SHARE PURCHASE AGREEMENTS & WARRANTY CLAIMS –
CURRENT TRENDS & PRACTICAL PITFALLS

Hugh Sims QC, Guildhall Chambers
Charlie Wedin, Partner, Osborne Clarke

October 2014

INTRODUCTION

"a lawyer's desire to make sure that every conceivable point has been covered"[1]

1. Share purchase agreements ("SPAs") are a classic manifestation of this "lawyer's desire", which has not been helped by the ability to cut and paste from previous lengthy precedents. Despite that desire, or perhaps because of it, such agreements remain fertile ground for disputes. SPAs provide the opportunity/risk for litigation and/or ADR on a number of fronts:

    (1) There are often disputes known about before the SPA is signed, and in respect of which there may be a contractually agreed or pre-ordained dispute resolution mechanism, or expert determination clause;
    (2) There can be disputes about pre-contractual representations said to have induced the agreement;
    (3) The long list of warranties gives the disgruntled buyer the opportunity to claw back some of the purchase price; and
    (4) There are always the professionals to blame if all else fails.

2. In these notes we concentrate on disputes relating to warranties: i.e. disputes relating to the promises made by the warrantor to the warrantee within the SPA itself. We propose to do so under three different headings, looking at drafting and judicial trends, and the pitfalls involved:

    (1) Warranties and misrepresentation claims;
    (2) Contractual limitation periods: threatened claims and notification letters;
    (3) Measuring loss.

WARRANTIES AND MISREPRESENTATION CLAIMS

3. Simply put, a warranty is a contractual statement of fact made by one or both of the parties, which is usually contained in the SPA or a schedule to it. The negotiation of warranties forms an inherent part of the negotiation as to risk, reflected by the fundamental concept in English law of "buyer beware", and is usually preceded by due diligence enquiries by the prospective buyer. The statement of fact will typically be in the nature of some promise or assurance as to the target company, or business, which will often have an impact on how the company is valued by the prospective purchaser. Many of the recent cases have focussed on warranties as to the finances of the target company, and how those warranties are to be interpreted: see for example the leading case on the meaning of "true and fair" in accounts, including management accounts, in *Macquarie Internationale Investments Ltd v Glencore UK LTd* [2010] EWCA Civ 697.

4. The essential concept behind the warranty is it gives the buyer the opportunity to seek damages to put them in the position they would have been if the promise was true. In contrast, in misrepresentation cases, the buyer is ordinarily seeking to obtain damages to put themselves into the position if no transaction had occurred. Indemnities are often sought to ensure the buyer is reimbursed in respect of loss suffered where some potential risk or loss is known about, and may be used where a breach of warranty claim would not give rise to a claim in damages.

[1] Per Lord Hoffmann in *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1998] 2 All ER 778 at 784, [1999] AC 266 at 274

5. A claim in misrepresentation may provide a claimant with advantages when it comes to an assessment of losses, as considered further below. The circumstances in which a claim can be brought in tort for a misrepresentation as well as (or instead of) a contractual claim for breach of warranty are case specific: there is no general principle of law applicable and much depends on the precise drafting adopted and the circumstances in which the SPA is entered into.

6. In *Senate Electrical Wholesalers v STC Submarine Systems Ltd* [1999] 2 LR 423 the claim in tort did not prosper and the case on appeal was entirely focused on the contractual claim (which also ultimately failed). However in *MAN Nutzfahrzeuge AG v Freightliner LTd and others* [2005] EWHC 2347 (Comm) the arguments succeeded on both representations and warranties in the SPA, albeit it may be said to be an extreme case as the representations were found to be dishonest.

7. The starting point for the prevailing view emerging from the courts is the decision of the Court of Appeal in *Bottin (International) Investments Ltd v Venson Group Plc* [2004] EWCA Civ 1368, where the court found that the parties intended that the warranties could not be said to be independently actionable as representations. The relevant clause (3(a)), on the face of it, provided some support for the notion that the warranties could be treated as representations, since it stated as follows:

   "*Subject to the following provisions of this clause, each of the Warrantors warrants in the terms set out in Schedule 3 to the Investor...The Warrantors acknowledge that the Investor is entering into this Agreement in reliance upon the warranties and agree that the Investor may treat them as representations inducing them to enter into this agreement*"

8. The case went on to set out a notification requirement (12 months – see further below) and other standard clauses.

9. The Court of Appeal's reasoning was that the court should have in mind the contractual allocation of risk and reward when deciding whether the parties were to be taken to have intended that claims for misrepresentation based on the same facts as gave rise to a claim for breach of warranty were to fall entirely outside the confined liability prescribed by the agreement. At para 65 Peter Gibson LJ reasoned as follows:

