18] … the 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…
>
> [19] This approach to exclusion clauses is not now regarded as a presumption, still less as a special

> rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause… The court must still use all its tools of linguistic, contextual, purposive and common sense analysis to discern what the clause really means…
>
> [21]… there remains a principle that an ambiguity in its meaning may have to be resolved by a preference for the narrower construction if linguistic, contextual and purposive analysis do not disclose and answer to the question with sufficient clarity."

67. But to similar effect one might also cite:

    i) Clarke LJ in *Zurich v Maccaferri* [32-3]: *"If Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result … given the nature of the clause the ambiguity must be resolved in favour of Maccaferri. Clauses such as these must be clear if they are to have effect."*

    ii) Lord Toulson in *Impact* at [35]: *"As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words"*.

    iii) Lord Bingham in *Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] 2 Lloyd's Rep 647 at [12]: *"The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party"*.

68. The overall warning which Mr Kealey sought to place firmly in my mind was as follows: If there is insufficient clarity, the authorities say there is no condition precedent.

69. I deal first with the question of construction as a pure exercise of linguistic analysis in the light of the authorities. Reading the clause in the knowledge of the conclusions which the Court of Appeal has reached, I have had no difficulty in concluding that the construction urged on me by the Defendants is that which is clearly indicated by the language of the clause, despite its imperfections.

70. I reiterate the entirety of the relevant clause first, for ease of reference, striking out the words which are effectively removed by the Court of Appeal Judgment and the sub-clauses which are not apposite to an indemnity.

> "~~The Purchaser shall not make any Claims against the Warrantors~~ nor shall the Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing ~~(specifying the details and circumstances giving rise to the Claim or Claims and an estimate in good faith of the total amount of such Claim or Claims)~~ is given to all the Warrantors as soon as possible and in any event prior to:
>
> ~~6.7.1 the seventh anniversary of the date of this Agreement in the case of any Claim solely in relation to the Taxation Covenant;~~
>
> ~~6.7.2 the date two years from the Completion Date in the case of any other Claim~~; and
>
> 6.7.3 in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."

71. Thus, the parties were in effect agreed that the first words and the words in brackets were removed from the equation by the Court of Appeal's judgment. One is then left with a clause which says: *"nor shall the Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing … is given to all the Warrantors as soon as possible and in any event prior to: … in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."*

72. The first point to make is that while the resulting clause is not perfect, it is - in real terms - perfectly clear. There are a few issues with it, but they are ones which any sensible reader can resolve without any difficulty. It is not ambiguous.

73. Thus, the use of the word "Warrantors" is not correct – but as the Court of Appeal has found at [17] of its judgment the first surviving reference to Warrantors is to be read as here being a reference to the Indemnitors *("that phrase is properly construed as meaning, in relation to the indemnity, "such of the Warrantors as have given the indemnity under clause 5.9"")*. That being the case, there is no reason why the second surviving reference to Warrantors should not be read in the same way, and every reason why it should. So, that problem effectively disappears.

74. In doing so it carries away with it the problem relied on by Mr Kealey of reference to notice being given to *"all the Warrantors"*. Notice to all the Warrantors would be odd; but notice to all the Indemnitors makes perfect sense. And, unlike the Claimants' approach (to which I will come below) it retains a clear notice provision in circumstances

where one would expect provision to be made not just for when notice is to be given, but to whom that notice is to be given.

75. The only other real issue with this construction is the near tautology of provision for "*in any event prior to: … … on or before…"*. A tautology would be completely unproblematic in this context – surplusage happens. This near tautology is almost equally unproblematic. Any reasonable reader will see that the latter (specific) provision effectively "overwrites" the earlier generic provision. There can be no conceivable issue with this where that reading benefits the Claimants to the tune of an extra day,

76. The result is a clause which says: *"nor shall the [Indemnitor] Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing … is given to all the [Indemnitor] Warrantors as soon as possible and in any event: … in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."*

77. On its face, that clause plainly imports a dual condition precedent: as soon as possible and in any event seven years. It is clear, it is grammatical, it is workable.

