Neutral Citation Number: [2024] EWHC 27 (Comm)

Case No: LM-2022-000152

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

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

Date: 11 January 2024

Before :

SIMON TINKLER SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

Ickenham Travel Group Limited	**Claimant**
- and -	
Tiffin Green Limited	**Defendant**

- -
- -

Ashley Cukier (instructed by **Fox Williams**) for the **Claimant**
Clare Dixon KC and William Harman (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 14, 15, 16, 20 and 22 November 2023

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JUDGMENT

Simon Tinkler sitting as a Deputy High Court Judge:

Introduction

1. This case involves a claim by a company, Ickenham Travel Group Limited ("**Ickenham**") against its former auditors, Tiffin Green Limited ("**Tiffin Green**").

Background

2. Ickenham is a travel agency. Until July 2019 it had two divisions: a business travel division Business Travel Direct ("**BTD**") and a consumer travel agency ("**LetsGo2**" or "**LG2**"). The LG2 division held an ATOL licence enabling it to deal with retail consumers. That license was issued by the CAA. Ickenham was also accredited by IATA, the body that facilitated transactions with international airlines.

3. In 2014 Ickenham appointed Tiffin Green as its auditor. Tiffin Green audited the accounts of Ickenham for the financial years ended 30 September 2014, 30 September 2015, 30 September 2016 and 30 September 2017.

4. In early 2019 Ickenham discovered serious irregularities in its accounting systems and records (the "**Irregularities**"). As a consequence of the Irregularities the trade creditors of the LG2 division were discovered in 2019 to be overstated by some £4,500,000 (the "**Understatement**"). The turnover in that period of LG2 and BTD combined was some £95,000,000 so the Understatement was very material. The Irregularities related only to the LG2 business. They did not relate to BTD.

5. The Understatement is believed to have built up over a large number of years. It was accepted by Ickenham by the end of the trial that the Understatement was at least £2,500,000 in September 2014 when Tiffin Green were first appointed.

6. This discovery of the Understatement was made before completion of the audit of the financial year ending 30 September 2018. Tiffin Green were replaced as auditors for the financial year ended 30 September 2018 and another firm, White Hart Associates, took over that audit.

7. Ickenham says that Tiffin Green was negligent and in breach of contract by failing to identify the Irregularities and Understatement in each of the years in which Tiffin Green audited Ickenham.

8. Ickenham says that as a consequence of the Irregularities it was required by the CAA to raise significant cash to carry on trading. In order to raise cash it sold BTD to Reed & Mackay in July 2019. Ickenham says that it suffered loss because BTD was sold at a price that was £6,000,000 below its true value. Ickenham says this true value was evidenced by an offer from a buyer called Endless/Amber Road with whom Ickenham had been in discussions for over a year before the actual sale. Amber Road was a travel agency business owned by Endless, who are a private equity firm. Most, if not all, discussions with Ickenham seem to have been with people from, or appointed by, Endless. To make this judgment easier to read I will refer to the possible sale to Endless even if technically it may have eventually been to Amber Road.

9. Ickenham says that if Tiffin Green had complied with its contractual duties, and had not been negligent, then Ickenham would have been told in 2014, and at each subsequent audit, about the Irregularities. Ickenham would then have taken steps to (a) address the amount of the Understatement at that time and (b) prevent any further increase in the Understatement. It says there would have been no need to sell BTD, let alone at an undervalue.

10. Ickenham also says that it incurred professional fees of some £300,000 in dealing with the Irregularities that it would otherwise not have incurred.

11. Tiffin Green raised four core reasons why it says it has no liability to Ickenham. The four reasons are that:

    i) BTD had been on for sale for some 18 months before its eventual sale in 2019, and that in July 2019 BTD was sold for its true value; Ickenham has not therefore suffered any loss on that sale (the "**Loss Argument**");

    ii) if the Understatement had been discovered during the audit of the financial year ended 30 September 2014, then Ickenham would have taken the same steps in 2014 as it eventually took in 2019, with the same consequences; that therefore any loss on the sale of BTD and any fees incurred by Ickenham would have occurred in any event, such that there is no factual causation by Tiffin Green of any loss to Ickenham (the "**Factual Causation Argument**");

    iii) if Tiffin Green had carried out its duties in the manner set out in the pleadings then Tiffin Green would not in any event have discovered the Understatement or Irregularities (the "**Pleadings Argument**"); and

    iv) the loss suffered by Ickenham on the sale of BTD is not a type of loss for which Tiffin Green is liable at law (the "**Legal Causation / Scope of Duty Argument**").

Decision

12. In my judgment, Ickenham has not proved that it suffered any loss when it sold BTD in July 2019. It has also not proved that the consequences would have been different if the Irregularities and Understatement had been discovered in 2014 or at any subsequent audit. Tiffin Green has therefore succeeded on both the Loss Argument and the Factual Causation Argument. Accordingly, I give judgment for the Defendant, Tiffin Green. My full reasons are set out below.

Outline chronology

13. The key events in the case are as follows:

30 September 2014	Financial year end for Ickenham. At this time the existing Understatement was at least £2,500,000
24 December 2014	Tiffin Green issue audit opinion on Ickenham's 2014 financial year
30 September 2015	Financial year end for Ickenham
22 January 2016	Tiffin Green issue audit opinion on Ickenham's 2015 financial year
30 September 2016	Financial year end for Ickenham
28 March 2017	Tiffin Green issue audit opinion on Ickenham's 2016 financial year
30 September 2017	Financial year end for Ickenham
January 2018	Ickenham begin talks with Portman Travel about a possible sale of BTD
February 2018	Tiffin Green issue audit opinion on Ickenham's 2017 financial year
February 2018	Ickenham appoints Mr Pay from EMC to seek buyers for, and advise on, a sale of BTD
May 2018	Ickenham begins talks with Endless about possible sale of BTD
January 2019	Endless make proposal to buy BTD
February 2019	Irregularities and Understatement discovered in LG2
13 March 2019	Endless make formal offer for BTD, start due diligence and are given period of exclusivity to undertake the acquisition
14 March 2019	CAA notified of Irregularities and Understatement

27 March 2019	CAA approves issue of ATOL licence to Ickenham subject to significant conditions including ringfencing of all new retail customer receipts
19 April 2019	Period of exclusivity with Endless finishes with due diligence uncompleted and no transaction signed
April/May 2019	Ickenham seeks other buyers for BTD
23 May 2019	Ickenham make contact with Reed & Mackay about possibly buying BTD
3 June 2019	Reed & Mackay indicate in principle that they are interested in buying BTD
12 June 2019	Ickenham tell Endless about the Irregularities and Understatement
14 June 2019	Reed & Mackay make an offer setting out terms on which they would buy BTD
12 July 2019	Reed & Mackay told of Irregularities and Understatement in LG2
17 July 2019	Reed & Mackay told of cash flow issues in BTD
19 July 2019	Reed & Mackay require changes to the terms of the sale of BTD
30 July 2019	Ickenham sale of BTD to Reed & Mackay is signed

Witnesses

14. I heard evidence from five witnesses of fact and two expert witnesses.

15. The witnesses were:

    i) Salman Rasool, a corporate finance adviser at White Hart Associates. He was involved in assessing the Irregularities and Understatement when they were first discovered. His evidence was clear. It was also not, by the time of the trial, particularly in dispute.

    ii) Christopher Photi, a consultant at White Hart Associates. He was heavily involved in advising Ickenham in early 2019 once the Irregularities had been discovered. His evidence was particularly relevant to the impact of the Irregularities on the ATOL licence and discussions with the CAA. His evidence was, in my view, straightforward and clear.

