



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 121

CA7/21

OPINION OF LORD BRAID

In the cause

ANDREW MARR INTERNATIONAL LIMITED

Pursuer

against

(FIRST) JOHN TAIT, (SECOND) KARL BROWN, (THIRD) ALLAN WATT,
(FOURTH) KENNETH REID, (FIFTH) ANDREW DIXON, (SIXTH) NEIL ARMOUR

Defenders

Pursuer: Crawford QC; Addleshaw Goddard

First, Second, Fourth, Fifth and Sixth Defenders: O'Brien QC; Davidson Chalmers Stewart LLP

Third Defender: Lord Davidson of Glen Cova QC; Stronachs LLP

3 December 2021

Introduction

[1] The parties entered into a Share Purchase Agreement (SPA) dated 6 December 2017 whereby the pursuer acquired from the defenders the share capital of Caley Marine Limited (CML) at a price of £14,179,692 (being £27 per share). The pursuer contends that the defenders breached a warranty in the SPA, in that they failed to disclose circumstances giving rise to a claim against CML which was subsequently settled in the sum of £4.5m, giving rise to a loss to the pursuer (so it is maintained) of that sum. Any liability under the SPA is capped at a total of £3m. In this action, the pursuer seeks a declarator that each of the

defenders is in breach of the warranty in question and is liable to make reparation to the pursuer. It also sues each defender severally for his due proportion (calculated in accordance with the SPA) of the capped sum of £3m.

[2] The action is defended on a number of grounds, principally: that the claim in question did not give rise to any liability, there being a complete defence to it; that the pursuer has not relevantly quantified its loss; and that the pursuer has failed to comply with the notice provisions of the SPA in relation to the bringing of a warranty claim.

[3] The case called before me for debate. The question for present purposes is whether the pursuer's case is sufficiently relevant to warrant a proof before answer, or whether the action should be dismissed.

Background

[4] The SPA included a warranty by the defenders (schedule 8, paragraph 13.2) in the following terms (references to the Sellers being to the defenders):

“... no Proceedings have been threatened or, so far as the Sellers are aware, are pending by or against [CML], any of the Subsidiaries, any Director or any person for whose acts [CML] or any of the Subsidiaries may be vicariously liable ...and so far as the Sellers are aware there are no circumstances likely to give rise to any such Proceedings ...”

The phrase “so far as the Sellers are aware” is the subject of a separate provision, clause 6.3 of the SPA, which provides, insofar as material:

“Warranties qualified by the expression **so far as the Sellers are aware**...are deemed to be given to the best of the knowledge, information and belief of the Sellers after they have made reasonable enquiries but without having made any enquiry of any other person (other than (a) the Sellers ...)”

[5] One of the Subsidiaries referred to was Caley Investments Limited (CIL). Another was Mountwest Trustees Limited (Mountwest), which was the corporate trustee of the Caley

Discretionary Trust. In 2014, Mountwest held 66.8% of the share capital of CIL, which in turn held the share capital in Caledonian Fisheries Limited (CFL), a company which has carried on business in the fishing industry in the North East of Scotland and which latterly held shares in a number of vessels, and certain valuable quota and licence rights.

[6] In 2014, Mountwest, acting as trustee of the trust, sold its shares in CIL to CML, which had been formed by the executive directors of CIL for the purpose of the share acquisition. Those directors included the first, second, third and sixth defenders. The sum offered by CIL was based on a price of £4 per share. That price was accepted by Mountwest.

[7] Certain beneficiaries were unhappy that the shares had been sold for such a low price without an independent valuation having been obtained. They contended that the price took no account of certain quota rights held by CIL and by CFL. In 2018, one of those beneficiaries, Stephen Buchan, brought an action against Mountwest in the Court of Session, seeking declarator that Mountwest had acted in breach of trust, and an order for restoration to the trust fund of the sum lost to it as a result of Mountwest's alleged breach of trust. The sum eventually sued for, after amendment, was £11,314,000. Another disgruntled beneficiary, Peter Tosh, was sisted into the action as an additional pursuer.

[8] The pursuer's case is that it received advice not only that Mountwest did not have a defence to the action, but that there was a likely onward liability against CML. Eventually it reached a settlement with the pursuers in the Buchan action in the sum of £4.5 million. It avers that the defenders were aware of the circumstances likely to give rise to the Buchan action and that, by not disclosing those circumstances, they breached the warranty. It seeks recovery of that sum, subject to the cap already mentioned, which it avers is the sum required to put it in the position it would have been in but for the breach.

The issues

[9] The following questions arise for determination:

- (i) Did CML have an onward liability for the claim against Mountwest?
- (ii) Has the pursuer relevantly pled quantification of its loss?
- (iii) Are the pursuer's averments about wilful concealment relevant?
- (iv) Has the pursuer relevantly averred compliance with the provisions of the SPA requiring it to give notice of a claim?
- (v) Has the pursuer relevantly averred breach of warranty on the part of the defenders?

[10] I will deal with each in turn, but, as will be seen, I have answered the first, fourth and fifth questions in favour of the pursuer, and the second and third in favour of the defenders.

(i) Did CML have an onward liability for the claim against Mountwest?

