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GETTING YOUR BREACH OF WARRANTY CLAIM OFF ON THE RIGHT FOOT

In *Nobahar-Cookson v The Hut Group Ltd [2016] EWCA Civ 128*, the Court of Appeal had to decide the meaning of the following limitation in a sale and purchase agreement:

"The Sellers will not be liable for any Claim unless the Buyer serves notice of the Claim on the Sellers (specifying in reasonable detail the nature of the Claim and, so far as is practicable, the amount claimed in respect of it) as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter."

"Claim" was defined as *"a claim by the Buyer for breach of a Warranty…"*

The buyer had notified the seller of a breach of warranty claim relating to the target's financial position. It had been aware of the facts giving rise to that claim (i.e. the inaccuracies in the financial data about the target) for more than 20 business days before the date of the notification. However, until the buyer had taken professional advice from its accountant, the Court accepted that the buyer was not aware that those facts were a proper basis on which to assert a breach of warranty claim against the seller. The buyer had notified the seller within 20 business days of receiving professional advice and determining it had a proper basis to assert a claim. The issue the Court of Appeal had to decide was what was meant by the phrase *"becoming aware of the matter"* and therefore whether the buyer had notified the seller of the claim within time or not.

Three rival interpretations were put forward: (1) awareness of the facts giving rise to the claim, even if unaware that those facts gave rise to a claim under the sale and purchase agreement; (2) awareness that there might be a claim; or (3) awareness that there was a proper basis for a claim for breach of warranty under the sale and purchase agreement.

The Court of Appeal decided that (3) was the right interpretation of the phrase. It meant that the buyer was afforded time to investigate the facts and take professional advice in order to understand whether the facts gave rise to a warranty claim.

The Court of Appeal's reasoning was as follows:

1. The meaning of the phrase should be ascertained from a linguistic, contextual and purposive interpretation of the words. Linguistically, the words did not favour one interpretation over another. However, the Court decided that the purpose of the provision was to ensure that the buyer dealt with claims promptly and did not keep warranty claims up its sleeve. This purpose was better served by an interpretation which focused on the buyer's awareness of a claim, rather than its awareness of facts which might give rise to a claim.

2. It was argued for the buyer that, if the 20 business day limitation period started running from the moment the buyer became aware of the facts giving rise to the claim (interpretation option 1), then the buyer might miss the deadline for notifying a claim before it had appreciated (or even suspected) that those facts gave rise to a breach of warranty claim. The buyer argued that this made no commercial sense. Two out of the three judges in the Court of Appeal found this argument persuasive as to why option (3) should be favoured as the correct interpretation.

3. Ambiguities in exclusion clauses should be interpreted narrowly. Exclusion clauses, by their nature, cut down the remedies available for breaches of contract. Clear words are required before a Court will conclude that the parties intended to limit their ability to seek recompense for breaches of contract. The Court quoted an earlier judgment in *Seadrill Management Services Ltd v OAO Gazprom [2010] EWCA Civ 691* which said that the principles applicable to interpreting exclusion clauses are, *"essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so."*

As well as notifying within the contractual limitation period, buyers must make sure that the content of the notification is in accordance with the terms of the sale and purchase agreement. In the recent case of *Ipsos S.A. v Dentus Aegis Network Limited [2015] EWHC 1171*, while acknowledging that each notification clause turns on its own words, the Court set out some general principles which apply to typical notification provisions in sale and purchase agreements:

- the commercial purpose of the notification clause includes ensuring that the seller knows, in sufficiently formal terms, that a breach of warranty claim is being made. This will enable the seller to make appropriate financial provisions for the claim;

- the notice should be sufficiently clear so that a reasonable recipient of the notice, who had knowledge of the context in which the notice was sent, would understand the letter to be a notification of a warranty claim;

- the notice must specify that a claim is being made; and
- if the sale and purchase agreement requires certain matters to be specified in the notice, then those matters must be specified.

The buyer's notification in the *Ipsos* case was ineffective and the buyer's claims failed. Although the buyer's letter informed the seller of a number of matters which might give rise to a warranty claim, it did not in terms say that a warranty claim was being made against the seller. It was not detailed enough in setting out the matters which gave rise to the claim or specific enough in describing the nature of claim. The case serves as a reminder to buyers that notification letters are formal documents, more akin to pleading in detail the buyer's case than a description of events. A buyer may discuss its concerns with the seller informally, or hold meetings to explore amicable resolutions, but this does not obviate the need for a formal and detailed notification letter to preserve the claim.

These two cases serve as a reminder to buyers to carefully check the provisions in their sale and purchase agreements to ensure that they do not miss any limitation periods or the formal requirements for notifying claims.

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