Neutral Citation Number: [2019] EWCA Civ 972

Case No: A4/2018/2453; A4/2018/2442

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT
MRS JUSTICE MOULDER DBE
[2018] EWHC 1658 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2019

Before:

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LONGMORE
and
LORD JUSTICE LEGGATT

- -

Between:

(1) MINERA LAS BAMBAS S.A. **(2) MMG SWISS FINANCE AG**	**Claimants/** **2453 Appellants/** **2442 Respondents**
- and -	
(1) GLENCORE QUEENSLAND LIMITED **(2) GLENCORE SOUTH AMERICA LIMITED** **(3) GLENCORE INTERNATIONAL AG**	**Defendants/** **2453 Respondents/** **2442 Appellants**

- -

Fionn Pilbrow QC and **Charlotte Thomas** (instructed by **White & Case LLP**) for the **Appellants**
Conall Patton and **Alyssa Stansbury** (instructed by **Linklaters LLP**) for the **Respondents**

Hearing dates: 8 and 9 May 2019

- -

Approved Judgment

Lord Justice Leggatt:

1. This case raises questions about the correct interpretation of certain tax indemnities and warranties contained in a contract for the purchase of shares in a company which owns a large copper mining project in Peru (and of a further deed of indemnity made pursuant to that contract). The tax liabilities to which the contract terms must be applied are liabilities under Peruvian law for value added tax (VAT). But although the relevant transactions and their subject matter have no other connection with this country, the contracts are, through the parties' choice, governed by English law and provide for disputes to be decided in the courts of England and Wales.

2. Contractual claims for indemnity raising a plethora of disputed issues were tried in the Commercial Court before Mrs Justice Moulder DBE. Her reasoning is set out in a judgment dated 29 June 2018: see [2018] EWHC 1658 (Comm). Each side has appealed, with the permission of this court, from parts of the judge's order.

The share purchase

3. The Las Bambas project is a very large project to develop, construct and operate copper mines in the Apurimac region of Peru. At the time of the share purchase the project was owned by a Peruvian company called Xstrata Peru SA through a wholly owned subsidiary, Xstrata Las Bambas SA.

4. Pursuant to a Share Purchase Agreement dated 13 April 2014 (the "SPA"), a Peruvian company which I will call "the first purchaser" and the second claimant purchased all the issued shares in Xstrata Peru SA from the first and second defendants (with the third defendant acting as their guarantor). Closing under the SPA took place on 31 July 2014. The overall price paid for the shares was around US$7 billion.

5. On 31 December 2014 the first purchaser and Xstrata Peru SA were absorbed by merger into Xstrata Las Bambas SA, which was renamed Minera Las Bambas SA ("MLBSA" or the "Company"). The Company is therefore not only the operating company for the project but also the corporate successor of (a) its parent company, Xstrata Peru SA, whose shares were sold under the SPA and (b) the first purchaser. The Company is the first claimant in this action. In this judgment I will refer to the claimants collectively as the "Purchasers" and to the defendants as the "Sellers".

Peruvian VAT

6. Under the Peruvian tax system VAT is levied in a broadly similar way to VAT in the UK. It is a tax charged on the supply of goods and services. There is a system of credits whereby a taxpayer can set off against the input tax which it charges and collects on its supplies of goods or services to others any output VAT that it pays on goods or services purchased from its own suppliers. A taxpayer with a surplus of output VAT in a given month can carry forward the credit to future months on a rolling basis to offset against its input VAT.

7. The Las Bambas project had a long development and construction phase before the production of copper commenced and income began to be earned. Construction started in October 2012 and was continuing at the time of the SPA. The project finally

achieved steady state commercial production on 1 July 2016. During the construction phase substantial sums were spent on goods and services purchased from third party suppliers. As a result, the Company accumulated a large VAT credit balance. It is common ground that this accumulated VAT credit balance was an important asset and source of working capital for the project.

8. There is a scheme in Peru (the "early refund scheme") under which, during the construction phase of a large mining project, a taxpayer can obtain a cash refund of VAT credits instead of carrying them forward to future months. (A different refund scheme operates once production has begun.) Under the early refund scheme the Company has claimed and received various cash refunds of VAT credits. It is common ground that such refunds represented a key source of cash inflow and funding for the project during the construction period and until the mine reached a steady state of commercial production.

The New Town VAT

9. During the development and construction phase of the project, the Company acquired land belonging to a rural community, "Comunidad Campesina de Fuerabamba", in exchange for building a new town for the community in a location away from the Project site. The community was then resettled in this new town of "Nueva Fuerabamba". The agreement under which this land exchange and resettlement took place was made in November 2011 and the new town came into existence on 27 June 2014 (i.e. before closing under the SPA).

10. After closing under the SPA, the Peruvian tax authority, known as the Superintendencia Nacional de Aduanas y de Administración Tributaria ("SUNAT"), conducted a number of audits which led ultimately to SUNAT issuing a tax assessment resolution dated 29 January 2016. By this resolution SUNAT assessed the Company as having incurred a liability to pay VAT in a principal sum of PEN 28,400,661 (an amount of Peruvian Nuevos Soles equivalent to about £6.3 million) on 27 June 2014 when the new town came into existence. SUNAT claimed to deduct this sum – which I will refer to as the "New Town VAT" – from the Company's accumulated VAT credit balance as it had stood in June 2014. SUNAT also charged penalties and interest as a result of the Company's late payment of the New Town VAT which totalled PEN 15,875,970 (equivalent to about £3.5 million) at the time of the assessment.

The rejected VAT credits

11. The assessment resolution issued by SUNAT on 29 January 2016 also determined that the Company had claimed tax credits for taxable supplies purchased from third parties between January and November 2014 for which it could not produce adequate supporting documentation and which, for this reason, were disallowed. Some of these rejected tax credits had been refunded to the Company under the early refund scheme. The amount which SUNAT concluded had been unduly refunded in respect of the period before closing under the SPA was PEN 18,777,336 (about £4.2 million). Of this amount – which I will refer to as the "unduly refunded" VAT, part (PEN 9,223,322, equivalent to about £2 million) had been paid out to the Company before closing and the rest was paid after closing under the SPA took place.

12. Other credits relating to the period before closing were also disallowed which had not been refunded to the Company were also disallowed. The total amount of these further rejected credits was PEN 10,416,979 (about £2.3 million), which SUNAT again claimed to deduct from the Company's accumulated credit balance. SUNAT also assessed the Company as liable to pay penalties for wrongly claiming the rejected VAT credits (and interest on such penalties) amounting in total to PEN 26,806,699 (about £6 million) at the time of the assessment.

Appeals against the assessment

13. The tax assessment has been appealed. The first appeal lies to SUNAT itself. SUNAT resolved this appeal by an "intendancy resolution" dated 1 December 2016, which confirmed its determinations. The second appeal is to the Peruvian tax court. The Company has lodged such an appeal but the appeal has not yet been determined. From the tax court, further appeals in principle lie to higher courts in the Peruvian legal system.

