Neutral Citation Number: [2012] EWHC 33 (Comm)

Claim No: 2011 - 406

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 20th January 2012

Before :

HIS HONOUR JUDGE CHAMBERS QC
sitting as a judge of the High Court

- -

Between :

	TEESSIDE POWER HOLDINGS LIMITED	**Claimant**
	- and -	
	(1) ELECTRABEL INTERNATIONAL HOLDINGS B.V. **(2) GDF INTERNATIONAL SAS**	**Defendants**

- -
- -

Alec Haydon (instructed by **Ashurst LLP**) for the **Claimant**
Laurent Sykes (instructed by **Eversheds LLP**) for the **Defendants**

Hearing dates: 12th, 13th and 15th December 2011

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Judgment

HHJ Chambers QC :

Introduction

1. By a share purchase agreement dated 22 February 2008 ("the SPA") the claimant and others sold the shares in Teesside Power Limited ("the company") to companies whose rights and obligations are presently held by the defendants. The consideration was in the region

of £340 million.

2. In addition to the SPA a tax deed ("the tax deed") was executed on 25 April 2008 of which the primary purpose was to confer upon the vendors ("the covenantors") powers of regulating the company's post completion activities so as to be able to maximise the benefit of the company's tax position in the periods prior to completion. Both defendants in this action may be treated as parties to the deed with the consequence that they are to be equated with references in the deed to "the Buyer".

3. Although tax deeds and their basic structure are commonplace, individual provisions vary. It is common ground that clause 6 of the tax deed is very unusual. In other words it is the expression of an agreement between the parties that was outside the normal content of a tax deed and was either a specific reflection of a more general agreement between the parties which governs its construction (the claimant's case) or is a 'one off' that falls to be construed in accordance with what is said to be the natural meaning of its wording (the defendants' case).

4. The relevance of this arises from the fact that it is common ground that clause 6 imposes at least some obligation on the buyer to pay to the covenantors the equivalent of sums received by the company by way of repayment by Her Majesty's Revenue & Customs ("HMRC"). The difference between the parties is that the claimant maintains that this obligation includes interest paid by HMRC on overpayments of tax under section 826 of the Income and Corporation Taxes Act 1988 in respect of the period over which the moneys have been held by them. The defendants disagree. The sum presently in question is £809,038.31 arising from the refunding of tax pursuant to the obtaining of group relief procured by the exercise of the powers conferred upon the covenantors by the tax deed.

5.Clause 6 of the tax deed reads as follows:

> "**6. REFUNDS**
>
> 6.1 The Buyer shall promptly notify the Covenantors of any repayment or right to a repayment of Tax which the Company is or becomes entitled to or receives in respect of a Relevant Event occurring or period prior to the Completion Accounts Date, where or to the extent that such right or repayment was not included in the Completion Accounts as an asset (a **"Refund"**).
>
> 6.2 Any Refund obtained (less any reasonable costs of obtaining it) shall be promptly paid by the Buyer to the Covenantors."

6. Although it was always apparent that the hearing involved the determination of a preliminary issue, its form was subject to a process of refinement until, with the agreement of the parties, it emerged as follows:

> "When a repayment is made to the Company under clause 6.1 does the obligation of the Buyer under Clause 6.2 include an obligation to pay the Covenantors the amount of interest paid to the Company by HMRC?"

Background

7. Although the parties have served evidence, much of it is simply opinion and none of it is relevant to the task before me.

8. The only external factors that form part of the background are that the tax deed was drafted and negotiated by specialist lawyers and that clause 6 is very unusual.

9. In particular, I do not have any external evidence that clause 6 was intended to reflect an agreement to the effect that there should be a complete 'wash through' to the covenantors of moneys received in connection with any repayment by HMRC. The question of whether there was such an agreement must be determined from the terms of

the SPA and the tax deed.

The applicable principles of interpretation

10. During the course of the hearing I was referred to a number of authorities of great distinction. They were concerned with various canons of construction governing the pedestrian, the opaque and the ambiguous. It seems to me that no great help will be derived from their analysis and quotation for the simple reason that their whole tenor is to eschew the artificial in favour of supporting the general freedom of the court to employ whatever method most sensibly presents itself as the way of finding out what the contract means.

