Warranty Claims: notification provisions and contractual time limits.

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1. Clauses requiring written notice of a warranty claim to be given by a specified deadline are a common feature of share purchase and other sale agreements. Often they are followed by a requirement that any claim be commenced within a further specified period of the giving of any notice of claim.

2. The recent decision of the Court of Appeal in *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128 (which considers the scope for reliance on the *contra proferentem* rule in the context of ambiguous notice provisions) provides an opportunity to consider traps for would be claimants when seeking to enforce contractual warranties.

3. By way of general observation, the proper meaning of notice provisions in a sale agreement falls to be determined in accordance with the principles applicable to all other kinds of contract, (as to which see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912F -913G per Lord Hoffmann, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, at [21] to [26]; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900; *Arnold v Britton* [2015] AC 1619). The construction of notices purportedly given in compliance with the contract must also be approached objectively (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749): how would the reasonable recipient (with knowledge of the context in which it was sent) have understood the notice? Ultimately, the meaning of each notice clause will turn on its individual wording: see *Forrest v Glasser* [2006] 2 Lloyds Rep 392 (at ¶ 24 per Ward LJ).

4. A convenient summary of principle appears in the judgment of Gloster J (as she then was) in *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm) at ¶ 10) where she distilled the following further relevant propositions from authorities to which she had been referred:

   (1) where a notification clause operates as a condition precedent to liability for breach of warranty, it is for the party bringing the claim to demonstrate that it has complied with the provision;

(2) the wording of the notification clause must be interpreted by reference to the commercial intent of the parties; that is to say, the commercial purpose that the clause was to serve;

(3) in all cases it is important to consider the detailed claim being made in terms of both the breach complained of and the remedy being sought, to ensure that it was a claim which was properly notified.

5. The notification clause with which Gloster J was concerned in *RWE* was in these terms:

> The Vendor will be under no liability in respect of any Claim unless written particulars of such Claim (giving details of the specific matter as are available to the Purchaser in respect of which such Claim is made) have been given to the Vendor within a period of 24 months from the date of Completion.

6. As to that the learned judge said this (at [11]):

> In my judgment what has to be notified in relation to any particular claim in the present case will be largely dependent on the nature of the Claim, the facts known to the vendor at the date of the notice, and whether it is realistic to put any monetary quantification on the amount claimed. I do not think one can lay down too rigid a formula for ascertaining what precise particulars or details have to be notified; the answer is that it will all depend. However, . . . I would expect a compliant notice would identify the particular warranty that was alleged to have been breached; I would expect that, at least in general terms, the notice would explain why it had been breached, with at least some sort of particularisation of the facts upon which such an allegation was based, and would give at least some sort of indication of what loss had been suffered as a result of the breach of warranty . . .

7. In *Laminates Acquisition Co v BTR Australia Ltd* [2004] 1 All ER (Com) 737 the notice clause in the share purchase agreement considered by Cooke J provided as follows:

> No claim ... shall be brought against the Vendor in respect of any Agreed Assurances . . . unless the Purchaser shall have given to the relevant Vendor written notice of such claim specifying (in reasonable detail, to the extent that such information is available at the time of the claim) the matter which gives rise to the claim, the nature of the claim and the amount claimed in respect thereof (detailing the Purchaser's calculation of the loss thereby alleged to have been suffered by it or the relevant member of the Purchaser's Group) . . . on or before 31st March 2000

8. Mr Justice Cooke identified (at [30]) the purpose of the above notice provision as to ensure that the vendor was provided with a warning of future legal proceedings against it with sufficient information and time to enable it to make enquiries, to make an informed assessment of the claim, decide what to do about it, take precautionary steps (such as notification to insurers and preparation of defence material), make provision in its accounts or obtain withdrawal of the claim or satisfy or settle it before legal proceedings were issued. To do any of those things, necessitated some particularisation of the claim.

9. Sometimes the commercial purpose or purposes behind the notice provision will be expressly referred to in the relevant contract. Thus, in *T&L Sugars Ltd v Tate & Lyle Industries Ltd* [2014] EWHC 1066 (Comm), cl 11.1 of the sale agreement (no doubt drawing upon the decision in *Laminates Acquisitions*) required notification of a claim to set out "such information as is available to [the purchaser] as is reasonably necessary to enable the [seller] to assess the merits of the potential claim, to act to preserve evidence and to make such provision as [the seller] may consider necessary."

10. Where the relevant clause requires notification of the estimated loss, this can present difficulties. Depending on the wording of the warranty or warranties said to have been breached (and any contractual remedy specified in the contract), frequently expert evidence may be required properly to quantify loss. There are dangers in under-estimating for the purposes of a required notification letter the losses said to arise out of the alleged breach: see *Highwater Estates Ltd v Graybill* [2009] EWHC 1192 (QB) where the court held that a discrepancy between the amount claimed in the notification letter (£387,000) and in the subsequent proceedings (£2.06m) was a further instance of non-compliance with the contractual requirements of the notice.

11. In *Nobahar-Cookson v The Hut Group Ltd* the Court of Appeal offered guidance on the construction of ambiguous contractual provisions relating to the time limits for notification of warranty claims. The relevant clause (clause 5.1 in a share purchase agreement) was in these terms:

    > 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.

12. “Claim” was defined in the relevant agreement as meaning “any Warranty Claim” which in turn was defined as “a claim by the Buyer for breach of a Warranty”. The ambiguity in cl 5.1 lay in the concluding words “aware of the matter”. Did they mean:

    (a) aware of the facts giving rise to the Claim (even if unaware that those facts did give rise to a claim);

    (b) aware that there might be a claim under the warranties; or

    (c) aware of the Claim, in the sense of an awareness that there was a proper basis for the Claim.