[11] There are two aspects to this question: would the Buchan action against Mountwest have succeeded; and if so, was there an onward liability on the part of CML? The Buchan action was founded upon the purchase of the CIL Shares at an undervalue; the failure to commission independent advice; and the fact that it should have been obvious from the surrounding circumstances that the transaction called for a heightened degree of scrutiny by Mountwest. It was averred that Mountwest had breached both its fiduciary duty and its duty to act with reasonable skill and care. The pursuer avers in the present action that the advice given to Mountwest that it could not successfully defend the action was correct, and in any event that it was reasonable for Mountwest to rely upon it.

[12] No issue arises as to the adequacy of those averments for inquiry. Where the controversy arises is in relation to whether there was an onward liability against CML.

The pursuer's averments about this are as follows:

"[Mountwest] would not have been in a position to satisfy any decree or agreed settlement. The legal advisers representing [Buchan and Tosh] made it clear that their clients would pursue recovery of the lost value of the CIL shareholding from CML by compelling [Mountwest] to take action against CML if necessary. There were essentially three bases that were said to give rise to this. The first was that the purchase of the shareholding was at undervalue. The second was that the directors of CML had knowledge of the existence of the Trust. The third was that the purchase by CML had not been in good faith... The present pursuer correctly and reasonably considered that there was no prospect of successfully defending such proceedings."

[13] Senior counsel for the pursuer confirmed that the "three bases" referred to were cumulative rather than alternative grounds of action: the pursuer offered to prove that if there had been a purchase at an undervalue, with the knowledge by the directors of CML of the existence of the trust, and there was an absence of good faith, CML would have been liable to the pursuers in the Buchan action.

[14] The position advanced by the defenders was that even if there had been a purchase at an undervalue in bad faith, no claim could have been successfully brought against CML.

In particular, it was submitted that any such claim would have been precluded by section 2 of the Trusts (Scotland) Act 1961, which provides:

"Where ... the trustees under any trust enter into a transaction with any person (in this section referred to as 'the second party'), being a transaction under which the trustees purport to do in relation to the trust estate or any part thereof an act of any of the descriptions specified in paragraphs (a) to (eb) of subsection (1) of section four of the Act of 1921 (which empowers trustees to do certain acts where such acts are not at variance with the terms or purposes of the trust), the validity of the transaction and of any title acquired by the second party under the transaction shall not be challengeable by the second party or any other person on the ground that the act in question is at variance with the terms or purposes of the trust..."

The acts specified in paragraphs (a) to (eb) of section 4(1) of the 1921 Act include selling trust assets: section 4(1)(a).

[15] The debate focussed upon two issues: whether a sale at an undervalue was an act which was at variance with the terms or purposes of the trust; and whether the claim against CML was properly categorised as an attack on the validity of the transaction. It was not in dispute that mere absence of good faith does not remove a transaction from the protection of section 2: Gloag and Henderson, *The Law of Scotland*, (14th Edition), paragraph 41.16; Gretton and Reid, *Conveyancing*, 5th Edition, § 26.13 and Scottish Law Commission, *Discussion Paper on Liability of Trustees to Third Parties*, Scot Law Com DP No 138, 2008, paragraph 2.29. That is not to say, of course, that absence of good faith is not a relevant ground of claim in an action which does not attract the protection of section 2.

[16] What is meant by an act which is at variance with the terms or purposes of a trust was considered in *Marquess of Lothian's Curator Bonis, Petitioner* 1927 SC 579 by Lord Blackburn at 587-588, where he expressed the view that an act was at variance with the terms of a trust when it was at variance with the express language of the trust deed, with the consequence that an act could be at variance with the terms of a trust only where its exercise was expressly prohibited by the trust deed; whereas "purpose" was a broader concept - whether an act was at variance with the purposes of a trust could be implied only from the language used. On that approach, the sale of the shares by Mountwest to CML could not be an act at variance with the terms of the trust. Could it be said to be at variance with the purposes?

[17] Senior counsel for the defenders submitted that the Caley Discretionary Trust had required the trustees to hold the trust property for the benefit of employees, who were beneficiaries; and that to sell the trust property for less than full value was an act which was at variance with the purposes of the trust. Senior counsel for the pursuer submitted that an

act was at variance with the terms or purposes of the trust only if it was *ultra vires*. A sale at undervalue was not an act which was *ultra vires*. Section 2 had no application.

[18] As to whether the claim was one which attacked the validity of the transaction, the defenders' submission was that a broad approach should be taken. The purpose of the section would not be achieved if a sale were rendered immune from challenge only for the purchaser to be exposed to a financial claim of equal value. Senior counsel for the pursuer submitted that section 2 did not confer blanket immunity from any claim which might be made: it simply protected the transaction which was entered into in consequence of the wrongdoing. Even though the transaction could not be undone, the trustee was not protected from a claim by the beneficiaries. Section 2 did not prevent the trustee from pursuing a claim in turn against the other party to the transaction. Under reference to Wilson and Duncan, *Trusts, Trustees and Executors* (2nd Edition) paragraph 10-13, she submitted that trust property could be recovered from a third party who had acquired it in bad faith, or gratuitously.

