The Devil Is In the Detail: Contractual Notification Clauses and Breach of Warranty Claims

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PRACTICES International Arbitration, International, Litigation

Contracts, in particular sale and purchase agreements in corporate acquisitions, may provide that if a party wishes to make a claim (usually the buyer post-completion), it must give notice to the other party (the seller) within a certain period of time. There may also be a requirement that any notice of a claim must be reasonably detailed, or in a particular form. Such provisions, if properly drafted, take effect as conditions precedent. A failure to satisfy any conditions imposed will preclude a claim, no matter how valuable or meritorious. It goes without saying that notices of claims to be given pursuant to such clauses must be carefully drafted.

One might think that a 9-page letter drafted by solicitors would do the trick. However, in *Drax Smart Generation* v *Scottish Power Retail Holdings* [2023] EWHC 412 (Comm), the Commercial Court recently held that precisely such a letter was deficient and did not meet the requirements of the provisions governing post-completion claims in a share purchase agreement. As a result, the buyer's breach of warranty claim had no prospects of success, and the defendant was entitled to summary judgment. *Drax* v *Scottish Power* is a timely reminder of how notices clauses are construed under English law, and it also illustrates the basis on which a buyer's losses for breach of warranty claims in corporate acquisitions are assessed. This article looks at both issues.

Background

In October 2018, Drax bought all the shares in Scottish Power Generation Limited ("**SPGL**"). SPGL was part of the Scottish Power group, and it had a range of assets. SPGL's assets included valuable land adjacent to the old Kingsnorth power station near Medway, Kent, owned by E.ON. Kingsnorth was a coal and oil-fired power plant. It was decommissioned and demolished in March 2018. SPGL's nearby piece of land, called Damhead Creek II, had long been considered as a potential location for a new, more environmentally acceptable, combined cycle gas turbine power station. One advantage of Damhead Creek II was that such a new power station could be connected to the UK's national grid relatively easily by running cables across to the old Kingsnorth power plant. Running those cables required an easement. The Scottish Power group had procured an option agreement for such an easement from E.ON.

On 1 June 2016, as part of an internal reorganisation, Scottish Power assigned the benefit of the option agreement to SPGL, intending for SPGL to be both the owner of Damhead Creek II and be able to call for the grant of an easement by E.ON. However, in early October 2018, during the negotiations with Drax, it proved impossible to locate any copies of the deed of assignment of the option agreement to SPGL from June 2016. Scottish Power therefore put in place a new deed of assignment, with retrospective effect as of 1 June 2016. In addition, SPGL also executed a deed of covenant in favour of E.ON, the grantor of the easement under the option agreement. By that deed, SPGL promised that it would perform all the obligations the original grantee had under the option agreement. Unfortunately, however, in October 2016, E.ON no longer owned the Kingsnorth site. The land had been sold to a company called Uniper. E.ON was therefore the wrong counterparty to SPGL's deed of covenant (since E.ON could no longer grant the easement). The

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deed of covenant should have been given in favour of Uniper. Without it, Uniper was not actually required to grant the easement to SPGL if the option were exercised.

The transaction between Drax and Scottish Power for the sale of SPGL was governed by a sale and purchase agreement ("**SPA**") of no fewer than 224 pages, which the parties signed on 16 October 2018. Drax agreed to pay Scottish Power £702 million for SPGL. In the thick of the negotiations, the full extent of the problem with Uniper was overlooked. Drax knew that Uniper now owned Kingsnorth, but did not know or appreciate that Uniper was not bound by the option agreement due to the missing deed of covenant. However, Drax had secured warranties and indemnities from Scottish Power. By the SPA, Scottish Power warranted to Drax that the benefit of the Damhead Creek II option agreement would be or had been effectively assigned to SPGL prior to completion. Scottish Power also agreed to indemnify Drax for all losses suffered in relation to the option agreement.

The deadline for exercising the option was 12 March 2019. On 8 March 2019, four days before the deadline, Drax's solicitors gave notice to Uniper under the option agreement. On 11 April 2019, after expiry of the option, Uniper's solicitors replied back, stating that absent any deed of covenant in their client's favour, the exercise of the option was ineffective, and any rights that SPGL might have had had since expired anyway. That left SPGL without an easement, unless new commercial terms could be agreed with Uniper. Drax and Scottish Power exchanged correspondence about this problem. On 22 May 2019, Drax gave notice of a matter which, its solicitors said, may give rise to a claim under the SPA. Over the following year, Drax and Scottish Power negotiated amendments to the SPA. On 30 June 2020, they reached agreement. The newly amended SPA defined a specific type of claim, called the "*Damhead Creek II Option Agreement Claim*". If Drax wanted to pursue that claim, it had to give notice of this by no later than 30 June 2021. That effectively gave Drax a year to try and come to terms with Uniper, and thus work out what the additional costs or losses it might want to claim from Scottish Power under the SPA were going to be.

