



Neutral Citation Number: [2021] EWHC 2385 (Comm)

Case No: CL-2020-000019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 August 2021

Before :

Sir Ross Cranston sitting as a High Court judge

Between:

(1) ALMACANTAR (MARBLE ARCH) SARL
(2) ALMACANTAR (MARBLE ARCH (NO 2))
SARL

**Claimants/
Respondents**

- and -

THE RAILWAY PENSION EXEMPT UNIT
TRUST (Acting by its trustee BNY MELLON
TRUST & DEPOSITARY (UK) LIMITED)

**Defendant/
Applicant**

DAVID HEAD QC (instructed by **Mills Reeve LLP**) for the **Defendant/Applicant**
ZIA BHALOO QC and **RUPERT COHEN** (instructed by **Hogan Lovells International**
LLP) for the **Claimants/Respondents**

Hearing dates: 27-28 July 2021

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.

.....
SIR ROSS CRANSTON

Sir Ross Cranston:

INTRODUCTION

1. This is an application for summary judgment and/or a strike out by the defendant, the Railway Pension Exempt Unit Trust, acting by its trustee, BNY Mellon Trust and Depositary (UK) Limited. For convenience the term “RailPen” is used compendiously in the judgment, unless the context suggests otherwise, to describe not only the defendant but other entities associated with it as well. The claim in which RailPen is the defendant is brought by the claimants, which are sociétés à responsabilité limitée incorporated in Luxembourg and part of a corporate group ultimately owned by Almacantar SA. The term “Almacantar” is used in the same compendious manner as with the defendant.
2. Almacantar’s claim is under a contractual indemnity in an agreement dated 12 May 2011 to which RailPen and certain Almacantar entities were parties (“the Agreement”). The indemnity concerned the stamp duty land tax which the parties anticipated might be payable to HMRC, Her Majesty’s Revenue and Customs, as regards the transaction to which the Agreement related. Under the indemnity RailPen agreed to pay a half of any stamp duty land tax arising. HMRC has now assessed a tax liability on Almacantar and it seeks to enforce the indemnity in the Agreement.
3. In this application for summary judgment, RailPen contends that the indemnity was expressly subject to contractual time limits which were not met so that the claim fails. In brief the time limits were that (i) no claim to an indemnity might be made unless a notice of claim was given within seven years after the completion date of the Agreement, in other words 23 June 2018; and (ii) any claim made would be deemed to have been waived or withdrawn on the expiration of six months after the date it was made unless court proceedings were issued and served within that period.
4. In response to RailPen’s contention that Almacantar has no reasonable prospects of succeeding at trial, Almacantar raises various arguments, but its primary focus at the hearing was on estoppel: the actions of RailPen’s representatives both before and after 23 June 2018 lead to the conclusion that they accepted and represented that RailPen remained liable for a half of any stamp duty land tax payable once the agreed process of engagement with HMRC to have it modify its views about liability reached a conclusion. In addition, Almacantar contended that the application for summary judgment should be dismissed because of the terms of the indemnity clause: amendments whether by way of the application of a proviso in the indemnity clause itself or an implied term meant the time bars were disapplied.
5. The principles applicable to summary judgement are well-known. Both parties cited the distillation by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], approved by the Court of Appeal in *AC Ward Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]. In short, and of relevance in this case: (A) the court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success (*Swain v Hillman* [2001] 1 All E.R. 91), a “realistic” claim being one which is “more than merely arguable” (*ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]); (B) in reaching its conclusion the court must not conduct a “mini-trial” (*Swain v Hillman* [2001] 1 All E.R. 91); (C) “the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real

prospect of success and that there is no other reason for a trial”; and (D) “If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant’s statement of belief. The language of CPR24.2 (“no real prospect ... no other reason ...”) indicates that, in determining the question, the court must apply a negative test”.

THE AGREEMENT

6. The Agreement between the parties in 2011 concerned the sale of property interests from BNY Mellon Nominees Limited and Railway JUT Limited, companies associated with RailPen (called “Sellers” in the Agreement), to Almacantar companies (called “Buyers” in the Agreement). In outline, following exchange, a restructuring would occur whereby the beneficial ownership in leased property known as Marble Arch Tower would be transferred from The Marble Arch Tower Limited Partnership, and legal title from nominees owned by Marble Arch Tower General Partner Limited, to the trustees of a trust called the Marble Arch Tower Unit Trust (“the Trust”). RailPen was the “Warrantor” in the Agreement.
7. There is no need to examine a subsequent arrangement in October 2013 whereby the original Almacantar Buyers transferred their interests to the Almacantar companies which are the claimants. For the purposes of this application RailPen is content to accept that they have the right to enforce the original Buyers’ rights under the Agreement. Further, in the proceedings the parties drew no distinction between the interests of the trust and Almacantar in dealing with HMRC and so the two are frequently elided in consideration of the current application.
8. As already indicated, the parties to the Agreement anticipated that the transaction might attract stamp duty land tax. Under clause 39.1.2 and 39.2 of the Agreement, RailPen as Warrantor agreed to pay the Buyers half of any tax, interest or penalties for which the Trust was liable, limited in aggregate to a maximum of £1.6m. Clause 39 provided:

“39. *Indemnity*

39.1 Subject to clause 39.2, the Warrantor shall pay to the Buyers by way of an adjustment to the consideration for the Sale Units, an amount equal to...

39.1.2 half of any [stamp duty land tax] and any interest or penalties thereon or by reference thereto for which the Trustees or the Trust as a deemed entity is liable in respect of any acquisition by the Trustees of an interest in the Property before or at Completion.”
9. Clause 39.2 limited any claim in aggregate to a maximum of £1.6m.
10. Clause 39.3 provided that a claim was subject to certain time limits (expressly inserted for the “protection of the...Warrantor”) contained in Schedule 7 to the Agreement. It read:

“39.3 Paragraphs...5, 6, 8, 9 and 10 of Schedule 7 shall apply (with any necessary amendments) to a claim under clause 39.1 as to a claim for breach of Tax Warranty. In relation to a claim under clause 39.1.2:

39.3.1 the Buyers shall give notice to the warrantor within 14 days of any relevant claim by HMRC or any communication from HMRC indicating that HMRC intend to bring or are considering bringing such a claim coming to their notice (so far as possible following the Buyers’ reasonable endeavours to procure that the Trustees keep the Buyers fully and promptly informed), to the notice of the Trustees...”