[19] I do not consider that section 2 would have provided a defence to a claim against CML in the circumstances averred. It is clear from paragraph 41.16 of Gloag and Henderson, and paragraph 2.31 of the Scottish Law Commission Discussion Paper, that section 2 precludes a challenge to the validity of a transaction only where the transaction was onerous, that is, for full value. The SLC Discussion Paper expresses the view that notwithstanding section 2, a remedy may exist to permit recovery from a third party who had transacted in bad faith, for example on delictual grounds, and further that a transaction at a substantial under-value carried out in bad faith could amount to fraud.

[20] The problem is how to reconcile that approach with the wording of section 2, since a gratuitous (or substantially gratuitous) transaction is undoubtedly one which a trustee does

not have the power to make; hence, such a transaction would be protected by the section.

One solution would be to say that the reference to sale in section 4(1)(a) of the 1921 Act must be to a sale at full value, so that a sale at a substantial under-value would not attract the protection of section 2, at least to the extent that it was gratuitous. Another would be to hold, as senior counsel for the pursuer submitted, that the section does not prevent a claim by the trustees against the other party for recovery of the trust estate, since the validity of the transaction itself is not being challenged by another party.

[21] Senior counsel for the defenders submitted that such an approach would result in the anomalous situation that a purchaser from a trustee who sold in direct contravention of a prohibition against sale would be immune from challenge whereas the purchaser from a trustee who was merely negligent would be exposed to liability. However, a sale which is contrary to an express term of the trust will not result in loss to the trust if for full value and I see nothing inherently anomalous in allowing a remedy where there has been a loss caused by a sale for less than full value, particularly where the purchaser has acted in bad faith. Indeed, that point is made in the SLC Discussion Paper at paragraph 2.31, where it is pointed out that lack of good faith will not harm the beneficiaries where the transaction is onerous.

[22] Conversely, it does seem anomalous to allow an entirely gratuitous transaction to be challenged, but not to afford a remedy where the transaction has been at a substantial under value, in bad faith.

[23] This is an area of law which it seems to me is not fully developed (as appears from the language used in the passage in the SLC discussion paper referred to). However, in the present case, the pursuer offers to prove not only that the directors of CML knew that the shares were being sold at an undervalue, but that the sale was structured by CML in its own

interests and that it engineered the resignation of two directors of Mountwest in order to enable the sale to proceed. In those circumstances, I consider not only that section 2 did not provide a defence to CML but that a relevant liability on the part of CML to Buchan and Tosh, through Mountwest, has been averred.

[24] Accordingly, the defenders' plea to the relevancy does not fall to be sustained on this ground.

(ii) Has the pursuer relevantly pled quantification of its loss?

The law

[25] The proper measure of damages for breach of a warranty in a transaction for the sale of shares depends on whether the warranty is as to the quality of the company whose shares are being sold. Where it is such a warranty, the correct measure of damages is the difference between what the shares as warranted would have been worth and what they were actually worth. Where the warranty is not one as to quality, the damages are the difference between the price paid, and that which would have been paid had the warranty been true: *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 WLR 1438 (PC), Lord Hoffman at page 1441F-H; *Wemyss v Karim* [2016] EWCA Civ 27, Leweson LJ at paragraphs 23 to 25. It is noteworthy that in either scenario, the starting point for the claim is the actual value at the time of sale or the price paid, as the case may be, with the damages being the difference between that and the assumed value had the warranty been true, or the price which would have been paid had the true facts been known. Damages are to be assessed as at the date of the breach: *Oversea-Chinese Banking Corporation Ltd v ING Bank NV* [2019] EWHC 676 (Comm), paragraphs 29 and 30. Thus it is not legitimate to value the claim with the benefit of hindsight by reference to what happened after the sale.

[26] The foregoing is settled law. A recent attempt was made to quantify damages on a different basis in *Oversea-Chinese Banking Corporation Ltd.* In that case, the seller had not disclosed a potential liability and the purchaser attempted to recover damages on the basis that had the liability been disclosed the purchaser would have sought, and been granted, an indemnity which would have entitled it to recover the full amount of the liability. The authorities were reviewed by Moulder J at paragraphs 33-38, following which she rejected that approach, stating that

“neither the authorities nor the textbooks support an entirely different measure of damages for breach of a warranty as to quality on a share sale other than the diminution of the value of the asset” (paragraph 39).

The pursuer's averments

[27] The pursuer nonetheless does attempt to adopt an entirely different measure of damages. Its averments about loss in Article 7 of condescence, insofar as material, and correcting certain typographical errors, are as follows:

“Had the warranty given been true, the pursuer would have got that for which it had contracted and, consequently, the value of the CML shareholding and the purchase price therefor would have been as had been agreed for the purposes of the SPA. ... The breach of warranty resulted in the substantial liability on the part of CML not being disclosed. The pursuer did not get that for which it had contracted, namely that no proceedings were likely against CML or its subsidiaries. The agreed purchase price took no account of such proceedings being likely and the consequent liability risk. The value of the CML shareholding was accordingly incorrect. Had the pursuer known the true position it would have taken specific advice on the circumstances disclosed in order to determine whether the pursuer ought to continue with the deal, and if so, what discount should have been sought. Given the magnitude of the issue, the pursuer would have either: a) sought a discount on the purchase price to take account of the potential liability including expected costs, interest and a margin for error; or b) elected not to proceed with the purchase. The discount sought by the Pursuer would likely have been in the region of £10M. In the circumstances, the reasonable measure of the pursuer's loss in order to place it in the position it would have been but for the breach of warranty is the amount that required to be restored to the Trust in settlement of [the Buchan and Tosh claims], namely £4.5 million plus costs and expenses incurred by the pursuer relative to the claim. Had the warranty been true the pursuer would have received that which it

had agreed to purchase. It would not have required to restore to the Trust the sums lost to meet the liability that arose from the proceedings.”