11. I use the word 'means' advisedly because the true meaning of a contract also tells one what the parties have agreed which is not the same as what one party might have understood the contract to have meant and not at all the same as a finding that the parties were aware of what they had or had not agreed.

12. In the present case a point was taken to the effect that the principles governing ambiguous provisions can only be invoked where there is a patent ambiguity and that the phrase 'repayment of Tax' is unambiguous. I think that this is just the sort of point that the authorities do not encourage.

13. There are cases where ambiguity within a contract can only be resolved by reference to something external to the contract but this is not one of them.

14. The reality is that clause 6.1 only has one meaning and that meaning is to be found in the contractual documents. One looks first at the wording in question because that will

almost always be the starting point. If the wording seems to be clear it will need something cogent to give the wording a different meaning but it is only when one has looked at all the possibilities that one settles upon the specific meaning. There is no point of deemed certainty that precludes full investigation. If for instance a word or phrase is defined, that is likely to be conclusive of the exercise but that does not mean that it is preclusive of the undertaking of the exercise.

15. Although the claimant has also raised the question of an implied term, it seems to me that there is no place for the concept in the present exercise. If the phrase 'repayment of Tax' in clause 6.1 is not to be read as including section 826 interest that is an end of the matter.

The documents

16. I turn first to the SPA.

17. Clause 1 is an interpretation clause. It contains a lengthy definition of tax or taxation of which the relevant parts reads as follows:

> " **"Tax" or "Taxation"** means any tax, and any duty, contribution, impost, withholding levy or charge in the nature of tax, whether domestic or foreign, and any fine, penalty, surcharge or interest connected therewith and includes corporation tax [there then follows a list of many kinds of tax and levy] and any other payment whatsoever which any person is or may be or become bound to make and which is or purports to be in the nature of taxation." (underlining added)

18. The above definition is relied upon by the claimant because of the passage that I have underlined. The defendants respond that this is all very well in respect of debit interest because that is payable by the company on tax that should have been paid at an earlier date but that it cannot relate to interest payable by HMRC on a repayment. Correct as I

consider the observation to be, I think that there is a more general pointer in the same direction.

19. It seems to me that the closing words of the definition are not only a 'mop up' provision but that they seek to define in general terms the meaning of the whole clause, namely that it applies to all payments which *"any person is or may become bound to make to any person and which is or purports to be in the nature of taxation"*. Thus all such payments either are or purport to be in the nature of taxation and are made by a person under an actual or potential obligation to make them. I find it impossible to see how such a characterisation could include interest that HMRC is liable to pay in respect of the period that HMRC has held tax which it has come under an obligation to repay.

20. Neither tax nor taxation is defined in the tax deed of which clause 1.1 provides that, *"Subject to clause 1.2 and unless the context otherwise indicates, words, expressions and abbreviations defined in the Sale Agreement shall have the same meanings in this deed and any provisions of the Sale Agreement concerning matters of construction or interpretation shall mutatis mutandis apply to this deed"*.

21. Clause 8.8 of the SPA provides:

> "8.8 Save in the case of fraud or fraudulent concealment by the Sellers, the Sellers shall be under no liability in respect of any claim under the Warranties:
>
> a) where the liabilities of the Sellers in respect of that claim would (but for this paragraph) have been less than £1,000,000 (one million pounds); or
>
> b) unless and until the liability in respect of that claim (not being a claim for which liability is excluded under clause 8.8(a)) when aggregated with the liability of the Sellers in respect of all other claims shall exceed £10,000,000 (ten million pounds) and, for the avoidance of doubt, in the event that such threshold is exceeded the Sellers shall be liable for the whole amount and not just the excess."

22. The provision can be taken as an example of a specifically negotiated provision that operated to the advantage of the vendors when, without it, there could have been no argument that a breach of warranty would create an obligation on the warrantor – all else being equal – to compensate for the resulting damage however small.