11. Under clause 39.3.2 RailPen had a right to a reasonable opportunity to comment on any correspondence or filings in draft form before submission to HMRC, and Almacantar could not unreasonably refuse to incorporate reasonable comments made by the Warrantor. Clause 39.3.2 provided:

“39.3.2 the Buyers shall (where the correspondence or filings are with or made by the Trustee, so far as possible following the Buyers’ reasonable endeavours) provide the Warrantor or its duly authorised representatives reasonable opportunity to comment on any correspondence or filings with a court or tribunal in draft form before submission and shall not unreasonably refuse to incorporate any reasonable comments made by the Warrantor...”

12. There was also an indemnity for legal costs:

“39.3.3 the Warrantor shall provide an indemnity to the reasonable satisfaction of the Buyer and the Trustees respectively in respect of half of the reasonable legal costs and expenses of the Buyer and the Trustees respectively in connection with reviewing and defending a claim or threatened claim by HMRC and the Buyers agree to meet or pay the other half of such reasonable costs and expenses and to provide an indemnity to the reasonable satisfaction of the Trustees in respect of half such reasonable costs and expenses of the Trustee.”

13. Paragraph 5 of Schedule 7 provided as follows:

“Schedule 7

Provisions for the protection of the Sellers and the Warrantor...

Time Limits

5.1 Subject to paragraph 5.2, no Claim may be made unless notice in writing of the Claim (specifying in reasonable detail with supporting evidence the event, matter or default which gives rise to the Claim and an estimate of the amount claimed) has been given to Sellers’ Representative (“Notice of Claim”)

5.1.1. In the case of a Claim under the Tax Warranties, within seven years after the Completion Date...

5.3 To the extent a Notice of Claim has been given to the Sellers’ Representative prior to the expiry of the relevant periods noted in paragraph 5.1 (above) the time

periods in paragraph 5.1 shall be extended to such date as is 30 Business Days after the date of the Notice of Claim, in respect of that Claim.

5.4 Any such Claim that may have been made shall (if it has not previously been satisfied, settled or withdrawn) be deemed to have been waived or withdrawn on the expiration of six months after the date it was made unless court proceedings in respect of it shall then have been commenced against the appropriate parties.

5.5 For the purposes of paragraph [5.4] court proceedings shall not be deemed to have been commenced unless they have been both issued and served on the appropriate parties.”

14. Both sides accepted that there was a typographical error in the cross-references in paragraph 5. In my view the substitution quoted in clause 5.5 above provides the simplest remedy of that error. It seems to me as well that there is another typographical error in the reference in the third line of paragraph 5.3, which should refer to paragraph 5.2 instead of paragraph 5.1. However, the issue does not arise since there was no Notice of Claim. In any event, as currently expressed the latest possible date for a notice to be given was 3 August 2018 and the latest possible date for the issue and service of proceedings was 3 February 2019.
15. The Agreement contained an entire agreement clause (clause 27).
16. Clause 28 was entitled “Waiver, Variation and Release”. It read:

“28.1 No omission to exercise or delay in exercising on the part of any Party to this Agreement any right, power or remedy provided by law or under this Agreement shall constitute a waiver of such right, power or remedy or any other right, power or remedy or impair such right, power or remedy. No single or partial exercise or any such right, power or remedy shall preclude or impair any other or further exercise thereof or the exercise of any other right, power or remedy provided by law or under the Agreement.

28.2 Any waiver of any right, power or remedy under this Agreement must be in writing and may be given subject to any conditions thought fit by the Sellers or Buyers. Unless otherwise expressly stated, any waiver shall be effective only in the instance and only for the purpose for which it is given.”
17. Clause 30 set out the formalities for notices and communications under the Agreement. In particular, notices had to be in writing and signed (clause 30.1). Communications had to be marked for the attention of named persons, and contact details for the purposes of the clause were specified.
18. Under clause 32, to be valid and effective an alteration or variation had to be in writing and signed by or on behalf of each party.

EVENTS FOLLOWING THE AGREEMENT

19. Following completion of the Agreement on 23 June 2011 there were discussions between the parties about HMRC’s claim as regards liability to stamp duty land tax. The substance of these discussions is contained in correspondence between the parties

and with HMRC. There are references in the correspondence to telephone calls between the parties' representatives. At this point in the proceedings there are limited records of what was said in those conversations.

20. In the interactions between the parties, Almacantar acted mainly through its legal director (now chief operating officer), Matthew Filkin, who has made a witness statement for the court. To an extent Almacantar's finance director, Mr Halcrow, was also involved as was in-house counsel, Linda Flavell. From 2015 Almacantar instructed Hogan Lovells International LLP to advise and act on its behalf. Rupert Shiers, a tax partner at Hogan Lovells, and Aaron Burchell, also with the firm, became involved.
21. RailPen was represented from 2011 until 2018 by Christopher Townsend, a partner and later a consultant with Mills & Reeve LLP. He was supported at times by Matthew Short. David Lee, a principal at Orchard Street Investment Management, the investment adviser under the Agreement ("Orchard Street"), was also closely involved on behalf of RailPen.
22. As regards the main proceedings RailPen placed a question mark over the authority of Mr Townsend and Mr Lee to make any representation and undertake any act relevant to the stamp duty land tax at issue. For the purposes of this application for summary judgment I assume that both had the requisite authority.

From completion in 2011 to HMRC's determination in May 2015

23. The date of completion of the Agreement was 23 June 2011.
24. Several months later, on 8 September 2011, Deloitte wrote to HMRC describing the nature of the restructuring and explaining that paragraph 18(1)(a) of Schedule 15 to the Finance Act 2003 applied. That, in its submission, meant that the chargeable consideration was only £79,815. At that early point Deloitte was acting for both sides of the transaction, but it soon dropped out of the picture.
25. On 2 April 2012 HMRC wrote to Mills & Reeve that it would check the land transaction return. On 28 August 2012 it raised an opening request for documents and information pertaining to the restructuring. The letter was addressed to Mr Townsend at Mills & Reeve and referred to an earlier telephone call between him and an HMRC official.
26. Almacantar then prepared a draft response to HMRC, and on 18 October 2012 Mr Townsend sent to Mr Halcrow of Almacantar what he described as "a few minor comments" on it, after he had spoken to Mr Lee. He asked for details of the tax adviser to Almacantar so that he could discuss any relevant issue. Mr Halcrow replied the same day that Deloitte was no longer acting, and at that stage they were relying on internal advice. He added that Mr Filkin would make contact early the following week.
27. Mr Townsend inquired about progress on the HMRC reply on 16 November 2012 and Mr Filkin responded shortly after, the same day, that a comprehensive draft response would soon be sent to him for review. Mr Filkin emailed Mr Townsend on 22 November 2012, informing him that the draft response would be sent to him the following Tuesday, at the same time inquiring whether he had some relevant documents which Almacantar was missing.