Drax then decided to sell SPGL to a third party, with that sale completing on 15 December 2020. As part of the sale, Drax had to indemnify the new purchaser of SPGL for any losses relating to the option agreement. Drax thus remained able to claim against Scottish Power under the SPA. Meanwhile, the new purchaser continued the negotiations with Uniper, but in the expectation of passing any costs back to Drax. On the last day of the extended period for making such a claim against Scottish Power, Drax's solicitors then gave notice of a claim that was (they said) squarely within the definition of a "*Damhead Creek II Option Agreement Claim*".

Drax's notice of claim

Over the nine pages of Drax's notice, its solicitors set out the factual background to the issue and the negotiations with Uniper over the grant of a new easement. Uniper was in principle willing to grant an easement at current market rates, but insisted on a different route which meant increased costs for making the connection with the national grid. Drax also reserved its right to apply for a compulsory purchase order in respect of the interest sought. Noting that the option could not be exercised as expected because Scottish Power had failed properly to complete an internal "*Reorganisation*" (including the assignment to SPGL), Drax stated that:

> "*Drax remains liable for any and all losses suffered by [SPGL] in relation to the Reorganisation.*"

The notice then turned to the losses that Drax was claiming. The letter said:

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> "*In the circumstances, the loss suffered is yet to crystallise. As such, we set out below the details of the likely heads of loss (in relation to both the potential terms that may be agreed with Uniper and in the event that such agreement is not reached and a compulsory acquisition is required) and where possible an estimate of the potential loss that is likely to be suffered. Given the unique circumstances of this matter, this is of course an estimate and Drax reserves the right to update the loss suffered as matters develop and the loss is crystallised.*
>
> *As the losses are yet to crystallise, Drax shall seek an indemnity from Scottish Power in relation to any future losses that may arise.*"

Below that, Drax's solicitors listed potential fees and payments that Uniper was likely to ask for in return for granting any easement (based on Uniper's position in the negotiations at the time), and further expected costs if an agreement could be reached, but with the easement relating to a route across Uniper's land that was less advantageous for the connection. The notice also raised the cost that would be incurred as a result of a compulsory purchase process.

Drax's claim in the Commercial Court

Scottish Power denied liability, and Drax commenced proceedings in the Commercial Court. Drax claimed for breach of warranty, relying on two specific warranties: firstly, that the Reorganisation had been properly carried out as required by the relevant agreement and that all "… *transfers or other actions envisaged* …" had occurred, and secondly that "*All material licences, registrations, consents, permits, concessions, certifications, approvals and other authorisations (public and private) that are necessary for the completion of the Reorganisation have been obtained.*" Drax also claimed an indemnity for all the costs that would be incurred by SPGL in implementing the Reorganisation properly.

Drax's Particulars of Claim reflected the losses described in the notice of claim. Drax included an estimate of the quantum claimed, based on Uniper asking for £2.8 million in fees for the new easement, and raising a further £5.2 million in additional contractor costs - a total of about £8.1 million in costs that SPGL itself was expected to suffer. Drax then sought to amend its claim, removing all references to loss that SPGL would suffer, and instead referred to loss that Drax itself had (already) suffered. Drax's new claim was that SPGL, when it was acquired by Drax, was worth less than it should have been. The measure of damages claimed was the difference between the warranted value of SPGL (with the benefit of the option) and the true or actual value of SPGL (without the option rights). That was to be assessed at the time when Scottish Power's breaches of the SPA were discovered. The amended pleading assessed the diminution in the value of SPGL in the same amount of £8.1 million – so Drax's assumption was that the additional cost of acquiring the (less convenient) easement from Uniper was the same as the diminution in value. Scottish Power resisted the amendments, applying for summary judgment on the basis that Drax had not properly notified the claims under the SPA, because the basis on which the losses were claimed had changed completely.

Diminution in value claims – a closer look

Before turning to whether Drax's notice of claim was sufficiently specific, we look at Drax's newly-alleged basis of claim in a little more detail. Under English law, diminution in value is the basis for assessing damages in claims for breaches of warranties under sale and purchase agreements. This was settled by the Privy Council in *Lion Nathan Ltd* v *C-C Bottlers Ltd* [1996] 1 WLR 1438.