Conduct of the tax claims

14. Under clause 12.5.1(iv) of the SPA, the Sellers have the right to take over the conduct of a claim by, or action against, a third party if it may give rise to a claim against the Sellers under the SPA. In order to exercise this right, the Sellers must give notice to the Purchasers and "agree in writing to indemnify the Purchasers against the full amount (if any) payable under such Third Party Claim (if adversely determined)." Provided this is done:

> "the Sellers shall be entitled at their own expense and in their absolute discretion … to take such action as it shall deem necessary to avoid, dispute, deny, defend, resist, appeal, compromise or contest the Third Party Claim … in the name of and on behalf of the Purchasers or member of the Purchasers' Group concerned and to have the conduct of any related proceedings, negotiations or appeals, subject to the Sellers not taking any action which could reasonably be considered to be likely to be materially prejudicial to the legitimate commercial interests of the Las Bambas Project or the Group Companies;"

15. In November 2014 the Sellers exercised their right under this clause to take over the conduct of the claim relating to the New Town VAT. For that purpose, the Sellers entered into the Deed of Indemnity with the Purchasers dated 24 November 2014.

16. The Sellers have not taken over the conduct of the claim relating to the rejected VAT credits, which is therefore being handled by the Company.

The graduality regime

17. Under Peruvian law a tax assessment issued by SUNAT becomes enforceable when the time allowed for filing an appeal expires, if no appeal has been filed within that time. If an appeal is filed, the tax debt cannot be enforced by any coercive measures until after the appeal has been determined (and then, of course, only if and in so far as the appeal is unsuccessful). To encourage payment of sums which are the subject of an

appeal, the Peruvian tax system operates a "graduality regime" under which the penalties charged by SUNAT (and interest on those penalties) are reduced if payment is made in full of the disputed tax liability before an appeal is filed. The size of the discount depends on the stage at which payment is made. If it is made before the filing of a first appeal to SUNAT, the taxpayer is entitled to a 60% discount. If the payment is made following a first appeal but before filing a second appeal to the tax court, the discount is 40%.

18. As I will discuss in more detail later, the Company paid all the sums claimed by SUNAT in respect of penalties and interest on 22 January 2018 after its appeal to SUNAT had been determined and before filing its appeal to the tax court. (No payment of the underlying tax debt was required to take advantage of the graduality regime as SUNAT had purported to deduct the relevant sums from the Company's accumulated VAT credit balance.) The Company therefore qualified for a 40% discount on any penalties and interest which are upheld on appeal but not for a 60% discount. The sums referable to the New Town VAT were paid under the direction of the Sellers (who, as mentioned, had taken over the conduct of this tax claim) and were ultimately funded by them. The payment referable to the rejected VAT credits was funded by the Purchasers. Whether or to what extent they are entitled to be indemnified by the Sellers for this outlay depends on issues considered later in this judgment.

Approach to contractual interpretation

19. The SPA is a long and detailed contractual document, which runs to 96 pages. It has all the hallmarks of a document professionally drafted by English lawyers, including an interpretation clause that specifies no fewer than 166 definitions of terms used in the contract; and its provenance is confirmed by the fact that the name and address of the Sellers' solicitors appear on the front page. Although it is much shorter, the same applies to the Deed of Indemnity, which bears on its front page the name and address of the Purchasers' solicitors.

20. The principles of English law which the court must apply in interpreting the relevant contractual provisions are not in dispute. They have most recently been summarised by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 at paras 10-14. In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance.

The tax indemnities

21. The clause at the centre of the present dispute is clause 10 of the SPA, headed "Tax Indemnity". This provides:

> "The Sellers shall indemnify the Purchasers in relation to, and covenant to pay the Purchasers an amount equal to:
>
> 10.1.1 the amount of any Tax payable by a Group Company to the extent the Tax has not been discharged or paid on or prior to the Effective Time and it:
>
> (i) relates to any period, or part period, up to and including Closing;
>
> …; or
>
> 10.1.2 to the extent that any Indemnified VAT Receivable … is found to be cancelled, lost or unavailable as a result of the breach of any Sellers' Warranty set out in paragraphs 13.1.1(i), 13.1.2 and 13.1.3 of Schedule 2 (as if given at the date of this Agreement and at Closing), the amount of the repayment of VAT … which would otherwise have been obtained …;
>
> …"

22. The definition of "Tax" in the SPA is very wide and covers all forms of taxation, including VAT. It also encompasses penalties and interest. The "Effective Time" is defined as the time immediately prior to closing (which, as mentioned, took place on 31 July 2014). The phrase "Indemnified VAT Receivable" used in clause 10.1.2 is defined to mean "a right to repayment of VAT to the extent that such right to the repayment has been taken into account in the Completion Statement." As I will discuss later, this was a reference to the Company's accumulated VAT credit balance, which was an important asset taken into account in calculating the consideration for the share purchase.

23. In addition, by clause 3.1 of the Deed of Indemnity, the Sellers have undertaken "to indemnify the Purchasers against the full amount (if any) payable by the Purchasers' Group under each of the Assumed Tax Matters (if adversely determined)." The "Assumed Tax Matters" are, in substance, the "claim or liabilities sought by SUNAT in relation to" the New Town VAT.

When is tax "payable"?

24. A central issue in dispute, which it is convenient to consider first, is at what point in time an amount of tax becomes "payable" within the meaning of clause 10.1.1 of the SPA and clause 3.1 of the Deed of Indemnity.

25. The context in which this issue arises is that, as the judge found on the basis of expert evidence given at the trial, under Peruvian law an assessment resolution issued by SUNAT establishes a tax liability. This is an actual and not merely contingent liability

and remains an actual liability unless and until there is a decision of the tax court which sets it aside. However, the liability is not enforceable in that the tax cannot be collected through any coercive procedure while the assessment is under appeal to the tax court.

26. The Purchasers contend that tax becomes "payable" within the meaning of clause 10.1.1, thus triggering the Sellers' obligation to indemnify them, when the existence and amount of a liability is established. This, as indicated, occurs when an assessment resolution is issued by SUNAT. The Sellers, on the other hand, contend that tax becomes "payable" only when an enforceable obligation to pay the relevant amount arises – which will not occur before the appeal to the tax court has been decided.

27. The judge concluded that the Sellers' interpretation is correct, and in my opinion she was right to do so.

28. As Slade LJ observed in *Morton v Chief Adjudication Officer* [1988] IRLR 444 at para 16, the word "payable" is not a legal term of art: it is a word which is capable of bearing different meanings in different contexts. In deciding what the word "payable" means in clause 10.1.1 of the SPA, it is therefore of no assistance to cite cases showing how the word has been interpreted in other documents and contexts – as both sides' counsel did at the trial and counsel for the Sellers did again in this court. As has repeatedly been said, but counsel hoping to buttress their argument with authority all too frequently ignore, every document must be construed in accordance with its particular terms and in its unique setting. Nor do I consider that in this case any assistance is to be derived from examining how the word "payable" has been used elsewhere in the SPA (in which we were told that it appears in a total of 35 places).

