Neutral Citation Number: [2020] EWHC 1624 (Comm)

Case No: CL-2018-000297

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

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

Date: 26 June 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

SKATTEFORVALTNINGEN (the Danish Customs and Tax Administration)	**Claimant**
- and -	
SOLO CAPITAL PARTNERS LLP (in special administration) and many others, including GOAL TAXBACK LIMITED	**Defendants**

- -

Jamie Goldsmith QC, James Ruddell & K V Krishnaprasad (instructed by **Pinsent Masons LLP**) for the **Claimant**
Jonathan Hough QC & Marie-Claire O'Kane (instructed by **Kingsley Napley LLP**) for **Goal Taxback Ltd**

Hearing dates: 3, 4 June 2020

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Approved Judgment

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

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 10.00 am on 26 June 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. Does an agent for a named taxpayer, acting expressly as such in submitting the taxpayer's tax refund claim to a national tax authority, owe some duty of care to the tax authority in respect of the statements included in the tax refund claim form, or in respect of the taxpayer's honesty? A question of that kind is raised by this summary judgment application pursued by Goal Taxback Ltd ("Goal"), and by Goal's related resistance to an application by the claimant to amend its Particulars of Claim as regards Goal. For the reasons set out in this judgment, both the summary judgment application and the cross-application to amend fail and will be dismissed.

2. The parties reminded me of the principles applicable to summary judgment applications. Those principles effectively apply also to the cross-application for permission to amend, since we are a long way away from any trial, the normal rule in this court is that amendments should be allowed, indeed agreed, in the absence of substantial grounds for objection (Commercial Court Guide, para C5.3), and the only substantial ground for objection raised has been the contention that with the amendments the pleaded claims would still be apt for summary dismissal under CPR Part 24.

3. There is no need in this judgment to consider those applicable principles at length. The well-known summary in *Easyair Ltd v Opal Telecom Ltd* [2009] EWCH 339 (Ch) at [15], approved by the Court of Appeal in *Global Asset Capital Inc v Aabar Block Sarl* [2017] 4 WLR 163 at [27], suffices in general and I shall not set it out. In addition, there is often a careful judgment to be made whether it is the occasion for 'grasping the nettle', so as to decide a point that seems at the interlocutory stage to be clear-cut, or for allowing an arguable claim or defence, but one assessed at the interlocutory stage to be weak, to proceed to trial precisely because that is but an interlocutory assessment, the claim or defence is nonetheless arguable not completely hopeless, and (if relevant) the court has to have an eye, as best it can, to whether realistically there may be materially different or additional evidence available at a trial.

4. There are statements in the cases to the effect that questions such as whether representations were made, or whether a duty of care was owed, may not lend themselves to the grasping of nettles, but no rule of law to the effect that summary judgment is prohibited or necessarily inappropriate. In relation to contentious issues of fact, a summary judgment application must not be allowed to become a quasi-trial, but a court does not have to accept without analysis anything and everything said in a pleading or witness statement because it bears a statement of truth, and it may be clear without the need for a trial that there is no real substance in factual allegations made.

5. The claimant is the Danish national tax authority. There is a question whether it is, or falls to be treated by this court as, a separate legal person from the Kingdom of Denmark, and there may be a question whether, if not, these proceedings should name the Kingdom of Denmark as the claimant. I may be grappling with such matters at the next CMC (July 2020), when there will be argument, in the context of Extended Disclosure under the Disclosure Pilot (CPR PD51U), whether documents held by other Danish national authorities are within the claimant's control. In this judgment, I

refer to the claimant as "SKAT" without by doing so intending to indicate any view on the question of its true nature or identity.

6. This is litigation on a massive scale, for the case management and trial of which I have been assigned as designated judge, with an alternate (initially Bryan J, currently Foxton J) pursuant to section D.4 of the Commercial Court Guide. SKAT claims to be the victim of fraud committed against it over a three-year period, from August 2012 to July 2015, to the tune of c.DKK12.5 billion (c.£1.5 billion), but with 90% or more of the damage being done in the second half of that period, from March 2014. The Claim in which the present applications arise is one of four that have been consolidated into a single action: CL-2018-000297 (70 defendants); CL-2018-000404 (25 defendants); CL-2018-000590 (8 defendants); and CL-2019-000487 (9 defendants). Goal is the 66th defendant to this Claim, CL-2018-000297. Allowing for overlap (some defendants are party to more than one Claim), there are 92 defendants in total. Taking account of common legal representation where that exists, at the date of this judgment there are 21 separate legal teams responding actively to SKAT's various claims, representing between them 76 defendants, 2 individuals litigating in person and 1 unrepresented corporate defendant, plus 13 defendants against whom proceedings are currently stayed or against whom default judgment has been entered on liability. A further indication of scale is that what I have described to the parties as the case management option of last resort here, namely a single trial of all claims and all defences, would take, the parties have suggested, 40-50 weeks, that is to say either a full court year or a full court year plus a further full court term, and I do not regard that as an over-estimate.

7. The alleged fraud concerns Danish withholding tax ("WHT"), which is deducted at source by Danish companies in that by law (i.e. Danish tax law) they must pay to SKAT 27% of any dividends they declare, so that they pay their shareholders, net of that deduction, 73% of the declared dividend. SKAT maintains a system for processing and paying claims for WHT 'refunds' to which foreign (non-Danish) shareholders may be entitled under Danish tax legislation giving effect to Denmark's obligations under double taxation agreements ("DTAs") concluded between Denmark and various other nations, including DTAs particularly relevant to this litigation with the USA and Malaysia. For instance, again particularly material to this litigation, a tax-exempt US pension plan that owned shares in (say) Carlsberg A/S so that it received 73% of a declared dividend on that investment would be entitled to claim a full 'refund' of the 27% WHT paid by Carlsberg to SKAT in respect of those shares.

8. The WHT refund system as operated by SKAT included more than one scheme. The fraud alleged is said to have been perpetrated through the 'Forms Scheme', which (as the label might suggest) operated by reference to a paper form. A standard form produced by SKAT, Form No. 06.003 "Claim to Relief from Danish Dividend Tax", had to be completed and submitted by post, with supporting documents, for consideration and approval or rejection, as the case may be, by SKAT's 'Accounting 2' department. The principal focus of the main fraud allegation is the activity of Mr Sanjay Shah through his business, Solo Capital Partners LLP ("Solo"), together with other entities associated or said to be associated with Solo, at the time an apparently reputable financial services operation authorised and regulated by the FSA, latterly the FCA. There are further significant fraud allegations relating to the activities of some individuals initially employed within Solo who, it is said by SKAT, came to use

the same or similar, and allegedly fraudulent, methods of procuring SKAT to make payments using the Forms Scheme.

9. At the risk of over-simplifying what will be SKAT's case on the allegedly fraudulent method, it says that during the relevant period it received, approved and paid thousands of WHT refund claims under the Forms Scheme that were bogus, in the sense that they each pretended that the refund applicant had owned shares in a Danish company and received dividends from it net of WHT, when in reality no such thing had occurred, and claimed payment of the supposed WHT deduction. It is not said that the allegedly fraudulent WHT refund claims were a work of total fiction unrelated to any share transaction or purported share transaction at all. Rather, it is said that self-cancelling or circular sets of (purported) share sales, purchases and loans were documented, the (lack of) substantive effect of which was that the resulting WHT refund claims might as well have been total fiction of that sort.

10. The fraud allegation, and associated allegations of conspiracy, says at its core that the WHT refund claims generated by transaction structures of the sorts deployed by the defendants who are said to have been dishonest were bad claims, and that those defendants must have realised that at the time. The focus, therefore, or at least the primary focus, of the causes of action said by SKAT to arise, is the information conveyed to SKAT by the WHT refund claim form, as completed and submitted, and the documents sent with it. Misrepresentations are alleged to have been made thereby to SKAT that induced the approval and payment of claims, in particular because of a strong culture in Denmark of presuming the taxpayer's honesty in its dealings with SKAT. Defendants said to have been at the heart of the alleged fraud maintain not only that there was no dishonesty but also that the WHT refund claims with which they were involved were valid claims correctly paid by SKAT.

11. One of the issues for consideration at the July 2020 CMC to which I have referred already will be whether there is room for a useful and productive preliminary issues trial on questions as to the basic validity of the WHT refund claims and/or as to what representations, if any, were made by WHT refund applicants by the documentation submitted to SKAT under the Forms Scheme. In this judgment, it is assumed that there is a case with a realistic prospect of success at a trial that the WHT refund claims in which Goal played a part were fraudulent claims. But no allegation is made that Goal acted dishonestly. It is sued only for damages for alleged negligence in connection with the WHT refund claims for which it was engaged, or for disgorgement of some or all of the fees it earned from that engagement on an allegation of unjust enrichment or 'knowing receipt'. It is said that Goal was the tax reclaim agent for WHT refund claims that SKAT says were fraudulent on which SKAT paid, in aggregate, c.DKK4.28 billion (equivalent to c.£503 million), and also the tax reclaim agent for other WHT refund claims, not said to have been fraudulent but said nonetheless to have been bad claims paid by mistake by SKAT.

12. Goal is not unique in being sued but not accused of dishonesty. It is one of a number of 'Non-Fraud Defendants' or 'NFDs' as they have become dubbed, some others of which performed roles similar to Goal's in relation to WHT refund claims, others of which performed different roles. This judgment concerns and concerns only Goal's position, involvement and role, and whether, as Goal maintains, SKAT cannot show a realistic prospect of succeeding at a trial on the claims it has pleaded or is seeking by amendment to plead against Goal.

13. There are a few points of detail on SKAT's current proposed revised pleading of its claims against Goal where Goal says that the amendment should not be allowed, because the particular allegation has no real prospect of success, even if that does not lead to a summary dismissal of the related cause of action, but that still means that the only basis for resisting permission to amend is always Goal's submission about the merits of the proposed plea. In this judgment, therefore, I consider the pleading of SKAT's claims to be as it would be were permission to amend granted, and focus on the summary judgment application, without for the most part giving separate consideration to the application for permission to amend.

14. Stated broadly, the main contest between SKAT and Goal at this stage can be summarised by posing these questions (in each case, remembering that this is a summary judgment application and not a trial):

    (i) As regards negligence, is SKAT seeking to impose on Goal a duty to investigate its clients and refuse to perform contractual services to protect the tax authority from a fraud it failed to detect for itself, or is it asking Goal merely to have done what anyone would expect it was doing to do its job properly, in its own and its clients' interests, and to be held responsible for statements it made for itself (not just as agent), if they were made carelessly, on which it should have realised SKAT would be likely to rely?

    (ii) As regards unjust enrichment, is Goal entitled to retain what it received as contractual fees earned in good faith, or was it sufficiently on notice of the possibility of fraud as to be required to make restitution or be treated as having been in 'knowing receipt'?

Goal – Tax Reclaim Agent

15. Goal is a company within a corporate group that provides services including what it describes as tax reclaim and class action services. It is managed by experienced financial services professionals of good standing, whose honesty (as I have already made clear) has not been put in issue. For example, Goal's CEO, Stephen Everard, has in the past held senior positions with Mercury Asset Management, Bank of America and Citigroup. During the period of interest to these proceedings, Goal's tax reclaim clients included major investment or private banks, Morgan Stanley, Danske, SEB, Lombard Odier and Pictet; and clients for other services included HSBC, Citigroup, Deutsche Bank and UBS.

16. It has been a phenomenon that a high proportion of dividend tax withheld at source, like Danish WHT, is not reclaimed by foreign investors with a refund entitlement, including investment funds. Although the refund process is not complex or difficult for the prospective applicant – at all events if SKAT's Form Scheme is an example to go by – there has been unfamiliarity on the part of investors or fund managers with the existence of and procedures for refund entitlements providing a business opportunity for a service such as Goal's tax reclaim service.

17. Thus, Goal offers to act as tax reclaim agent, identifying to clients the documentation required to make refund claims in a range of jurisdictions, then preparing and submitting the necessary forms and supporting papers, as instructed and provided by clients. It provides that tax reclaim service on the terms of its standard business

agreement, to which I refer below. As a slight aside, although if it matters this is or may be contentious, Goal says that it does not provide advisory services. For example, its website FAQs in relation to WHT includes this:

> "***Are you tax lawyers or attorneys?***
> *No. We do not provide tax advice or act as advisors. The information we provide is based on experience in a very niche area of the market.*"

The degree to which that may be contentious, to be clear, is not so much as to what Goal actually does with and for its tax reclaim clients (although there are some points of dispute there), but more whether, if it matters, what it does amounts to or involves the giving of advice of such a nature or to such an extent that it is a firm providing by way of business "advice about the tax affairs of other persons" so as to be a "tax adviser" as defined by regulation 3(8) of the Money Laundering Regulations 2007 (UK SI2007/2157, "the MLR"), so that the MLR apply to Goal under regulation 3(1)(c).

18. To stay abreast of the availability and requirements of WHT refund claims around the world, Goal subscribes to the Tax Research Platform of the IBFD (International Bureau of Fiscal Documentation) and (since January 2015) Ernst & Young's Global Withholding Tax Reporter. Goal uses its knowledge and experience of the world of WHT refund claims to produce Market Guides giving a summary of the WHT rules in a range of jurisdictions. Those Market Guides are used by Goal staff as a point of reference and are typically provided to clients as regards jurisdictions in which they are invested. Goal also produces, which are internal documents only, step-by-step process guides for its staff to work through in the preparation and submission of individual reclaim applications in the given jurisdiction.

19. In relation to WHT, Goal regarded itself, and by its website advertised itself, as an expert tax reclamation services specialist, and "*a leading supplier of products and solutions for the reclamation of withholding tax on cross-border securities dividend income*", with a team including "*highly experienced securities and taxation professionals who utilise their wealth of knowledge to deliver and enhance our service delivery*". That team included Charlotte Benge (Tax Operations Manager and later Global Business Development Manager), who was lauded on the website as having "*over 15 years strong analytical knowledge or withholding tax within the EMEA and US markets in the Investment Banking area*" and "*a wealth of technical knowledge and experience*". The nature and quality of Goal's client base was also trumpeted on the website.

20. The nature of the WHT reclaim service was described on Goal's website in these terms: "*Delivered within a service provision environment, and using our own GTRS technology, Goal Taxback provides an outsourcing capability for those clients who, in the quest to reduce costs, minimize risk and leverage the latest technologies view outsourcing as a viable solution to remaining competitive in their marketplace*"; which I understand to mean this, namely that Goal offered to do, and to do well, a job that clients could do for themselves but might find it cheaper to get Goal to do for them. Thus, Goal "*will undertake all the work necessary to recover excess withholding tax suffered on foreign income by utilising our proprietary software together with all the knowledge and expertise gained through years of experience in the business. All we require to implement this service is some simple documentation*

to be completed." The service also included the provision of reports enabling investment managers to "*track and monitor the status or your reclaims throughout their lifecycle*".

21. Goal's standard business agreement referred to in paragraph 17 above opened with recitals stating that Goal "*provides a global tax reclamation outsourcing service*", that "*The Customer wishes to engage [Goal] to carry out such global tax reclamation outsourcing service on behalf of its Clients*" and that "*[Goal] and the Customer agree that the provision of the global tax reclamation outsourcing service by [Goal] to the Customer shall be provided on the terms and conditions set out in this Agreement.*"

22. The material terms of Goal's tax reclaim service, and upon which it was provided, were then as follows:

    (i) Clause 1.1 contained definitions, including definitions of:

        (a) 'Tax Reclaim(s)', to mean "*an individual Tax Reclaim on behalf of a Beneficial Owner on an investment income event generated in one country on one payment date at one payment rate per unit of security on one security*";

        (b) 'Beneficial Owner(ship)', to mean "*any individual or entity who is the legal and registered owner of a security and in whose name or, subject to power of attorney acceptable to [Goal], on whose behalf a Tax Reclaim can be filed with a foreign or local tax authority*". This seems an odd definition, as it would appear to provide that in any case where the distinction might fall to be drawn because of the way the security in question was held, the 'Beneficial Owner' as defined would be not the beneficial owner as that concept would ordinarily be understood by an English lawyer. For example, most obviously, for shares held by a nominee shareholder as part of an investment management service for investor clients the nominee would seemingly be the 'Beneficial Owner' of the shares it held on trust for the investor clients as beneficial owners;

        (c) 'Client', to mean "*those entities including but not limited to individuals, institutions, companies, or other bodies (i) who have bestowed upon the Customer responsibility and/or authority to custody, manage, administer or operate their securities portfolio, and (ii) to process Beneficial Ownership information for the provision of the Service*"; and

        (d) 'Service', to mean "*the provisions [sic.] of the global tax reclamation outsourcing service by [Goal] wholly or partially, either from their offices or in the Customer's office. The primary service is to outsource the process for Tax Reclaims but could also encompass support for global relief at source outsourcing services and the provision of related tax information and consultancy services of a related tax or general securities industry operational nature as agreed with the Customer*".