    iii) Mark Caldicott, the senior statutory auditor at White Hart Associates who audited the Ickenham accounts for the financial periods after Tiffin Green. His evidence related mainly to the manner in which the accounts addressed the Understatement once it had been discovered. His evidence was, in my judgment, straightforward and clear. It was not, by the time of trial, particularly relevant to the matters still at issue.

iv) Mike Pay, a corporate financier who advised Ickenham on various matters, including the sale of BTD. His evidence related to the terms on which BTD was sold, and the terms on which it might have been sold if it were not for the discovery of the Irregularities. The evidence Mr Pay gave on factual matters within his knowledge was largely clear. He was, however, a witness of fact and not an expert. Despite this, he sometimes strayed into speculation on matters that were clearly outside his direct knowledge. I also consider that his evidence tended to put an interpretation on events, and how matters would play out, that was favourable to Ickenham's claim. This was the case even when the contemporary documents did not support (or even contradicted) his view. When assessing the evidence of Mr Pay I therefore considered carefully his evidence as to:

a) what he says he said at the relevant time;

b) what he says he thought at the relevant time;

c) what he says he believes other people were thinking at the relevant time

and how the contemporary and later documents did or did not support his evidence. My analysis of these matters on the specific questions in this case is set out in the relevant sections below. I do not consider that Mr Pay was consciously giving evidence that was selective or intended to mislead; he was, however, in my judgment overly optimistic about events and in a manner that generally favoured the interpretation that he wanted, both in 2019 and at trial.

v) Peter Reglar, the founder and CEO of Ickenham. His evidence was, in my judgment, thoughtful and balanced. He accepted when matters were outside his area of expertise. He gave useful evidence as to general matters in the business. He was, unsurprisingly given his broad role, not particularly involved in the detail of a number of the matters that were raised.

vi) Julian Beressi, an expert on valuation and audit called by Ickenham. His evidence was, in my judgment, thoughtful and considered. He accepted when his evidence needed clarifying or amending when shown other evidence that was relevant.

vii) Moira Hindson, an expert on valuation and audit called by Tiffin Green. Her evidence was, in my judgment, also thoughtful and considered. She accepted when her evidence needed clarifying or amending when shown other evidence that was relevant, or when she did not have the evidence to comment.

16. Ickenham invited the court to take account of the fact that Tiffin Green did not call any witnesses of fact. Tiffin Green explained that there were only two senior individuals who had significant involvement in the audit of Ickenham in the relevant period. One of these people had subsequently died and the other was medically unfit to give evidence. The two junior people at Tiffin Green who were involved had left Tiffin Green and were said, in any event, to have limited evidence they could give. I did not draw any adverse inference from the fact that Tiffin Green did not call any witnesses of fact. I also note that the majority of the matters in question in this case, such as the

sale process for BTD and the interactions with the CAA, were matters on which Tiffin Green would not be able to give evidence in any event.

17. Tiffin Green invited the court to take account of the fact that Ickenham did not call any witnesses of fact as to the causes of the underlying accounting issues, nor from Endless or Amber Road as to their actual intention to purchase BTD (or not). I did not draw any adverse inference from the fact Ickenham did not call such witnesses of fact. The absence of direct evidence from Endless/Amber Road did, of course, mean that there was less evidence before the court from which the court could draw conclusions about their intentions.

18. I have set out in the relevant sections of my judgment the conclusions I drew from the relevant witness evidence. In doing so I am mindful of the guidance from Leggatt J in *Gestmin*[1] at paragraphs 15-22 (inclusive). I am also mindful of the decision in *Kogan v Martin*[2] at paragraphs 86 to 88 (inclusive). For the purposes of this case all I need say is that the witness evidence is one aspect of the overall factual matrix which I considered, and where I reached a conclusion that contradicted (some of) the evidence I have explained why I reached my conclusion.

Documentary evidence

19. There was significant documentary evidence in relation to some aspects of the case. There were, for example, many internal and external emails regarding the sale of BTD. That covered the possible sale to Endless, the eventual sale to Reed & Mackay, as well as possible sales to other parties which were contemplated before the sale to Reed & Mackay. In assessing those emails and documents, I considered who wrote them, for what purpose and for what audience.

20. There was, on the other hand, little documentary evidence that addressed the Irregularities themselves or the causes of Understatement, nor was there much documentary evidence of how the quantum of the Understatement had built up over time. There was, for example, no forensic accounting report on them. This was most relevant to the Factual Causation Argument. It was, however, by the end of the trial less relevant than at the start of the trial. On the final morning of the trial Ickenham accepted that there was a significant Understatement of at least £2,500,000 when Tiffin Green first audited Ickenham in 2014. It was therefore no longer necessary to unpick the reasons for, and likely timing of, the build up in order to estimate the likely Understatement in 2014.

The issues

21. I will address the issues in the following order:

    i) Breach of Duty;

    ii) The Loss Argument;

    iii) The Factual Causation Argument;

[1] [2013] EWHC 3560 (Comm)
[2] [2019] EWCA Civ 1645

iv) Professional Fees;

v) Legal Causation / Scope of Duty;

vi) The Pleadings Issue; and

vii) Limitation.

I will set out the key facts and legal principles in relation to each issue rather than collectively.

Breach of duty

22. I can deal relatively briefly with the question as to whether Tiffin Green were in breach of their duties in contract or were negligent in performing their duties.

23. It was not disputed that Tiffin Green had duties which arose under (a) the contracts for their audit services and (b) at common law which required Tiffin Green to conduct its audit with the skill to be expected of a reasonably competent auditor, as informed by the statutory and other regulatory duties.

24. The experts jointly concluded that "If the [Understatement] was caused by a fundamental accounting breakdown then …a reasonably competent auditor would probably have identified and would have alerted [Ickenham] to the [Understatement]". The evidence showed that the Understatement was caused by some form of fundamental accounting breakdown.

25. Tiffin Green did not challenge further assessments by the experts of their work. Ms Hindson, the expert called by Tiffin Green themselves, accepted that Tiffin Green's work was "*seriously defective in a number of key areas*". Mr Beressi, the expert called by Ickenham, described their work as having a "*complete lack of professional scepticism*", "*an abdication of responsibility*" and being "*seriously defective*". His views were not challenged.

26. The experts agreed that a reasonably competent auditor probably would have identified and alerted Ickenham to the Irregularities and Understatement. Tiffin Green had failed to do so and had accordingly breached their duties as auditors in both contract and tort by failing to act as a reasonably competent auditor. These beaches included failing to identify the Understatement and failing to identify the Irregularities.

27. Tiffin Green did not seriously challenge this conclusion. Indeed, in closing submissions it effectively accepted that it may have done a "*bad job*". The question was whether the breaches of its duties caused any loss to Ickenham.

28. I note for completeness that Tiffin Green submitted that it was Ickenham and its directors who have the primary duty to maintain accurate accounting records. This is of course true. It does not, however, assist the auditors in assessing whether they breached their duties in contract or tort. It may have been of relevance on a question of contributory negligence, but that question did not arise in this case as there was no loss caused by Tiffin Green.

The Loss Argument

29. There was no dispute on the legal test to be applied. In order for Ickenham to succeed in this part of its claim it had to show that it had suffered a loss when it sold BTD. In July 2019 Ickenham sold one asset, BTD, in return for another asset, namely cash proceeds. Ickenham had suffered a loss therefore if the cash proceeds received were less than the value of BTD at that time.