29. Like the judge, I accept that, as a matter of ordinary language, the word "payable" is capable of being used in either of the two senses for which the parties respectively contend. But, in the setting of clause 10.1.1, I agree with her that the word is reasonably understood to mean that there is an enforceable obligation to pay an amount of tax and not merely that a liability to pay an amount of tax has been established. I reach that conclusion for two main reasons.

30. The first is that the obligation imposed by clause 10 is one of indemnity. In English law an indemnity is a promise to prevent the indemnified person from suffering loss (*damnum*): see e.g. *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The "Fanti" and "The Padre Island")* [1991] 2 AC 1, 35 (Lord Goff). If the existence and amount of a debt have been established but the indemnified person has not yet come under an enforceable obligation to pay the debt, it cannot be said that any loss has been suffered which the indemnifier has failed to prevent or to hold the indemnified person harmless against. To treat the Sellers' obligation to pay an amount of money to the Purchasers as triggered in such a situation therefore seems to me to be inconsistent with the general nature and purpose of an indemnity.

31. A second and related reason for preferring the Sellers' interpretation is that it does not make commercial sense to require the Sellers to pay an amount of money to the Purchasers which is not at present needed, and may never be needed, to satisfy a liability to pay tax. Thus, in the case of the New Town VAT, if the appeal to the tax court succeeds and SUNAT's assessment is set aside, then (assuming no further appeal) the Company will never come under an enforceable obligation to pay the sum claimed by SUNAT. It is commercially unreasonable to interpret clause 10 as obliging the Sellers

to put the Purchasers in funds for an amount of money which they may, or may not, come under an enforceable obligation to pay in the future. If the intention were to oblige the Sellers to provide what would in substance be security for a potential future payment obligation, rather than simply to prevent the Purchasers from being left out of pocket through being compelled to make a payment, I would expect to find language used which established such an arrangement in clear and direct terms.

32. The consequences of the Purchasers' interpretation are particularly stark in relation to the VAT credits which SUNAT has assessed as having been unduly refunded. Pending its appeal to the tax court, the Company still has the money which was refunded and has not been compelled to pay any of it back to SUNAT. The evidence at the trial (referred to at para 209 of the judgment) indicated that the Company expects to succeed on its appeal, in which event it will never be required to pay the money back to SUNAT. Yet the Purchasers' case is that clause 10.1.1 of the SPA entitles them to be paid by the Sellers an amount equal to the refunded amount now, even though the Company has not paid it, need not pay it and expects never to pay it to SUNAT. That would result in the Company having the benefit of the money twice over for the duration of the court proceedings, which is not an arrangement that would serve any legitimate commercial purpose.

33. The Purchasers seek to draw support for their interpretation from clause 11.13.2 of the SPA, which provides a contractual mechanism for reimbursing the Sellers if:

> "…the Sellers have paid an amount in discharge of any claim under [the SPA] and subsequently the Purchasers or any Group Company is entitled to recover … from a third party a sum which indemnifies or compensates the Purchasers or Group Company (in whole or in part) in respect of the loss or liability which is the subject matter of the claim …"

I cannot see, however, how the existence of this general purpose reimbursement mechanism assists the Purchasers' argument that the Sellers' obligation to indemnify them arises at an earlier rather than a later date. If anything, clause 11.13.2 seems to me to undermine the Purchasers' interpretation. If, for example, the Sellers are required to pay to the Purchasers now an amount equal to the amount of the "unduly refunded" VAT credits, but it is subsequently decided by the tax court that the credits were correctly refunded, the Purchasers or Company will not thereby become entitled to recover any sum from SUNAT to indemnify or compensate them in respect of a loss or liability. Indeed, they will not become entitled to recover any sum from SUNAT at all. The position will simply be that the Company does not have to pay money to SUNAT and has not incurred a loss or liability. On the face of it, therefore, clause 11.13.2 would not apply in this situation. As there would be no sum recovered (or which the Purchasers or any Group Company was entitled to recover) from SUNAT, the clause would not require the Purchasers to reimburse the sum received from the Sellers to them. This is consistent with the conclusion that clause 10.1.1 of the SPA is best understood as obliging the Sellers to indemnify the Purchasers only when the Company comes under an enforceable obligation to pay an amount of tax to SUNAT.

34. Counsel for the Purchasers also relied on the time limit for claims in clause 11.1.1 of the SPA, which excludes liability for any tax claim unless notice of the claim is given by the Purchasers to the Sellers within six years following closing. They submitted

that, given the length of time that audits, assessments and subsequent appeals may take before the existence and amount of a tax liability are finally determined and the liability becomes enforceable, the Sellers' interpretation of clause 10.1.1 could have the effect that a claim for an indemnity under that clause would be time-barred before it could be brought. I do not accept this contention. There is nothing to prevent the Purchasers from giving notice of a claim under the SPA and bringing proceedings to establish their right to be indemnified in respect of an amount of tax before the tax has actually become "payable" and the right has accrued. Indeed, that is what they have done in this case.

35. This is reinforced by clause 11.5, which states:

> "**Contingent Liabilities**
>
> 11.5.1 Neither Seller should be liable under this agreement in respect of any liability which is contingent unless and until such contingent liability becomes an actual liability.
>
> 11.5.2 For the avoidance of doubt clause 11.5.1 does not restrict the ability of the Purchasers to make a claim under this agreement in relation to a liability which is contingent, where such claim is made within the time limits specified in clause 11.1."

Given that a claim may be made before the time limit has expired in relation to a liability which is merely contingent, there can be no doubt that a claim may be made in relation to an actual liability, as is the position here, even if the liability is currently unenforceable pending the outcome of an appeal.

36. I conclude that the judge was right to decide that under clause 10.1.1 of the SPA neither the New Town VAT nor the "unduly refunded" VAT credits are currently "payable" within the meaning of that clause. They will only become "payable" if and to the extent that the Peruvian tax court confirms that the Company is liable to pay either of these amounts to SUNAT and the debt becomes "coercively" enforceable under Peruvian law.

37. It is common ground that the word "payable" must bear the same meaning in clause 3.1 of the Deed of Indemnity as it does in clause 10.1.1 of the SPA. It follows that the judge was also right to hold that no sum is currently "payable" within the meaning of clause 3.1.

Can rejected VAT credits amount to "Tax payable"?

38. The judge held that the amount of any tax credit refunded by SUNAT will constitute "Tax payable" if it has to be paid back to SUNAT because the tax court upholds SUNAT's assessment that the Company was not entitled to repayment of the amount in question. However, she also held that there will not be any "Tax payable" just because the tax court upholds SUNAT's rejection of VAT credits which have not been refunded. The judge considered that the rejection of tax credits which have not been refunded will only give rise to "Tax payable" if it has the result that output tax exceeded input tax such that a payment was due in relation to a period prior to closing.

39. Counsel for the Purchasers argue that this is an illogical distinction. They emphasise that the disallowance of a tax credit has the same economic effect on the Company's balance sheet as the recognition of a liability to pay an amount of tax and will ultimately lead to the Company having to pay more VAT to SUNAT once its accumulated credit balance is exhausted. They contend that, to give effect to the commercial purpose of the indemnity, the words "Tax payable" in clause 10.1.1 should therefore be construed as encompassing the rejection of a tax credit.

