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Case No: CL-2022-000222

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

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

Date: 23/01/2026

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

SYNTHOS SPOLKA AKCYJNA	**Claimant**
- and -	
INEOS INDUSTRIES HOLDINGS LIMITED	**Defendant**

- -
- -

Alain Choo-Choy KC and **Rachel Oakeshott** (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Conall Patton KC and **Veena Srirangam** (instructed by **Slaughter & May**) for the **Defendant**

Hearing dates: 6-9, 13-15 and 21-22 October 2025

- -

Approved Judgment

This judgment was handed down remotely at 9.30am on 23 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the trial of the liability issues that arise in respect of a claim by the claimant for damages for breach of warranty and/or breach of alleged notification duties contained in a share sale agreement dated 6 May 2016 ("SSA") by which the defendant sold to the claimant its shares in Ineos Styrenics European Holding BV ("Styrenics") and (by a related agreement) the business and assets of Ineos Styrenics International SA. Together these transactions constituted the sale to the claimant of the whole of Ineos's expanded polystyrene ("EPS") business ("EPS Business"). Prior to the sale this part of the Ineos business formed part of the Ineos Enterprises division.

Background

2. Prior to the sale and from no later than 2012, the EPS Business purchased styrene from third party suppliers from which it manufactured EPS at its plants at Konijnenberg 63, Breda, Netherlands, Rue Duplat 62410, Wingles, France and 704 Rue Pierre et Marie Curie, 60170, Ribecourt-Dreslincourt, France by turning the styrene into small beads – a process known as polymerisation - and then converting it to polystyrene which was then sold downstream to manufacturers who used the material to manufacture various bulk use items including insulation and packing.

3. The EPS Business purchased styrene from the main European suppliers under annual rolling agreements that were subject to a price adjustment mechanism using a formula that included as a major component the Styrene Monthly Contract Price ("SMCP"). In addition, the EPS Business was able to obtain discounts to the SMCP. The success of the EPS Business depended on maintaining as wide a spread as possible between the cost of manufacture of EPS (the major component of which was the cost of buying in styrene) and the price obtained for the downstream sale of EPS.

4. Following the sale of the EPS Business to the claimant, it emerged that the EPS Business had participated in an unlawful buyers' cartel in order to eliminate or minimise the volatility of styrene prices that would otherwise have been the feature of a properly functioning market. As described by the EU Commission ("Commission") in its report referred to below, effect was given to the cartel by its members setting the SMCP for each month using unlawful means. The method for the setting of the SMCP each month was described by the Commission in these terms:

> "In order to establish a SMCP for the upcoming month, the following method was applied:
>
> (a) at the beginning of each month, buyers negotiated with sellers with whom they had a long-term supply agreement; they negotiated in pairs, independently and separately from other pairs.

> (b) Once a pair of buyer-seller agreed on a desired level of SMCP ("settlement"), the result of that bilateral SMCP settlement was communicated to ICIS (Independent Commodity Intelligence Services), a reporting agency, as the views of that specific pair of buyer and seller about the appropriate level of the SMCP for that month.
>
> (c) When another pair had reached and notified to ICIS a bilateral settlement at precisely the same SMCP level ("2+2 rule"), that number was then published by ICIS and became the SMCP valid for the entire upcoming month. This figure was used for the pricing of styrene delivered under long-term supply contracts whose pricing formula was based on the SMCP."

5. In essence the cartel consisted of the six principal buyers of styrene (including the EPS Business) coordinating their SMCP negotiations with the aim of buying styrene at a lower price from the seven principal suppliers of styrene, by conduct summarised by the Commission at paragraph (45) of its report as being that the parties to the cartel:

> "(a) exchanged and occasionally agreed on the SMCP proposals they intended to use for the start of the bilateral negotiations with styrene sellers;
>
> (b) exchanged commercially sensitive information about the sellers' and other buyers' willingness to enter into settlement and at what level and about the SMCP sellers aimed to achieve;
>
> (c) exchanged and occasionally agreed on the SMCP they ultimately wanted to achieve in the bilateral negotiations with styrene sellers;
>
> (d) exchanged and occasionally agreed on the price negotiation strategy they would pursue to reach the desired level of SMCP;
>
> (e) exchanged in parallel with their negotiations with their sellers commercially sensitive information on the status of negotiations with styrene sellers, including the price increases or reductions that they managed to obtain from them;
>
> (f) exchanged and jointly evaluated information on market trends and developments of elements likely to influence the forming of the SMCP, such as the price of feedstock, styrene spot prices, reduced level of feedstock availability, styrene imports, closure or planned maintenance of plants.

The information referred to above was exchanged by email, text messaging, phone calls and meetings. The Ineos entities by which its EPS Business was carried on had instigated and then actively participated in this activity from not later than 1 May 2012. It follows that by September 2015, when the defendant decided to sell the EPS Business, the EPS Business had been actively

participating in the cartel described above for over three years. During the process leading to the SSA and the associated sale of the business and assets of INEOS Styrenics International SA no mention was made of the cartel described above or the role the EPS Business played in it.

6. The Commission conducted an investigation that ended in November 2022 with it concluding that the conduct summarised above had breached Article 101 of the EU Treaty and Article 53 of the EEA Agreement because it had been undertaken with the intention of reducing competitive uncertainty and was "… *by its very nature, among the most harmful restrictions of competition*…". The Commission imposed very substantial fines ranging from €17.215m to €43.011m on those participating in the cartel with the exception of Ineos, which was granted immunity because it had submitted a Leniency Application on 28 September 2017 and was granted conditional immunity from fines for the infringement on 22 May 2018.

7. Whilst the Commission found that the claimant had participated in the cartel, it was found to have done so only between 1 September 2016 and 30 June 2018. Thus its involvement only commenced after the sale of the shares in Ineos Styrenics European Holding BV pursuant to the SSA which completed on 31 August 2016 and after execution of the Business Transfer Agreement dated 31 August 2016 by which the Swiss Entity sold its business and assets to the claimant. The individuals responsible for carrying into effect Ineos's involvement in the cartel transferred on completion of the sale and appear to have carried on the cartel as they had before the sale.

8. The claimant alleges that by failing to inform the claimant of Styrenics' participation in the cartel the defendant thereby breached various warranties contained in the SSA and/or various notification duties also contained in the SSA.

9. The defendant admits that but for the fact that this claim was not commenced within the contractual time limit that applies to breach of warranty claims, it would have been liable for breach of its warranty at clause 17(a)(i) of the SSA that Styrenics had not "… *at any time been party to or directly or indirectly concerned in any agreement, arrangement, understanding or practice … or course of conduct which (i) is or was in breach of any competition or similar legislation in any jurisdiction in which the Business is or has been carried on*…". The defendant denies that it is otherwise liable to the claimant on any of the other provisions on which the claimant relies. It is common ground that the claim has been brought outside the contractual time limit that applies to breach of warranty claims but the claimant asserts that it is entitled to rely on a contractual exception by which that bar is disapplied in respect of "… *any claim for breach of the Warranties where the fact, matter or circumstance giving rise to the claim arises as a result of fraud on the part of the Seller*." The claimant maintains that the contractual time bar is of no application to its notification claims.

The Trial and Framework Principles Applicable to the Assessment of the Evidence

10. The trial took place between 6-9, 13-15 and 21-22 October 2025. I heard oral evidence adduced on behalf of the claimant from:

    i) Mr Jaroslaw Tomasz Grodzki, the Deputy Chairman of the Supervisory board of the claimant; and

    ii) Mr Wojciech Pawel Ciesielski, a Polish qualified lawyer who at all material times provided legal and allied services to the claimant in Poland and who was a member of the claimant's supervisory board between 2005-2011 and September 2015-November 2017.

    I heard oral evidence adduced on behalf of the defendant from:

    iii) Ms Juliet Lewis, who was the Group Legal Manager for Ineos Group between February 2013 and September 2015, then Head of Legal at Ineos Enterprises ("Enterprises") until the end of July 2024;

    iv) Ms Louise Jacqueline Calviou, who was the Chief Operating Officer of the EPS Business from December 2015 to August 2016, when it was sold to the claimant. Ms Calviou continued in various roles within the Ineos Group until October 2023, when she left to join Argent Energy, initially as its Chief Operating Officer and from January 2024 its Chief Executive Officer;

    v) Mr Stephen John Dossett, who was the Procurement Director of the Ineos Enterprises Division between 2012-2014; and between 2014-2019 was the Business Director of Ineos Enterprises Division and Chief Operating Officer of another Ineos entity, INEOS Baleycourt. He remains a senior employee within the Ineos group, being currently the Chief Executive Officer of Ineos Inovyn; and

    vi) Mr Robert Michael Ingram, who was the Chief Operating Officer of the EPS Business from September 2012 to December 2015. He too remains a senior Ineos employee as Chief Executive Officer of Ineos Olefins and Polymers Europe.

11. Given the time that has elapsed since the events that matter took place, I have approached this evidence by testing it wherever possible, against the contemporary documentation, admitted and incontrovertible facts and inherent probabilities – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 413 and Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) at [15]-[22] – and their subsequent conduct – see Bailey v. Graham [2012] EWCA Civ 1469 per Sir Andrew Morritt CHC at [57]. Whilst it is necessary to consider all of the relevant evidence and not simply such documentation as may be available – see Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at [88]-[89] - there is nothing either in this authority or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques referred to

above – see Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413 *per* Males LJ at [48], where he observed:

> "… I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

12. Given the claimant's reliance on the fraud exception to the contractual time bar, it is important to identify at the outset some fundamental principles that I am bound to apply and have applied when reaching conclusions as to what has been alleged. In summary:

i) The legal onus of proof rests from first to last on the claimant who must prove its pleaded factual case on the balance of probabilities, although an evidential burden rests on the defendant to prove any affirmative case it seeks to advance; and

ii) Whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said:

> "The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence... Built into the preponderance of probabilities

> standard is a generous degree of flexibility in respect of the seriousness of the allegation."

The SSA

13. Following protracted pre-contract negotiations, on 6 May 2016, the claimant and defendant entered into the SSA. In so far as is material for present purposes, the SSA provided as follows:

> "1 **DEFINITIONS**
>
> …
>
> **"Business"** means the business of the Target Group, and the business of the Swiss Entity that is to be transferred pursuant to the Asset Transfer Agreement, in each case as conducted on the date of the Offer Letter and from time to time thereafter.
>
> "**Completion**" means completion of the sale and purchase of the Shares in accordance with clause 7.
>
> "**Completion Date**" means the date on which Completion is required to take place on and subject to the terms of clause 7.1.
>
> …
>
> "**Data Room**" means the Intralinks electronic data room provided by or on behalf of the Seller under the project name "Argent" containing information and materials relating to the Target Group uploaded up to and including 2 a.m. 24 March, 2016, as delivered to the Buyer on the Disclosure Disc (and each document therein referred to as a "Data Room Document").
>
> …
>
> "**Disclosure Bundle**" means the bundle of documents attached to the Disclosure Letter, an index of which is included in the appendix to the Disclosure Letter and two copies of which have been initialled for the purposes of identification for and on behalf of each of the Seller and the Buyer.
>
> "**Disclosure Disc**" means the CD Rom of those documents made available to the Buyer and its advisers via the Data Room up to and including 2 am 24 March, 2016.
>
> "**Disclosure Letter**" means the letter dated the same date as the Offer Letter from the Seller to the Buyer disclosing information relating to certain of the Warranties and the Tax Warranties and certain other matters referred to in this agreement.
>
> "**Disclosure Materials**" means the Disclosure Letter, the Disclosure Bundle and the Disclosure Disc and, in relation to the

Repeated Warranties only, the Updated Disclosure Letter (together with any documents annexed thereto).

…

"**Repeated Warranties**" means each of the Warranties, save for the Warranties set out in paragraphs 2.1, 2.2, 2.3 3.1(a), 3.3, 4.1 to 4.6, 4.8, 4.9, 5.2(a), 5.4(b), 5.4(c), 8(c), 8(e), 8(h), 9(a), 12.1(a), 12.1(c), 13.1(b), 13.1(c), 14.1(a) and 14.1(d) of Schedule 2.

"**Seller's Group**" means the Seller, any subsidiary of the Seller, any holding company of the Seller and any subsidiary of any holding company of the Seller and any associated undertaking of any such person, from time to time, including the Excluded Entities and the Swiss Entity, but excluding the Target Group and, in the context of clause 11 only, excluding any third party entity (which is not currently within the Seller's Group) that may acquire any member of the Seller's Group after the date of the Offer Letter.

…

"**Swiss Entity**" means INEOS Styrenics International SA.

"**Target**" means INEOS Styrenics European Holding BV,

…

"**Updated Disclosure Letter**" means the disclosure letter to be dated as at the Business Day prior to the date of Completion from the Seller to the Buyer disclosing information relating to certain of the Repeated Warranties as at the date of Completion.

"**Warranties**" means the warranties set out in Schedule 2 and each statement shall be a "**Warranty**".

2 **INTERPRETATION**

…

2.2 The recitals and schedules form part of this agreement and have the same force and effect as if expressly set out in the body of this agreement and any references to this agreement include the recitals and the schedules.

…

3 **CONDITIONS**

…

3.5 The Seller undertakes to notify the Buyer in writing of anything which will or may prevent any of the Condition from being satisfied on or before the Long Stop Date or which would entitle the Buyer to terminate this agreement in accordance with clause 9.4 promptly after it comes to its attention.

…

4 ACTION PENDING COMPLETION

4.1 Pending Completion, the Seller shall procure that each member of the Target Group shall (and the Swiss Entity shall, in relation to the Business) carry on the Business and otherwise conduct its affairs in the ordinary course so as to maintain that business as a going concern and not make any payment other than routine payments in the ordinary and usual course of trading.

…

8 PRE- AND POST-COMPLETION OBLIGATIONS

8.1 From the date of this agreement until Completion… the Seller shall …promptly notify the Buyer in writing, providing reasonable detail, of any events or developments which could affect the financial or trading prospects of the Business or the Target Group to any material extent (other than general industry developments that do not have a disproportionate impact on the Business)…

9 WARRANTIES AND INDEMNITIES

9.1 The Seller warrants to the Buyer on the terms of the Warranties as at the date of the Offer Letter, and on the terms of the Repeated Warranties as at the date of Completion…

9.2 Each Warranty made or given in respect of the Target or the Target Group shall be deemed to be and a warranty of the Seller made or given in respect of each member of the Target Group and (in relation to the Business and to any rights, assets, liabilities or obligations that are to transfer pursuant to the Asset Transfer Agreement) in respect of the Swiss Entity and (unless the context or subject matter otherwise requires) the expressions the "Target" and the "Target Group" in the Warranties shall be construed accordingly.

9.3 Each Warranty shall be construed as a separate and independent warranty and, except where expressly stated, shall not be limited or restricted by reference to or inference from the terms of any other warranty or any other provision of this agreement.

9.4 The Buyer shall be entitled, by notice in writing to the Seller, to terminate this agreement with immediate effect, subject to, and on the basis set out in clause 12, at any time prior to Completion if:

(a) there are or have been one or more breaches of the Warranties at the date of the Offer Letter and/or any of the Repeated Warranties are or become untrue or inaccurate at any time from the date of the Offer Letter up to and including Completion and/or any one or more breaches by the Seller of its obligations under clause 4.1 and 4.2 or of its obligations under paragraph 4.1(a) of the Offer Letter occur at any time from the date of the Offer Letter up to and including Completion, and, based on those taken together, the Buyer would have, or would be reasonably expected to have, claims under this agreement and/or the Offer Letter which in total would exceed ten million euros (€10 million) if Completion took place …

…

9.5 If any Warranty is qualified by the expression "so far as the Seller is aware" or "to the best of the knowledge, information and belief of the Seller" or words to such effect, such expression shall mean the actual knowledge of the Seller (including, for the avoidance of doubt, the actual knowledge of the Seller's directors and officers), after making reasonable enquiry of Louise Calviou, Ashley Reed, Juliet Lewis, Andrew Brown and of such other persons within the Business as are relevant to the subject matter of the particular Warranty.

…

9.6 Notwithstanding any other provisions of this agreement, none of the limitations contained in this clause 9, Schedule 4 [sic: Schedule 6] … shall apply to any of the following claims:,

…

(b) any claim for breach of the Warranties where the fact, matter or circumstance giving rise to the claim arises as a result of fraud on the part of the Seller.

…

12 **TERMINATION**

…

12.2 The Seller undertakes to disclose promptly to the Buyer in writing any breach, matter, event, condition, circumstance, fact or omission of which any member of the Seller's Group is or

becomes aware may give rise to a termination right under this agreement

…

17 **GOVERNING LAW AND JURISDICTION**

17.1 This agreement and any non-contractual obligations arising out of or in connection with this agreement shall be governed by and construed in accordance with English law…

17.2 Each Party irrevocably agrees to submit to the exclusive jurisdiction of the courts of England in relation to any claim or matter arising under or in connection with this agreement

…

SCHEDULE 2

Warranties

…

11 **LITIGATION, DISPUTES & COMPLIANCE**

11.1 **Litigation**

(a) Except as claimant in relation to the collection of unpaid debts arising in the ordinary course of business, none of which exceeds €1,000,000 and the aggregate of which does not exceed €2,000,000, the Target has not in the 3 years preceding the date of the Offer Letter been and is not involved in any legal or administrative or arbitration proceedings …, no such proceedings are pending or threatened and, so far as the Seller is aware, there are no circumstances likely to give rise to any such proceedings.

…

11.3 **Investigations and disputes**

(a) No governmental or other official investigation or inquiry concerning the Target is in progress or, so far as the Seller is aware, pending, and, so far as the Seller is aware, there are no circumstances likely to give rise to any such investigation or inquiry.

…

17 **COMPETITION**

(a) The Target is not and has not at any time been party to or directly or indirectly concerned in any agreement, arrangement, understanding or practice (whether or not legally binding) or course of conduct which:

(i) is or was in breach of any competition or similar legislation in any jurisdiction in which the Business is or has been carried on;

…

(iv) is or was otherwise registrable, notifiable, unenforceable or void or which renders the Target or any of its officers liable to administrative, civil or criminal proceedings under any competition or similar legislation in any jurisdiction in which the Business is or has been carried on.