30. Ickenham's case was largely based on the assertion that it would have sold BTD to Endless, or alternatively lost the chance to sell BTD to Endless, for £11,000,000. It is clear from the authorities in *Allied Maples Group Ltd v Simmons & Simmons* [3], and *Mount v Barker Austin* [4] that there is a significant difference between a chance which is "merely negligible" or "speculative", and a chance that is "real and substantial". A chance of a transaction which falls into the former category, which is often categorised as being less than 10%, should be treated as being a chance that does not exist. It was therefore crucial to analyse the likelihood of the transaction with Endless eventually going ahead.

31. Ickenham's case was a simple one. It said that it had agreed to sell BTD to Endless for £11,000,000 and that was the true value of BTD. After discovery of the Irregularities it eventually sold BTD to Reed & Mackay for £5,000,000. Ickenham say that the difference between the sale proceeds and the true value of BTD was therefore £6,000,000.

32. Tiffin Green, on the other hand, says that the true value of BTD was the price that Reed & Mackay paid for it. It says that Endless were not actually prepared to buy BTD for £11,000,000 or indeed at all. It says that if it is wrong on that point then in any event the difference between the Endless offer and Reed & Mackay price was not £6,000,000.

33. I will consider those arguments in turn.

34. BTD was a business specialising in providing travel agency services to the business community. It was not the kind of asset for which there is a clearly defined and priced market. It is very different from shares in a listed company, or any other asset for which the price can easily be obtained. Mr Pay used the analogy of the sale of a house when he was describing certain aspects of the sale of BTD. That description has some use. In the housing market, however, there are likely to be significantly more data points that provide evidence of value than in the case of unlisted private companies.

35. Ultimately the value of BTD at any particular time was the price that a willing buyer would pay to a willing seller. That price would only become certain when the buyer and seller sign a binding agreement.

36. Ickenham had been in discussions about selling BTD for almost 18 months by the time it was sold to Reed & Mackay. Those discussions began in January 2018 when they started talking with Portman Travel. There was clearly a serious contemplation of a sale of BTD as early as February 2018 when Ickenham appointed Mr Pay from EMC to advise on the sale.

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[3] [1995] 1 WLR 1602
[4] [1998] PNLR 493

37. Discussions with Portman did not prove fruitful. Portman never made a formal offer to buy BTD. There was engagement with Portman during 2018. Portman made numerous requests for financial information on BTD . They also asked for explanations of trends and other key matters in the underlying business. The closest Portman came to making an offer was in late 2018/early 2019 when there seems to have been some discussion between Mr Pay and Portman about the terms of the offer Portman would propose if they made an offer. Mr Pay asserted that Portman would have made an offer that was, in broad terms, comparable to the Endless offer. There was no email or other evidence from Portman itself. It was, however, common ground that discussions with Portman ended before Portman were aware of the Irregularities or Understatement. There seems to have been no engagement with Portman in April/May/June 2019 when the sale to Reed & Mackay was contemplated. Ickenham relied on the Endless offer as being the one that showed that the value of BTD was £11,000,000. The fact that Portman had previously had some interest in the business but never proceeded with an offer either in 2018 or June 2019 was, ultimately, background context to the actual offers made by Endless and Reed & Mackay. It did not, in my view, provide meaningful evidence that BTD was worth £11,000,000 in July 2019.

38. In May 2018 there were initial conversations with Endless. The commercial rationale for Endless in buying BTD was to combine it with Amber Road. There would have been synergies between the two businesses which would have increased the combined underlying profit. Amber Road would also have become a larger business and benefited from increased scale.

39. In January 2019, prior to discovery of the Irregularities, Endless set out the key terms on which they might be prepared to acquire BTD. This was based on the information on BTD provided to them by Ickenham. It was not based on any independent analysis done by Endless. The purpose of this offer was to enable Ickenham to decide whether to proceed with discussions with Endless. If Ickenham were prepared to proceed with discussions then Endless would be allowed access to the financial and other information relating to BTD so that Endless could undertake its own analysis of BTD. Endless would then decide whether to proceed with an acquisition of BTD and if so on what terms.

40. The terms included a cash payment on completion of £11,000,000. The original proposal from Endless included a cash payment of £8,000,000 plus an earn out of up to £2,500,000. This price change followed Ickenham saying to Endless that the projected EBITDA in BTD in 2018 would be £1,700,000, as opposed to £1,300,000.

41. Ickenham became aware of the Irregularities in February 2019. They were advised that the CAA would wish to know how Ickenham planned to remedy the Understatement. One of the routes was to raise cash by the sale of BTD. Ickenham asked Endless to confirm its proposal for BTD in writing. The inference is that Ickenham intended to use this offer as evidence to present to the CAA. Endless wrote an offer letter on 13 March 2019. The terms largely mirrored those discussed in January 2019.

42. On 14 March 2019 Ickenham informed the CAA of the discovery of the Understatement. Ickenham then entered into discussions with the CAA about how Ickenham could continue to maintain its ATOL licence. If it lost that licence then it would in all likelihood have ceased trading. Ickenham told the CAA that one option it

was considering was selling BTD and using the cash to support the LetsGo2 business. The offer letter from Endless was used to support this proposal.

43. Ickenham gave Endless the exclusive opportunity to conduct due diligence on BTD in order to confirm their provisional offer. Endless started financial due diligence during March 2019 on the information supplied by Ickenham.

44. There were a number of requests from Endless for the information which they needed in order to analyse BTD. They were particularly focussed on whether the EBITDA for FY 2018 was £1,700,000 as Ickenham had represented, and whether the 2019 FY EBITDA would be £2,000,000 as projected. During March and April 2019 Ickenham were struggling to provide the information requested.

45. By 17 April Endless were expressing serious concerns internally about financial information on BTD that had been and had not been provided, as well as Ickenham's inability to explain some key elements of it. This was set out in an email from Lee Abbott to the Endless team. It was sent by Endless to Mike Pay on 1 May 2019. This was not the first time Endless had expressed these concerns. Indeed, as far back as December 2018 they had been "*frustrated with the process*". They had not received the financial information they required to verify what Ickenham were telling them and had told Mr Pay that "*If "assurances" were enough we'd never need to do any due diligence!*".

46. Ickenham itself recognised these issues. Julie Oliver emailed Peter Reglar on 18 April 2019 for example to say that it "*is clear [Endless] are concerned on current DD and 2019 Profitably[sic]*". Even Mr Pay agreed that Endless were "*expressing concerns about … the due diligence they are doing and seeing and the information they are being provided with*", although later in his evidence he watered this down to saying that this was, notwithstanding all the emails and other evidence, just "*conjecture*".

47. The period of exclusivity with Endless expired on 19 April 2019. At this point Endless did not know about the Irregularities.

48. There is little evidence of Endless doing any further due diligence or other work after 19 April 2019. There were never any legal documents in negotiation, nor any evidence of Endless doing the other elements of due diligence that would be required.

49. On or around this time the evidence was that Amber Road had lost a significant customer and so was itself struggling. Endless were considering whether they wished to remain owners of Amber Road itself, or whether they wished to sell it. As it transpired, Endless sold Amber Road in September 2019.

50. Ickenham said that Endless did not proceed with their offer because of the discovery of the Irregularities. There is no evidence of any email from or conversation with Endless in which they indicated that their disengagement was caused by the discovery of the Accounting Issues in the LG2 division.