78. It is also the way that it was read both by the Claimants' then leading counsel, Mr Butcher QC and the first instance judge Leggatt J in the following passage of argument:

> "Mr Butcher QC: In other words, if what one is talking - and one must be talking - about a claim for an indemnity … all that 6.7 says is that there shan't be any liability unless notice in writing of the relevant matter or thing is given to all the warrantors as soon as possible in relation to a claim under the indemnity in Clause 5.9 on or before the seventh anniversary of the date of this Agreement.
>
> … in relation to "as soon as possible," that just means that you have got to notify whatever the matter or thing is in relation to the claim under indemnity as soon as possible. …'
>
> Leggatt J: How does it operate in some sort of practical way where you can have some means of telling whether you have done it as soon as possible or when the obligation kicks in?
>
> Mr Butcher: Well, it is going to be difficult, in my submission, to say that there isn't some sort of non-compliance with that."

79. Further, as Ms Smith QC pointed out in argument, this position had been made clear in the Claimants' skeleton: "*The claimants' primary position is all that 6.7 requires for the purposes of the claim under the indemnity provision in clause 5.9 is a notice in writing of the relevant matter or thing as soon as possible and in any event on a date prior to the seventh anniversary of the date of the SPA"*.

80. This construction can also be usefully contrasted with the case which the Claimants advanced. Their case was that the clause should be approached thus (difference from the Defendants' construction in italics):

> "~~The Purchaser shall not make any Claims against the Warrantors~~ nor shall the Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing ~~(specifying the details and circumstances giving rise to the Claim or Claims and an estimate in good faith of the total amount of such Claim or Claims)~~ is given *~~to all the Warrantors as soon as possible and in any event prior to~~*:
>
> ~~6.7.1 the seventh anniversary of the date of this Agreement in the case of any Claim solely in relation to the Taxation Covenant;~~
>
> ~~6.7.2 the date two years from the Completion Date in the case of any other Claim~~; and
>
> 6.7.3 in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."

81. That produces a clause which says: *"nor shall the [Indemnitor] Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing … is given … in relation to a claim under the indemnity in clause 5.9 on or before the seventh anniversary of the date of this Agreement."* There are numerous difficulties with this approach.

82. The essential problem with it is that it requires 6.7.3 to be treated almost as if 6.7 were not there. At some points in the argument indeed, this almost seemed to be the Claimants' submission.

83. However, since such an argument was doomed to failure, this was not ultimately what the Claimants argued. The reason why such an argument was doomed to failure was that Clause 6.7.3, as written, is evidently dependent upon the remainder of Clause 6.7 (i.e. the introductory words of Clause 6.7) for its context and sense. One simply cannot make sense of it without introductory words. This much was admitted by the Claimants in paragraph 19(e) of their Reply and

Defence to Counterclaim of the Third Fourth and Sixth Defendants, where they said in terms: *"It is agreed and averred that Clause 6.7.3 of the SPA is dependent on the remainder of Clause 6 for its content and sense"*.

84. But once this is conceded (as it must be) this presents the Claimants with a fundamental difficulty. If words are to be lost from the introductory wording (other than the bracketed words, which have (i) brackets and (ii) a reference to Claims with a capital C to justify their omission, as well as Court of Appeal authority), on what basis is that to be done? This was an argument to which there was no satisfactory answer. It could not be said that having a dual condition precedent was unthinkable, and so the general must give way to the specific: this is because such dual conditions are not infrequently encountered (e.g.: in the CPR: the *Springer* case being one in point, but also in commercial contracts), and there is no logical or practical reason why they should not exist.

85. The argument involves deleting the second reference to the Warrantors for no good reason – and given the Court of Appeal's clarification, the only real reason for this appeared to be to avoid an even more arbitrary commencement point for the deletion within the final part of the introductory wording. Further that deletion in practical terms makes the clause less clear, by removing the identification of the recipients of the notice which is to be given.

86. Secondly the commencement of deletion is in any event somewhat arbitrary – the deletions mandated by the Court of Appeal's approach are each made sensible by being either a separate clause or bracketed. But here, why stop after "given" rather than "Warrantors"? And if there is no reason to delete "Warrantors", why stop at all?