(ii) By clause 2, headed "*THE SERVICE*", Goal agreed "*to provide the Service, subject to appropriate Beneficial Ownership and such investment income data relating to the Customer, the Client and/or any Beneficial Owner as [Goal] shall reasonably request being available from the Customer to enable [Goal] to facilitate the Service*" (clause 2.1), promised to "*carry out its duties under this Agreement with reasonable skill and care*" (clause 2.2), and made clear that it "*does not guarantee that any Tax Reclaim application will be successful*" (clause 2.4).

(iii) Still in clause 2, there was provision for *ad hoc* and monthly reporting to the Customer (clause 2.5[1] (my numbering, as there were two clauses 2.5)), and then this (clause 2.5[2] (ditto)): "*[Goal] shall not initiate any Tax Reclaim process or set up any Clients/Beneficial Owners on [Goal's] systems until the Customer has signed to agree that the Client/Beneficial Owner static data is complete and accurate*".

(iv) Clause 2.3 stipulated that Goal's obligations under the contract "*are owed to the Customer and for the avoidance of doubt nothing in this Agreement shall extend to any Beneficial Owner, Client or other party any rights under this Agreement or entitle any Beneficial Owner, Client or other party to claim against [Goal]*". Mr Hough QC for Goal accepted that he could not say, for a summary judgment application, that this would defeat an otherwise well-founded negligence claim by SKAT.

(v) Clause 3.1 provided that the detailed commercial obligations of both the Customer and Goal were defined in a 'Service Level Agreement', and that was included as Schedule B to the contract.

(vi) By clause 4.1, Goal agreed "*to attempt the Tax Reclaim process, where appropriate, on behalf of the Customer and its Clients/Beneficial Owners, on identifiable over withheld tax and tax credits on global investment income*", "*[s]ubject to the compliance by the Customer of [sic.] its obligations hereunder and to provision of adequate information, dates and proof of beneficial ownership …*".

(vii) By clause 5.1, the Customer promised "*to provide such information, data, resources, assistance and original hard copy evidence of tax deducted at source on Clients/Beneficial Owner(s) investment income as are necessary/or requested by [Goal] … including but not limited to the Customer's Clients/Beneficial Ownership static data and investment income data in electronic format in addition to assistance to find evidence of tax deductions to support Tax Reclaim applications to enable the provision of the Service by [Goal] to the Customer*"; and by clause 5.4, the Customer promised to "*act towards [Goal] conscientiously and in good faith*".

(viii) Clause 6.1 provided that Goal's fees as set out in Schedule A to the contract would be due to Goal and paid in accordance with that Schedule.

(ix) Clause 9, "*LIMITATION OF LIABILITY AND INDEMNITIES*", included:

(a) an indemnity in favour of Goal in respect of any negligence, recklessness, default or fraud of the Customer or its officers, employees, agents or consultants (clause 9.1);

(b) an entire agreement provision (clause 9.2);

(c) a disclaimer by Goal of responsibility for the information that might be supplied by the Customer, clause 9.3, in these terms: "*... [Goal] accepts no liability whatsoever for the veracity or accuracy or fullness of information supplied by the Customer or its Client(s)/Beneficial Owner(s) nor for the consequential intent on the party for [sic.] the Customer or its Client(s)/Beneficial Owners that may be implied by the nature of the information. If any officer, employee, agent or consultant of [Goal] has reason to believe that information or materials have been supplied by the Customer or its Client(s)/Beneficial Owner(s) to [Goal], whether knowingly or otherwise, which are in breach of any regulations, statute or other legal instrument or this Agreement, [Goal] reserves the right to return such information to the Customer and/or to decline to process the Tax Reclaim(s) so affected. ...*";

(d) an exclusion of Goal's liability to the Customer save for cases of "*gross negligence, wilful misconduct or fraud of [Goal], or that of its employees, officers, or agents*" (clause 9.5);

(e) a limitation of Goal's maximum aggregate liability "*to the Customer or otherwise under this Agreement*" to the total fees received from the Customer for the year ending on the date of the first matter giving rise to a claim, but capped at £1 million (clause 9.8).

(x) Clause 16.1 provided that no term of the contract was enforceable by any third party under the Contracts (Rights of Third Parties) Act 1999, "*but this does not affect any right or remedy of any third party which exists or is available apart from under that Act*".

(xi) Clause 18 provided for English law to govern the contract, with each party submitting irrevocably to the exclusive jurisdiction of the English Courts.

23. Schedule A, as referred to in clause 6.1, provided for fees of three types for the Service:

(i) "*Account opening fees*" of €2,300 per beneficial owner;

(ii) "*Transaction fees*" of "*[X]% of amounts recovered, per beneficiary, per claim (capped at €12,000 per reclaim)*", where X was typically 0.85, although that was negotiable (e.g., it may have been 1.0 for some of the WHT refund claims the subject of SKAT's claims); and

(iii) a fee of €2,300 for "*Cancellation of a tax reclaim which [Goal] has commenced processing, or an amendment resulting in an extra reclaim*".

24. Schedule B, the Service Level Agreement, set out under paragraph 1 a long list of bullet points by way of steps that Goal agreed to take, "*subject to compliance of the Customer with their obligations under the Service Level Agreement, and under the Global Tax Reclamation Outsourcing Agreement [i.e. the main contract terms]*". The bullet points included the following, namely that Goal would:

- *Agree a format and methodology with the Customer for the receipt of Client/Beneficial Owner income entitlement data to enable potential Tax Reclaims to be identified.*

- *Prepare, collate and submit Tax Reclaims to the relevant tax authorities … .*

- *If required produce tax vouchers for the Customer for its Clients/Beneficial Owners investment income to back up the Tax Reclaim process with fees to be negotiated under separate agreement.*

  (I quote this one, only to dismiss it, because it was the subject of some discussion during argument that led SKAT to flirt with pleading it. But it had not been referred to before and no evidence had been addressed to it. Mr Hough QC informed me on instructions that no such service has been sought from or provided by Goal for over 10 years, and SKAT withdrew any intention to rely on this point.)

- *Produce Tax Reclaim status reports in such format as [Goal] shall decide and use reasonable endeavours to distribute to the Customer and/or its Clients/Beneficial Owners (as instructed in the Client set up process) electronically within 10 business days of each month.*

- *When reasonably requested provide ad hoc reporting at Customer or Clients/Beneficial Owners expense.*

- *Use reasonable efforts to investigate any noted discrepancies, and liase [sic.] with the Customer and/or Clients/Beneficial Owners and relevant tax authority … where any adjustment is necessary under advice to the Customer and/or its Clients/Beneficial Owners.*

- *Appoint a Client Services Representative responsible for overseeing and maintaining the proper reasonable application of this Agreement externally with the Customer and it's [sic.] Client(s)/Beneficial Owners and internally with the [Goal] operations department.*

- *Facilitate any reasonable administrative or consultancy requests over and above those defined in this Agreement by the Customer (or the Client) and charge … £1000.00 per day … and as may be increased from time to time by [Goal] by notice in writing to the Customer.*

25. Paragraph 2 of Schedule B provided that "*For the avoidance of doubt [Goal] will not*" *inter alia* "*Initiate the Tax Reclaim process or set up Clients/Beneficial Owners on [Goal] systems until both the Customer and [Goal] have signed to agree that the Client/Beneficial Owner static data is complete and accurate.*"

26. Paragraph 3 of Schedule B set out as bullet points particular steps the Customer promised to take, including:

- *Arrange for the Clients/Beneficial Owner(s) to complete all relevant and related tax documentation required by [Goal] in order to effect any Tax Reclaim or avoidance or reduction of double taxation on investment income from securities. The Tax Reclaim form must include certification from the Beneficial Owners local tax office together with any other required residency documentation.*

- *Obtain a Power of Attorney executed by the Client or Beneficial Owners or any other authorised person [as may be required].*

- *Submit the original tax voucher or any other acceptable hard copy documentation to [Goal] within 60 days of original distribution to facilitate the Tax Reclaim or recovery of double taxation on investment income from securities.*

27. As set out above, Goal's standard contract referred a number of times to the 'static data' on a Customer's 'Clients/Beneficial Owners' that had to be provided so as to set it up on Goal's systems and before Goal could be required to prepare or submit any individual WHT refund claim. In that respect, Goal required completion of a beneficial owner questionnaire. This was a fairly rudimentary form, by which (as it stated) "*Client provides information as to beneficial owner status, and in order that [Goal] can provide a tax reclaim service*", its stated purpose being "*for the client either to:*
Confirm that it is the beneficial owner of the relevant securities and to supply relevant information. In particular information as to its tax residence and tax status as required; or
Confirm that it is not the beneficial owner and to state whether or not it wishes to disclose the identity of the beneficial owner of the securities."

28. That contemplates, as does the contract the 'Customer' (not the 'Client') will have signed, that the 'client' may not be the 'beneficial owner' of relevant securities. Unhelpfully, given the definition of 'Beneficial Owner' in the customer contract (see paragraph 22(i)(b) above), the questionnaire does not specify what it means by 'beneficial owner'. Also oddly – unless this was masked by the fact that there were redactions in the copy example I was shown – the questionnaire did not require the 'client' providing information by completing it to be identified in the form.

29. Rather, the questionnaire first called for the identification not of the 'client' but of the Safecustody Account (Name and Number), securities held in which were to be the subject of possible tax reclaims, and an Agent/Customary Contact Address. The example I was shown then contained:

(i) A standard form statement that "*We are resident in the USA and are not subject to taxation in the USA. The income from the securities in our Safecustody account(s) will be included in the annual corporation or income tax return filed with our local tax authorities.*"

(ii) A statement in a box, with Yes and No boxes underneath to be ticked as appropriate to confirm or deny it, namely "*The income from the securities in our Safecustody account(s) is not [delete where applicable] derived from a permanent establishment or a fixed place of business we have in any countries of investment.*" It is obviously rather odd to have both "is not *[delete where applicable]*" (the instruction in parentheses presumably applying to the word "not") and an option to tick Yes or No whether the statement was correct.

(iii) A pair of statements in a box, with a single set of Yes and No boxes underneath to be ticked as appropriate, namely "*We are not the beneficial owner of the securities, we may hold from time to time in the above Safecustody account(s). We are prepared to disclose the name of the beneficial owner(s) of the securities and have completed the attached beneficial ownership questionnaire.*" I sought to explore with Mr Hough QC, without great success since there was no evidence on it, what a single 'Yes' or 'No' tick against that pair of statements was understood within Goal to mean. The client was next asked by the form to include (copies acceptable) its certificate of incorporation and memorandum and articles, and its Form 6166 (if applicable, as to which see paragraph 30(iii)(c) below). The next page, headed 'Beneficial Owner', contained boxes for 'Full Legal Name', 'Full address of the registered office' and 'Contact name and full postal address (if different from above)', together with tick-box sections by which to indicate 'Entity Type' and 'Tax Status' (e.g. 'Pension Fund' and 'Tax Exempt', in the example I was shown), before concluding with a Yes/No tick-box section for the question "*Does the beneficial owner have any special tax dispensations already in place with any tax authorities either outside the country of residence or from the beneficial owners' local tax authorities?*", followed by "*If yes, please attach documentary evidence of any dispensations*", and a section for identifying the 'Tax Identification Number *allocated to the beneficial owner by the local tax office*', 'Tax Office Name', 'Contact Name *if possible*', 'Telephone Number' and 'Tax Office Address', only the first two of which pieces of information appear to have been provided in the example I was shown.

30. Most directly pertinent to SKAT's negligence claim, the business end of the tax reclaim service in relation to Danish WHT involved Goal completing and submitting to SKAT, for and on behalf of a named refund claimant, a Form 06.003, sending with it documents provided to Goal by the client. As I mentioned above, the Forms Scheme ran on 'snail mail', so there was a hard copy covering letter enclosing a signed, hard copy Form and supporting material:

(i) Goal's habit was for the covering letter, under a heading identifying the WHT refund client, to open with, "*Please find enclosed a tax reclaim form, together with evidence of payment and tax deduction paid on the above client's securities.*" It then gave bank details for the Goal account to which funds were to be transferred if the refund claim was accepted, with a reference to quote on the funds transfer, and asked for acknowledgment of receipt by email to GTB@goalgroup.com or by signing and returning by post an enclosed copy of the covering letter.

(ii) The completed Form 06.003, a copy example of which (with claimant identity details redacted) is included as an Annex at the end of this judgment, was headed "Claim to Relief from Danish Dividend Tax", below which there was an "X in the box" choice to select between "*In my capacity as beneficial owner*" and "*On behalf of the beneficial owner*". Goal would put its X in the latter box. Then came:

(a) "*Claim is made for refund of Danish dividend tax, in total DKK:* [*amount claimed*]".

(b) The name, address and contact email address of the "Beneficial Owner", the email address being clientservices@goalgroup.com (i.e. a Goal address).

(c) A signature, under a heading "Beneficial owner/applicant" and above "*If the claim is made on behalf of the beneficial owner the applicant's power of attorney shall be enclosed*". The signature would be that of an authorised Goal employee, alongside a Goal stamp.

(d) "*As documentation is enclosed dividend advice(s), number:* [*number*] *(This documentation is obligatory)*".

(e) The bank details for payment if the claim were accepted, under "*The amount is requested to be paid to:*".

(f) Finally, a "**Certification of the competent authority**" section with "*It is certified that the beneficial owner is covered by the Double Taxation Convention concluded between Denmark and ……*", and space for a dated "*Official stamp and signature*". Goal entered the DTA counter-party (e.g. "*U.S.A.*" in the example reproduced in the Annex) but left the certification space blank.

(iii) The supporting material (assuming the examples I was shown are typical) would comprise:

(a) The Power of Attorney under which Goal claimed authority to submit the WHT refund claim.

(b) A document issued by a securities custodian purporting to record a dividend payment and associated Danish WHT. I shall refer to such documents generically as 'dividend advices'.

(c) For a US taxpayer, its Form 6166, which is an IRS Form (i.e. issued by the IRS to a US entity) certifying tax status, so in the example I was shown the Form 6166 was a certificate from the IRS that "*to the best of our knowledge, the above-named entity is a trust forming part of a pension, profit sharing, or stock bonus plan qualified under section 401(a) of the U.S. Internal Revenue Code, which is exempt from U.S. taxation under section 501(a), and is a resident of the United States of America for purposes of U.S. taxation.*"

31. For convenience, whilst recognising that SKAT's case involves an allegation that the parties named as beneficial owners on Forms 06.003 submitted by Goal were in one sense not meaningfully taxpayers at all, I shall refer to those parties, in Form 06.003 forms submitted by Goal, as the 'taxpayers' involved. I have not adopted the term 'WHT Applicant' used by SKAT in the Particulars of Claim, because where the Form was signed and submitted by an agent, the Form labelled that agent (i.e. Goal, for present purposes) the 'applicant' (see paragraph 30(ii)(c) above), so 'WHT Applicant' not referring to Goal could be confusing.