   "*To my mind it makes no commercial sense for the Agreement to impose conditions as to the giving of notice of a breach of warranty and as to the commencement of proceedings for such breach and limiting the maximum liability if Bottin was intended to be left free of those conditions and those time limits and the limits on liability by treating the warranties as representations...The final words of cl 3(a) would permit a claim for rescission of the Agreement. That gives sufficient effect to those words, without having to give them the meaning contended for by Mr Wardell which flouts commercial good sense.*"

10. The agreement also contained a non-reliance and entire agreement clause in the following terms:

    "*The Investor acknowledges that it has not relied on any warranty, representation or information in entering into this Agreement other than as expressly set out in this Agreement. This Agreement...constitute the entire agreement...*"

11. The court did not find it necessary to determine whether or not that give rise to an estoppel (though as to the development of the concept of contractual estoppel see *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 and the cases which have followed it).

12. Two cases in 2012 illustrate the trend by the Courts to uphold the idea that the parties intended their rights and remedies to be contained within the four walls of the SPA:

13. In *Bikam Ood & Another v Adria Cable Sarl* [2012] EWHC 621 (Comm) the claimant applied for summary judgment on the defendant's misrepresentation counterclaim. The total price

payable by the share purchaser was 6.45m Euros (subject to post completion adjustments), payable in two tranches. The first tranche of 850k was paid, but the second tranche of 5.6m was not. The warranties were also fortified by an indemnity clause, which required the seller to indemnify the buyer against any and all liabilities arising out of any breach of warranties. Clause 9.10 of the agreement provided as follows:

"*The Buyer Acknowledges and agrees that its sole remedy against Sellers for any breach of the Sellers' Warranties is set out in this clause 9...*"

14. Clause 21 contained an entire agreement clause, including a clause (21.2) that:

"*Each party waives its rights against the other in respect of warranties and representations (whether written or oral) not expressly set out in this Agreement.*"

15. Simon J expressed some doubt as to whether a representation which only appears in a contract can fall within the terms of section 2(1) of the Misrepresentation Act 1967, but in any event proceeded on the basis that it was arguable that it could. Ultimately however he found that the contract read as a whole, and the above identified clauses in particular, demonstrated that the parties intended that claims for misrepresentation were excluded. He was particularly struck by the fact that it would be an "un-commercial reading" of the contract to construe it to permit a claim without the careful scheme of limitations set out by the warranty clauses.

16. The second decision in 2012 is *Sycamore Bidco Ltd v Breslin & Another* [2012] EWHC 3443 (Ch), a decision of Mann J later the same year. Ultimately he arrives at the same conclusion as Simon J. In doing so he distinguished/declined to follow an earlier decision of Arnold J called *Invertec Ltd v De Mol Holding BV and another* [2009] EWHC 2471 (Ch) where it had been found that matters which formed warranties could also be relied on as misrepresentations. The reason he did so was because ultimately he formed the view that there was nothing to make the warranties become representations. He also was persuaded by the fact that the SPA was "part of a suite of documents, negotiated at arms length by commercial parties" and "where both parties were assisted by experienced professionals (solicitors and accountants)." He concluded the buyers were content with extensive warranties and there is nothing unreasonable about excluding any parallel liability for misrepresentation in those circumstances.

17. Finally, the decision in *Fox v Hall* [2014] EWHC 2747 (QB) is also worth a brief mention. It is the joker in the pack and not strictly an SPA case at all. The decision is worth reading if only for the entertaining summary of the pitfalls of litigation in the first paragraph of the judgment.

18. The rejection of the pre-contractual assurance argument in that case, aside from the fact that the judge found that the representor was not present at the meeting in question, reflects judicial reluctance to be drawn into making decisions in relation to chance remarks before formal sign off. As such the decision reflected the oft cited judgment of Lightman J in *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 LR 611 at [7] (on the purpose of entire agreement clauses) that such drafting is:

"*...preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim*"

19. In summary, short of allegations of deceit, any claim is likely to gain best attention if firmly built on a warranty clause. It may fairly be said that whilst each contract will need to be considered carefully on its own terms, the current trend is in favour of a presumption against parallel claims in misrepresentation where the contract forms part of a carefully drafted suite of documents which contain detailed warranty claims.

20. This trend also serves to emphasise the need to ensure that warranties are expressed to continue to completion if there is any gap between exchange and completion.

CONTRACTUAL LIMITATION PERIODS

Introduction

21. The concept of contractual time bars, or limitation periods, is one familiar to lawyers dealing with share purchase agreement warranty disputes. They form part of a wider body of case law concerning contractual and related time bars to bringing a claim (whether in court proceedings or an arbitral process). These notes are restricted to claim time bars. They are not concerned with the issue of contractual time bars concerned with matters other than issuing proceedings, for example contractual time limits for contractual reviews, albeit such reviews can have consequences every much as fatal as a claim time bar (especially where time is "of the essence").