23. Schedule 7 of the SPA is headed, *"**Accounting Policies and Procedures for the Completion Accounts**"*. At clause 2.1(d)(vi) it provides that, *"No account shall be taken of those losses available for surrender to the Group Companies by way of group relief"*. Thus the provision paves the way for the use of such losses under the tax deed to which I now turn.

24. What follows next is a description of the structure of the deed with extracts from its terms and a degree of comment.

25. Clause 1 is concerned with interpretation.

26. Clause 2 underpins most of the deed. It provides the covenantors' indemnity to the buyer in respect of tax obligations and allied costs falling on the company outside the exceptions set out in clauses 2.2 and 2.3.

27. Despite the detail of the provisions in clause 2.2 I think that they may be described as embracing (a) that which has been taken account of in the completion accounts (b) tax on moneys actually earned or received before the completion accounts date but not reflected in them (c) obligations caused by the activity or inactivity of the company or the buyer (d) situations where the company either is not or need not be out of pocket.

28. I shall come later to the argument that assistance can be derived from clause 2.2(j) in

considering whether section 826 interest falls within clause 6.

29. Clause 2.3 provides that, *"The liability of the Covenantors in respect of liability for tax under this deed shall be limited or restricted pursuant to the provisions of clauses 8.6, 8.7, 8.8, 8.9, 8.10 and 8.14 of the Sale Agreement"*. Those provisions being uniformly in favour of the vendors/covenantors, it is to be supposed that this provision was inserted by those acting for them in order to have their rights made clear.

30. Clause 2.4 provides that, *"Any payment made under this deed between the parties ... shall be treated as far as possible as an adjustment of the consideration paid by the buyer under the Sale Agreement for the shares of the Company in question"*. The provision was provided for revenue purposes and does not advance the present exercise.

31. Clause 3 relates to the timing of payments by the covenantors. Apart from the fact that the word 'repayment' is used in clause 3(e) in its normal sense the clause is of no significance to the present exercise.

32. Clause 4 is relied upon by both the parties as informing the approach to the present problem.

33. Clause 4.1 reads:

> "4.1 If the Buyer or the Company is or becomes entitled to recover from some other person [including HMRC] any amount as a result of or by reference to any Tax Liability which has resulted in a payment by the Covenantors to the Buyer under this deed (or would so result but for the provisions of clause 2.2 or 2.3), then the Buyer shall promptly notify the Covenantors of the said entitlement and, if so required by the Covenantors and provided the Covenantors shall indemnify the Buyer for all reasonable costs and expenses incurred by the Buyer and the Company in enforcing that recovery, shall and shall procure that the Company shall enforce that recovery (keeping the Covenantors fully informed of progress) and shall apply the same in accordance with clause 4.2.

34. Thus clause 4.1 identifies situations in which the buyer and the company can be required to recover moneys without specifying the use to which such recoveries shall be put; that being the purpose of clause 4.2.

35. Clause 4.2 reads:

> "4.2 If the Buyer or the Company receives a recovery as mentioned in clause 4.1 or a Relief or other benefit as a result of a Tax Liability which gives rise to a claim by the Buyer under the terms of this deed then:
>
> a) Where the Covenantors have previously paid any amount in respect of such Tax Liability under this deed, the Buyer shall promptly pay the Covenantors an amount equal to so much of any recovery or Relief or other benefit received (less any Tax paid by the recipient in respect thereof) as does not exceed the amount which the Covenantors have previously paid under this deed (together with so much of any interest or repayment supplement paid to the recipient of the recovery or Relief or benefit in respect thereof as corresponds to the proportion of the recovery or Relief or benefit accounted for under this clause);
>
> b) Where the Covenantors have not yet paid any amount in respect of such Tax Liability, the amount of such recovery, Relief or other benefit (less any Tax paid by the recipient in respect thereof, but together with any interest or payment supplement received) shall be offset against any subsequent payment which the Covenantors would otherwise have been liable to make."
>
> (underlining added)