40. I do not accept this argument. Conceptually and as a matter of language, the loss of a right to receive repayment of a tax credit cannot, of itself, be characterised as the incurrence of an obligation to pay tax. Moreover, the parties were plainly alive to the distinction, as they included in clause 10 a separate provision (clause 10.1.2) which protects the Purchasers against the loss of a VAT receivable that was taken into account in valuing the assets purchased under the SPA.

41. I accept Mr Pilbrow QC's submission that it would be wrong to assume that there is no overlap or duplication between clauses 10.1.1 and 10.1.2, as it is common place in professionally drafted contracts of this kind to find provisions which are duplicative included out of an abundance of caution or what Hoffmann LJ once described as "a determination to make sure that one has obliterated the conceptual target": *Arbuthnott v Fagan* [1995] CLC 1396 at 1404. Mr Pilbrow also pointed out that clauses 10.1.3 and 10.1.4 (which I have not quoted, as they are not otherwise relevant for present purposes) are to an extent duplicative of clause 10.1.1. It does not follow, however, that the presence of clause 10.1.2 in the SPA is irrelevant or should be ignored in determining the scope of clause 10.1.1. The fact that the parties have included a clause that deals specifically with VAT receivables removes any reason to give a strained interpretation to clause 10.1.1 in order to make commercial sense of the agreement. Furthermore, in order to establish a right to an indemnity under clause 10.1.2, it is necessary to show that an "Indemnified VAT Receivable" has been lost as a result of a breach of warranty by the Sellers. That restriction on the scope of the indemnity for loss of a VAT receivable would be bypassed if any loss of a VAT receivable, whether resulting from a breach of warranty or not, is treated as constituting "Tax payable" so that it falls within clause 10.1.1. This is a further reason for rejecting such an expansive interpretation of clause 10.1.1.

42. I therefore agree with the judge that the disallowance of a VAT credit which has not been refunded and which results only in the reduction of an accumulated credit balance is not covered by clause 10.1.1 and attracts an indemnity only if it falls within clause 10.1.2 – to which I now turn.

The claim under clause 10.1.2

43. To establish a right of indemnity under clause 10.1.2 (quoted at paragraph 21 above), the Purchasers need to show that (1) an "Indemnified VAT Receivable" (2) is found to be cancelled, lost or unavailable (3) as a result of a relevant breach of warranty by the Sellers. The meaning and effect of each of these three requirements is in issue.

What constitutes an "Indemnified VAT Receivable"?

44. As mentioned, the expression "Indemnified VAT Receivable" is defined in the SPA to mean "a right to repayment of VAT to the extent that such right to the repayment has been taken into account in the Completion Statement".

45. The judge found on the basis of expert evidence of Peruvian law that a VAT credit is not itself a right to repayment of VAT but only an amount which the taxpayer is entitled to deduct from input tax that it would otherwise be required to pay. However, the judge held that there is a right to repayment of VAT where a VAT credit falls within the early refund scheme. She also concluded that the "unduly refunded" VAT falls within the definition of an "Indemnified VAT Receivable" because it was a "right to repayment" which was taken into account in the Completion Statement. The judge found that this was so even in the case of that part of the "unduly refunded" VAT (in the amount of PEN 9,223,322) which was paid out to the Company before closing.

46. The Purchasers challenge the judge's analysis of VAT credits, contending that an accumulated credit balance constitutes "a right to repayment of VAT" for the purpose of the definition of an "Indemnified VAT Receivable" irrespective of whether it was or could have been the subject of a claim for a refund under the early refund scheme. They argue that the definition should be interpreted as including such a credit balance because the balance can be used to reduce other VAT liabilities and is therefore an asset which is equivalent in commercial terms to a right to repayment. I consider this a hopeless argument. The fact that an asset has the same economic value as a right to repayment does not mean that it is such a right. A right to use a credit as a set-off to discharge a tax liability when it arises may be regarded as a right to use the credit as a form of payment. But that is conceptually different from, and cannot reasonably be described as, a right to receive payment (or repayment) of the sum in question.

47. For their part, the Sellers challenge the judge's finding that the "unduly refunded" VAT is within the definition of "Indemnified VAT Receivable". They make two points. Their narrower point is that a right to repayment of VAT only falls within the contractual definition "to the extent that such right to the repayment has been taken into account in the Completion Statement." This must mean, Mr Patton submitted, that the amount in question has been taken into account by including it in the Completion Statement as a VAT receivable. It was common ground at the trial that the amount of PEN 9,223,322 which was refunded to the Company before closing was not included as a receivable in the Completion Statement. That was for the very good reason that the money had already been received: in the terms of the definition, there was no "right to repayment" of this amount as it had already been repaid. It follows that this part of the "unduly refunded" VAT is on any view not within the definition of an "Indemnified VAT Receivable".

48. This point seems to me unanswerable. The judge concluded that the amount of PEN 9,223,322 was within the definition on the basis of evidence given by Mr Heng, the person responsible for supervising on behalf of the Purchasers those aspects of the Completion Statement which related to tax. While agreeing that this amount was not included in the Completion Statement as part of the VAT receivable balance, Mr Heng had suggested in his witness statement that the amount was nevertheless "taken account of in the Completion Statement". However, he did not specify how or where in the Completion Statement the amount in question was allegedly taken into account, and

without such an explanation his entirely unsubstantiated assertion was not capable of sustaining a finding that it was in fact taken into account. More fundamentally, it is clear from the wording of the definition that what must be taken into account in the Completion Statement is "a right to repayment of VAT". There is no other way in which such a right can be taken into account except by including it in the VAT receivable balance: if an amount is not part of that balance, then according to the Completion Statement there is no right to repayment of VAT in that amount and *ex hypothesi* therefore no such right is capable of being taken into account anywhere else in the Completion Statement.

49. The wider argument made by the Sellers is that, in order for there to be an "Indemnified VAT Receivable" covered by clause 10.1.2, it is not sufficient that the amount in question was taken into account in the Completion Statement as a receivable: there must be a subsisting right to repayment at the time when the indemnity is claimed. That will not be the case if the amount in question has been repaid. Accordingly, none of the "unduly refunded" VAT – including the part which was repaid after closing – falls within the contractual definition.

