Neutral Citation Number: [2023] EWCA Civ 1284

Case No: CA-2023-000822

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Simon Gleeson (sitting as a Deputy High Court Judge)
[2023] EWHC 588 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2023

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ASPLIN
and
LORD JUSTICE BAKER

- -

Between:

(1) DECISION INC HOLDINGS PROPRIETARY LIMITED **(2) DECISION INC SHARECO (RF) PROPRIETARY LIMITED**	**Claimants/ Respondents**
- and -	
(1) STEPHEN GARBETT **(2) ANIS EL-MARIESH**	**Defendants/ Appellants**

- -
- -

David Lowe (instructed by **Wallace LLP**) for the **Appellants**
Mark Warwick KC (instructed by **Child & Child Law Ltd**) for the **Respondents**

Hearing dates: 18 and 19 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 03 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Newey:

1. This appeal relates to an amended share purchase agreement dated 8 October 2018 ("the SPA") pursuant to which the defendants, Mr Stephen Garbett and Mr Anis El-Mariesh, agreed to sell to the first claimant, Decision Inc Holdings Proprietary Limited ("Holdings"), the issued shares in a company then known as Copperman Consulting Limited ("the Company"). Holdings subsequently assigned its rights and benefits under the SPA to the second claimant, Decision Inc Shareco (RF) Proprietary Limited ("Shareco").

2. In a judgment dated 16 March 2023 ("the Judgment"), Mr Simon Gleeson, sitting as a Deputy High Court Judge ("the Judge"), concluded that the defendants were liable to pay Shareco £1.31 million in damages for breach of a warranty contained in the SPA. The defendants now challenge that decision.

Basic facts

3. This section of this judgment is largely derived from the Judgment.

4. The Company specialises in the design of enterprise performance management ("EPM") software. Such software is used by very large companies to manage financial flows within their businesses and facilitates planning, modelling, consolidation and reporting of data across multiple systems within an organisation. As the Judge explained in paragraph 7 of the Judgment:

> "In general a business will come to an EPM specialist when they want a new system designed and built for them. This means that the revenues of that specialist arise in … 'large lumps' – at any given time, such a business will have a relatively small number of relatively large projects ongoing, and there is relatively little 'flow' work. In summary, the continual winning of a few large mandates is essential to the business."

5. The future of a business of this kind is conventionally assessed by compiling a "pipeline" listing new business prospects. As the Judge noted in paragraph 8 of the Judgment, "A pipeline document can include everything from a remote prospect to a concluded agreement – it simply lists all of the identified possibilities."

6. The Judge went on to observe in paragraph 9 of the Judgment:

> "[T]he nature of the EPM consultancy business is such that its operational gearing is very high. The design and implementation of EPM systems is difficult and complex work, and in order to be successful a firm needs a strong bench of full-time employed specialist consultants. The vast majority of such a firm's costs are therefore fixed. This means that when the firm is fully employed the profits may be very high, but a relatively small downturn in turnover may have a significant negative impact on profits."

7. The Company was founded in 2007 and enjoyed success. However, by 2017 the defendants, who were the Company's directors as well as holding its shares, were concerned that its small size counted against it when pitching for new work and believed that it needed to become part of a larger group. In mid-2017, therefore, they approached Equiteq, a corporate finance firm, with a view to selling the Company. Equiteq in turn contacted Mr Nicholas Bell, the founder and chief executive officer of Holdings, a South African company.

8. Mr Bell came to London in November 2017, met the defendants and sought more information about the Company. Over the following months, the defendants supplied a number of pipeline and other documents bearing on the Company's financial position. Thus:

    i) On 25 January 2018, Mr El-Mariesh sent Mr Bell a sales pipeline for that month and a sales breakdown. The pipeline showed a grand total of £13,360,000 of possible work, with the BBC and Kerry Group as two of the biggest new potential projects. No information was given as to the likelihood of a mandate being won;

    ii) On 29 March 2018, Mr Bell was sent a further pipeline with a total of £15,210,000. This document used a red/amber/green colour-coding system to indicate the chances of an item producing paid work;

    iii) On 31 May 2018, Mr Bell was sent drafts of another pipeline ("the May Pipeline") and a detailed profit forecast ("the May Forecast"). The May Pipeline used the same colour-coding system as its predecessor and gave a total of £15,128,000. The May Forecast anticipated EBITDA (or "Earnings Before Interest, Tax, Depreciation and Amortisation") for the full year of £1,628,393 and assumed that the BBC, Kerry, Transport for London ("TfL") and Nidec ("the Four Contracts"), which were significant elements in the May Pipeline, would begin generating revenue in the current year, in September, June, June and June respectively;

    iv) On 11 July 2018, Mr Bell was provided with the Company's draft June 2018 management accounts;

    v) On 24 July 2018, Mr Garbett sent Mr Bell an "updated pipeline plan" ("the July Pipeline") with an overall total of £21,554,000. The July Pipeline depicted TfL and Nidec in green and the BBC and Kerry in amber. The total value given for the BBC, which was described as "ongoing", was £3 million;

    vi) On 5 October 2018, Mr Bell was sent the Company's June and July management accounts; and

    vii) On 8 October 2018, the day on which the SPA was concluded, Mr Bell was supplied with a document headed "August 2018 relevant invoices/revenue".

9. Somewhat earlier, on 11 June 2018, Holdings had entered into an initial share purchase agreement ("the First SPA") with the defendants. The document was, however, subject to significant conditions precedent and (to quote from paragraph 32 of the Judgment) "seems to have been regarded by both parties as a declaration of

intent whose major function was to set out a pricing formula". On 26 July, Mr Bell told the defendants in an email that Holdings' shareholders, although fully supportive, were not yet prepared to commit to the purchase. Mr Bell said:

> "Despite the positive signs there remains a high degree of scepticism with the first half performance to June, and whilst June was really positive, it is only one month and the previous five have been very poor by comparison."

10. The First SPA was superseded by the SPA when the latter was signed on 8 October 2018. On 12 October, in accordance with the terms of the SPA, the defendants transferred 70% of the shares in the Company to Holdings and were paid £5 million. A further sum of £1,751,500 million was placed in escrow, but it subsequently fell to be returned to the claimants, and was.

11. On 31 October 2018, Mr Bell was provided with the monthly accounts for the Company for August and September. These showed net losses after tax of £40,746 for August and £2,382 for September. Mr Bell was astonished by these figures.

12. As required by the SPA, the parties agreed and signed a statement showing the position of the Company as at 12 October 2018. This recorded net assets of £571,949 and a profit for the year of £315,073 (which was not, however, an EBITDA figure).