36. Thus the covenantors' potential for financial benefit from the provision only bites upon something which is *"a result of a Tax Liability which gives rise to a claim by the buyer under the terms of this deed"*. In such an event each of two situations is dealt with. The first is where the covenantors have already made a payment under the deed in respect of a Tax Liability and the second is where no payment has yet been made. The first provision provides for a contra payment and the second for an offset. In each case the question of interest is addressed. In each case interest is treated as distinct from the

"recovery, Relief or other benefit". The claimant asserts that this indicates the parties' general intention that interest received by the company from a third party shall enure to the benefit of the covenantors and that the need for specific mention only arises from the need to apportion. The defendants assert that the express provisions are preclusive of an assumption that, where there is no reference to interest, section 826 interest should be accounted for to the covenantors.

37. These arguments are also made in respect of clause 4.3 which reads:

> "4.3 To the extent the sum recovered or the Relief or benefit received (less any Tax paid by the recipient in respect thereof, but together with any interest or repayment supplement received) exceeds the amount which the Covenantors have previously paid under this deed or the amount of any subsequent payment which would otherwise have been made in respect of that Tax Liability, then such excess shall be carried forward and set off against any future claims made against the Covenantors under this deed."

38. Thus clause 4.3 simply pursues the logic of the previous sub-clause without casting any fresh light on matters.

39. Clause 5 deals with overprovisions and is irrelevant to the present exercise.

40. For convenience I set out clause 6 again. It reads:

> "**6. REFUNDS**
>
> 6.1 The Buyer shall promptly notify the Covenantors of any repayment or right to a repayment of Tax which the Company is or becomes entitled to or receives in respect of a Relevant Event occurring or period prior to the Completion Accounts Date, where or to the extent that such right or repayment was not included in the Completion Accounts as an asset (a **"Refund"**).
>
> 6.2 Any Refund obtained (less any reasonable costs of obtaining it) shall be promptly paid by the Buyer to the Covenantors."

41. For the claimant, it is pointed out that, on any view, the clause could be better expressed. Thus the obligation on the buyer is not to pay the refund (which has been received by the company) but an amount equivalent to the refund. Common sense it is said requires one to read the word 'repayment' (and by necessary implication 'refund') as including all interest.

42. The defendants say that 'repayment' means what it says and does not include section 826 interest.

43. For immediate purposes I shall confine myself to two observations.

44. The first is that the format of clause 6.1 must be intended to make the word 'Refund' a term of art which is indicative of special thought having been given to the wording of the provision, especially by those acting for the covenantors for whose benefit this unusual clause was drafted. While it may be argued that this does not have to carry the implication that similar thought was given to the meaning of the words 'repayment of Tax', it might be thought odd that, if the parties were under an agreed assumption that the phrase included interest paid by HMRC, this was not stated.

45. The second point is that it is self-evident that there is nothing in the provision that is indicative of an agreement between the parties that the covenantors shall have the benefit of every penny of any payment accruing to the company. One has to remember that clause 6 was a special provision; thus had there been no clause 6, both the repayment and the interest would have been retained by the company with a corresponding benefit to the buyer. To argue that it is a 'windfall' for the buyer to retain the benefit of the interest is to beg the question.

46. Clause 7 deals with resistance of claims and is irrelevant to this exercise.

47. Clause 8 sets out the mechanism by which the covenantors are to be enabled to exercise their powers under the deed.

48. Clause 9 provides for the buyer's counter indemnity and carries matters no further.

49. The claimant has placed considerable emphasis on clause 10 because it is the provision that deals with the ability of the covenantors to avail themselves of the benefit of group relief acquired by the company and it was the refunding of tax paid to HMRC prior to the allowance of group relief that gave rise to this claim. The clause is aimed at a situation in which the company has not as yet paid the tax that will be saved by the relief so no question of interest upon a repayment can arise.