50. I do not accept this argument in the form that it was advanced. The evident commercial purpose of clause 10.1.2 is to protect the Purchasers against the risk that (any part of) the accumulated VAT credit balance at the time of closing, which represented a valuable asset included in the amount of the consideration paid to purchase the shares, might turn out to be illusory. Interpreted in that light, I read the definition of an "Indemnified VAT Receivable" as concerned solely with what was taken into account in the Completion Statement and not with what has happened after closing. Indeed, clause 10.1.2 would not work if the definition required there to be a subsisting right to repayment when the right of indemnity arises as, in order for the clause to apply, the right to repayment must by that time have been found to be cancelled, lost or unavailable. I nevertheless consider that VAT credits which were included as receivables in the Completion Statement (and therefore fall within the contractual definition) cannot be the subject of a right of indemnity under clause 10.1.2 if they have in fact been refunded. That is because a right to repayment cannot be said to have been cancelled, lost or unavailable if repayment has actually been obtained. Furthermore, the amount which the Sellers are obliged to pay the Purchasers where clause 10.1.2 is engaged is "the amount of the repayment of VAT … which would otherwise have been obtained." There is therefore no amount which the Sellers are obliged to pay if repayment has in fact been obtained. This conclusion does not give rise to any gap in the contractual scheme because, as already discussed, a VAT credit which has in fact been repaid will fall within clause 10.1.1 if the Company comes under an enforceable obligation to pay it back to SUNAT.

51. I therefore consider that the judge should have found that the "unduly refunded" VAT is not within the scope of clause 10.1.2 of the SPA.

The trigger event under clause 10.1.2

52. The right to an indemnity under clause 10.1.2 is triggered when a relevant right to repayment "is found to be cancelled, lost or unavailable". The judge held that the words "is found" should be interpreted as requiring a definitive finding such that the issuance of an assessment resolution by SUNAT is not sufficient to trigger a right of indemnity whilst it remains under challenge in the tax court.

53. I agree that this is the correct interpretation. It is consistent with the effect of clause 10.1.1, as I have interpreted it, and is similarly justified by the nature and commercial purpose of the clause. In particular, it would not make commercial sense to require the Sellers to "indemnify" the Purchasers in circumstances where there has not yet been a finding that a right to repayment of VAT has been lost or is unavailable which has conclusively determined the legal position and can therefore give rise to an enforceable payment obligation.

The meaning of the relevant warranties

54. A claim made under clause 10.1.2 also depends on establishing a breach of one of the warranties set out in paragraph 13.1 of Schedule 2 to the SPA. The warranties on which the Purchasers rely are warranties that:

> "13.1.1 All returns, computations, notices and information which are or have been required to be made or given by each Group Company for any Taxation purpose:
>
> (i) have been made or given within the requisite periods and on a proper basis and are up-to-date and correct; and
>
> …
>
> 13.1.2 Each Group Company is in possession of sufficient information or has reasonable access to sufficient information to enable it and/or its officers, employees or representatives to compute its liability to Taxation insofar as it depends on any Transaction occurring on or before Closing, and to meet any other legal obligation relating to Taxation or accounting matters."

55. The reason why the relevant VAT credits were rejected by SUNAT is that during SUNAT's audits the Company did not produce documentation that was accepted by SUNAT as adequate to demonstrate that it had paid output tax on goods and services supplied by third parties. At the trial, the Purchasers alleged that the Sellers were in breach of the warranty set out in paragraph 13.1.2 on the footing that at the time of closing the Company was not "in possession of" sufficient information nor did it have "reasonable access to" sufficient information to enable it to compute its tax liability or to meet its obligation to retain the requisite evidence to demonstrate its entitlement to VAT credits.

56. The judge found that relevant documents were stored by the Company in multiple locations, including at the project site, in a remote mountainous area over 1,000 miles from Lima. But she rejected the Purchasers' argument that, properly interpreted, the warranty required not merely physical possession of the documentation in question but possession "in a manner which allows, with the exercise of reasonable efforts, the location and recovery of such documentation in a cost-effective and timely manner." She considered that there was no justification for reading such a qualification into the wording of paragraph 13.1.2. She also found that, in so far as the required documents were not in the Company's possession, the Company was able to request copies from

its suppliers and contract managers who, on the evidence, were responsive when asked to provide information. The judge found that, to the extent that the phrase "reasonable access" should be interpreted to mean "in a cost-effective and timely manner" (as the Purchasers contended), the evidence did not establish that the required documentation could not have been obtained in a manner which would satisfy SUNAT. She thus concluded that the Purchasers had failed to establish a breach of the warranty.

57. I see no merit in the argument made by the Purchasers on this appeal that the judge misconstrued paragraph 13.1.2. The concept of documents or information being in the "possession" of a company is straightforward and cannot reasonably be understood to depend on whether the documents are well organised or on the number and geographical location of the places where they are stored or on how easy or time-consuming it is to locate or retrieve them. Before the Purchasers entered into the SPA they had the opportunity in the course of their due diligence investigations to find out where and how information was held by the Company and, if they thought fit, to seek to negotiate a warranty as to the manner in which documents were stored or as to the ease of retrieval of information. In the absence of any warranty expressly addressing such matters, it is impossible to conjure one out of a bare promise that the Company was "in possession of" information.

58. Any such attempt is all the more unsustainable given that paragraph 13.1.2 is disjunctive and is satisfied if the Company is either in possession of the information or has reasonable access to it. This wording makes it even plainer that the question whether information is reasonably accessible is not part of the test of possession: it is a different question which provides an alternative route to complying with the warranty. It is only where information is not in the possession of the Company that it is relevant to consider whether it can be retrieved in a cost-effective and timely manner – which is agreed to be an appropriate test of whether the Company has "reasonable access" to information.

59. I also do not accept the submission made by counsel for the Purchasers that the judge applied the wrong test when considering the second limb of the warranty and treated the mere ability to request documents from third parties as sufficient to constitute "reasonable access". It is clear from paras 197 and 198 of her judgment that she did not and that she expressly found that, on the evidence, the Purchasers had failed to establish that the required documentation could not have been obtained from contract managers and suppliers in a cost-effective and timely manner. She therefore concluded that, on what the Purchasers themselves maintain and is agreed to be the correct test, the Sellers were not in breach of the warranty set out in paragraph 13.1.2. There is no basis for interfering with that finding on appeal.

60. As an alternative case, the Purchasers have contended that the warranty in paragraph 13.1.1(i) that all returns, computations, etc. have been made "on a proper basis" means "on a basis that could be sufficiently evidenced". The judge rejected that contention on the ground that paragraph 13.1.1(i) is concerned with the intrinsic correctness of the returns, computations, etc. and not with whether sufficient evidence is available to demonstrate their correctness. I agree. The words "on a proper basis" would be hopelessly vague and inadequate to express a warranty as to the availability of evidence to support tax returns, computations, etc. and cannot reasonably be read as an attempt to do so – particularly when a warranty dealing in specific terms with that subject matter is set out in paragraph 13.1.2. Furthermore, it is obvious from the other components of

paragraph 13.1.1(i) that this warranty – unlike paragraph 13.1.2 – is concerned with the timeliness and content of tax returns, computations, etc. Read in their contractual setting, the words "on a proper basis" are reasonably understood to refer to the accounting basis on which such returns, computations, etc. are prepared, and not their evidential basis.

61. I do not accept Mr Pilbrow's submission that the warranty must mean something different because a promise that tax returns, computations, etc. have been made on a proper accounting basis is already encompassed by the warranty that they are "correct". First of all, that is not clearly the case as the term "correct" is at least capable of being understood more narrowly to refer to the accuracy of information given the accounting basis on which the relevant return has been prepared; and secondly, the same could equally be said about the promise that the returns etc. "are up-to-date".