13. As the Judge explained in paragraph 60 of the Judgment:

> "Revenues continued to be low, with the Company making a loss of £16,197 EBITDA in October and a profit of £1,078 EBITDA in November. However, these figures paled into insignificance in the face of the December figures, which showed an EBITDA loss of £97,387. The position did not noticeably improve in 2019, when the January EBITDA loss was £95,708."

14. On 6 March 2019, Holdings and Shareco sent a formal letter to the defendants alleging breach of warranties which they had given in the SPA.

15. On 4 September 2020, Holdings and Shareco gave formal notice ("the Notice") of a claim pursuant to clause 11.4 of the SPA. The present proceedings were issued on 2 October 2020.

16. Thereafter:

    i) the defendants served a defence and counterclaim in which they denied liability and also counterclaimed for the issue of shares in Holdings to the value of £787,000 pursuant to the terms of the SPA mentioned in the next paragraph; and

    ii) the claimants served a reply and defence to counterclaim in which, among other things, they explained that they intended to set off £787,000 against what they were awarded for breach of warranty.

The SPA

17. The SPA provided for the defendants to sell the shares in the Company to Holdings in two tranches. In the first instance, 70% of the shares were to be transferred on the "First Completion Date" (in the event, 12 October 2018) in return for £6,751,500 plus or minus 70% of the "Actual Excess Cash" or "Actual Cash Shortfall", on the footing that the difference between £6,751,500 and £5 million would be paid into a "Retention Account" pending determination of the "Actual Excess Cash" or "Actual Cash Shortfall". The remaining 30% of the shares in the Company were to be transferred within 30 business days of the finalisation of the Company's audited accounts for 2019 and a statement of the Company's 2019 EBITDA ("the Second Completion Date"). At that stage, the defendants would receive a further payment if the average EBITDA for 2018 and 2019 multiplied by 6.43 exceeded the sum of what they had already been paid plus a minimum of £787,000. There was also provision for the issue to the defendants at that point of shares in Holdings to the value of at least £787,000.

18. By clause 10.2 of the SPA, the defendants warranted that, "except as Disclosed", each of the warranties set out in schedule 4 to the SPA was true on the date of the agreement and the First Completion Date. Schedule 4 provided so far as relevant:

> "**19 CHANGES SINCE THE ACCOUNTS DATE**
>
> Since the Accounts Date:
>
> …
>
> 19.1.2 there has been no material adverse change in the turnover, financial position or prospects of the Company
>
> ….
>
> **20 FINANCIAL AND OTHER RECORDS**
>
> 20.1 All financial and other records of the Company ('**Records**'):
>
> 20.1.1 have been properly prepared and maintained;
>
> 20.1.2 constitute an accurate record of all matters required by law to appear in them, and in the case of the accounting records, comply with the requirements of section 386 and section 388 of the CA 2006;
>
> 20.1.3 do not contain any material inaccuracies or discrepancies; and
>
> 20.1.4 are in the possession of the Company

…."

19. "Accounts Date" was defined by clause 1 to mean 31 December 2017.

20. Clause 11 of the SPA imposed limitations on claims for breach of warranty. Clause 11.4 provided:

> "The Sellers shall not be liable for a Claim unless notice in writing summarising the nature of the Claim (in so far as it is known to the Buyer) and, as far as is reasonably practicable, the amount claimed, has been given by or on behalf of the Buyer to the Sellers:
>
> 11.4.1 in the case of a Claim for breach of the Tax Warranties, on or before the seventh anniversary of First Completion; or
>
> 11.4.2 in any other case, on or before the expiry of the period of 24 months commencing on the First Completion Date."

21. "Claim" was defined by clause 1 to mean "a claim for breach of any of the Warranties in Schedule 4", and another restriction on liability in respect of "a Claim" was to be found in clause 11.3. Clause 11.3 stated:

> "The Sellers shall not be liable for a Claim unless:
>
> 11.3.1 the Sellers' liability in respect of such Claim (together with any connected Claims) exceeds £10,000; and
>
> 11.3.2 the amount of the Sellers' liability in respect of such Claim, either individually or when aggregated with the Sellers' liability for all other Claims … , exceeds £100,000 …."

22. It is also relevant to note that the SPA contained provisions relating to matters which were disclosed to Holdings or of which it otherwise had knowledge. Thus:

    i) Clause 10.6 provided that, except for "the matters Disclosed", "no information of which [Holdings] … has knowledge … , or which could have been discovered … , shall prejudice or prevent any Claim or reduce the amount recoverable under any Claim";

    ii) By clause 10.7, Holdings warranted that it had "no actual knowledge … of any fact, matter or circumstances constituting a breach of Warranty save as Disclosed"; and

    iii) Clause 11.5 provided that the defendants should not be liable for a "Claim" to the extent that the "Claim" "arises from facts, events or circumstances that have been Disclosed including Disclosed in the Disclosure Letter".

23. "Disclosed" was defined by clause 1 to mean "fairly disclosed in the Disclosure Letter in such detail so as to enable a reasonable buyer to understand the relevance and importance of such information and to assess its impact on the Company and the nature of any relevant Warranty".

The claim

24. Both in the Notice and in their particulars of claim, the claimants alleged breaches of the warranties found in paragraphs 19 and 20 of schedule 4 to the SPA (respectively "Warranty 19" and "Warranty 20").

The Notice

25. As regards Warranty 19, this was said in the Notice:

> "5. There have been breaches of Warranty 19, specifically Warranty 19.1.2.
>
> 6. Based on the actual financial performance of the Company in FP May 2018 as reported in the FY2018 Forecast P&L, on an annualised basis, full year revenue for FY2018 of £4,337,0711 is £916,997 (or 17.5%) lower than FY2017 of £5,254,068, £836,151 (or 16.2%) lower than FY2016 of £5,173,224 and £81,076 (or 1.8%) lower than FY2015 of £4,418,148. The reduction in revenue in FY2018 alone represents a material adverse change in the turnover of the Company and therefore a breach of Warranty 19.
>
> 7. While *'prospects'* is not defined in the Agreement, and while *'prospects'* is not a recognised accounting term, prospects refers to the future financial performance (or forecasts) of a company. Since the Accounts Date there had been a material adverse change in both the turnover and the prospects of the Company, which was not properly reflected in the FY2018 Forecast P&L, the May 2018 Sales Pipeline or the July 2018 Sales Pipeline.
>
> 8. The prospects of the Company were represented in the May 2018 Sales Pipeline (on which the FY2018 Forecast P&L was based) and the July 2018 Sales Pipeline. However, these documents included revenue from projects which it was not certain that the Company would in fact win. Had the correct position been represented in the FY2018 Forecast P&L, then Consulting Services Revenue forecast for FY2018 would have been £3,553,464. This represents a decrease of £1,204,100 from the actual Consulting Services Revenue recorded in FY2017 of £4,757,564, a decrease of 25.3%. This represents a material adverse

> change in the turnover and the prospects of the Company."