51. On 29 May 2019 the Ickenham directors considered the position of the various parties to whom they might sell BTD. The note for Endless indicates that Endless "*were concerned with the sale price*" and "*they have not been in the data room*". That is clear written evidence that Endless were not, even prior to being told about the Irregularities

and Understatement, prepared to buy BTD for £11,000,000. That note also confirms that Endless were, in the light of the Amber Road issues, considering whether to remain in the travel sector at all. In his evidence even Mr Pay accepted that the rationale for Endless to buy BTD had "*faded*" and "*diminished*".

52. On 12 June Mr Pay met James Woolley of Endless to try and (re) engage them in discussions about buying BTD. Following that meeting Mr Pay emailed Mr Woolley. Mr Pay said that he thought the underlying EBITDA of BTD was £1,300,000 for FY 2018. This was not the £1,700,000 that had previously been held out to Endless during the negotiations. Mr Pay proposed a value for BTD of £7,800,000 rather than the £11,000,000 that was originally discussed. There is no evidence that Endless even responded to this offer let alone expressed a continuing interest in buying BTD.

53. In reality the only meaningful evidence before the court that there was any ongoing prospect of a sale to Endless were the statements of Mr Pay in his witness statement and at trial. He may have hoped that Endless would return to the negotiations. He may even believe today that in the fullness of time Endless would have returned with an offer of £11m. His evidence on these points is not, however, supported by any email or conversation either with Endless or with any of the directors of Ickenham at the time. Indeed, the final engagement he had with Endless was at the meeting on 12 June 2019 when he sought to construct a transaction with Endless that valued BTD at £7,800,000. After the meeting Mr Pay did not report to Ickenham that he thought a deal with Endless was achievable at that price, or indeed any price.

54. Endless sold their Amber Road business in September 2019, less than two months after the sale of BTD to Reed & Mackay. Mr Pay gave evidence that sales of private businesses such as BTD, and thus Amber Road, often took many, many months. An obvious inference to draw is that Endless had decided at some point in 2019 to pursue a sale of Amber Road and that was why they were longer interested in buying BTD.

55. Mr Pay also asserted that in his experience some 90-95% of transactions completed on the terms set out in the heads of terms. He invited the court to use this assertion as evidence that Endless would have returned to negotiations and concluded a transaction for at least £11,000,000. His assertion about transactions concluding on agreed terms was somewhat undermined by his subsequent explanation that if the underlying business changed, for example by losing a significant contract, and the price for the business was therefore reduced, this still represented a transaction on the original terms. He asserted that a loss of a material contract "*isn't an erosion in the value of the business*" yet in the next sentence said that "*the business was not worth as much the day after losing the contract as it was the day before*". This was, in my judgment, a clear example of Mr Pay using linguistic gymnastics to explain a position that was not particularly plausible.

56. In any event, Mr Pay was a witness of fact and not an expert. Neither Mr Beressi not Ms Hindson gave evidence that supported Mr Pay's assertion about the general likelihood of transactions proceedings on their original terms, nor by implication the inherent likelihood of Endless concluding a purchase of BTD for £11,000,000. In this case it seems abundantly clear to me that Endless were by May 2019 (at the latest) no longer interested in purchasing BTD, and their decision to withdraw was not caused by them being told about the Irregularities or Understatement in LG2. I do not therefore need to give a formal view on Mr Pay's general assertion about 90-95% transaction

success rates because either the Endless transaction is in the 5-10% claimed by Mr Pay, or Mr Pay is not right about the 90-95% - or both.

57. In summary, in my judgment the evidence clearly shows that:

i) Endless were no longer a willing buyer of BTD by early May 2019 at the latest.

ii) This was for some or all of the following reasons:

a) The loss of the BT contract by Amber Road had led them to question the strategic reason for the acquisition of BTD;

b) They had significant concerns about the lack of financial information about BTD;

c) They were not convinced the underlying EBITDA of BTD was £1,700,000 for FY 2018 as represented referring to "*softness in the historic adjusted EBITDA*" , or that BTD would achieve the future EBITDA levels claimed;

d) The "*poor financial detail/deterioration in performance*" in BTD;

e) Ickenham being "*unable to explain rolling margin trend [in BTD]*" and to provide basic management accounts for BTD; and

f) significant concerns about the quality of the BTD finance function and the efforts that would be needed to remedy that.

58. The inescapable conclusion is, in my view, that the possibility of a transaction with Endless had disappeared over the horizon long before the Understatement was revealed to them in June 2019. It was certainly less than 10% and as such can be ignored.

59. Ickenham made assertions in the pleadings and at trial that if they had more time then they would have potentially been able to sell BTD for a higher price than that paid by Reed & Mackay. That is of course a possibility. There was, however, no evidence that it was a realistic possibility rather than a theoretical one. The only other buyers that Ickenham suggest would have paid a higher price were Portman, who never came close to making an offer, and Endless, who were not prepared to buy the business at all.

60. Ickenham had been considering a sale of BTD since at least January 2018. They had been advised during this time by experienced corporate finance specialists whose role was to identify possible purchasers. They had considered the universe of possible buyers again in April/May 2019 when it became apparent that Endless were not going to go ahead with a purchase. During that entire time neither Ickenham nor their advisers identified a specific purchaser who they thought would pay more than Reed & Mackay. In his witness evidence Mr Pay did not identify any such possible purchaser. There was no evidence of other potential buyers who Ickenham could have approached if they had more time.

61. Mr Pay said that he had a target price for BTD of £14,000,000 and he expressed confidence that he could achieve that. There is however no evidence whatsoever of any purchaser who was prepared to pay that, whether Portman, Endless, Reed & Mackay or

anyone else. I am sure Mr Pay would have liked to be able to tell Mr Reglar that he had found a buyer for BTD at £14,000,000. There is, however, simply no evidence that such a buyer existed or ever would exist.

62. Furthermore, there was evidence from the expert witnesses on the true value of BTD. Mr Beressi accepted that it was no more than speculative that any transaction with Endless would have completed. Mr Beressi then confirmed that in his view on the assumption that the Endless deal did not proceed then :

"*Question: [Does] the Reed & Mackay deal, as concluded, represent[s] a realistic and reasonable valuation of BTD?*

Mr Beressi : Yes"

63. In my judgment, Ickenham have not shown that a transaction with Endless at all, let alone on terms in which they would have paid £11,000,000 is anything more than speculative. There is, in conclusion, no other evidence that any person would have paid a higher price than Reed & Mackay either in July 2019 or at any later date. Ickenham has not proved that the terms of the transaction with Reed & Mackay were anything other than the best terms on the open market that Ickenham could obtain for BTD; in other words, the fair market value.

64. During the trial there was discussion about the impact of the value of LG2 on the terms of the sale of BTD. There was much discussion about whether LG2 was loss -making, and when it became profitable, if at all. By the end of the trial both parties accepted that LG2 had been loss making until some point in early 2019. After that point Ickenham implemented profit improvement measures. Those may or may not have moved LG2 into profitability and it may or may not have had a value if sold at that point. In mid 2019 Ickenham were asserting that LG2 was profitable and was expected to have an EBITDA in 2019 of some £342,000. Mr Pay, who prepared the document that included this assertion, however, described the document as a "*sales document*". He said the intention was merely to illustrate that LG2 had a *"value…rather than it being a basket case*". Ultimately both parties, however, accepted that the value of LG2 had no bearing on the value of BTD as the two business were separate. Accordingly, I do not need to make any findings about the value or profitability of LG2.