87. Thirdly it forces a very odd result *vis a vis* the other parts of the clause. I asked Mr Kealey in argument whether he accepted that *"as soon as possible"* applied to 6.7.1 and 6.7.2. Initially he did so accept. However, that is plainly a strained construction, in part because of the "and" at the end of 6.7.2 which indicates that the three subclauses are following on an equal footing, and in part because there seems no reason based in the nature of the claims why "*as soon as possible*" would be objectionable for one and not for the others – a point reinforced by contextual issues to which I will come below.

88. In reply Mr Kealey therefore performed a *volte face*, arguing that "*as soon as possible*" was inapplicable to any of the sub-clauses; in other words that there was no condition precedent requiring notification "*as soon as possible*". This was premised on an argument that there was no commercial purpose for *"as soon as possible and in any event"* applying to Clause 6.7.1 or Clause 6.7.2 because the parties had explicitly or impliedly covered the circumstances in which notice was

to be given to the Warrantors in relation to Claims in Clause 6.12 and 6.11, and the remedies for breaches of those notice obligations were also contained in Clauses 6.11 and 6.12. However (parking for a moment the substance of the commercial purpose argument, which is addressed below) that argument on its face does some striking violence to the wording of the clause. Essentially, all of the clause after the bracket has to be deleted as erroneous, for all the sub-clauses, in circumstances where there is no argument that it is surplusage.

89. As a simple matter of language, therefore, the Defendants' approach is very much to be preferred to that put forward by the Claimants.

90. However, I bear well in mind that the language of the clause must not be divorced from its commercial purpose and its context and have thus given careful consideration to these arguments, and how they integrate as part of the iterative process alluded to in *Wood* at [12].

91. I was not however persuaded that these factors required any revision to the result which simple linguistic reading offers. Although Mr Kealey repeatedly invoked [39] of the Court of Appeal's judgment as if it were a trump card, in this context I do not consider it to be so.

92. One issue with this approach was that it involves a far too narrow focus on precisely what the Court of Appeal said, while neglecting the context of the argument in which they said it – and specifically that this current issue was not in play at the time. Another is that the Court of Appeal did not, as I read their judgment, make a "bright line" distinction between Clause 5.12 and this part of Clause 6.7. Their distinction is between Clause 5.12 (early notice to enable defence) and 6.7.3 (seven years limitation). They were not looking at the Clause 6.7 introductory words. Further, what they say makes this clear - in that "*as soon as possible*" in conjunction with seven years does not make sense in the context of a "longstop" limitation (there cannot be two such disparate longstop limitation dates). If there is a dual condition precedent, that clause has two purposes, not one: (i) as soon as possible – provides early notice to enable defence to be undertaken promptly and (ii) seven years – provides a longstop, or limitation period. In a sense these are both time limitations, of course; but they are time limitations with different points of focus. As such the Court of Appeal's finding is no more than neutral in this analysis.

93. Nor was I persuaded that the existence of Clause 5.12 means that a condition precedent based on "*as soon as possible*" is redundant because the Defendants have a remedy via that clause. Firstly, there is no logical reason why the SPA should not provide for both remedies. One can perfectly well envisage circumstances where 5.12 would bite, but 6.7.3 did not; such as a failure to give full information or co-operation during the handling of a potential claim. Secondly, in other contexts it at least appears that both remedies were given by the

SPA: Clauses 6.7.1 and 6.7.2 have their own similar provisions in Clauses 6.11 and 6.12.

94. This links to Mr Kealey's late argument that there was no condition precedent based on "*as soon as possible*" for any of the clauses. In terms of context and commercial purpose I can follow this argument to this extent - there is no logic or apparent commercial purpose reason for a distinction between the two sets of sub-clauses, since both on their face provide both for a damages claim and a bar and there is nothing in the nature of the clauses and what they cover to call for a difference.

95. However, the logic of the argument which follows is that if Clause 5.12 is to be deemed an adequate remedy in the context of indemnities, it follows that Clauses 6.7.1 and 6.7.2 have to be similarly limited, with the consequent violence imported to the wording of the clause. And yet the contextual or commercial reason driving such a conclusion for all three clauses is lacking.