Going back to first principles, Lord Blackburn famously said in *Livingstone* v *Rawyards Coal Co* (1880) 5 App Cas 25, at 39 that:

> "*… where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation*"*.*

Applying that rule of the law of damages to a breach of warranty situation requires a comparison between the actual value of the company (or the shares) with the value they would have had if the warranty had been true. In *Lion Nathan*, their Lordship drew an analogy between the sale and purchase of a company, and the sale and purchase of goods. In each case, the purchaser was entitled to assume that what it stood to receive would be of the warranted quality, which means that the purchaser could claim damages to compensate them for having received something that was worth less than what they contracted for. As we will come on to see, a claim for diminution in value is not always easy to quantify. This may have been the reason why Drax initially sought to claim the (expected) losses that SPGL would suffer – because those would be actual costs incurred, without the need for a valuation exercise.

No duty to mitigate

A few points are worth bearing in mind when it comes to diminution in value claims. The first is that the loss crystallises on completion, when the warranty is breached. It follows that, after completion, the purchaser does not actually have to take whatever steps are needed to restore the company to the 'quality' or condition it should have been in (so Drax or the new owner of SPGL would not have to pay Uniper and lay the cables). Instead, the purchaser can apply damages for diminution in value as it sees fit, and the usual common law duty to mitigate does not apply. In *Equitix EEEF Biomass 2 Ltd* v *Fox* [2021] EWHC 2531, Mr Justice Kerr confirmed that in such cases:

> "*… there is no room for the common law doctrine of mitigation of loss to operate. As the defendants rightly point out, the doctrine is not, as it is often described, a "duty" to mitigate loss in a strict sense. It is a rule that avoidable losses are irrecoverable if a claimant acts unreasonably by not avoiding them. In a normal share valuation case such as this, where the measure of damages is the ordinary one for breaches of warranties of quality, steps taken or not taken by the buyer to mitigate its loss after the purchase are simply irrelevant and of concern only to the buyer, not the seller The loss has already crystallised at the point of purchase.*"

Playing by your own rules

In some sale and purchase agreements, including the contract before the court in *Equitix*, the parties had agreed to introduce a contractual duty to mitigate. As Mr Justice Kerr found in *Equitix*, even in the case of a diminution for value claim, a contractual provision requiring the buyer to take reasonable steps to mitigate after completion will be given effect. The parties can therefore alter the common law rules for the assessment of damages by agreement. However, there is still a presumption that they did not intend to depart greatly from those rules.

The common law duty to mitigate places the burden of proof on the defendant, who has to establish that what the claimant did was unreasonable and led to avoidable loss being suffered. It is not enough for the defendant to allege that there were some reasonable steps that could have been

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taken by the claimant to mitigate the loss. In *Equitix*, the argument was made that the post-completion mitigation provision in the contract reversed the burden of proof, by stating that the buyer would take "… *all reasonable steps to mitigate its loss*." Mr Justice Kerr found that the clause had been drafted against the background of the common law duty, and the wording was insufficiently clear to put the onus on the buyer to show that all reasonable steps had indeed been taken:

> "*… the onus is on the defendant to show an unreasonable failure to mitigate; the threshold is low (because the criticism comes from the party at fault); the victim need not embark on expensive and uncertain litigation; and it is not enough to show that the steps the seller proposes would be reasonable. In their commercial context, I think the words "all reasonable action" mean action it would be unreasonable not to take.*"

He noted that the buyer of the company was not obligated to embark on expensive and uncertain litigation against third parties in order to put right any matters that amounted to a breach of warranty – in other words, you do not have to litigate to mitigate. In Drax's case, therefore, it would not have been open to Scottish Power to argue (for example) that Drax should have challenged Uniper through formal proceedings under the option agreement.

Assessing the diminution in value

Diminution in value is often assessed by reference to the parties' agreed method of valuation which is either set out in, or underlies, their sale and purchase agreement. In *Lion Nathan*, the parties based the purchase price on an agreed multiple – 20 times – of the company's expected profits for a particular tax year.