28. Mr Filkin circulated the draft response prepared for HMRC on 27 November 2012 and chased for Mr Townsend's comments on 4 December 2012. Two days later, on 6 December 2012, Mr Townsend sent Mr Filkin his comments, and a few minutes later they discussed them on the telephone. Later that day Mr Filkin sent an additional suggestion for a closing sentence for the draft, to which Mr Townsend agreed the next day. Mr Townsend had made clear that his comments needed approval by Mr Lee, and these were not available until some ten days later. The final version of the response was sent to HMRC by Almacantar/the Trust on 20 December 2012.
29. HMRC sent an acknowledgment in early February 2013. A more detailed response dated 25 February 2013 commented on the points made in the 20 December 2012 letter but sought further information about the transaction. The HMRC response was distributed to both sides by the Trust's fiduciary agent for comment.
30. Mr Filkin sent a draft reply to HMRC's letter to Mr Townsend on 19 March 2013, highlighting certain areas where he would like RailPen's input and inviting general comment as well. Mr Townsend sent comments by way of a mark-up of the draft on 27 March 2013. There was a conversation between the two that day. On 8 April 2013 Mr Filkin told Mr Townsend that there were no further comments on the markup, and the combined draft would be sent to the trustees for comment.
31. The response was submitted to HMRC by Almacantar/the trust on 19 April 2013. HMRC responded on 14 June 2013. On 26 June 2013 Mr Townsend emailed Mr Filkin about whether he and Mr Halcrow had discussed "our proposal that we respond to HMRC's latest letter with a letter which highlights the key points as we see them, and seeks to bring closure..." Mr Halcrow emailed Mr Lee on 1 July 2013 that he thought it had been agreed that the aim was speedy discussions with HMRC, either to flush out any technical justification for HMRC's position or to satisfy HMRC about the transaction.
32. Mr Halcrow drafted a letter to HMRC that day. Mr Townsend consulted Mr Lee about the draft, who approved it the following day, although Mr Townsend himself had some points which Mr Lee forwarded to Mr Halcrow. Following submission of this letter by Almacantar/the Trust on 10 July 2013, HMRC responded on 26 July 2013. On 16 August 2013 the fiduciary agent to the Almacantar trustees sent a draft response to be sent to HMRC for comment by Mr Lee and Mr Townsend on the approach and disclosure proposed. Mr Filkin and Almacantar's then representatives, Freshfields, chased them for their comments over the following days. Mr Townsend sent comments and some factual information to Freshfields on 23 August 2013.
33. The letter was sent with attachments by the Almacantar/ the Trust to HMRC the following day, 24 August 2013. In mid-November 2013 Mr Lee inquired of the Almacantar trustees whether anything had been received from HMRC. In late January 2014 the Almacantar trustees were told that the matter had been referred to HMRC's Solicitors Office. There was another holding letter from HMRC in April 2014 and again Mr Townsend was informed.
34. HMRC's covering letter and formal determination under paragraph 25, Schedule 10 to the Finance Act 2003 was dated 29 May 2015. This was that a land transaction return had not been filed in respect of a notional transaction under section 75A of the Finance Act 2003. Stamp duty land tax was payable in the sum of £3,192,600, together with

accrued interest of £368,942.10. The interest, it was explained, would continue to accrue at a daily rate of £262.41.

Events from HMRC's determination in May 2015 to May 2017 meeting

35. Almacantar received HMRC's determination on 2 June 2015 and sent it to Mr Lee the same day. There is a document recording arrangements for making a call by Mr Filkin which took place on 5 June 2015, when the parties agreed to challenge HMRC's determination. In his witness statement Mr Filkin says that that agreement to contest HMRC's determination was not time limited and that he

"understood (and I presume Mr Lee and Mr Townsend also understood, given that they continued to inform and participate in the appeal...) that the agreement to contest the Determination lasted as long as long that process took or until all parties agreed otherwise".
36. For the challenge to HMRC's determination the Almacantar's trustees instructed the law firm Hogan Lovells. Mr Lee was informed of this on 12 June 2015. He was also asked for comments on the relatively short reply letters which the firm had prepared. Mr Shiers of Hogan Lovells had e-mailed Mr Filkin at Almacantar the previous day setting out his advice, with the draft letters attached. One concerned a section 75A appeal, the other a discharge application. Mr Shiers suggested that the letters should be "...passed to Orchard Street and their advisers in accordance with the conduct of claims process between the parties".
37. After approval of the letters by Mr Lee in an email dated 15 June 2015, a notice of appeal was given under paragraph 36, Schedule 10 to the Finance Act 2003, along with a claim for discharge under paragraph 34, Schedule 10 to the Finance 2003. There was then correspondence during July 2015 between Almacantar and HMRC about a possible meeting. HMRC's position was that while they remained open to a meeting, in relation to section 75A its view was that the trustees should either concede or appeal to the tribunal. In late July Mr Lee (and through him Mr Townsend) was notified that these discussions had been going on after Mr Shiers of Hogan Lovells reminded the trustees' fiduciary agent to keep them "in the loop".
38. Hogan Lovells prepared a draft email to HMRC in mid-August and again Hogan Lovells reminded the trustees' fiduciary agent to keep Orchard Street informed. In early September 2015 HMRC requested a fuller response from Hogan Lovells on the legitimate expectation point which it had raised and a more detailed explanation about why it was considered that section 75A did not apply. On 2 October 2015 HMRC wrote rejecting the public law arguments. Hogan Lovells suggested a response to this. In late October, after the trustees had approved this course, Mr Lee was sent a copy "for their information and in case they have any queries." There is a suggestion in an email chain that Mr Townsend may have had a discussion with Hogan Lovells about the matter in late October.
39. In early November 2015, after the trustees had approved a letter to HMRC, Mr Lee was sent a copy for approval. Mr Townsend made a few comments on the draft, which was finalised and sent to HMRC on 17 November 2015. HMRC responded in a letter dated 29 April 2016, which was forwarded to Mr Lee on 11 May 2016. Hogan Lovells took

the view that the HMRC arguments were weak, and Mr Lee consulted Mr Townsend that day about his views.