[28] Several observations fall to be made about those averments. First, while the pursuer avers in the opening sentence that the warranted value was the price paid, there is no averment as to what the true value was. Second, although the averments flirt with the suggestion that the correct measure of damages is not the difference in value but the difference between the price paid and the price that would have been paid had the true circumstances been known, by reference to the discount the pursuer would then have sought, there is no averment that the discount sought would in fact have been agreed, and accordingly no averment as to the price which would have been paid (*cf Oversea-Chinese Banking Corporation* where the claimant offered to prove not only that an indemnity would have been sought, but that it would have been granted). Third, to the extent that the pursuer offers to prove that it would not have proceeded with the transaction at all had it known the true position, such a claim would nonetheless require to be valued by reference to the loss which the pursuer sustained on the transaction, which would necessarily involve a comparison between the price paid and the value of the shares acquired. Fourth, the final averment in the passage quoted proceeds on the basis that it was the pursuer which had to restore the £4.5 million to the trust, whereas the liability was that of CML. To the extent that the pursuer seeks to compare the reduction in the price it would have sought with the amount which CML had to pay, it does not compare like with like. The averment tends to overlook, or at least to obscure, the fact that the pursuer’s true complaint is that as a result of a breach of warranty, it acquired shares valued at £27 each which, due to the liability to Buchan and Tosh, were not in fact worth £27.

The nature of the warranty

[29] There was some discussion at the debate as to the nature of the warranty, and whether, as the defenders contended, it was a warranty as to quality. Since the pursuer's claim must be valued either on the basis of the difference in value on the one hand, or the difference in price on the other, and the pursuer (while to an extent riding both horses) offers to prove neither, I am not persuaded that the nature of the warranty is ultimately of any great significance. However, I will deal briefly with the submissions on this point. The defenders submitted that the warranty - that there were no proceedings against CML - went to the value of the shares, and therefore to their quality. Senior counsel for the pursuer submitted that the "difference in valuation" approach applied only where the warranty related to accounts or to profits and, on that basis, she sought to distinguish the warranty here from those in the authorities.

[30] I consider that the pursuer's approach takes too narrow a view. The authorities were not decided as they were because the warranties happened to be about profits, but because they impacted on the quality or value of the shares purchased. I agree with the defenders that the warranty in the present case goes to the value and therefore to the quality of the shares, as the final sentence of para [28] above underlines. Even if that is wrong, and the warranty is not as to quality, that would not allow the pursuer to quantify its claim with the benefit of hindsight by reference to the amount eventually paid to settle the liability. As already made clear, the measure of the pursuer's loss in those circumstances would be the difference between the price paid and that which would have been paid had the true position been disclosed.

[31] As an aside, whether a warranty is one as to quality or not may not always be an easy distinction to draw. Indeed that was the issue which the Privy Council had to resolve

in *Lion Nathan*, where the warranty was that a profits forecast had been calculated in good faith, and on a proper basis, and was achievable. The Privy Council held that not to be a warranty as to quality (disagreeing with the Court of Appeal on that point), although clearly it had a bearing on the profitability of the company, and the purchaser was restricted to recovery of the difference between the price paid and that which would have been paid had a proper forecast been prepared.

Decision

[32] The kernel of the pursuer's argument that its loss is properly quantified at £4.5million appears at paragraph 13 of its note of arguments, where it is stated that it is immaterial whether a discount of £10 million could have been achieved because the damages sought by the pursuer are assessed by what happened after the breach and what the pursuer in fact lost. This measure is said to be the more appropriate measure and to avoid the need for speculation. The pursuer's argument is in effect that it does not matter that it cannot prove that the £10 million discount would have been acceptable to the defenders because the liability was in the event less than that. The fallacy in that argument is that the pursuer compares the discount *it* would have sought with the sum which *CML* had to pay and so the argument simply fails to get off the ground. Further, the pursuer's argument is based upon an inherent assumption that it was somehow possible for it to acquire *CML* without the liability to Buchan and Tosh. If that is taken as the starting point, it is superficially attractive to say that the pursuer's loss is the sum required to put *CML* into that position; but the reality is that it was not possible for the pursuer to acquire *CML* without that liability, as the liability was always there (and would have been there if the

warranty were true; namely that the defenders were unaware of the circumstances giving rise to it).

[33] In a nutshell, the pursuer's true complaint is that it paid more than it ought to have done for shares which, by reason of a liability of which the pursuer was unaware, turned out to be worth less than the pursuer believed on the strength of the warranty. In those circumstances, the law is plain: the measure of loss is either the difference between the warranted value and the actual value, or between the actual price and the price which would have been paid. The pursuer has failed to make relevant averments about either. The averments which it has made are irrelevant. There has been no offer to amend. It is nothing to the point that, as senior counsel for the pursuer submitted, quantification of the claim on a valuation basis might be a difficult exercise. That is, nonetheless, the exercise which ought to have been carried out.