65. The question then becomes whether Reed & Mackay reduced their price once they were told of the Irregularities. If they did reduce the price then that would be evidence that the sale price for BTD was below its "true value" because of the existence of the Irregularities.

66. Almost all conversations and negotiations with Reed & Mackay took place before Reed & Mackay knew about the Irregularities. There is clear documentary evidence as to what the terms of the transaction were. There was, by the end of the trial, no meaningful dispute between the parties as to the terms of sale before and after the discovery of the Irregularities.

67. Immediately prior to Reed & Mackay being informed of the Irregularities the financial terms of the transaction were as follows:

    i) A payment on completion of £5,000,000;

ii) A further payment of £1,000,000 subject to deductions if the working capital of BTD was not as promised; and

iii) An earn out based on future profits of up to £4,000,000.

68. Reed & Mackay were told of the Irregularities and Understatement in LG2 on 12 July 2019. At that time they were not told about the need for a cash injection of £1,000,000 into BTD.

69. Mr Hanly of Reed & Mackay responded to being told about the Irregularities and Understatement in LG2 by emailing "*As long as the prior year adjustment relates exclusively to LG2 then hopefully we can get comfortable with it*". This was part of a much longer email dealing with various other matters including the legal documents, the IATA registration transfer that was needed and the like. There is no indication whatsoever that the Irregularities or Understatement were the source of serious concern to Mr Hanly. Mr Pay responded by assuring him that the issue only related to LG2.

70. After receiving the response from Mr Hanly, Mr Pay emailed the directors of Ickenham at 3.28pm on Friday 12 July to say that all was "*hopefully positive!*".

71. Mr Pay said in his witness statement that in the evening of Friday 12 July he had a call with Mr Hanly who was "fuming about the hole" in the LG2 accounts. In his evidence at trial Mr Pay said that on reflection he thought Mr Hanly had been angry about the disclosure of the need for Ickenham to sell BTD. There is no evidence from Mr Hanly or from phone records to confirm that the call took place on 12 July. Tiffin Green suggested that neither version of Mr Pay's recollection was correct. It said the call took place a few days later and related to the matters I am about to describe.

72. There is no indication in emails or documents that Reed & Mackay were "*fuming*" or that they were asking for changes to the transaction terms after being told of the Irregularities and Understatement. Their stated concern was to ensure the issue was ringfenced within LG2 and did not impact BTD. Indeed, Mr Hanly said they were "*getting close to concluding this acquisition*".

73. On Tuesday 16 July Mr Hanly emailed Mr Pay repeating a previous request for the cash flow forecasts for BTD. He wanted clarity on the Balance Sheet and details of working capital so he could *"manage the cash flows…post completion".*

74. Ickenham emailed the daily cash flows to Mr Hanly at 11.35 on Wednesday 17 July. Those cashflows include the assumption that a working capital injection of £1,000,000 would be needed into BTD in July 2019. Within 25 minutes Mr Hanly emailed back to say "*This cash flow raises some very serious concerns. We will need to consult internally*".

75. Mr Hanly responded on Friday 19 July. His email, in essence, said that Reed & Mackay were, after some deliberation, prepared to go ahead with the purchase of BTD. He set out his three top concerns. They were (1) the cash flow shortage of £1,000,000 (2) the risk of cash being trapped in Ickenham that related to BTD and (3) reputation. Reed & Mackay required changes to the transaction terms to address these issues. The key financial changes were

i) A reduction in the initial purchase price of £1,000,000 to reflect the working capital needed in BTD; and

ii) A change to payment dates of the £5,000,000 cash consideration such that £3m was to be paid on completion, £1,000,000 on 25 October 2019 and £1,000,000 in January 2020.

76. There were subsequent negotiations which resulted in Reed & Mackay agreeing to increase the amount that could be paid under the earn out provisions by £1,000,000. The financial terms otherwise remained as proposed by Reed & Mackay.

77. The agreement to sell BTD on those terms was signed on 30 July 2019 and included those financial terms. I note, finally, that Reed & Mackay were assuming an EBITDA of only £1,200,000 for BTD. They were not prepared to accept an EBITDA assumption of £1,300,000 let alone £1,700,000 as originally put forward to Endless.

78. The changes that were made to the financial terms following the revelation of the Irregularities are therefore clear. Those changes, however, also followed the revelation of the working capital position of BTD. That working capital position had been of concern to Reed & Mackay throughout the negotiations. They had from the start required an amount of £1,000,000 to be available to cover possible working capital shortfalls in BTD.

79. In my judgment, the evidence from the emails to and from Reed & Mackay, together with inferences that can readily be drawn from the sequence of events, show the following:

i) The reduction in the up front payment of £1,000,000 was entirely to do with the working capital position of BTD; it was not related to LG2 and the Irregularities;

ii) The deferral of the two payments of £1,000,000 each can reasonably be inferred to relate to concerns about the ongoing financial position of LG2, as that was the only business left in Ickenham after the sale of BTD and would be responsible for meeting any obligations of Ickenham to Reed & Mackay after the sale completed;

iii) The increase in the earn out was to Ickenham's benefit, although of possibly limited value as it was viewed as being aspirational at best.

80. The two payments that were deferred under (ii) above were subsequently paid on or around their due dates by Reed & Mackay. Deductions were made from those payments but those deductions related to liabilities of BTD that Reed & Mackay had agreed not to take, or to liabilities of the LG2 division which had wrongly been transferred. There was no evidence that Reed & Mackay first raised these deductions in connection with Ickenham revealing the Irregularities and Understatement to Reed & Mackay. In other words, the deductions were completely unrelated to the Irregularities and would, on the evidence before me, have been made in any event. In particular, the price of £5,000,000 for BTD was always said to be on a debt-free and cash-free basis based on a normal level of working capital. The only difference was that on the original terms Ickenham would have had to pay the amount of those working capital deductions to Reed & Mackay, whereas under the deferred consideration structure Reed & Mackay made the

deductions itself from the two payments of £1,000,000 it was due to make to Ickenham. The ultimate net payment from Reed & Mackay for BTD was the same. Ickenham suffered no loss because the payment terms were changed from £5,000,000 on completion to the payment of £3,000,000 on completion and two payments of £1,000,000 subsequently.

81. In my judgment, Mr Pay's recollection that he had a conversation with Mr Hanly in which Mr Hanly was "*fuming*" is likely to be accurate. Mr Pay described where he was, and the tone of the conversation in a credible way. In my judgment, however he is mistaken about the timing of the call. The evidence indicates that Mr Hanly reacted very badly to the discovery of the cash flow position of BTD. He did not react badly to the revelation of the Irregularities; indeed, Mr Pay described Mr Hanly's reaction as "*hopefully positive!".* Mr Pay changed his witness evidence at trial to say that Mr Hanly was most angry about the accounts saying the BTD sale was needed. This does not seem supported by any contemporary evidence. It seems to me more likely that Mr Pay's prior evidence is correct in which he said that Mr Hanly was "fuming about the hole". The most likely hole about which he was fuming was, however, the hole in BTD's cashflow about which he was told on Wednesday 17 July and which prompted the almost instant reaction that this was "*very serious*", followed by the email requiring changes in the transaction terms.

82. I will deal briefly with one final point made by Tiffin Green. They asserted that the Reed & Mackay offer was in reality for £10,000,000. This was because it included an earn out of up to £5,000,000. The Reed & Mackay offer was therefore almost the same as the Endless offer of £11,000,000. Ms Hindson gave evidence that she agreed with this assessment. As I have determined that the Reed & Mackay offer represented the market value of BTD I do not need to address this point. Suffice it to say that it seems to me to be quite challenging to accept that a payment of £11,000,000 is the same as a payment of £5,000,000 with a possibility of further payments of up to £5,000,000 if certain very stringent targets are met.