…

SCHEDULE 6

Limitations

1 DEFINITIONS AND INTERPRETATION

In this Schedule (unless the context otherwise requires), the following words and expressions shall have the following meanings:

"**Claim**" means any Warranty Claim or Tax Warranty Claim.

"**Fundamental Warranty Claim**" means any claim under the Warranties in paragraphs 1.1 to 1.3 (inclusive), 1.9 to 1.15 (inclusive) and 4.11 of Schedule 2;

…

"**Warranty Claim**" means any claim under the Warranties, save for the Warranties relating to Tax at paragraph 16 of Schedule 2.

2 TIME LIMITS FOR BRINGING CLAIMS

2.1 The Seller shall not be liable for any Claim, Indemnity Claim (other than a claim under Clause 9.10 or 9.18) or a claim under the Tax Covenant (each a "Time Limited Claim") unless and until it has received from the Buyer written notice containing the details set out in paragraph 2.2 below on or before the date falling:

(a) 18 months from Completion in respect of a Warranty Claim other than a Fundamental Warranty Claim;

> …
>
> 2.4 Any Time Limited Claim (other than a claim under the Tax Covenant) shall (if not previously satisfied, withdrawn or settled) be deemed to have been withdrawn and waived by the Buyer (and no new Time Limited Claim may be made in respect of the facts giving rise to such withdrawn Time Limited Claim) unless legal proceedings in respect of such Time Limited Claim have been commenced (by being both issued and served on the Seller) within 6 months of the notification of such Time Limited Claim to the Seller pursuant to paragraph 2.1 above.
>
> …
>
> 3 **LIMITATIONS ON QUANTUM**
>
> 3.1 Notwithstanding any other provision of this agreement:
>
> (a) the total aggregate liability of the Seller for all Warranty Claims (other than Fundamental Warranty Claims) and for all claims under Clause 9.9 and 9.11 and shall not in any circumstances exceed 25% of the aggregate amount of the Consideration received by the Seller…
>
> …
>
> 3.4 The Seller's liability shall not be limited by this section 3 in respect of a Claim where the breach arises as a result of fraud on the part of the Seller or, for the avoidance of doubt, where clause 9.6 provides that it shall not be so limited.
>
> …"

The Claims

14. The defendant maintains that I should resolve the breach of warranty claim (which primarily concerns the effectiveness of the claimant's reliance on the fraud exception to the contractual limitation provision within the SSA) first and then turn to the alternative ways in which the claim is put, whereas the claimant suggests that the other allegations should be considered first. I will address each of the alternative ways in which the claimant has advanced its claim in the order in which the claimant has addressed them. This involves considering the clause 8.1 Claim (and any other notification claim that it remains necessary to consider after considering that claim) first. Aside from this being the order that the claimant prefers its claims to be resolved in, it will make additional sense if (as the claimant contends) the limitations that apply to breach of warranty claims do not apply to the notification claims and the claimant is otherwise entitled to succeed on one or more of its notification claims, because it will then be unnecessary to take up time determining whether the claimant has established its entitlement to rely on clause 9.6(b).

The Clause 8.1 Notification Claim

15. As the claim was opened, the claimant relies principally on what it contends to have been a breach of clause 8.1 of the SSA. As noted already, the relevant part of this provision imposed on the defendant an obligation to "…*promptly notify the [claimant] in writing, providing reasonable detail, of any events or developments which could affect the financial or trading prospects of the Business or the Target Group to any material extent*…" The obligation applied "(*f)rom the date of this agreement until Completion*…" The claimant's case is that the effect of this provision is that from 6 May 2016 until 31 August 2016 the defendant (as Seller) was required promptly to notify the claimant (as Buyer) in writing, providing reasonable detail, of any events or developments which could affect the financial or trading prospects of the Business or the Target Group to any material extent. The claimant maintains that by failing to notify the claimant of the participation of the EPS Business in the cartel, the defendant acted in breach of that obligation.

16. In this regard, the claimant maintains that the EPS Business participated in the cartel by participating in the SMCP settlement process in June – August 2016 and that such participation each month constituted "… *events or developments which could affect the financial or trading prospects of the Business or the Target Group to any material extent…"* because such activity (as the defendant admits) could expose the companies concerned to a fine of up to 10% of worldwide turnover and to follow-on claims by third parties. In that regard it is not necessary to go further than the parties' pleaded cases. In paragraph 64.1 of the Re-Re-Amended Particulars of Claim ("Particulars of Claim"), the claimant pleaded (in relation to an allegation concerning clause 4.1 of the SSA) that:

> "64.1 Ineos Styrenics Services BV's and/or Ineos Styrenics Switzerland's participation in the Syrenics Buyers' Cartel
>
> (a) did not have a legitimate commercial or business justification, and/or
>
> (b) was not consistent with ordinary acceptable business practice because it was anti-competitive and unlawful, and/or
>
> (c) was conduct which would or could expose the companies concerned to a fine from competition authorities of up to 10% of their annual worldwide turnover and to follow-on damages claims from third parties."

By Paragraph 73 of its Re-Re-Re-Amended Defence ("Defence"), the defendant admitted each of those allegations. The claimant maintains that had the position been revealed as it alleges it should have been then the transaction would not have proceeded and the claimant would have exercised the contractual powers within the SSA to terminate the agreement.

17. The defendant admits that it did not inform the claimant that the EPS Business had participated in the cartel - see Defence, paragraph 75A.2 - but denies breach of clause 8.1 on the basis that:

i) Clause 8.1 is a notification duty in respect of new events or developments arising between signing and closing, whereas participation in the Styrenics Buyers' Cartel long pre-dated signing and did not give rise to any new event or development notifiable pursuant to Clause 8.1 (Defence, Paragraphs 74.2 and 75A.1); and

ii) The defendant was not aware that there had been events or developments which could affect the financial or trading prospects of the Business or the Target Group to a material extent and/or could be reasonably expected to impact on achieving implementation of the Completion (Defence, Paragraph 75.3(c)); and

iii) The May-July settlements could not affect the financial or trading prospects of the Business or the Target Group to a material extent or reasonably be expected to impact on achieving implementation of Completion (Defence, paragraph 75A.1)

18. Aside from these points, the defendant relies on what it characterises as being a "*threshold answer*" to the clause 8.1 claim and other notification claims, being an assertion that the Schedule 6 limitations apply to a claim for breach of the notification obligations as they do to a claim for breach of warranty. I turn to this point first.

The Applicability of the Schedule 6 Limitations to the Notification Claims

19. Paragraph 2.1(a) of Schedule 6 provides that the defendant "… *shall not be liable for any Claim…*" unless notice has been given within the time fixed by the clause which is 18 months. "*Claim"* is defined as meaning "… *any Warranty Claim*…" and a "… *Warranty Claim…"* is defined as meaning "…*any claim under the Warranties*…". The word "*Warranties*…" is defined in clause 1 of the SSA as meaning "… *the warranties set out in Schedule 2 and each statement shall be a "Warranty*"".

20. The defendant's case as to the applicability of the Schedule 6 limitations to the claimant's notification claims depends on the true construction of Schedule 6 read in the context of the SSA as a whole. The principles that apply to the construction of a contract governed by English law are now well established. As a matter of general principle, where the parties have used unambiguous language in their agreement, the Court must apply it - see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 *per* Lord Clarke JSC at paragraph 23 – and should not reject the natural meaning of the language used as incorrect simply because it appears to be an imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight - see Arnold v Britton [2015] UKSC 36 [2015] AC 169 *per* Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Ltd [2017] UKSC 24 *per* Lord Hodge JSC at paragraph 11. This is all the more the case where the agreement in issue is a sophisticated, complex agreement drafted by skilled professionals, as is the SSA, because such agreements are likely to be interpreted principally by textual analysis unless the disputed provision lacks clarity or is apparently illogical or incoherent - see Wood v Capita Insurance

Services Ltd ibid *per* Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 *per* Hamblen LJ at paragraphs 39 to 40. Overall, the ultimate question that has to be resolved applying these principles is what a reasonable person, with all the background knowledge that would have been reasonably available to the parties when they entered the contract, would have understood the language used by the parties to mean.

21. In my judgment applying these principles is fatal to the defendant's submission that I am now considering and on its proper construction paragraph 2.1(a) of Schedule 6 applies exclusively to a claim for breach of one of the Warranties as defined. It has no application otherwise. What constitutes "*Warranties*" is defined in the clearest of terms in clause 1 of the SSA. What constitutes a "*Warranty Claim*" is equally clearly defined as meaning any claim under the Warranties and "*Claim"* is defined equally clearly as being a Warranty Claim. All this is unambiguous language appearing in an agreement that is obviously a sophisticated, complex agreement drafted by skilled professionals. There is no basis for concluding that the language used lacks clarity, nor is it illogical or incoherent in any relevant sense. It follows that effect must be given to the language used by the parties by confining the applicability of the Schedule 6 limitations to claims for breach of the Warranties as defined.

22. Although the defendant submits that construing a claim for breach of clause 8.1 as a claim "*under the Warranties*" makes commercial sense, in my judgment that submission is mistaken and must be rejected. Firstly, as I have said such a construction flies in the face of the express language that parties have chosen to use in this bespoke sophisticated agreement. Commercial common sense is material only where there is a possible ambiguity as to what was intended to come within the scope of the provision being interpreted, when it is legitimate to consider which outcome is more consistent with commercial common sense when viewed from the point of view of reasonable people in the position of the parties at the date when the contract was made - see Arnold v Britton ibid *per* Lord Neuberger PSC at paragraph 19. What is said to make commercial sense is irrelevant therefore, because even if right, it would not enable a court to reject the plain meaning of the language the parties have chosen to use. To decide otherwise would be to re-write the parties' agreement, which is not the function of a construction exercise of the sort that arises in this case or generally otherwise than where rectification is sought.

23. This approach of giving effect to the plain words the parties have chosen to use is all the more appropriate where (as here) the clause being considered removes or reduces the rights that would otherwise be available to a party as a matter of general law because parties are not lightly to be taken to have intended to affect the remedies which the law provides for breach of important contractual obligations without using clear words having that effect - see Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689; Seadrill Management Services Ltd v OAO Gazprom [2010] EWCA Civ 691 and Nobahar-Cookson v The Hut Group Ltd [2016] EWCA Civ 128 *per* Briggs LJ as he then was at [18]-[19], where however he acknowledged that "(*c)ommercial parties are entitled to allocate between them the risks of*

something going wrong in their contractual relationship in any way they choose…" I respectfully agree. However, that means that a court must give effect to plain language, where plain language has been used by the parties and all the more so where they have done so in a sophisticated professionally drawn agreement.

24. Secondly, I am unpersuaded that what the defendant contends to make commercial sense is anything other than an attempt to avoid what has turned out from the defendant's perspective to be an inconvenient provision. Thirdly, I do not accept that the provision is incoherent or illogical. The parties have chosen to manage different risks in different ways which is why the Schedule 6 limitations apply only to certain defined claims with different time limits applying to different types of claim that otherwise come within Schedule 6.

25. For those reasons I reject as wrong the defendant's submission that the claimant's notification claims should be treated as subject to the Schedule 6 limitations.

The Remaining Defences to the Clause 8.1 Claim

26. The claimant accepted in its oral opening that the events or developments covered by the clause must be events or developments that arise between the two dates identified in clause 8.1. The clause does not extend to events or developments pre-dating the date of the SSA. That concession was rightly made and follows from the language of the clause which focuses on the occurrence of "*… events or developments…*" which occurred between "*… the date of this agreement until Completion…*". However, the claimant maintains that the defendant was required to notify the claimant of the participation of the EPS Business in the cartel in respect of the SMCP settlements that took place between 6 May and 31 August 2016, it being common ground that there were such settlements and that they gave effect during that period to the cartel described earlier.

27. In relation to the claim as it is now advanced, the defendant advances two arguments, being that the SMCP settlements in June -August 2016 did not fall within the scope of clause 8.1 because:

    i) the settlements were merely the continuation of a routine pre-existing state of affairs that could not be considered an "*…event or development…*"; and

    ii) any event or development was notifiable only if it was one "*… which could affect the financial or trading prospects of the Business or the Target Group to any material extent…*" which the defendant contends the settlements were not, or at any rate have not been proved to be. It will be recalled that the claimant's pleaded case was that this last condition was satisfied either because the events concerned created the risk of a fine being imposed by the Commission and/or follow-on claims by those claiming to be a victim of the cartel. In my judgment on each of these issues the claimant's case is to be preferred for the following reasons.

28. In relation to the first of these points the issue is one that depends upon the true construction of the clause read as a whole in its relevant context with the ultimate question being (as I set out earlier) what a reasonable person with all the background knowledge which would have reasonably been available to the parties when they entered the contract, would have understood the language used by the parties to mean. In arriving at a conclusion on this issue the language in dispute has to be assessed in the light of (i) the natural and ordinary meaning of the provision being construed; (ii) any other relevant provisions of the contract being construed; (iii) the overall purpose of the provision being construed and the contract in which it is contained; (iv) the facts and circumstances known or assumed by the parties at the time the document was executed and (v) commercial common sense - see Arnold v Britton [2015] UKSC 36 [2015] AC 169 *per* Lord Neuberger PSC at [15] and Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2 [2023] 1 WLR 575 *per* Lord Hamblen at [29(1)]. In carrying out this exercise it is necessary to consider the contract as a whole since it may be apparent from such a reading that the parties intended either a narrower or conceivably a wider meaning than the literal meaning of the words used might suggest when read in isolation - see Barclays Bank plc v Unicredit Bank AG [2014] EWCA Civ 302 [2014] 2 All ER (Comm) 115 per Longmore LJ at paragraph 14. I have already drawn attention to the other relevant principles earlier when considering the impact of Schedule 6 on claims other than claims for breach of warranty.

29. As I have said already, the SSA is a sophisticated document plainly drafted by skilled and experienced professionals that was closely negotiated by such professionals acting on each side of the transaction. It is therefore one of those agreements which should be construed primarily by textual analysis unless the disputed provision lacks clarity or is apparently illogical or incoherent applying the principles summarised earlier.

30. Although the focus of attention has been on the part of the clause on which the claimant relies, applying the principles summarised above it is necessary to consider the clause as a whole, its place in the contractual structure adopted by the parties apparent from considering the SSA as a whole and bearing in mind the self-evident contextual point that in the period between the date of the offer letter (or date of the SSA) and Completion, the target company and business remained exclusively under the direct control of the Seller and in consequence knowledge concerning the activities of the targets was exclusively that of the Seller.

31. It is necessary therefore to start by considering the language of the clause as a whole. In its unabridged form the clause provides that:

> "From the date of this agreement until Completion, the Seller shall procure that, within 15 Business Days of the end of each calendar month, a report setting out the management's calculation of EBITDA for the Target Companies and, in relation to the Business, the Swiss Entity for that calendar month is delivered to the Buyer in the form utilised by the Target Group and the Swiss Entity. In addition, the Seller shall promptly notify

> the Buyer in writing, providing reasonable detail, of any events or developments which could affect the financial or trading prospects of the Business or the Target Group to any material extent (other than general industry developments that do not have a disproportionate impact on the Business) or which could reasonably be expected to impact on achieving fulfilment of the Condition or the implementation of Completion."

As will be apparent from the text as a whole, the primary focus of attention is on the need for reports by no later than 15 days after the end of each month between exchange and completion setting out the management's calculation of EBITDA for that month. This suggests that the focus of attention of the clause in relation to EBITDA is on changes and, from the perspective of the claimant, managing the risks posed by adverse changes from the figures applicable at exchange. It is in that context that the clause also requires the defendant to provide notification of "… *any events or developments which could affect the financial or trading prospects*…" of the EPS Business to a material extent.

32. It is improbable that a reasonable party with all the relevant background knowledge available to the parties would have concluded that the second sentence was focussed on anything other than changes from the position as it was (or should have been) known to the parties or warranted by the defendant at exchange. EBITDA was likely to change from month to month whereas many other aspects of the business conducted would not. In my judgment that this is what such a reasonable person would conclude was intended follows also from the word in parentheses which refers to developments that by necessary implication occur after exchange and which the clause requires to be reported if such developments have a disproportionate effect on the EPS Business. Finally, in my judgment the phrase "… *or which could reasonably be expected to impact on achieving fulfilment of the Condition or the implementation of Completion*…" support that approach as well.

33. In relation to competition issues at least, this approach receives further support when the position concerning warranties is considered. By clause 9.1 the defendant warranted to the claimant "… *on the terms of the Warranties as at the date of the Offer Letter and on the terms of the Repeated Warranties as at the date of Completion,* …", which suggests that the focus of attention so far as clause 8.1 is concerned is on events or developments after the date of the Offer Letter (being a letter "… *dated 24 March 2016 pursuant to which the Buyer made an irrevocable and binding offer to acquire the Shares subject to the terms and conditions therein*…") or, where there are to be repeated Warranties, from that date to the date when the relevant warranties are repeated. It follows from this that the claimant had the benefit of a warranty that the EPS Business was not at the date of the Offer Letter and had not "… *at any time been party to or directly or indirectly concerned in any agreement, arrangement, understanding or practice … which… is or was in breach of any competition or similar legislation in any jurisdiction in which the Business is or has been carried on*…"

34. This suggests that the relevant sentence in clause 8.1 was concerned with events or developments occurring after the date of the Offer Letter. This acquires

further support from clause 9.4 of the SSA, by which the claimant was entitled to terminate the SSA "… *at any time prior to completion*…" (subject to satisfaction of other requirements set out in the clause) if any of the Repeated Warranties became "… *untrue or inaccurate at any time from the date of the Offer Letter up to and including Completion*…" As Mr Choo-Choy KC submitted on behalf of the claimant at T8/15/9-14:

> "All of those warranties are only stated, pursuant to clause 9.1 as at the date of the offer letter as warranties, and repeated arranties are only given or repeated as at the date of completion…"

It is that which focusses attention on what clause 8.1 is concerned with, which is adverse events or developments occurring in the period between the date of the offer letter and completion.