22. The starting point is that limitation periods apply irrespective of whether or not the parties have agreed to them under legislation – the Limitation Act 1980 is silent as to whether parties can agree to vary or waive them by contract, or may be estopped from pleading a limitation defence.

23. The issue can arise in three different ways: reducing the limitation period; extending it (e.g. contracting under seal, or under standstill arrangements); or changing or defining the start date. The latter is a problem which emerges in case law but draftsmen rarely consider it prospectively (though standstill agreements do often consider the point). Most of the case law and disputes arise in the context of an attempt to reduce the limitation period which would otherwise apply under the Act.

24. Notwithstanding the lack of express entitlement to contract out in the Act the Courts have long accepted that parties may contract out of, or vary the statutory limitation period: see *Lade v Trill* (1842) 11 LJ Ch 102. They may do so by agreement, express or implied. In addition a party may be estopped from asserting a limitation defence: see, in the context of rent review and housing, *Co-operative Wholesale Society Ltd v Chester le Street District Council* [1998] RVR 202; *Ellis v Lambeth London Borough Council* [2000] 32 HLR 596, CA; *Cotterrell v Leeds Day*, CA, unreported, 13 June 2000; *London Borough of Hillingdon v ARC Ltd (No 2)* [2000] RVR 283, CA.

25. So a limitation period may, subject to the impact of the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999, be limited or excluded by agreement, and a party may be estopped by conduct from asserting a limitation defence. What has not yet been tested (or argued) are contracts which seek to extend time limits. In this respect there may be public policy arguments against contracting out of long stop limitation periods and fair trial (article 6) points may be said to arise. In some jurisdictions certain long stop limitation periods are not viewed as being capable of extension by agreement (for example see the Swiss Federal Supreme Court ruling 4A_221/2010, January 12, 2012, which considers the rule that the parties may extend the statutory limitation period up to a maximum of 10 years from delivery of work). However in commercial cases it is not uncommon to find parties agreeing to indefinite extensions of time (in the context of standstill agreements), which are terminable on notice being given. An example of such a clause can be found in the case of *Gold Shipping Navigation Co SA v Lulu Maritime Ltd* [2009] EWHC 1365 (Admlty) and it does not appear to have occurred to either side that it could be argued that the clause was in some way unenforceable as a result.

26. The modern approach in commercial cases is to apply freedom of contract principles. Moreover the observation of Lord Nicholls *Valentines Properties Limited v Huntco Corporation Ltd* [2011] UKPC 14 at [20] is worth heeding in this context:

    "*Inherent in a time limit is the notion that the parties are drawing a line. Once the line is crossed, a miss is as good as a mile.*"

27. The question of contractual time bars arises in different contexts: many of the cases arise in the context of warranty disputes, but it is not uncommon to find such clauses in the construction sector and in other sectors. The context in which the dispute arises inevitably

influences the court's approach to the interpretation and application of the time bars in question. For the purposes of these notes the main focus is on warranty disputes but, where appropriate, case law from other industry disputes will be considered.

The interpretation approach

28. The first point to consider is the interpretation of the wording of the clause, which will guide not only the time period but also the contents of the notice which has to be served (and sometimes also the means of service), as opposed to the notice served under the clause (which may give rise to a separate issue).

29. In considering how the clause should be interpreted the question arises as to the proper approach to construction – should the clauses be treated as akin to exemption and/or limitation clauses, and is there any difference between the two?

30. In Lewison on The Interpretation of Contracts Sir Kim Lewison suggests (at para 12.17, 5th Edn) that time bar clauses are treated as exemption clauses and interpreted strictly and contra proferentem. This statement of principle can be traced back to the decision of the House of Lords in *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus and Co* [1922] AC 250, where it has held that a time bar clause was to be construed strictly because it purported to remove a cause of action after the lapse of a stipulated time. This was applied to the time bar clause in *Beck & Co v Szymanowski & Co* [1924] AC 43. This general statement of principle by Lewison was endorsed in *Odifefell Seachem A/S v Continentale des Petroles et D'Investissements* [2005] 1 All ER (Comm) 421.

31. Nevertheless since the decision of the House of Lords in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964 the courts have recognised there is a difference between how the courts will approach exclusion and limitation clauses, the latter being treated less strictly by the courts. There was some debate as to where time bar clauses might fall: they may be said to be limiting the claim in time, but once the time has gone the entirety of the claim is gone, and thus excluded. The balance now seems to be coming down in favour of the idea that they should be treated as more akin to limitation clauses, and so construed in a less restrictive manner than might otherwise be the case; see *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429 at para 22 (Moore-Bick LJ). In that case the court also displayed a reluctance to find that the clause was too uncertain to construe.