26. Later in the Notice, in paragraph 34, this was said:

> "Based on the information provided, the Consulting Services Revenue forecast for FY2018 of £5,189,157 was overstated by £1,635,6942 and should have been £3,553,464, an overstatement of 46.0%. This represents a material inaccuracy in breach of Warranty 20. Furthermore a forecast of £3,553,464 represents a decrease of £1,204,100 from the actual Consulting Services Revenue recorded in FY2017 of £4,757,564, a decrease of 25.3%. This represents a *'material adverse change in the […] prospects of the Company'* in breach of Warranty 19."

27. A footnote to the "£1,635,694" found in this passage explained:

> "£427,300 (BBC) +£358,288 (Nidec) + £669,456 (Kerry) + £390,075 (TfL) - £209,425 (Remaining Projects) = £1,635,694. The adjustment of £1,635,694 removes the revenue for BBC, Nidec and Kerry from the FY2018 Forecast P&L in its entirety. The adjustment to TfL removes £390,075 of the total forecast revenue of £512,100. The remaining £122,025 comprises revenue earned in August of £1,500 plus 50% of project revenues for months one to three of the project in October to December to reflect the uncertainty over the anticipated revenue for FY2018. The adjustment to remaining projects of £209,425 represents an uplift of 63% to other project revenues of £330,575 in October to December to reflect the potential for additional revenue which could have been generated from existing clients in FY2018."

28. The Notice dealt compendiously with what was claimed in respect of the breaches of warranty alleged. It said in paragraph 45:

> "So far as is reasonably practicable the Buyer's calculation of the amount claimed pursuant to Clause 10.3.1 is £8,848,500. Without prejudice to the Buyer's contention that there is no obligation for this notice to provide any particulars of the said sum, the following calculation is provided:
>
> (a) the Enterprise Value of the Company based on the warranted information of £9,645,000; minus
>
> (b) the Adjusted Enterprise Value of the Company of £796,500."

Pleadings

29. The particulars of claim reflected the Notice. In fact, paragraphs 9-12 and 38 of the particulars of claim were in precisely the same terms as paragraphs 5-8 and 34 of the Notice, and paragraph 49 of the particulars of claim was to the same effect as paragraph 45 of the Notice. Paragraph 49 of the particulars of claim read:

> "The amount claimed pursuant to Clause 10.3.1 is £8,848,500. This figure is calculated as follows:
>
> (a) the Enterprise Value of the Company, based on the warranted information of £9,645,000; minus
>
> (b) the Adjusted Enterprise Value of the Company of £796,500."

30. The claimants also served a reply and defence to counterclaim. They said in paragraph 41 of this:

> "the word '*prospects*' is a reference to the Defendants' then present day assessment of the opportunities that were listed. Some of these prospects (in green) had already been secured and were 'ongoing'. Others (in yellow) were potential (often with a description of the likelihood of that potential being appended)."

Trial submissions

31. In their opening skeleton argument for the trial, the claimants said that it was their contention that "prospects" referred to "the future financial performance (or forecast) of the Company".

32. A written note for closing prepared on the claimants' behalf included this:

> "**Issue 3 – As at the First Completion Date (viz. 12 October 2018), since the Accounts Date (viz. 31 December 2017) had there been a material adverse change in the turnover and/or prospects of the Company on the basis that the turnover and/or prospects of the Four Projects [i.e. the Four Contracts] was not properly reflected in the FY2018 forecast P&L, the May 2018 Sales Pipeline or the July 2018 Sales Pipeline, as alleged?**
>
> 18. This calls for a comparison between the Company at 2 points in time, viz the Accounts Date and the First Completion Date.
>
> 19. As regards the Accounts Date, the prospects of the Company can be shown in a number of ways, including:
>
> (i) The Info Memo at F1/62 et seq. …

> (ii) The documents at F1/252-254
>
> (iii) The EBITDA as at Jan 2018, see G/19, viz £114,449.
>
> 20. As regards the First Completion Date, the prospects will be for the Court to assess. However the overwhelming evidence is that the true position as at 12 October 2018 was materially adverse to the Accounts Date. The Forecast and pipeline documents did not reveal the true position, rather they concealed it. The true position emerged from the August and September management accounts ….
>
> 21. Evidence as to the true position can be found as follows:
>
> (i) From the Dearman report [i.e. the report prepared by the expert instructed by the claimants]. The actual position for FY2017 was £4,757,564 …. For FY2018 the position was £3,572,273 ….
>
> (ii) From Mr Thompson [i.e. the expert instructed by the defendants] – His EBITDA for FY2017 was £997,019 and for FY2018 was £175,897 ….”

33. The oral closing submissions of Mr Mark Warwick KC, who was appearing for the claimants (as he also did before us), reflected the written note. His submissions included this passage:

> “So we make the basic point that this issue calls for a comparison between the company at two points in time. So you then need to look at those points in time and so the first is the accounts date. Obviously, we don’t have a document per se that tells us that on 31 December, so you have to look at material in the vicinity of that.
>
> So we’ve got at (i) the information memorandum. That of course was a little earlier in time, but that gives you some clue as to what the prospects were. There are documents at F1,252 …. That’s 21 January and there was a sales forecast and some pipeline figures there. So we’ve got those documents.
>
> Then we’ve got the EBITDA at January with a figure for that of about 114,000.
>
> So we’ve got – this is the position at about – the prospects of the accounts date. Then we’ve got to look ahead and say what were the prospects at the first completion date ….”

The Judgment

34. At trial, as in the Notice and their particulars of claim, the claimants alleged:

    i) Breach of Warranty 20, on the basis that the Company's "records" were defective;

    ii) Breach of Warranty 19, on the basis that there had been a "material adverse change in the turnover" of the Company; and

    iii) Breach of Warranty 19, on the basis that there had been a "material adverse change in the … prospects" of the Company.

35. The Judge did not accept the first two allegations. So far as Warranty 20 was concerned, he concluded that the documents on which the claimants relied were not "records" within the meaning of the warranty and that they were not in any event inaccurate. In this connection, the Judge said, among other things, in paragraph 94 of the Judgment:

> "I am strongly of the view that Mr Garbett was guilty of a degree of self-persuasion when he put the pipeline documents together. However he was extensively cross-examined on this point, and I can find nothing in his evidence which suggests that what was written was not an accurate record of what he believed the position to be. The same applies as regards the May Forecast – no matter how implausible the beliefs of the Defendants may have been at the time when this document was put together, I can find no evidence that it did not, at that time, accurately record their beliefs as to the likely course of the financial year."