35. It is in that context that Mr Choo-Choy's submission that it was irrelevant that the events or developments in question were of a kind which have occurred in the past has to be considered. As he put it, "… *What matters is not novelty in any sense, what matters is whether the events or developments that occur between the date of the SSA and completion are ones that could materially affect the financial or trading prospects of the business or target group*…". He urged me to reject the defendant's submission that the June – August settlements were merely the continuation of a routine pre-existing state of affairs that could not be considered an "…*event or development*…" .

36. I agree. Merely because an event occurring after the date of the offer letter is part of a pattern of undisclosed conduct occurring before that date does not lead to the conclusion that is not an event or development. In my judgment this approach is supported not merely by the contractual context in which the words "… *events or developments…"* are used when read with the SSA as a whole but is apparent too from the fact that the parties have inserted language that restricts the obligation to notify. In a context such as this it is highly improbable that the parties would have intended such an obligation to be subject to an unexpressed qualification of the sort contended for by the defendant. The qualification that parties chose to include were the words "… *which could affect the financial or trading prospects of the Business or the Target Group to any material extent… or which could reasonably be expected to impact on achieving fulfilment of the Condition or the implementation of Completion*". In my judgment Mr Choo-Choy is correct when he submits that if an event could affect the financial or trading prospects of the Business then the fact that similar events had occurred before the date of the agreement (or for that matter the date of the offer letter) is immaterial. For these reasons, I reject the defendant's submission that events or developments similar in kind to those that occurred prior to the offer letter date were intended to be excluded from the scope of clause 8.1.

37. However, the next question that arises is whether either of the express qualifications contained in clause 8.1 were satisfied in the circumstances of this case. On this issue the focus during the trial was on whether participation by the EPS Business in the SMCP settlements in June -August 2016 were events "… *which could affect the financial or trading prospects of the Business or the*

Target Group to any material extent…". The claimant's pleaded case on this point was that this was conduct which would or could expose the companies concerned to a fine from competition authorities of up to 10% of their annual worldwide turnover and to follow-on damages claims from third parties.

38. The first issue that arises concerns what Mr Patton KC characterised as relativity. Mr Patton submits on behalf of the defendant that the relevant comparison for deciding whether the event or events concerned could have any material adverse effect on the financial or trading prospects of the EPS Business is between the prospects in light of the event or development, as compared with the prospects as they were on the date of the Offer Letter.

39. In principle, when viewing this contract as a whole, I consider this point is well made subject to the point that there is or may be a difference between the approach to be adopted in deciding whether there has been a breach of the clause 8.1 notification obligation and the issues that arise concerning causation arising from any established breach by the defendant of the clause. The claimant accepted the risks associated with the way in which the EPS Business had been operated down to the date of the Offer Letter. It did so on the basis of the protection afforded by the Warranties that had been given by the defendant. This is why the focus of clause 8.1 is on the period after the date of the Offer Letter. Thus (at any rate in relation to this dispute) whether there has been a material effect caused by the event or development concerned for the purposes of that clause is to be judged by comparing the position at it was at the date of the Offer Letter assuming the EPS Business was as warranted with the position following the post Offer Letter event. The clause is in other words concerned only with post Offer Letter deterioration. Although Mr Choo-Choy submitted that the defendant was seeking to re-write clause 8.1 by inserting a "*requirement of relativity to the position as at the signing of the SSA…*" I do not agree. This approach is necessary in order to give effect of the construction principles identified already and in order to make the SSA work coherently as a whole and to give effect to how the parties have chosen to apportion risk by their agreement.

40. Mr Patton also submitted that the claimant "… *appears to posit a notification obligation, even though the chance of Completion being implemented remains the same as it was at signing.*" I do not consider that is what the claimant was submitting not least because the impact of the events concerned on Completion was expressed disjunctively from that concerning material adverse effect on the financial or trading prospects of the EPS Business. The obligation to report arose if either the event or events in question could have a material adverse effect on the financial or trading prospects of the EPS Business or if it or they could reasonably be expected to impact on achieving fulfilment of the Condition or the implementation of Completion. It is entirely realistically foreseeable that an event could occur that falls within one but not the other characterisation as well as one that could fall within both. Had the parties intended that the qualifications should apply cumulatively they would have said so. No reasonable party with all the information reasonably available to the parties would conclude otherwise.

41. Mr Patton submits that the claimant has not proved that the SMCP settlements that took place between 6 May and 31 August 2016 could have had any material impact. He submits that pointing to a single case where a substantial fine was imposed by the EU Commission ("Commission") on a cartelist proved to have attended only one information sharing meeting is not a sufficient basis for a finding to this effect and because in any event any fine for pre Completion anti-competitive conduct would fall on the defendant not the claimant. Finally, Mr Patton submits that as a matter of construction, clause 8.1 requires the defendant to have knowledge of the events in question and that applying the common law rules of corporate attribution this has not been proved either. It is necessary that I consider each of these points in turn.

42. In my judgment the first of these points is to be resolved in favour of the claimant. Although the defendant formulates its submission as that the claimant's claim should fail for want of proof, some care is required when considering that point. The issue that arises (whether the SMCP settlements that took place between 6 May and 31 August 2016 could have had any material impact on the financial or trading prospects of the EPS Business) is entirely counter factual. Secondly, the issue that arises is in any event not whether the settlements had such effect but merely whether they could have had such an effect. Allied to this last point is the point that whilst the quantum of any such impact is material to an assessment of whether the claimant could have taken advantage of clause 9.4 of the SSA had they been notified of the SMCP settlements that took place between 6 May and 31 August 2016, it is immaterial to the issues that arise concerning whether clause 8.1 was engaged, where the contractual test is whether the event or events relied on could affect either the financial or trading prospects of the EPS Business "… *to any material extent*…". I construe this as meaning that any adverse effect that is more than *de minimis* will suffice.

43. Whilst the evidence relied on is of necessity inferential given the counter factual nature of the issue that arises, in my judgment, the claimant has more than passed this modest threshold. I reach that conclusion for the following reasons. Firstly, although the defendant submits it is unreal to suppose that the Commission would have imposed a fine in respect of the participation by the managers of the EPS Business in the three SMCP settlements that took place between 6 May and 31 August 2016, in my judgment that misstates the point and is a mistaken analysis of the principles that the Commission applies when quantifying the fines imposed on cartelists. It misstates the point to focus on participation in three meetings because that is not the mischief on which the Commission would have focussed. Rather the Commission's focus would have been on participation in the cartel. Whilst the fines imposed will differ at least in part depending on how long a cartelist participated in the cartel, it is participation that is punished by the imposition of the fine. In that context, the Commission takes a very serious view of any collective anti-competitive conduct that prevents the relevant market from operating as a properly functioning market. In this case the Commission concluded that the cartel had been undertaken with the intention of reducing competitive uncertainty and was "… *by its very nature, among the most harmful restrictions of competition*…". Whilst of course that conclusion was reached by reference to the cartel over the

years that it operated, its approach would be no different in relation to a party who (counter factually) participated for a shorter rather than a longer period.

44. In this regard it is worth noting two conclusions in a report entitled "*Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions*" written by Professor Richard Whish and David Bailey published by the Commission. Although the claimant places significant reliance on the content of the "*Table of Buyer Cartel Cases*" because it summarises the fines imposed by the Commission in buyer cartel cases measured in multiple tens of millions of Euro, that is not the primary importance of the report for present purposes. Rather its importance is to be found in paragraph 4.11, where the authors report that in relation to buyer cartel cases, "… *fines were imposed in every case that we have discovered*…" and that "(*w)e have not found a buyer cartel case in which the competition authority did not impose a fine*." This practice is likely to reflect the view of the Commission that such cartels are "… *among the most harmful restrictions of competition…"*. All this points firmly to the question arising from the events I am now considering being ones the Commission would have treated as active participation albeit for a relatively short period in a cartel the object of which was to prevent the market in styrene monomer from operating as a properly functioning market.

45. The defendant's submissions also proceed on the basis of a misunderstanding of how the Commission approaches the quantification of fines. Whilst the point is best illustrated by reference to the approach of the Commission to the quantification of fines in this case, the point that matters is that the approach it adopted was entirely orthodox. It was an approach that had been adopted for many years prior to the Commission's investigation of the styrene monomer cartel. That report demonstrates that a major component in the setting of fines is the length of time a party had participated in the relevant cartel. With that introduction I turn to the Commission's report, the relevant part of which is Section 8. As recorded at recital (127) "(*i)n fixing the amount of any fine pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard is to be had both to the gravity and to the duration of the infringement*." [Emphasis supplied]. At Recital (129) it added that "(*i)n assessing the fines to be imposed on each undertaking, the Commission will also take account of the respective duration of its participation in the infringement as described in point 24 of the Guidelines on fines*." The starting point for the level of fines was the value of sales during the last full business year of the party's participation. The Commission adopted a range for this metric. In the case of Ineos, it was €170m-220m and for the claimant it was €120m – 140m. In relation to duration, the Commission recorded at recital (145) that:

> "In assessing the fine to be imposed on each undertaking, the Commission will also take into consideration the duration of the infringement, as described in recital (86) and Table 1. The increase for duration (duration multiplier) is determined based on each Party's exact number of days of participation in the infringement, expressed in years."

For Ineos, the duration was 1979 days and for the claimant 668 days. Applying this led to a conclusion concerning the basic level of fine. For illustrative purposes the lowest figure for Ineos was €170m and for the claimant €50m. Applying a 117 day multiplier to these figures results in figures of €10m for Ineos and €8.7m for the claimant. As the claimant accepts in paragraph 141 of its closing submissions, the precise fine imposed on a particular entity in a particular case depends on many factors, such as the gravity of the infringement (including the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement, and/or whether or not the infringement has been implemented) as well as the duration of each undertaking's participation in the infringement. In those circumstances, whilst it would be wrong to proceed on the basis that these figures represent the range of fines that would have been imposed in the counter factual event I am considering, they nonetheless demonstrate that participation in the cartel for the period between 6 May and 31 August 2016 was likely to have resulted in substantial fines that plainly could affect the financial prospects of the EPS Business to a level that was more than *de minimis*, particularly when read together with the conclusions of Professor Richard Whish and David Bailey referred to earlier and the strict view that the Commission adopts in relation to market management cartels.

46. Aside from the factors I have considered so far, there are two other elements that together lead me to conclude that the modest threshold imposed by clause 8.1 has been surpassed by the claimant. Firstly, there was the potential for more than minimal external legal costs (which could affect the financial prospects of the Business to a level that was more than *de minimis* when taken together with the exposure to a fine from the Commission) as well as more than minimal internal management costs being imposed on the EPS Business as a result of even the limited participation relevant to the counter factual I am considering, which could affect the financial or trading prospects of the EPS Business to a level that was more than *de minimis* when taken together with the other factors I have mentioned. The claimant also relies on the possibility of follow-on claims being brought by victims of the cartel. The possibility of such claims being brought cannot be ruled out although I accept the value of any such claims is speculative.

47. Mr Choo-Choy makes one further submission concerning adverse effects that I should comment on albeit briefly. He submits that if the defendant had notified under clause 8.1 the three SMCP settlements that took place between 6 May and 31 August 2016, it was inevitable that this would have revealed that similar conduct had occurred prior to 6 May. He submits that this being so, the potential impact of notification of the May to August cartel on financial or trading prospects could have been greater than the impact in respect of that limited period. I am bound to say that I do not entirely follow that argument but in any event in my judgment it is not one I should take any account of for the reasons set out earlier – the sole focus of attention in relation to whether the obligation to notify under clause 8.1 was triggered is on the effect of the events that are said to be ones that should have been reported.

48. The next point that I have to consider is a submission by the defendant that the possibility of a fine being imposed by the Commission is immaterial because any fine for such conduct prior to Completion would be imposed on the Seller not the Buyer of the EPS Business. This point was concisely made by the defendant in paragraph 417-8 of its closing submissions in these terms:

> "417. Any competent competition lawyer would have advised C that C would have no liability for the Target's involvement in the cartel conduct prior to the acquisition. That is the clear position under EU competition law: a new parent company will not be held liable for the conduct of the subsidiary prior to its acquisition. As Bellamy & Child note: "The new parent will not be held liable for the conduct of the subsidiary prior to its acquisition, even if the new parent could not have been unaware of its involvement in the infringement."
>
> 418. The authority cited for that proposition, Case C-408/12P YKK v Commission [2014] Bus LR 1376, §65 emphasises that this is a well-settled principle of EU competition law:
>
> > "A company cannot be held to be responsible for infringements committed independently by its subsidiaries before the date of their acquisition, since the latter must themselves answer for their unlawful conduct prior to that acquisition, and the company which has acquired them cannot be held to be responsible.""

The short answer to this is that it ignores that the subsidiary is jointly and severally liable with its parent and, therefore, that the entities being sold will have a liability, if fined, that would remain with the entity after it had been sold. Whilst the position may be different where a business as opposed to the shares in a company are being sold, the SSA at least was concerned with the sale of the shares in Ineos Styrenics European Holding BV, which in turn owned the operating companies that participated in the cartel. Thus, whilst the defendant would no doubt retain its joint and several liability with its relevant subsidiaries for cartel activity down to the date of completion of the SSA, the entities being sold that were direct participants would retain their liability on sale.

49. Finally I turn to the defendant's submission that no duty to notify could arise unless it can be shown that the Seller had knowledge of what it is said should have been notified applying the common law rules relating to the attribution of knowledge to companies. In essence the defendant submits that as a matter of construction of clause 8.1, it is obvious the clause is triggered only by knowledge. The defendant submits that even if this is incorrect as a matter of construction, it arises by implication of a term.

50. I do not accept that the defendant is correct in its construction case. As it accepts in paragraph 354 of its closing submissions, what the defendant contends to be the requirement for knowledge "*is not spelt out as clearly in the language of clause 8.1…"*. As I have explained already, the SSA is a sophisticated, complex

agreement drafted by skilled professionals, and as such is likely to be interpreted principally by textual analysis unless the disputed provision lacks clarity or is apparently illogical or incoherent. With such a contract, the mere omission of express words of itself may not be sufficient but the point becomes much stronger where the parties have demonstrated a willingness to use express language where they wished to qualify an obligation by reference to the knowledge available to the party concerned. The parties have shown such a willingness here. It is not necessary to refer to every provision where this is so but by way of example:

i) Clause 3.5 provides that:

> "The Seller undertakes to notify the Buyer in writing of anything which will or may prevent any of the Condition from being satisfied on or before the Long Stop Date or which would entitle the Buyer to terminate this agreement in accordance with clause 9.4 promptly after it comes to its attention." [Emphasis supplied]

ii) Clause 9.5 provides that:

> "If any Warranty is qualified by the expression "so far as the Seller is aware" or "to the best of the knowledge, information and belief of the Seller" or words to such effect, such expression shall mean the actual knowledge of the Seller (including, for the avoidance of doubt, the actual knowledge of the Seller's directors and officers), after making reasonable enquiry of Louise Calviou, Ashley Reed, Juliet Lewis, Andrew Brown and of such other persons within the Business as are relevant to the subject matter of the particular Warranty."; and

iii) Clause 12.2 provides that:

> "The Seller undertakes to disclose promptly to the Buyer in writing any breach, matter, event, condition, circumstance, fact or omission of which any member of the Seller's Group is or becomes aware may give rise to a termination right under this agreement."

51. Of these, clause 9.5 is particularly significant since it shows the degree to which the parties gave consideration not merely to which warranties should be made subject to a knowledge requirement but how attribution was to work. Clause 12.2 is also significant because of the stark contrast it provides when compared and contrasted with clause 8.1 and the specific words relied on by the claimant. In clause 12.2 the obligation was to disclose any of the occurrences there referred to only if and when "… *any member of the Seller's Group is or becomes aware*…" that the occurrence in issue "… *may give rise to a termination right under this agreement*…", whereas the obligation to notify in clause 8.1 is entirely unqualified. Given the care with which the SSA has been negotiated and drafted it is improbable that this omission was anything other than intentional.

52. There are two other aspects of clause 8.1 that suggest that this conclusion is correct. The first is that the words relied on by the claimant appear in a clause where the only other obligation is an obligation to procure the delivery to the Buyer of a report tracking any changes in EBITDA for each month between the date of the SSA and Completion. This suggests that this clause was designed to impose unqualified obligations on the Seller. The other textual factor that supports this analysis is the final sentence of the clause. It contains an express qualification on the requirement to comply with the clause in these terms: "*The obligations in this clause 8.1 shall apply only to the extent that the information concerned can be provided without breaching Applicable Law*." The presence of this provision within the clause shows that the parties considered what qualifications should be imposed on the obligations contained in the clause. Given how this agreement was prepared it is my view highly unlikely that the parties would not have considered a knowledge qualification when considering inclusion of the final sentence. Whilst this point might not be a particularly strong factor viewed in isolation, that is not the point. All the factors I have so far considered need to be considered together and the point that emerges is that they are all consistent with the parties having included an express knowledge qualification where they considered that to be appropriate.

53. The care that the parties took in deciding when a knowledge requirement should be imposed is apparent in particular from the terms of the various warranties contained in Schedule 2 to the SSA. To carry out a comprehensive survey of the whole of Schedule 2 would over extend this judgment. Some examples will suffice. Paragraph 17 (the competition warranty the defendant admits it was in breach of) is wholly unqualified by any requirement for knowledge. By way of contrast, Schedule 2, paragraph 4.10(c) provides that:

> "All Licences are in full force and effect and unconditional or subject only to conditions that have been satisfied. No material expenditure or work is or, so far as the Seller is aware, will be required to comply with, maintain or obtain the renewal of any Licence. There are no grounds known to the Seller for the suspension, cancellation, variation, revocation, termination or non-renewal of any Licence."