Interaction and the need for clarity

32. The interaction between the limitation periods under the Act and contract fell for consideration in the decision of Ramsey J in *Oxford Architects' Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC). The case concerned a construction dispute and article 5 of the contract which provided that "*No...proceedings...shall be commenced against the Architect after the expiry of six years...from the date of Practical Completion*". The judge held this did not have the effect of extending the life of a claim which would otherwise be statute barred under the Act, and did not operate so as to exclude any such limitation defences. To do that he considered that clear words were needed. Nor was he persuaded that the article defined when a cause of action accrued for the purposes of the Limitation Act 1980. He found that simply because the six years in the clause coincided with the statutory limitation period for causes of action for breach of contact or negligence does not mean that there was an agreement that the cause of action accrued at the date of Practical Completion for the purpose of the Limitation Act. In short he concluded (at paragraph 21) that article 5 provided an additional contractual limitation on the ability of the College to bring proceedings – an additional time bar but one which was not effective to prevent reliance on any statutory limitation defences which arose earlier. The lesson to be drawn from that decision is that the parties should not assume that it will be understood they intended any contractual time bar to exclude a limitation period defence which would otherwise be available, and the linkage between the Act and contractual bars should be spelt out.

Commercial common sense

33. That said, simply because the clause may be said to affect a limitation defence which would otherwise be available does not mean the court abandons a purposive or commercial approach to construction. In *Gold Shipping Navigation Co SA v Lulu Maritime Ltd* [2009] EWHC 1365 (Admlty) the parties had agreed, after a dispute had arisen, to "*a mutual unlimited extension of time from 16/10/07 within which to commence proceedings in England subject to one month's notice of termination of intention to proceed by either side*." No that is not a mis-typed sentence by the authors of this note: as the judge remarked (at paragraph 18) clearly something had "gone wrong" with the latter part of the sentence. One possible (catch 22) scenario was that the parties had agreed an unlimited extension of time which could never be brought to an end. The judge rejected the notion that a reasonable person with the background knowledge of the parties at the time of the agreement would have had that in contemplation. He found that the extension could be terminated by either party giving one month's notice, during which month the party intended to proceed with its claim by commencing proceedings. That is what had happened, with one of the parties having given notice "to start proceedings in England within one month from today" and the judge held that was effective (at paragraph 27).

Effect of without prejudice label

34. The effect of without prejudice communications on contractual limitation provisions arose in the case of *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] EWCA Civ 64. The parties had agreed a contractual limitation clause which provided that no action or proceedings could be brought after "*(a) the expiry of 1 year from the date of Practical Completion of the Services, or (b) where such date does not occur, the expiry of 1 year from the date the Contractor last performed Services in relation to the Project*". It was common ground that Practical Completion had not occurred, and so the scope and application of (b) was in issue. The defendant contended it had completed its work in February 2009. However, there was a meeting on site in March 2010. The defendant contended that the purpose of that meeting was to hold without prejudice discussions and steps to avoid litigation, following service of a letter before claim. The claimant suggested that the fact that the services were provided in order to comply with the pre-action protocol, or may be said to amount to without prejudice discussions, was irrelevant, provided the services were being performed in relation to the Project. The Court of Appeal upheld the decision at first instance that attendance at without prejudice meetings should not result in the time being extended. The defendant had made clear that it went along with the claimant's proposals entirely without prejudice to its rights, and the argument of the claimant, if correct, did prejudice the claimant's rights.

Filing v issuing

35. Ordinarily the time bar will be related to the date of issue, which is what the Act is also focussed on. However there is nothing to stop the parties agreeing a different relevant date. This occurred in the case of *Elvanite Full Circle Ltd v Amec Earth & Environmental (UK) Ltd* [2013] EWHC 1191 (TCC). It was similar to the case of *Inframatix* in that both cases ostensibly concerned one year contractual limitation clauses. However the issue in *Elvanite* was subtly different and arose from the particular wording of the time bar clause, which stated as follows:

    "*All claims by the CLIENT shall be deemed relinquished unless filed within one (1) year after substantial completion of the Services.*""

36. The defendant reasonably advanced the argument that filed meant commencing proceedings and was equivalent to "issuing". The judge, Coulson J, took a more cautious approach, noting that "filing" was not a word apparently used in the CPR in the context of the issuing of a claim. As a result he felt unable to accept that this provision required the claimant to issue within a year. However that begged the question of what it did mean. He ultimately accepted that "filing" in this context meant the provision of a properly particularised letter of claim. The judge's initial benevolence appears to have been tempered therefore by the conclusion that something more than a mere intimation that a claim might be made was justified, and on the facts of the case the letter as sent did not satisfy the requirements of a letter of claim.