32. The litigation so far as it relates to Goal concerns WHT refund claims submitted by Goal as described in the previous paragraphs that were accepted and paid by SKAT. The amounts claimed and paid were received by Goal and the same amounts, net of any transaction fees due thereon to Goal, were paid on by Goal as it may have been instructed by or on behalf of the taxpayer.

33. The final main feature of the case, so far as concerns Goal, is the exclusivity agreement it concluded in December 2014 with Aesa Holdings Ltd ("Aesa"), a company in the Solo group. By that agreement, Goal undertook (subject to certain exceptions in relation to existing clients) not to provide tax reclaim services for various entities that Goal says were, or at least were identified to it by Solo as, competitors of Solo. Thus the Solo group, through Aesa, was buying the exclusive right to use Goal for WHT refund claims on behalf of Solo clients.

34. This exclusivity was not reciprocal. Solo/Aesa was under no obligation not to make use of other tax reclaim agents, and Solo continued to do so. Those other agents included, for example, Acupay System LLC ("Acupay") (the 3rd defendant in Claim No. CL-2018-000404), with whom a similar (one-way only) exclusivity deal was struck.

35. The consideration for Goal giving up the right to provide its relevant services other than for Solo clients was an annual cash payment of £1.5 million. The first such payment fell due and was paid in December 2014 and is the subject of SKAT's knowing receipt claim against Goal. After SKAT raised the alarm that, as it says, it had been the subject of fraudulent claims, Goal terminated all its dealings with the Solo group. So it may be there were no further exclusivity fees, although that was not dealt with in the evidence so for this hearing so perhaps I shall learn more later in the proceedings.

SKAT's Claims vs Goal

The Negligent Misstatement Claim

36. The foundation for the fraud as alleged by SKAT, so far as then concerns the negligence claim against Goal, is paragraph 19 of the main Particulars of Claim (presently in 'Fourth Draft Amended' form, but paragraph 19 remains as originally pleaded), which asserts that the submission to SKAT of the papers described in paragraph 30 above, involved the making of the following express, alternatively implied, representations, namely:

(i) that the taxpayer "*was the beneficial owner of the shares in the Danish company … (on the day before the ex-date, where stated)*" ("the ownership representation");

(ii) that the taxpayer "*had beneficially received the dividend, net of tax, described … (on the payment date described …, where stated)*" ("the dividend receipt representation"); and

(iii) that the dividend referred to in the refund claim "*had been paid to [the taxpayer], after the Danish company had withheld the tax described …*" ("the dividend payment representation");

and I shall refer to those three representations together as "the basic representations"; and finally

(iv) that the WHT refund claim was "*a genuine application (i.e. made with an honest belief as to the truth of the statements of fact in it) to reclaim tax deducted from a dividend paid to [that party] by the named Danish company*" ("the honesty representation"). The honesty representation is thus an implied representation of an honest belief in the truth of the basic representations.

37. The dividend payment representation in fact involves two representations, that the taxpayer had been paid the dividend, and that the Danish company had withheld the stated tax amount from that payment. I find it somewhat obscure to see what the dividend receipt representation adds, or the second element of the dividend payment representation, since it is not SKAT's case that the relevant taxpayers were paid dividends but not for their own benefit or were paid dividends but gross of WHT. Rather (at least as I presently understand it) the case is that given the (purported) transaction structures used, the taxpayers were not paid dividends at all.

38. Paragraph 19 pleads that those representations were made by the 'WHT Applications', a defined term in the Particulars of Claim that includes some but not all of the refund claims on which Goal was the tax reclaim agent. Goal was also the tax reclaim agent for some of the 'ED&F Man Applications' as defined in the Particulars of Claim, being WHT refund claims the supporting documentation for which included ED&F Man dividend advices. The ED&F Man Applications, however, are not alleged to have been fraudulent (on anyone's part), and no negligence claim is made against Goal in relation to them.

39. Paragraph 19 does not plead by whom it is alleged that those representations were so made. However, paragraphs 13 to 18 make clear that the allegation is that where the refund claim was submitted to SKAT by Goal, it is alleged (conceded) that Goal was doing so as agent for and on behalf of the named taxpayer. Thus, and as I understood to be accepted in argument, the allegation in paragraph 19 is that representations were made (so far as concerns any legal responsibility or liability towards SKAT that might attach to them) by the taxpayer through the agency of Goal, and not by Goal for itself or on its own behalf. For the present purpose of Goal's summary judgment application, it is not suggested that SKAT has no realistic prospect of securing at trial a finding that the basic representations and the honesty representation were made in that way by the taxpayer when a WHT refund claim was submitted on its behalf by Goal. Indeed, unless I am missing a subtlety in the precise terms in which paragraphs

24.1 and 24.2 of Goal's Defence are expressed, they seem to admit that those representations were indeed so made:

> "*24.1 It is admitted that, by each WHT Application submitted by Goal as agent, the relevant WHT Applicant represented (among other matters) (a) that it was the beneficial owner of shares identified in the Credit Advice Note; (b) that it had received a dividend payment as identified in the Credit Advice Note; and (c) that tax had been withheld before payment, at a rate identified in the Credit Advice Note.*
>
> *24.2 It is further admitted that, by each such application, the WHT Applicant impliedly represented that the facts stated in the application form and supporting materials were true to the best of its knowledge and belief.*"

40. The negligence claim alleged against Goal is nonetheless, and solely, a claim for alleged negligent misstatement *by Goal*. That is how the negligence claim against Goal is introduced, at paragraph 86 of the Particulars of Claim, and Mr Goldsmith QC for SKAT reconfirmed during the oral argument, as the nature of the claim made and its constituent ingredients came under the spotlight on this application, that SKAT puts its negligence claim on that basis alone.

41. It is unhelpful, therefore, both generally and especially since paragraph 19 does not allege any representation by Goal, that what representations Goal is alleged to have made on its own behalf is not pleaded separately or clearly. Rather, that allegation, paragraph 87(e) of the Particulars of Claim, is tucked away within a long plea under paragraph 87 of facts and matters said to support a "*duty to exercise reasonable care to communicate only genuine WHT Applications to SKAT and in particular to avoid causing loss to SKAT through the communication of fraudulent WHT Applications*". There is an obvious mismatch there. The duty of care in a negligent misstatement claim is a duty to exercise reasonable care to ensure that a statement is true.

42. I treat SKAT as alleging that duty, the negligent misstatement liability duty, by reason of the facts and matters set out in paragraphs 87(a)-(d) and 87(f), in respect of the statements made to SKAT by Goal on its own account alleged by paragraph 87(e). I shall not allow SKAT's negligence claim to proceed to any trial without an amendment to paragraph 87, so that (a) the allegation of statements made is separated out, and (b) the duty of care alleged is reformulated to match the negligent misstatement claim said to be pursued.

43. To be fair to SKAT, I should say that the pleading of its claims in these proceedings was a daunting task, and the formulation of its case against Goal is clarified by a separate Schedule 5W to the Particulars of Claim dealing only with Goal rather than tax reclaim agents compendiously. That said, as will be seen, I agree with Mr Hough QC that the claim now proposed to be pleaded in the final version (there have been several) of a draft re-re-amended Schedule 5W is different to the claim pleaded by paragraph 87.

44. In the main body of the Particulars of Claim, then, the allegation of a representation by Goal is paragraph 87(e):

> "*As set out at paragraph 19(d) above, the Agents represented that each WHT Application was a genuine application to reclaim dividend tax, alternatively that the Agents had reasonable grounds to believe that to be the case.*"

That is a bad plea, because (a) (as I have already explained) paragraph 19(d) does not contain an allegation of a representation made by Goal, (b) there is in any event no reference in paragraph 19(d) to a representation about grounds for belief, and (c) strictly (although I suspect this was not intended) it alleges a representation by Goal as to the genuineness of WHT refund claims with which it had no involvement.

45. I take the intention to be to allege that when Goal submitted a WHT refund claim, and by doing so, Goal represented to SKAT that:

(i) it was a genuine claim (in the sense defined in paragraph 19(d), i.e. a claim made by a taxpayer who honestly believed the statements being made on its behalf to be true); alternatively

(ii) Goal had reasonable grounds for believing that it was a genuine claim, in that sense.

To avoid repetition of qualifiers such as 'in the sense pleaded by SKAT', in the rest of this judgment, whenever I refer to the concept of a 'genuine' claim, it is to the concept pleaded by SKAT, as I have just stated it in (i) above.

46. Thus, the case pleaded in the body of the Particulars of Claim is that by submitting a WHT refund claim under the Forms Scheme, Goal told SKAT that the taxpayer was being honest, alternatively that SKAT had reasonable grounds for believing so. Although not made clear, this must be an implied (alleged) representation. No express statement to any such effect is alleged.

47. Turning then to Schedule 5W, it is proposed to plead at paragraph 4E that Goal impliedly represented to SKAT, when it submitted a WHT tax reclaim and by doing so, that:

(i) "*Goal believed [the refund claim made thereby] to be genuine (i.e. not fraudulent)*"; and

(ii) "*it had reasonable grounds for that belief*".

Consistent with its position throughout that Goal is not accused of dishonesty, paragraph 4E immediately clarifies that only the latter alleged representation is said to have been false.

48. Mr Hough QC submitted, and I agree, that paragraph 4E of Schedule 5W is a different allegation to the allegation at paragraph 87(e) of the Particulars of Claim. The primary allegation there is that the honesty representation was made by Goal (i.e. as well as by the taxpayer), that is to say that Goal represented that *the taxpayer was making an honest claim*; and although there is no proper plea of falsity in the main body of the Particulars of Claim (another criticism I have of it), it is tolerably clear from the plea of negligence and loss, at paragraphs 88 to 90, that the primary

representation in paragraph 87(e), as a representation by Goal, is said to have been false, not only the alternative representation as to reasonable grounds for a belief.

49. In paragraph 4E of Schedule 5W, however, the allegation, presented during this hearing as SKAT's final and best articulation of its claim, is that Goal represented only that *Goal believed that the taxpayer was making an honest claim*; and it is made clear that that is not alleged to have been false. Further, it is confusing and unhelpful to introduce as paragraph 4E a new and different definition of a 'genuine' claim, and moreover a definition of one legal idea by reference to another ('not fraudulent').

50. I would not grant permission for paragraph 4E of Schedule 5W unless (a) it referred to "genuine (in the sense defined in paragraph 19(d) of the Particulars of Claim)" rather than "genuine (i.e. not fraudulent)", and (b) paragraphs 87(e) and 88 to 90 of the Particulars of Claim were amended so that, for Goal, they fell in line with Schedule 5W. Paragraphs 87 to 90 of the Particulars of Claim in fact plead a case against all 'Agents' as defined in the pleading, so it includes also Koi Associates Ltd ("Koi") (the 67th defendant in this Claim), Syntax GIS Ltd ("Syntax") (the 68th defendant in this Claim and the 22nd defendant in Claim No. CL-2018-000404), and Acupay. If the negligence claim is to proceed to a trial against Goal, it will be a matter in the first instance for SKAT to consider whether it is content for paragraphs 87(e) and 88 to 90 to continue to apply to all Agents, if for Goal they have to conform to Schedule 5W; and it will then be a matter for each of Koi, Syntax and Acupay, whether any objection is taken to whatever course SKAT proposes to adopt, to the extent it would apply to them if allowed, and there may be an extra element to that as regards Koi and Syntax since judgment has been entered against each of them in default, for damages to be assessed.

51. The difficulty with Schedule 5W does not stop there. It is proposed that paragraph 5 be amended to add an alternative plea in relation to duty of care. Paragraph 5, as originally pleaded, set out additional particulars, specific to Goal, cross-referenced to the matters pleaded in paragraphs 87(b)-(d) and 87(f) (not 87(e)) of the main body of the Particulars of Claim as against all tax reclaim agents that have been sued, in support of the existence of the duty of care alleged in paragraph 87 in the terms quoted in paragraph 41 above (and that, incidentally, reinforces the conclusion in paragraph 42 above). Now it is proposed to say that they are particulars in support of the case that that duty existed at all times, "*alternatively that Goal owed such a duty to SKAT from such time as Goal had constructive knowledge and/or notice that the WHT Applications it was submitting were, or were likely to be, fraudulent for the reasons set out in paragraph 4A above*".

52. Paragraph 4A of Schedule 5W is a proposed new plea asserting that Goal was or must have been aware of facts and matters that would have given a reasonable person in its position cause to question the propriety of the WHT refund claims it was being instructed to submit. SKAT does not allege that anyone at Goal did in fact suspect impropriety, but says (hence paragraph 4A, in the section of Schedule 5W setting out SKAT's claim against Goal for "**Unjust enrichment/knowing receipt**") that being aware of matters that would have given a reasonable person serious cause to suspect foul play is or may be sufficient in law for it to have been in 'knowing' receipt if it received payments derived from the proceeds.

53. In my judgment, this new alternative case on duty of care, for the negligence claim, is misconceived, and I refuse permission for it. There is no basis upon which arguably the acquisition of additional knowledge by the defendant making it careless to believe a statement true, if it was not careless before, or more careless than it was before to think it true, creates a duty of care in respect of the statement that otherwise would not exist. But that, in substance, is what SKAT is alleging. Goal either did or did not make the statements to SKAT that are alleged, and if it did it either owed SKAT a duty of care in relation to them or it did not, without reference to how strongly, if at all, it ought to have suspected that they might not be true.

54. In a negligence case about the provision or submission of information by a defendant to a claimant and what use foreseeably might be made of it by the claimant, the objective fact, if it be true in the circumstances of the particular case, that the defendant is better placed than the claimant to assess whether the information is accurate, or honest, or more likely than the claimant to have or acquire knowledge of matters that might cast doubt on the information, may be relevant, I apprehend, to whether the defendant owed any duty of care to the claimant. That, however, is a different point and does not concern whether the defendant did in fact have or acquire such knowledge (at all events if, as here, the claimant has no knowledge about the state of the defendant's (actual) knowledge).

55. If Goal made statements to SKAT in respect of which it owed a duty of care, it could be that they did so without carelessness for a time and thereafter carelessly, because of the sorts of matters alleged in paragraph 4A, if proved and if they have the implications suggested. In that case, subject to all the other ingredients of liability, SKAT might prove a case against Goal but only in respect of WHT refund claims made after some particular point in time. However, if that were the result, it would not be because there was only a duty after that point in time; what is said in the alternative case to cause a duty of care to spring into existence goes to breach, not duty, and duty must be established otherwise. (The analysis is not complicated in this case by any further possibility of a liability for failing to stop SKAT from accepting and paying a refund claim submitted by Goal without negligence where, prior to payment, Goal learned of matters that ought to have caused it concern. No such claim is pleaded.)

56. I would not grant permission to amend paragraph 5 of Schedule 5W as proposed, therefore, but in the interests of clarity, and all things being equal, I would allow an amendment to this: "*In addition to the matters set out in paragraph 87 of the Particulars of Claim, SKAT will rely on the following facts and matters in support of its case that Goal owed SKAT the duty of care there alleged*". All things are not equal, however, and more major pleading surgery will be required since there is not to be summary judgment now in favour of Goal (see paragraph 58 below).

57. That (slightly destructive) analysis of SKAT's pleading is not pedantry. It is impossible to begin consideration of whether Goal might arguably have made statements to SKAT that are said to attract liability or of whether, if so, such statements might arguably attract liability (i.e. might be statements as to the making of which Goal owed a duty of care to SKAT though acting as agent for the taxpayer), without a clear understanding of what statements by Goal are alleged in the first place, and what matters go to duty rather than breach.

