Claim notification clauses in share purchase agreements: the devil in the detail

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The *Teoco UK Ltd v Aircom Jersey 4 Ltd* decision

1. The recent Court of Appeal decision of Teoco UK Ltd v Aircom Jersey 4 Ltd [2018] EWCA Civ 23 has emphasised the need for the notification of a claim under a contractual notification clause to accord precisely with the requirements of that clause.

3PB's Analysis

2. **The Facts.** The Appellant, Teoco, was the purchaser of the issued shares in 2 companies – Aircom International Ltd (**"Aircom"**) and Aircom International (Austria) Holdings GmbH from the Respondent, Aircom Jersey 4 Ltd. The purchase of the shares was governed by a share purchase agreement dated 19 November 2013 (**"the SPA"**). The SPA, as is the norm, contained various warranties by the vendor, including in relation to tax affairs.

3. The SPA also limited the vendor's liability for breach of warranty (amongst other things) to claims of which it had been given notice in accordance with paragraph 4 of schedule 4 of the SPA. This stated:

   "***4. Notice of Claims***

   No Seller shall be liable for any Claim unless the Purchaser has given notice to the Seller of such Claim setting out reasonable details of the Claim (including the grounds on which it is based and the Purchaser's good faith estimate of the amount of the Claim (detailing the Purchaser's calculation of the loss, liability or damage alleged to have been suffered or incurred))." [The author's emphasis]

4. Schedule 6 of the SPA was also relevant. It was described by Newey LJ as follows:

   "*In broad terms, the Purchaser was entitled to withhold £4.1 million of the purchase price (i.e. the same amount as the maximum aggregate liability of the Sellers) until the end of June 2015, at which stage it was to use the money to pay an amount equal to the estimated value of any disputed claims into an escrow account. Paragraph 2.1 of the schedule stated that, in the case of a claim estimated to be worth £250,000 or more, the purchaser was to:*

   'obtain a written opinion, from a commercial barrister ..., that ... the purchaser has a more than likely chance of success and ... provide a copy of such opinion to the sellers together with the purchaser's estimate.'"

5. The purchaser subsequently claimed to have discovered breaches of warranty in relation to tax said to be owed by 2 subsidiaries of Aircom: hereafter **"Aircom Brazil"** and **"Aircom Philippines"**.

6. Its solicitors wrote to the vendor in February 2015 purporting to give notice under paragraph 4 of schedule 4. In the case of both claims in respect of Aircom Brazil and Aircom Philippines, the solicitors wrote an identical sentence:

   "*It is our understanding that these liabilities were not disclosed, or deemed to have been disclosed, to our clients, or to PwC, during either preliminary discussions, or specifically against the Tax Warranties or General Warranties given by the Seller in the SPA and are therefore Warranty Claims; as to which particular head of Claim it would fall under, our clients' position is reserved.*" [The author's emphasis]

7. A further letter in June 2015 set out the sums claimed in greater detail, but did not disclose upon which warranty or other head of claim the purchaser's claims were based.

8. **First Instance Decision.** The claims ultimately came to court, where the vendor applied to have

them struck out on the basis that the purchaser had failed to identify the grounds on which the claims were based when notifying the vendor of its claim in the February and June letters.

9. Mr Richard Millett QC, sitting as a deputy high court judge, acceded to that application on the basis that:

"*...the February and June letters were not notices under paragraph 4 [of schedule 4 to the SPA] at all, or else failed to comply with the requirements of paragraph 4...*"

10. **Appeal arguments.** On appeal, the purchaser argued that:

10.1. There were no general principles that that particular warranties must be identified where (as here) a notification clause in an SPA provides for details to be given of a claim;

10.2. In this case, the SPA did not in terms impose an obligation to specify individual warranties and schedule 6 made such a requirement unnecessary since (a) the parties had thereby put in place a scheme which ensured that the Sellers did not need to make separate financial provision for claims and (b) the barrister's opinion that was to be obtained would naturally include details of the legal grounds of the claims.

10.3. In any case, a reasonable recipient of each letter would have understood how the tax warranties were or might be engaged and that the purchaser was also notifying claims under the tax Covenant.

11. **Decision on appeal.** Both parties accepted that, in order to determine its requirements, "*every notification clause turns on its own individual wording*" (*per* Gloster J in RWE Nukem Ltd v AEA Technology plc [2005] EWHC 78 (Comm), at [10], endorsed in Forrest v Glasser [2006] 2 Lloyd's Rep 392 (CA), at [24]). Accordingly, the issue was whether the judge had correctly interpreted paragraph 4 of this SPA.

12. Newey LJ, giving the only reasoned judgment of the court, found that he had. While earlier cases depended on the particular clauses being considered, they did usefully emphasise the importance of claims notification clauses in achieving certainty, particularly from the point of view of the vendor, as to the basis of the claim against him (at [21]-[22]).

13. His Lordship accepted the vendor's submissions that generally, "*setting out*" the "*grounds*" of a claim required explicit reference to particular warranties or other provisions. Whilst there were potential exceptions, such as cases where this could be achieved where the facts were so unequivocal as to which warranty was breached that there was no need to identify it, or where the wrong warranty was referred to, but the correct warranty was obvious, this was not such a case.

14. He found that there was real scope for doubt as to which warranty was broken (and was assisted in this regard by a witness statement from the purchaser's solicitor which suggested a number of general warranties might have been breached in respect of the Aircom Brazil claim) and that an "*omnibus reference to Warranty Claims or Tax Claims*" was not sufficient to discharge the requirement of paragraph 4.

15. He further found that neither the *contra preferentem* rule nor schedule 6 supported the purchaser. Firstly, a restrictive construction of the notification clause[1] was unnecessary because its meaning was not ambiguous; the "*tools of linguistic, contextual, purposive and common-sense analysis*" led to the conclusion that, in general at least, it was incumbent on the purchaser to specify the material warranties or other provisions (see at [25]-[26], [28]). Secondly, the mere fact that an opinion subsequently obtained from a barrister might include reference to warranties or other provisions was not significant.

[1] As had been suggested in Nobahar-Cookson v. The Hut Group Ltd [2016] EWCA Civ 128.

Impact of the Decision

16. Legal advisors should take heed to follow the exact provisions of a notification clause. Whilst they will be keen to avoid a situation where they are so specific as to fail to advance a particular claim, they should not stray so far into generality so as to fail to accord with the wording of the provision.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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