50. I think that it is sufficient to set out clause 10.1 and 10.3 which read:

> 10. **SURRENDER OF GROUP RELIEF TO THE COMPANY**
>
> 10.1 The Buyer shall procure that, to the extent permitted by the law, the Company shall claim from the Covenantors or such other member of the Covenantors' Group as the Covenantors may specify such Group Relief as the Covenantors may at their sole discretion direct in writing in respect of any accounting period of the Company beginning before Completion.
>
> …
>
> 10.3 Except in respect of a surrender made in the circumstances described in clause 2.2(j) of the Deed, the Buyer shall procure that, in consideration of each of the claims to be made as mentioned in clause 10.1 above, the Company shall pay to the surrendering company in respect of the surrender in question a sum equal to the amount of Tax saved by the Company as a result of the surrender.
>
> …"

51. The remaining two clauses of the deed are irrelevant.

Analysis

52. The effect of the documents is to ensure that the vendors/covenantors receive a number of benefits that would not result from a bare contract of sale and purchase. Some of those benefits are often to be found in such transactions but it is agreed that clause 6 is not among them. That clause is one of only two clauses in which there might be a focus on interest paid to the company as opposed to interest paid by the company. The other is clause 4. Subject to the argument concerning clause 2.2(j), in no other part of the deed is there the potential for the question to arise.

53. As to clause 4, it is incorrect to say it necessitated an express reference to interest because of the potential need to apportion the sum as provided. The apportionment formula in respect of interest reads *"together with so much of any interest or repayment supplement paid to the recipient of the recovery or Relief or benefit in respect thereof as corresponds to the proportion of the recovery or Relief or benefit accounted for under this clause"*. Therefore the exercise of apportionment is reflective of the sums which attracted the interest rather than the period over which the interest accrued. In other words, assuming that, instead of being dealt with expressly, interest was included by inference, the exercise under clause 4.2(a) would be the same as it appears in the deed. This is apparent from the fact that any variation in the applicable rates of interest over the total period to which they relate would not affect the exercise because it is the gross sum of interest that is apportioned without reference to its rate of accrual.

54. It follows that the sole function of the reference to interest in 4.2(a) must be to ensure that interest is included in the exercise of apportionment and thus of repayment.

55. Insofar as clauses 4.2(b) and 4.3 are concerned the question of apportionment does not even arise.

56. For the third (and last) time I set out clause 6. It reads:

> "**6. REFUNDS**
>
> 6.1 The Buyer shall promptly notify the Covenantors of any repayment or right to a repayment of Tax which the Company is or becomes entitled to or receives in respect of a Relevant Event occurring or period prior to the Completion Accounts Date, where or to the extent that such right or repayment was not included in the Completion Accounts as an asset (a **"Refund"**).
>
> 6.2 Any Refund obtained (less any reasonable costs of obtaining it) shall be promptly paid by the Buyer to the Covenantors."

57. The bold heading could hardly be clearer nor could the word 'repayment' but is the payment of interest to be inferred from the provision?

58. It seems to me that the inference encounters an immediate difficulty in the words *"where or to the extent that such right or repayment was not included in the Completion Accounts as an asset"*. It seems to me that what is being assumed is that items of that nature could appear in the completion accounts as repayments or rights to repayment of tax. Although I can see the argument for saying that the appearance in the completion accounts of an item under that description would not rule out its including interest paid or payable by HMRC, I would not consider that to be its normal meaning. Everyone knows that interest is something different from that in respect of which it is calculated.

59. The difficulty for the claimant in resorting to the definition of tax in the SPA is that it clearly refers to interest paid by the company as opposed to interest paid by HMRC.

The overlap between clauses 4 and 6.

60. It is agreed between the parties that there are situations that can fall within the terms of both clauses. In such an event, I think that it must follow that because of the generality of clause 6 and the specificality of clause 4, it will be the latter that governs the situation. If some situations falling within clause 6 can produce an obligation to account to the covenantors for interest paid by HMRC why should not that be the case for all situations within clause 6?

61. I think that the answer lies in the fact that in clause 4 the treatment of interest was expressly addressed not because the parties had to do so but because they wanted to do so because they must be taken to have recognised that, unless they did so, interest paid by HMRC would enure to the sole benefit of the company/buyer.