40. On 19 May 2016 Mr Townsend asked Mr Shiers of Hogan Lovells whether he could have a brief discussion about the matter. Mr Shiers responded that he was to have a conference call with Almacantar and the trustees later that day and Mr Townsend might like to join. Mr Lee was away, and so Mr Townsend was without specific instructions, but Mr Lee agreed that he should join the conference call in order to keep things moving. With Orchard Street's approval on 26 May 2016, Hogan Lovells prepared a letter to HMRC on the section 75A issue. On 27 June 2016, it was forwarded to Mr Townsend for review and approval. On 8 July 2016 Mr Townsend raised three points on the draft, which on 22 July 2016 Mr Burchell of Hogan Lovells indicated had been adopted.
41. Following a reply from HMRC dated 28 September 2016, Hogan Lovells sought a meeting with HMRC, a course which Mr Townsend approved when notified about it. Hogan Lovells then drew up a draft agenda for the meeting with HMRC. On 1 November 2016 Mr Townsend was invited to comment on the draft agenda. The issue of reliance on HMRC Guidance was specifically highlighted for his attention. The agenda was "slightly amended", as Mr Burchell explained, following Mr Townsend's input. Following this, in December 2016, dates were provided to HMRC for a meeting. HMRC stated by way of email on 10 February 2017 that, having reviewed the proposed agenda, its policy, legal and technical colleagues would not attend.

The 17 May 2017 telephone conference between the parties

42. In anticipation of the meeting with HMRC, there was a meeting via telephone on 17 May 2017 between the Almacantar and RailPen representatives to consider the position. It was attended by Mr Filkin and Ms Flavell of Almacantar's legal team, their external lawyer, Mr Burchell of Hogan Lovells, and Mr Townsend and Mr Lee for RailPen.
43. There is a manuscript attendance note by Mr Townsend of the telephone call, which on its face is not complete in every detail. It records Mr Burchell stating at the outset that HMRC had rowed back from having a discursive meeting, but it was Hogan Lovells' view that there was a need to have a meeting at which HMRC could not ignore the arguments. Mr Lee responded that the dispute had been going on for five years, and he wanted to understand the benefits of further correspondence and whether a "proper" meeting could be achieved. Mr Filkin is recorded in the note as saying that HMRC was being a brick wall and saying "See you in Tribunal". Mr Townsend rejected that interpretation. Ms Flavell stated that there was no guarantee that a meeting would be successful. Mr Burchell expressed the view that it was an "all or nothing" case. Mr Townsend's attendance note then has Mr Lee asking whether they should try to persuade HMRC to do a U-turn, commenting that both sides wanted to bring the matter to a conclusion, and adding that there was sufficient material to appeal to the tribunal and that the parties should not pull punches but get on with it. Mr Burchell then agreed that a "muscular" approach was needed.
44. In his witness statement Mr Filkin's evidence about the 17 March 2017 meeting is that the principal point of discussion was whether to accept HMRC's position and pay the stamp duty land tax or to continue to dispute the claim. He states that his recollection is that he indicated that Almacantar was minded to pay, but that Mr Lee ultimately

persuaded him to press on with having a meeting with HMRC. He refers to Mr Townsend's note of the call as supporting his recollection, with its recording of Mr Lee's approach.

45. Mr Filkin also states in his witness statement that it was clear from this 17 March 2017 meeting that Mr Lee fully understood and accepted that RailPen was liable for their share of the tax and that agreeing to his strategy of continuing to resist HMRC's claim would not change that. He adds:

“There was no suggestion that this was subject to the service of notices or the issuance of a claim and/or that continuing to dispute matters with HMRC would ultimately result in RailPen being let off the hook.”

From March 2017 meeting to June 2018

46. As a result of the 17 March 2017 meeting, in early April 2017 Mr Burchell of Hogan Lovells prepared a draft letter to send to HMRC, which he discussed with Mr Townsend. In late April, HMRC agreed to a meeting. There were discussions about this, including over HMRC's email sent to Hogan Lovells on 11 July 2017 refusing to discuss public law issues at the meeting. In anticipation of the meeting with HMRC, Mr Burchell of Hogan Lovells exchanged emails with Mr Townsend in late September and early October 2017.
47. On 13 October 2017 Mr Burchell circulated a first draft of submissions for HMRC on the section 75A point for use at the meeting, and Mr Townsend provided some comments three days later on 16 October 2017. The meeting with HMRC was to take place on 19 October 2017. At that meeting HMRC requested that Almacantar should send a written summary of its arguments that no stamp duty land tax was due. Accordingly, Mr Burchell of Hogan Lovells circulated a summary for forwarding to HMRC on 31 October 2017. Mr Townsend provided comments on the draft on 16 November 2017.
48. In his email of 31 October 2017, Mr Burchell also requested that Mr Townsend should prepare evidence relevant to a public law argument regarding reliance placed on HMRC Guidance at the time of the transaction in 2011. Mr Townsend sent a relatively short draft letter to Mr Lee on 24 November 2017. Mr Burchell chased for the draft letter on 4 December 2017. Mr Townsend and Mr Lee were going through historic correspondence to identify what information had been shared with the trust and RailPen prior to the Agreement.
49. Mr Townsend sent two versions of a draft letter prepared for HMRC to Mr Burchell of Hogan Lovells on 8 February 2018 for his consideration. Mr Burchell returned comments on 12 February 2018. Mr Burchell asked for an update on 26 March 2018, and Mr Townsend provided a further draft on 18 April 2018. Mr Burchell provided his comments on 19 April 2018. On 30 April 2018 Mr Townsend accepted some, but not others. On 1 May 2018 Mr Burchell asked Mr Townsend if the HMRC reliance letter could be finalised so it that could be sent. Mr Lee stated on 10 May 2018 that he was still reviewing his files for relevant material.
50. A telephone call was arranged between Mr Burchell of Hogan Lovells and Mr Townsend and Mr Short of Mills Reeve for 25 May 2018. A draft of the letter was sent

to Mr Lee. On 31 May 2018 Mr Townsend sent an updated draft to Mr Burchell and Mr Lee. Mr Lee had comments on the role of Orchard Street in the Agreement and to whom it communicated the joint advice on stamp duty land tax. The reworked letter “in discussion with David Lee and yourselves” was sent to Mr Burchell on 15 June 2018, who sent it to HMRC three days later on 18 June 2018. Mr Burchell’s email of 18 June 2018 also asked about progress more generally.