36. With regard to the allegation relating to "turnover", the Judge said in paragraph 123 of the Judgment:

> "The question is therefore simply as to whether the turnover figures for the months of August and September were so far away from the long-run average for the Company that a hypothetical reasonable seller would have concluded that there had been a fundamental change in the nature of the revenue flows into the Company. Although there was a significant drop in these figures – particularly considered on a month-by-month basis – I am by no means certain that it is large enough for such a seller to have concluded that there was such a fundamental change. It should also be emphasised that the turnover warranty, unlike the prospects warranty, is necessarily purely backward-looking. The question is simply one as to whether developments up to the Effective Date [i.e. 12 October 2018] constitute a material change. I have some difficulty with this determination, but I think that on balance the Claimants have failed to make their case that these events, taken as a whole,

> show a change in turnover which was so significant as to be material."

37. In contrast, the Judge held that there had been a breach of Warranty 19 as regards "prospects" of the Company. The Judge commented on how an allegation of breach of Warranty 19 should be approached in paragraphs 99-103 of the Judgment. He said in paragraphs 100-102:

> "100. … In essence, there are three stages to the process. The first is to determine what might be called a 'baseline' figure – that is, what was the expected or forecast level of the relevant factor at the time of the contract. The second is to determine the 'actual' figure – what was the actual position as at the date of the contract. The third is to consider the difference between the baseline and the actual figure, and determine whether that difference is so great as to be material.
>
> 101. The establishment of a baseline figure is not as easy as it seems. For a well-established business with predictable revenues, the baseline may simply be the historic level of that factor – thus, if turnover has been 100/month for the last five years, the baseline will be 100/month. However, for a business with highly variable turnover, such an exercise may make no sense. In this sort of case it is necessary to examine the process by which the agreement was reached, and to try and establish what a reasonable expectation would have been. Here again, the test is objective and not subjective – a wildly over-optimistic purchaser does not acquire a cause of action in this regard as a consequence of his over-optimism. The baseline is the level which reasonable buyers and sellers, had they been asked to do so, would have agreed to be the most likely estimate of the factor concerned over the period concerned.
>
> 102. The ease of establishment of the actual figure depends heavily on the factor forecast. For turnover, for example, the actual level of turnover as at the Effective Date [i.e. 12 October 2018] can be established by simple inspection of the books of the Company at that date. However, for a warranty as to the future – in this case, of prospects – some analysis may be necessary in order to determine what the actual prospects of the Company were as at the Effective Date …."

38. After explaining in paragraph 125 of the Judgment that the claimants argued that the Company's "prospects" depended on its future profitability and that the defendants suggested that "prospects" referred "more generally to the Company's chances of being successful in the future", the Judge said in paragraph 126 that he thought it clear

that "if anyone had asked [Holdings] what it considered the 'prospects' of the Company to be at any point prior to completion (or indeed thereafter), the resulting discussion would have been conducted entirely in terms of expected levels of EBITDA". The Judge then asked himself "what the position would have been if, immediately prior to the First Completion Date, the Defendants had given an accurate account to [Holdings] of the position as at that date": see paragraph 128. After observing in paragraph 131 that the defendants' position was that, "even in October 2018, a reasonable person in their position could not have expected that the year-end figure would be as bad as it in fact turned out to be", the Judge noted in paragraph 132 that, at 12 October 2018, "the Defendants knew, and [Holdings] did not, the outcome of the months of August and September". He continued in paragraphs 133 and 134:

> "133. These months had been put down in the May forecast as producing EBITDA of £231,796 and £228,077 respectively. The Defendants knew that the actual figures were a loss of £40,746 in August and a profit for September of £2,382. This means that they knew that they were nearly half a million pounds adrift of the forecast which they had given Decision in May. This difference, although enormous, would not of itself have taken them out of the range of contemplated outcomes under the SPA. However, the only way that a reasonable person in their position could have concluded that there had not been a material change in the prospects of the Company would have been if they were very highly confident that the remaining months of the year would produce at the very least the £432,463 predicted for it in the May forecast.
>
> 134. I think this is relevant to the issue of the approach of the hypothetical reasonable seller. A hypothetical reasonable seller in this position would, I think have concluded that there had been a material adverse change in the prospects of the Company unless he had a very high degree of confidence that profits over the next few months would be sufficient to rebalance the ship. That question would depend almost entirely on the prospect of substantial revenue under the Four Contracts being received in that period. The question is therefore simply this – how confident of this were the Defendants at the time, and would that confidence have been shared by a hypothetical reasonable seller?"

39. The Judge next considered the Four Contracts in turn, concluding:

    i) In relation to the BBC, that he "absolutely [did] not think that a hypothetical reasonable seller would have had a high degree of confidence that this contract would produce any significant turnover in the medium-term future": paragraph 137 of the Judgment;

ii) In relation to TfL, that "a hypothetical reasonable seller could well have concluded that it was certain that £28,500 would be received under this contract, and highly likely that £122,025 would have been received by the year end" but that this was "not … anywhere close to the £512,100 which had been projected for the contract over 2018 as a whole": paragraph 142;

iii) In relation to Nidec, that he "[could not] accept that a hypothetical reasonable seller could have concluded that any forecast revenue should be attributed to this contract at all for the year 2018": paragraph 145; and

iv) In relation to Kerry Group, that he did "not believe that a hypothetical reasonable seller would have concluded that there was any reasonable prospect of any revenue being received under this contract in the course of calendar 2018": paragraph 149.

40. In the light of that analysis, the Judge accepted evidence given by Mr David Dearman, the expert instructed by the claimants, to the effect that the Company could have been expected to achieve EBITDA of £325,897 for 2018. The Judge said in paragraph 156 of the Judgment:

> "I am prepared to use this figure as an accurate estimate of what a reasonable hypothetical seller in the position of the Defendants would have known to be the true expected prospects of the Company for the year 2018. More simply, what that figure indicates is that the Company, in aggregate, would be lossmaking in the second half of the year."

41. Turning to the "baseline" for the "prospects" limb of Warranty 19 ("the Prospects Warranty"), the Judge said in paragraph 150 of the Judgment:

> "The May Forecast suggested that EBITDA for the year might be £1.5m, but it does not seem to me that the Claimants ever regarded this as certain, or even probable. I think the best guide to the expectations of the parties can be derived from the agreed pricing structure for the transaction."

The Judge concluded in paragraph 155:

> "the baseline estimate from which the assessment of material adverse change must start is the expectation that the Company would generate around £1m EBITDA in the year 2018, and possibly a little more in 2019. That is the expectation which a reasonable buyer would have had, and the baseline against which the question of whether there was a material adverse change must be assessed."