62. If I am correct, I think that it must follow that if a similar agreement had applied to clause 6 then the treatment of interest paid by HMRC should have been similarly spelt out. I do not accept the suggestion that a certain laxity in the drafting of clause 6 may be treated as being part and parcel of a similar informality in respect of the treatment of interest in that clause. I see no reason why the care in the drafting of clause 4 should not also have been used in respect of interest in clause 6. It is illogical to suggest the contrary.

63. Apart from what I have said already, I repeat that a difficulty with suggesting a joint assumption by the parties as to the treatment of interest paid by HMRC is that clause 6.1 sets out an express definition: a situation to which the parties are to be expected to have brought a particular focus.

64. I think that the reality of the matter is not that the parties consciously excluded the treatment of interest paid by HMRC from clause 6 but that there was no agreement as to its inclusion.

The clause 10 argument.

65. Paragraphs 4, 5 and 6 of the 'mini-skeleton' prepared at my invitation by Mr Haydon, counsel for the claimant, read as follows:

> "4. If the express words of clause 6 cannot be construed as suggested above and it is not possible to imply a term of general application requiring interest to be included in the amount to be paid by the Buyers to the Sellers, then it must follow that the draughtsman of clause 10 failed to address the situation of a retrospective adjustment to the tax position of the Company following a surrender of losses for group relief under clause 10.1.
>
> 5. However, it is clear that both parties agree that in that event something was to happen (see [*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988], paragraph 18) and it is to be inferred from clauses 10.3 and 10.4 that, in the specific case of refunds generated by clause 10.1, the principal amount of "Tax saved" (which can be understood to refer to a refund as well as to a discount) is to be treated as owed to the surrendering company from the time the tax was paid. Hence a term must, of necessity, be implied in clause 6 to deal with clause 10, as follows:
>
> "Any Refund obtained (less the reasonable costs of obtaining it) shall be promptly paid by the Buyer to the Covenantors, save in the case of a Refund paid in response to a claim made under 10.1 in which case the Buyers shall procure that this amount, together with any interest received by the Company, shall be promptly paid by the Company to the surrendering company."
>
> 6. It is clear that in the case of clause 10, the Company's position was intended to be economically neutral: see C. skeleton, para 58, 59, 87, 127."

66. While I can see the logic of the argument, I do not think that it takes the claimant where it wants to go.

67. Clause 10 was not intended to deal with refunds and it does not do so. If it did the trial

would have been concerned with the construction of clause 10 and not clause 6. It is not difficult to see why, if a party is accountable to another party as at a certain date, it should also account for the benefit that it has obtained by retaining the moneys after that date. But that is not expressly provided for by clause 10. As Mr Haydon says, the provision, if it exists, must be inferred. I doubt that it is to be inferred. I think that the situation would be that, if there had been an actionable default under clause 10, interest would have been claimable under the normal principles governing the late payment of debts.

68. Mr Haydon's submissions ask me to draw an inference from an inference in implying a lengthy term into clause 6 that must either be confined to interest paid by HMRC on the repayment of tax resulting from group relief or must be treated as being of general application to all clause 6 refunds that are not governed by clause 4.

69. I see no reason why I should regard the limited provisions of clause 10 as sailing on so open a sea of interpretation when there is no difficulty in giving its wording its grammatical effect.

70. I can no benefit from clause 10 in construing clause 6.

Clause 2.2(j)

71. This aspect of the argument led to an exchange between counsel as to the circumstances in which the point came to be argued. As I do not understand any point to be taken as to the permissibility of the argument being continued on paper after the closing of the oral hearing, I need make no further comment except insofar as it as it appears to be suggested that counsel for the defendant, Mr Sykes, is bound by a concession that he is

said to have made towards the end of the oral hearing to the effect that 'Relief' as defined in the deed included section 826 interest.

72. It seems to me that it would be unrealistic to hold Mr Sykes to such a concession where he has since made his position clear, the point is one of pure construction and the claimant has had a full opportunity to address it.