Events after 23 June 2018

51. 23 June 2018 was the date seven years after the completion date of the Agreement on 23 June 2011.
52. On 28 June 2018 Mr Burchell emailed Mr Townsend asking if he or Orchard Street would be happy for him to send a chaser email to HMRC. Mr Townsend replied on 2 July 2018 stating that “neither we nor Orchard Street have any comments and, accordingly, are happy for the short chaser email to go to HMRC”. The chaser was sent to HMRC the following day in which it was pointed out that the meeting with HMRC had occurred some eight months earlier.
53. HMRC replied by email on 4 July 2018 apologising for the delay. It pointed to a case called *Hannover Leasing* which had been heard in the First Tier Tribunal concerning stamp duty land tax and asked whether the Trust would wish to wait for the judgment. Mr Burchell was against waiting and consulted Mr Townsend, who responded: “we and Orchard Street have looked over your draft response to HMRC and have no comments to add”. Mr Burchell sent a letter to HMRC on 16 July 2018 and informed Mr Townsend.
54. HMRC sent a further letter on 22 August 2018 which Mr Burchell asked Mr Townsend to pass on to Orchard Street. Mr Burchell and Mr Townsend spoke about that letter on 11 September 2018 after which Mr Townsend confirmed on 25 September 2018 that it was sensible to await the outcome of the *Hannover Leasing* decision given that it “could pave the way to HMRC accepting that no [stamp duty land tax] arose on Marble Arch Tower”. On 31 October 2018 Mr Townsend informed Mr Burchell that his consultancy agreement had come to an end and that Matthew Short was to be contacted “with developments as they arise”.
55. Following the hand down of the *Hannover Leasing* decision, Mr Burchell emailed Mr Short on 9 July 2019 asking if he and Orchard Street agreed with his proposal to email HMRC for an update on their views. Mr Short said he would “check with colleagues here, and [RailPen] and get back to you”. In a letter of 25 July 2019 HMRC reiterated its approach in the Determination. Mr Short sent an email to Mr Burchell copied to Mr Shiers on 29 July 2019 stating:

“Given that the limitation period for claims in respect of the [stamp duty land tax] indemnity under [the Agreement] has expired, we will leave you to take this forward with HMRC as you see fit”.
56. Mr Filkin informed Mr Lee of HMRC’s position the same day, 29 July 2019, who then emailed Mr Short of Mills & Reeve stating: “Matt Filkin may not be aware that it is not my position to advise further?” Mr Filkin sent a further email to Mr Lee on 31 July 2019 that the “final roll of the dice we agreed on” with HMRC had not worked, despite

the best efforts of working together, Almacantar proposed to settle the liability and draw the matter to a close. He observed that since RailPen's liability was capped, Almacantar would take the hit in relation to the interest which had accumulated.

57. Mr Lee replied on 31 July 2019 that the work previously undertaken by Orchard Street had been taken inhouse at RailPen at the end of 2017, that he did not have instructions although he had worked on some legacy issues, including this, during 2018. He added that he would contact Mills & Reeve to contact RailPen, and that he would "expect one of us will be contacted...so we can progress the matter quickly"
58. On 6 August 2019 RailPen notified Mr Filkin that the limitation for the indemnity having expired without the requisite notice being given, it did not have any liability. On 23 September 2019 Almacantar gave a Notice of Claim to Railway JUT Limited and Orchard Street seeking payment of the sum of £1,600,000 pursuant to clauses 39.1.2 and 39.2 of the Agreement. The Determination was enclosed with that notice. Mills & Reeve on behalf of RailPen denied that payment was due by way of letter dated 7 November 2019.
59. On 15 January 2020 Almacantar issued the present claim for payment of: (i) the sum of £1.6 million; (ii) sums pursuant to clause 39.3.3 of the Agreement in the sum of £84,568.49; and (iii) interest and costs.

Mr Filkin's witness statement

60. In his witness statement in these proceedings, Mr Filkin states that overall it was clear to him that the parties were travelling down the same path and were of the same understanding: they would continue to engage with HMRC and RailPen would be there to meet its share of the tax liability once the dispute had run its course. It was clear to him that Mr Lee and Mr Townsend knew that this represented Almacantar and the Trust's understanding and always acted consistently with it. In summarising what he saw as the manner in which the parties addressed the issue of tax liability, Mr Filkin states:

"(i) No step could be taken in the communications and appeal against [the Determination] without the agreement of both those acting for the Claimants and Mr Lee. In other words the parties had to take an agreed approach; (ii) Payment of [stamp duty land tax] was not to be made by the Trust if either Mr Lee or Mr Townsend disagreed to it being paid ...; (iii) The Determination ... was the point at which [RailPen] became liable to pay 50% of any sums eventually paid to HMRC ...; (iv) Both parties had to agree to the appeal against the Determination being withdrawn following which the Defendant would pay 50% of the [tax]."

RAILPEN'S CASE FOR SUMMARY JUDGMENT

61. Railpen's case for summary judgment is simple. Almacantar did not serve a Notice of Claim within 7 years of the completion date as required by the Agreement. Under the terms of clause 39.1.2, any claim by Almacantar for an indemnity in respect of half of the stamp duty land tax for which the Almacantar trustees or trust were liable had to be the subject of a notice in writing complying with paragraph 5.1 of Schedule 7 and sent or delivered to RailPen's representative, for the attention of the person named there, in

one of the ways prescribed in clause 30. No claim under clause 39.1.2 could be made unless that was done within 7 years of the completion date, in other words, by 23 June 2018 at the latest. Nor pursuant to paragraph 5.4 and 5.5 of Schedule 7 of the Agreement did Almacantar issue and serve court proceedings within 6 months of such notice, in other words, by 23 December 2018 at the latest.

62. In advancing its submissions, RailPen underlined the importance which the law attaches to notice provisions like those in the Agreement in the interest of commercial certainty. As with paragraph 5 of Schedule 7 of the present Agreement, the notice provision in the share purchase agreement at issue in *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540 (Comm); [2004] 1 All ER (Comm) 737 provided that no claim could be brought in respect of the assurances in the agreement unless written notice of the claim specifying relevant matters in reasonable detail had been given before a specified date. Cooke J held that the party's letters relied on there did not state in accordance with the terms of the notice provisions what was being claimed, what warranty was allegedly broken, or with sufficient detail the quantification of the claim being made. Cooke J said:

“[29] Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be notified and a failure to observe their terms can rarely be dismissed on a technicality.

[30] The starting point here must be, regardless of the proviso dealing with the need for legal proceedings within a specific time, that the terms of the notice provision are clear in debarring claims which have not been notified within the required period. Thus the clause begins ‘No claim shall be brought unless’.”