[34] Accordingly, the defenders' pleas to the relevancy of the action fall to be sustained at least insofar as they are directed towards quantum.

(iii) Are the pursuer's averments about wilful concealment relevant?

[35] Without needing to refer to it in detail, clause 7 of the SPA generally limits the defenders' total liability for any breach of warranty to £3,000,000. Up to that limit, each defender is liable for his Relevant Proportion (a defined term) of the claim. However there is an exception in the case of wilful concealment. Clause 7.19 of the SPA provides:

"Nothing in this clause 7 applies to exclude or limit the liability of a Seller to the extent that a Claim arises as a result of fraud or wilful concealment on the part of that Seller (except in respect of the limitation of liability of each Seller to his Relevant Proportion of any Substantiated Claim as provided for in clause 7.3) but clause 7 shall continue to apply for the benefit of the other Sellers to the extent there has been no fraud or wilful concealment on their part in relation to the relevant Claim."

[36] The effect of this is to disapply the cap in respect of any particular defender who has been guilty of fraud or wilful concealment, albeit that defender's liability would remain restricted to his Relevant Proportion of the total claim. The pursuer is entitled to argue in relation to one or more defenders that the cap did not apply to him or them, because of fraud or wilful concealment. In that event, assuming that the pursuer succeeded in showing that the total uncapped value of the claim was £4.5 million, it could recover from such defenders their Relevant Proportion of that sum.

[37] The foregoing is not in dispute, but what the pursuer in fact avers, in Article 7 of condescence, is the following:

"However, reference is made to the above inferential averments at Cond. 6 regarding awareness on the part of the defenders relative to para 13.2 of schedule 8. Insofar as actual awareness of these matters on the part of any of the defenders is demonstrated on the evidence, a further inference would fall to be drawn: that the defender in question had wilfully concealed the matter being warranted. In that event: the agreed liability cap would not apply to that defender's pro rata share of liability; and the pursuer will seek to amend the conclusions to reflect that. Reference is made to Cl 7.19. In the meantime, and under reservation of its position, the pursuer proceeds on the footing that the liability cap will apply to each defender."

[38] The defenders argue that the pursuer is not entitled to ride two horses in this way. If it wishes to, and can, plead a case of wilful concealment against one or more defenders then it should do so. If not, it is not open to it to reserve its position in the way it seeks to do. Further, senior counsel for the defenders submitted that even actual awareness of the claim would be insufficient to amount to wilful concealment of it: something more would be required. The averments were irrelevant and should not be admitted to probation.

[39] Senior counsel for the pursuer founded upon Articles 2 to 6 of condescence which contained averments of facts from which awareness (as defined in the SPA) of circumstances likely to give rise to proceedings could be inferred. She further submitted

that those facts may further give rise to the irrefutable inference that one or more defenders were actually aware that the proceedings were likely to be brought as opposed to having mere information or belief. The pursuer could aver no more at this stage because it could not know what was in each defender's mind. It would only be after hearing the evidence that the pursuer could properly plead a case of wilful concealment against any defender. Finally, she submitted that actual awareness, without anything more, would be sufficient to give rise to wilful concealment.

[40] Dealing with that last point first, although I was not referred to any authority on it, I tend to agree with senior counsel for the defenders that to wilfully conceal something requires more than mere knowledge of the thing concealed. There must also be a deliberate decision not to disclose. A person may "know" something but forget it, or reach a *bona fide* view, in the present context, that it was not a circumstance likely to give rise to a claim. Clause 7.19 applies to all the warranties which were given, not simply to the one which has given rise to this action, and the concept of wilful concealment may more readily apply to other warranties than to a warranty which is given to the best of the defenders' belief.

[41] However, no final view need be reached on that at the present time, since, more fundamentally, the pursuer's approach is misconceived and contrary to our system of pleading. As the pursuer appears to acknowledge, short of an admission by one of the defenders, each defender's state of mind at the time of the transaction can only ever be determined by drawing an inference from facts which are proved. It is for the pursuer to plead those facts from which the requisite inference or inferences can be drawn. If the pursuer considers that if it proves the facts which it offers to prove, an inference can properly be drawn that one or more of the defenders wilfully concealed the claim, then it should make averments to that effect, and amend its conclusions against that defender, or

those defenders, accordingly. If it considers that the facts do not found such an inference, then it must proceed with the action as currently framed. To allow the pursuer to proceed otherwise would not afford the defenders fair notice of the claim which they have to meet. In the event that in the course of giving evidence a defender were to admit that he had wilfully concealed the claim, then it would of course be open to the pursuer to move to amend its pleadings at that time, as the defenders acknowledged. But the pursuer cannot reserve its position in the manner it currently proposes.

[42] Accordingly, the averments in the passage identified in Article 7 should not be remitted to probation, and the second plea in law for the first, second, fourth, fifth and sixth defenders falls to be sustained to that extent.

(iv) Has the pursuer relevantly averred compliance with the provisions of the SPA requiring it to give notice of a claim?