42. Coupling this with his assessment of the Company's "actual" "prospects", the Judge said in paragraphs 157 and 158 of the Judgment:

> "157. If, on the Effective Date [i.e. 12 October 2018], the baseline figure for expected prospects for 2018 was

> £1m, whilst the actual expected profit was £0.3m, I think it is clear that this constitutes a material adverse change in the prospects of the Company as at that date. If the Company was now lossmaking, this would lead to cash-flow shortfalls and the need for recapitalisation – as indeed eventually proved to be the case.
>
> 158. I am therefore satisfied that at the Effective Date, the Defendants were in breach of their warranty that there had been no material adverse change in the prospects of the Company as at that date."

43. The Judge further considered that the claimants had given the defendants due notice of the claim for breach of the Prospects Warranty which he held to have been established. He noted that Mr David Lowe, who had appeared for the defendants (as he also did before us), had argued that the fact that the Notice did not specify in respect of each breach of warranty alleged the quantum of damages sought in respect of that breach meant that the Notice did not comply with clause 11.4 of the SPA, but he rejected that contention. He said:

> "193. My starting point here is to consider the specific facts of the case. In particular, I cannot see how it would have been possible for the Claimants to proceed as Mr Lowe suggests and allocate different values to the different breaches. Mr Thompson attempted in his expert's report to calculate the loss relating to one particular breach – the breach of the turnover warranty – in order to demonstrate that this was theoretically possible. However, I agree with Mr Dearman that this exercise is in reality not possible, since, as Mr Dearman points out, the assumptions required to establish one breach necessarily imply other breaches which would fall to be valued in turn. In reality, the breaches here are so intertwined that it is impossible to say with any degree of plausibility that this breach caused £x of damage, whereas that breach caused £y. The reason that the Claimants gave only a single figure for the cumulative impact of the breaches was because that was the best they could do, and that must mean that their estimate was 'reasonable' – which is all that is required by clause 11.4.2.
>
> 194. I do not think that the facts of this case come anywhere near the principles established in *Senate* [i.e. *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423]. There is no question that the Claimants' notice was such, or was pleaded in such a way, as to leave any doubt as to the allegations of breach being made or the calculation mechanism to be applied in arriving at the quantum of damages if the claim was successful. There is no

> question of the Defendants having been disadvantaged in any way by reason of the form of the notice or the way in which the case was pleaded."

44. As for quantum, the Judge recorded in paragraph 197 of the Judgment that "both of the parties … proceeded on the basis that the correct approach would be to ascertain the value of the company as it would have been if its prospects had been as mutually expected, to ascertain the value of the company as it was with its prospects impaired, to calculate the difference between the two, and to require that difference to be paid to the Company". On the footing that the warranted EBITDA was around £1 million, the Judge said in paragraph 205 that "the As Warranted value of the Company – that is, the value if the warranty had been correct – would have been £6.43m; a figure arrived at by simply plugging an estimated £1m EBITDA for 2018 (and 2019) into the pricing formula set out in the Agreement": paragraph 205. In contrast, the Judge assessed "the true value of the Company as at the date of completion" to have been £3,690,493, on the strength of a "maintainable weighted average EBITDA figure" of £573,949 and a multiplier of 6.43: paragraphs 218 and 224. It followed that the "prima facie damages flowing from the breach are … £6.43m less £3.69m – that is, £2.74m": paragraph 226. However, an adjustment needed to be made to take account of the fact that, had the EBITDA figure been £1 million, the claimants would have had to pay a total of £6.43 million for the Company's shares, comprising £5.43 million in cash and £1 million in shares: paragraph 227. That being so, "to put [the claimants] in the position in which they would have been had the contract not been breached, they can claim £2.74m, but must account for £1.43m in unpaid consideration": paragraph 227. The Judge accordingly awarded damages of £1.31 million.

The issues

45. The following issues arise:

    i) Was the Judge's interpretation of, and approach to, the Prospects Warranty wrong?

    ii) Should the Judge's order be set aside on the basis that the breach of the Prospects Warranty which he held to have taken place did not reflect a claim pleaded or argued by the claimants?

    iii) Did the Notice give adequate notice of a claim for the breach of the Prospects Warranty which the Judge found proved?

    iv) Did the Judge fail to take proper account of revenues from work on the TfL project in August and September 2018?

    v) In the event of the appeal succeeding, should the case be remitted for a re-trial?

Issue (i): Interpretation of, and approach to, the Prospects Warranty

46. The Judge approached the claim for breach of the Prospects Warranty on the basis that he needed to compare "the expected or forecast level of the relevant factor at the time of the contract" (which the Judge termed the "baseline" figure) with the "actual

position as at the date of the contract": see paragraph 100 of the Judgment. The "baseline" figure, the Judge said, was "the level which reasonable buyers and sellers, had they been asked to do so, would have agreed to be the most likely estimate of the factor concerned over the period concerned", to ascertain which it was "necessary to examine the process by which the agreement was reached": paragraph 101. Applying those principles to the facts, the Judge concluded that "the expectation which a reasonable buyer would have had, and the baseline against which the question of whether there was a material adverse change must be assessed", was that "the Company would generate around £1m EBITDA in the year 2018, and possibly a little more in 2019": paragraph 155. In contrast, "the actual expected profit was £0.3m", that being "what a reasonable hypothetical seller in the position of the Defendants would have known to be the true expected prospects of the Company for the year 2018": paragraphs 156 and 157. There had thus been a "material adverse change in the prospects of the Company" and a breach of warranty: paragraphs 157 and 158.

47. In my view, there are various problems with this analysis. The first concerns dates. The defendants warranted that, "[s]ince the Accounts Date", there had been "no material adverse change in the … prospects of the Company". For the warranty to have been breached, therefore, the Company's "prospects" must have worsened since 31 December 2017. It was hence necessary to evaluate the "prospects" at 31 December 2017 and those in October 2018, when the SPA was signed and the First Completion Date occurred. The Judge did not, however, undertake any such exercise. He assessed the "actual" position in October 2018 but contrasted that, not with that on 31 December 2017, but with the "expectation which a reasonable buyer would have had". The "best guide to the expectations of the parties", the Judge considered, was to be "derived from the agreed pricing structure for the transaction": paragraph 150. That pricing structure was, however, to be found in the SPA, dating from October 2018, and so could not establish the Company's "prospects" at the end of the previous year.