13. The Court of Appeal dealt first with the relevance of the *contra proferentem* rule in resolving ambiguity. After noting that in its classic form the rule was by no means limited to, or even mainly about, exclusion clauses (of which cl 5.1 was an example), Lord Justice Briggs went on (at [16]) to record that recent cases about exclusion clauses have continued to affirm the utility of the principle that, if necessary to resolve ambiguity, such clauses should be narrowly construed. In the judgment of Briggs LJ (at [18]), the underlying rationale for the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed had nothing to do with the identification of the proferens, either of the document as a whole or of the clause in question. Nor, he said, was it a principle derived from an identification of the person seeking to rely upon it. Rather, ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations with using clear words to that effect.

14. In the court below, Blair J had rejected recourse to a narrow construction to resolve ambiguity on the basis that both sides had given warranties to each other. That approach was criticised by Briggs LJ (at [20] who said he could see no reason to disapply the principle that resolves ambiguities in a particular exclusion clause by a narrow construction, merely because the same contract contained an exclusion clause limiting the extent of contractual warranties given by the other party.

15. What is clear from the judgment of Briggs LJ (at [21]) is that adoption of a narrow construction to resolve ambiguity is not a starting point to construction. Rather it is to be used if linguistic, contextual and purposive analysis does not disclose an answer to the question with sufficient clarity.

16. As to the rival interpretations of cl 5.1, Briggs LJ rejected (b) (in paragraph 12 above) as uncommercial on the basis it required notification of a Claim when it was merely suspected. As between the others, Briggs LJ preferred ("on a fairly narrow balance") the conclusion of the judge below in favour of (c). In upholding the decision below, Briggs LJ was persuaded that the purpose of cl 5.1, namely to prevent the Buyer from pursuing claims previously kept up its sleeve (rather than to goad him towards analysis and the obtaining of advice about known facts sufficient to enable him within 20 Business Days to notify a Claim) was better served by an interpretation which focussed upon awareness of the Claim than upon awareness of the underlying facts. Both Hallett LJ and Moylan J agreed with Briggs LJ as to the dismissal of the appeal but both would have put more emphasis on the commerciality of the successful respondent's interpretation.

17. A contractual time limit within which a warranty claim must be commenced will frequently use the words "issued and served". In *T&L Sugars Ltd v Tate & Lyle Industries Ltd* (supra) the High Court (Flaux J) held, in a clause in a share and business sale agreement deeming any notified warranty claim to have been irrevocably withdrawn unless "legal proceedings in respect of [it] were commenced by being both issued and served", meant issued and served in accordance with the CPR, not delivered and received in some non-legal sense (as Green J had held in respect of a similarly worded clause in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2013] EWHC 3261 (QB)).

18. In concluding that "served" in the relevant clause (cl 11.3) meant served in accordance with the CPR Flaux J relied upon the following reasons.

19. First, the word was used in the phrase "has issued and served proceedings". Clearly, said Flaux J, the word "issued" in that phrase must mean issued in accordance with English procedural rules (since the only proceedings permitted by virtue of the exclusive jurisdiction clause were before the English courts), in other words issued and sealed by the court in accordance with CPR 7.2. "Issued" in that context could

not have some ordinary, non-legal meaning, for example sending of a draft claim form and Particulars of Claim, as sometimes happens to facilitate settlement before proceedings are formally issued. On the basis that "issued" in that context meant issued in accordance with the CPR, it would be "very odd" if "served" in the same phrase did not also connote served in accordance with the CPR.

20. Secondly, when cl 11.3 talks about proceedings (which by necessity means proceedings before the English courts) being "issued and served", the natural meaning of the word "served" in that context is "served in accordance with the procedural rules in force in England at the relevant time". He rejected as uncompelling Green J's reasoning in *Ageas* to the effect that the parties as reasonable businessmen would have intended "served" to have some ordinary meaning of delivered and received. Had that been the case, different words would have been used.

21. Thirdly, Flaux J agreed with counsel for the seller that the relevant contract envisaged two separate regimes, one for the giving and receipt of contractual notices and the other for issue and service of proceedings.

22. Fourthly, although he agreed that the purpose of a clause such as cl 11,3 was to bring to the attention of the seller the existence of a warranty claim, within a relatively short period (there 12 months) so that the seller would know, once the time limit had passed and no proceedings had been issued and served, that it was free from the risk of proceedings, that did not, said Flaux J, assist in answering the question what step or steps had to have been taken to serve proceedings within the meaning of the clause.

23. Fifthly, contrary to Green J's reasoning, he did not consider the absence of clear words making it plain that service in accordance with the CPR was contemplated assisted determination of the proper meaning.

24. Finally, although he agreed with Green J that the contract had to be construed as whole as part of the "unitary exercise" of construction in accordance with *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900, the presence of the exclusive jurisdiction clause made it quite clear that the proceedings referred to in cl 11.3 must be before the English courts and the clear distinction drawn in the agreement between the giving

and receipt of contractual notices and the service of proceedings, all pointed to service meaning service under the CPR.

25. As to when service was effected, Flaux J held it was the date service was actually effected in accordance with CPR 7.5 not the (later) deemed date of service under CPR 6.14. That rule (CPR 6.14) was looking at when service will be deemed to have taken place for the purpose of other steps in the proceedings thereafter, beginning with the filing of an acknowledgement of service.

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