96. Further, there is plainly a synergy, or as Ms Smith elegantly put it, a "*confluence of purpose*" between Clause 5.12 and Clause 6.7.3, in so far as the latter provides for notification "*as soon as possible*". The wording of Clause 5.12 does not provide any time for when notification must be given. However given that (i) it is there to enable participation by the Defendants in dealing with the situations covered by it and (ii) it is drafted in terms of the very earliest stages of possible claims (*"in order to avoid, dispute, resist, mitigate, compromise, defend or appeal against any relevant claim which will if successful give rise to liability under clause 5.9"*) the timing which is naturally suggested as being necessary is precisely *"as soon as possible"*. Here it seems to me that the use of the word "avoid" in Clause 5.12 is not insignificant. Avoidance is likely to require very early notification indeed.

97. This approach dovetails with that of the Court of Appeal, which acknowledged that a single notification might serve for both clauses (*"the provision of information under clause 5.12 and the giving of notice of any matter or thing that may give rise to an indemnity claim are linked in the sense that they may be achieved by a single notification"*). But one might go further and say that the natural reading is that, given the absence of notification timing in Clause 5.12 itself (unlike Clause 6.11, which has a 14 day period specified for at least one aspect), the single timing of "*as soon as possible*" for both Clauses 5.12 and 6.7.3 is the operative one.

98. I would add that I do not consider that this approach is negatively affected by the rather different regime under Clauses 6.7.1-2/6.10-11. That setup, which deals with the run up to and dealing with of "Claims", has the refinement of a specific 14 day obligation in relation to circumstances "*giving or likely to give rise to*" a Relevant Third

Party Claim, which is itself something different from *"any relevant matter or thing"* under Clause 6.7 - which in the context of the warranties has to be read with the brackets which are inapplicable to indemnity claims. Reading across between the two schemes therefore has to be done with a degree of caution; and the more so given that this was a point which neither party had raised before the hearing and was dealt with on the hoof. However the fact of giving such a short period as 14 days for the notification of "likely" Relevant Third Party Claims, in the context of still potential warranty Claims, might well be said to be consistent with or support the need for notification "*as soon as possible*" to assist in preventing potential indemnity claims reaching any more advanced stage.

99. I then turn to the question of whether there is anything in the authorities which steers the analysis in a different direction to that indicated by the wording of the clause; which is if anything supported by the commercial purpose arguments.

100. The Claimants' secondary case (which arises if I am not persuaded that their construction is correct as a matter of language and commercial context) is that this case is analogous to that considered by Morison J in *AIG Europe (Ireland) Limited v Faraday Capital Limited* [2006] EWHC 2707 (Comm), where the Court rejected the argument that an apparently similar provision effectively created two conditions precedent (as soon as possible/30 days), each of which had to be fulfilled.

101. There were two facets of the judgment which Mr Kealey QC drew to my attention. The first was that there was uncertainty in that case as to what consisted a loss, in the context of a clause triggered by a loss. The second aspect was that a similar clause with a notification requirement incorporating both notification "*as soon as reasonably practicable and in any event within 30 days*" was considered: the "*as soon as*" aspect was rejected as a condition precedent because it was unclear to the party who had to operate it.

102. Mr Kealey says that both aspects are also present here (an uncertainty about the trigger event, and the dual clause): and this points the beneficiaries of the indemnities effectively to the seven year time period rather than the "*as soon as possible*" being operative.

103. This argument hinges upon the following passage in the judgment:

> "64. The remaining argument raised by Mr Macdonald Eggers was, in my view, hopeless. It goes like this. The requirement in subparagraph (a) of the Clause was to:

> 'advise the Reinsurers thereof as soon as is reasonably practicable and in any event within 30 days'.
>
> 65. There are two conditions precedent, each of which must be fulfilled: to advise as soon as is reasonably practicable and to advise within 30 days. Even if the court concluded, as it has, that the loss was notified within 30 days, that is not sufficient if the advice could reasonably practicably have been given sooner.
>
> 66. To which I think the answer is:
>
> (1) If that had been the intention behind this draconian clause it should have been spelt out. On a natural reading of the clause a Reinsured would be forgiven for thinking that there was one condition only, namely the 30 day provision and that the other alleged condition was not a condition precedent because the extent of the obligation would be too uncertain to be workable. The words "and in any event" destroy the point being made.
>
> (2) The clause would be ambiguous and unfair, if Mr MacDonald Eggers was right...I would adopt the further formulation in MacGillivray 9th Ed, 19-35: 'Such clauses should not be treated as a mere formality which is to be evaded at the cost of a false and unnatural construction of the words used in the policy, but should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology'".