37. It is questioned how much can be drawn from this case beyond the facts of the case. The use of the word "filing" does appear in CPR 2.3 and is defined, in relation to a document, as "delivering it, by post or otherwise, to the court office". The judge was aware of this argument but discounted it on the basis that it only applied in relation to documents after issue. Whether or not that is so, there seems to be some tension between the ultimate decision in this case and the way the courts have considered the "notification" requirements in most warranty disputes (such as in *Forrest v Glasser* [2006] EWCA Civ 1086), as discussed further below. Whilst the conclusion appears to be correct the route by which the judge got there appears to be at best doubtful.

Abuse of process

38. A word of caution in relation to those claimants, however, who simply issue a claim form to protect against limitation. If they do so in the hope that "something may turn up" they may be faced with a strike out application on abuse of process grounds. This type of abuse was reviewed by Cooke J in *Nomura International Plc v Granada Group Limited* [2007] EWHC 642 (Comm), (2008) Bus LR 1. Cooke J who concluded (at para 38) that the key question must always be "*whether or not, at the time of issuing a Writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshall what it knew, to formulate Particulars of Claim*." He went on to observe: *" If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, of necessity, the former. If the claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no basis to issue a Claim Form at all "in the hope that something may turn up".*

39. In paragraph 39 of the *Nomura* judgment it was observed that this concept is reinforced by the terms of CPR 16.2 (1) which states that "*The claim form must –(a) contain a concise statement of the nature of the claim*". The judge noted that CPR 22.1(4) requires the claim form to be verified by a statement of truth confirming that the party believes that the facts stated on the claim form are true. Clearly if there was no known basis, or foundation, for the claim to be made such a statement of truth could not honestly be made. Cooke J went on to observe in paragraph 41 that a defectively endorsed writ under the RSC could only be subsequently saved by the service of proper particulars if the plaintiff had a known genuine cause of action.

Accrual of cause of action

40. The concept of accrual of causes of action is critical to many limitation disputes. In breach of contract disputes accrual is on the date of breach, and is usually straightforward to pin-point, but the position is not so straightforward in tortious claims. A recent example of a case where this difference was significant was the decision in the Leeds District Registry Mercantile Court in the case called *Interface Europe Ltd v Premier Hank Dyers Ltd & Another* [2014] EWHC 2610 (QB). Whilst the court found that the claim in contract was statute barred the claimant was permitted to amend to frame their claim in tort because that claim was not statute barred.

41. In economic loss cases there will often only be a contingent loss or liability at the date of breach, and contingent liability for loss is not a loss for the purpose of accrual of a cause of action in negligence; the question is whether alleged negligence gives rise to a contingent or an immediate, measurable loss, *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 A.C. 543 and *AXA Insurance Ltd (formerly Winterthur Swiss Insurance Co) v Akther & Darby Solicitors* [2009] EWCA Civ 1166, [2010] 1 W.L.R. 1662.

42. Sometimes the draftsman will exclude any liability arising in tort, and the claim is limited to the contractual, warranty claim, or similar. In those cases the point at which time starts to run, in contract, is normally easy to establish. In share purchase cases, for example, it will ordinarily be when the share purchase agreement is executed. But where tortious liability is not

excluded the parties are sometimes left in the position of not being able to identify easily when the time has started to run. This may be an area which could be developed further by careful drafting.

Construction of notices

43. Before considering the wording in notification clauses it is worth briefly reminding ourselves of the court's approach to notices generally.

44. The leading case on the construction of notices themselves is *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. This concerned the service of a break clause notice and the court was forgiving as to the infelicities of the drafting on the basis that, whilst it contained a minor mis-description, interpreted against its contextual setting, it was sufficient to give unambiguous notice to the reasonable recipient as to how and when it was to operate. *Mannai* is referred to with approval in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 and is widely applied in general commercial disputes on the question of the proper approach to interpretation of notices, including warranty dispute cases such as *GB Gas Holdings Ltd v Accenture (UK) Ltd & Others* [2010] EWCA Civ 912. A very recent example of its application is the decision of Popplewell J in the Commercial Court in *QOGT Inc v International Oil & Gas Technology Ltd* [2014] All ER (D) 215 (May), which concerned the termination of an investment management agreement).

45. The disputes which arise in relation to notification of claims are sometimes concerned with the construction of notices served, but more often the critical factor is the description of the type of notice required, and the detail required, particularly in warranty dispute claims.