83. It follows from the conclusions above that, in my judgment, the price paid by Reed & Mackay was the market value of BTD and there was no reduction in the price paid by Reed & Mackay caused by the Irregularities or Understatement. In other words, there was no loss caused to Ickenham on the sale of BTD to Reed & Mackay caused by Tiffin Green.

Factual Causation

84. The parties agreed that if Ickenham would have taken the same steps in 2014 when informed by Tiffin Green of the existence of the Irregularities and Understatement as it did in 2014 then as a matter of law Tiffin Green would not have caused loss to Ickenham. Ickenham would have failed to prove its case on what is usually referred to as the "but for" test; it would not have shown that the loss would not have arisen "but for" Tiffin Green's actions.

85. The first audit opinion issued by Tiffin Green was in December 2014. I have already determined that the opinion was issued negligently and in breach of their contractual obligations to use reasonable care. Ickenham accept that in 2014 the Understatement was at least £2,500,000. The question is whether Ickenham have proved on the balance of probabilities that if they had been issued with an audit opinion in 2014 that identified

the Irregularities and the Understatement that Ickenham would not have suffered the losses which they claim in this case.

86. Ickenham claims that it lost (1) the opportunity to prevent the Understatement increasing (2) the opportunity to remedy the existing Understatement without having to sell BTD at an undervalue and (3) the cost of fees incurred in 2019 addressing the consequences of the Understatement. I address this last point in a separate section below.

87. Ickenham says that it lost the opportunity to prevent the Understatement increasing. It does not, however, point to any financial loss that it says arose from this loss of opportunity. In reality, in my judgment, this first point is in essence the same as the second point. The loss of opportunity to prevent the increase in the Understatement is only relevant if, and to the extent that, the subsequent increase adversely affected the opportunity to remedy the Understatement as it existed in 2014.

88. Mr Photi gave evidence in relation to the position of the CAA, and in particular how they had assessed the financial position of Ickenham in 2019. He was not an expert witness. His evidence on how the CAA would have assessed the financial position in 2014 on the Understatement in 2014 was however directly comparable. It was not challenged in closing submissions by Ickenham.

89. His evidence was that the CAA had specified criteria by which they assessed the financial stability of a business. The overarching concern of the CAA was to be satisfied that the resources and financial arrangements of Ickenham were "*adequate for discharging the actual and potential obligations in respect of the activities in which it is engaged*". The CAA used these criteria in order to determine whether a business should be allowed to hold an ATOL licence. If a business held such a licence then any consumer to which it sold holidays would be protected against losing their money if the travel operator became insolvent. It was very important for a travel agent to hold an ATOL licence in order to sell holidays to consumers.

90. Mr Photi gave evidence that the CAA criteria were reviewed by the CAA as a whole but that two carried particular weight. The analysis of those ratios in 2019 indicated to Mr Photi that there were significant issues in Ickenham. When the CAA were informed by Ickenham of the position in March 2019 they, unsurprisingly, therefore took an immediate interest. They required Ickenham to place new customer money into a ringfenced account. That meant that Ickenham could not use that money for ongoing funding. In essence, that is why Ickenham had to sell BTD – it needed the cash to fill the hole left by the Understatement, and to replace the working capital previously provided by the customer funds that were now ringfenced.

91. Mr Photi gave evidence as to what the impact on the CAA criteria would have been if the Understatement of at least £2,500,000 had been discovered in 2014. Tiffin Green helpfully set out in its closing submissions the various ratios as they would have been in 2014 with an Understatement of at least £2,500,000. Those ratios were simply arrived at by taking the audited accounts for Ickenham and applying an Understatement in 2014 of £2,500,000. I need not set the figures out in full here. I will however highlight two specific examples which give a sense of the scale of the likely problem. Ickenham would have gone from having positive net equity of £923,229 as at 30 September 2014 to having negative net equity of £(1,576,771). One key IATA requirement was simply

for a company to have positive net equity. Clearly Ickenham would have failed that test by a very significant margin. The first CAA criterion is the ratio of a company's current assets to its current liabilities. A ratio of more than one indicates that current assets exceed current liabilities. Mr Photi gave evidence that a ratio of less than one would be of serious concern to the CAA. In 2014 Ickenham's ratio was 1.17. However, if the Understatement of £2,500,000 had been discovered in 2014 then the ratio would have fallen significantly to 0.78. In other words, significantly below the CAA threshold for concern.

92. When asked what would have happened if the Understatement had been £2,500,000 in 2014 Mr Photi said that "*[Ickenham] would not pass the test in 2014*". He went on to say that the consequence was that "*[Ickenham] would need a remedy*". He expanded that "*one of the remedies could be [a sale of BTD]….It could have been raised by finance, shareholder finance, shareholder call or [other things]*".

93. He was to an extent speculating as to how the CAA would have reacted, but his evidence was clear. The CAA test would be failed and Ickenham would need a financial remedy.

94. There was no real disagreement by Ickenham with the view that in 2014 they would have needed to have informed the CAA and that the matters would have been "*of concern*" to the CAA. In my judgment the evidence shows that it is likely that the CAA would have required Ickenham to obtain funding to address the shortfall. That was the evidence of Mr Photi. There was no evidence that suggested the CAA would have taken a different view in 2014 on what were in essence very similar facts to those in 2019.

95. The issues in 2014, as in 2019, only related to the LG2 business. An option in 2014 to raise funding for the LG2 business would have been to sell BTD. Mr Pay said that if he had been appointed in 2014 he would have "*done the same thing in terms of six, seven years previously of selling the business*". That sale would have been conducted on an even shorter time scale than in 2019, when a sale had been in the offing for over a year. In 2014 there would have been less preparation of BTD for sale. There would also have been less time to analyse and approach possible buyers. If the 2019 sale was claimed by Ickenham to be a "fire sale" then a sale in 2014 would have been even more so. There was thus no evidence that any buyer would have paid more for BTD in 2014, or that Ickenham was in any worse position in 2019 than it would have been in 2014.

96. Mr Reglar asserted that Ickenham could have raised money from its shareholder, namely himself. He said that "*I know that my financial circumstances were such that I could have dealt with it*". He did not however provide any explanation as to how he would have "*dealt with it*" nor any documents to evidence how he would have "*dealt with it*". He did not explain what had changed between 2014 and 2019 that meant he was unable to "*deal with it*" in 2019.

97. The Understatement was at least £2,500,000 in 2014. There was no evidence that the amount that was needed by Ickenham for funding was any less than this. Indeed Mr Photi said that "*the CAA doesn't only require a hole in the balance sheet to made [sic, filled], it would require a business to have sufficient funding to continue to trade to their financial fitness requirements*".

98. There was no evidence provided in relation to Mr Reglar's personal finances in 2014, let alone anything that indicated he could and would have provided funding at the level needed to support Ickenham. The evidence indicates that in 2019 Mr Reglar made a loan of just £350,000 to Ickenham but did not provide further funds beyond that.

99. Ickenham raised the possibility that it would have been able to raise debt finance in 2014 to support its business and to remedy the £2,500,000 shortfall. Ickenham did not provide any evidence to support this assertion, nor did they provide any evidence to show that funding was more easily available to Ickenham in 2014 than it was when the Understatement was actually discovered in 2019.