48. That leads to a second objection to the Judge's approach. As was pointed out by Mr Lowe, the allegation of breach of the Prospects Warranty called for a comparison between the same thing (viz. "prospects") on different dates (31 December 2017 and October 2018), not a comparison between different things ("the expectation that a reasonable buyer would have had" and the "actual" position) on the same date. The Judge was thus mistaken not only in failing to address the position as at 31 December, but in the importance he attached to "the expectation that a reasonable buyer would have had". The Prospects Warranty was concerned with what the Company's "prospects" in fact were (at two stages), not with what a buyer would have expected them to be.

49. A third difficulty with the Judge's analysis arises from the period he selected for the consideration of EBITDA. The word "prospects" looks to the future. By whatever criterion "prospects" are to be determined, therefore, the concern must surely be with what might happen *after* the relevant date. The Judge, however, focused on EBITDA for 2018 even though more than nine months of the year had passed by the time the SPA was concluded: he compared "a forecast for the prospects … *for the financial year 2018*" (emphasis added) with the EBITDA that a reasonable buyer might have expected for that year. To a great extent, accordingly, the Judge was assessing

whether the Prospects Warranty had been breached by reference to what had already happened, not how the Company might fare in the coming period.

50. A fourth issue arises from the fact that the Judge equated "prospects" with EBITDA. The meaning to be attributed to "prospects" may, of course, be affected by the context in which the word is used and, where used contractually, could potentially vary from one contract to another. In the context of the SPA, "prospects" is not easy to construe. I have not, however, been persuaded that it simply refers to EBITDA. Had the parties had EBITDA in mind, they could have been expected to use the term: after all, EBITDA features elsewhere in the SPA in a number of places. Moreover, the word "prospects", read naturally, seems to me to connote "chances or opportunities for success" in a more general way.

51. When refusing to grant the defendants permission to appeal, the Judge said this:

> "the Agreement … provided that the Claimant can make no claim under any warranty in respect of any matter where the relevant facts had been disclosed to him. Since a very great deal of information was disclosed to the Claimants between the accounts date and the Effective Date [i.e. 12 October 2018], I decided that it was appropriate to use the expectations of the parties after that information had been disclosed – that is, on the Effective Date – as the baseline for determining the common expectation of the parties as regards prospects. I do not see that this does anything more than to give effect to the terms of the Agreement as a whole."

52. However:

i) It would appear from paragraphs 100 and 101 of the Judgment that the Judge's starting point was that, when considering "how a breach of a warranty of this kind should be established", "the expected or forecast level of the relevant factor at the time of the contract" should be compared with "the actual position as at the date of the contract". That premise was flawed. The Prospects Warranty called instead for the actual position in October 2018 to be compared with the actual position at 31 December 2017;

ii) While the defendants might not have been vulnerable to a claim in respect of matters "Disclosed", "Disclosed" was a defined term. A matter was "Disclosed" only if "fairly disclosed in the Disclosure Letter";

iii) The correct approach had to be to assess the Company's "prospects" at 31 December 2017 and to compare them with the "prospects" in October 2018. Supposing them to have worsened, it could be relevant to consider whether matters bearing on that had been "Disclosed". The fact that the defendants might have been able to escape liability in respect of matters "Disclosed" could not, however, remove the need to evaluate the Company's "prospects" at 31 December 2017, nor make it appropriate to work from the "expectations of the parties".

53. I therefore accept Mr Lowe's submission that the Judge's interpretation of, and approach to, the Prospects Warranty were erroneous.

Issue (ii): Pleadings and submissions

54. The basis on which the Judge held the Prospects Warranty to have been breached differed substantially from how the claimants had put their case in the Notice, their pleadings and their submissions.

55. One distinction relates to the meaning of "prospects". The claimants had not suggested that "prospects" should be taken to mean EBITDA. The claimants said in the Notice and their particulars of claim that "prospects" referred to "the future financial performance (or forecasts)", that "prospects" were "represented" in certain pipeline documents and that a "material adverse change" in the Company's "prospects" was demonstrated by a fall in "Consulting Services Revenue". In their reply and defence to counterclaim, the claimants pleaded that "prospects" was "a reference to the Defendants' then present day assessment of the opportunities listed". In his written opening submissions, Mr Warwick said that "prospects" referred to "the future financial performance (or forecast)", and neither when opening nor in his closing submissions did Mr Warwick suggest that "prospects" should be identified with EBITDA.

56. That said, the Judge asked Mr Lowe during his oral closing submissions whether it was "wrong to say that EBITDA was treated by all parties as the prospects of the company". The Judge thus gave Mr Lowe an opportunity to comment on the proposition.

57. The key departure from the case advanced by the claimants lies elsewhere. The Notice and pleadings contained no suggestion that "actual" "prospects" in October 2018 should be compared with what would reasonably have been expected at that date. Instead, the Notice and particulars of claim contrasted forecast "Consulting Services Revenue" with "actual Consulting Services Revenue recorded in FY2017". Further, at trial Mr Warwick was explicit both in his written closing submissions and orally that what was called for was a comparison "at two points in time".

58. Was it nevertheless open to the Judge to take the course he did? The cases to which we were referred in this context included *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 ("*Al-Medenni*"), *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 ("*UK Learning Academy*"), *Satyam Enterprises Ltd v Burton* [2021] EWCA 287, [2021] BCC 640 ("*Satyam*"), *Ali v Dinc* [2022] EWCA Civ 34 and *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] 1 WLR 575 ("*Sara & Hossein*"). In *Al-Medenni,* the trial judge had found for the claimant on the basis of what was termed "the third man theory", which had been neither pleaded nor explored with witnesses. Dyson LJ, with whom the other members of the Court agreed, concluded in paragraph 25 that, "[b]y making findings for which the claimant was not contending, … the judge crossed the line which separates adversarial and inquisitorial systems". Earlier in his judgment, in paragraph 21, Dyson LJ had said:

> "In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our

> adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

59. In *UK Learning Academy*, David Richards LJ, with whom the other members of the Court agreed, stressed the importance of what is pleaded. He said in paragraph 47:

> "I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was 'a prevailing view that parties should not be held to their pleaded cases', it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

60. In *Satyam*, the trial judge had dismissed the claim on the basis that "the Croydon Properties were held on trust for Mr V Sharma" even though no party had so suggested. The Court of Appeal allowed an appeal and ordered a re-trial. Nugee LJ, with whom Lewison and Arnold LJJ expressed agreement, said:

> "36. The present case … is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's

> function which is to try the issues the parties have raised before him. The relevant principles were stated by this court in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 ….
>
> …
>
> 38. In the present case, the possibility that the Croydon properties were held on trust for Mr V Sharma does not appear to have been even canvassed by the judge during the hearing, but, as far as we know, first emerged fully-formed in the judgment. That, for the reasons given by Dyson LJ in *Al-Medenni*, was not a course that was open to him. Judges may sometimes think - and may even sometimes be right - that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point, and to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound and justified sense of unfairness."