Notification of claims

46. It is useful to run through some of the warranty dispute cases to consider the wording of the clauses and how they were approached by the courts. The cases show that the courts will pay heed to the level of specificity the parties have agreed is required, and moreover that the reasonable man will know that if specificity is not stipulated then a reasonable inference to be drawn is that it is not required.

47. First in time is the decision in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep. 423. The relevant clause required notice to be given "*setting out such particulars of the grounds on which such claim is based*". The notice took the form of a letter which only said: "*It is now clear that the Management Accounts were manifestly inaccurate and did not take into account certain matters which they should have taken into account. Further it appears that by [date of completion] there had been a severe downturn in the trading position of the Business. The purpose of this letter is to notify you...that a substantial claim is likely to be made against STC for breach of warranties contained in the Agreement.*" May J held the notice requirement was satisfied but the Court of Appeal disagreed, noting "Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based".

48. In *Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540, [2004] 1 All ER (Comm) 737, the clause (para 2, Schedule 8) required "*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)*." The letters relied on made no attempt to comply with the terms of para 2, since they did not state what was being claimed nor what warranty was allegedly broken, and no sufficient quantification of the claim was made. Thus, the preliminary issue was answered in favour of the defendant.

49. In *Bottin (International) Investments Ltd v Venson Group Plc* [2004] EWCA Civ 1368 one of the issues concerned whether notice of the claim had been made in compliance with a clause which stated the notice had to be in writing "*specifying such details of the event or*

circumstances giving rise to such claim as are available to the investor and an estimate (if capable of preparation by the investor) of the total amount of the warrantor's liabilities therefor claimed." The judge at first instance (Peter Smith J) held that the notice served contained insufficient detail of the claim. The Court of Appeal concluded that he took an overly literal approach and the intention of two commercial parties cannot have been to have required as much detail as would be required for particulars of claim, and certainly not more than would be required (as the defendant suggested). The court concentrated on the fact that the details required were of what has happened to cause the claim to be made, and identification of what is claimed to be a breach, rather than the details as to how it might be established.

50. In *RWE Nukem Ltd v AEA Technology Plc* [2005] EWHC 78 the requirement was for "*written particulars of such claim (giving detail of the specific matter as are available to the purchaser in respect of which such claim is made).*" Sufficient detail was given according to Gloster J. The decision was the subject of an appeal on a different point (reported at [2005] EWCA Civ 1192).

51. In *Forrest v Glasser* [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep. 392 the notification wording in issue was in relation to any claim by the subscribers: "*6.3.1 which shall not have been notified in writing to the Company on or before the third anniversary of the Completion Date, or the sixth anniversary in the case of matters relating to Taxation; and 6.3.2 in respect of which court proceedings have not been issued and served on the Warrantors within 12 months of the date of notification of such claim to the Company, (except that the time limits shall not apply in respect of Claims arising from fraud or wilful misconduct or wilful concealment by the Warrantors, the Company or any of its officers or employees) shall be deemed to have been waived.*"

52. The Court of Appeal held that this wording did not require particulars to be given. The reasoning was as follows (paragraph 21, per Ward LJ):

    "The natural and ordinary meaning of the words in clause 6.3 seem to me to be plain enough. "Claim" is defined in clause 6.1. Reading it into clause 6.3, the clause provides that "any Claim under the Warranties which shall not have been notified in writing to the company on or before the third anniversary of the completion date … shall be deemed to have been waived." Thus what has to be notified is a claim under the warranty. "Claim" is an ordinary word which does not need further definition. The requirement is that the warrantors must be informed that a demand is being made for damages for breach of warranty. That is all. On the ordinary meaning of the words, no particulars have to be given of that claim."

53. One of the issues arising in the Court of Appeal in *GB Gas Holdings Ltd v Accenture (UK) Ltd & Others* [2010] EWCA Civ 912 (which also addressed the question of damages; as to which see further below) was the notification required by the claimant of its proposed warranty claims. The Court of Appeal found that the judge had been correct to find that the claimant had not been required to state, in the notification, the warranties allegedly breached, the nature of the alleged material errors, or the serious adverse effect relied upon. There was no express requirement in the provision for notification for any of those matters to be notified. It would not be right to imply any such requirement since no such implication was necessary to make the notification provision work.

54. In *ROK Plc v S Harrison Group Ltd* [2011] EWHC 270 (Comm) the contract provided that "the nature of the Claim" be specified "in reasonable detail". This was interpreted to mean that the notice had to spell out the clause which was said to be breached (or applicable).