104. Mr Kealey submits that the Defendants' case would be precisely this trapping of his clients via an obscure and ambiguous phraseology.

105. I would not necessarily be minded to make a distinction between that case and this on the basis that it concerned an insurance contract and this does not. However, there is some force in Ms Smith's submission that this case is different by reason of the fact that it is not about a set of standard terms and conditions offered by an insurer to a (commercial) consumer, but rather it was an individually negotiated contract between businessmen. It follows that the *dictum* from MacGillivray cannot be assumed to be applicable here.

106. Further, there are two important factual distinctions from the perspective of construction.

107. Firstly, in *AIG v Europe* it could (just) be said that there was scope for confusion arising from as soon as possible and 30 days occurring together in the clause. In essence, because 30 days in quite a short period, an unwary reader might be misled into thinking that it defined as soon as possible. This concern plainly operated on the judge's mind, though it did not form part of his reasoning: "*On a natural reading of the clause a Reinsured would be forgiven for thinking that there was one condition only*" ([66(1)]). It is true that 30 days might (very charitably) do duty for as soon as possible. In the present case, any such confusion is plainly absurd. In no way could 7 years be seen as defining "*as soon as possible*". Any literate reader must understand that there are on the face of the clause two quite distinct requirements: (i) as soon as possible and (ii) in any event within 7 years.

108. Secondly, in *AIG Europe,* there was both perhaps greater scope for confusion and greater logic in elision in that both potential dates "counted from" one single starting point – the uncertain loss date. In this case however (i) the two cannot be elided as to start date either and (ii) there is no scope for uncertainty as regards the start date for the seven year limitation period, which counts from the date of the SPA. The impossibility of elision is significant, because that offered Morison J a route away from doing what the Claimants here are driven to – namely saying that words in the clause which plainly on their language import a condition precedent, have to be disregarded (because they cannot be given any other sensible meaning). This harks back to the question of doing violence to the wording of the clause, dealt with above.

109. I would add, for completeness, that I do not consider that the uncertainty of the start date overtly had any effect on Morison J's reasoning. The question of loss is dealt with and clearly closed in the judgment before turning to consideration of the condition precedent issue, and there is no cross reference back, or allusion (as there is to the elision point).

110. I therefore do not need to consider the submission that the decision of Morison J is wrong. I see the force in the submission made for the Defendants that the backdrop in terms of the authorities on contractual construction has moved on since that decision was given, and that it appears to be somewhat at odds with the decision in *Springer*.

111. In effect neither case particularly relied on by the parties is truly analogous: *Springer* concerns construction of the CPR, which is not the same as construction of a commercial contract. *Faraday* relates to an insurance contract on standard terms with a different wording.

112. Nor indeed is the late appearing authority of *A v B* [2017] EWHC 3417 (Comm), relied on by the Claimants in oral argument, analogous; that

case concerned construction of the new LCIA Rules against a background where the Arbitration Act and authorities on that and previous iterations of the LCIA Rules were relevant factual matrix. Thus the judgment takes in reviews sections 31 and 73 of the 1996 Act, the UNCITRAL Model Law, and (by reference) both the current and previous versions of the LCIA Rules (as well as some flavour of the regime under the 1950 Act, which was not one which referred to "*as soon as possible*", but to "*steps in the proceedings*").

113. Returning to *AIG Europe,* I need only say that against the distinguishable background I consider that if one had to choose, I would incline to the view that the approach in *Springer* is to be preferred as more intellectually robust. I would also add that even looking at the facts of *AIG Europe,* I would have difficulty in characterising the argument of Mr MacDonald Eggers as "hopeless" in the context of the modern authorities on construction.