63. That approach was reiterated by the Court of Appeal in *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2018] EWCA Civ 23; [2018] B.C.C. 339, [29], per Newey LJ, in dismissing an appeal from the judgment of Richard Millett QC, sitting as a deputy High Court judge. That was a case where letters failed to satisfy the requirements of the notice provisions in a share purchase agreement because they did not identify satisfactorily the specific warranties and provisions of the tax covenant on which the relevant claims were based.
64. Consequently, Mr Head submitted, there was no realistic prospect of Almacantar succeeding at trial and the court should give summary judgment in RailPen's favour so as to dismiss the claim.

THE ISSUES

65. Almacantar resisted the application for summary judgment on various grounds. Each, Ms Bhaloo QC submitted, defeated RailPen's summary judgment application. The grounds revolve around issues of estoppel, waiver and variation on the one hand, and the interpretation and terms of the contract on the other. They are addressed shortly.
66. As well, Ms Bhaloo advanced several overarching points. One was what she described as ludicrous delays on the part of HMRC. HMRC was intransigent, as demonstrated by the refusal in February 2017 to have its policy, legal and technical colleagues attend any meeting with Almacantar. Matters consequently took an inordinate amount of time and that was part of the context as to why the parties had dispensed with the time limits.

In my view this point goes nowhere in light of the analysis of the relevant factual matrix below.

67. Secondly, there was the state of the evidence. For Almacantar there was a witness statement from Mr Filkin, who took a lead in matters from the outset. There is no comparable witness statement from Mr Lee or Mr Townsend from RailPen. There is a statement from the partner at Mills & Reeve LLP, Rachel Higgs, who has carriage of the current proceedings on Raipen's behalf but who was not involved in the discussions from 2011.
68. Ms Bhaloo submitted that in light of this I should accept Mr Filkin's evidence. To my mind Mr Head is correct in his submission that it is not a matter of disbelieving what Mr Filkin says in his statement, but rather scrutinising it to see if it can bear the weight of Mr Bhaloo's submissions that the prerequisites of estoppel are met in the contemporary record or other evidence: see *Optaglio Ltd v Tethal* [2015] EWCA Civ 1002, [32] and [35].
69. Thirdly, to make her case Ms Bhaloo took me through the available correspondence at some length, reflected in the detail of material summarised earlier in the judgment. In the process of doing this, Ms Bhaloo submitted that on its face it was obvious that there was additional evidence, not available at this stage, such as the telephone calls referred to in the emails. Ms Bhaloo contended that this provided a basis for ordering a trial because it would go to establishing the estoppel and related grounds. That was a basis for dismissing the application, she contended, since it met the evidential burden of proving some real prospect of success or some other reason for a trial.
70. In my view that does not follow. The estoppel and related grounds Almacantar advance turn importantly on the statements to them or conduct as perceived by them. That sort of evidence should be available to Almacantar. They should be able to identify the statements or conduct which lead to an estoppel without needing disclosure by RailPen. In as much as they are not in the documentary record, they should be addressed in Mr Filkin's witness statement. I accept Mr Head's submission that the disclosure of further information will not change the complexion of the case in this regard.

Estoppel, Waiver. Variation

71. At the hearing Ms Bhaloo advanced Almacantar's case mainly under the heading of estoppel by convention. There was no need to consider estoppel by acquiescence, she submitted, since the conduct giving rise to an estoppel was manifest and unequivocal. In short RailPen was estopped from denying its liability under the indemnity. It had to meet its share of any stamp duty land tax at the end of the process of appealing against HMRC's Determination, however long that took and insofar as any was due.
72. After the hearing the Supreme Court handed down its decision in *Tinkler v Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39. The parties were content that I accept the law on estoppel by convention laid down in that case, since the court endorsed established principles. The Supreme Court judgment obviates the need to consider all of the authority canvassed before me. Lord Burrows (with whom Lord Hodge, Lady Arden and Lady Rose agreed) reviewed the caselaw, in particular at paragraph [45] the statement of principles by Briggs J in *Revenue and*

Customs Commissioners v Benchdollar [2009] EWHC 1310 (Ch); [2010] 1 All ER 174, At paragraph [52] Briggs J had said:

- “(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
- (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
- (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
- (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- (v) Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

- 73. Lord Burrows added that Briggs J had accepted in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch) that principle (i) had to be amended to include that the “crossing of the line” between the parties may consist either of words or conduct from which the necessary sharing can properly be inferred. That amendment was endorsed by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023; [2017] Ch 389. Lord Briggs accepted all this in his separate judgment in *Tinkler*.
- 74. In summing up in *Tinkler* the first three principles of *Benchdollar*, Lord Burrows said:
 - “[51]...The person raising the estoppel (who I shall refer to as ‘C’) must know that the person against whom the estoppel is raised (who I shall refer to as ‘D’) shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C’s reliance on the common assumption.
 - [52] It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D’s affirmation of the common assumption and D must (objectively) intend or expect that reliance.”
- 75. While unnecessary for the decision in *Tinkler*, but of relevance in the current proceedings, Lord Burrows added that the five *Benchdollar* principles, with the *Blindley Heath* amendment to the first principle, comprised a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings: [78].
- 76. Ms Bhaloo characterised the course of dealing between RailPen and Almacantar from 2012 to 2018 as demonstrating that the relationship was (as she variously described it)

a “joint enterprise”, “joint endeavour” or “joint venture” and that RailPen’s understanding was that it was “on the hook” for their share of the tax liability irrespective of the notice provisions and seven-year time limit. Ms Bhaloo underlined how even on minor points RailPen had an input into Almacantar’s dealings with HMRC, the extent of its engagement, the time involved, how it entailed not just comment but approval of the tactics adopted, and how RailPen was kept “in the loop” on all aspects of Almacantar’s dealings with HMRC. Overall, she contended, there was a state of affairs in which, despite the strict terms of the Agreement, RailPen accepted that it would be liable for half of any tax for which the Trust/Almacantar was ultimately liable.