It is an example of a Warranty where an express knowledge requirement (to which clause 9.5 of the SSA applies) has been imposed for some but not all of the obligations imposed by the clause. An example of a warranty where all the obligations imposed by the warranty have been qualified by a knowledge requirement is Schedule 2, paragraph 5.4(c) which appears in the same group of warranties as that in paragraph 5.4(a), where the obligation is in part qualified by an express knowledge requirement. All this (in combination with the point made earlier concerning the provision in the main body of the SSA) points very strongly to the SSA being an agreement where obligations that were intended to be qualified (including by imposing a knowledge qualification) were qualified expressly. It supports the proposition that a reasonable person with all the knowledge reasonably available to the parties would conclude that the absence of an express knowledge requirement from clause 8.1 was deliberate.

54. The final textual point that suggests this conclusion is correct involves considering the structure of the SSA as a whole. Contracts such as the SSA are involved at least in part in managing or apportioning the risks attendant upon the transaction being undertaken. In this case the parties have chosen to manage or apportion that risk by a suite of warranties given by the defendant to the claimant which govern the position down to the date of the Offer Letter. That left an obvious lacuna consisting of the period between that date or the date of the SSA and Completion, when the EPS Business would be managed exclusively by or on behalf of the defendant. This information and control asymmetry makes it much more likely that the parties would have intended that the defendant would make it its business to actively conduct the enquiries necessary to enable it to comply with its notification obligation rather than leaving the obligation to notify to such knowledge as the Seller might happen to be treated as having acquired applying the common law principles of attribution. This is all the more likely to be what was intended given that many of the warranties are not qualified by a knowledge requirement including Schedule 2, paragraph 17.

55. This construction exercise helps resolve the defendant's alternative case concerning knowledge, which is that the knowledge requirement is to be implied. Terms are to be implied into a contract only if to do so is necessary in order to give business efficacy to the provision or contract concerned or where what is sought to be implied is so obvious that it goes without saying; and it is only after the process of construing the express words is complete that the necessity question and the allied question whether the terms sought to be implied contradict the express terms of the contract concerned can be answered. – see the judgment of Males LJ in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613

56. The principles that apply to the implication of terms into a contract are those set out comprehensively in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72; [2016] AC 742 and applied in Ali v. Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531. Aside from the point that terms are to be implied only if to do so is necessary in order to give the contract or term concerned business efficacy or the proposed implication is so obvious that it goes without saying, it was made clear in all the judgments in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid) and emphasised by Lord Hughes in Ali v. Petroleum Company of Trinidad and Tobago (ibid) at paragraph 7, that the "… *concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion*." In relation to inconsistency between a suggested implied term and an expressly agreed term, Lord Hughes added:

> "… if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

57. Finally, particular care is required when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties. The reason for this is obvious. Where an issue has been left unresolved, it is much more likely to be the result of choice rather than error. This point was one emphasised in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid) and by Fancourt J in UTB LLC v. Sheffield United Limited [2019] EWHC 2322 (Ch) who at paragraph 206 summarised the applicable principle as being that where " … *detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same)*".

58. Having construed the SSA as having the effect set out above, it necessarily follows that the implication for which the defendant contends must be rejected, applying the principle summarised above. The implication contended for is not necessary either to give clause 8.1 business efficacy or to give effect to what is so obvious that it goes without saying. This is so once it is understood that the effect of the clause is to apportion risk by imposing on the defendant the obligation to notify and to take the steps necessary in order for it to comply with its obligations under the clause.

59. Two points remain. The first is that the defendant contends that the requirement that the Seller shall "*promptly notify*" the Buyer of a relevant event or development implies that the obligation will arise only once it is known to the defendant. I do not agree. Promptness is to be judged by reference to the occurrence of the event not when it first became known to the defendant. This conclusion follows from my conclusion that the parties intended that the defendant would make it its business to conduct the enquiries necessary to enable it to comply with its notification obligation rather than leaving the obligation to notify to the acquisition of knowledge by the Seller. The defendant also submits that the inclusion of the requirement that the notification provide "*reasonable detail*" only makes sense if the obligation is read subject to a requirement that the defendant should first have knowledge of the event. Again, I disagree. This phrase either when read on its own or as part of clause 8.1 read as a whole does not imply a requirement for prior knowledge but is concerned with what has to be notified which in turn reflects on the level of enquiry the defendant was obliged to undertake in order to equip itself to comply with its obligations.

60. Drawing this together, I conclude that the clause imposed on the defendant the obligation to notify the claimant of events or developments that could have a more than *de minimis* adverse effect on the financial or trading prospects of the EPS Business and that participation by the EPS Business in the Styrene Monomer cartel by taking part in the SMCP settlements between 6 May and 31 August 2016 could have such effects. In consequence, I conclude that the defendant was in breach of its obligation to notify the claimant of those occurrences.

Causation

61. The claimant's case is that had it been informed of participation by the EPS Business in the Styrene Monomer cartel by taking part in the SMCP settlements between 6 May and 31 August 2016, it would have terminated the SSA before Completion pursuant to clause 9.4 of the SSA.

62. Clause 9.4(a) in so far as is material for present purposes provides:

> "9.4 The Buyer shall be entitled, by notice in writing to the Seller, to terminate this agreement with immediate effect, subject to, and on the basis set out in clause 12, at any time prior to Completion if:
>
> (a) there are or have been one or more breaches of the Warranties at the date of the Offer Letter and/or any of the Repeated Warranties are or become untrue or inaccurate at any time from the date of the Offer Letter up to and including Completion and/or any one or more breaches by the Seller of its obligations under clause 4.1 and 4.2 or of its obligations under paragraph 4.1(a) of the Offer Letter occur at any time from the date of the Offer Letter up to and including Completion, and, based on those taken together, the Buyer would have, or would be reasonably expected to have, claims under this agreement and/or the Offer Letter which in total would exceed ten million euros (€10 million) if Completion took place …"

The claimant submits and I accept that the effect of this provision is that it had a right to terminate the SSA with immediate effect at any time prior to Completion if: (i) there are or have been one or more breaches of the Warranties and/or one or more breaches of Clause 4.1, and (ii) in light of such breach or breaches, the claimant would have, or would be reasonably expected to have, claims under the SSA exceeding €10 million if Completion took place.

63. The requirement that there had been a breach of warranty is satisfied because the defendant admits breaching Schedule 2, paragraph 17(a) – see paragraphs 8 and 65 of the Defence. Further, the claimant's allegation in paragraph 64.1(c) of the Particulars of Claim that participation in the Styrene Monomer cartel was conduct which would or could expose the companies concerned to a fine from competition authorities of up to 10% of their annual worldwide turnover, as well as to follow-on damages claims from third parties was admitted by the defendant in paragraph 73 of its Defence. In light of these admissions it is not necessary for me to consider further clause 4.1 because on the facts admitted the right to terminate was in principle available to be exercised in the period between the date of the SSA and Completion.

64. The question that remains therefore, is whether the claimant would have terminated had it been notified as I have concluded it should have been pursuant to clause 8.1 of the SSA. This issue engages directly with the evidence of Mr Grodzki and Mr Ciesielski. This is critical for the reasons identified in paragraph 376 of the defendant's closing submissions – the only loss claimed is the difference between the consideration paid under the SSA and the actual

value of what was acquired. A claim on this basis can succeed only if the claimant establishes it would have terminated the SSA had it been notified as required by clause 8.1. If the claimant fails to establish that it would have terminated before completion then the transaction would have proceeded and the loss claimed cannot have been caused by the breach alleged.

65. The Defendant submits that I should conclude that the claimant would have proceeded with the transaction because on receiving the notification, the claimant would have taken legal advice and that advice would have been that the risk of a fine being imposed on the claimant was "*…low or non-existent…"* and that the risk of any third party follow-on claims could be adequately protected against by requiring the defendant to provide appropriate indemnities. The defendant submits that given the other benefits to the claimant of the transaction the management board of the claimant would have recommended that the transaction should proceed and the supervisory board of the claimant would have accepted that recommendation.

66. In support of that submission, the defendant relies on two points. The first is that it reflects what had been pleaded by the claimant until its most recent iteration of the Particulars of Claim, which was for an indemnity in respect of the fine imposed on the claimant; the legal costs and expenses and internal management time and costs incurred by the claimant in relation to the Commission's investigation into the Styrene Monomer cartel. There are significant difficulties about this formulation given that the period identified as relevant to the fine post-dated the date of completion of the SSA, but the point that matters for present purposes is that this formulation pre-supposes that the SSA would be completed. The claimant's pleaded case now is for the difference between the consideration paid under the SSA and the actual value of what was acquired, which is premised exclusively on what is alleged in paragraph 70.1A of the Particulars of Claim namely that under Clause 9.4(a) "… *Synthos SA would have been entitled to terminate the SSA with immediate effect, and would have exercised that right*."

67. The defendant submits that this is a late change which in truth did not reflect reality, as is apparent from the way the claim had been pleaded. The second point made by the defendant is that the claimant would have completed the SSA because on a previous occasion, the claimant had proceeded with the acquisition of a company that had been found, at the time of the acquisition, to have participated in a cartel, on the basis of a contractual risk management mechanism in relation to the Commission fine and possible third party claims. Finally, the defendant maintains that the real decision maker was the management board not the supervisory board of the claimant and that in effect the supervisory board adopted a supine approach to the transaction by providing the required consents as and when they were sought by the management board.

68. The claimant's case starts with a number of contextual points. As is apparent from the terms of clause 8.1, any notification was required to provide "*reasonable detail*" of the event or events being notified. The claimant submits and I accept that of necessity that would have included a description of the relevant events, which would have involved both an explanation of the

information being exchanged and its purpose. This would almost inevitably have required disclosure of the fact that the exchanges were in furtherance of the Styrene Monomer cartel. There would have been no other basis for identifying the events as being ones that could affect the financial or trading prospects of the EPS Business.

69. I also accept that notification of the events between May and the end of August 2016, would have revealed both the existence of the cartel and that it pre-dated the SSA and for that matter the Offer Letter. This would have resulted in further enquiries that would have led to the disclosure that the EPS Business had participated in the cartel for years and therefore that the defendant had breached the warranty in Schedule 2, paragraph 17(a) of the SSA. That is likely to be what would have happened because the claimant maintains and I accept that the combined effect of clauses 16.9 and 16.12 is that the clause 8.1 notification was required to be delivered to Messrs Bartosz Kowalczyk and Zbigniew Lange, who were at the time respectively the claimant's chief legal and chief financial officers. There is no reason to suppose that either would approach participation by the EPS Business in the cartel other than seriously and the exchange of emails between Mr Kowalczyk and Ms Lewis on 7 and 11 July 2016 suggests that was precisely the approach each was adopting in relation to the competition law sensitivities posed by the proposed acquisition of the EPS Business by the claimant given that the entities carrying on the EPS Business and the claimant were competitors. Thus, delivery of the notification to them would have resulted in the further enquiries to which I referred above. Further, the claimant was represented in relation to the transaction by the London office of White & Case LLP. Although it is an inference, I consider it highly probable that if a clause 8.1 notification had been received by Mr Kowalczyk that explained that the senior management of the EPS Business had been actively participating in the Styrene Monomer cartel, that would have been passed by him to White & Case for advice. It is highly probable that this would have resulted in the enquiries to which I referred earlier either directly by White & Case on instructions from the claimant or indirectly by Mr Kowalczyk supported by White & Case.

70. For these reasons, I accept the claimant's submissions and find that on the balance of probabilities, had a clause 8.1 notification been provided as it should have been, that would have led to it being revealed to the claimant that the defendant was in breach of the Schedule 2, paragraph 17(a) warranty. Indeed, none of this seems seriously to be in dispute. What is in dispute is what advice would have been given by Mr Kowalczyk and/or White & Case and what the management and supervisory boards would have done in light of that advice.

71. Answering the question depends upon an evaluation of the arguments of the parties because there is no evidence from either the claimant's chief legal officer or any of its external advisors. I do however have some evidence available to me from Mr Ciesielski, who as I noted earlier is a Polish qualified lawyer who was a member of the claimant's supervisory board between 2005-2011 and September 2015-November 2017 and provided legal and allied services to the claimant in Poland.

72. For the reasons set out earlier, the legal advice that would have been sought by the claimant would have been on the basis that the cartel had been in existence for many years and the EPS Business had actively participated in it for many years prior to the date of the SSA or Offer Letter. It follows from this that any apparently competent advisor would have alerted the claimant to its right to terminate the SSA under clause 9.4 because any such advisor would either have known or could with reasonable diligence have discovered that the Commission treated cartels such as the Styrene Monomer cartel particularly seriously, viewing them as in breach of relevant competition law by reason of their objects rather than their proven effects and that there was no case in which substantial fines had not been imposed on participants. That advice would have been that the fines that could be imposed were up the maximum theoretical level based on turnover and that the amount of fines imposed tended to increase the longer the party concerned had participated in the cartel with attention being drawn to the fact that the EPS Business had been participating in the Styrene Monomer cartel for at least 4 years from May 2012. It is likely therefore that based on past decisions of the Commission the claimant would have been advised that the fines could potentially at least be of tens of millions of Euros. The advice would also have been that fines could be avoided or mitigated by seeking leniency from the Commission but whether and if so to what extent leniency could be obtained would depend on a number of unknown and unknowable factors taken into account by the Commission. Such an advisor would have advised that the availability of leniency and its extent would depend on whether any other participants had reported the existence of the cartel to the Commission and obtained leniency subject to confidentiality while the Commission continued its enquiries.

73. The defendant submits that had the claimant been notified as it should have been under clause 8.1, then steps would have been taken to bring the EPS Business's participation in the cartel to an end. In my judgment that misses the point. First it assumes that the claimant would have been willing to proceed on that basis and secondly it ignores that at least the entity being acquired would have remained liable both for fines and any follow-on claims.

74. It is likely therefore that a competent adviser would have advised that the fines imposed on the corporations forming part of the EPS Business would be substantial but even an approximate estimation could be difficult. It is probable that such advice would have included advice that the Commission would treat corporate parents as jointly and severally liable with the participating subsidiaries applying the principles considered earlier and that whilst parental responsibility could not arise in relation to activities prior to acquisition of the relevant subsidiaries, the subsidiaries would be jointly and severally liable with its former parent for any fines imposed by the Commission.

75. In addition, the apparently competent adviser would also have warned that the participant in a cartel that was the subject of a formal investigation and Commission decision could be exposed to a follow-on claim for damages in which the claimant would be entitled to rely on the findings of the Commission to prove liability and would be required to prove only causation and loss. Such an adviser would also have pointed out that it was impossible to quantify the

amount that might become payable by way of damages having regard to the complexity of such enquires – as to which see Granville Technology Group Ltd and others v. Chunghwa Picture tubes Ltd and others [2024] EWHC 13 (Comm) *passim* – but the sums involved could be substantial and would involve potentially each styrene supplier of the EPS Business.

76. The apparently competent adviser would conclude by advising that (a) the potential impact of fines would have to be taken into account as a contingent liability when valuing what was being purchased, (b) by removing itself from the cartel the EPS Business would or might suffer a significant reduction in profitability given the objects of the cartel were to maintain or enhance the margin on which the profitability of its participating businesses depended; (c) the EPS Business (or its buyer) would be exposed to substantial legal costs and loss of managerial time in relation to any Commission investigation; (d) there may be reputational issues which could damage the profitability of the buyer and (e) given the very serious breach of the Schedule 2, paragraph 17(a) warranty, at least consideration would have to be given as to whether and if so what other warranties may have been breached.

77. In relation to the profitability issue, some care is required. As I have said, the Commission proceeded on the basis that the cartel violated competition law by reason of its objects rather than its effects. Whilst the material provided by Ineos in its 2015 information memorandum suggests a modest improvement in average EPS margins over Styrene Monomer contract prices during the currency of the cartel, that of itself says nothing about the effectiveness of the cartel in achieving its objects. That requires a complex exercise usually conducted using multiple regression analysis in order to eliminate market movements due to factors other than the activities of the relevant cartel – see Granville Technology Group Ltd and others v. Chunghwa Picture Tubes Ltd and others [2024] EWHC 13 (Comm) at [64] to [84]. However that does not matter for present purposes. A competent adviser would have noted the length of time that the cartel had remained in operation and the constancy of its members and would have advised that it was improbable that the participants would have continued with it for as long as they had unless they perceived there to be a clear commercial benefit and that this required a reappraisal of the transaction given the price had been calculated on the basis of gross earnings (EBITDA) and a multiplier.

78. The defendant maintains that the advice it is likely the claimant or Seller would have received would have been that the risk posed by a fine being imposed on the participating entities carrying on the EPS Business and the possibility of third party claims could be adequately protected against by securing appropriate indemnities from the defendant. This submission fails to engage with the wider issues summarised above including the possible need to re-consider the price, the fundamental uncertainties that surround each of the issues identified above including in particular the likely amount of the fine and the ability of the EPS Business to eliminate or mitigate any fine by recourse to leniency arrangements. Given the relatively low sale price (€80m odd) it is highly unlikely that the Seller would be willing to offer an unqualified indemnity even for the fines much less the other financial consequences. By the same token it is improbable

that the claimant would have been prepared to take any risk in relation to these issues given the potential amounts involved and the uncertainty involved in attempting to quantifying them. Additionally the SSA does not permit a renegotiation of the price payable under the SSA, much less for the inclusion of additional indemnities.

79. Once a notification under clause 8.1 had been given, there was a time limited opportunity to terminate the SSA if the obligation to complete was to be avoided. This is because clause 9.4 expressly provides that the right to terminate is a right to terminate "*… at any time prior to Completion…"*. This suggests that if a price was to be renegotiated then absent agreement varying the terms of the SSA concerning Completion, there would have to be a termination followed by a renegotiation unless agreement could be reached very quickly. It has never been suggested much less proved by the defendant that it would have conceded indemnities that would have satisfied the claimant's demands. There is no evidence available that supports the proposition that the price paid under the SSA and the actual value of what was acquired was the same. If that was to be alleged by the defendant it would have been for the defendant to prove it – see paragraph 12(i) above, McGregor on Damages, 22nd Ed., at 52-065 and Gruber v AIG Management France SA [2019] EWHC 1676 (Comm) *per* Andrew Baker J at [21]. The defendant has not attempted to prove such an allegation. That being so, I cannot sensibly conclude that the claimant would have been willing to proceed on the terms of the SSA having been notified as it should have been under clause 8.1.

