# Better come clean—breach of warranty and misrepresentation claims (MDW Holdings v Norvill)

This analysis was first published on Lexis®PSL on 11 May 2021 and can be found here (subscription required).

**Dispute Resolution analysis: This judgment, concerning a multi-faceted claim for breach of warranty in the context of environmental wrongdoing, provides helpful guidance to both litigants and draftsmen involved in sale and purchase agreements. Judge Keyser QC examines some unusual wording in such a contract and its consequent effect on the claims in contract and tort available to the purchaser of an overvalued company with a concealed history of significant environmental wrongdoing. Written by Natalie Todd, partner and Anastasia Tropsha, lawyer at PCB Byrne LLP.**

*MDW Holdings Ltd v Norvill & others* [2021] EWHC 1135 (Ch)

## What are the practical implications of this case?

This case is a useful reminder of key principles in a breach of warranty case, namely of the claims available to a buyer and the potential defences that could be put forward by the sellers. It is important to note that each unique clause will be interpreted by the court on its face: if the wording does not include the familiar representation and reliance exclusions, this will expose a seller to pre-contractual misrepresentation claims.

Judge Keyser QC's judgment also usefully summarises the guidance from leading cases in relation to the disclosure and late notification clauses. In order to effectively rely on a disclosure clause as a defence to a breach of warranty claim, the disclosure provided by a seller must:

- fairly disclose matters giving rise to a breach
- comply with the requirements of the disclosure clause in the contract
- be adequate, taking into account any material incorporated by reference, and
- include sufficient detail and not rely on disclosure by omission

As to notification clauses, the key points to keep in mind are:

- every notification clause turns on its own individual wording, but this will be interpreted by reference to the commercial intent of the parties
- if any claim is subject to this clause, it falls upon the claimant to demonstrate compliance
- proper notification of a claim must include sufficient detail of grounds, particulars, remedy and quantum

## What was the background?

By a share purchase agreement (SPA) dated 14 October 2015, MDW Holdings Ltd purchased the entire share capital of GD Environmental Services Ltd ('GDE') from the three defendants for £3,584,224.

The management and disposal of waste is highly regulated, and the operation of a waste management business such as GDE's is dependent on consents and permits from environmental regulators (see para [17]).

MDW alleged that GDE had been systematically breaching environmental law and unlawfully avoiding the costs of environmental compliance, thereby increasing its profits to levels that would not have been achieved if it had acted lawfully; and that, in consequence, MDW paid substantially more for the shares in GDE than they were worth. It claimed against the defendants damages for breach of warranty, for misrepresentation and, against the first defendant, for deceit. The tortious claims were advanced in the alternative to contractual claims due to the fact that some representations as to compliance and profitability pre-dated the SPA (which contained an entire agreement clause) and were alleged inducements for MDW to enter into the contract.

The SPA also made liability on the part of the defendants for any breach of warranty dependent on the prior written notification of a claim in that regard within certain time limits (see para [121]). The defendants relied on a series of defences to the contractual claim, including disclosure, knowledge, and late notification.

### What did the court decide?

By reason of GDE's non-compliant practices, as well as by making false statements to regulators in breach of the general legal prohibition, the defendants were in breach of several warranties contained in the SPA (see paras [212]–[221]). Judge Keyser QC was not convinced by any of the defences advanced.

Firstly, the defendants relied on a disclosure clause, which can exonerate a seller where fair and adequate disclosure of matters giving rise to a breach was made (see O'Farrell J in *Triumph Controls UK Ltd v Primus International Holding Company* [2019] EWHC 565 (TCC) at [335]). The disclosure letter provided to MDW, however, did not contain any information about the most significant breaches, such as wrongful waste disposal and leachate discharge, nor the history of this non-compliance, nor any information as to regulatory issues and the provision of false data to the regulator (see para [225]).

Secondly, the defendants argued that an agent of MDW had actual knowledge of the breaches and so the defendants were exonerated of liability. However, the judge found that the limited scope of the knowledge that could be proven was too limited to enable reliance on this defence (see para [229]).

Thirdly, although the notification clause in the SPA was not entirely clear, the judge relied on case law related to the interpretation of such clauses to decide that some of the claims were not notified on time (see *Laminates Acquisition Co v BTR Australia Ltd* [2004] 1 All ER (Comm) 737, per Judge Cooke at [29]; and Gloster J in *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 (Comm) at [10]). However, due to the fact that the claims notified late were in respect of knowing and deliberate misconduct, involving dishonesty and concealment, the defendants could not avoid liability for breaches of warranty (see para [242]).

The court also decided that an entire agreement clause did not preclude claims for pre-contractual misrepresentations (see para [246]; see also *Al-Hasawi v Nottingham Forest Football Club Ltd* [2018] EWHC 2884 (Ch)), especially where the SPA does not include an agreement that there has been no representation nor reliance on one, nor was liability for misrepresentation excluded (see para [247]).

Having found that, on the basis of a valid agency, only the written representations could be attributed to the defendants, HHJ Keyser QC held that MDW relied on the misrepresentations and was induced by the same to enter into the SPA, by virtue of rebuttable presumptions of intended reliance where a contract was entered into following a material misrepresentation and a fraudulent one (see *Mathias v Yetts (1882) 46 LT 497 and Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501).

Quantum was decided as the difference between the value of GDE had the warranties been true and its actual value.

**Case details:**

- Court: High Court of England and Wales, Business List (Chancery Division), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Judge Keyser QC, sitting as a judge of the High Court
- Date of judgment: 4 May 2021

Natalie Todd is a partner and Anastasia Tropsha a lawyer at PCB Byrne LLP. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.