58. It will be seen from later parts of this judgment that my criticisms of SKAT's pleading do not end there. I regret to say I have come to the conclusion that SKAT's pleading is not fit for purpose, so far as concerns SKAT's claims against Goal, on which alone I have focused in the detail required to form such a view because of the need to determine this summary judgment application. SKAT's claims against Goal must be re-pleaded with the concision and precision of analysis that should be the hallmark of any pleading, but which are on any view demanded by a massive, complex case like this in this court. I fear the more that SKAT has sought to revise the pleading to meet, if it can, the contention by Goal that it did not raise a realistically arguable case for a trial, mostly to supplement it by throwing more detail at the problem, the less it has looked like a pleading, the more it has become a mass of material, mixing propositions apt to be pleaded with argument, comment, evidence and speculation, all presented in a confusingly structured fashion, not even (so far as I can see) conforming to the distinction seemingly sensibly drawn between the main body of the Particulars of Claim (allegations common to all Agents) and Schedule 5W (additional particulars specific to Goal).

59. That said, the upshot for the negligence claim against Goal is that the question on this application resolves to this, namely whether there should be summary judgment preventing SKAT from taking to trial a claim that:

    (i) by submitting a WHT tax refund claim, Goal impliedly represented to SKAT that it (Goal) believed the taxpayer to be making a genuine claim;

    (ii) that representation, if made by Goal as alleged, was always true, but carried with it a further implied representation that Goal had reasonable grounds for its belief that the taxpayer was making a genuine claim;

    (iii) Goal owed SKAT a duty of care such that if it did not have reasonable grounds for believing that the taxpayer was making a genuine claim, then it could have a liability to SKAT for loss foreseeably resulting from the submitting of the WHT tax refund claim in question, subject to any reduction for contributory negligence;

    (iv) Goal indeed did not have such reasonable grounds, either ever or from some point in time during the claim period, and loss in the amounts paid out on claims where that was so resulted from Goal's breach of duty so that, again subject to contributory negligence, Goal is liable in damages in respect of that loss.

60. Before turning to my initial analysis of the unjust enrichment / knowing receipt claim, I should acknowledge that Goal might say that the second half of paragraph 59(iii) above skates over other arguments. Goal is very critical (as are other defendants, as have been certain public authorities in Denmark) of what it will say was a carelessly superficial approach within SKAT to scrutinising WHT refund claims. The principal relevant employee, Sven Nielsen, is a serving prisoner in Denmark, having been convicted of dishonesty offences in relation to some of his work at SKAT, unrelated to the WHT refunds relevant to these proceedings or any of the parties to this litigation. The evidence on this hearing is that he has refused to co-operate with SKAT in this litigation. It is said that SKAT hopes eventually to obtain evidence from him, after his release from prison, which it is expected should occur during the

life of these proceedings (in April 2021), but I agree with Mr Hough QC that it appears speculative to suppose that Mr Nielsen will ever co-operate with SKAT voluntarily. It is said that the Hague Convention (on the Taking of Evidence Abroad in Civil and Commercial Matters) might be used. But no application has been made, and it seems SKAT has no mind to pursue that possibility until some point in 2021, after disclosure.

61. Subject to the speculative possibility that evidence from Mr Nielsen might cast a different light, the position appears to be that the processing of WHT refund claims by SKAT's Accounting 2 section during the relevant period involved taking the documentation submitted entirely at face value. So long as it appeared to indicate a factual situation understood to qualify for a refund, the claim would be accepted and paid. In effect, absolute trust was placed in the honesty and accuracy of the taxpayer's information, in the absence of error or inconsistency on the face of the documentation submitted. It is acknowledged by SKAT – without any final admission – that there may be at least a case to answer of contributory negligence. But it resists any suggestion that there should be summary judgment against it on primary causation.

62. I endorse that resistance. I do not regard the questions of causation (and/or contributory negligence) that arise on the negligence claim against Goal as suitable for summary determination. For example, there was some focus in argument on whether there is any real basis for supposing that there might be a finding at trial that the fact Goal as tax reclaim agent put its name to the WHT refund claims it submitted (in whatever sense, if any, the court may say it did so) had any influence on Mr Nielsen or his colleagues when those claims were assessed and authorised for payment by Accounting 2. Provisionally, I can see there may be force in the argument that there is none, in other words there may be force in the argument that it is speculative to suppose a finding at trial that the WHT refund claims submitted by Goal were dealt with differently because Goal's name appeared than they would have been if submitted directly by the taxpayers, depending on exactly what is meant by that, and I shall come back to that in the context of whether any duty of care was owed. But if a duty of care was owed, and breached, it is not clear to me that it is necessary for SKAT to establish specific reliance on Goal's involvement, claim by claim, to make out a case for damages.

63. What is meant by reliance (inducement), as regards Goal's misstatements (if any), and indeed whether, albeit SKAT does allege this, reliance in fact (claim by claim) is a necessary averment, are in my view complex questions of mixed fact and law that I do not regard as capable of summary disposal.

64. Put affirmatively, and this may perhaps explain the way in which the duty of care allegation has been formulated and my criticism of it in paragraph 41 above, if Goal owed a duty to SKAT, to take reasonable care in respect of a statement it would make, by submitting a WHT refund claim as tax reclaim agent, that it (Goal) believed the claim to be genuine, and breached that duty, the question what should have happened had Goal not been negligent might be answered, after a trial, by a finding that the refund claim should not have been made. Part of that, since the allegation is of an implied representation, is that it might be concluded at trial that *ex hypothesi* Goal could not complete and submit the WHT refund claim without making it.

65. For summary judgment purposes, it is not clear to me that it would then be a defence for Goal to show, if it could, that the taxpayer would have made the particular (*ex hypothesi* fraudulent) claim anyway, either directly or through a different tax reclaim agent; nor anyway could I make such a finding (as to the hypothetical facts) without a trial. As to the first part of that, which may be a point of law, see *Kuwait Airlines Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (HL) at [82], *per* Lord Nicholls, "*The likelihood that, had the defendant not wronged the plaintiff, somebody would have done so is no reason for diminishing the defendant's responsibility for the loss he brought upon the plaintiff.*"

66. At the risk of appearing to cut across Mr Goldsmith QC's insistence that the only claim pursued is for negligent *mis*-statement, and my insistence that if so the pleading should be formulated consistently with that, in my view there is room for the possibility that the articulation of an implied representation that Goal had reasonable grounds for holding, as it did, the belief that the taxpayer was honest, is really no more than one way of expressing the conclusion that Goal owed SKAT a duty to take reasonable care over making an implied representation, if it did, that it held that belief. It may be a distinction without a difference to say that the claim is for a *mis*-statement, necessarily negligent, that Goal had reasonable grounds for holding a belief it claimed to (and did) hold, rather than to say that the claim is for Goal's belief, stated to SKAT, having been negligently held such that (because a duty of care was owed in respect of it) it should not have been stated. Indeed, it might be said that the latter expression of the logic for a possible claim is, if anything, the more natural: the defendant held liable for honestly providing an opinion, on the basis that it was not a reasonable opinion to have provided, might find it odd, I suggest, to be told the law regarded them guilty of misrepresentation; when told they had incurred that liability, might they not, more likely, understand the criticism to be that it had been careless of them to hold the view they held, so they should not have expressed it, rather than that they had misstated something?

67. For there to be summary judgment against SKAT on the negligence claim, therefore, in my judgment I would need to be satisfied that it has no realistic prospect of success at trial (and there is no other compelling reason why there should be a trial) as to whether Goal (a) impliedly stated to SKAT, by submitting a WHT refund claim, that it believed the taxpayer to be making a genuine claim, if so (b) owed SKAT a duty of care in respect of that implied statement of belief, if made, and if so (c) did not have reasonable grounds for holding that belief.

The Other Claims

68. Section A2 of Schedule 5W to the Particulars of Claim originally gave very brief particulars of an unjust enrichment claim against Goal. The heading was "**Unjust enrichment**", and there was no 'knowing receipt' claim. Section A2, under that heading, was a single paragraph 4, alleging by way of inference, so as to be the subject of SKAT's unjust enrichment claim, that Goal received fees as a result of the WHT refund claims submitted by Goal that SKAT alleges not to have been genuine claims (that being extended by amendment to ED&F Man Applications submitted by Goal that SKAT says were bad, though genuine, claims), and that those fees included the exclusivity fee, referred to by SKAT (presumably in ignorance of the detail) simply as a payment of £1.5 million in December 2014, said to have been made by Solo.

69. The final draft revised Schedule 5W now accepts, as I read it, that only Goal's transaction fees can properly be the subject of the simple unjust enrichment claim pleaded in the main body of the Particulars of Claim, and that the £1.5 million payment in December 2014 was indeed the exclusivity fee claimable, if at all, only on the basis of knowing receipt, a new claim on which basis is now proposed to be added to that main body. Instead of separating out those different claims, Section A2 of Schedule 5W now would open with a combined heading "**Unjust enrichment/knowing receipt**", and paragraph 4 would be expanded to plead Goal's receipt of transaction fees at paragraph 4.1 and the exclusivity fee at paragraph 4.2. However, both would be introduced still by the allegation, by way of supposed inference, that those were fees received by Goal "*as a result of the WHT Applications and the ED&F Man Applications*", though that is patently not true for the exclusivity fee. That is not good enough and I shall not allow these claims to be pleaded in that way.

70. Just as the main body of the Particulars of Claim recognises, in final draft amended form, that the knowing receipt claim is quite distinct from the simple unjust enrichment claim, both as to the requirements of the claim and as to its subject matter on the facts, so ought Schedule 5W. If one were simply amending Schedule 5W, Section A2 would have to be confined to its original paragraph 4, amended to remove reference to the £1.5 million, now accepted by SKAT not to have been a payment in respect of transaction fees, and to remove the suggestion, now a false one, that the pleaded case is based on inference. There would then need to be a separate Section A2.1 (or however SKAT might prefer to number it) particularising the knowing receipt claim in respect of the exclusivity fee.

71. It is clear from the summary judgment argument that SKAT wishes to rely on elements of the principal particulars for the knowing receipt claim, which are the particulars now proposed to be included of an allegation that Goal had 'constructive knowledge' that the exclusivity fee probably represented the proceeds of fraud, in reply to the unjust enrichment defences raised by Goal, to challenge the assertion within them that Goal acted in good faith, as that concept is used in this context. SKAT will say that doing something other than making restitution when possessed of 'constructive knowledge' such as (it says) might found a knowing receipt claim is to act otherwise than in good faith for these purposes. But that is not good reason, or any reason, for including the matters relied on for any such argument in reply as part of a jumbled, conjoined plea of the two different claims (unjust enrichment and knowing receipt). I would require that particulars of constructive knowledge for the exclusivity fee be pleaded in Schedule 5W, as part of the knowing receipt claim in respect of that fee; and to reply to unjust enrichment defences raised by Goal in the way just indicated will require permission for a late Reply.

72. Not only is the proposed revised plea at paragraph 4 of Schedule 5W still a plea merely that it is to be inferred that Goal received fees, and that this "included" transaction fees and the exclusivity fee, it continues to add that "*Further details of fees received by Goal will be provided after disclosure and/or witness statements.*" In my judgment, it is speculative to suggest that Goal received fees of any kind not identified by it in its evidence on this application, if that is now the intention of that pleading, rather than just that SKAT will need disclosure (perhaps also trial witness statements) before it can finally particularise dates and amounts for the transaction

fees; and SKAT has enough evidence to plead a viable claim, if there is one, in respect of any or all of the types of fees referred to in the summary judgment evidence, but it has pleaded only an unjust enrichment claim as regards transaction fees and a knowing receipt claim as regards the exclusivity fee. In the circumstances, I would not allow any unjust enrichment or knowing receipt claim, respectively, to go to trial, unless there is a realistic prospect of success as regards in each case the claim now (proposed to be) pleaded.

The Unjust Enrichment Claim

73. The foundation for these claims, as alleged against Goal, is SKAT's case that it paid by mistake the WHT refund claims submitted by Goal that it (SKAT) says involved fraud by defendants other than Goal and/or those of the ED&F Man Applications as were submitted by Goal, which claims SKAT says were none of them good claims in respect of a WHT refund entitlement that existed. It is not said, for this summary judgment application, that SKAT has no realistic prospect of establishing that foundation at a trial.

74. It sets up a *prima facie* case of unjust enrichment to allege simply that, since the claim concerns only Goal's transaction fees on the refund claims in question: Goal received transaction fees in respect of those successful WHT refund claims; *prima facie* that enriched Goal unjustly, if the claims were paid by mistake, and that is presently assumed to be a realistic possible finding at a trial. Subject to any defences, therefore, there is a realistic prospect of success for SKAT on its unjust enrichment claim. As I explained when outlining the nature and operation of Goal's role as tax reclaim agent, each transaction fee was earned by Goal upon payment by SKAT of the WHT refund claim in question. Indeed, therefore, though treated by Goal as both creating and discharging a fee entitlement owed by its customer, in practical terms Goal was paid the transaction fee by SKAT and (upon the current premise) by mistake.

75. For the purposes of summary judgment, the only defence Goal relies on is what it calls its "*clear defence of good consideration*", the elements of which (as pleaded by Goal) are as follows, namely that:

    (i) Goal's transaction fees were fees "*for its administrative work in preparing and submitting the WHT reclaim applications to which SKAT's claim relates*", albeit Goal admits that it received those fees "*by deducting them from reclaimed sums before passing on the balance at the customer's direction*" (Defence, paragraph 61.1).

    (ii) Goal (therefore) "*provided good consideration for the fees received, in the form of the administrative work done in preparing and submitting the WHT reclaim applications*" (Defence, paragraph 61.2).

76. SKAT denies that Goal has any such defence, or in any event that it might justify the summary dismissal of its unjust enrichment claim, on the basis that it does not work at all, alternatively that if it could work it would only be if Goal was acting in good faith (as that concept is used for a change of position defence to an unjust enrichment claim) and there is a realistic prospect of a finding at trial that Goal was not so acting, given the facts and matters relied on by SKAT for the purpose of the knowing receipt claim.

The Knowing Receipt Claim

77. As I explained above when criticising paragraph 4 of the draft revised Schedule 5W, this is a new claim, proposed to be introduced in response to the summary judgment application, concerning only the £1.5 million exclusivity fee. The allegation is that Goal:

    (i) received, when paid that fee, the traceable proceeds of SKAT's funds paid by mistake, so as to have been impressed with a constructive trust in the hands of the payee, that had been paid away in breach of that trust; and

    (ii) had such knowledge when doing so as to make it unconscionable for Goal to retain the benefit of that receipt.

78. The second allegation – SKAT's case as to why the receipt was a 'knowing' receipt – is, more particularly, this: "*Specifically, on the facts actually known to Goal, a reasonable professional in its position would have made inquiries and sought advice that would have revealed the probability that such beneficial receipt was wrongful and in breach of trust.*"

79. The general formulation of SKAT's case on whether Goal's receipt of the exclusivity fee was a 'knowing' receipt is taken from *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 (CA) at 455E, where the requirement was stated to be that "*the recipient's state of knowledge [is] such as to make it unconscionable for him to retain the benefit of the receipt*"; and SKAT also relies on that authority, at 455H, to say that dishonesty is not required. SKAT's specific formulation of why, on the alleged facts of this case, it can satisfy the unconscionability requirement, is taken from the judgment of Stephen Morris QC, as he was then, sitting as a Deputy Judge of the High Court, in *Armstrong GmbH v Winnington Networks Ltd* [2013] Ch 156 at [132] (see also *Papadimitriou v Crédit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265 (PC), *Lewin on Trusts*, 19th Ed at [42-076], *First National Trustco (UK) Ltd v Page* [2019] EWHC 1187 (Ch) at [282], and *Brent LBC v Davies* [2018] EWHC 2213 (Ch) at [565]). For summary judgment purposes, Goal did not seek to challenge the sufficiency in law of SKAT's averments. The question is whether there is a realistic prospect of success on the facts.

80. The summary judgment argument does not contend that SKAT does not have a realistic prospect of establishing at a trial that the exclusivity fee was traceably derived from payments made by mistake by SKAT. SKAT's case is that Aesa was put in funds to pay the fee by a loan from an entity called Ganymede (Cayman) Ltd whose only relevant source of funds to provide that loan would have been ill-gotten gains of fraudulent WHT refund claims.