62. I conclude that the judge interpreted the relevant warranties correctly and was entitled to find that the Purchasers had failed to establish any breach of warranty on which they could rely to claim an indemnity under clause 10.1.2 of the SPA.

The Sellers' defence regarding production of documents

63. Although the judge rejected outright the claim under clause 10.1.2 in respect of rejected VAT credits and held that no claim under clause 10.1.1 had yet accrued, she held that a claim under clause 10.1.1 could in future arise for the "unduly refunded" VAT, and for penalties and interest, if the Peruvian tax court were to uphold SUNAT's assessments.

64. The Sellers maintained at the trial that, in that event, they would nevertheless have a defence to the claim under clause 11.8.2 of the SPA. Clause 11.8 is contained in a section of the SPA entitled "Limitation of Sellers' Liability" and provides as follows:

> "**11.8 Matters Arising Subsequent to this Agreement**
>
> Neither Seller shall be liable under this Agreement in respect of any matter, act, omission or circumstance (or any combination thereof), including the aggravation of a matter or circumstance and any Losses arising therefrom, to the extent that the same would not have occurred but for:
>
> **11.8.1 Agreed matters**
>
> Any matter or thing done or omitted to be done pursuant to and in compliance with this Agreement or otherwise at the request in writing or with the approval in writing of either of the Purchasers or the Purchasers' Guarantor;
>
> **11.8.2 Acts of the Purchasers**
>
> Any act, omission or transaction of either of the Purchasers or any member of the Purchasers' Group or any of the Group Companies, or their respective directors, officers, employees or agents or successors in title, after Closing;

> **11.8.3 Changes in legislation**
>
> (i) the passing of, or any change in, after the date of this Agreement any law, rule, regulation or administrative practice of any government, governmental department, agency or regulatory body …
>
> (ii) any change after the date of this Agreement of any generally accepted interpretation or application of any legislation or regulation; and
>
> **11.8.4 Accounting and taxation policies**
>
> any change in accounting or Taxation policy, bases or practice of either of the Purchasers or any of the Group Companies introduced or having effect after Closing."

65. The Sellers' case was that, in circumstances where the judge had concluded that the failure to produce adequate documentation to satisfy SUNAT that the Company was entitled to the rejected VAT credits was not the result of a breach of warranty by the Sellers, it followed that such failure constituted an "omission … of the Purchasers" within the meaning of clause 11.8.2, but for which any losses resulting from the rejection of VAT credits would not have occurred. Hence, the Sellers cannot be liable to indemnify the Purchasers for any such losses under clause 10.1.1.

66. The judge rejected this defence. In doing so, however, she dealt with the issue as a pure point of timing, holding that any delay in producing documents to SUNAT might have affected the resolutions that were issued by SUNAT but did not affect the (future) decision of the tax court on the substantive issue of whether the Company is entitled to the VAT credits.

67. The Sellers have appealed against the judge's decision on this issue. They criticise her reasoning on the question of timing but also complain that the judge did not address their wider case that the Company had failed to provide adequate documentation to SUNAT, not just in time, but at all. Mr Patton submits that, had she considered this wider argument, the judge was bound to uphold it, as both sides recognised at the trial that it was simply the other side of the coin of the breach of warranty issue, the question in each case being who was responsible for the failure to produce adequate documentation to substantiate the VAT credits.

68. I accept that the wider case is one that was advanced by the Sellers at the trial and was never abandoned, although their closing submissions focused on the question of timing. It is also clear that the judgment does not address the Sellers' wider argument. This fact was brought to the judge's attention in a letter from leading counsel then acting for the Sellers after the judgment was circulated in draft and before it was handed down, but the judge declined to add anything to the draft judgment to deal with the point. I do not, however, accept Mr Patton's submission that it follows "seamlessly" from the judge's earlier conclusion that there was no breach of warranty that, if any tax becomes "payable" within the meaning of clause 10.1.1 in respect of the rejected VAT credits, the Sellers will have a good defence to the Purchasers' claim for an indemnity under clause 11.8.2.

69. As I read the judgment, the judge did not make any positive finding that all the documents which would have been needed to satisfy SUNAT were reasonably available to the Purchasers in that they could have been obtained from contract managers and suppliers in a cost-effective and timely manner. All that she found was that the Purchasers, on whom the burden of proof lay to prove a breach of warranty, had failed on the evidence to establish that this was not the case. To make good an affirmative defence under clause 11.8.2, however, the burden of proof is on the Sellers. The judge has not made any finding that this burden has been discharged.

70. As both parties rightly recognised, this court is in no position to evaluate the evidence given at the trial and reach a conclusion on the issue. It was suggested in argument that in these circumstances the matter should be remitted to the judge for reconsideration; but I do not consider that this is an appropriate course. As matters presently stand, the issue is hypothetical as the appeal to the Peruvian tax court has not yet been determined. If that appeal succeeds (and assuming no further appeal to the higher courts), there will never be any tax payable within the meaning of clause 10.1.1 in respect of the "unduly refunded" VAT or any penalties and interest claimed by SUNAT, and the question whether the Sellers have a defence under clause 11.8.2 to such a claim will therefore not arise. That question will arise if the tax court finds that there is a liability. But the basis on which the tax court reaches that conclusion, if it does, may affect how the question should be answered.

71. It seems to me unwise as well as potentially wasteful of time and costs to ask the judge to rule on the future availability of a defence without knowing the factual basis on which the issue will arise, or whether it will ever arise at all. The better course, in my view, is simply to make it clear that the issue remains undecided and that the Sellers are not precluded from raising it in the event that the Peruvian tax court determines that there is any relevant liability.

The loss of the 60% discount

72. I described earlier the graduality regime under which discounts are available on penalties and interest if contested sums are paid (under protest) before an appeal is filed. I also noted that the Company did not make the payment required to obtain the maximum 60% discount in respect of the penalties and interest charged by SUNAT in connection with the rejected VAT credits, but did qualify for a 40% discount by making the requisite payment before filing its second appeal to the tax court.

73. The judge rejected an argument made by the Sellers that the failure to take advantage of the 60% discount amounted to a breach of the Purchasers' obligation under clause 11.12 of the SPA to take reasonable steps to mitigate its losses. Clause 11.12 provides:

> "**Mitigation of Losses**
>
> The Purchasers shall procure that all reasonable steps are taken and all reasonable assistance is given to avoid or mitigate any Losses which in the absence of mitigation might give rise to a liability in respect of any claim under this Agreement."

74. The judge nonetheless held that the Sellers have a good defence under clause 11.8.2 to any claim by the Purchasers to be indemnified for a larger amount in respect of penalties

and interest than it would have been necessary to pay in order to obtain the 60% discount. Her reasoning was that, if SUNAT's assessment is ultimately upheld by the tax court, the Sellers will not be liable for the difference between the 60% and 40% discount on the basis that the Purchasers took a decision not to pay the penalties at the time when the 60% discount was available and the additional cost accordingly represents a loss that would not have occurred but for an "act" of the Purchasers.