80. That brings me back to the pleading point made by the defendant summarised earlier being that until a relatively late stage in the proceedings the claimant's case had been that it was entitled to a financial remedy in the form of an indemnity in respect of the fine imposed on the claimant; the legal costs and expenses and internal management time and costs incurred by the claimant in relation to the Commission's investigation into the Styrene Monomer cartel. It will be recalled that the defendant argues that this was inconsistent with the causation and loss claim now advanced because it presupposed that the SSA would have been completed and that I should reject as after the event reconstruction the suggestion that the claimant would have terminated the SSA had it been provided with a clause 8.1 notification in proper form and containing the information required.

81. I reject that argument on the basis that it does not counterbalance the points made above when taken together, but in any event it should be rejected because it does not refer to the whole of the claimant's originally pleaded case. True it is that having pleaded that the claimant could have required the defendant to provide the various indemnities summarised above (see the originally pleaded paragraph 70.3) it then concluded at paragraph 70.4 by pleading that "(*h)ad Ineos Industries refused to agree to provide such indemnities, Synthos SA would have terminated the SSA in accordance with Clause 9.4 and would not have completed the Transaction*…" As I have explained there was a time limited opportunity provided by clause 9.4 in which to seek and be provided with the indemnities sought and it had never been suggested by the defendant that it would have provided the indemnities referred to by the claimant in its original

pleading (or at all). In my judgment therefore, this pleading point does not assist the defendant.

82. It is now necessary to consider the oral evidence adduced on behalf of the claimant before reaching a final conclusion on the issue I am now considering. This evidence was subjected to severe criticism but in my judgment it survived this challenge. The defendant submitted that both witnesses were unsatisfactory for various reasons. Mr Grodzki was said to have been a defensive witness who refused to accept even uncontroversial propositions when put to him and that in any event his evidence revealed his limited recollection of the transaction, reflecting the limited role he played in it. Mr Ciesielski was said to be an advocate rather than a witness for the defendant in a way that was incompatible with Mr Ciesielski's role as a factual witness. In my judgment much of this criticism can be explained by a natural desire on the part of the witnesses to distance themselves from what had happened, from English not being either witness' first language and from them not being members of the management board of the defendant that had every day conduct of the acquisition of the EPS Business. It is for that reason that I prefer to resolve the issues that arise applying the principles identified at the start of this judgment.

83. Since the issue I am now considering depends on what would have happened in a counter factual situation, that means inevitably that the focus must be on the inferences to be drawn from the admitted and incontrovertible facts and inherent probabilities. When considering what would have happened in a counter factual world, what even decision makers say they would have done is of limited value and what those at one remove from the decision makers say is likely to have happened is of even more limited value. That is why the defendant's submission that because no one from the management board has given evidence "… *that leaves a gaping evidential void in C's evidence on whether it would have terminated, had notification occurred prior to Completion*…" is significantly over stated. It is also undermined by the point made by Mr Choo-Choy as to the case the claimant was expected to meet. The defendant's pleaded case on the issue I am now considering was that it was to be inferred that if the claimant had learned about the EPS Business's participation in the cartel that would not have made a difference to the claimant's decision to proceed with Completion because such participation would not have detracted from the claimant's original rationale for the acquisition. That did not require the claimant to adduce evidence as to how it might have proceeded had indemnities been offered, which engages a series of quite complex commercial issues concerning the scope and terms of the indemnities offered and the credit risk they would pose. There is a plain difference between a case that the claimant would have proceeded because of the commercial benefits of the transaction and a case that the claimant would have proceeded because indemnities could have been negotiated.

84. That said, I accept that the supervisory board is likely to have acted on the recommendations of the management board but the question that arises is what recommendation the management board would have made in the counter factual world I am considering. Given the nature of what has been pleaded and arguments deployed at the trial, the issue is one that can be resolved primarily

by reference to the admitted and incontrovertible facts and inherent probabilities.

85. There is no real doubt that the management board favoured the acquisition. In March 2016, the management board sent to the supervisory board a report entitled "*Ineos EPS Business Acquisition Opportunity*". In section 7 of that report, the management board set out the "*Strategic rationale and key risks of acquisition*". The document is detailed and technical in nature but in broad summary the acquisition was supported on the basis that it would reduce fixed and variable costs by improving the bargaining position of the claimant and taking advantage of the consolidation opportunities that the acquisition offered. Reliance was placed in particular on revenue / price growth, Styrene Monomer purchase savings, other variables savings in both sites' operation and logistics and a possible increase in the price that could be charged for the output products as a result of the market consolidation that the acquisition would facilitate. All this is an entirely conventional justification for a strategic acquisition. Given the conclusions expressed in the report, it is apparent why the management board would wish to proceed with the acquisition. Following an approval in principle at that stage, there was no further interaction between the management and supervisory boards until 17 August 2016, when approval to complete the transaction was sought and given. The defendant submits that in these circumstances, it was the members of the management board that were most able to provide evidence as to what would have happened in the counter factual event I am now considering and that "… *there appears to have been a deliberate decision by C not to call witnesses from the Management Board who could have been examined on the question of what Synthos would have done*."

86. I agree with the defendant's submission that the critical question is how the management board would have reacted to a clause 8.1 notification. Although the defendant focusses on the benefits the acquisition offered for the claimant as set out in the March 2016 document referred to above, I do not consider that helps on the issue that arises. What that document establishes is that the acquisition was commercially attractive to the claimant for the reasons there set out. However, I do not accept that these advantages would have led the management board to conclude that the claimant should proceed with the transaction in light of the unquantifiable risks and uncertainties identified by a properly formulated clause 8.1 notification, particularly given the time limited opportunity available to renegotiate the SSA.

87. In any event it is inherently improbable that the management board would have proceeded without notifying the supervisory board of the receipt of the clause 8.1 notification and the consequential information which I have concluded would have emerged very quickly following its receipt. The defendant accepts that "… *if it were assumed that the Management Board would have been specifically informed that the practices in question were anti-competitive, the likely reaction of the Management Board would have been to consider C's options and seek legal advice*…" I agree subject to my further conclusion that this would have been the outcome if the management board had been informed either that the practices either were or might have been anti-competitive. Had such advice been sought then the advice received would have included that set

out in summary earlier. It is that which would have triggered the management board to refer the information received as a result of the notification and the advice received as a result to the supervisory board and for the reasons developed above to the probable termination of the SSA.

88. Although the defendant submits that it would have been open to the parties to "… *provide appropriate indemnities*…" that misses the point. There is no evidential basis for concluding that the defendant would have provided an unqualified indemnity – indeed, the defendant expressly concedes that "… *the precise terms of the indemnity and how it was set up, that would no doubt have been a matter for negotiation*…" It is inherently improbable that the defendant would have agreed to provide unqualified indemnities given the selling price was €80m and there is no evidential or inherent probability basis for concluding that the claimant would accept less than full protection. The conceded need to negotiate the terms of the indemnities that the defendant maintains would have been forthcoming takes no account of the limited time available for that exercise and it takes no account either of the credit risk posed by the offer of indemnities. This last point was one made expressly by Mr Grodzki in the course of his cross examination. The answer offered by the defendant in its closing submissions was "… *C would have had no concern about the financial position of D as a part of the wider INEOS Group*…" The short and obvious answer to that is that the claimant's contractual counterparty was not "… *the wider INEOS Group…"*. Whilst I do not suggest this would necessarily have proved an insuperable difficulty, it would have required time and would have required a negotiation with the "… *the wider INEOS Group…"* or the ultimate Group holding company in order to secure either a third party or acceptable parent company guarantee or indemnity.

89. Finally, I must mention the claimant's involvement in the earlier and unconnected transaction concerning the acquisition by the claimant of Kaučuk SA ("Kaučuk") in 2007. The point made by the defendant is that Kaučuk had been fined by the Commission in November 2006, for participating in a cartel with other producers of synthetic rubber before the claimant purchased it in January 2007. The fine was annulled in 2011 but the defendant submits that the claimant was clearly content to proceed with the acquisition of Kaučuk notwithstanding that the Commission had publicly found Kaučuk to have engaged in anti-competitive conduct. Deciding whether that point has any merit involves a satellite investigation into the merits of that transaction. That of itself suggests there is limited assistance to be derived from a point of this sort. Two points matter for present purposes. Firstly, the transaction was materially different from the claimant's acquisition of the EPS Business and secondly it proceeded in the face of knowledge as to the exposure of Kaučuk to a quantified fine. This latter factor led to an agreed split as between the vendor and purchaser of the fine with an adjustment mechanism that applied to the price to reflect both changes in the fine as a result on an appeal process and the incidence of third party claims. The defendant also argues that the Kaučuk transaction shows that acquiring a business that has historically committed anti-competitive conduct causes no reputational risk for the acquirer who is innocent of involvement and that it shows that an appropriate indemnity is a commercially sensible way of neutralising the risk posed by a fine or third party claims.

90. I reject the suggestion that what happened in the Kaučuk transaction should lead me to conclude that the claimant's causation case should fail because indemnities would have provided an answer. Aside from the point that the defendant had not pleaded its case on the basis that indemnities were available, even now it has not made any concession as to what if any indemnities would have been offered, over what duration, by reference to what events and by whom. The Kaučuk transaction was materially different to the present one because in that case exposure of the target company to a fine by the Commission was known to all parties and taken into account whereas in this case on the hypothetical I am considering the EPS Business's participation in the cartel was concealed, it was in breach of a warranty that could only have become apparent by a clause 8.1 disclosure made after the SSA has become binding and in circumstances where there was an obligation on the claimant to complete the SSA unless it was terminated in accordance with clause 9.4.

91. Aside from that, the point made above concerning the likely size of the fine as against the value of the transaction is the opposite of the position with the Kaučuk transaction, where the value of the transaction was circa €195m and the value of the fine was (a) known and (b) was known to be €7.55m. The claimant's 50% share of that was therefore €3.8m or about 4.5% of the value of the transaction. In terms of the economic and financial risk profile of the transactions, they could not have been more different. As noted already with this transaction the likely fine was unknown but was likely to be measured in tens of millions of Euros for the reasons set out above.

92. The other point relevant to the financial risk profile posed by the transactions concerns price. The cartel relevant to the Kaučuk transaction had come to an end at the end of November 2002 and the sale took effect four years later in January 2007. Thus the sale and the price were negotiated with full knowledge of the historic involvement of the target in the cartel and its trading free of the effect of the cartel could be examined over the roughly 4 years between the end of its involvement in the cartel and the date of the sale agreement concerning the sale of the target. As explained above the opposite is the position that applied when the sale of the EPS Business was being negotiated. Not merely was its involvement in the Styrene Monomer cartel concealed but the EPS Business was an active participant in that cartel for four years prior to the SSA. Thus not only was that business exposed to an unquantifiable fine likely to be measured in tens of millions of Euros, but it was also exposed to the possibility of unquantifiable follow-on claims for the whole of that period. In addition, gross earnings (the base metric used to calculate the purchase price of the EPS Business) depended on a margin that was or was intended to be maintained or enhanced by its (concealed) participation in the Styrene Monomer cartel.

93. The factors I have so far considered lead me to conclude that what happened in Kaučuk transaction provides no useful insight into what would have happened if hypothetically, the defendant had notified the claimant as it should have done of its participation in the Styrene Monomer cartel.

94. I have not so far considered the impact of the transaction on the reputational damage point. I do not consider the entry of the claimant into the Kaučuk

transaction is material to that issue either. There is a substantial difference between entering into a contract to acquire an entity where its participation in a cartel was known and ceased 4 years before it was purchased and acquiring an entity where the vendor had not revealed its historic or continuing participation in a cartel. Even if this is wrong, and the correct inference to be drawn from the Kaučuk transaction is that the claimant would have been unconcerned by the reputational risks posed by the EPS Business's participation in the Styrene Monomer cartel, it would be immaterial to the points I have made concerning the financial, economic and trading risks posed by that participation and by it being concealed until the hypothetical notification.

95. Bringing these points together, I reject the suggestion made on behalf of the defendant that the claimant would have proceeded with the transaction in the form set out in the SSA even if notified under clause 8.1 of the post contract events it should have been informed about. I do not accept as likely that satisfactory indemnities would have been offered by the defendant not least because no evidence has been offered by the defendant to that effect and I do not accept that they could have been negotiated without terminating the SSA given the time limited opportunity for termination that was available.

96. I am satisfied on the balance of probabilities that on learning that the EPS Business had participated in the Styrene Monomer cartel for some 4 years prior to the date of the SSA in breach of at least the warranty contained in Schedule 2, paragraph 17.1 of the SSA (as I have concluded would have become apparent very quickly after receipt of a clause 8.1 notification in the terms that was required contractually), the claimant would have terminated the agreement under clause 9.4. It would have done so at least because of the resulting manifest uncertainties concerning price, the amount of any fine and the number and value of any third party claims that might be made against the entity being sold.

97. I conclude therefore that the causation issues that arise should be resolved in favour of the claimant.

98. Having tested the issue in the manner described above, I conclude that I should accept Mr Grodzki's oral evidence in the course of his cross examination that "*If I knew before August 2016 that such things happened, it's possible we wouldn't meet today because I would vote against this transaction. So simple*…" and Mr Ciesielski's evidence that:

> " I confirm this is a hypothetical situation that I'm referring to, and that's because nobody in Synthos, not me, not the supervisory board as a whole, was told about the cartel. So it's a hypothetical situation. We can only consider it as such. … My position would be not to get involved in a transaction with such a burden."

The warranty Claim

99. Given the conclusions I have reached so far, it is not necessary strictly for me to resolve the issues that arise on the breach of warranty claims. However, it was argued in full, took up much of the time spent on oral evidence and may be

relevant if I am wrong to conclude that a notification obligation arose under clause 8.1. For those reasons I set out below my conclusions in respect of the issues that arise.

100. The claimant alleged breach of three warranties being those set out respectively in Schedule 2, paragraphs 11.1(a), 11.3(a) and 17. The most directly relevant (that in paragraph 17) is one that the defendant has admitted being in breach of whilst denying that is liable for any such breach by reason of the contractual limitation provision imposed by paragraph 2.1(a) in Schedule 6 to the SSA, which requires notice of a claim to be given on or before the date falling 18 months from Completion. The defendant disputes liability under each of the paragraph 11 warranties and in any event relied on the contractual time limit in respect of those claims as well.

101. The claimant submits that the defendant is in principle liable under all three of the warranties it relies on and in relation to the defendant's reliance of the contractual time bar, it maintains that it is entitled to rely on the exception set out in clause 9.6(b) of the SSA because in each case the fact, matter or circumstance giving rise to the warranty claims arises as a result of fraud on the part of the Seller. There is a dispute between the parties as to the true meaning and effect of clause 9.5.

102. Thus the issues that arise are

i) whether as a matter of construction and in the events that have happened, the defendant is in breach of either of the paragraph 11 warranties; and

ii) whether the claimant is entitled to rely on clause 9.6(b) in relation to either:

a) the paragraph 11 warranties; and/or

b) the paragraph 17 warranty that the defendant has admittedly breached.

The reason the claimant maintains its claims under the paragraph 11 warranties is because the attribution of knowledge test that applies to those warranties (being that set out in clause 9.5 of the SSA) is different from that which applies to the paragraph 17 warranty and one that it is more likely to succeed on. If the claimant succeeds on either of the paragraph 11 warranties, it will not be necessary to consider further the paragraph 17 warranty claim.

The paragraph 11 Warranties

103. Paragraph 11.1(a) provides (in so far as is material) that:

> " … the Target is not involved in any legal or administrative or arbitration proceedings …, no such proceedings are pending or threatened and, so far as the Seller is aware, there are no circumstances likely to give rise to any such proceedings."

It is not in dispute that administrative proceedings by the Commission in respect of the activities of the cartel would be and were "*... legal or administrative…. proceedings"*. Since it is not alleged that the EPS Business was involved in any such proceedings or had been threatened with such proceedings at any material date, the sole question is whether at the applicable date, so far as the Seller was aware, there were no circumstances likely to give rise to any such proceedings. Paragraph 11.3 provides (in so far as is material) that:

> "No governmental or other official investigation or inquiry concerning the Target is in progress or, so far as the Seller is aware, pending, and, so far as the Seller is aware, there are no circumstances likely to give rise to any such investigation or inquiry."

Again there is no dispute that an investigation into the cartel by the Commission would be and was "… *a governmental or other official investigation or inquiry concerning*…" the EPS Business. It is not alleged that the Commission's investigation was in progress or pending at any material time so again the sole question that arises is whether at the applicable date, so far as the Seller was aware, there were no circumstances likely to give rise to such an investigation.

104. The defendant submits that what is required in each case was for the defendant to have been aware not merely of the factual circumstances that are relevant but also that those circumstances are likely to give rise to the proceedings or investigation. The claimant maintains that this is wrong and that it is necessary for the claimant to demonstrate only knowledge of the circumstances and to do so using the relevant attribution of knowledge routes. Thus the difference between the parties is the familiar one of whether what is required is merely knowledge of the facts and matters which found the relevant conclusion or knowledge both of the facts and matters and that conclusion. In support of its contention, the defendant relies on the principles of construction set out earlier in this judgment and maintains that applying those principles, a reasonable person with all the knowledge reasonably available to the parties at the time they entered onto the SSA would conclude that the parties intended that before a claim could be made for breach of either warranty, the claimant would have to prove not only that the defendant was aware of the underlying circumstances, but also of the likelihood that those circumstances will give rise to the investigation, enquiry or proceedings in issue.

105. In support of its construction case, the claimant invites me to apply the construction adopted by O'Farrell J in Triumph Controls UK Ltd v Primus International Holding Co [2019] EWHC 565 (TCC) at [322], where she concluded that the obligation to notify pursuant to a clause in similar but not identical terms to the paragraph 11 provisions I am concerned with arose only if the circumstances it is alleged should have been but were not notified were such that a reasonable person in the position of warrantor would recognise them as matters that might give rise to a claim or proceedings.