77. In my view there was no crossing of the line through RailPen’s words or conduct (including silence) sufficient to manifest a sharing of any assumption which Almacantar might have had. No necessary sharing of a common assumption can properly be inferred to base an estoppel. The dealings between the RailPen representatives, Mr Lee of Orchard Street and Mr Townsend of Mills & Reeve on the one hand, and the Almacantar representative, primarily Mr Filkin of Almacantar and Messrs Shiers and Burchell of Hogan Lovells on the other, were expressly contemplated by clause 39.3.2 of the Agreement. That conferred on RailPen a right to be given copies of correspondence with HMRC, a reasonable opportunity to comment on any correspondence or filings in draft form before submission, and the right not to be unreasonably refused incorporation of its reasonable comments on what was said to HMRC.
78. In my view, the substantial input Mr Lee and Mr Townsend made in commenting on Almacantar’s submissions to HMRC, indeed in preparing the public law submission, was consistent with these express contractual terms. There is nothing in the long history of the dealings between the parties indicating that this went further and that there was a shared assumption that the notice provisions and time limits in the Agreement would not apply. This was not a joint venture or the like, rather actions taken pursuant to rights expressly conferred by the Agreement. Nor is there evidence that Almacantar knew that RailPen shared the common assumption, or was strengthened, or influenced, in its reliance on that common assumption by that knowledge. Still less is there any evidence that RailPen intended or expected, even in an objective sense, that there would be an effect on Almacantar of its conduct crossing the line so that one can say that it has assumed some element of responsibility for Almacantar’s reliance on any common assumption in subsequent dealings between the parties.
79. Ms Bhaloo referred to Mr Filkin’s witness statement that the parties were travelling down the same path and were of the same understanding, that they would continue to engage with HMRC, but that RailPen would be there to meet its share of the tax liability without reference to notice periods once the dispute had run its course. Mr Lee and Mr Townsend knew that this was Almacantar’s understanding, Mr Filkin asserts in his statement, and always acted consistently with it.
80. The difficulty with this submission is that there is no evidence to suggest that this was anything other than an assumption on Mr Filkin’s part. There is nothing to the point that I should accept what Mr Filkin says given the absence of any evidence from the RailPen representatives who from 2012 engaged in these matters. It is not a matter of believing or disbelieving Mr Filkin. The determining factor is that in my view Mr Filkin does not identify any outward manifestation, conduct or representation on RailPen’s

part to support what he says touching on any common understanding between the parties about the notice provisions or time limits. It will be recalled that the so-called *Blindley Heath* amendment requires words or conduct from which the necessary sharing can properly be inferred.

81. There is nothing in Mr Filkin's evidence or in the correspondence summarised earlier that the parties gave any thought to the terms of the Agreement or the notice provisions and time limits contained in Schedule 7. What we see is that the parties focused on dealings with HMRC, and whether and how to advance arguments before HMRC given the latter's stance that Almacantar was liable for stamp duty land tax, confirmed formally in the Determination. Essentially, there were a series of submissions to HMRC and the back and forth of how best to advance arguments for HMRC's consideration and how to respond to its views. There was the related attempt to arrange a meeting with HMRC and discussions as to its ambit and agenda. There is nothing explicit or implicit in any of this about RailPen's indemnity or the limitations of its operation.
82. In her submissions Mr Bhaloo placed special emphasis on three matters, first, the agreement in 2015 to contest HMRC's Determination; secondly, Mr Lee persuading Mr Filkin at the 17 March 2017 meeting to continue to challenge HMRC; and thirdly, the behaviour of the RailPen representatives in the run-up to the expiration of the seven year time limit in June 2018. In my view none of three matters establish that RailPen either expressly or impliedly conveyed a message that the notice periods would not apply or that they constituted words or conduct from which could be inferred a common assumption about this.
83. In his witness statement Mr Filkin states that the 2015 agreement to contest HMRC's Determination was not time limited, but it is clear from the passage quoted earlier in the judgment that this was only his understanding of what contesting the Determination entailed, and a presumption of what he took to be the understanding of Mr Lee and Mr Townsend. There is nothing about RailPen affirming any understanding about notice provisions and time limits by words or conduct. More than agreeing to challenge the Determination is required to establish a common understanding which is the base of estoppel by convention.
84. The manuscript attendance note of the April 2017 meeting is not (and of its nature could not be) a full account of what occurred. Despite his early remarks as recorded in that meeting, Mr Lee seems to have adopted a bullish approach later in the discussion. In his witness statement Mr Filkin states that it was clear from this conference call that Mr Lee understood and accepted that RailPen was liable for its share of tax and that agreeing to his strategy of continuing to resist HMRC's claim would not change that. That is too large an inference to draw. It should not be overlooked that the attendance note also records Mr Burchell of Hogan Lovells stating that a "muscular" approach was needed.
85. The key point is that, as Mr Head submitted, Mr Lee's actions are consistent with those of a party potentially liable for a half of any tax liability under the indemnity attempting to reduce it. Neither can it realistically be inferred from his approach that RailPen was making an implicit statement about the notice periods in the Agreement that they would not apply. And it certainly cannot be said that there was conduct crossing the line so that one can say that RailPen assumed some element of responsibility for Almacantar's reliance on any common assumption (if there was one) about the notice provisions.

86. Ms Bhaloo was especially critical of the behaviour of RailPen in 2018, before and after the seven-year period expired. Hogan Lovells had produced the post-meeting bullet points on 19 November 2017, yet it was not until 18 June 2018 that Mr Townsend drafted his letter on the public law issue of reliance on the 2011 guidance, just short of the long stop period expiring. Then there was Mr Townsend’s continued involvement after that date, especially his 25 September 2018 email that it was sensible to await the outcome of the *Hannover Leasing* decision. Further, in his 31 July 2019 email Mr Filkin indicated that the parties “agreed” course of action had failed.
87. Again I accept Mr Head’s submission that none of this can be construed as suggesting or conveying an understanding that the notice requirements would not apply. The delay in Mr Townsend and Mr Lee preparing the public law letter does not constitute conduct relevant to the parties disregarding the notice provisions. The seven-year period was not contingent on the state of preparation of submissions or dealings generally with HMRC. Mr Townsend’s 25 September 2018 email is consistent with both sides simply overlooking the agreed 23 June 2018 deadline. The references to a line being “agreed” in Mr Filkin’s emails of 29 and 31 July are vague, and in any event do not suggest any agreement about disregarding the time limits in the Agreement. I also note that these emails were sent after RailPen had notified the Almacantar side of its intention to rely on the notice provisions. Overall, there was no understanding, agreement, or statement shared by the parties that the deadline would be varied or would no longer apply.
88. Even if the analysis thus far is wrong, Almacantar would still need to establish detrimental reliance for the purposes of an estoppel. Ms Bhaloo contended that, quite apart from the time and cost of preparing the submissions to HMRC, there was the burden which Almacantar alone carried for the mounting interest payable to HMRC both at the time of the Determination and beyond as the parties persisted with their challenge to it. As Mr Filkin put it in his late July 2019 email, it was Almacantar which was taking the hit. That, Ms Bhaloo submitted, was detrimental reliance.
89. Under clause 39.2 RailPen’s liability was limited in aggregate to a maximum of £1.6m. HMRC’s Determination in May 2015 was of £3,192,600, together with accrued interest of £368,942.10. So even at that point RailPen’s potential liability under the indemnity was at the £1.6 million limit. This was nothing more than the Agreement provided. In agreeing to clause 39.2, Almacantar was accepting that in light of the tax liability imposed, and the interest accrued during the time any determination was challenged, it might have to bear a greater burden than RailPen. In those circumstance there is no detrimental reliance; it is a detriment which derives from the Agreement.
90. As to variation or waiver, let me record for sake of completeness that there is no basis for thinking that the parties varied the Agreement or that RailPen waived the terms relating to notice and time limits. Clause 39.3.2 conferred on RailPen the right to see correspondence from HMRC and to comment on submissions to it. The dealings between the parties over this cannot be interpreted as constituting an amendment or waiver of its terms. In any event clause 28 of the Agreement required any variation or waiver to be in writing and there was none. Such “no oral variation” clauses are effective: *Rock Advertising Ltd v MWB Business Exchange* [2018] UKSC 24; [2019] AC 119.