There were two warranties. One was that this forecast was calculated on a proper basis, and the second that the forecast was achievable based on current trends and performance. The seller's forecast was for earnings of NZ$ 2.3 million. There was a substantial shortfall after the sale. The buyer brought a claim for breach of warranty. In the Privy Council, Lord Hoffmann confirmed that applying the parties' own multiple of earnings was the proper basis for assessing the diminution in value, but found that on a true construction of the warranties, they were not warranties of quality. The seller had not warranted that the company was capable of generating earnings of NZ$ 2.3 million, but rather only that the forecast had been prepared by the seller with reasonable skill and care.

There was no single basis for properly preparing a forecast. Different forecasters could reasonably take different views. The Privy Council thus found that the diminution in value had to be assessed by reference to the figure which the court considered a forecast made with reasonable care would most likely have produced. The Privy Council did not have to determined that on appeal, but Lord Hoffmann raised a number of issues for the lower courts (who would have to decide what a reasonable forecast was) to grapple with. For instance, it would have to be investigated whether the subsequent drop in earnings was caused by something which a reasonable forecaster could not have predicted. The seller might not be liable for unforeseeable events which caused lower profits, absent a warranty that nothing of the sort would happen after completion. If the warranty had been one of quality, on the other hand, none of this would have mattered. The damages would simply have been assessed by taking the difference between the company's actual (lower) profits multiplied by 20, and the forecast of NZ$ 2.3 million multiplied by 20.

Questions of evidence

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The decision in *Lion Nathan* illustrates that it is not always straightforward to assess the diminution in value, unless the warranty in question is truly aimed at a quality (or condition) of the company. The valuation methodology adopted for the transaction (which is usually the starting point) can be complex, and there may be components of any applicable formulae that might need to be adjusted or revisited. Damages will ultimately be assessed by the court based on expert evidence. In *The Hut Group Ltd* v *Nobahar-Cookson* [2014] EWHC 3842, the High Court noted that:

> "*… This involves a valuation, and as with any valuation the process involves establishing (as the defendants' expert put it), "The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in arm's length transaction, after proper marketing where the parties had each acted knowledgeably, prudently, and without compulsion".*
>
> *… However, there is no one methodology to be applied in a valuation (Sycamore Bidco Ltd v Breslin [2012) EWHC 3443 (Ch) at [405], Mann J).*
>
> *… As with any valuation it is necessary, as both experts agreed, to appraise the number in question in the light of the circumstances. As THG's expert aptly put it, " ... you always have to stand back and say, does the answer give you a sensible result and not get too worked up in the model itself".*"

A practical illustration

The Court of Appeal's decision in *Karim* v *Wemyss* [2016] EWCA Civ 27 is a good example of how the courts approach a situation where the evidence of diminution in value is unsatisfactory or missing in the first place.

The seller had warranted that the business, a firm of solicitors, was capable of generating annual profits of £120,000. It turned out that the company's actual profit earning capacity was only £92,000. The Court of Appeal had no difficulty in accepting that the buyer had suffered a substantial loss. The capacity of a business to generate profits is generally reflected in its goodwill, which (as in *Lion Nathan*) is frequently valued by applying a multiplier to the annual profits. Before the judge, the parties had not adduced expert evidence as to what the appropriate multiplier might be, and no such figure was apparent or could be derived from the sale and purchase agreement.

Lord Justice Lewison noted that if there had been expert evidence, this would have addressed the appropriate multiplier for a business such as the firm of solicitors in question in the marketplace which buyers and sellers might agree. However, the best comparable was the business itself. The agreed purchase price had been £100,000, paid in consideration for all the goodwill, the fixed and moveable assets, the intellectual property and the firm's IT system. The sale and purchase agreement had envisaged that the parties would apportion the price to all those elements, but they had not done that.

The Court of Appeal thus looked at the firm's accounts and its balance sheet, which showed fixed assets of £31,860. That left £68,140, which the Court of Appeal allocated entirely to goodwill (to the buyer's benefit). If the buyer had paid £68,140 for goodwill capable of generating £120,000 in annual profits, then how much should they have paid if the profits were only £92,000 a year? The answer, Lord Justice Lewison held, was to take the ratio of price / goodwill (120,000/68,140 =1.76) and apply that as a divisor to the shortfall in profits of £28,000. That gave a sum of £15,909, which the Court of Appeal discounted by £909 for inherent uncertainties.

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Karim v *Wemyss* shows that while damages are often assessed on the basis of a multiplier, that does not always have to be the case. To avoid any difficulties in assessing the quantum, the buyer (the likely claimant) will want to ensure that the way in which the price has actually been calculated is reflected in the sale and purchase agreement. Neither party should have much to complain about if the effect of a breach of warranty is assessed based on a valuation that they both agreed to.