Part B: Trigger

114. The next issue, which can be dealt with quite briefly, was the question of uncertainty as to start date imported by the wording "matter or thing". This was (of course) persuasively argued by Mr Kealey. His own formulation bears repetition:

> "It all depends how you interpret a relevant matter or thing and what is the standard of relevance. Is it something which may or something which might, which is the same? Something which is likely to, which is 50%, or something that is expected to, which is probably more than 50%, because expectation denotes a likelihood, at least in certain people's eyes.
>
> But is it something, again, which may give rise to a claim even though the vendors, the purchaser doesn't himself or herself appreciate that, itself appreciate that? What if the purchaser doesn't realise that it might? Is it objective/objective, is it objective/subjective? Is it subjective/subjective? Which would you like to choose?"

115. But in reality, this was something akin to the forensic prestidigitation attributed by the Court of Appeal to the then Mr Sumption QC in *Hiscox v Outhwaite* [1991] 2 WLR 1321; and like them, I remain unbeguiled. The time for "*as soon as possible*" starts to run at a time when there is an identifiable matter or thing in relation to which a claim under the Clause 5.9 indemnity may arise. Neither Leggatt J nor the Court of Appeal was troubled by this. The former said [40-41].

> "However, whilst there may well be scope for argument about the exact point at which a notice may be given under clause 6.7, it seems to me that the clause can sensibly be interpreted as requiring notice as a precondition of making a claim once there is an identifiable matter or thing which may give rise to a claim under the indemnity provision. Once one accepts that the relevant matter or thing is not an actual claim under the indemnity, it seems to me that the best interpretation of the clause is that it is intended to denote a matter or thing which may give rise to such a claim."

116. The latter said: [50]: *"those words are wide enough to include matters or things which precede the making of a claim against the company is made clear by clauses 6.11 and 6.12."*

117. Mr Kealey sought to complicate the matter out of existence by reference to objective and subjective and combinations thereof. It appears to me tolerably obvious that the answer is that there must be what subjectively satisfies this test – a pure objective/objective test could hardly sit with the "*as soon as possible*" wording. This is the way the matter is dealt with as regards "likely" claims in Clause 6.12. The fact that this is not spelt out in terms does not render the clause unclear.

118. This too is consistent with what the relevant authorities in the insurance context have to say. Mr Kealey cited in this context *Kajima UK Engineering v Underwriter Insurance* [2008] 1 All ER (Comm) 855, *HLB Kidsons v Lloyd's Underwriters* [2008] 1 All ER (Comm) 769 (FI), *Aspen Insurance UK Ltd v Pectel Ltd* [2009] Lloyd's Rep IR 440, *HLB Kidsons v Lloyd's Underwriters* [2008] Lloyd's Rep. IR 237.

119. But in the context of this case, this is an arid debate, given that it is not suggested that this is a case which turns on the acquisition of knowledge, or the late dawning of knowledge. The reality is that the core of the argument comes back to what was billed as the Claimants' principal point: the construction of the words. If they are clear in the Defendants' favour, that is the end of the story.

120. It is interesting here to note that in the end while Mr Kealey put a positive case on construction, he did not press it very hard, tacitly (and realistically) acknowledging that I would almost inevitably read the clause as I have. It was not more than nominally his case that his was clearly the right construction. That was a sensible approach, because there was no way in which I could have been persuaded of that point. However, in effect he had to maintain his case as to a positive construction at least to some extent, because as a matter of logic, if he did not offer a credible alternative construction, his real (though technically his backstop) case, that the clause was

insufficiently clear to be given effect as a condition precedent, must fail. The authorities turn on clarity versus ambiguity. A clause can be clear simply by default of alternative. Here the result is that the clause is actually clear on analysis, and is the more so because the alternative offered lacks the credibility which might indicate ambiguity.

121. Two further points can be made on this. Firstly, it is not satisfactory or right as a matter of law to say that one construction is better than the other, and indeed the other is hopeless, but then to say that the construction is insufficiently clear to be given the effect which its words import. That was however ultimately where Mr Kealey invited me to go. That was the logical correlate of his submission that I had to "unthink" the clarification offered by the Court of Appeal, and consider the clause and its clarity or lack thereof by reference to how the parties might have approached it absent that judgment. The result on that analysis might be to conclude that the clause was (now) perfectly clear and that there was only one possible reading, but that nonetheless it should not be given effect because it is only so clear because of the issues settled in the Court of Appeal. Yet this must be wrong. In the first place the Court of Appeal have not in fact "clarified" the clause. They have construed it, and they have determined the meaning which those aspects of it which they considered always had. And (ironically) that was in fact the construction for which the Claimants always contended on those points.

