

Summary dismissal of breach of warranty claims

Breach of warranty claims are unfortunately a not uncommon scenario following the sale of a company, particularly where some part of the purchase price remains outstanding or is being paid by instalments. Such claims are often seen as a means of re-negotiating the sale price when the purchaser is in a stronger position to do so after having acquired the share capital and control of the company.

When faced with such a claim it is important for the seller to consider carefully whether an application for summary dismissal might be appropriate to knock out the claim at an early stage.

In *Cypher Holdings Ltd -v- Bertram & Ors* (2001), Bertram applied for summary judgment to dismiss Cypher's claim on the basis that it had no real prospect of succeeding if it proceeded to a full trial. Cypher had agreed to purchase the share capital of the company for a provisional sum of £36,140,340.00 subject to adjustment after completion. It brought an action for damages for breach of warranty alleging that various statements in the management accounts, which were included in the disclosure bundle annexed to the disclosure letter, were untrue.

Cypher claimed that clause 4.3.3 was breached because the management accounts did not "in all respects reflect the assets and liabilities" of the company and that clause 27.2.1 was breached because the management accounts contained statements with respect to the assets, liabilities, profits, stock and creditors which were not accurate in all material respects.

Bertram, on their application for summary dismissal, argued firstly that Cypher could not establish liability for breach of warranty

and secondly, that even if there was a sustainable claim for breach of either warranty, such a claim had been excluded in each case by specific exclusion clauses in the sale agreement.

In dismissing Cypher's claim the Court held that the provisional nature of the relevant figures and the weaknesses in the company's accounting practices had been expressly drawn to Cypher's attention by the accountant's due diligence report which was also included in the disclosure bundle. Accordingly, there had been fair and proper disclosure of the fact that the management accounts did not in fact "in all respects reflect the assets and liabilities of the company". Under the circumstances, Cypher did not have any real prospect of succeeding in its claim for damages for breach of warranty in respect of clause 4.3.3.

Further, the Court found that the statements on which the claim for breach of clause 27.2.1 were based were qualified by other material in the disclosure bundle so as to preclude a breach of warranty claim. On a proper analysis, the statements that were alleged to amount to a breach of warranty were in fact statements of opinion and not statements of fact. Statements of opinion were covered by clause 27.2.2 but that clause was not relied upon by Cypher.

The Court continued that such conclusions were reinforced by the overall scheme and the commercial reality of the agreement. Bertram had expressly warranted the assets and liabilities but not the profits and there was in fact a mechanism in place in the sale agreement to adjust the consideration to reflect any deficiencies in the management accounts.

Head Office

3 Lonsdale Gardens
Tunbridge Wells
Kent TN1 1NX
T 01892 510000
F 01892 549884

Thames Gateway

The Old Rectory
St. Mary's Road
Greenhithe
Kent DA9 9AS
T 01322 623700
F 01322 623701

Summary dismissal of breach of warranty claims (continued)

With respect to Bertram's exclusion clauses, although one was found to be ineffective, they could rely on the other because it was specific and made full provision for the matter to which the claim related in the completion accounts and that, as such, the exclusion clause operated to exclude the claim.

In view of this, the Court found that Cypher's claim had no real prospect of success at a full trial and, as there was no other compelling reason why the case should go to trial, the claim should be dismissed.

This case illustrates the fact that the Courts are prepared to take a robust and commercial approach to warranty claims and, where claims are considered to be without merit, the Courts are quite prepared to dismiss them at an early stage.

This information sheet has been prepared to highlight some key issues relating to summary dismissal of breach of warranty claims. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2009 and may be affected by subsequent changes in the law.

Should you require any specific legal advice on the issues covered, please contact Kamal K Aggarwal by email at kamal.aggarwal@ts-p.co.uk or call Kamal on 01322 623700.