81. Thus, the sole question on this summary judgment application, as regards the knowing receipt claim, is whether SKAT has a realistic prospect of showing at trial that on the facts actually known to Goal when receiving the exclusivity fee, a reasonable professional in its position would have made inquiries and sought advice that would have revealed a probability that what it was being paid derived from dishonest WHT refund claims, or there is some other compelling reason to allow a trial of the knowing receipt claim.

The Danish Law Claims

82. Finally, SKAT pleads claims against Goal under Danish law, but strictly in the alternative if Danish law governs the question whether Goal has any liability to SKAT. Neither SKAT nor Goal contends that Danish law governs. To the contrary, SKAT's case, admitted by Goal, is that English law governs. So the Danish law claims against Goal cannot arise, cannot provide any answer to Goal's summary judgment application, and fall to be struck out come what may.

The Witness Evidence

83. The factual witness statements on the summary judgment application were, I regret to say, substantially unsatisfactory. They were (in service sequence):

(i) A first statement of Fiona Simpson of Kingsley Napley ('Simpson 1'), served together with a first statement of Mr Everard ('Everard 1') in support of the summary judgment application.

(ii) A fifteenth statement of Andrew Herring of Pinsent Masons ('Herring 15'), served in opposition to the summary judgment application and in support of SKAT's responsive application to amend its pleadings.

(iii) Second statements of Ms Simpson and Mr Everard ('Simpson 2' and 'Everard 2'), served in reply on the summary judgment application and in opposition to the amendment application.

(iv) A first statement of Stuart McNeill ('McNeill 1'), served in reply on the amendment application but also (effectively) by way of rejoinder on the summary judgment application.

(v) Third statements of Ms Simpson and Mr Everard ('Simpson 3' and 'Everard 3'), by way of surrejoinder.

84. My criticism concerns not the number or sequence of statements. I am not troubled, in particular, by the fact that McNeill 1 led to Simpson 3 and Everard 3 by way of a further round of evidence. My criticism concerns, rather, the content and length of the statements. They were, to a substantial extent, not witness evidence, but argument. The parties have therefore expended the time and effort, at no doubt very considerable cost, to argue the summary judgment application twice over, once in writing through the solicitors' witness statements, then again at the hearing. It is not as if, recognising the extent of coat-trailing, the parties declined to follow the modern habit of lengthy and detailed skeleton arguments. They sought and were granted liberty for their skeleton arguments to be up to 50 pages each. Needless to say, perhaps, they did not restrain themselves from exercising that liberty to the full (although in SKAT's case, the skeleton only just tipped over 49 pages, by a couple of lines and a final footnote). To be clear, I am not suggesting that argumentative witness statements plus short skeleton arguments cross-referring me to them would have been proper procedure, but the latter, having committed to the former, might at least have been more cost-efficient.

85. I find it impossible to identify what purpose it was thought might be served by arguing the application out through the witness statements like that. Of course these were not trial witness statements – indeed I imagine Ms Simpson, Mr Herring and Mr McNeill are unlikely to be witnesses at a trial – and a limited element of explanation of the perceived relevance to the anticipated summary judgment argument of factual matters dealt with in the statements might not be out of place. But that is not required and should be included, if at all, with real care and an eye on minimality.

86. To the extent that contemporaneous documents will be relied on, they are naturally and conveniently exhibited and identified through a main witness statement from the legal representatives, where parties are legally represented, or from litigants in person themselves, whether or not they would be witnesses at any trial in due course. But taking a court through the documents, making submissions as to what they show or what inferences are to be or might be drawn from them, is a matter for argument, not for witness evidence. Again, limited indications of the nature of what it will be submitted the court should find in or infer from the documents can have their place. But again, less is more should be the rule if that is to be done at all.

87. To highlight some elements of Simpson 1 that, sadly, set the trend on this occasion, on no view should it have included:

    (i) A lengthy summary (running to some 8 pages) setting out how Ms Simpson read the pleadings.

    (ii) An outline detailed argument (6½ pages) why the court should say no duty of care was owed, lightly dotted with snippets of factual evidence. This was presented by way of seven propositions, all of which were self-evidently matters of argument, not fact, some using language such as "*SKAT's attempts to suggest … are, with respect, hopeless*", "*Quite apart from the complete failure by SKAT to say …, such a duty cannot be established as a matter of principle*", "*SKAT's position is not improved by …*", or "*… it is striking that SKAT nowhere pleads … [but] simply asserts. … The pleading is also strikingly vague …*".

    (iii) A submission as to whether Goal breached any duty of care or whether, if so, loss foreseeably resulted, which admittedly ran to only 2 pages, but of which, on reflection, only three sentences covering 8 lines of text were proper content, the first of which (covering the first 4 lines of text) did no more than locate the relevance of the minimal factual points made by the second and third sentences with a cross-reference to and quotation from paragraph 88 of the Particulars of Claim.

88. Having seen the extent to which these were not witness statements but written submissions, I required further copies to be provided with passages to be relied on as factual evidence, rather than argument, highlighted. The parties also provided me, after the hearing, with Word documents in which only the highlighted passages were retained. Those exercises demonstrate that whereas the solicitors' witness statements as served were some 157 pages long in total (29, 50, 56, 10 and 12 pages respectively for Simpson 1, Herring 15, Simpson 2, McNeill 1 and Simpson 3), that could and should have been no more than c.80 pages (say 12, 28, 25, 6 and 9 pages

respectively), even if they retained (as the Word documents I was given did) the unnecessary quotation of documents I would be taken to or asked to read.

89. In fact, I would go further and say that it is far from clear to me that substantial factual evidence was reasonably required for this hearing at all. Mr Hough QC largely failed, with respect, to keep clearly distinct in his oral submissions whether, or where, the case for Goal is that there was no viable claim, taking at face value the material facts pleaded by SKAT (one element of which may be argument over what pleaded facts are material) and whether, or where, the case is that SKAT has no realistic prospect of establishing at a trial the material facts pleaded. Given the difficulties with SKAT's pleading, I should say that may not be as significant a criticism of Mr Hough as it might sound. But for the most part, in my judgment, the serious argument for Goal on this application was an argument of the former kind; and even where it is clearly of the latter kind, it is for the most part just argument nonetheless, for example whether SKAT has identified any credible basis for a finding of fact the pleading says it will seek at trial by way of inference.

90. This is not, or is not primarily, a complaint about the burden of pre-reading. Judges can recognise, and ignore or skim through, argument when they see it in a witness statement; although that does not address my wider concern that I could probably have been spared the need to read, at least for the most part, even that 50% or so of the witness statements that did contain evidence of fact. Nor in this case is it a complaint about wasting paper, as the case materials are hosted digitally by Opus 2 using their Magnum system. It is a concern that far too much time will have been spent on the pre-hearing stages of this application, on both sides, at expensive hourly rates, because of the approach adopted by Goal, and joined in enthusiastically by SKAT, to treat the exchange of evidence for the application as an opportunity to (try to) argue the application out between the legal teams, on paper, before then arguing it out, this time properly, before the court at the hearing, further exacerbated, if I am right in my wider concern, by a failure to assess whether or to what extent factual witness evidence was reasonably called for at all.

91. There is a further significant criticism of Goal's witness statements. As I have noted, they came from Ms Simpson, who claims no first-hand knowledge of the underlying events, and Mr Everard (only) of Goal. But Mr Everard, so far as I can see (provisionally) at this stage, does not appear to have had any very substantial day-to-day role either, as regards many of the matters that will or may be relevant. This being a summary judgment application, not a mini-trial, it is not necessarily a difficulty for Goal that I do not have separate witness statements from others at Goal who were more closely involved in the detailed facts. But I agree with Mr Goldsmith QC that it is necessary to approach with very real caution any suggestion that the facts are clear, or that the issues raised by the summary judgment application should not have the benefit of normal pre-trial procedures and a full trial, if it requires the court to take at face value evidence it is not clear Mr Everard is in a position to give from his own knowledge but for which no other source is identified.

92. Mr Goldsmith QC referred me to a summary judgment decision in *Punjab National Bank (International) Ltd v Techtrek India Ltd et al.* [2020] EWHC 539 (Ch), in which Chief Master Marsh said this, at [17]-[20]:

"*17. CPR rule 32.8 specifies that a witness statement must comply with the requirements set out in Practice Direction 32 and paragraph 18 of that practice direction sets out provisions specifying what must be contained in the body of a witness statement. Paragraph 18.2 requires that the witness statement contains a statement indicating which of the statements are made from the witness's own knowledge and which are matters of information and belief. In addition, the witness statement must indicate "... the source for any matters of information or belief." The rule does not say whether the "source" of evidence in the case of a corporate entity must be identified by referring to a person or persons, or whether, as here, it suffices to identify "officers of the Claimant".*

18. CPR rule 32.4(1) describes a witness statement as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally." Whether the witness statement is intended for use at a trial or another hearing the form of the statement is the same and the requirements of CPR rule 32.8 and the Practice Direction must be complied with. It is important ... that the maker of the witness statement makes it clear when the statement contains hearsay evidence and in doing so complies with the requirement to specify the source. As Patten J pointed out in Clarke v Marlborough Fine Art Ltd [2002] 1 WLR 1731 at [37] the failure to identify the source of hearsay evidence does not render the hearsay evidence inadmissible but it goes to the weight the court will give to that evidence.

19. As a general observation, it is a matter of considerable convenience that a legal representative is able to provide hearsay evidence for hearings, other than trials, based on instructions. One reason for this is that it is more economical for evidence to be gathered in one place, rather than the court being provided with a series of witness statements from those who can give first-hand evidence. Another factor that will be in the minds of legal advisors is that hearsay evidence provided by a solicitor prevents the person who has knowledge of the relevant events being subjected to cross-examination at the trial on the content of a witness statement made at an early stage of the claim and before disclosure has been given. The corollary, however, is that the requirements of paragraph 18 of Practice Direction 32 must be carefully complied with if the statement is to be given full weight. Where the applicant seeks summary judgment this is of particular importance.

20. In my judgment, where the maker of a statement is relying on evidence provided by a witness who is an officer of, or employed by, an incorporated body, the requirements [sic.] of paragraph 18 of Practice Direction 32 to provide the source of evidence is not complied with merely by saying that the source is the entity or officers of the entity. If the source of evidence is a person, as opposed [to] the source being documents, the person or persons must be identified and named. ... A failure to identify the source in a manner that complies with paragraph 18.2 will mean the court has to consider whether to place any weight on the evidence, especially where it touches on a central issue."

93. I agree with almost all of that. I disagree with the apparent suggestion, if intended by the middle sentence of [19], that it might properly be in the mind of legal advisors that their giving hearsay evidence at an interlocutory stage might be a means for avoiding cross-examination of their source, if called as a witness at trial, on the account thus presented to the court at that prior stage as having been their account. I also disagree with the possible suggestion, again if intended by that same sentence, that there is necessarily a difficulty if the court becomes aware of what was a witness's account prior to disclosure. There is generally no such difficulty. Rather, in general, it will be of benefit to a party, possibly significant benefit, if a witness's account can be seen to have been given, or first given, a lot earlier than only around the time of an exchange of witness statements a few months before trial, even if it is fair and sensible for any final version to be signed off only at that stage (and after disclosure, in particular).

94. CPR 32 PD18.1(5) provides that a witness statement should state the process by which it has been prepared. That is not limited to the basic point given "*for example*", namely whether the statement was prepared "*face-to-face, over the telephone, and/or through an interpreter*". It is not a problem, rather it is to the credit of a witness, and to the party calling the witness, if there is greater transparency at trial as to the process by which any final version of the witness's evidence for trial was collated and created, although of course litigation privilege means it will be for the party to decide how much is to be revealed to the court. On important contentious points of fact, greater transparency is to the credit of a witness (and the party calling the witness) even if – indeed, especially if – it extends to the witness being open up front, i.e. in chief, that when first asked about them, he or she perceived as recollection a certain version of events, but having been reminded of some document or documents they saw at the time or been assisted in some other legitimate way, he or she now has a different recollection, or an additional recollection, or both. The law on refreshing a witness's memory during oral evidence in chief is stated succinctly in *Phipson on Evidence*, 19th Ed., at 12-09 (and for a fuller exposition of the common law rules, see the 15th Ed., at 11-45*ff* (not 12-54*ff* as suggested in the 19th Ed. at 12-54)); that law is, for good reason as I would understand it, quite narrow. I do not say a witness cannot properly be asked to consider, for the purpose of a trial witness statement, material he or she could not use to refresh recollection during an oral examination in chief. But care needs to be taken, where that is to be done or has been done, if it is not to devalue the resulting testimony. If the recollection presented in a trial witness statement is neither unaided nor the result of memory being refreshed in that way, that may not mean, without more, that the testimony is rejected by the court; but to be able properly to assess the weight to give it, it is better if the court is told where it has come from.

95. The assessment of the weight to be given to a factual witness's trial testimony is supposed to be a matter for the court. Giving the court by a trial witness statement, as happens all too often, a polished and heavily lawyered version of events, the process behind which has far removed it from any account the witness could have given in examination in chief, assists neither the court nor the witness. It serves to increase the cost of the witness statement phase, to lengthen and increase the hostility of cross-examination and increase the witness's vulnerability to that lengthened cross-examination, and thus ultimately to harm, not to improve, the case of the party calling the witness.

96. Aside, then, from that middle sentence of [19], I agree with Chief Master Marsh's views, *supra*. Contrary to paragraph 18 of CPR PD32, as there explained, Goal's witness statements for its summary judgment application largely failed to identify the source or sources of the information being presented (where those were not just the documents exhibited). Each of Mr Everard's brief statements included some limited factual content plus a verification in general terms of the facts set out in Ms Simpson's corresponding statement. It is not clear, however, whether Mr Everard was in any real sense Ms Simpson's source of information. In each of her statements, she noted that Mr Everard's statement "*attests … to the facts in this statement of mine which I provide on instructions from Goal*" (my emphasis). (That quotes Simpson 1. The wording used in Simpson 2 and Simpson 3 was different, but to the same effect: "*Where I comment on Goal's business practices, its dealings with others … and its state of knowledge, my evidence is based on instructions from Goal. A second [respectively, third] statement is being served from Stephen Everard, CEO of Goal, which endorses and attests to the factual content of my statement.*")

97. That indicates to me that Ms Simpson's source of information was one or more unnamed individuals, not Mr Everard, but that Mr Everard was asked to look over, and in the event felt able to confirm the accuracy of, the resulting statement of the facts, to the extent Ms Simpson did state facts rather than argue the case. Mr Everard for his part does not identify how much of what Ms Simpson sets out he claims to recall from first-hand knowledge at the time and to what extent he is purporting to verify Ms Simpson's 'facts' upon the information of the unidentified others. Everard 1 says that the factual account in Simpson 1 is "*based on information and documents that we at Goal have provided to our solicitors*". He repeats that formula for Simpson 2 and Simpson 3, in Everard 2 and Everard 3 respectively, in each case adding that where Ms Simpson attributes an understanding, or views, to Mr Everard himself, her evidence "*is correct*" and that "*Where she attributes understanding or views to Goal, I believe her evidence to be correct based upon my own knowledge and information from my colleagues in the company.*" Leaving aside Mr Everard's own understanding or views, identified as such by Ms Simpson, it is nowhere explained for what Mr Everard claims to be able to rely on his own knowledge, and for what he speaks from information given to him by his unnamed colleagues, with what reason (if any) for treating their information as relevant or helpful.