Necessary amendments

91. Almacantar's case under this head is that clause 39.3 provides that paragraph 5 of Schedule 7 "shall apply (with any necessary amendments)". The argument is that the terms of paragraph 5 which otherwise apply to claims for breach of a tax warranty need modification given the terms of clauses 39.3.1 – 39.3.3. Tax warranties warrant the existence of facts at a given point in time and give rise to claims which are necessarily adversarial. By contrast a claim based on clause 39.1.2 is a claim by HMRC and involves the parties to the Agreement cooperating in a common cause. Given that RailPen approved a course of action which resisted liability to stamp duty land tax, the time bar in paragraph 5.1.1 and the deemed waiver or withdrawal in paragraph 5.4 of Schedule 7 was subject to "necessary amendments".
92. In Almacantar's submission, the "necessary amendments" to the Agreement are the addition of the following clauses:
- "Insofar as the "Buyers" pursuant to the Agreement act in accordance with the comments, requests and/or instructions of the Warrantor and/or its duly authorised representatives pursuant to clause 39.3.2: (i) they are not engaged; alternatively, (ii) they are only engaged upon the Warrantor and/or its duly authorised representatives giving the "Buyers" pursuant to the Agreement reasonable notice that the Warrantor intends to rely on the time periods therein prior to the expiry of those time periods.
- They are not engaged at any point prior to which the Buyers, the Defendant and the Almacantar Trustees agree that [stamp duty land tax] is owed pursuant to clause 39.1.2 and, in the event that that agreement post-dates the time periods in those paragraphs then they have no application."
93. These amendments are necessary, Almacantar contends, because of the obligation on it not unreasonably to refuse to incorporate any reasonable comments made by RailPen. If no amendments were made RailPen could compel Almacantar to adopt a position with respect to HMRC which would have the effect of engaging the time bars. Further, Almacantar might have to demand payment under the indemnity in circumstances where, potentially, neither of them believed that payment to HMRC was due. The amendments, in effect, cement the primacy of the mechanism in clause 39.3.2 over the time bars in paragraph 5 of Schedule 7.
94. The extent of what Almacantar contends are "necessary amendments" alone gives one considerable pause. On closer examination not only are these necessary amendments not necessary, they are also impractical. Unamended the Agreement is workable: there is nothing inconsistent with Almacantar acting in accordance with RailPen's suggestions and the notice requirements. As in other comparable situations notice could be given preventively, and legal proceedings begun, in light of the time period expiring despite on-going dealings with HMRC. Moreover, amended with the "necessary amendments", the Agreement could result in a claim being made on the indemnity many years later. For example, under the second amendment suggested by Almacantar, if there were no agreement between the parties, matters could run for years and the commercial certainty of a longstop to a financial commitment would evaporate.

Implied terms

95. As an alternative to the “necessary amendments” submissions, and on the same basis, Almacantar submitted that the “necessary” terms as quoted are to be implied in the Agreement. That would give business efficacy to clause 39, or those terms are so obvious that their implication goes without saying, by enabling the course adopted in respect of potential tax liability pursuant to clause 39.3.2 to take effect despite the time bars.
96. This submission fails for reasons similar to those given in rejecting the “necessary amendments” arguments. There is no way that these clauses are necessary to give business efficacy to the contract or are so obvious that it goes without saying that they should be there: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742. The simple point is the Agreement imposed time limits, to RailPen’s advantage, at the same time as obliging Almacantar under clause 39.3.2 to incorporate reasonable suggestions from RailPen. Those terms were no doubt a negotiated compromise flowing from RailPen’s providing an indemnity for any tax liability.

Legal costs and expenses

97. The argument here is that the indemnity in clause 39.3.3 is not contingent on a notice of claim having been given. The indemnity is not given only in respect of costs incurred where there is a liability for stamp duty land tax such that a Notice of Claim ensues. The words “defending a claim or threatened claim” would otherwise be redundant. The costs relate to defensive action in respect of tax liability, not solely unsuccessful defensive action which leads to a Notice of Claim.
98. This submission is defeated by the language of the clauses. The time limits in paragraph 5 of schedule 7 apply to a claim under clause 39.1. The language is that “...in relation to a claim under clause 39.1.2...39.3.3 the Warrantor shall provide an indemnity...in respect of half of the reasonable legal costs.” Thus the indemnity for costs under 39.3.3 is part of a claim under 39.1.2, and thus subject to the same time limits that apply to any claim under 39.1.

Clause 39.3.1

99. There was a suggestion by RailPen that somehow compliance with clause 39.3.1 was a prerequisite to the recovery of an indemnity under clause 39.1.2, and that Almacantar was in breach of clause 39.3.1 in failing to give notice to RailPen of a relevant claim by HMRC within 14 days of such a claim (which might have arisen as early as 2012). In reply Almacantar stated that RailPen had waived any non-compliance with the terms of clause 39.3.1 or is estopped from asserting that any non-compliance prevents the current claim. Whatever the ramifications of clause 39.3.1, it contains different notice provisions from those at issue in this application, which are in Schedule 7. The language and location of these provisions makes clear that they are independent notice requirements, and a claim under one is not a prerequisite to a claim under another.

CONCLUSION

100. For the reasons given Almacantar’s claim has no real prospect of success. There is no other compelling reason why it should go to trial. RailPen is entitled to summary judgment.