No shortcut

In *Oversea-Chinese Banking Corporation Ltd* v *ING Bank N.V.* [2019] EWHC 676, the buyer sought to get around the need for proving a diminution in the value of the business it had acquired, but ultimately failed to persuade the Commercial Court to assess damages on an alternative and innovative basis.

The relevant share purchase agreement contained a warranty that the accounts of the company gave a true and fair picture of the state of the company's affairs as at the relevant date. Following completion the purchaser discovered that the target company was embroiled in a derivatives dispute. The company ended up paying US$ 14.5 million to settle it. Had the accounts been drawn up properly reflecting this potential liability, the buyer would have discovered this prior to completion.

The purchaser commenced proceedings, claiming damages for breach of warranty by reason of the undisclosed liability. However, the purchaser did not allege that there had been a diminution in value. Instead, they argued that if the accounts had been drawn up properly, they would have asked for an indemnity in the sale and purchase agreement, which the seller would have agreed to.

The purchaser argued that there was an analogy to be drawn between this case and claims for the loss of a chance, where the claimant has to establish on a balance of probabilities what action that would have been able to take but for the defendant's breach, and show how much better off they would have been had they been able to avail themselves of that opportunity. Moulder J reviewed the authorities and dismissed the claim on that basis:

> "*… neither the authorities nor the textbooks, support the proposition … that on a claim for breach of warranty of quality on a share sale, the measure of damages claim could be a hypothetical indemnity and the amount which could have been claimed under that hypothetical indemnity. As stated above, it seems to me that in determining the "loss of bargain" it may be necessary to adjust the valuation methodology but 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.*"

Effect of the notices provision in Drax's SPA

Returning to the decision in *Drax*, the SPA provided that:

> "*In the case of the types of claim detailed below, the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim, stating in reasonable detail the nature of the claim and the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered) …*"

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Scottish Power relied on this wording as barring the claim. The Commercial Court reviewed the authorities relating to notices provision. Simon Birt KC sitting as judge in the High Court, recalled that the real principle in their construction was that the effect of each clause turned on its own wording (read objectively in the usual manner), but that some helpful indicators could be found in cases dealing with similarly-worded clauses.

Notices clauses exist for a purpose, and that is to give certainty to the party who is to be notified. A failure to comply with a notification provision is not just a technicality. In *Senate Electrical Wholesalers Ltd* v. *Alcatel Submarine Networks Ltd* (formerly STC Submarine Systems Ltd) [1999] 2 Lloyds L.R 423, the Court of Appeal stressed this:

> "*Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty. Thus, there is merit in certainty …*"

Part of the purpose of a notices provision is to allow the recipient to make enquiries into the facts and matters giving rise to the claim to gather evidence and assess the merits, perhaps to take steps in front of the tax authorities (where relevant), and make allowances for potential liabilities in their business dealings, including by way of formal reservations or provisions in the accounts (see *Dodika Ltd* v *United Luck Group Holdings Ltd* [2021] EWCA Civ 638). Requirements in notices clauses that reasonable detail be provided about the claim should be approached on the basis that the parties would have wanted such detail to satisfy the commercial purpose of the clause, rather than insisting on information that helped nobody, and that parties asking for reasonable detail would not expect the same kind of detail as might be found in formal legal submissions. The notice itself is to be construed objectively, with the court asking how a reasonable recipient would have understood it in the contractual context. In effect, the notice will be construed much like a contractual document, even though it is a unilateral document produced by one of the parties. As regards the effect of the clause, the clear wording used ("… *the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim …*") meant that if the claim had not been properly notified within the relevant time limit, it would be barred once and for all. Drax argued that since the notices provision would have the effect of excluding liability for any claim that had not been complied with, it should be construed narrowly *contra proferentem*.

The more recent case law states that this terminology is no longer apt, not least because of the difficulties in identifying whether the clause should be construed narrowly against the party who drafted it or the party relying on it (raising the question of who exactly is the *proferens*). Instead, there remains a principle in English law that where exclusion clauses are ambiguous, they should be construed narrowly.

The modern rationale underlying that principle is no longer concerned with a *proferens*, but rather with common sense: parties are unlikely to give up valuable rights without clear words to that effect, and the more valuable a right, the clearer the language has to be (a summary of the authorities appears in *The Federal Republic of Nigeria* v *JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm)). However, it is important to bear in mind that 'clear words' means something like "*Party A shall not be entitled to bring any claim against Party B unless it serves a notice by X Date*". There is no magic in this requirement. Commercial parties are free to allocate risks of

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something going wrong in their contractual relationship as they wish. All they have to do is say so in ordinary words.