106. In my judgment some care is required in relation to such a submission. The principles applicable to construction are those summarised earlier in this

judgment. In each case, the textual, commercial and factual context will differ to the extent that a conclusion as to the intention of the parties to be derived from the language they have used may differ even though the language used is to a lesser or greater extent similar to that used in other contexts and for that reason adopting constructions concerning similar but not identical language used in different commercial contexts is an inappropriate approach to a contested construction exercise. Each contract must be construed afresh applying the principles summarised earlier save where the term is a standard term used in a standard and widely used contract form.

107. Applying those general principles, as I have already concluded when construing other parts of the SSA, it is a sophisticated, complex agreement drafted by skilled professionals, which for that reason should be construed principally by textual analysis unless the disputed provision lacks clarity or is apparently illogical or incoherent.

108. In my judgment the language used is neither incoherent or illogical. The language used by the parties is textually clear. The phrase "…*so far as the Seller is aware*…" qualifies both the existence of the relevant circumstances and the requirement that those circumstances are "… *likely to give rise to any such investigation or inquiry*." Such an approach is not illogical but on the contrary is logical because it is difficult to see how logically a person could be held to be in breach of a warranty that so far as the warrantor is aware there were no circumstances likely to give rise to any relevant investigation, enquiry or proceedings unless the warrantor was aware both of the relevant circumstances and that those circumstances were likely to give rise to the investigation, enquiry or proceedings in issue.

109. It is arguable that this construction deprives the warranties of some of their intended effect and on that basis that it should be rejected as contrary to commercial common sense. This argument depends on the purpose of the warranties being to protect the claimant from the consequences of its ignorance as to matters it considered material to the decision to purchase and/or the price at which to purchase the EPS Business. The claimant argues that it is unlikely that a reasonable person with all the relevant background knowledge would conclude that the parties intended the warranties I am now considering not to be breached where the relevant circumstances were known to the warrantor but (subjectively but genuinely) the warrantor was not aware that those circumstances were likely to give rise to an investigation enquiry or proceedings, when a reasonable person in the position of the warrantor would have known or believed the circumstances were likely to give rise to an investigation enquiry or proceedings. On this basis it is submitted I should reach the same conclusion concerning construction as that adopted by O'Farrell J in Triumph Controls UK Ltd v Primus International Holding Co (ibid).

110. In my judgment that argument fails given the language used by the parties. Whilst I accept that warranties of this sort are a means by which the parties to a contract such as this can manage the risk posed for a buyer by a seller having, or having the means of acquiring, all relevant knowledge, that merely begs the question as to how the parties have chosen to manage that risk. That is to be

ascertained in this case at least by reference to the language the parties have used. Had the parties wished to impose on the defendant the obligation of disclosing circumstances likely to give rise to an investigation enquiry or proceedings without reference to the seller's awareness then they could easily have stated that requirement expressly. Likewise if they wished the requirement for subjective awareness to apply only to the circumstances and not to whether those circumstances were likely to give rise to proceedings, investigation or inquiry, they could easily have provided for that expressly. They chose not to do so. The language the parties have used clearly shows they intended that the awareness required was of both the relevant circumstances and that those circumstances are likely to give rise to proceedings, investigation or inquiry. To decide the parties intended otherwise by reference to supposed commercial common sense would be heterodox because it would involve rejecting the natural meaning of the language used by the parties (reflecting as I have said the logic of the situation) as incorrect simply because in hindsight it appears to have been an imprudent term for the claimant to have agreed. What now appears to the claimant to be commercial common sense, would not necessarily have appeared so to the defendant or perhaps either of the parties at the time when the contract was entered into.

111. It is no doubt for these reasons that Mr Choo Choy correctly recognised that this was not his best point (T8/73/10) and it is for these reasons that I accept Mr Patton's submission that the awareness that must be established by the claimant is awareness of both the relevant circumstances and that those circumstances are likely to give rise to proceedings, investigation or inquiry. That said, where the relevant individuals whose knowledge is to be treated as that of the Seller know or believe that their conduct is or likely to be contrary to competition law, it can be readily inferred that they knew not merely of the circumstances that are relevant but also that they were likely to give rise to proceedings or to an official investigation or enquiry.

112. It is now necessary to consider the defendant's awareness of (i) the relevant circumstances and (ii) that those circumstances are likely to give rise to proceedings, investigation or inquiry. As to the first of these requirements there is no dispute. In paragraphs 62 and 63.2 of its defence, the defendant admitted that it "… *was aware, within the meaning of Clause 9.5, of the way in which the SMCP process was being managed by the SM buyers acting on behalf of [the EPS Business] (the "INEOS SM buyers") and therefore was aware of the conduct constituting the Styrenics Buyers' Cartel so far as it concerned INEOS companies*…" and that it "… *ought reasonably to have been aware that the conduct constituting the Styrenics Buyers' Cartel so far as it concerned INEOS companies was likely to give rise to legal, administrative or arbitration proceedings involving [the EPS Business] and/or governmental or other official investigations and/or inquiries concerning INEOS Styrenics Services BV and/or INEOS Styrenics Switzerland*."

113. The issue that remains is whether the Seller had knowledge or awareness, within the meaning of clause 9.5, of the likelihood that such participation in the Cartel was likely to lead or give rise to proceedings, or an investigation or inquiry – see paragraph 63A of the Defence. Subject to the matters of construction and

law considered below, that is an issue of fact which I address at the end of this section of the judgment.

The Scope and Effect of Clause 9.5 of the SSA

114. As set out earlier in this judgment, in so far as is material for present purposes, clause 9.5 provides that *"If any Warranty is qualified by the expression "so far as the Seller is aware"… such expression shall mean the actual knowledge of the Seller (including, for the avoidance of doubt, the actual knowledge of the Seller's directors and officers), after making reasonable enquiry of Louise Calviou, Ashley Reed, Juliet Lewis, Andrew Brown and of such other persons within the Business as are relevant to the subject matter of the particular Warranty."*

115. It is common ground that the test this clause imposes is objective in that it is concerned with what actual knowledge would have been acquired by the Seller (acting by its directors and officers) had reasonable enquires been made of (a) the named individuals and (b) those in the "*within the Business*" class of individuals, with what would have been revealed had such enquiries been undertaken being treated as within the actual knowledge attributable to the defendant irrespective of whether those enquires had in fact been made. If and to the extent there is a dispute about that, I conclude that to be the correct construction of the clause applying the principles summarised earlier.

116. There are two issues of principle that I have to resolve before turning to the evidence. The first concerns who of the witnesses come within the scope of the phrase "… *other persons within the Business as are relevant to the subject matter of the particular Warranty…"* and the second concerns whether the actual knowledge to be attributed to the Seller for these purposes means the knowledge to be obtained by aggregating the knowledge of all those coming within the scope of clause 9.5.

117. It is common ground that four individuals had relevant knowledge of the Seller's participation in the cartel namely Ms Calviou, Mr Ingram, Mr Housecroft and Ms Aebischer. The defendant does not accept that Mr Dossett had such knowledge. It is common ground now that Ms Lewis would have known that such conduct was a probable breach of competition law. There is a dispute as to whether either Mr Ingram or Mr Dossett are "… *persons within the Business as are relevant to the subject matter of the particular Warranty…*"

Mr Ingram and Mr Dossett

118. Turning to Mr Ingram first, he is expressly named in Schedule 1 as a director of the Target and its subsidiaries but he is not a named individual in clause 9.5. The point made by the defendant is that he had ceased to be the COO in December 2015 and therefore should not be regarded as being someone "… *within the Business…"* either at the date of the Offer Letter or the date when the SSA was entered into by the parties. I reject this argument. Firstly, although the defendant submits that this follows from Mr Ingram not being named in clause 9.5, that simply does not follow. That would only have been so if the phrase "… *within the Business…"* had not appeared in the clause. It does not

follow either from the fact that Ms Calviou and Mr Brown are mentioned by name, because it is common ground that Mr Ingram was at all material times a statutory director of the Target (Ineos Styrenics European Holding BV) and its various subsidiaries so the question remains whether as a matter of construction a statutory director of the Target was within the business of the "*Target Group*", meaning Ineos Styrenics European Holding BV and its subsidiaries. I do not see how sensibly a statutory director could not be within the business carried on by the company of which he is a statutory director, at any rate for the purposes of clause 9.5.

119. Clause 9.5 is concerned with what constitutes the actual knowledge of the Seller. The clause deems the Seller to have knowledge that could have been obtained by reasonable enquiry of all the named individuals and all those in the Business. Whilst there might be an argument to be had as to whether a statutory director not in fact involved in the conduct of the Business was one of its commanding minds, that is not the issue that arises here. The only question is whether such a director is a person who is "*within the Business*". That phrase is one of wide scope and intentionally so. In my judgment all statutory directors would fulfil this requirement. The only remaining question is then what information would have been forthcoming "… *after making reasonable enquiry…*" of the statutory directors. If the answer is no relevant information would have been forthcoming whether because the statutory director was not in fact involved on a day to day basis with the management of the Target's business or otherwise, then that is the end of the exercise. If on the other hand relevant information would have become available, had reasonable enquiries been made of Mr Ingram then that is to be treated as being within or part of the "… *actual knowledge of the Seller*."

120. Turning now to Mr Dossett, Mr Patton submits that he does not satisfy the contractual test because he was not a person who was "… *within the Business…*" of Ineos Styrenics European Holding BV and its various subsidiaries because he was not a statutory director or employee of any of them at any material time. That is Mr Dossett's evidence and does not appear to be in dispute.

121. Mr Dossett was the business director of Ineos Enterprises. Ineos Enterprises appears to have been an unincorporated umbrella organisation that provided central services including procurement to approximately 8 smaller businesses within the Ineos organisation. Mr Dossett maintains that the work undertaken by Enterprises in respect of the EPS Business was small in amount because it was largely managed internally by its COOs. In my judgment this is all beside the point. The phrase "… *within the Business…*" is widely cast as I have said and is one that is capable of covering both those who were directors or employees of the Target or its subsidiaries or other employees within Ineos who carried out functions for it. That Mr Dossett was employed by Enterprises not the Target or its subsidiaries is not to the point. If in his capacity as an employee of the Ineos Group he carried out functions for them he was capable of being "… *within the Business…*". That phrase was in my view intended to capture all those within the Ineos organisation concerned with the Target's business either as directors or employees of the Target and its subsidiaries or as employees within the wider group providing supervision or services to the Target and/or

its subsidiaries. Given the structure within Ineos where some of a subsidiary company's activities are carried on by directors or employees of that entity and some by individuals employed by other group entities, no more restrictive interpretation could make sense contextually. In my judgment Mr Dossett fulfils this definition because he was a member of the board within Ineos to whom Ms Calviou reported. His actual involvement in the affairs of the Target is illustrated by his role in settling a dispute with a supplier called Helm AG, which appears to have been settled on terms that Ms Calviou considered ill-advised.

The Composite Knowledge Issue

122. The defendant's case is that clause 9.5 requires at least one of the individuals identified in clause 9.5 to have knowledge of both the relevant circumstances and that they are likely to give rise to proceedings, or an investigation or inquiry, whereas the claimant maintains that the clause treats the actual knowledge of the Seller as comprising the knowledge that it would acquire assuming it made reasonable enquiry of all the designated individuals in relation to the subject matter of the relevant warranty with the result that the Seller is treated contractually as having the aggregate actual knowledge of the individuals identified therein as part of the actual knowledge it otherwise has applying the conventional attribution principles. In my judgment the claimant's construction is to be preferred for the following reasons.

123. Firstly, what the clause is concerned with is all the information that the Seller could have acquired had it made "… *reasonable enquiry of Louise Calviou, Ashley Reed, Juliet Lewis, Andrew Brown and of such other persons within the Business…"* The use of the word "*and*" emphasises that the clause is concerned with the cumulative actual knowledge that could have been acquired by the Seller (or its directors as the controlling minds of the Seller) had it made reasonable enquiries of all of the individuals identified by name or as falling within the class of those within the Business.

124. Secondly, the enquiry is not as to what each individual knew but what the "… *the actual knowledge of the Seller…"* would have been had it carried out enquires of all the relevant individuals. By definition, the actual knowledge the Seller is deemed to have had is a composite of knowledge that could have been obtained by reasonable enquiry from each relevant individual. This approach is consistent with the purpose of the clause, which is to identify what the Seller's actual knowledge is deemed to be as a matter of contract for the purpose of complying with the knowledge based warranties to which clause 9.5 applies.

125. Given the purpose of clause 9.5, there is also no justification in distinguishing between factual, commercial or legal knowledge. A reasonable enquiry by a main board director of a company may start with a factual enquiry followed by an enquiry to an in house legal adviser (Ms Juliet Lewis in this context) as to the legal ramifications of the factual information obtained from one or more of the other named sources. Indeed, it is difficult to see what would have been the purpose of including Ms Lewis in the list if legal information was not to be included, given her role.

126. Since the information available from Ms Lewis was likely to be predominantly legal and the information from the others likely to be, or be predominantly, factual or commercial, it is difficult to see what sense the clause could make if the information reasonably obtainable by the claimant from the individuals is not to be treated as aggregated in the hands of (or mind of those who control) the Seller. Finally given the terms of the paragraph 11 warranties which must be regarded as being in the minds of those negotiating the SSA when they agreed the terms of clause 9.5, the intention must have been to aggregate the knowledge to be obtained from the individuals given that those warranties were concerned with knowledge both of the relevant circumstances and that those circumstances are likely to give rise to proceedings, investigation or inquiry. The first element is predominantly factual whereas the second element involves applying the relevant legal principles to the relevant circumstances, which is no doubt why the parties included Ms Lewis in the list of named individuals. It is unreal to suppose that in the context of a high value complex commercial arrangement of the sort governed by the SSA, anyone could have thought that all the actual knowledge relevant to any identified knowledge based warranty could be in the possession of one person.

127. Once the board of the Seller had the factual information that could have been supplied by Mr Housecroft as to his participation in the SMCP Settlement process and from Ms Lewis as to the lawfulness of those practices, the powers of the Commission to initiate enquiries and affected third parties to bring claims, the Seller's directors and officers would have had all the knowledge necessary for them to be aware of circumstances likely to give rise to an investigation, inquiry or proceedings.

128. The defendant's answer to this is that the paragraph 11 warranties in combination with clause 9.5 proceed on the basis that the question deemed to have been asked of each individual is whether they knew of circumstances likely to give rise to proceedings or an investigation. If the answer is negative (as it would probably be unless the aggregation point is resolved in favour of the claimant) then the Seller will not be aware of the falsity of the warranty. In my judgment that approach is not one that a reasonable person with all the relevant knowledge available to the parties at the time they entered into the SSA could have thought had been intended.

129. No such person could have thought that in a substantial and complex business all the relevant information would have been available to one person for all the information based warranties that were to be given or that deeming the Seller only to have asked an ultimate question of this sort could provide any sufficient protection for the claimant given that it was bound to rely on the warranties as protection in respect of what was unknown and unknowable to it.

130. The defendant maintains that such an exercise would in practice be impractical given the volumes of work that would have to be undertaken. As to this point, it is one I should reject because it ignores the point that the issue that arises concerns the construction of the SSA – an agreement that was closely negotiated by the parties. What warranties were to be given and with what qualifications was a matter for the parties to negotiate and agree at the date when they entered

into the SSA. What the parties intended is to be judged by the language used read in the commercial context of the function to be performed by the warranties. It is not appropriate to maintain that the construction to be adopted after the event is to be determined by how burdensome the obligations were or had become simply because that begs the question of what the parties intended to be ascertained applying the principles referred to earlier.

131. The defendant submits that the approach to aggregation of knowledge is one that should be rejected applying the principles to be derived from Armstrong v Strain [1952] 1 KB 232 and Stanford International Bank Ltd (In Liquidation) v HSBC Bank Plc [2021] EWCA Civ 535; [2021] 1 WLR 3507. In my judgment this is mistaken. Nothing in the authorities relied on by the defendant impacts on the effect of a contractually agreed mechanism for attributing knowledge to the defendant in respect of warranties qualified by reference to the defendant's awareness. Any dispute as to the scope and effect of what has been agreed is one for construction of the contract applying the principles set out earlier – see by way of example Jafari-Fini V. Skillglass Ltd & Ors [2007] EWCA Civ 261 at [97]. The authorities on which the defendant places reliance are not concerned with that at all.

132. To be clear therefore I reject the defendant's contention that the paragraph 11 warranties would be breached only if one (or more) of the named individuals knew both what the factual circumstances were and whether that factual position is likely to give rise to proceedings. To adopt such an approach would largely defeat the carefully formulated structure of clause 9.5.

The Effect of Clause 9.6(b) of the SSA

133. None of the Schedule 6 limitations that would otherwise apply to a claim for breach of the paragraph 11 warranties (or for that matter the paragraph 17 warranty either) apply "… *where the fact, matter or circumstance giving rise to the claim arises as a result of fraud on the part of the Seller*".

134. There are two issues of construction between the parties being:

i) Whether (as the defendant contends) clause 9.6(b) requires that the underlying cartel conduct should have involved fraud on the part of the Seller or whether (as the claimant contends) it requires only that the warranties should have been given and repeated fraudulently; and

ii) Whether, in determining if there had been fraud on the part of the Seller, account should be taken of clause 9.5 for the purpose of ascertaining the knowledge of the Seller as is contended by the claimant or whether no account should be taken of it as is contended by the defendant.

Each of these issues involves a dispute as to construction, which is to be resolved applying the principles summarised earlier. For the reasons given earlier, these issues are not to be resolved by reference to judgments in other cases concerning contractual language that is different from that used in the contract to be interpreted and/or used in a different contractual and commercial context. That being so, I do not accept that the construction issue that arises is

one I should consider determined by Arani v Cordic Group Ltd [2023] EWHC 95 (Comm). The construction adopted in that case turned on the language used (which was different from that used in the SSA) and appears to have been based on a concession – see paragraph 65 of the Judgment. This last point was conceded by Mr Choo Choy in his closing submissions – see T8/106/8-11.