[43] The SPA contains two notice provisions in relation to claims. Clause 7.6 insofar as material provides:

“The Sellers shall not be liable for a Claim or a claim under the Tax Covenant unless notice in writing summarising the nature of the Claim or claim under the Tax Covenant (in so far as it is known to the Buyer) with supporting evidence and, as far as is reasonably practicable, the amount claimed, has been given by or on behalf of the Buyer to the Sellers as soon as reasonably practicable after the Buyer becomes aware of the facts, circumstances or matters giving rise to the Claim or claim under the Tax Covenant and in any event:-

- (a) in the case of a claim made under the Tax Warranties or under the Tax Covenant, on or before the seventh anniversary of Completion; or
- (b) in any other case, prior to the expiry of the period of eighteen (18 months) [sic] commencing on the Completion Date,

and any such Claim or claim under the Tax Covenant so notified shall (if it has not been previously satisfied, settled or withdrawn) be deemed to have been withdrawn and become fully barred and unenforceable at the expiry of a period of 9 months from the date of giving of such notice unless at the relevant time legal proceedings in respect of the Claim or claim under the Tax Covenant have been commenced.”

Clause 7.9 then provides that in the event of a Relevant Third Party Claim (defined in clause 7.13 as “any claim by a third party against the Buyer or the Company and/or (any of the Subsidiaries which will or may reasonably be considered likely to give rise to a Claim”), the Buyer shall:

“...give notice to the Sellers as soon as reasonably practicable, and in any event within 20 Business Days of any [such] claim...coming to its notice...”

“Claim” is defined in the agreement as “a claim for breach of any of the Warranties.”

[44] The timeline in relation to the giving of notices in the present case is not in dispute.

The Buchan summons was served on 4 July 2018. A Third Party Claim notice was served under clause 7.9 on 26 July 2018. The record in the Buchan action closed on 15 January 2019. A section 7.6 notice was then served on 21 January 2019.

[45] It was submitted for the defenders that the giving of a notice under clause 7.6 is a condition precedent to the making of a claim (a position also adopted by the pursuer in its pleadings, although departed from in submissions); and that the notice must be given as soon as reasonably practicable, the reference to 18 months simply being to a long-stop date after which the Sellers could be confident that no claim would be made if no notice had been served. A comparison of the adjusted summons in the Buchan action with the service copy summons disclosed that no material adjustments were made in the period between service of the summons and the closing of the record; certainly none that brought any significant new information to the pursuer’s attention. The pursuer had made insufficient averments to support its position that the notice had been served as soon as reasonably practicable.

[46] As alluded to in the previous paragraph, the position advanced by senior counsel for the pursuer differed from that taken on record. As well as acknowledging in Article 8 that service of a notice was a condition precedent to the making of a claim, the pursuer also avers

in the first sentence of that article that clause 7.6 required it to serve a notice with supporting evidence as soon as reasonably practicable after becoming aware of the facts, circumstances or matters giving rise to the claim, which it avers it did: no mention there of the clause being directory only, or of an ability to raise proceedings even if no notice had been served. There is no hint of any fall-back position. However, in her submissions, senior counsel for the pursuer argued that a purposive approach should be taken to the construction of clause 7.6, and that the construction should apply commercial common sense: *Hoe International Ltd v Andersen* [2017] SC 313; that on a proper construction of that clause, it was not after all a condition precedent of a claim that a notice must always be served; that the purpose of a notice was to give the defenders notice of a claim, which they already had by virtue of the section 7.9 notice; and that consequently the defenders had not been prejudiced by any non-timeous notice of the claim.

[47] Since much of the pursuer's submission was founded on the argument that clause 7.6 did not always require a notice to be served, and that proceedings could be raised even in the absence of a notice, provided that was done within 18 months of the date of completion, I will deal with that first. Senior counsel for the pursuer submitted that the words "in any other case" where they appear at the beginning of (b) meant that the pursuer had the option of proceeding with or without a notice; the one case being where a notice had been served, and the other where it had not. If it served a notice, then the legal proceedings must be commenced within 9 months of the giving of the notice. If it did not serve a notice (or did not serve a notice as soon as reasonably practicable) it nonetheless was able to raise proceedings provided it did so within 18 months of completion. The purpose of that long-stop date was to provide certainty: *ENER-G Holdings plc v Hormell* [2012] EWCA Civ 1059, [2013] 1 All ER (Comm) 1162.

[48] I do not agree with that construction, which is an unnatural and strained interpretation of the language used. The words “in any other case” in (b) are not a reference back to the opening part of the clause, but to paragraph (a) which deals with the case of a claim made under the Tax Warranties. The clause is merely drawing a distinction between Tax Warranty claims (where proceedings must be commenced within 7 years) and other claims (where proceedings must be commenced within 18 months) - those periods, in both cases, running from the date of completion. No other construction is grammatically possible. *ENER-G Holdings* does not assist the pursuer. In that case there was no requirement to serve a notice as soon as reasonably practicable. It does not support the pursuer’s argument that provided the Claim was brought within the longstop period of 18 months, no notice was required.