55. The above authorities disclose no obvious pattern, and the only principle to be distilled (as noted in *Forrest & Ors* in the Court of Appeal at paragraph 24) is that summarised by Gloster J in *RWE Nukem Ltd v Aea Technology Plc* [2005] EWHC 78 (Comm) (as the name suggests RWE was a nuclear engineering company, not, seemingly, a missile company) when she stated:

    "*Every notification clause turns on its own individual wording*".

Validity of service

56. Most well drafted agreements will also deal with the issue of service. The wording of such clauses and the issue of whether or not they are permissive or mandatory can give rise to dispute.

57. It is worth briefly returning to the decision in *Bottin (International) Investments Ltd v Venson Group Plc* [2004] EWCA Civ 1368 on the issue of validity of service. The agreement provided for service of a notice by personal delivery. The Court of Appeal concluded that this would be satisfied when notice was delivered to someone authorised to receive it, by process server or similar. So, on the facts of the case, leaving the document with a receptionist, who was authorised to receive it and pass it on to a director, was sufficient. The receptionist had given an express assurance the notice would come to the attention of a director and no evidence was adduced by the defendant company to suggest it had not.

58. The decision of the Court of Appeal in *Ener-G Holdings Plc v Philip Hormell* [2012] EWCA Civ 1059 concerned a contract which stated the notice "*may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party"*. First, on the question of personal delivery, the court found that this meant that it had to be served on the recipient personally and it did not have to be served by a personal deliverer. In this respect the decision in *Bottin* above was followed. Secondly (Longmore LJ dissenting) that the methods of service were intended to e permissive rather than exclusive or mandatory, the most obvious support for that conclusion being the use of the word "may".

Computation of time

59. The CPR now contains some helpful guidance on computation of time for the purposes of the deadlines which apply when proceedings have been issued (see CPR 2.8). This makes clear, at least for the purposes of the rules, that "clear days" excludes the date at either end, "within" a specified period of days means including the number specified and there are special rules applicable where the date falls on a bank holiday, or when the court office is closed.

60. Nevertheless it is not automatically the case that the same meaning will apply to contractual notification clauses, unless the parties expressly or impliedly indicate this is so.

61. Through the cases the following general approaches to computation of time appear to emerge:

    (1) A month will usually mean a calendar month (see e.g. LPA 1925, s 61);

    (2) Where a period is measured in months from the last moment of a numbered day in one month it will usually be held to end on the corresponding day of the specified later month (see *Dodds v Walker* [1981] 2 All ER 609);

    (3) When a period is expressed as running "from" or "after" a specified date that date is not included in the computation, but when the period is expressed as one "beginning on" or "commencing on" a specified date that date is ordinarily included in the computation (see *Trow v Ind Coope (West Midlands)* [1967] 2 QB 899)

Claims made and service

62. In SPAs there will often be a contractual requirement for claims to be made within a certain period of time (say a year) and then once made (i.e. notified to the proposed defendant) for the claimant to have to issue and serve the claim on the defendant. Two recent cases have considered the service requirements in this context.

63. In the first case Green J was required to consider the requirements as to service in a SPA relating to the purchase of the automotive business known as "Kwik-Fit". In his judgment,

reported under the name *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2013] All ER (D) 297 (Oct), he was required to consider the clause as to service, which stated:

"Any claim for breach of Warranties other than the Tax Warranties which is made within the relevant time limit specified above shall, unless previously satisfied, settled or withdrawn, be deemed to be withdrawn and no longer enforceable unless legal proceedings in respect thereof are (i) *commenced by validly issuing and serving legal process* within six months of the making of such claim and (ii) being pursued with reasonable diligence."

64. He concluded that the SPA, and the italicised words above, did not require service in accordance with the CPR, and there were no clear words in the SPA to ascribe to the parties an intention to treat a person who had actually been served as being deemed not to have been served at all. He also stated that in any event he thought the relevant rule as to service in the CPR was 7.5 not 6.14 (with deemed service dates).

65. This decision was applied by Flaux J in the later decision of *T & L Sugars Ltd v Tate & Lyle Industries Ltd* [2014] All ER (D) 90 (Apr), insofar Flaux J also agreed that the correct rule to apply was CPR 7.5, though he concluded that the words 'issued and served' in clause 11.3 of the SPA in that case did mean issued and served in accordance with the CPR.

MEASURING LOSS

66. It is trite law that damages for breach of warranty are damages for breach of contract and are (on classic *Robinson v Harman* 1 Exch 850 principles) to be assessed on the basis of putting a claimant into the position they would have been in had the contractual promise been fulfilled.

