Post-transaction disputes: take notice!

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In the current economic climate, claims under share purchase agreements may be on the increase where buyers are of the view that the value of the company they have purchased has fallen and "*buyer's remorse*" has kicked in.

The recent case of *Drax Smart Generation Holdco Limited v Scottish Power Retail Holdings Limited* [1] is a useful reminder of the strict interpretation the Court will take when construing notice provisions in a breach of warranty claim, even where the consequences for the buyer are drastic.

In summary, one of the key takeaways is that buyers who wish to bring a breach of warranty claim must follow the notice provisions strictly or risk being found to have provided insufficient notice of the claim, with the result that the claim will fail. This in turn may lead to a professional negligence claim for the legal advisors.

The facts

Drax Smart Generation Holdco Limited ("**Buyer**") brought claims against Scottish Power Retail Holdings Limited ("**Seller**") for breach of warranty, indemnity and other contractual breaches under a share purchase agreement ("**SPA**"), pursuant to which the Buyer bought shares in VPI Power Limited (previously, Scottish Power Generation Limited) ("**Company**").

Under the SPA, the Seller provided a warranty in favour of the Buyer that the benefit of an option agreement would be assigned to the Company before completion and agreed to indemnify the Buyer for any losses suffered in relation to the option agreement.

Subsequent events transpired such that the option was not properly assigned to the Company after expiry of the option period, with the result that the option fell away and loss was suffered by the Company.

The relevant notification clause under the SPA required the Buyer, as a condition to the Seller's liability, to give written notice of the claim within the notice period. To comply with the notification clause, the notice had to state "*in reasonable detail the nature of the claim and the amount claimed*", and the *"Buyer's calculation of the [l]oss*" alleged to have been suffered.

The Buyer sought to give formal notice of the option agreement claim, and a reorganisation indemnity claim, to the Seller by way of a nine-page solicitor's letter ("**Notice of Claim**").

Decision

The High Court considered whether to grant summary judgment dismissing the Buyer's warranty and indemnity claims under the SPA because the Notice of Claim failed to comply with the notification clause.

There was no dispute between the parties in relation to the adequacy of the detail of the events which gave rise to the claims as provided in the Notice of Claim. Similarly, there was no dispute as to whether the Notice of Claim adequately identified the relevant provisions under the SPA. The Seller nevertheless denied any liability on the basis that the Notice of Claim was defective because it did not state "*in reasonable detail*" the nature of the claim, the amount claimed, or the Buyer's calculation of the loss alleged to have been suffered. This is because the Notice of Claim did not notify of any claim for loss based on the diminution in value of the shares acquired in the Company, being the relevant measure of loss under English law as was recognised and particularised in the subsequent draft Amended Particulars of Claim. This document was held by the Court to be the best particulars of loss available to it. In the Notice of Claim by contrast, the Buyer claimed for lost profits of the Company.

Citing various authorities as to the proper construction of such a notice, the Court ultimately agreed with the Seller in respect of the warranty claims.

Mr Simon Birt KC held the Notice of Claim had to provide details sufficient for the recipient "*to understand why that is the figure being claim[ed] and what its basis is*". The Seller should have been able to understand the claim against it "*in at least outline terms*", including how the loss was said to have been suffered and how it was recoverable by the Buyer.

The Court was of the view that this was how the commercial purpose of the notification clause should have been fulfilled. The commercial purpose was held to play an important role to enable the recipient of the

[1] [2023] EWHC 412 (Comm)

notice to make inquiries into the amount being claimed, potentially with a view to gathering or preserving evidence; to assess the merits of the claim; to take into account the nature and scope of the claim in its future business dealings; and potentially to resolve the claim.

Comment

From this perspective, the question of whether the Notice of Claim gave "*reasonable*" details of the claim in respect of the loss suffered, the amount claimed and how that loss is calculated was held to be central to its validity. As there was no reference to a diminution in the value of the shares in the Company within the Notice of Claim and as it referred to "*likely heads of loss*" and "*potential loss*", rather than providing an actual calculation of the loss with reference to the difference in the value of the Company following the Seller's non-compliance, this was held to be inadequate.

On the facts, it is difficult to disagree with the Court's conclusion. Practically speaking, there are good commercial reasons as to why such a clause would require a reasonable amount of detail in the notice. In short, the notification requirement enables a seller to understand, to a reasonable degree, the amount being claimed so that it could take into account the claim, as necessary, in its future business planning including whether to make a formal reservation or more generally to give an assessment of potential liability.

This is a clear reminder to buyers to comply fully with notice provisions in post-transaction breach of warranty claims. If not, the claim is likely to fail and the buyer may well look to its legal advisors to recover its losses for any potential negligence in preparing the notice. It is also a reminder that when notifying of claims of this nature, a practitioner must go back to the first principles and articulate a legitimate basis of loss applicable to the particular cause of action being pursued – the decision demonstrates that a Court will not be inclined to help a firm who fails to do so.

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