75. The Purchasers take issue with this interpretation of clause 11.8.2 on two grounds.

Factual and legal causation

76. First, the Purchasers argue that the judge was wrong to construe clause 11.8.2 as imposing a purely factual test of causation. Rather, they say, the clause ought to be interpreted as excluding liability only where standard principles of legal causation are satisfied and the loss is one which can properly be said to have been caused by an act, omission or transaction of the Purchasers.

77. The distinction between 'factual' and 'legal' causation is well recognised in assessing liability to pay damages at common law. In order to recover damages for a loss caused by a breach of contract (or other actionable wrong), both tests must generally be satisfied. The test of factual causation is whether, but for the defendant's breach of contract, the loss would have occurred. This requires a simple factual comparison to be made between the claimant's actual financial position and the financial position which the claimant would have occupied if there had not been a breach. However, not every loss (or gain) which would not have occurred but for the breach is treated in law as caused by the breach, such that the defendant is held legally responsible for it. In particular, an unreasonable act or omission of the claimant without which the loss would not have occurred may be held to 'break the chain' of causation.

78. The fatal difficulty, however, which confronts the Purchasers' attempt to interpret clause 11.8.2 as involving a test of legal as well as factual causation is that the opening words of clause 11.8 unambiguously specify a test of purely factual causation to define the requisite link between a matter for which the Sellers would otherwise be liable and (among things subsequent to the SPA) an act, omission or transaction of the Purchasers. Notably, the clause does not use the language of causation at all. It does not say that the Sellers will not be liable in respect of any matter etc. to the extent that the same "has been caused by" (or any similar phrase) any act, omission or transaction of the Purchasers. Instead, it specifies a pure 'but for' test. The only question which has to be answered in order to determine whether the Sellers are exempted from liability is whether the relevant matter "would not have occurred but for … any act, omission or transaction of … the Purchasers". This wording is only capable of being understood as requiring a simple factual comparison to be made between what has actually happened and what would have happened in the hypothetical scenario. It does not involve or permit consideration of whether the matter (or any losses arising from it) should be treated in law as caused by the Purchasers' act or omission.

79. The distinction between factual and legal causation is a familiar one to English lawyers and it is impossible to infer, as Mr Pilbrow at one stage in the oral argument sought to suggest, that the lawyers who agreed this wording on behalf of their clients must have done so by oversight.

80. The only route open to the Purchasers to attempt to construe clause 11.8.2 as importing a test tantamount to one of legal causation is to seek to read the clause as if it referred to "any unreasonable act, omission or transaction of either of the Purchasers …". However, I can see no warrant for interpreting a clause in a professionally drafted contract of this kind as if it included such a significant limitation on its scope when no qualifying language has been used. Although the Purchasers complain that the application of an unqualified 'but for' test has the potential to produce unfair results, the measure of fairness in allocating liability for losses under a commercial contract of this nature is what the parties have agreed; and to introduce a requirement of unreasonableness into clause 11.8.2 would, as it seems to me, involve rewriting their agreement.

81. Counsel for the Purchasers argued that, unless clause 11.8.2 is treated as containing such a qualification, clause 11.12 (the clause requiring mitigation of losses) is redundant. This may be correct but, as mentioned earlier, arguments based on redundancy are generally of little weight in construing commercial contracts. As stated by Sir Kim Lewison in his book on *The Interpretation of Contracts* (6th Edn, 2015) at para 7.03, in terms that I would adopt, "an argument based on surplusage cannot justify the attribution of a meaning that the contract, interpreted as a whole, cannot bear." Certainly, such an argument does not bear the weight of reading a requirement of unreasonableness into clause 11.8.2.

Was there an "omission"?

82. The Purchasers' second and alternative ground of challenge to the judge's interpretation of clause 11.8.2 is to argue that she was wrong to classify the failure to make a payment in time to obtain a 60% discount as an "act" and should have held that a failure to do something is only capable of amounting to an "omission". It was further argued that a failure to take a step only constitutes an "omission" in the ordinary sense of the word, and in the sense in which the word is used clause 11.8.2, if the step is one that it is reasonable to expect the party in question to have taken. It was therefore said to follow from the judge's rejection of the argument that the Purchasers failed to take reasonable steps to mitigate their loss when they passed up the opportunity to obtain a 60% discount that there was also no "omission" for the purposes of clause 11.8.2.

83. I would accept the first stage of this argument. We were not referred to any evidence that any formal decision was taken by the Company not to avail itself of the opportunity to obtain a 60% discount by making the required payment before filing its first appeal with SUNAT. Indeed, the judge records (at para 209 of the judgment) that one of the Purchasers' witnesses, Mr Ossio, gave evidence that the Company was (wrongly) advised that the discount was not available at that point. The situation is therefore simply that the Company did not make the requisite payment. That is properly characterised as an omission rather than an act. However, I do not accept the second stage of the Purchasers' argument. While it is true that the word "omission" can sometimes have a connotation of culpability – as, for example, in the phrase "errors and omissions" when used in relation to professional liability insurance – whether it has that connotation must depend on the context: cf *Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd (the "Yangtze Xing Hua")* [2017] EWCA Civ 2107; [2018] 2 All ER (Comm) 99, paras 22-25 and 27. It is unreasonable to interpret the word "omission" as having this sense when it is used in conjunction with the neutral words "act" and "transaction". Unless such an intention was clearly

signalled, it would be illogical to interpret one word in this composite phrase as importing a requirement to show culpable fault when the other words do not.

84. I accept that there are limits on what would reasonably be understood to count as an "omission" – or for that matter an "act" – of the Purchasers for the purpose of clause 11.8.2. For example, there could not sensibly be said to have been an "omission … of the Purchasers" by reason of their failure to do something which it was not within their power to do or which was not an option that was reasonably available to them. I also think it so obvious as to go without saying that the concept cannot have been intended to include a failure to do something which would be unlawful or which would place the Purchasers in breach of a legal duty (either to the Sellers or to a third party). Likewise, something done pursuant to a legal obligation or by someone acting in the name of the Purchasers to whom they had irrevocably delegated the power to take decisions on their behalf would not reasonably be regarded as an "act of the Purchasers". Thus, it could not realistically be suggested – and has not been suggested by the Sellers – that the failure of the Company to pay the penalties (and interest on penalties) referable to the New Town VAT in time to take advantage of the 60% discount involved an "act, omission or transaction … of the Purchasers" in circumstances where the Sellers had exercised their right under clause 12.5.1(iv) of the SPA to take over the conduct and control of that "Third Party Claim".

85. It is a further and, in my view, impermissible step, however, to read into the language of clause 11.8.2 a requirement of fault or culpability on the part of the Purchasers. Such a requirement is far from being necessarily implicit in the description "act, omission or transaction of … the Purchasers". In a contractual clause concerned to allocate liability between sophisticated commercial entities advised by expert lawyers, it is a qualification which, had it been intended, the reasonable reader of the contract would expect to see spelt out.