98. That is not a satisfactory basis upon which to seek the summary dismissal of otherwise fairly arguable claims, i.e. claims that have a realistic prospect of success, or for which there is other compelling reason for a trial, on the facts and arguments of law presented by SKAT without reference to Ms Simpson's and Mr Everard's statements (to the extent they do more than exhibit documents to inform the argument). If SKAT's claims against Goal are not otherwise fairly arguable, in that meaning, Goal does not need those statements to persuade the court to dismiss SKAT's claims summarily. If they are otherwise fairly arguable, however, then Goal has not put before the court evidence that I can say at this stage is worthy of being given any particular weight, let alone such weight as to knock SKAT out summarily, on matters of fact that would or might realistically be contentious at a trial. In other words (and echoing what I called my wider concern about the witness statements (paragraph 89 above)), I struggle to identify what Goal's witness statements added to the fact that there was a Statement of Truth appended to its Defence signed by Mr Everard as CEO. Had Goal rested upon that Statement of Truth, then on contentious

points of fact I would have accepted the inevitable argument by Mr Goldsmith QC that that was not good enough to dispose of SKAT's claims summarily if they otherwise raised a case to answer. Despite their length, but because of their content, the witness statements served by Goal, with respect, do not do any better for it for the purpose of an attempted summary dismissal of SKAT's claims.

Summary Judgment?

99. That brings me, finally, to the determinative part of this judgment, addressing on the facts and the law:

(i) For the negligence claim, whether I am persuaded that SKAT has no realistic prospect of success at trial (and there is no other compelling reason why there should be a trial) as to whether Goal (a) impliedly stated to SKAT, by submitting a WHT refund claim, that it believed the taxpayer to be making a genuine claim, if so (b) owed SKAT a duty of care in respect of that implied statement of belief, if made, and if so (c) did not have reasonable grounds for holding that belief.

(ii) For the unjust enrichment claim, whether I am persuaded that Goal has no realistic prospect of failing at trial (and there is no other compelling reason why there should be a trial) on its good consideration defence.

(iii) For the knowing receipt claim, whether I am persuaded that SKAT has no realistic prospect of success at trial (and there is no other compelling reason why there should be a trial) as to whether on the facts known to Goal when it was paid the exclusivity fee, a reasonable professional in its position would have made inquiries and sought advice that would have revealed a probability that it was being paid funds derived from dishonest WHT refund claims.

The Negligence Claim

(i) SKAT's Detailed Case

100. I set out in this section of the judgment, and in some cases assess as I do, the facts and matters alleged by SKAT, over and above those I set out when describing Goal's role as tax reclaim agent (paragraphs 15 to 33 above), in support of the notion that WHT refund claims submitted by Goal involved it in making to SKAT a representation of belief, i.e. of Goal's belief, that the claim was genuine, the contention that, if so, Goal owed SKAT a duty of care in relation to that statement of belief, and/or the allegation that Goal did not have reasonable grounds for holding such a belief.

101. By paragraphs 87(a)-(c) of the Particulars of Claim, with paragraph 5(a) of Schedule 5W, SKAT says that:

(i) under the MLR, Goal was obliged to verify the identity of any taxpayer on whose behalf it submitted a WHT refund claim to SKAT, the source of the taxpayer's funds, and the identity of authorised representatives acting for the taxpayer. In that regard, SKAT places particular reliance on the obligations under MLR regulations 5, 7 and 14 as regards customer due diligence measures, including identity verification, and under MLR regulations 8 and 11

as regards ongoing monitoring and, in certain circumstances, ceasing to conduct transactions; and

(ii) irrespective of any MLR obligation (Goal denies that the MLR apply to it), Goal in fact conducted customer due diligence via the beneficial ownership questionnaire.

102. Next, paragraph 87(d) alleges that Goal knew or ought to have known that it was seeking very large WHT refund amounts over an extended period of time on behalf of taxpayers who were pension plans or entities represented by a small number of authorised representatives (many of whom represented multiple taxpayers using Goal) and paid the large majority of the proceeds of their successful claims to Solo. Some particular facts said to support the inference that Goal knew, or the contention that it ought to have realised, that much of the relevant proceeds went to Solo are then pleaded in paragraph 5(c) of Schedule 5W. It is unnecessary to rehearse the detail.

103. Paragraphs 87(e1) and 87(e2) allege in respect of the representations that Goal admits were made by the taxpayers when Goal submitted their WHT refund claims for them that:

(i) They concerned facts not entirely within SKAT's knowledge and SKAT did not have access to all relevant information and documents.

(ii) They were made in documents, sent under cover of letters from Goal itself, sent by Goal to SKAT; and it is pointed out that the Form 06.003 forms completed by Goal were addressed to SKAT. It is suggested this means there was "*a direct relationship between the parties [i.e. between Goal and SKAT]*"; and in that regard, paragraph 5(b) of Schedule 5W pleads in addition the fact that Goal's covering letters described the dividend advices it enclosed as "*evidence of payment and tax deducted on the above client's securities*".

104. Paragraph 87(e3) pleads, still wrongly said to be a matter of inference not yet known to SKAT (as in paragraph 4 of Schedule 5W), that Goal was paid fees indirectly out of WHT refunds paid by SKAT. The position is that, as SKAT can now plead with confidence not as a matter for possible inference, Goal's transaction fees were admittedly so paid.

105. Paragraph 87(e4) alleges that the documents sent by Goal to SKAT when submitting WHT refund claims "*were intended by Goal to influence SKAT's decision making process and they in fact influenced SKAT to accede to [those claims]*".

106. Paragraph 87(f) alleges that it was reasonable for SKAT to rely on Goal's allegedly implied representations that it (Goal) believed, and had reasonable grounds for believing, that the WHT claims it was submitting were genuine, "*without further enquiry when deciding whether to accede to the WHT Applications and [Goal] knew or ought to have known that SKAT was highly likely to do so*". In support of that contention, it is alleged that:

(i) Goal knew or ought to have known from its experience of tax reclaim applications generally, alternatively its experience of making such claims on SKAT in particular, that SKAT would rely on the fact that claims were made

through Goal as a factor in support of the claim, that the large majority of claims would not be subjected to detailed scrutiny by SKAT absent irregularities on the face of the claims, and that it was not possible for SKAT to verify the claims of share ownership or dividend receipts made by taxpayers in their WHT refund claims given that the claimed shareholdings would relate to dematerialised shares held by custodians (a point repeated, without adding anything so far as I can see, in paragraph 5(d)(vii) of Schedule 5W);

(ii) Goal knew or ought to have known that SKAT did not have access to information that Goal had, but had not communicated to SKAT, showing that the taxpayers in question could not realistically have been the beneficial owners or dividend recipients their WHT refund claims purported them to have been. Particular examples of this information imbalance are given in paragraph 5(d)(v) of Schedule 5W, which largely duplicates, but with less detail, the long plea at paragraph 4A of Schedule 5W in support of the allegation that Goal knew enough to be on notice that their relevant clients might be fraudsters;

(iii) Goal knew or ought to have known that SKAT did not know to whom the WHT refund claim amounts, when paid by SKAT, were paid by Goal, most notably that (as SKAT says) most of what was paid went to Solo.

107. Other aspects of paragraph 87(f), beyond the point mentioned in paragraph 106(ii) above, are also supplemented by paragraph 5(d) of Schedule 5W, in which SKAT relies on:

(i) an assertion that Goal should have known, and that SKAT would reasonably have assumed that Goal would know, the requirements for a valid WHT refund claim under Danish law and/or applicable DTAs;

(ii) Goal's website statements about its skill and experience in the field of tax reclaims. It is suggested, further, that the court can infer that Mr Nielsen read and relied on these. But there is no arguable basis for such an inference, and I do not allow that particular suggestion to be added (it is one of the many amendments now proposed). The alleged basis for the supposed inference is that Goal's website address appeared after the email signature of Goal staff in communications with Mr Nielsen. That does not arguably make it probable, if it was not otherwise, that Mr Nielsen did any research for himself into who Goal were. This is pure speculation: if Mr Nielsen looked at Goal's website (and SKAT has no evidence or idea whether he ever did), he might have seen some of Goal's self-serving puffs; if he saw those, it is possible (*sed quaere*) that he might have been impressed by them (but SKAT has no evidence or idea whether in fact he was);

(iii) an email from Melissa-Anne Rodrigues, Tax Operations Manager at Goal, in an email to Mr Nielsen dated 9 June 2014, lauding Goal's services to its clients (in line with the website puffs) and seeking a meeting with Mr Nielsen to "*obtain a direct working relationship with the Danish Tax Authority and … improve our good quality service <u>to you</u> and our clients*" (emphasis added by SKAT). SKAT pleads further to this that at least two meetings did take place between Goal and SKAT, referring to a meeting in January 2015 (attended for

Goal by Ms Benge and Pat Bingham-Peters (Director of Global Sales and Relationship Management)) and a meeting in July 2015 (attended by Ms Rodrigues and Ms Nimmo (Head of Operations)). The inference is said to be that the Goal attendees would have talked up Goal's services in line with Ms Rodrigues' 2014 email and (again) Goal's website claims. Provisionally, in the context of a summary judgment application, I think that could realistically prove to be a fair inference to draw, by reference to the inherent probabilities and Ms Rodrigues' email;

(iv) the absence of any disclaimer by Goal addressed to SKAT;

(v) what I might call 'the Danish approach', as pleaded in paragraph 5(d)(iii) of Schedule 5W. That is an important plea, so I deal with it separately below. In passing, I make the observation that it is not clear why it appears only in Schedule 5W (the Goal-specific particulars), as it does not seem to be peculiar to Goal;

(vi) the fact that Solo/Aesa had been prepared to pay Goal £1.5 million per annum to have exclusive use of its tax reclaim services, which it is not suggested SKAT knew but which is said to reinforce the notion that what Goal did provided substantial value (to clients) and "*required experience, expertise and/or reputation, and could not be readily replicated*".

108. I said I would return to the Danish approach, as alleged by SKAT in paragraph 5(d)(iii) of Schedule 5W. That pleads as follows:

> "*(A) under the Danish system of taxation, and under Danish law – as Goal could reasonably have been expected to know as a professed specialist in tax reclaims in Denmark – SKAT's general approach was to trust and accept WHT [refund] applications on the faith of the information provided to it absent obvious irregularity. In particular, SKAT relies on:*
>
> *(i) Articles 1 and 2 of the Danish Tax Control Act, which put the onus on taxpayers to report material information about their tax affairs to SKAT;*
>
> *(ii) The principle of Danish law that the burden of proof is on the taxpayer to establish that the information provided to SKAT is accurate and truthful;*
>
> *(B) the average time for SKAT to pay out on WHT Applications submitted by Goal was 24 days, whilst the average time for SKAT to pay out on WHT and ED&F Man Applications over the same period was 33 days [the burden of this allegation, I interpose, being that that was quick, both generally and in comparison to other jurisdictions around the world];*
>
> *(C) SKAT accepted and paid out on all of the WHT Applications submitted by Goal without ever raising any queries with Goal or its clients in relation to such reclaims (and such enquiries would have come to Goal's attention).*"

109. Though it is common ground that SKAT's claim against Goal is governed by English law, I can well see it may be relevant to consider the Danish legal context (tax law and practice) in which necessarily WHT refund claims had to be made. Goal protests that attributing to it an appreciation of such matters, or casting upon it an expectation that it would be informed of them, is unfounded and unreasonable respectively. The former (Goal's actual understanding of these matters) is not properly evidenced at this stage and requires investigation through disclosure. The latter (the reasonable expectations of Goal as an expert and experienced international tax reclaim agent) seem to me equally unsuited to a summary determination unless SKAT's claim about it is manifestly unarguable, which it is not.

110. Taken together, all the various matters I have set out or summarised in this section of the judgment are then said by SKAT at paragraph 87(g) of the Particulars of Claim to justify the conclusion that Goal knew or ought to have known that their (alleged) implied representations would be relied on by a specific entity (SKAT) for a specific purpose in connection (on each occasion) with a specific transaction or decision (the refund claim in question, or whether to make the payment to Goal it sought).

111. Finally, SKAT pleads matters that to my mind are, or should be, uncontentious at least for summary judgment purposes. That is to say there is plainly at least a realistic prospect of success for SKAT on pleaded propositions that:

    (i) It was reasonably foreseeable to Goal (rather clumsily pleaded as an allegation that it was or ought to have been known to Goal that it was reasonably foreseeable) that, if dividend advices submitted in support of WHT refund claims were fraudulent, SKAT might suffer loss by paying out on bad claims (paragraph 87(h)).

    (ii) SKAT was the only party that could suffer loss if Goal carelessly submitted fraudulent WHT refund claims (paragraph 87(i)).

(ii) <u>Implied Representation?</u>

112. The inadequacy of paragraph 87(e) of the Particulars of Claim, as a plea of the making of any representation by Goal, for itself or on its own behalf, was aired during the argument. SKAT's response was the production of the final draft form for a revised Schedule 5W with the primary plea in paragraph 4E that I have already dissected (see paragraph 47*ff* above), supported (and this is the important point now) by particulars of how or why SKAT will say at trial that the representation alleged, by Goal as to Goal's belief, was implicit in its submission of WHT refund claims to SKAT.

113. SKAT in that way now relies on the following facts, namely that: Goal was a leading tax reclaim specialist; Goal was submitting large numbers of WHT refund claims; Goal chose to describe the dividend advices it submitted as "*evidence of payment and tax deduction …*" and put its name (albeit as the taxpayers' agent) to the Form 06.003 forms with their statements that what was being claimed was a refund of tax that had been paid; from June 2014, Goal had the additional direct contacts with Mr Nielsen, as referred to in paragraph 107(iii) above; SKAT's publicly available 'Legal Guide' stated at all material times that where a taxpayer was acting through an agent, "*the representative replaces the party and thus has all the party's rights and obligations*";

there was (so SKAT asserts) the imbalance of information between Goal and SKAT, as referred to in paragraph 106(ii) above.

114. Whether in the circumstances Goal impliedly represented to SKAT that it (Goal) believed the taxpayer was making a genuine claim falls to be judged in the same way any allegation of an implied representation is judged, by asking whether a reasonable person in SKAT's position would have taken it from Goal's words and conduct that Goal was saying that (as opposed to something different, or nothing, on that topic). That is what it means to ask in this case "*what a reasonable person would have inferred was being represented by the representor's words and conduct in their context*", *per* Toulson J (as he was then) in *IFE Fund SA v Goldman Sachs International* [2006] 2 CLC 1043 at [50]. In that regard, it can be helpful to consider "*whether a reasonable representee would naturally assume that the true state of facts did not exist and that, if it did, he would necessarily have been informed of it*" (*Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 3529 (CA) at [132], approving a dictum of Colman J in *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 at 683B, albeit emphasising that that "*is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied*").

115. For completeness, I would say that the helpful test derived from Colman J's dictum is only one manifestation of a broader notion, because it is constructed around only one possibly sufficient 'but for' conclusion. If the representee would reasonably and naturally assume that the true state of facts did not exist because he would take it as obvious that, if it did, the communication or conduct said to give rise to the implied representation would never have been sent or occurred, that might equally properly found the conclusion that the representation was indeed implied as alleged.

116. It is contentious and requires a trial to resolve whether there was the information imbalance that SKAT claims there was, and while it will be Goal's case that it never saw or considered SKAT's Legal Guide, that is not satisfactorily evidenced prior to disclosure or trial witness statements and there will be room to explore in any event, requiring a trial, whether Goal ought reasonably to have been aware of it and/or whether SKAT could reasonably, or did in fact, assume that professional tax reclaim agents dealing with it would make themselves aware of it. Those points aside, I did not understand the matters highlighted by SKAT (paragraph 113 above) to be much, if at all, in dispute.

117. I could not say, therefore, that SKAT does not have a realistic prospect of proving at trial that those highlighted matters are all matters of fact in this case. If it does establish all those matters, then I regard it as realistically arguable that the right conclusion will be that Goal's words and conduct in submitting a WHT refund claim on behalf of a taxpayer implied a statement, on its own account, that it believed it was submitting a genuine claim. I agree with Mr Goldsmith QC that an implied representation of that kind is not unknown to the law (see *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3625 (Comm), *per* Males J (as he was then) at [740], and perhaps also, for a similar idea, *Sasea Finance Ltd v KPMG* [2000] 1 All ER 676 at 681c-h; these are both cases that, to be clear, no one could suggest were on all fours with this case, but that is not the present point). I do not think it can be said that the fuller detail and context in and of those matters that will inevitably come through at a trial could not influence the outcome, nor could I predict what that

fuller detail and context might look like. So this is not an occasion for 'grasping a nettle' and trying to form final views, for example whether if paragraph 113 above proved to be the length and breadth of it at trial I would find the implied representation proved.