135. In construing the clause applying the principles summarised earlier, it is necessary to read the clause as a whole. As a whole, the clause disapplies the Schedule 6 qualifications in respect of "… *any claim for breach of the Warranties where the fact, matter or circumstance giving rise to the claim arises as a result of fraud on the part of the Seller*." The phrase "*… the claim…"* refers back and can only have been intended to refer back to "… *any claim for breach of the Warranties…"*. Thus the clause is to be understood as a matter of textual analysis as meaning "… *any claim for breach of the Warranties where the fact, matter or circumstance giving rise to the claim for breach of the Warranties arises as a result of fraud on the part of the Seller*." Approached in this way, the question whether the claim for breach of the paragraph 11 warranties relied on by the claimant is one to which clause 9.6(b) applies is to be determined by asking whether a claim based on an allegation that there were circumstances that were known to the Seller as likely to give rise to an investigation or inquiry or proceedings is a claim that "… *arises as a result of fraud on the part of the Seller…"*

136. In my judgment for present purposes it matters not whether the actual knowledge of the Seller is knowledge that it is deemed to have had by operation of clause 9.5 of the SSA or acquired using the common law principles of attribution, because the effect of the parties' agreement concerning attribution is that the Seller is deemed to have actual knowledge of what it could have gained actual knowledge of by making reasonable enquiry of the individuals or classes of individuals referred to in the clause.

137. In my judgment if (as here) a party warrants that there are no relevant circumstances known to it when in fact it either knew there were such circumstances; or warranted that there were no such circumstances without belief in the truth of that warranty or was reckless, not caring whether what it warranted was true or false, then on a proper construction of clause 9.6(b) such a warranty would be given fraudulently. Fraud is not a necessary ingredient of a claim for breach of warranty but it may be where, as here, the allegation of breach depends on the warrantor having the knowledge that it has warranted it did not have. The focus of attention where breach of a warranty concerning knowledge of the warrantor is alleged is whether a warranty that the warrantor lacked knowledge of something was true or not. That provides a principled basis for displacing a contractual (or for that matter a statutory) limitation period. The exception to the applicability of the Schedule 6 exceptions will apply therefore only where fraud is a necessary ingredient of the allegations being made. That is satisfied in the circumstances of this case because to succeed the claimant must prove that the Seller had actual knowledge contrary to its representation that it did not have that knowledge.

138. I turn then to the second construction issue that arises in relation to clause 9.6(b) being whether in determining if there had been fraud on the part of the Seller for the purposes of clause 9.6(b), account is to be taken of clause 9.5 for the purpose of ascertaining the knowledge of the Seller.

139. Since the question whether the claim arises as a result of fraud depends on the actual knowledge (including the deemed actual knowledge) of the Seller, it necessarily follows that the question is to be determined by applying clause 9.5. Clause 9.5 enables the actual knowledge of the Seller to be ascertained. If the actual knowledge of the claimant so ascertained was that it knew there were circumstances that were likely to give rise to an investigation or inquiry or proceedings when it was warranting that there were not, then the claim available to the claimant is one that arises as a result of fraud on the part of the Seller.

140. Whilst the defendant is correct to submit that clause 9.5 does not purport to address proof of fraud within the meaning of clause 9.6(b), that is because it does not have to. What is fraudulent for present purposes is a claim that depends on fraud as it is understood at common law. A claim that in breach of warranty a warrantor actually knew of circumstances that may give rise to proceedings or an inquiry or investigation, when he had warranted that he did not is a claim based on an allegation of fraud that depends on the application of clause 9.5. If a claimant is able to prove such a claim then it comes within the scope of clause 9.6(b).

141. As the claimant submits, the question of what is known to the Seller is the key component when deciding the fraud issue because the fraud issue that arises is whether the Seller gave the warranties with actual knowledge that they were false, or without belief in their truth, or recklessly not caring whether they were true or false. For the purpose of clause 9.6(b) the question that arises is whether any particular warranty was given with actual knowledge that they were false, or without belief in their truth, or recklessly not caring whether they were true or false. In each case that will depend on the knowledge that the defendant is to be treated in law or by agreement of the parties as having. In relation to the paragraph 11 warranties this last mentioned question depends on clause 9.5. Although the defendant maintains that this results in different treatment of a breach of the paragraph 17 warranty that does not assist because the parties have agreed that clause 9.5 should apply to the paragraph 11 warranties but not the paragraph 17 warranty.

The Deemed Actual Knowledge of the Defendant at the Date of the Offer Letter

142. The individuals whose knowledge matters for present purposes are Mr Ingram, Mr Housecroft, Ms Aebischer, Mr Dossett and Ms Lewis. Of these, Mr Housecroft was the person mainly involved in the day to day negotiation of the SMCP settlements each month. I conclude that the knowledge of each concerning the cartel and its lawfulness was knowledge that the Seller could have obtained by making reasonable enquiry of each of them and that such knowledge (if obtained) would have been actual knowledge on the part of the defendant (as Seller) that there were circumstances known to it that were likely

to give rise to proceedings or an inquiry or investigation. My reasons for reaching that conclusion are set out below.

143. It is convenient to start with Ms Lewis's evidence. Ms Lewis is a solicitor who candidly accepted that had Mr Housecroft told her that buyers were discussing price proposals as part of the SMCP process, she would have appreciated that this was collusive and unlawful. This evidence was not in dispute. Although it was alleged at one point that Ms Lewis personally acted recklessly in relation to the giving of the warranties, this was abandoned. It is important however that I should record that this allegation was made but was withdrawn shortly after it was made and in the end it was not suggested that she was aware of the cartel prior to Completion. She is entitled therefore to an unqualified rejection of those allegations as not merely unproven but in the end not even persisted with. She is entitled to an apology from the claimant as well since in the circumstances the allegations were ones that should not have been made. As she put it in her statement and I accept:

> "… If Simon had told me that Styrenics and other buyers were discussing price proposals as part of the styrene monomer purchase process, I … would have appreciated at the time that such conduct was collusive and unlawful. … "

I accept this evidence because legally it is entirely orthodox, is obvious and is knowledge that I would expect any apparently competent solicitor practising in the mergers and acquisitions sector to know. As I have explained earlier, none of this was new. It reflected the consistent position of the Commission for many years prior to the relevant date. In fact as I explain below, at least some of the other clause 9.5 individuals knew that this was at least a possibility as well.

144. Turning next to Ms Calviou's evidence, both parties accept that her evidence is evidence I should accept – see the claimant's closing submission at [79] and the defendant's closing submissions at [149] although each emphasises different parts of her evidence. That said, as the defendant accepts, Ms Calviou's evidence was that she understood how competition law worked in relation to purchaser pricing information. As she put it in the course of her cross examination:

> "Q. So in other words, as I understand your evidence, although you have said in writing that you never really thought about it, there was absolutely no doubt in your mind that the competition law restrictions against the exchange of commercially sensitive information would apply equally to buyers talking to each other about what pricing strategy they would employ, for example, in negotiations with sellers?
>
> A. That is correct, yes.
>
> Q. Right. You understood that was not allowed?
>
> A. I did understand that, yes."

As she also said:

> "Q. And obviously "sensitive procurement information" would obviously include information about procurement prices, ie prices of raw materials, yes?
>
> A. So anything that's obviously not in the public domain would be sensitive, so anything that was a commercial term, or the price you were paying for something, or how the price was constructed, absolutely.
>
> Q. Or, in a negotiation context, what your intended strategy would be as to pricing?
>
> A. Absolutely. With any other competitor, absolutely, no, you wouldn't have that discussion."

The defendant submitted that it did not follow from this that she was aware that illegal conduct was afoot. Given my conclusions in relation to what constitutes the actual knowledge of the defendant, whether Ms Calviou appreciated that illegal conduct was afoot is not to the point.

145. I am however doubtful about her evidence that she did not appreciate how the SMCP Settlement was being conducted and that it constituted collusive conduct. She was the Chief Operating Officer of the EPS Business from December 2015 to August 2016. A, and perhaps the, critical part of that business from a commercial perspective was maintaining and enhancing the margin between the cost of Syrene Monomer on the one hand and the sale price of EPS on the other.

146. There is a significant amount of email traffic passing between Ms Calviou and Mr Housecroft and others on this topic. I find it difficult to accept that she could have only the selective knowledge of how this process was managed that was claimed. The oral evidence above was inconsistent with the attempt she made in her witness statement to distance herself from what she accepted reflected her knowledge – see paragraph 31, where she implied that the law against sharing information applied only downstream with other producers of EPS and paragraph 32 where she stated:

> "In my role at Styrenics, I never really thought about whether the sharing of information between buyers of the same raw material in a procurement context was anti-competitive. This had not been a high-risk area in any of my previous roles as I had spent more of my career selling rather than buying commodities. In previous roles, I had had interactions with other competing sellers where you needed to be very careful, so I was particularly attentive to anti-competitive behaviour on the seller side. In addition, while I received company-wide competition law training from internal and/or external lawyers, I cannot recall receiving competition law training specifically on the rules for procurement.

In my judgment this statement was essentially diversionary and I conclude that paragraph 27 of her statement should be viewed in a similar light. There she said of her knowledge of Mr Housecroft's activities that:

> "Simon would often ask for our views before he started negotiations for that month. When seeking advice he would often pass on information to us about cost structure, supply and demand and general market sentiment, including information about shortages, crude oil prices, spot price trades, plant outages, exchange rate movements and SM feedstock prices and how they might affect costs for the production of EPS. I assumed Simon got his information from speaking with Styrenics' suppliers, SM traders, INEOS Styrolution and market commentators. By "SM traders", I mean those who bought and sold styrene purely to make a margin, without manufacturing raw materials or downstream products (such as EPS)."

147. This is to be contrasted with admissions made by the defendant prior to the trial in its Further Information that:

> "It is admitted that, in the course of her role as COO of INEOS Styrenics, Ms Calviou acquired knowledge of some of the conduct constituting the Styrenics Buyers' Cartel so far as it concerned INEOS companies. If required, the nature and extent of Ms Calviou's knowledge will be a matter for evidence in due course."

This is consistent with the defendant's Defence, where at paragraph 62C it is pleaded that:

> "As to paragraph 55.1, as regards Ms Louise Calviou: it is admitted that in the course of her role as the Chief Operating Officer of INEOS Styrenics (between December 2015 and August 2016), Ms Calviou acquired knowledge of some of the conduct constituting the Styrenics Buyers' Cartel so far as it concerned INEOS companies."

By the time of the defendant's written opening submissions it:

> "… accepted that Ms Calviou, Mr Ingram, and Ms Aebischer each acquired knowledge of some of the buyers' conduct in the SMCP process. It is also accepted that Mr Housecroft, given his role, was aware of the conduct."

148. This pleaded position is consistent with the email traffic that was placed in evidence. It would be wrong to overburden this judgment with too many examples and I accept (a) that some years have passed since the time in which they were exchanged, (b) Ms Calviou's recollection of them and what she might have thought about the contents at the time is likely to have dimmed with the passing of the years, and (c) looking at some emails in isolation from what is likely to have been a significant volume of internal email traffic in the ordinary

course of business may create an unrealistically stark impression, but nonetheless the mail traffic is significant when read with her concession in the oral evidence quoted above that there was absolutely no doubt in her mind that the competition law restrictions against the exchange of commercially sensitive information applied equally to buyers talking to each other and was not permitted. Given what was admitted by the defendant, that it was consistent with the emails to which I refer below and Ms Calviou's admission that such conduct was not permitted, I infer that in those circumstances she knew there were circumstances likely to give rise to proceedings or an inquiry or investigation.

149. Turning to the email traffic, a particular exchange is contained in emails between Ms Calviou and Mr Housecroft on 22 August 2016 in relation to the September SMCP Settlement discussion. Mr Housecroft conducted the negotiations at all material times on behalf of Ineos. His reporting line was to Ms Calviou amongst others. In his email to Ms Calviou he said:

> "The next settlement will (subject to EU clearance) be done under Synthos.
>
> For planning purposes and under strict confidentiality, can I have a brief discussion with ICIS regarding the reporting on day 1?
>
> In addition, and not uncommon with other main buyers, can I have a discussion with Tomasz about expected levels. (I know we can't discuss reasons why we want certain levels but, I believe we can discuss open market data, spot levels and Styrene European supply demand balances)
>
> CP settlement will be the first public activity under Synthos so I would like to get it right." [Emphasis supplied]

Ms Calviou's response was:

> "I don't think you can have any discussions with Tomasz yet, apart from flag that you will require delegated authority on day 1 to be able to negotiate SMCP
>
> Re ICIS I think you can discuss hypothetically what will be the changes in September if the deal has been cleared and completes by the end of August"

As is apparent from the first paragraph Ms Calviou recognised that the proposed discussions were not permitted because until the SSA was signed, the Buyer and Seller were competitors. In other words, Ms Calviou recognised that the communications proposed by Mr Housecroft were not permitted between competitors. Ms Calviou accepted in cross examination that the email disclosed conversations with the other main buyers (that is the EPS Business's competitors) but suggested initially that it concerned open market data. When it was pointed out to her that the email referred to discussions concerning "*expected levels"* – that is the expected SMCP levels – and "… *Styrene European supply demand balances…*" – that is the volumes available and

required – she acknowledged that the email said that "*... when I read it carefully…"*. In my judgment this was diversionary. This led to this exchange:

> "Q. And you see, what I suggest is puzzling about your reaction in this particular instance is that you're so assiduous in your response and your absolute firmness there has to be no discussion with Synthos as a buyer. But there he's telling you that, well, it's not uncommon for me to have discussions about the levels of the SMCP with other main buyers, and there's just no reaction at all on your behalf. That --
>
> A. That's -- I -- and I agree. I look at it and I think: why -- why I didn't see it?
>
> Q. But isn't an explanation for that, Ms Calviou, an explanation for why you had no adverse reaction to it, or not even a question, is because you knew perfectly well that that was what happened? But -- that --
>
> A. It's an explanation, but it's not the truth.
>
> Q. That would explain -- you -- you treated existing practices of the procurement department, including buyer discussions, as being a necessary part of the process by which Styrenics would seek to influence the SMCP level, didn't you?
>
> A. No, I didn't."

Ultimately she said of this exchange of emails that whilst she was clear about the restrictions that applied, it was correct for counsel to describe her approach as being apparently blind to the exchanges that happened between Ineos and other buyers. When it was put to her that "*It's very hard to explain isn't it"*, her reply was *"(i)t is, and I -- I'm not arguing with you*." Returning to the Further Information referred to above, she accepted in light of the emails to which she was taken "*… that I can see from those emails that you've shown me that it was clear that I had been copied in on the fact that there was communication with buyers, so I can see that therefore it is true*." In relation to the Further Information and the part of the Defence set out earlier there then followed this exchange:

> "Q. … But you recognise that the admission is consistent with the documents that we've been looking at during your cross-examination, and that was your explanation for why perhaps the admission was made; is that fair?
>
> A. That's fair, yes."

150. It follows that even if I am wrong in how I have resolved the aggregation issue, reasonable enquiries made of Ms Calviou would have revealed that she was aware of circumstances likely to give rise to proceedings or an inquiry or investigation into communications between the EPS Business acting by Mr

Housecroft and other buyers that were not permitted as a matter of competition law. This follows from the email communications, the admission and her concession in cross examination.

151. Turning next to Mr Dossett, I consider that Mr Dossett was a witness who sought to distance himself as much as possible from the events relevant to this dispute. Thus, notwithstanding his role, he denied even knowing that the EPS Business was one of the biggest consumers of Styrene in Europe at the time – see T5/62 *passim*. He denied knowing that the settlement level was achieved each month when two independent pairs of buyers and sellers reported a deal at the same price to the price reporting agency – see T5/64/1-4. His written evidence was that "… *I was not aware of exactly how SMCP settlement negotiations worked or how an SMCP emerged each month*.". His evidence at [28] of his statement was:

> "I was not aware that Styrenics was participating in SMCP settlement negotiations, whether regularly, occasionally or ever and did not pick up on this from communications with members of the Styrenics team. I do not recall the names of the organisations that participated in the monthly contract price settlement process, nor do I recall ever knowing. I did know, however, that another INEOS business outside of the Enterprises portfolio, INEOS Styrolution ("Styrolution"), was a seller of styrene monomer (both on the spot market and under contracts) and had participated in the SMCP settlement process at some point."

152. In the course of his cross examination, Mr Dossett was taken to an exchange of emails initiated by Ms Aebischer, whose email was captioned "*March CP"* and was addressed to Ms Calviou and copied to Mr Dossett. In it she said:

> "would like to have a chat with you. The cost gap with back integrated producers (feedstock costs down by 35 ¬ /t (expected) is more than 150 ¬ /t. And we have still 3 barges to buy on the now very expensive spot market.
>
> I will explain my proposal on price positioning, the impact on volume and margin of different scenario and would like to agree with you before communicating to the team."

This followed an earlier email attached in which Ms Aebischer (also with the caption "*March CP"*) had reported that:

> "Last night numbers were talked at +115 ¬ /t to 120 ¬ /t.
>
> The +50 ¬ /t is over. We will most probably have a 3 digits increase.
>
> We discuss during the day on our target increase and our walk away position."

Mr Dossett responded by joining three people to the email chain including Mr Housecroft and stating:

> "Crude up this morning and Asian Styrene surging. We need to be careful regarding cash here. Buying expensive styrene after overselling PS in Feb not too good for cash. Would like to see what cash forecast is like over March and April with these latest developments to help guide pricing notes."

153. Ms Aebischer's signature block in the emails described her as being "*EPS Business Manager, INEOS Styrenics"*. Notwithstanding this and Mr Dossett's role, he sought to distance himself from Ms Aebischer and her communications by denying knowing she had any role other than that she was "*involved in sales"*. This was an attempt to divert away from the subject matter of the emails or the importance he would attach to them. It is an attempt I reject.

154. Mr Dossett gave some highly defensive evidence concerning the subject matter of the emails even though it is clear that it expressly referred to the March SMCP Settlement negotiations. He then sought to explain his response in terms of the effect that increased costs in relation to styrene would have on the rest of the business for the purpose of distancing himself from the specifics contained in Ms Aebischer's email.