122. Secondly if Mr Kealey were right, the clause would be construed as a condition precedent if it were all construed in one step (i.e. if Leggatt J or the Court of Appeal had construed all the points, or if the summary judgment had never happened), but would not, if the process of analysis was staged as it has been here. That cannot be right.

123. This point too has its ironic aspect: the reason why this issue was not considered as part of the debate on the summary judgment application was that the Claimants contended that it would require factual evidence – but have now elected to serve none, and contended that I should regard the Defendants' factual evidence as inadmissible. Thus on their case as it now presents itself there was no reason why Leggatt J and the Court of Appeal should not have approached the exercise of construction in one go.

124. Regardless of the steps which have occurred procedurally, the clause means what it means; and what it means is that the Indemnitors are under no liability under Clause 5.9 unless notice of any matter or thing is given to them as soon as possible. It only remains to determine whether in fact such notice was given.

Issue 3 – Was notice given as soon as possible?

125. This issue was the subject of lengthy chronologies by both parties and detailed oral submissions by Ms Smith, assisted by Mr Hodson on the spreadsheets.

126. I was grateful for those submissions in that they assisted in determining a few questions on the timeline, and reinforced the clear impression which I had had from the chronologies alone: notice was not given "*as soon as possible*".

127. What one is looking for is the point at which the Claimants knew any matter or thing, which they knew or any reasonable person would know might give rise to a claim under the Clause 5.9 indemnity. This investigation takes place against a background where it is common ground that there was insurance in place, but that insurance (i) was limited in extent, so there was scope for large losses to exceed the insurance available and (ii) carried a deductible for each and every claim, so any successful claims would feed through into the indemnity at least to that extent.

128. In those circumstances, the investigation is not the complicated thing which it might conceivably be if there was ground up insurance to a level which made the indemnity answerable only to quasi-catastrophic losses.

129. There is in this context an obvious indication given by the notification given by the Claimants to their insurers. This was done first in February 2014, just after the first section 166 Notice ("the ETV Notice") was served, and then further notifications were sent in March, April, October and December 2014 – after the second section 166 Notice ("the UCIS Notice") had been served. Further that notification was done in circumstances where the obligation to notify in that context was triggered by becoming aware of any claim or 'CIRCUMSTANCE', and was to give notice of it "*as soon as practicable*". 'CIRCUMSTANCE' in this context meant *"information or facts or matters of which the INSURED is aware which is likely to give rise to a claim*…". It was therefore on its face a less onerous test, because of the likelihood requirement.

130. The indication given by these notifications is backed up by an examination of the underlying materials. Without going into all the detail to which I was taken in argument the following points appear to be of some relevance:

    i) There had been contact with the FCA from mid-2012 with regards to these categories of transactions, with the FSA seeking information. By early 2013, the FCA had flagged *"a number of major issues"* and failures of risk and compliance functions. Clear notice was given that notices were going to be served. The FCA also gave some granular examples of why they

were concerned – of 14 files reviewed only one was deemed "suitable" (acceptable to the FCA);

ii) On 5 March 2013 an internal report was provided to insurers as part of the exercise of full and frank disclosure on making a submission for renewal of the insurance cover;

iii) By 27 March 2013 the Claimants had already started to identify potential claims. That action included a detailed spreadsheet which included not only a brief description of individual claims, but also a column for "Action Taken", which contains details of what the Claimants had done to manage the complaint this far. That is a column which has obvious resonance with Clause 5.12 – and also, to the extent the two march together, with the "*as soon as possible*" requirement of Clause 6.7.3. The document includes claims deriving from the former M2.

iv) By June 2013 the Claimants had identified 79 potential claims from M2. In July a report produced for the Claimants indicates that specialist consultants Hazell Carr were evaluating the issues and that PwC was also involved. Insurers were informed of the results of this investigation.

v) By December of 2013 the FCA had formally confirmed that section 166 Notices would be served, and the Claimants were setting out in a spreadsheet of cases what was thus far thought to be owed from (and inferentially to be notified to) insurers – and to "Vendors".

vi) Shortly after the service of the first section 166 Notice, in February 2014, the internally estimated assessment of claims (across the board and not confined to ex-M2 business) was £19.6-22.6 million for UCIS and around £31 million ETV.