118. For summary judgment purposes, on the negligence claim against Goal, in my judgment SKAT gets to first base. The claim is not apt to be dismissed summarily on Goal's contention that there were not implied representations by it that it believed it was submitting genuine claims. Reflecting what I said in paragraphs 66 and 67 above, I do not propose to separate the consideration of whether such implied representation carried with it an implied representation that Goal had reasonable grounds for its belief from the consideration of whether Goal owed a duty of care. It is well arguable that in a case like this those may be seen to be flip sides of the same coin, or just different ways of articulating the same idea and conclusion.

(iii) Duty of Care?

119. Much of the argument was devoted to the implications of the point that Goal did not make (nor is alleged to have made) any representation of primary fact to SKAT, for itself or on its own behalf. For example, Goal was not, nor is it said to have been, the representor for any of the basic representations. It was, and is only alleged to have been, the means, *qua* agent, by which the taxpayers made those representations to SKAT.

120. Accordingly, Goal put at the front and centre of its argument propositions that

(i) asking whether, assessing the factual circumstances objectively, the defendant can be said to have assumed some relevant responsibility to the claimant remains the primary consideration when asking whether a duty of care was owed in a negligent misstatement case (see *NRAM v Steel* [2018] 1 WLR 1190 (SC), *per* Lord Wilson at [24], or *Playboy Club Ltd v Banca Nazionale del Lavoro* [2018] 1 WLR 4041 (SC), *per* Lord Sumption at [7]), and

(ii) the agent for one party to a transaction, acting expressly as such, will generally not owe a duty of care of his own to the counterparty with whom he is dealing in respect of his communication of information to the counterparty for and on behalf of his principal (see *Gran Gelato Ltd v Richcliffe (Group) Ltd et al.* [1992] Ch 560; see also *NRAM v Steel*, *supra*, *per* Lord Wilson at [32] – reliance by the counterparty on the agent is "*presumptively inappropriate*" – and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830). The capacity of the agent, known to the counterparty, does not as a matter of law preclude the possibility of a duty of care owed to his principal's counterparty, but there will need to be particular circumstances cogently demonstrating that the agent was assuming his own personal responsibility to the counterparty, additional to that of his principal.

121. However, in my judgment those starting points may not take Goal very far, or far enough anyway, at a trial. This is not an ordinary, arm's length, business transaction under English law for which *caveat emptor* remains a guiding principle underlying the analysis of many contractual and non-contractual incidents of the interactions between the parties. This is taxpayers dealing with one of their tax authorities and seeking to

ensure that they pay what they should have to pay, but not more than what they should have to pay, in taxes.

122. Take for instance the US domiciled, and US tax exempt, pension funds that were among Goal's clients via Solo. At a simple level SKAT was not their tax authority, since by definition they answered to the IRS, which is a function of the US Treasury operating under US Federal law, as regards their taxation obligations. The matter is not so simple, or does not stop there, however, precisely because on SKAT's analysis of the implications of the making of a WHT refund claim, which to this extent are agreed by Goal, those pension funds were claiming, in substance, to have been taxed by SKAT, i.e. to have been treated by SKAT's WHT rules in the same way as Danish taxpayers, so that pursuant to the applicable US-Danish DTA and the Danish implementing legislation they, the taxpayers, were owed a tax refund by SKAT.

123. Prior to factoring in any particular features that may be material of the world of DTA and international dividend taxation arbitrage, or of the Danish way of doing things (if that is a meaningful notion), the starting analogy here, as it seems to me, will not be commercial agents negotiating business transactions with contractual counterparties, but independent bookkeepers, accountants or tax agents preparing and submitting clients' tax returns for them. I was not taken to any authority holding for or against the proposition that such agents have, or may have, a liability in negligence to the tax authority for submitting tax returns they should reasonably have realised were or might be dishonest. Absent binding authority on that sort of question, I do not regard it as suited to a summary determination.

124. Taking into account, then, the more specific matters relied on by SKAT, as set out or summarised in paragraphs 101 to 103, 105 to 108 and 111 above, on which I could not say that SKAT does not have a realistic prospect of proving those matters at trial (except where I expressed a contrary view in those paragraphs), I am quite unable to say that there is no realistic prospect of success for the argument that Goal owed a duty of care in relation to its belief, if implicitly communicated to SKAT as alleged by SKAT, that WHT refund claims submitted by it were genuine claims on the part of the taxpayers in question.

125. SKAT pleads a further, specific, conclusion at paragraph 5(d)(vi) of Schedule 5W, namely that "*It was reasonable for SKAT to place greater reliance on documents from professional persons such as tax reclaim agents than documents submitted by the beneficial owners personally*", founded (so SKAT says) on the matters it highlights for its implied representation argument (see paragraph 112 above) and the proposition that a professional tax reclaim agent like Goal "*could reasonably be expected to have applied its skill and experience in submitting the reclaim application, to have taken some steps to check that the relevant requirements … had been satisfied and at least to have made reasonable inquiries or taken advice before sending [it] to SKAT if it had serious cause to question [its] propriety.*"

126. This attracted sharp criticism from Mr Hough QC in argument, who suggested it was a nonsense to suppose that SKAT would, let alone reasonably would, scrutinise less carefully a refund claim because it had (say) Goal's name on it than if it had come apparently direct from the taxpayer. It is easy to see there is force in that criticism, but it is not clear to me that it will necessarily meet SKAT's point (see below). Mr Hough also submitted that SKAT appears to have no evidence now, nor anything

more than a speculative hope that it might obtain evidence in the future, that Mr Nielsen or anyone else at Accounting 2 *in fact* gave Goal-sponsored WHT refund claims a lighter touch than claims received direct from taxpayers. That seems to me to be right: as regards Mr Nielsen, see again paragraph 60 above; there is no evidence suggesting there would have been any difficulty obtaining evidence for this application from anyone else that might have been a relevant claim checker at Accounting 2 during the period of the alleged fraud; and whilst disclosure is going to be a huge effort in these proceedings as they now are, the first document collection that SKAT is bound to have done after the balloon went up in mid-2015 will surely have been its documentary records, whatever they might comprise, of the receipt, processing, approval and payment of what were now to be considered suspect or possibly suspect claims, so if there was any real indication of a differential approach when it came to checking claims SKAT ought to have been able to show that to the court for this hearing.

127. SKAT's point, however, or so it seems to me, is not going to be so much that seeing Goal's name caused Accounting 2's guard to be lowered, rather than that seeing Goal's name was or may have been an additional comfort, and that the relevant counter-factual, prospective when considering the duty of care question and retrospective on causation and loss, is not what would Goal have reasonably expected might happen, respectively what would have happened, if the taxpayer had made the same claim without Goal's name on the papers, but what if (etc) the claim had not been submitted.

128. These are all to my mind interesting and not necessarily straightforward issues to consider, on which SKAT has a properly arguable case that does not lend itself to the forming of a final view without a trial. I regard it as a realistic possibility – I do not need nor is it appropriate to try to take a view beyond this – that after a trial the conclusion may be that interacting with SKAT as Goal did, given who Goal was and appeared to be, carried with it, objectively speaking, an assumption of responsibility to SKAT to take care over Goal's belief in the genuineness of what it was submitting.

129. The same is true of Mr Hough QC's submission that "*however SKAT seeks to dress up its case, it is seeking to impose a duty on Goal to investigate its own customers and then refuse to perform contracted services in order to protect a foreign tax authority from fraud which it has been too lax to detect*". There is in fact a lot to unpack there:

    (i) There is nothing inherently objectionable in the notion in a financial services context that it might properly be the function of a firm to be on guard actively to ensure it is not unwittingly party to dishonest dealing, for the protection of the firm and those with whom it might deal on behalf of a dishonest client. Stating the idea at that level of generality is not enough for a finding that Goal did owe SKAT a duty of care, but in the context of a properly considered assessment of the circumstances established in detail at a trial, it seems to me capable of drawing the sting out of Mr Hough's attempted characterisation of the facts.

    (ii) In view of Goal's Customers' obligations under the standard contract, particularly under clauses 5.1 and 5.4 (see paragraph 22(vii) above), it seems to me it might well be considered incorrect to characterise SKAT's case as requiring Goal to refuse to perform contracted services.

(iii) It is not obvious that the fact that the tax authority in question is SKAT in Denmark rather than HMRC in the UK is bound to assist Goal, but perhaps the seeming emphasis on the fact that SKAT is a *foreign* tax authority was a forensic flourish for a summary judgment soundbite that will be polished into something more substantial for trial.

(iv) Laxity on SKAT's part, if laxity it was, or its degree, that has a role to play in explaining what happened, could perhaps tip a final balance against the imposition of a duty of care on Goal rather than going only to causation or contributory negligence. But that is not clear-cut, or capable of assessment without a trial, and may well do no more than bring the court back to whatever findings are made at trial about the Danish approach and information imbalance.

130. The response is similar in relation to the submission that SKAT was seeking to have the law impose on Goal "*an array of obligations well outside its contractual obligations. SKAT's assertions that Goal was under such duties and assumed the consequent risk for carrying them out properly – despite not being paid for them – is unsustainable. No rational commercial agent would freely assume such a risk, particularly without any corresponding reward.*" It seems to me fairly possible that after a trial the conclusion might be that SKAT's case involves no more than a reasonable expectation that Goal would take care that it had good reason for treating the taxpayers' claims it was submitting as genuine, an expectation it might be held was part of, or naturally incidental to, not inconsistent with, Goal's contractual obligations, and not onerous.

131. Mr Hough QC emphasised Goal's obligations to submit reclaims promptly once provided with the information and documents required, and sought to argue that the duty of care proposed by SKAT would conflict with those obligations, since such a conflict will often be a weighty consideration against the imposition of a duty of care (see *James-Bowen v Commissioner of Police for the Metropolis* [2018] 1 WLR 4021, *per* Lord Lloyd-Jones at [28]). But identifying something of a kind that is often found at a trial to be a weighty consideration is not the same as finding that a claim has no realistic prospect of success; and in any event in my judgment there is a realistic prospect for SKAT of there being a conclusion at trial that there was no such conflict, and that properly construed Goal's contract did not require it to submit anything promptly if there were reasonable grounds based on the information in Goal's possession for thinking that the refund claim it was being asked to submit might be a fraud.

132. For the reasons given in this section of this judgment, SKAT's negligence claim has taken second base, for summary judgment purposes. It is not apt to be dismissed summarily on Goal's contention that it owed no duty of care in respect of implied representations by it, if made, that it believed it was submitting genuine claims. The parties' skeleton arguments considered the three recognised approaches, that in general ought to be complementary, for assessing whether a duty of care should be imposed: voluntary assumption of responsibility; incremental extension of precedent; the three-stage *Caparo* test (*Caparo Industries Ltd v Dickman* [1990] 2 AC 605 (HL)). They read much like outline closing submissions after a trial, complete with reliance on each side upon contentious matters of fact or assessments of the

implications of uncontentious facts. I do not propose to lengthen this summary judgment analysis by assessing the case through those three different lenses *seriatim*.

(iv) Negligence?

133. The primary allegation of breach of duty was very bare. It was said, without particularisation, that there was "*a failure to make any or any reasonable enquiries into whether the [WHT refund claims that Goal] were putting forward were genuine*", alternatively Goal "*had no reasonable grounds for believing that [they] were genuine*". That is, with respect, hopeless in the absence of some affirmative particular case that Goal should have identified from the information it had, though (it is accepted) it did not in fact do so at the time, that there was a real chance that it was unwittingly facilitating fraud. Put another way, that bare pleading (paragraph 88 of the Particulars of Claim) cried out for particulars, and if SKAT were unable to provide them then the negligence claim might have been apt to be struck out.

134. SKAT has now sought to provide particulars, however, in paragraphs 5A and 5B of revised draft Schedule 5W. They rely heavily on paragraph 4A and I consider that when dealing with the knowing receipt claim, below. Effectively for the reasons that I give there, I do not conclude that SKAT is without a realistic prospect of success on its claim that Goal did not have reasonable grounds for the belief that SKAT accepts it did have, namely that the taxpayers on what SKAT now says were fraudulent WHT refund claims were making genuine claims. I can see there may be room at trial for possibilities such as that that only came to be true, if at all, some way into the relevant period, but I do not find that there is not a realistic prospect of the conclusion at trial being that Goal was careless materially from the off in relation to Solo's business.

135. There may also be scope – I find it difficult to assess this on a two-day summary judgment argument – for fine distinctions between what SKAT must prove for the purposes of knowing receipt (as regards unconscionability), to the extent it relies in that regard on facts and matters also relied on for the negligence claim, and proof that Goal's belief in the genuineness of the claims it was submitting was a careless belief. So I am not necessarily to be taken to have concluded that SKAT must or is likely either to succeed or fail, as the case may be, on both together. But without getting to the bottom of that, there is such obvious similarity between the two aspects of the case that I could not say, as I do below, that SKAT has a realistic prospect of success on unconscionability, but not on carelessness of belief. It would be different, going back to the timing point, if the triable case on unconscionability (on the facts) only existed because of matters arising and knowledge acquired by Goal late in the chronology but in time to affect its receipt of the exclusivity fee in December 2014. That might hold out the prospect of dismissing some sufficient proportion of the negligence claims (as after all, strictly, there are separate causes of action for damages for negligence here, if there is any good claim at all, one for each WHT refund claim submitted negligently by Goal and paid by SKAT) as to make it worth granting such a partial summary judgment. But that is not the conclusion I come to below in relation to the basic factual contention that Goal should have been concerned about the propriety of what Solo was doing.

136. SKAT's negligence claim, so far as this summary judgment application is concerned, therefore gets itself to third base. From there, yet again assessing it only for whether

there is a realistic prospect, nothing more, I mapped out the run in to the home plate earlier in this judgment (paragraphs 60 to 67 above).

(v) Conclusion

137. For all those reasons, Goal's application for a summary judgment dismissing SKAT's negligence claim against it fails and will be dismissed. However, so too does and will be SKAT's application for permission to amend its pleading of that claim, in the main body of the Particulars of Claim and by Schedule 5W thereto. I shall invite the parties' submissions after this judgment has been handed down as to how best to give effect in an order to my conclusions that SKAT must go away and re-plead its English law negligence claim and that, as against Goal, the alternative claims under Danish law must be struck out.

The Unjust Enrichment Claim

138. Mr Hough QC submitted as to the law that where a payee in good faith has provided consideration for the payment received, that provides a defence to an unjust enrichment claim. The payee, he argued, can be regarded as a *bona fide* purchaser for value without notice. He relied on *Goff & Jones, The Law of Unjust Enrichment*, 9th Ed. at 29-12 to 29-27, and referred me to *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677, *per* Goff J at 695C-D, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, *per* Lord Hope at 408B, *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, especially *per* Lord Goff at 575H-577G, in which, Mr Hough said, the necessary premise of all the argument was that good consideration was in principle a valid defence, and *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110.

139. The distinguishing feature of the present case, however, is that, at least on the face of things, Goal had no entitlement to the transaction fees now reclaimed by SKAT on the basis of unjust enrichment except an apparent entitlement created by the very payment to Goal by mistake (it is to be assumed for present purposes) of the WHT refunds which generated those fees, and out of which Goal would pay itself those fees. Mr Hough QC was unable to suggest that any case has held that the good consideration defence would answer the unjust enrichment claim on those facts, even leaving aside any question of good faith. Mr Goldsmith QC noted that in *Barclays Bank v Simms*, at 695G, Goff J appears to have taken it as obvious that any good consideration defence could not meet a claim based upon the setting aside, for mistake, of the very transaction.