67. By contrast, the tortious measure of damages is to put the claimant in the position they would have been in had the promise or representation not been made. Moreover in misrepresentation claims under s 2(1) of the Misrepresentation Act 1967, until such time as the decision of the Court of Appeal in *Royscott v Rogerson* [1991] EWCA Civ 12 is disturbed, damages are assessed on the "fiction" of fraud basis.

68. Ordinarily warranty clauses will be giving warranties as to a quality of the business in question. A classic example being the profitability of the business. In such cases, one compares the claimant's position as a result of entering into the transaction with what it would have been if the information had been correct; see Lord Hoffmann in *SAAMCO* [1997] AC 191 at 216. Usually the market value of the company, had the warranties been true, will be taken to be the price paid on the contract, though it remains open to a defendant to show that the claimant made a bad bargain, or for the claimant to show it made a good bargain; see *Eastgate Group Ltd v Lindsey Morden Group Inc* [2002] 1 WLR 642 (at para 18). The value has to be objective – see *RWE Nukem Ltd v AEA Technology* [2005] EWHC 78 (Comm) at para 5.

69. A good starting point for assessing the correct measure of losses will be to use the transaction valuation methodology – in other words look to see how the buyer and seller arrived at the sale price. An example of a case which *departed* from the transaction methodology was *Senate Electrical v STC* [1999] 2 LR 423. The parties had arrived at the purchase price in that case on the basis of an apportionment as to £70m for estimated capital and £20m for goodwill. The SPA contained a standard warranty as to accounts being "true and fair". However, they contained a £1.7m overstatement of profits. The claimant advanced its claim on the basis of a price/earnings ratio (p/e), but the judge rejected that approach (in respect of which he was upheld on appeal) on the basis that this was not what the parties had used to arrive at the price, and it was important to remember that the purchaser in question was the actual claimant, not a hypothetical claimant. The court of appeal ultimately rejected the judge's decision to find an alternative basis for compensating the claimant, mainly because the claimant had not advanced such an alternative case. The dilemma of the alternative case is not always an easy call to make, especially bearing in the mind the small number of cases which make it to trial.

70. The decision of the Privy Council in *Lion Nathan Ltd v CC Bottlers* [1996] 1 WLR 1438 is an illustration of a more conventional p/e or EBITDA calculation being applied in a profit forecast case, based on management accounts. The warranty in that case was a qualified warranty, so as to only require the exercise of reasonable skill and care, which had an effect on the valuation exercise. In such cases of qualified warranties the court's decision is likely to be strongly influenced by what profits were in fact made during the relevant period (on the basis that a reasonable profit forecast should arrive at such a figure).

71. To take an example, if a business is purchased at £15m on the basis of a multiplier of 3 and EBITDA of £5m, then if in fact the true EBITDA is £3m (if for example the accounts had been true and fair) then the actual value may be said to be £9m, with the damages assessed at £6m.

72. However the p/e approach is not a panacea, and should not be applied in all cases, particularly where there may be evidence that the approach is unreliable or involves a large degree of conjecture and surmise; see the observations of Jacob J in *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573.

73. Cases are normally complicated by completion accounts issues. Most SPAs will contain a net asset adjustment mechanism, which will typically see deferred consideration payments being reduced by adjustments consequential on completion accounts being prepared post-completion. This can give rise to questions as to how this should affect the damages to be awarded on a breach of warranty, the main point being to avoid questions of double recovery.

74. A recent example of an assessment of damages in an indemnity case is the decision of Popplewell J in *Capita (Banstead 2011) Ltd & Another v RFIB Group Ltd* [2014] EWHC 2197 (Comm). Under an indemnity clause in a share purchase agreement, a company, which had bought a specialist benefits consultancy, was liable to be indemnified by the seller for any claims arising from services provided prior to the transfer date. The position was complicated by the fact that the advice was ongoing. The judge ultimately found that the claimant was entitled to half of its costs of settling a claim brought against the consultancy for breaches of contract and duty, on the basis that this represented the liability to be attributed to services provided before the transfer date.

75. And last but not least, whilst an insured professional may prove to be a better litigation target, it should be remembered that such a claim, if against a firm of solicitors in relation to the negotiation or drafting of the SPA terms, may be subject to a price chip on the basis that it may be a loss of chance case, and accordingly subject to a percentage discount to allow for the contingencies inherent in such a claim (see for example the decision in *Perkin & Anor v Lupton Fawcett* [2008] EWCA Civ 418). That is not to say every claim against professionals in relation to the due diligence exercise will be a loss of chance claim: if the complaint is the transaction would not have gone ahead at all but for the professional's negligence then the entire losses might be recoverable (compare, for example, with the claim against the accountants in *Swynson Ltd v Lowick Rose Llp* [2014] EWHC 2085 (Ch), [2014] All ER (D) 07 (Jul)).