61. In *Ali v Dinc*, it was similarly argued that the trial judge had decided the case on a ground that was not open to her. Having cited, among other authorities, *Al-Medenni* and *Satyam*, Birss LJ, with whom Green and Whipple LJJ agreed, said in paragraph 25:

> "To these statements of principle I wish only to add the following. These problems are all concerned with the interests of justice and, in particular, with circumstances which cause prejudice to the losing party. The common sort of prejudice which is to be avoided is that a new point has arisen in such a way that the losing party was not given a proper chance to call evidence or ask questions which could have addressed it. That is why the function performed by pleadings, lists of issues and so on, which is to give notice of and define the issues, is an important one; but is also why a judge can always permit a departure from a formally defined case where it is just to do so. It is also why the judge's function is to try the issues the parties have raised before them, rather than to reach a conclusion on the basis of a theory which never formed part of either party's case. By placing the emphasis on prejudice, the point I am making is that the modern approach to the definition of the issues requires judges to adopt a pragmatic approach in line with the overriding objective and not seek to be governed by unnecessary formality, provided always that it is just not to do so."

62. On the facts, Birss LJ concluded that "the judge's conclusions are composed entirely of the acceptance or rejection of factual assertions which were pleaded" (paragraph 30) and that the appeal should be dismissed. Birss LJ said in paragraph 34:

> "[S]tanding back it is fair to note that the judge's conclusion does amount to a particular intermediate combination of the various factual assertions making up both parties' cases, and the combination itself is one that neither party had expressly pleaded. However that is a commonplace in civil litigation. The circumstances in which that occurs will be infinitely variable and in many cases, like this one, it presents no problems of any sort. In the closings at trial, the case was argued out fully by counsel before the judge. In no sense could it be said that the appellants were ambushed or precluded from advancing submissions or evidence which they might otherwise have done. The appellants have not identified any step they might have taken, but were deprived of the opportunity to take, because of the way the case was decided. No evidence has been identified which the appellants might have called but did not, nor any questions which might have been asked in cross-examination, nor any authority which might have been cited. No prejudice to the appellants of any sort has been identified."

63. In *Sara & Hossein*, the Supreme Court adopted by a majority an interpretation of a lease which (as Lord Briggs observed in paragraph 71) was "not a construction thus far identified by any of the courts below, or proposed by either of the parties". Mr Lowe told us, however, that the Supreme Court had canvassed what it had in mind in the course of argument and that the appellant's counsel had adopted the proposal in the course of her reply.

64. Mr Warwick suggested that *Ali v Dinc*, as supplemented by *Sara & Hossein*, shows that the Courts are now willing to take a more flexible approach than earlier cases might have suggested. He pointed out, moreover, that the pipeline documents were centre stage at the trial; that the extent to which Holdings knew of matters bearing on the Company's prospects at the date of the SPA was also in issue; and that the Judge could be seen to have had in mind Mr Lowe's submissions.

65. To my mind, however, this is not a case in which it is necessary to examine the nuances of the judgments in *Ali v Dinc* and previous authorities. The simple fact is that the approach which the Judge took to the Prospects Warranty differed radically from any that the claimants had espoused, and it seems to me that, even supposing that the Judge's reading of the Prospects Warranty had been correct, he could not properly have adopted it. True it may be that, at trial, there was extensive discussion of the pipeline documents and what Holdings knew, but that was for different purposes: the defendants were not forewarned even during closing submissions that there was any question of the Judge determining whether the Prospects Warranty had been breached by reference to "the expectation that a reasonable buyer would have had" in October 2018 as to EBITDA for that calendar year. Since the concern would have been with what a "reasonable buyer" would have expected rather than with what Holdings in fact expected, it may be that, as Mr Lowe was inclined to accept, the point would not have affected cross-examination, at least to any great extent. It would

certainly, however, have had a major impact on how Mr Lowe framed his submissions. In fact, it appears to me that it would have been reasonable for Mr Lowe (a) to insist that the claimants should apply to amend their particulars of claim if they wished the Judge's idea to be taken into account and (b) to ask for time in which to consider the implications of the new case. As matters proceeded, the defendants did not have a fair opportunity to address the basis on which the Judge later held the Prospects Warranty to have been breached.

Issue (iii): The Notice

66. As already mentioned, clause 11.4 of the SPA provided that the defendants should not be liable for a "Claim" unless given notice in writing "summarising the nature of the Claim (in so far as it is known to the Buyer) and, as far as is reasonably practicable, the amount claimed".

67. Mr Lowe submitted that, contrary to the Judge's view, the terms of the Notice were not such as to allow the defendants to be held liable for the breach of the Prospects Warranty which the Judge found proved. He argued that:

    i) The Notice was defective because it failed to give the "amount claimed" for breach of the Prospects Warranty; and

    ii) The breach of the Prospects Warranty outlined in the Notice did not correspond to the breach which the Judge held to have occurred.

68. With regard to the first of these points, the Judge said in paragraph 193 of the Judgment that he "[could not] see how it would have been possible for the Claimants to … allocate different values to the different breaches". Likewise, when refusing permission to appeal, the Judge said:

> "The Defendants' expert sought to argue that it would have been perfectly possible to do a separate damages calculation for each breach identified in the Claimant's notice, the Claimants' expert said that it was impossible. I am entirely with the Claimants' expert on this point. I cannot for the life of me see how individual claims could have been attached to figures …."

69. Appellate Courts are, of course, slow to interfere with such findings. In *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, Lord Reed said at paragraph 67:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified".

The circumstances in which an appellate Court will interfere with an evaluative assessment by a trial judge are similarly limited.

70. It seems to me, however, that it was not reasonably open to the Judge to find either that it was "not possible" to give an amount claimed for breach of the Prospects Warranty or that it was not "reasonably practicable" to do so. Common sense suggests that it was not impossible to work out how much was claimed. While the damages sought might have overlapped with those claimed for other alleged breaches of warranty, there was surely no bar to assessing what the damages would be if no other breach of warranty were alleged or made out. In fact, the Judge himself undertook such an exercise in the Judgment. Nor can Mr Dearman's evidence fairly be taken to have been to the effect that it would have been impossible to determine the "amount claimed" for breach of the Prospects Warranty. He and Mr Thompson said in paragraph I.2.1 of their joint statement:

> "The Experts agree in principle, that different findings by the Court in relation to each of the alleged breaches might result in different assessments of damages. The experts would be happy to assist the Court further if required, in order to assist in the assessment of damages on alternative bases."