140. I regard it as well arguable for SKAT that Goal's transaction fees were success fees, earned only upon payment by SKAT of valid WHT refund claims processed and submitted by Goal, and not fees intended, as between Goal and its Customers, to be paid to Goal in respect of invalid WHT refund claims paid by mistake by SKAT. The good consideration defence raised by Goal does not enable me to say that SKAT's unjust enrichment claim does not have a realistic prospect of success. I shall not grant summary judgment to dismiss that claim.

141. In any event, for the reasons I give below in relation to the knowing receipt claim, I do not find that SKAT has no realistic prospect of success in seeking to rebut any good consideration / *bona fide* purchaser defence on the basis that Goal did not act in

good faith, as that concept is used in this context (which, as Mr Goldsmith QC was at pains to emphasise, will not require SKAT to show that Goal behaved dishonestly, that not being an allegation it makes).

The Knowing Receipt Claim

142. As I have trailed now twice, because this is the point where, on the facts, not having reasonable grounds for believing WHT refund claims were genuine, not acting in good faith in the context of unjust enrichment defences, and knowingly receiving funds paid away in breach of trust, meet and overlap, at all events for summary judgment purposes, I am unable to say as proposed by Goal that SKAT has no realistic prospect of showing at a trial that Goal received the exclusivity fee knowing of such matters as would have caused a reasonable person either to conclude that it was probably the proceeds of fraud or to make enquiries or seek advice that would have revealed the probability of fraud (applying the test stated in *Armstrong v Winnington* and agreed as a correct statement of the law for present purposes, see paragraph 79 above).

143. On the facts of this case, and (as always) for summary judgment purposes only, there is no additional difficulty over the need for Goal to have been on notice in that sense that the particular payment of £1.5 million made to it in December 2014 may have been derived from fraudulent WHT refund claims. The essential gist of SKAT's allegation is that Goal was very much on notice by then that the WHT refund claims it had been submitting for Solo might well not be genuine and might well have been a dishonest money-making scheme on a very large scale for Solo. If that be right, it may not be much of a leap at trial to say that Goal could not in good conscience keep the £1.5 million, if it was in fact derived from the proceeds of fraud, having not taken what it might be said ought to have seemed the obvious step of asking where the money was coming from.

144. I now summarise some (not all) of the main matters pleaded by SKAT that are said by it to have put Goal on notice that there was or might well be something very wrong with what Solo was doing, to give a sufficient flavour of the case it wishes to take to a trial. Thus, SKAT says that:

(i) Goal was a professional tax reclaim agent professing expertise in the field, submitting large numbers of WHT refund claims for Solo that were generating very large payments by SKAT. As a result, it is said, Goal "*must have known*" various things about the requirements for a valid refund claim, and so for example (as SKAT alleges) must have understood that it would not be a valid claim if the taxpayer "*did not own any real shares*", "*had not received any real dividends traceable to a Danish company*", or "*was a mere agent, nominee or conduit for another person*". In my judgment, that is a credible, realistic contention that will take a trial fairly to determine.

(ii) Goal was submitting large numbers of WHT refund claims to SKAT, for very large aggregate amounts, implying implausibly large holdings in major, listed Danish companies on the part of the taxpayers making the claims, who were (in substantial part):

(a) recently formed, small US pension plans with no obvious basis for the level of wealth that in turn implied. One particular point taken in that regard by SKAT is that, it says, many of the relevant taxpayers were '401(k) plans' (a reference to section 401(k) of the US Internal Revenue Code), meaning they would be subject to a maximum annual contribution limit per participant of c.US$50,000 (the exact figures do not matter); or

(b) recently formed Malaysian entities with no obvious business or source of wealth other than the WHT refund claims being submitted on their behalf by Goal.

These are serious points raising a realistic case that Goal knew or must have known enough to make a reasonable person in its position concerned about what was going on. It is not answered, for summary judgment purposes, by the submission for Goal in response, correct though that is so far as it goes, that it is possible for recently formed investment funds to be very large and have very substantial holdings. There is no proper evidence at this stage that Goal thought that is what they were actually dealing with (because of the nature, or rather the limitations, of the witness evidence served by Goal for this application). There is a proper case for SKAT that requires a trial whether that can credibly have been the case.

(iii) It is to be inferred that Goal will have been told something of the (purported) transaction structure being sponsored by Solo and used by its taxpayer clients to underlie the WHT refund claims Goal was being asked to submit. On this application, of course, it is not for the court to attempt to assess whether that inference *is* to be drawn, or whether it *will or probably will* be drawn at trial. The question is only whether there is a realistic or serious prospect that after a trial the conclusion may be that that inference is to be drawn. In my judgment, there is such a prospect. Once that is so, it is quite impossible to say now that there is no realistic prospect that Goal knew enough to see that there was or may well be a real problem with the WHT refund claims Solo was paying it to make. The (objective) validity of WHT refund claims based on the Solo transaction model is a major contentious issue in this litigation. I have described it to the parties during case management as potentially determinative of or at least definitional for all of the causes of action asserted by SKAT. Hence my direction that the parties at least give serious consideration to whether we might usefully employ preliminary issues as part of managing these massive proceedings. It is also clear to me that the nature of SKAT's case on that question of validity is not only that the Solo model was not a valid way to generate a refund liability on the part of SKAT, but that that would be obvious to anyone with a working knowledge of DTAs, WHT deductions and WHT refunds. I am in no position to say now that there is no realistic chance SKAT is right about that.

(iv) There was something suspicious about the restructuring of Solo's business midway through 2014 so that Solo-sponsored taxpayers made their WHT refund claims supported by dividend advices provided by several different Solo entities. It is said by SKAT, after the fact, that this can be seen to have been an attempt to avoid SKAT being alerted to what was becoming a highly

implausible transaction volume. There is an associated plea that following this restructuring WHT refund claims were made by different Solo-sponsored taxpayers "*for suspiciously similar volumes, spread across the four Solo Group Custodians*". It is said by Goal that it reasonably had no cause to think the restructuring more than a matter for Solo and/or its clients' business convenience, and there was nothing suspicious in several investment funds using Solo's services investing at the same time to a similar extent in the same companies, so that Goal did not think much of these matters or ask for more detail, nor reasonably ought to have done so. I cannot resolve such disputes without a trial. A further associated point is that a large majority of Solo-sponsored taxpayers were represented by a small group of authorised representatives. Provisionally, I would say that seems to me likely perhaps to prove less significant than other points, but this is now descending to a level of detail that only serves to reinforce the basic conclusion that there is a case here that requires a trial.

(v) The £1.5 million a year exclusivity arrangement was itself inherently suspicious. There is here a willingness to wound yet a fear to strike. SKAT does not accuse Goal of being dishonestly involved and accepts thereby that the exclusivity agreement was what it appears to be (at least from Goal's perspective), namely a contract negotiated and agreed at arm's length to purchase the exclusive use of Goal's services. I do not find it entirely easy, provisionally, to see why that could be simultaneously honest yet suspicious. If this were SKAT's only point, it would not persuade me there was a realistic prospect of success on knowing receipt. But it is not SKAT's only point and how it will play out so as to contribute, if at all, to a finding in SKAT's favour or in Goal's favour at a trial I am not in a position to assess.

(vi) The facts and matters relied on by SKAT would have been known principally to a small group of key employees, none of whom provided evidence for this hearing, directly or indirectly, namely Ms Benge, Ms Nimmo and Ms Rodrigues. This seems to me a credible and realistic possibility on the facts and it is easy to see how it could be significant, even if it would not give rise on its own to any specific finding of knowing receipt, as compared to a situation in which pieces of information that can be put together after the fact were scattered more widely across an organisation.

145. For the reasons I have given as I went through those principal matters relied on by SKAT, I am not persuaded by Goal to find that there is no realistic prospect of the finding at trial being that by the time it received the exclusivity fee in December 2014, Goal was aware of such matters as to render it unconscionable for it to keep that payment, applying the legal test that was common ground for present purposes. Furthermore, in my judgment it is realistic to suppose that if that is the finding at trial, for December 2014, there will be a finding that that did not become the position only then, but rather Goal knew enough that it should have seen major cause for concern at a much earlier stage. It is not unrealistic to propose, as SKAT does, that after a trial the finding may be that Goal knew enough reasonably to have concerns that ought to have been followed up; and that the emptiness of the Solo taxpayers' purported entitlement to WHT refund claims as now alleged by SKAT could not have failed to

become apparent upon reasonably following up a concern, if held, that they might be empty.

146. Goal says, stating it broadly but sufficiently for present purposes, that (a) it did not in fact know much of what SKAT suggests it must or ought to have known, and (b) it is not reasonable to expect that it should have. For instance, it is said it did not know that many of the 401(k) plans whose WHT refund claims it submitted were small plans that could not plausibly be as wealthy as was implied by the claims they were making; and it did not know about the annual contribution limits applicable to 401(k) plans anyway. But that will be contentious at trial. In my judgment, SKAT has raised serious grounds for supposing Goal's relevant personnel may have known a lot more than that, and has a serious basis for an argument that on any view they should have; and Goal has not provided me with any or any proper evidence to the contrary (see paragraph 98 above), let alone evidence that blows SKAT's case out of the water, to use the time-honoured phrase of the Master's corridor on (as they used to be) RSC Order 14 applications. Similarly, the 'evidence' from Ms Simpson, purportedly verified by Mr Everard, matching its Defence, is that Goal never asked and was never told anything about the Solo transaction model. But the poor quality of that evidence means it does not assist Goal on this application – in short, or especially, the fact that I cannot say it is even asserted to be the evidence that any truly relevant witness of fact will give in chief, leaving aside any question whether SKAT should be deprived of the opportunity to test any such evidence at a trial.

147. As I noted at the outset (paragraph 6 above), the Solo fraud (as SKAT claims it to have been) is said to have been practised against SKAT between August 2012 and July 2015. But the flow of WHT refund claims now said not to have been genuine was not constant. Rather, it built and built over that period until SKAT shut it down. Thus, for example, SKAT pleads that it paid out WHT refund claims now said not to have been genuine to the tune of c.DKK40 million in 2012, c.DKK670 million in 2013, c.DKK3.5 billion in 2014 and c.DKK7.9 billion in January to August 2015.

148. Matching that pattern, and the fact that the determinative focus for the knowing receipt claim is Goal's state of knowledge and understanding in early December 2014, there is a certain concentration in the detailed particulars SKAT has been able to provide to date upon facts and matters through 2014 and into 2015, with a little material from 2013, plus a background of, in effect, general criticism of a lack of serious customer due diligence throughout, as SKAT alleges. That critical mass of material for the later part of the period of the alleged fraud (2014-2015) does not mean it is possible at this stage to judge when at the earliest it might realistically be concluded after a trial that Goal knew enough to be on notice that it was probably participating innocently in a fraud (if it was).

149. Were there no realistic prospect of a finding that that ever became true, summary disposal would be an option (subject to there being other compelling reasons for a trial). That is not the position, however, and so it is not possible summarily to determine that SKAT may only pursue a case that Goal should have caused itself to become aware that there was probably a problem with the genuineness of WHT refund claims it was being asked to submit on and from some particular date within the period of the alleged fraud rather than from the outset. In any event, it would not reduce by a substantial proportion the claims Goal faces, and it would have no or minimal case management impact, to attempt to limit SKAT in that way so long as it

was pursuing a claim that Goal should have seen that there were red flags waving by early 2014, and on any view SKAT has a case to that effect that requires a trial.

150. The conclusion of this section of this judgment, then, is that Goal has not persuaded me that SKAT has no realistic prospect of success on its knowing receipt claim.

Fallback Points

151. If, as has come to pass, Goal's summary judgment application were to fail, Mr Hough QC contended by way of fallback position that certain particular elements of SKAT's pleaded case were objectionable come what may and so ought not to be allowed. In considering the summary judgment application, I have taken something of a wrecking ball to SKAT's current pleading in any event. It remains for me therefore to deal now with those few specific fallback points taken by Mr Hough that have not been overtaken by that demolition job.

152. Firstly, Mr Hough QC argued that the proposed amendment alleging that Mr Nielsen must have read and relied upon specified contents of Goal's website "*should be refused on the basis that it is patently nothing but guesswork*". I agree – see paragraph 107(ii) above. When SKAT re-pleads, that allegation should not be repeated, unless I suppose SKAT can show that it has acquired some evidence to support it.

153. Secondly, it was suggested that it was equally speculative to plead by inference that those attending meetings with Mr Nielsen on behalf of Goal made statements about Goal and its services in line with its self-publicity. I disagree – see paragraph 107(iii) above.

154. Thirdly, it was argued that I should refuse permission to amend to suggest that the fact WHT refund claims were made through Goal was a material influence. I disagree – see paragraphs 125 to 127 above.

155. Fourthly, Goal objected to a specific point I have not mentioned so far, namely a suggestion that the fact that the form of Power of Attorney Goal used, which would be seen by SKAT as a signed Power of Attorney was a pre-requisite for a WHT refund claim submitted through an agent, included an indemnity in favour of Goal in respect of possible liabilities towards third parties. I agree with Mr Hough QC that this does not tenably support any conclusion relevant to any of SKAT's claims. It should not be included in any re-pleading of those claims.

156. Fifthly, and finally, it was submitted that I should refuse come what may permission to amend to place reliance on the Danish approach (as I have labelled it), as alleged by SKAT. I disagree – see paragraphs 108 and 109 above.

Conclusions

157. For the reasons set out above, Goal's summary judgment application fails and will be dismissed.

158. On the other hand, SKAT's pleading is badly structured and unhelpful, confusing, and in places inconsistent. I have described it as unfit for purpose. SKAT's application

for permission to amend is also dismissed, and I shall require SKAT to re-plead the case against Goal, this time concisely, precisely and coherently. SKAT, Goal and the court will all benefit from its doing so as the case progresses further.

159. In addition to that general direction, in any re-pleading of the claims:

(i) I expect SKAT to adhere to the instructions in paragraphs 41 to 42, 46 to 50, 51 to 53, 69 to 71 and 82 above.

(ii) The allegation referred to in paragraph 152 above should not be included absent evidence for it that I was not shown on this hearing.

(iii) The allegation referred to in paragraph 155 above should not be included.

160. In closing, I pay tribute to the exemplary way in which the hearing itself was prepared for and conducted remotely, especially to the quality of submissions from Mr Hough QC and Mr Goldsmith QC in their oral arguments. In this judgment I am critical of both sides in certain respects, and I can imagine there will be disappointment felt on reading those criticisms. I make clear therefore that I am acutely aware it can be far easier for the court to see these things, having had the benefit of one side's skilfully developed critique of the other side's efforts that is an important and healthy feature of our adversarial system of litigation. My acceptance of arguments of that kind on both sides should not be taken as personal criticism of any individuals or as indicating any failure to appreciate the great challenges involved in dealing with this case.

SKAT v Goal Taxback

Annex to Judgment – Example Form 06.003

SKAT

Claim to Relief from Danish Dividend Tax

☐ In my capacity as beneficial owner ☒ On behalf of the beneficial owner

Claim is made for refund of Danish dividend tax, in total DKK: 1431195.08

Beneficial Owner

Full name [redacted]

Full address [redacted]

E-mail
clientservices@goalgroup.com

Signature
Beneficial owner/applicant

.....

If the claim is made on behalf of the beneficial owner the applicant's power of attorney shall be enclosed

As documentation is enclosed dividend advice(s), number: 1

(This documentation is obligatory)

Financial institution

The amount is requested to be paid to:

Name and address
Goal TaxBack Ltd
NatWest Bank
High Street BranchCroydon

Reg. no	Account no	
	34015159	
SWIFT	BLZ	IBAN
	NWBKGB2L	IBAN GB88NWBK60730134015159

On reclaim please quote:-OPL DK 1

Certification of the competent authority

It is hereby certified that the beneficial owner is covered by the Double Taxation Convention concluded between Denmark and U.S.A.

.....

Date Official stamp and signature

When signed to be forwarded to:

Skattecenter Høje-Taastrup
Postboks 60
DK-2630 Taastrup

2010.07 (gl.nr. U 20a)

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