It is only where there is an ambiguity in the words used that a clause might be construed narrowly, and when that is the only remaining option. In *Nobahar-Cookson* v *The Hut Group*, Briggs LJ (dealing with a similar argument concerning the notices clause in that case) said:

> "*… there remains a principle that an ambiguity in its meaning may have to be resolved by a preference for the narrower construction, if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity*."

This is a helpful and condensed statement of the approach that English law takes. First, there has to be an ambiguity – so a word or phrase must be capable of more than one meaning. If there are really two (or more) different ways of reading the contract wording, then one first has to make sure that the answer as to which rival meaning should be adopted cannot be found by reading the clause in the context of the contract and against the commercial background or purpose of the agreement. If those interpretative exercises do not resolve the issue, the judge or arbitrator may then adopt the narrower meaning. The narrower meaning will be that which has the result of not excluding a claim, or part only of it. It would be wrong, however, to look at an exclusion clause and immediately try to find the narrowest possible meaning simply because the clause would otherwise have a draconian effect.

Drax's notice was insufficiently detailed for the diminution in value claim

Mr Birt KC then went on to hold that the clause before him did have such a draconian effect on Drax's amended claim for breach of warranty. The letter from Drax's solicitors did not anywhere mention a diminution in value of the shares. Instead, it referred to Drax remaining liable for all the losses suffered by SPGL, leading the reasonable reader to conclude that Drax had entered into an indemnification agreement with the new purchaser. The notice also contained multiple references to losses expected to be suffered, yet to be suffered or future losses, and stated that "… *the loss suffered is yet to crystallise.*" None of this is consistent with a diminution in value claim, where the buyer suffers the loss on completion, and not when the target company goes on to incur additional costs or suffers its own direct losses. The requirements of the notices clause had not been met:

> "*… in order to state in reasonable detail "the amount claimed (detailing [Drax's] calculation of the Loss thereby alleged to have been suffered)", Drax would have had to explain that the calculation of its loss was the difference between the warranted value of the shares in the Company, and the actual value of the shares, and either state those two values, or otherwise explain the basis on which a figure had been arrived at for the difference. However, that was not set out in the Notice of Claim. There was no claim for diminution in the Company's share value.*"

That conclusion was reinforced, the judge thought, by the commercial purpose of the notification provision. He felt that if Drax's notice had informed Scottish Power of the true basis of the claim, then Scottish Power would have been better placed to assess the merits of the claim. After all, as discussed, a diminution in value claim requires expert evidence and a valuation of the company, where a claim for loss and expense suffered does not. While the notice would not have needed to contain the amount of detail expected of Particulars of Claim, the true basis of the claim should have been disclosed, as that information was seen to be of real commercial benefit to Scottish Power. Neither was the judge persuaded by an argument that since diminution in value was the usual basis of a claim for a breach of warranty, the reasonable reader should have assumed that

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this was what had been intended. That argument fell flat in circumstances where Drax's experienced solicitors had drafted a notice of claim that put SPGL's expected losses, as supposed to Drax's own losses as purchaser, front and centre. The judge thus granted summary judgment for Scottish Power, dismissing the breach of warranty claim.

In the alternative, Drax had claimed an indemnity for the same expected loss of £8.1 million. That claim, the judge found, had been sufficiently set out in the notice, since it was based on SPGL's losses, and the indemnity clause in the SPA made Scottish Power liable for costs incurred by SPGL. That indemnity claim survived, but Drax would need to prove that SPGL actually incurred these costs, since indemnities to not apply to prospective losses.

Conclusion

Drax Smart Generation Holdco Ltd v *Scottish Power Retail Holdings Ltd* is a good reminder, if one were needed, that notices provisions in contracts governed by English law are not to be swept aside as mere technicalities. If a clause requires that the basis of the claim be set out, or that details be given of the loss, the notifying party would do well to consider this carefully, advised by their litigation counsel. If the loss cannot yet be quantified, there is nothing wrong with saying so expressly and providing an estimate. The party giving notice is also entirely free to set out as many alternative bases of claim as might be available to it – and it is best to cover all bases. As *Drax* v *Scottish Power* shows, depending on the wording in the notices clause, it may well not be enough that all claims, no matter how they are framed, lead to the same quantum.

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