Asked in cross-examination whether he accepted in principle that a breach of one warranty might result in a different claim value as compared with the breach of another warranty, Mr Dearman accepted that but said he had not originally been instructed to look at whether claims could be disaggregated. When, later in the cross-examination, Mr Dearman was asked whether "in principle it can be done and you can just assume the only breach alleged is this one and then you work out where that gets you", he replied, "In principle", but explained that he had not thought about how one might do it.

71. Mr Warwick, however, submitted that there was no need to specify the "amount claimed" in respect of each breach of warranty alleged in the Notice. Correctly construed, Mr Warwick argued, clause 11.4 of the SPA required no more than that the *total* claimed be given, if reasonably practicable. In this connection, Mr Warwick pointed out that clause 1.6 states that, [u]nless the context otherwise requires, words in the singular shall include the plural". He also sought support for his contentions in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 CLC 573 ("*Nobahar-Cookson")* and *Hopkinson v Towergate Financial (Group) Ltd* [2018] EWCA Civ 2744. In the latter case, which concerned the interpretation of indemnity provisions in a share sale agreement, David Richards LJ, with whom Underhill LJ and Sir Patrick Elias agreed, said in paragraph 52 that he had "not found [the previous authorities to which he had been taken] of any assistance in the construction of this particular provision" and repeated the observation of Gloster J in *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm), in paragraph 10, that "[e]very notification clause turns on its own individual wording".

72. In *Nobahar-Cookson*, Briggs LJ observed in paragraph 19 that "[c]ommercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose". He nonetheless considered that he should approach the construction of a provision comparable to clause 11.4 of the SPA "upon the basis that 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 an answer to the question with sufficient clarity": paragraph 21. He had said in paragraph 18:

> "Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. 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".

He also said, however, that the Court "must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means" (see paragraph 19), and Hallett LJ and Moylan J, who were the other members of the Court, "place[d] greater emphasis … on the commerciality of the Respondent's interpretation" (see paragraphs 40 and 41).

73. For his part, Mr Lowe took us to, among other authorities, *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, another case involving a notification provision in a sale agreement. Giving the judgment of the Court of Appeal in that case, Stuart-Smith LJ said in paragraph 91:

> "Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty. Thus there is merit in certainty and accordingly, in our judgment the point taken by the [vendor] is not a matter of mere technicality and is not without merit."

74. On balance, it seems to me that, even allowing for Briggs LJ's concern that parties should "not lightly [be] 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", the correct view is that clause 11.4 of the SPA required the claimants to state the "amount claimed" in respect of *each* breach of warranty alleged, not just an omnibus figure, as far as reasonably practicable. Clause 11.4 stipulates that the defendants are not to be liable for "a Claim" (i.e. "a claim for breach of any of the Warranties") in the absence of a notice "summarising the nature of the Claim … and, as far as is reasonably practicable, the amount claimed". On the face of it, this means that a notice must summarise in respect of each claim for breach of warranty "the nature of the Claim … and … the amount claimed": the words "amount claimed" relate back to "a Claim". Further, there is a commercial logic to such a requirement,

not least because, as Mr Lowe said, a recipient might wish to settle a stronger claim but to fight a weaker one. As I have mentioned, Mr Warwick placed reliance on clause 1.6 (under which words in the singular are deemed to include the plural), but (a) it is clear from the context that the words "a Claim" in the provision immediately preceding clause 11.4 (viz. clause 11.3, set out in paragraph 21 above) did not extend to multiple "Claims" (a distinction being drawn in clause 11.3 itself between, on the one hand, "such Claim" and, on the other, "any connected Claims" and "all other Claims") and (b) were the presumption for which clause 1.6 provides in point, then, as Baker LJ observed during the hearing, it would seem that it should be applied to "amount claimed" as well as to "a Claim" and "the Claim" (so that there would be a requirement to summarise the nature of the "Claims" *and* the "amounts claimed").

75. In all the circumstances, it appears to me that, for the claimants to be entitled to pursue a claim for breach of the Prospects Warranty, the Notice had to include the "amount claimed" in respect of that breach and that the fact that it did not do so meant that the defendants could not be held liable for any such breach.

76. In the light of that conclusion, I do not need to consider whether the Notice also failed to identify adequately the breach of the Prospects Warranty which the Judge held to have occurred.

Issue (iv): TfL revenue

77. I do not need to consider this issue, either. It would have been significant only if we had rejected the defendants' submissions on the previous issues.

Issue (v): Remittal?

78. Mr Warwick submitted that, if we decided issue (i) and/or issue (ii) in favour of the defendants, the matter should be remitted for a re-trial. The claim for breach of the Prospects Warranty which the claimants had advanced in the Notice, their pleadings and their submissions would not, he said, have been the subject of adjudication, and should be. He pointed out that re-trials had been ordered in both *Satyam* and *Charles Russell Speechlys LLP v Beneficial House (Birmingham) Regeneration LLP* [2021] EWHC 3458 (QB), [2022] Costs LR 343 (where a judge had fallen into error in allowing a party to advance, and then making a finding on the basis of, a case outside the scope of the pleadings: see paragraph 77).

79. In the event, I have also concluded that the Notice was defective. On that basis, a re-trial would be pointless. The claim for breach of the Prospects Warranty could not succeed.

80. A further reason for declining to order a re-trial is, I think, that a claim for breach of the Prospects Warranty could not properly proceed on the basis of the existing particulars of claim and, even supposing that an amendment to them were compatible with the Notice, it must be much too late to permit one. As they stand, the particulars of claim allege breach of the Prospects Warranty on the footing that the "Consulting Services Revenue" for 2018 should have been forecast to be £3,553,464 whereas "Consulting Services Revenue" amounted to £4,757,564 in 2017. The claimants could not, however, establish liability on this basis: the Company's "Consulting Services Revenue" over the *previous* year cannot be equated with its "prospects" on 31

December 2017, and forecast "Consulting Services Revenue" for 2018 cannot be equated with the Company's "prospects" in October 2018, more than nine months into 2018. Nor do the submissions at trial help. As regards the position at 31 December 2017, it was suggested that the Company's "prospects" could be shown from certain documents, but, with respect, there was no explanation of what that would involve or what the result would be, and the "prospects" at 12 October 2018 were said to be "for the Court to assess".

Conclusion

81. I would allow the appeal and dismiss the claim. I would also give judgment in the defendants' favour in the sum of £787,000 on their counterclaim. Both counsel told us that, if we concluded that the counterclaim was well-founded, their clients would prefer an order for the payment of £787,000 to one providing for the issue to the defendants of shares to the value of £787,000.

Lady Justice Asplin:

82. I agree.

Lord Justice Baker:

83. I also agree.