100. The evidence indicates that Ickenham seemed able to take steps from the point of discovery of the Understatement to prevent it increasing. This was by charging a currency surcharge for new bookings. This seemed to be successful in 2019 in preventing an increase in the Understatement. There is no reason to think that a similar measure could not have been introduced in 2014. The surcharge that was introduced did not, of course, reduce the existing Understatement in 2019 nor would a surcharge on new bookings have reduced the existing Understatement in 2014.

101. In conclusion, in my judgment, Ickenham have not proved that the steps they took in 2019 would have been different from the steps they would have taken in 2014. They have not shown that in 2014 they had any options for internal or external funding that were not available in 2019. In other words, Ickenham has not proved that there was any difference between:

    i) the position it would have been in if Tiffin Green had informed it of the Understatement in 2014; and

    ii) the position it was in when the Understatement was actually discovered in 2019.

    Accordingly, even if BTD was sold at an undervalue in 2019 in order to raise funds for Ickenham, Ickenham has not proved that Tiffin Green caused that loss. Ickenham was, in essence, always going to be in the situation in which it found itself, whether the Understatement was discovered in 2014, or 2019, or at any point in between.

Professional fees

102. Ickenham claimed for just over £300,000 of professional fees. These were incurred for advice received in 2019 following the discovery of the Irregularities. The fees were incurred in relation to the following advisers:

    i) Blake Morgan;

    ii) Cherry B Consulting;

    iii) FRP Advisory;

    iv) Interim Financial Solutions Ltd;

    v) White Hart Associates;

    vi) Grant Thornton UK Limited;

vii) and PTT Trustees.

103. At the trial Ickenham accepted that the fees incurred by Blake Morgan were in fact incurred in connection with this litigation. They were therefore removed from their damages claim.

104. The parties agreed that if Ickenham would have taken the same steps in 2014 when informed by Tiffin Green of the existence of the Irregularities and Understatement as it did in 2019 then as a matter of law Tiffin Green would not have caused loss to Ickenham. Ickenham would have failed to prove its case on what is usually referred to as the "but for" test; it would not have shown that the loss would not have arisen "but for" Tiffin Green actions.

105. The evidence set above under "Factual Causation" applies equally to the court's analysis on the professional fees claimed. The evidence clearly shows that Ickenham would have needed to engage in 2014 with the CAA in relation to its ATOL licence. This is because there was an Understatement of at least £2,500,000 that existed when the 2014 audit opinion was issued by Tiffin Green. The evidence also shows that Ickenham would have had to seek funding in 2014 to address that Understatement. The Understatement increased from 2014 until its discovery in 2019. The rate of increase is not known. There is no evidence to suggest that Ickenham would have been in a better position with the CAA or had a lesser need to seek additional funding at the time of issue of the audit opinions in 2015, 2016 or 2017.

106. Ickenham did not produce any evidence that it appointed any advisers in 2019 that would not have been appointed in 2014 or subsequently. It did not produce any evidence that the fees incurred in 2019 were in excess of the fees it would have incurred in 2014 or subsequently. It is, of course, for the claimant to prove its case and not for the defendant to disprove it. Indeed, when Mr Reglar gave evidence he even accepted some of the fees were unrelated to the Understatement and Irregularities. He said, for example, that invoices from Cherry B Consulting were at least "*partially*" to cover a gap caused by the departure of the previous finance director.

107. In my judgment, Ickenham has not shown that the professional fees it incurred in 2019 were caused in whole or in any part by Tiffin Green's breach of duty in 2014 or at any subsequent point. They were caused by an Understatement of which at least £2.5 million existed in 2014 when Tiffin Green first conducted an audit and which existed throughout the period in question. Ickenham's claim in relation to professional fees therefore fails.

Legal Causation / Scope of duty

108. I have already determined that as a matter of fact there was no loss of value on the sale of BTD. I have also determined that any loss, if there had been any, was not caused by the negligence or breach of contract of Tiffin Green.

109. I do not therefore need to decide whether the loss of value on the sale of BTD was a type of loss for which Tiffin Green as auditors would be liable at law. I heard, however, argument on this topic. I will record it briefly for completeness.

110. The leading authority *is Manchester Building Society v Grant Thornton UK LLP ("MBS")*[5]. The court summarised the law derived from previous cases including in particular *SAAMCO*[6], *Caparo Industries plc v Dickson*[7], *Nykredit* [8]and *Hughes-Holland*[9]. There was a difference of opinion between the majority of the court and Lord Leggatt JSC. For the purposes of this case, however, the core question was the same. The majority held in paragraph 13 that the "*scope of the duty of care assumed by a professional adviser is governed by the purpose of that duty, judged on an objective basis by reference to the reason why the advice is being given*". Lord Leggatt JSC preferred an analysis which focussed on whether the "*basic loss was causally related to the subject matter of the …advice*", rather than being causally connected to the loss itself.

111. For the purposes of my assessment of these questions I will assume that BTD was sold for a price below its true value and that Tiffin Green caused that loss of value. That loss of value is therefore the type of basic loss suffered by Ickenham.

112. It was accepted that Tiffin Green's duty included the customary duties under the Companies Act 2006 of an auditor. Ickenham said that Tiffin Green's scope of duty went further than this.

113. From 2016 the CAA required a company to appoint auditors accredited by the CAA. Auditors are accredited by the CAA because they are viewed as having a special expertise or experience in travel businesses. Prior to 2016 there was no such requirement but even in that period Tiffin Green held themselves out as having particular expertise in the travel business. The Tiffin Green engagement letter recognised this. Ickenham says that Tiffin Green therefore held themselves out as having a purpose in auditing the accounts that went beyond the normal purpose of auditors. The purpose was to assist Ickenham in maintaining its approval by the CAA.

114. The CAA, in connection with is approval, required Ickenham to provide them with timely and accurate financial statements. This included the annual accounts and the auditors report on them.

115. The final question for the court is to assess whether the type of loss suffered falls within the scope of the duty. In this context, the critical question posed by Lord Leggat JSC in *MBS* at paragraph 96 was:

> "*The relevant causal relationship for this purpose is not between the provision of information or advice and the claimants loss but between what made the information or advice wrong and the loss. What makes information or advice wrong is the existence of facts or matters which the adviser has misrepresented or failed to report. It is the foreseeable consequences of those matters to which the advisers responsibility is limited."*

[5] [2022]AC 788
[6] [1997] AC 191
[7] [1990] 2 AC 605
[8] [1998] 1 All ER 305 HL(E)
[9] [2018] AC 599

116. The majority of the Supreme Court preferred a simple assessment of the "*purpose*" of the duty.

117. In its defence Tiffin Green accepted that "*The purpose of Tiffin Green's retainers were to prepare and audit ITG's financial statements in order, amongst other things to maintain (insofar as it was possible to maintain) ITG's accreditation by IATA and ATOL*".

118. If that was an accepted purpose then it seems to me that it is reasonably foreseeable that if Tiffin Green failed properly to carry out their obligations then that was likely to impact Ickenham's CAA approval. The reasonably foreseeable consequences of that impact might include the steps that Ickenham would be required to take to maintain its approval. To the extent that those steps caused loss to Ickenham whether by sale of assets at an undervalue or by incurring fees then it seems to me that Tiffin Green might be liable at law for those losses. That is the case on the tests set out both by Lord Leggatt JSC and the majority. Given my factual findings above, however, I do not need to go further than this on the subject of legal causation.