[49] As regards the wider construction of the clause, and whether the requirement for a notice is a condition precedent or the clause is merely directory, the words “The Sellers shall not be liable for a claim...unless” strongly denote that the service of a notice is a condition precedent to a valid claim. *Hoe International* is not in point. The issues in that case were whether the notice which was served contained sufficient information to comply with the clause in question; and whether a failure to comply with the strict requirements of the contract invalidated the notice, if it had in fact come to the attention of the recipient. Neither issue arises here, where the issue is not how the notice was served, or what it contained but whether or not it was served timeously in accordance with the contract. While *Hoe International* is authority for the proposition that a purposive and commercially sensible approach should be taken to the construction of notice clauses, I do not consider that it is contrary to commercial common sense to hold that a notice should be served strictly in accordance with a requirement to serve it as soon as reasonably practicable, even where the

recipient has had receipt of a different notice under a different provision (as here). That is particularly so where service of the notice sets the clock ticking for the bringing of proceedings. To adopt any alternative construction would, as Mr O'Brien submitted, mean that in the context of a tax warranty claim, a notice could be served after, say, 6 years and 11 months even where the purchaser had been aware of the claim throughout that period; and such a construction does not accord with commercial common sense.

[50] Senior counsel for the pursuer expressly disavowed any argument that the notice under clause 7.9 served as the notice under clause 7.6. While such an argument would in any event have been an unattractive one (aside from not being to the pursuer's advantage, since it would have set the limitation period running), it is difficult to see why the clause 7.9 notice is of any relevance. Either the defenders had notice of the claim or they did not. The pursuer cannot at the same time argue that the 7.9 notice gave the defenders adequate notice of the clause 7.6 claim but that it was not a 7.6 notice.

[51] Accordingly, I hold that there is no reason not to give the words in clause 7.6 their natural meaning which is that the pursuer had to serve a notice under that clause as soon as reasonably practicable, as a condition precedent to a claim; and if it did not do so its right to bring a claim was lost. Whether or not the defenders suffered any prejudice is nothing to the point.

[52] The final issue which arises in relation to construction of the clause is what the reference to the Buyer having "[become] aware of the facts, circumstances or matters giving rise to the Claim" means, and whether the pursuer has relevantly (and with sufficient specification) averred that it did not become aware of such facts, circumstances or matters in time for it to have served the notice sooner than it did. Senior counsel for the pursuer submitted that the "as soon as reasonably practicable" time limit related to awareness of

facts, circumstances or matters giving rise to the Claim in question, not awareness of facts and circumstances which might give rise to a claim, citing *Hut Group Ltd v Nobahar-Cookson* [2016] EWCA Civ 128; [2016] 1 CLC 573 in support of that submission. A claim notice would require at the very least to set out the particular warranties said to have been breached: *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2018] EWCA Civ 23; [2018] BCC 339. Senior counsel for the defenders submitted that neither authority was in point. The decision in *Hut Group* necessarily turned on the wording of the particular notice provision in that case, which was in ambiguous terms. The court had held that a construction which required notice to be given upon awareness of the facts and circumstances giving rise to a claim, or a competing construction which required it to be given upon awareness of the right to bring a claim, made equal commercial sense. That case did not assist the pursuer. As for *Teoco*, it could not be correct, standing the decision in *Hoe International*, in which it was held that a notice which referred to the warranty clauses said to have been breached, and enclosed a letter intimating a third party claim, gave sufficient notice of a warranty claim.

[53] As to which of the parties is correct, the trigger which gives rise to the requirement to serve a notice is awareness of the facts, circumstances or other matters giving rise to the Claim. That focuses on awareness of the facts, circumstances or other matters upon which the claim is ultimately founded, rather than on awareness of the availability of an action arising out of those matters. That is not quite an end to the matter however, since the obligation on the pursuer was not to serve a notice as soon as it had awareness of the facts; but only to do so as soon as it was reasonably practicable to do so. Determining whether a notice was served as soon as reasonably practicable necessarily entails consideration of when the pursuer was in a position to include in the notice all the information which required to be included. While it is clear that information about the amount claimed need

not always be given (only when it was reasonably practicable to do so), the notice had to summarise the nature of the Claim and to provide supporting evidence. This suggests that the pursuer did after all require to have (and to impart to the defenders in the notice) some knowledge of the nature of the claim and not simply knowledge of the facts giving rise to it. There may well be a lapse of time between awareness of the facts, and the point at which it is reasonably practicable to have served a notice.

[54] With those comments in mind I now turn to consider the pursuer's averments about the notice in Article 8. That article contains averments about the pursuer's state of knowledge, or lack thereof, between 4 July 2018 and 21 January 2019. In particular, the pursuer avers that service of the summons was the first notification it had of the claim against Mountwest; that it took legal advice; that it gave consideration to what notice, if any, had to be given to the defenders; that it reached no concluded view at that time as to whether a clause 7.9 notice was necessary but mindful of the strict time limit, concluded that the prudent course was to serve such a notice, as it did; that it did not have the necessary information to enable it to meet the requirements of a section 7.6 notice; that its understanding of whether the Buchan claim could be successfully defended was dependent on what it was told by the defenders; that adjustments to the defences in the Buchan action were made on 18 December 2018 and that adjustments were made to the summons on 15 January 2019; and that only then did it determine that it should serve a section 7.6 notice.

[55] I consider that these averments about what the pursuer knew, and when, are sufficient to entitle it to a proof before answer on the notice point. It would be taking too narrow a view of clause 7.6 to hold, without inquiry, that a perusal of the pleadings in the Buchan action leads to the inevitable conclusion that the notice had not been served as soon as reasonably practicable, or that the pursuer's averments lack sufficient specification.