131. This then resonates with the terms in which the claims are notified to insurers, which spoke of *"circumstances that are likely to give rise to a loss"* including to the second excess layer of their cover. They repeatedly acknowledged a clear likelihood that the FCA Notice might result in further claims and that the first layer of cover would be exhausted.

132. Against those circumstances there can be only one answer to the question of whether the Claimants by this stage knew any matter or thing, which they knew or any reasonable person would know might give rise to a claim under the indemnity. That answer is "Yes".

133. It was telling that the insurance notifications were completely ignored by the Claimants in both their written and oral submissions. No argument was proffered suggesting that, in circumstances where notification of knowledge of likely claims reaching some way up the

insurance programme had been made, it could be said that the requirements of Clause 6.7.3 were not met.

134. Indeed, it seems likely, though it is not relevant for current purposes, that the requirements of the clause were met earlier than this. Given the exposure to deductibles, there is an appearance of quite sufficient information to prompt a notification by the time that the March 2013 spreadsheet was produced and considered. And this of course, resonates with the fact that the Claimants felt that disclosure of the issue had to be made on renewal at about that time. The case for notification becomes still clearer as the year progresses.

135. In those circumstances I need not consider the question of whether the condition precedent was fulfilled if (contrary to the above) the Claimants were right in their case that no notification was necessary until they had *"meaningful and useful information"*.

136. However, for completeness I conclude that, even on that basis, the requirements of the clause were met well before any notification was in fact given. The level of detail available after the internal review by Hazell Carr, and which formed the basis of the notification to insurers, was quite sufficient to amount to *"meaningful and useful information"*. The fact that the Claimants are right to say that there was still a lot of work to be done to reach a really robust estimate of the liabilities in the light of the Skilled Person Reviews is not to the point. I should however make plain that the amount of work involved is manifest from the documents to which the Claimants have referred me - as well as the costs which were incurred in the process: by September 2014 incurred review costs were £1.3 million and in early 2015 review costs were estimated at £5.5 million.

137. The Claimants' submission amounts to one that in the context of:

    i) This clause, which features both the words "*as soon as possible*" and "*any matter or thing*" (unqualified by a requirement of likelihood);

    ii) The background of Clause 5.12 and its contemplation of the Defendants' involvement from a stage when "avoiding" as well as contesting or mitigating claims was a possibility;

    iii) They were entitled to wait for over 2 years after they had made insurers aware of the situation and 17 months after they had formally notified – and to delay to a time when payments had begun to be made and they had incurred millions of pounds of costs of investigation. The Claimants themselves, it should be noted, internally designated this phase the "execution/redress" phase, which followed on from the "design/initial assessment" phase.

138. That submission is manifestly unrealistic, despite Mr Kealey's very best attempts to re-dress the situation in a more attractive garb.

139. The conclusion is only reinforced given that the Claimants were also unable to point to what changed in July 2015, in the sense of acquisition of *"meaningful and useful information"*, to prompt notification – other than the looming seven year limitation date, which the evidence showed that the Claimants had diarised.

140. The spreadsheets to which Mr Hodson took me showed that the numbers of claims notified in July 2015 had in fact been identified as early as July 2014, and had been under a continuing process of analysis through six iterations of spreadsheet since then. The process of bottoming out claims was and apparently remains a continuum. In June 2015, the "Internal Superbowl" notes indicate that *"material uncertainties continue to exist"*. Nothing of significance appears to have occurred between this time and the date of actual notification; and, again, the Claimants did not address submissions to this point, in tacit acknowledgement of the position.

141. Therefore, whichever test is applied, the conclusion would remain the same: the condition precedent was not complied with.

Conclusion

142. It follows from the above, that the preliminary issues are determined against the Claimants and that their claim for an indemnity against those Defendants fails.