155. The key point was however that when it was put to him that the effect of the email from Ms Aebischer was that there had been a discussion the night before between at least some buyers as to the likely March settlement price, that it was very high and that therefore there needed to be a discussion during the day on what Styrenics' revised target SMCP should be and what its walk away position would be in the negotiations, Mr Dossett's response was "*…she's directing this email to her sales team …"* and then that she was referencing a need to increase the sales of products. That was not what this exchange of emails was about and this evidence was an attempt to divert attention from its true subject matter – which is the March CP Settlement discussion.

156. The reason why Mr Dossett was keen to divert attention away from the email was because it was referring to an inter-purchaser discussion – see T5/74/11-16. Although he suggested that "… *I'm not aware of the running, the day-to-day, month-to-month running and pricing strategy of the Styrenics business*…" I reject that. It is inherently improbable given his role and is inconsistent with him having added Mr Housecroft to the list of persons to whom the email chain was to be sent. Symptomatic of Mr Dossett's approach was his description of Ms Calviou as "… *Louise Calviou, who was, as I understand it was COO of Styrenics*…" Again it is inherently improbable given his role that Mr Dossett did not know who Ms Calviou was and her role. This was an attempt to distance himself from the detail that did him no credit and which I reject.

157. He gave a series of inconsistent explanations about the contents of the email. In his statement he implied that he may not have read the initial email from Ms Aebischer which refers to "*Last night numbers were talked at +115 ¬ /t to 120 ¬ /t*". I reject that evidence. Whilst it is possible that Mr Dossett may not have

read the chain of emails as not relevant to him or his role, in fact he read this chain because he responded to what is set out in the emails below his in some detail. It is inherently improbable that he would have responded without reading each of the very short emails in the chain before composing his response. He then says that if he had read the bottom email he would have assumed it was a reference to spot settlements or information from price reporting agencies. When it was pointed out to him in the course of his cross examination that the subject matter was clear from the caption reference to "*March CP*", not spot settlements, his response was to say "*…it could have been, I don't know…"* followed in the next sentence by saying that the "*…reason why I refer to spot settlements is that spot settlements influence the outcome of the styrene contract price*." This again was an attempt to divert attention from what was obvious – he was copied into the email from Ms Aebischer because he was involved in the SMCP process because of its impact on the success of the business and because he understood the mechanism used for arriving at the monthly settlements. That is why he added in Mr Housecroft to the email chain when he responded. He certainly did not express shock or surprise at the content of the email nor did he suggest that he spoke to anyone suggesting that the discussions referred to in the mail were improper or should not take place. This silence is consistent with knowing that such discussions had been taking place for years and were regarded as part of doing business in this particular market.

158. In the end he accepted that Ms Aebischer was addressing the March CP but maintained that "… *where she got the number from I don't know*…" I reject that evidence. I do so not merely for the reasons set out above but also because it is inconsistent with a number of other email exchanges. There were a series of emails exchanged between Mr Housecroft and Ms Aebischer on 1 April, which were then copied by Mr Housecroft to Ms Calviou. She then copied them to Mr Dossett "*FYI*". That suggests very strongly to me that Ms Calviou believed that the meaning and effect of what was in the emails initiated by Mr Housecroft would be self-evident to Mr Dossett.

159. In cross examination it was put to Mr Dossett that the effect of the emails was that Mr Housecroft was pointing out that two pairs of independent buyers and sellers had settled at the same level. He was not happy with that level and had not himself settled at that level, but under the SMCP process, the EPS Business had to follow at that level, which Mr Dossett accepted was its effect – see T5/83/1. In my judgment that acceptance is consistent with Mr Dossett being far more familiar with the true nature of the process than he was willing to admit in his earlier evidence referred to above. In my judgment his evidence that he did not recall receiving the email is not to the point. I am sceptical whether that was so, once his attention had been drawn to it, but that is not the point: the point is that he fully understood what Mr Housecroft was saying in his email. When it was put to him that he would have understood that the EPS Business was participating actively in the CP Settlement negotiations being discussed in the email, his response was that:

> "I wasn't aware that Styrenics, as we've discussed earlier, actively participated in the monthly contract price discussions. Now, it may well be that I didn't get into the detail of his email.

> It may well be that I mean, the most important thing for the SMCP for the business is the actual level of the – of the settlement. But for me, as a board member of Enterprises, costs go up, prices go up, prices go down. Who settles it/what the actual level of the settlement is is kind of not the most relevant thing. So, yes, looking at that email, if I'd looked at that email in that detail, I may have inferred, if I'd read it in detail, that there was a role that Styrenics played in the settlement of the process. But what I am saying is that I wasn't -- perhaps I should have been aware, but I wasn't aware that they played an active role at this time."

All this is beside the point. In fact, Mr Dossett knew full well the mechanism for arriving at the monthly CP settlement and that it was actively negotiated by Mr Housecroft on behalf of the EPS Business. His answers were consistent only in his desire to distance himself from what I consider it probable he knew was taking place. His attempts to distance himself from this activity suggests that he knew or believed or chose to ignore whether such activity was a breach of competition law.

160. The ultimate outcome of these discussions was reported by Ms Calviou to Mr Reed with copy to Mr Dossett by email dated 1 April. In so far as is material for present purposes it read:

> "Spot styrene prices have increased by ¬ 80/te during March and April SMCP has increased by ¬ 95/te following the ¬ 100/te increase in March. Sunpor and Trinseo settled with Shell and BASF as we did not agree that the fundamentals supported a rise above ¬ 80/te, but the back integrated players had a different agenda to us and were talking ¬ 110 - 120/te."

When asked in cross examination if he would have understood the first part of the second sentence to be saying Sunpor and Trinseo had settled with Shell and BASF for an increase of €95 per tonne, Mr Dossett's response was that "(*r)eading it now, that's absolutely clear*…" but "(*w)hat I'm questioning is whether I read this weekly report in any detail to form a view of whether they were participating in the contract price or not*." By now the way in which Mr Dossett chose to respond in relation to documents that he considered damaging will be clear – it was to distance himself from the documents concerned, to attempt to confine what was said in the document to the narrowest possible literal construction of the words used and to suggest that he may not have read them at the time or that his role was such that he was not involved in the day to day conduct of the process. This led him to say that:

> "So to answer your question do I read every report from every Enterprises business every week or every month, the answer is, I have to admit, no. But would I be aware of important things that matter to the board of Enterprises for each of these businesses, the answer is yes, but that doesn't include the detail in this email."

This is evidence that I reject. It may be that some reports would be read more quickly than others but he could not be aware of what he calls "*important things*" without first reading the reports sent to him in order to decide what is and isn't important. There is similar evidence over pages of transcript that it is not necessary for me to reproduce.

161. On 28 September 2017, Sir Jim Ratcliffe caused an email to be sent to all CEOs within the Ineos Group following the emergence of an investigation by the Commission into another cartel in an unrelated area of its business in which he sought information concerning any potential breach, in which he asked:

> "To CEOs.
>
> We all know that price collusion is illegal and this has been clearly communicated for a long time through our organisation.
>
> It is not as obvious that price collusion between buyers is also illegal in most circumstances. You will probably have heard very recently about the ethylene enquiry by the European Competition authorities which is concerned about exactly this point. Fines are big. To be clear corner shops can club together to improve purchasing power. Big buyers cannot. It is illegal. I confess that I have never focused on this point.
>
> Please enquire whether there is any suspicion that we may have stepped over the line however unwittingly. Take any raw material that is in a monthly or quarterly pricing regime and quickly check if your buyers have been chatting on email, Whatsapp, texting or whatever with fellow buyers of the same product.
>
> A quick response before the weekend would be appreciated. And maybe midweek next week to answer Jonny's note attached.
>
> Sorry but timing is important here.
>
> Jim
>
> PS We are not implicated in ethylene enquiry."

This was forwarded to Mr Dossett. His response the next day was:

> "In response to Jim s [sic] mail, our current businesses are not exposed to the settlement of benchmark contract prices, however our former EPS business was, not just in daily spot transactions of styrene which in of themselves can influence the monthly contract price but also the contract price settlement process itself."

Since the EPS Business had long since been sold this can only reflect knowledge that Mr Dossett had acquired in the period of his involvement down to the date

when the SSA was entered into. It is noteworthy that he does not suggest that this was because of any lack of knowledge that what was being done was not permitted or that those involved had not been trained or any other exculpatory explanation. This is not surprising - at the time these exchanges were taking place, Mr Dossett knew that it was unlawful to exchange information concerning purchase pricing because he admitted such was the case – see T5/163/17-22. In my judgment as a matter of probability the response to Sir Jim's enquiry reflected accurately his knowledge at the time.

162. The claimant makes similar criticisms of Mr Ingram' s evidence. I have drawn attention to the fact that the defendant has admitted that Mr Ingram was aware of some of the cartel conduct – see paragraph 62E.4 of the Defence. He accepted in the course of his evidence that information sharing between buyers was as objectionable in competition law terms as information sharing between sellers – see T6/103/14-16.

163. It would unnecessarily overlengthen this judgment to set out all the unsatisfactory evidence deployed by Mr Ingram in relation to the relevant emails. It is necessary to refer to one run of emails in order to establish Mr Ingram's knowledge of how the market was managed. By an email of 26 April 2013, Mr Housecroft emailed Mr Ingram about the upcoming SMCP Settlement in the following terms:

> "From: "Simon Housecroft
>
> Sent: 26.04.2013 08:57 ZE2
>
> To: Rob Ingram
>
> Subject: SMCP
>
> Rob,
>
> Ahead of the initial discussions, these are my thoughts on where I see the right place for settlement.
>
> Current market:
>
> Bz Expected Up 60 70 Depending on the next few days
>
> C2 Latest view is potentially down 130
>
> Feedstock variance up 14
>
> Spot is still in the mid $1500 s
>
> Target SM CP should be desired down 10 20. This would put spot at 14.5 15% below CP (right for a long market) and recovers some of the spread gains from Q1 that producers have claimed ahead of the TARs.
>
> US spot 1590 Asia 1633.

> Will let you know how the first discussions go."

Mr Ingram replied:

> "Simon,
>
> Down 20 would be good.
>
> Good luck with your discussions and keep me updated."

Mr Housecroft responded later in the day:

> "Just heard Shell think up 30 is the right level!
>
> I am rallying the buyers!" [Emphasis supplied]

to which Mr Ingram relied:

> "Up 30 is nuts !!
>
> Best regards,"

Mr Ingram accepted that he would have understood from these exchanges that Mr Housecroft was talking to other buyers – see T6/92/7. He was then asked to explain what he considered Mr Housecroft meant when he said "*I am rallying the buyers*…". He maintained that he did not recall the specifics of the email which was diversionary because he had not been asked that, but had been asked what he would have understood the email to have meant on the assumption he had read it. He repeated that *"(a)s I say, I don't recall the specific instance, so I can't attest to what I thought actually*…". Ultimately, Mr Ingram suggested that Mr Housecroft would be doing no more than to encourage buyers to talk to their suppliers. When it was put to Mr Ingram that what was meant was that Mr Housecroft would be rallying the buyers to adopt the EPS Business target, Mr Ingram responded:

> ""I -- I'm not sure whether that's what he meant or not. With the knowledge I have now as to the styrene monomer contract price investigation by the Commission, one can infer that that was the case. At the time, that is not I don't recall that that was my interpretation of that line at all."

Mr Ingram was prepared to accept however that the rallying the buyers statement was information from Mr Housecroft as to what he was going to do. It necessarily means that Mr Ingram also understood Mr Housecroft's statement in his email to Mr Ingram on 28 August 2013 that he was *"(t)rying to get the other buyers aligned"* as meaning that he would be actively engaging with other buyers.

164. Another exchange which in my judgment clearly shows the level of Mr Ingram's knowledge is that starting with Mr Housecroft's email to Mr Ingram of 25 June 2015 in which Mr Housecroft reported on the state of the market "*(a)fter the discussions"*. To this email, Mr Ingram responded:

> "Sent: Thursday, June 25, 2015 10:08 AM
>
> To: Simon Housecroft
>
> Subject: Re: SMCP update
>
> Simon,
>
> Very clear. Thanks.
>
> Is the buying side fairly well aligned ?
>
> Do expect settlement on Wednesday, or before ?"
>
> [Emphasis supplied]

That can only be understood as being a request by Mr Ingram for information as to what transpired following discussions between the buyers. Mr Housecroft then reported back to Mr Ingram:

> "Rob
>
> The buyers are broadly aligned.
>
> Settlement is set for Wednesday morning and feels like it should be a short process. With the market coming off a little I bought just 1 spot and we moved a contract around. I will lock the other spot after CP. It feels as though the spot market might drop further afterwards.
>
> On my initial email the Bz level is the LV as it will probably settle Tuesday (maybe Monday)" [Emphasis supplied]

This was and can be understood only as being a report back of the discussions that had taken place between Mr Housecroft and various other buyers. The attempt to avoid or deflect from the effect of these discussions is one I reject. These emails and the many others to which I was taken in the course of the trial lead me to conclude that it was or would have been clear to Mr Ingram that Mr Housecroft was having discussions with other buyers concerning pricing in the course of the monthly SMCP settlement meetings and that Mr Ingram was fully aware that such discussions were information sharing meetings which were contrary to the requirements of competition law.

165. That leaves Mr Housecroft and Ms Aebischer. Each was undoubtedly aware of the contact being made each month with other buyers. That much is apparent from the emails to which I have referred already. In relation to Mr Housecroft, I can safely infer that he not only knew what contact was being made but that it was or was probably unlawful. There is a difficulty about Mr Housecroft because of course he did not give evidence. In those circumstances any conclusions inevitably have to be based on inferences to be drawn from the documentation that is available.

166. As noted above, Mr Housecroft's email to Ms Calviou of 22 August 2016 sought her consent for him to have discussions with the claimant "… *about expected levels. (I know we can't discuss reasons why we want certain levels but, I believe we can discuss open market data, spot levels and Styrene European supply demand balances)*…". There is significant documentary evidence that establishes Mr Housecroft went further even than this in the course of his discussions with other buyers. I have already referred to some of the emails above. In addition, in an email of 27 October 2015 from Mr Housecroft to Ms Aebischer and copied to Mr Ingram he records collusive discussions with other buyers with specific information set out as to the initial offer to be made by the buyers or some of them in order to permit the settlement of a contract price for the month under discussion.

167. Similarly the exchange of emails between Mr Housecroft and Mr Cayuela of Styron (a competitor and buyer) on 31 May to 1 June 2013 shows clearly collusive behaviour by Mr Housecroft, which starts with him saying he won't agree an increase of more than €10/MT; Mr Cayuela then saying his intention is to agree an increase of €20/MT and concludes with Mr Housecroft saying "*I understand what you are saying but we need to look a little wider as CP settlers*." In relation to particular reasons for seeking market levels, the same emails with Mr Cayuela disclose such discussions taking place. Similarly the emails between them on 3 June 2013 plainly show Mr Cayuela giving reasons to Mr Housecroft for seeking a particular increase and likewise the emails of 29 August 2013 between Mr Housecroft and Synthomer.

168. That Mr Housecroft must have thought this conduct involved at least a possible breach of competition law is apparent from the terms of the email sent to him by Mr Grosshennig of Synthomer dated 8 August 2014 in which Mr Grosshennig stated:

> "just tried to reach you by phone without success.....
>
> I need to remind you that we (Synthomer) are not allowed to have any communication with you during the Styrene CP negotiations. Which means it is ok for us if you give us your estimation before the Benzene settlement.
>
> But pls. don't send us any CP related information after the Benzene price settlement and the point of time when ICIS has published the new Styrene Contract price.
>
> Thanks for your understanding."

This email is clearly one purchaser telling Mr Housecroft that his conduct was not permitted. Mr Ingram accepted in cross examination that had he seen this email he would have wanted to investigate and obtain advice on what had occurred – see T6/179/3-7. A similar albeit implicit warning was provided to Mr Housecroft by ICIS – the publisher of the matched pricing information resulting from supposedly separate discussions between pairs of sellers and buyers acting separately from each other. In the course of an email to ICIS, Mr Housecroft had expressed concern about publishing the details of any initial

settlement between one buyer and one seller because it may be a result driven by particular circumstances and as such might cause "*... confusion and undermine... the process"*. Mr Mellor of ICIS responded that whilst he agreed that may be the effect, "… *my only concern is about the CP process itself and whether this would move it from something like separate discussions between pairs of settling parties to a process that is built more on wider consensus (or collusion, depending how cynical one is)*…".

169. Finally in April 2016, Mr Housecroft wished to send a note out to fellow purchasers concerning information made available in the course of negotiations. His initial draft focussed on not sharing information concerning downstream activities by fellow purchasers. Ms Lewis obtained advice from external legal advisors concerning the draft as a result of which it was changed so as to include the statement that:

> "Ineos adheres to very strict policies with regards to all areas of competition law and is careful, particularly during contract price negotiations, to avoid any wider discussions where conflicts could occur (e.g. Where we have competitive downstream activities). Pricing must always be determined independently and sharing of information directly or indirectly is strictly prohibited by law."[Emphasis supplied]

It is difficult to see how Mr Housecroft could have been in any doubt as to the risks posed by his conduct as disclosed in the emails in evidence as to his contact with fellow purchasers during the monthly SMCP Settlement process. In the circumstances, I conclude that Mr Housecroft must have known or suspected that his discussions with other buyers might breach competition law and in consequence would give rise to legal proceedings or an investigation or enquiry.

170. Drawing this material together. I conclude that the buyer is to be treated contractually as having the factual knowledge it warranted that it did not have in the paragraph 11 warranties and that the claimant is entitled to succeed in its breach of warranty claims and that those claims are claims where the fact, matter or circumstance giving rise to the claim arises as a result of fraud on the part of the Seller so that the claim is not subject to the contractual limitation that applies to warranty claims.

Conclusions

171. For the reasons set out above I conclude that the claimant is entitled to succeed in its clause 8 claim and its claims for damages for breach of the paragraph 11 warranties. In light of these conclusions it is not necessary for me to decide whether the claimant is entitled also to succeed on any of the other notification claims or the paragraph 17 warranty claim.