119. I will, for completeness, address one further point that was raised. Tiffin Green invited me to conclude that *Equitable Life*[10] is supported the proposition that a fall in value in a company automatically falls outside the kind of losses for which an auditor might be liable. The relevant part of *Equitable Life* to which I was referred was the first instance decision of Langley J on an application for strike out. The Court of Appeal did not decide that the loss was or was not one for which the auditors was liable; they decided that, in that case, it was not an appropriate matter for summary judgment. I therefore do not agree with that proposition by Tiffin Green.

The Pleadings Issue

120. Tiffin Green say that Ickenham's pleaded case is that the underlying accounting issues were caused by a failure to revalue the foreign currency creditors at each financial year end. Tiffin Green say that the experts agree that this could not be the cause of the Understatement and accordingly Tiffin Green cannot be liable on the pleaded case.

121. Ickenham says that the pleaded case sets out multiple ways in which Tiffin Green were negligent and in breach of contract. These included a failure to revalue foreign currency creditors but are certainly not limited to that. Ickenham says that the pleaded case also makes it clear that there are several possible causes of the Understatement. It also says that the actual cause remains unknown. It says that the experts agree that a competent auditor would have identified the issue, whatever the underlying cause ultimately turned out to be. Ickenham says that accordingly Tiffin Green remain potentially liable under their pleaded case.

122. The purpose of the pleadings is to enable the parties to identify the issues in the case, disclose all appropriate information, and be able to present their evidence and arguments. I have considered the Particulars of Claim, the Defence, the Reply and the Request for Further Information. It is clear to me, and should be clear to Tiffin Green, that (a) the underlying cause of Understatement was not known and (b) Tiffin Green were said to be negligent and in breach of contract by having failed to discover the

[10] [2003] PNLR 23; [2004] PNLR 16

Understatement and Irregularities. The experts subsequently discounted one possible cause of the Understatement, namely the failure to revalue the payables at the year end to reflect the current FX rate. They did not identify the actual cause. They were however agreed that it was some sort of fundamental accounting or record keeping failure.

123. Given my findings above, my decision on this point does not affect the overall conclusion. I am, however, satisfied that the pleadings adequately identify the issues for Tiffin Green. In particular, Ickenham's pleaded case would not fall away if the cause of the Understatement is not the failure to revalue outstanding creditors at the year end. The cause was alleged to be a significant accounting failure, of a nature that was unknown, but that was of such a magnitude that a competent auditor would have discovered it. Tiffin Green are therefore, in my judgment, unsuccessful on the Pleadings Argument.

Limitation

124. This is a claim in both contract and tort. The underlying act which is said to have caused the loss for which Tiffin Green should be liable was the issue of audit opinions. There were four audit opinions in relation to which Tiffin Green were said to be liable. It was common ground that the opinions for the years ended 2015, 2016 and 2017 were issued within the tortious and contractual limitation periods. By the end of opening submissions Ickenham accepted that the contractual claim in relation to the 2014 audit opinion had been issued outside the limitation period. It therefore fell away. There was a dispute as to whether the claim in tort in relation to the 2014 audit opinion had been issued within the limitation period.

125. Ickenham accepted that the claim in tort in relation to the 2014 audit opinion had been issued more than 6 years since the audit opinion was issued. It made submissions that its cause of action arose when actual damage was suffered in 2019. I was taken to *Forster v Outred*[11] and the summary of the current law in *Jackson & Powell* and the authorities cited in it in relation to this point, and generally on limitation. Ickenham is, in my judgment, clearly wrong about s2 Limitation Act 1980. The point made by Ickenham was also not what was pleaded or argued at trial. The cause of action arose when Ickenham was first issued with the audit opinion in 2014 which negligently failed to inform Ickenham of the Understatement and Irregularities and therefore deprived Ickenham of the opportunity to address them. Ickenham also argued that its claim fell within s14 (A) Limitation Act 1980. That section allows a claim in tort to be brought within 3 years of the starting date, as defined in s14A (5). The starting date is the earliest date on which Ickenham had both (a) the knowledge required for bringing this action and (b) the right to bring the action.

126. The first limb of the test is the question of when Ickenham had the requisite knowledge.

127. I was referred to the decision of Richard Sheldon QC (sititng as a Deputy Judge of the High Court) in *Integral Memery plc v Haines Watts* [12]. That summarised, at paragraphs

[11] [1982] WLR 4
[12] 2012 EWHC 342 (Ch)

39 to 41 the authorities in *Hallam-Eames v Merrett Syndicates* Ltd [13] and the House of Lords in *Haward v Fawcetts* [14]. I need not set out those paragraphs in full.

128. The key facts are set out above. In summary, Ickenham did not know until February 2019 of the Irregularities or the Understatement. Tiffin Green argued that Ickenham had some knowledge of the Irregularities in 2014. Ickenham been told by Tiffin Green that they might need to review their accounting treatment of foreign currency creditors. That was however raised in an extremely low key way, was not raised as a material issue and was not even suggested by Tiffin Green to have absolved them of liability for the breach. At its highest, it was a suggestion that it might have been contributory negligence. That could not be said, in my judgment, to constitute actual or imputed knowledge of the Understatement, or of the Irregularities for the purposes of s14A. Accordingly in my judgment the starting date for the first limb of the test in s14A (5) is February 2019.

129. The second limb of the test is when Ickenham acquired the right to bring the action. The facts in this aspect of this case are very straightforward, and the law on this point was not in particular dispute. I can deal with the issue quite simply. When the audit opinion was issued in 2014 Ickenham was deprived of the opportunity to address the Understatement as it is existed at that time, and to address the Irregularities and thus prevent the Understatement increasing. This is their pleaded cause of action. The loss they say they suffered when selling BTD was the crystallisation of a liability which until then had been contingent. In my judgment Ickenham plainly had the right to bring its claim from 24 December 2014 when the first audit opinion was issued. That is therefore the starting date for the second limb of the test in s14A (5).

130. Tiffin Green argued that this limitation point had not been properly pleaded. It said that when Tiffin Green had raised limitation its defence, the Reply referred in paragraph 37 only to the 6 year limitation point and not s14A. That is true. It is not, however, the whole truth. Paragraph 30 of the Reply denied paragraph 38 of the Defence. In that paragraph the Defence relied on s2 and s5 Limitation Act 1980. Section 2 does not, of course, apply if s14A applies. Accordingly, the Reply was in paragraph 30 denying that s2 provided Ickenham with a defence and it was not limiting that to the 6 year point only. It would have been preferable if that paragraph 38 had specifically referred to s14A. The Particulars of Claim did, however, clearly set out that Ickenham first became aware of the Irregularities and Understatement in 2019. In my judgment, taken as a whole, the pleadings adequately identify Ickenham assert that s2 Limitation Act 1980 does not preclude it bringing the claim in tort, and identify the underlying facts which support that. I then turn to the relevant date for the purposes of s14A.

131. The earliest date on which Ickenham had both (a) the knowledge required for bringing the action for damages and (b) a right to bring such an action was February 2019. Their claim in tort in relation to the 2014 audit has, in my judgment, therefore been brought within the three-year period in s14A Limitation Act 1980.

Conclusion

[13] [2001] Lloyd's Rep PN 178
[14] [2006] 1 WLR 682

132. Ickenham has not succeeded in the Loss Argument or the Factual Causation Argument. Its claim therefore fails.

133. I invite the parties to agree consequential matters between themselves. If they are unable to do so by 4pm on Thursday 25 January then I will give directions as to how any outstanding matters are to be resolved.

Judgment ends