Allegedly unjust consequences

86. In their written and oral submissions counsel for the Purchasers invited the court to consider various hypothetical scenarios to illustrate what they submitted is the injustice that will potentially result if clause 11.8.2 is interpreted as it was by the judge. For example, they postulated a situation (outside the context of tax) where the Company is sued by a third party in respect of a matter relating to a period before closing and for which the Sellers are responsible under the SPA, but where the Sellers choose not to exercise their right under clause 12.5.1(iv) of the SPA to take over the conduct of the claim. If the Company, acting reasonably on legal advice, declines an offer to settle the claim by making a payment to the third party and ends up being held liable to pay a greater sum, counsel for the Purchasers point out that, on the judge's interpretation of clause 11.8.2, the Sellers will not be liable to compensate the Company for the additional loss thereby incurred. Conversely, if the Company reasonably accepts a settlement offer, the Sellers will nevertheless be able to argue that they have a defence under clause 11.8.2, on the basis that, if the claim had been contested at a trial, the Company's ultimate liability would have been less than the amount paid.

87. Counsel for the Purchasers further suggested that, taking the judge's interpretation of the clause to its logical conclusion, the Sellers will also be able to avoid liability on the footing that the Company did not reduce or extinguish its liability to the third party by, for example, successfully campaigning for a change in the law.

88. This last suggestion can, I think, be discounted when it is recalled that the test of factual causation built into clause 11.8.2 requires the Sellers to prove that the particular loss would not have occurred in the hypothetical scenario. It would be an ambitious task, at least in most circumstances, to attempt to prove that a campaign to change the law so as to relieve the Company retrospectively of liability arising from a transaction that occurred before closing under the SPA was a reasonably available option, let alone that such a campaign would on the balance of probability have succeeded. Similarly, in the example where the Company settles a claim, to establish a defence the Sellers would have to prove to the satisfaction of the English court that, if the Company had taken the case to trial, it is more probable than not that the Company would have achieved a better outcome. If the Company was acting on legal advice that the settlement was a favourable one, this will require the Sellers to show that the advice was wrong.

89. I accept that the effect of clause 11.8.2 is to allocate more risk to the Purchasers than they would bear under common law rules, which enable a claimant to recover losses that it could have avoided, provided that it has not acted unreasonably. But it cannot be assumed that a clause included in the contract under the heading "Limitation of Sellers' Liability" is intended simply to replicate or restate limitations on the extent of liability that would anyway exist at common law, rather than imposing further and greater restrictions. In a contract for the sale of a business the extent to which the risk of losses or liabilities arising after the sale is assumed by the purchaser or retained by the seller is a matter for negotiation between them. There is no inherently right or reasonable allocation of the risk, particularly given that the extent of the warranties which the seller is prepared to grant depends in large measure on what price the purchaser is willing to pay. Within very wide limits, English law leaves the parties free to make their own bargain and affords them the respect, when they have entered into a formal, professionally drafted and commercially negotiated agreement, of treating them as having meant what they said. An agreement which exempts the seller from liability for losses which the purchaser could have avoided cannot be considered irrational and there is no basis on which the court can or should infer that it is not an agreement the parties intended to make.

A timing argument

90. In his oral submissions Mr Pilbrow QC tried another argument on behalf of the Purchasers which did not feature in his skeleton arguments or in the Purchasers' notice of appeal. He submitted that if, for example, the tax court upholds SUNAT's assessment that the Company is liable to pay tax (including interest and penalties) in respect of the "unduly refunded" VAT, it cannot be said that this liability is or arises from a matter or circumstance that would not have occurred but for the omission of the Purchasers to avail themselves of a 60% discount on the penalties and interest, because the liability to pay the penalties already existed before the opportunity to obtain a discount arose. Hence clause 11.8.2 does not apply.

91. This afterthought fares no better, in my view, than the Purchasers' other arguments on this issue. The short answer to it is that, however the relevant "matter" referred to in clause 11.8 is identified, the clause also encompasses "any Losses arising therefrom". The term "Loss" or "Losses" is defined in the SPA to mean "all losses, liabilities, costs (including reasonable legal costs and experts' and consultants' fees), charges, and expenses, arising from any action, proceeding, claim or demand." The "Losses" arising from the claim by SUNAT will include any penalties and interest which the Company

is ultimately found by the tax court to be liable to pay and which thereby become "payable" within the meaning of clause 10.1.1. To the extent that the amount payable in respect of such penalties and interest would have been lower if the Purchasers had taken advantage of the 60% discount, this element of "Loss" is excluded by clause 11.8.2. There is no timing point to be made.

92. I would therefore reject the Purchasers' appeal on this issue.

Clause 10.1.1 revisited

93. I have taken account of this conclusion in considering the issue discussed first in this judgment of when tax is "payable" for the purpose of triggering the indemnity in clause 10.1.1 of the SPA. On behalf of the Purchasers, Mr Pilbrow QC emphasised that the effect of clause 11.8.2, as interpreted by the judge, is that, in any case where the Company receives a tax assessment relating to a period before closing, the practical reality will be that the Company will have to pay the tax claimed before filing an appeal and take advantage of the discount available from SUNAT in order to avoid losing the right to recover a full indemnity from the Sellers. Yet if the judge's interpretation of clause 10.1.1 is correct, the Company will be left out of pocket throughout the appeal process, which may last many years, and will not be able to obtain an indemnity from the Sellers unless and until it loses the appeal and the debt becomes coercively enforceable. (If the Company is successful on appeal, the money will be refunded by SUNAT.) Mr Pilbrow submitted that this cannot be what the parties reasonably intended.

94. I accept that the contract does have this practical effect. I also recognise that this consequence may not have been foreseen, at any rate by the Purchasers, when the contract was negotiated and drafted. But I do not consider that the meaning of clause 11.8.2, taken together with the graduality regime under which discounts are available for paying disputed tax assessments under protest before filing an appeal, can reasonably drive or dictate how the indemnity in clause 10.1.1 is interpreted. Even assuming – as I do – that the graduality regime forms part of the background which, for the purpose of interpreting the contract, the parties should be taken to have known, no one drafting clause 10.1.1 would reasonably expect its meaning to be ascertained by analysing the interaction of rules of Peruvian tax law and one of the clauses limiting the Sellers' liability. This is therefore not a consequence which it is, in my view, relevant to take into account in construing clause 10.1.1.

Conclusion

95. For these reasons, I would uphold the judge's decision on all the issues raised on these appeals, with the following exceptions only. I have concluded (i) that the unduly refunded VAT is not within the scope of clause 10.1.2 of the SPA, and (ii) that paragraph 6 of the judge's order should be varied so as to provide that, if any "unduly refunded" VAT or any penalties or interest on rejected VAT credits becomes payable (within the meaning of clause 10.1.1 of the SPA), the Sellers are not prevented by the order from asserting a defence to liability based on clause 11.8.2 of the SPA. In all other respects, I would dismiss the appeals.

Lord Justice Longmore:

96. I agree.

The Chancellor of the High Court:

97. I also agree.