(v) Has the pursuer relevantly averred breach of warranty on the part of the defenders?

[56] It was submitted for the defenders that the pursuer's averments about breach of the warranty were irrelevant. There were two strands to this submission. First, the circumstances averred by the pursuer (such as that shareholders were unhappy) did not support any inference that the defenders were aware of circumstances likely to give rise to a claim. The pursuer would require to aver actual awareness which it did not do, or to aver material from which relevant awareness could be inferred on a balance of probabilities, which it also did not do. The second strand to the submission focussed on the lack of averments about awareness on the part of the sellers as a body. The pursuer made averments about what certain individual defenders knew but it failed to make relevant averments about them as a body.

[57] The first of these submissions is easier to resolve than the second. I accept the pursuer's submission that the facts averred by them about: the circumstances in which two directors of CML resigned and were replaced prior to the sale; an undervaluation in 2014; breach of fiduciary duty; expressions of views by disgruntled shareholders in 2014 and thereafter; another litigation, which was disclosed; and payment of an extraordinary dividend in 2015 or 2016, are all relevant to establish awareness on the part of at least some of the defenders. However that begs the question as to which defenders might be inferred to have that awareness, which leads to the second strand of the submission. The question is whether the defenders can be liable only as a body and whether knowledge of one can be imparted to the others. If only one had the requisite knowledge, are all the defenders liable, which senior counsel for the third defender submitted would be contrary to commercial common sense. Or, if five had knowledge and one did not, are all six to escape liability, a

result which senior counsel for the pursuer described as absurd. Or, what if each of the defenders held a single piece of the jigsaw, such that no single one of them was aware of the likelihood of proceedings, but the overall likelihood appeared when the pieces were put together?

[58] The following provisions of the SPA are relevant (repeating several clauses already set out above for ease of reference):

“1.12 A reference to the Sellers shall include a reference to each of them.

1.19 Where any obligation, undertaking, commitment or liability arising under this Agreement is given by several persons (including, without limitation, the Sellers or any of them), the obligation, undertaking, commitment or liability shall not be given by those persons on a joint and several basis but shall be given on a several basis only unless this Agreement expressly states otherwise.

6.1 Subject to clause 6.2, each of the Sellers severally warrants to the Buyer that except as Disclosed, each Warranty is true and accurate on the date of this Agreement.

6.2 Each of the Sellers gives the Warranties contained in paragraph 1 and paragraph 2.2 of Part A of schedule 8 in respect of his own capacity only and in respect of the Sale Shares held by him only.

6.3 Warranties qualified by the expression **so far as the Sellers are aware** or any similar expression are deemed to be given to the best of the knowledge, information and belief of the Sellers after they have made reasonable enquiries but without having made any enquiry of any other person (other than (a) the Sellers...)

7.3 Each of the Sellers shall be liable for his Relevant Proportion of any Substantiated Claim (except to the extent that it is a Claim under the Warranties contained in paragraph 1 and paragraph 2.2 of Part A of Schedule 8)...

7.6 The Sellers shall not be liable for a Claim...unless notice in writing ... has been given...to the Sellers...

7.7 The Sellers shall not be liable for a Claim to the extent that the Claim...

Schedule 8, 13.2so far as the Sellers are aware there are no circumstances likely to give rise to [proceedings]...”

[59] It is plain from clause 6.1 (which is consistent with 1.19) that apart from the exceptions, each warranty, which therefore includes that in 13.2, is given severally rather than jointly. That is consistent with clause 7.3 which holds each Seller liable only for his own proportion of any claim. However, 7.3 also envisages that in the event of a successful claim, each of the Sellers will be liable for that proportion. Further, the exception provided for in 6.2 rather suggests that in general, but for the exception, one Seller may be held liable for a breach of warranty by one or more of the others. Clause 6.3, rather curiously, requires the Sellers to make enquiries of themselves. It may well be arguable that the requirement to make reasonable enquiries of each other is sufficient to fix all the defenders with the knowledge of one or more of them; which may also provide the answer to the “jigsaw” problem.

[60] I have come to the view that a final decision as to the proper interpretation of these provisions can be reached only after inquiry into the facts. Although the pursuer’s senior counsel submitted that the SPA provided for collective responsibility, she also appeared to accept that if, at proof, it emerged that any particular defender had no knowledge of the circumstances giving rise to the claim, she might not seek decree against that defender. While there is a degree of inconsistency in that approach, nonetheless it cannot be said that the pursuer’s averments are so lacking in specification and relevancy that they should not be permitted to sue any of the defenders. The defenders all have adequate notice of the facts from which it is said their knowledge can be inferred.

[61] Accordingly, I find that the averments on breach of warranty are sufficiently relevant and specific to merit a proof before answer.

Disposal

[62] Had it not been for the conclusion for declarator of breach of warranty, I would have dismissed the action, sustaining the first plea in law for the first, second, fourth, fifth and sixth defenders, and the first plea in law for the third defender. However, standing that conclusion, I have decided at this stage to put the case out by order to discuss what order should be made in light of this opinion. I have also reserved all questions of expenses.