73. I now turn to the issue.

74. Clause 2.1 sets out the situations in which the covenantors will be obliged to make payment to the buyer. Clause 2.2 sets out the situations in which any such obligation will (a) not arise because it is an exempted event (b) be extinguished or (c) be diminished. The contrast with clause 4 is that the latter clause provides either for a payment by the buyer or the creation of a notional sinking fund against which a future obligation that arises under clause 2.1 may be set off.

75. The function of clauses 6 and 10 is to direct to the covenantors benefits received by the company which lie outside the above regime hence the express reference in clause 10.3 to the exclusion of clause 2.2(j) from its provisions.

76. Thus, whereas clause 6 and 10 are aspects of one type of regime, clauses 2 and 4 are aspects of another regime. Therefore, whatever the cross-fertilisation (or lack of it) as between clauses 4 and 6, the expectation is that there should be a harmonious interpretation of clauses 2 and 4. In certain circumstances it might be expected that there would be such a degree of similarity between the types of situation set out in clause 2.2 and those in clause 4 that one would be able to draw clear inferences as to their joint meaning. However, as the nature of the debate has indicated, out of the fourteen sub-

clauses in question only clause 2.2(j) has the potential to offer itself as a comparator with clause 4 for present purposes. This is because of the parasitic nature of interest. The other exemptions apply to situations in which the question of interest does not arise.

77. Clause 2.2(j) is to the effect that the covenant to indemnify does not bite upon any Tax Liability to the extent that *"any Relief … is available [or would be available] at no cost to the Company to set against or otherwise mitigate the Tax Liability in question [including the surrender to the Company of any Reliefs or losses by any Covenantor or any member of the Covenantors' Group at no cost to the Company]"*.

78. The claimant submits that 'Relief' includes s 826 interest. The defendants submit that it does not.

79. The deed provides that, ***"Relief"*** *means any allowance, credit, exemption, deduction or relief from or in computing Tax or any right to the repayment of tax"*.

80. Given the specific nature of the interest with which I am concerned, it seems to me that the relevant wording is *"any allowance, credit, exemption, deduction or relief in computing any Tax or any right to the repayment of Tax"*. It seems to me that I therefore have to consider whether the exercise of calculating interest in respect of an ascertained sum falls within the description that I have set out. I do not see how it can. It seems to me that the words in question describe how the sum that is to attract the interest has been arrived at. It follows that such interest is not included in the definition of 'Relief' which governs the deed. I am fortified in this conclusion by the way that clause 4.2(a) of the deed draws a clear distinction between "Relief" (which is treated as a form of principal) and the interest paid in respect of it.

81. Even if I am wrong, I would think it unacceptable to seek to ascertain the meaning of one difficult provision by seeking to resolve the difficult construction of another limited provision when there is another provision that deals with the matter entirely clearly.

Conclusion

82. I can find nothing in the SPA and the deed that supports the view that the intention of the parties as expressed in those documents was that there should be a total 'wash through' to the vendors/covenantors of benefits received by the company in respect of tax matters concerning the period before the date of the completion accounts. On the contrary, I think that what appears from the documents is that the vendors/covenantors negotiated for and obtained benefits that went beyond those normally conferred by a tax deed and that there is no reason to suppose that the parties agreed more than they expressly bargained for.

83. I am unimpressed by the claimant's appeal to common sense which seems to suggest that, where parties have been careful to set out their relationship in writing in wording that if not challenged carries a clear meaning, a party can impose on those words an arguable meaning because that it is what suits it best. Unlike the situation in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, there is no commercial weather vane that points towards the claimant's preferred construction.

84. It seems to me that that the plain fact is that the parties did not include section 826 interest on refunds in clause 6. There is no implication in the words 'repayment of Tax' that they include such interest. There was no consensus between the parties to that effect and the consequence must be that the clause does not apply to such interest with the result that there is no obligation on the buyer to account for it.

85. No one need attend the handing down of this judgment. Unless agreed, all consequential matters shall be dealt with at a time and in a manner convenient to the parties which shall be an adjourned hearing of that at which this judgment is handed down. Any relevant time limit is extended until then.