

Construction M&A Review of 2018

Corporate partner James Hutchinson looks back at the deals that shaped the construction sector in 2018 and what lessons we can learn from a number of key court judgments for deals in 2019.

Author:
**James
Hutchinson**

Date:
January 2019

January is always a good time to reflect on the previous year and plan ahead. 2018 saw significant corporate and M&A activity in the construction sector. There was the negative impact of the collapse of Carillion, but also positive M&A activity. Our corporate team was kept busy on multiple deals for clients, including the sale of MFD to Thornton Tomasetti and the acquisition by Ramboll of DEG Signal. Across the sector, there were a large number of transactions, including the acquisitions of Peter Brett Associates by Stantec, Alun Griffiths by Tarmac, Louis Berger by WSP, QTS by Renew and Freedom Group by NG Bailey.

2019 looks to be a pivotal year, with the UK due to leave the European Union on 29 March 2019. The uncertainty in trading conditions is reflected in the potential impact on UK law, including procurement, data protection, employment and trade. Deal flow is likely to be reduced until the form of Brexit (if any!) is finalised. Nevertheless, the fall in the value of the pound makes the UK construction sector, with its historic international links, of particular interest to overseas acquirers. Succession planning will continue to be a major driver of M&A activity and we are seeing increased interest in employee ownership trusts and management buy outs.

We have been looking back at the case law from last year and selected five judgments which we consider should be of interest to those involved in construction related M&A. These cases give some lessons to learn about how the terms of deals should be structured to avoid the issues encountered, as we explain in the summaries below.

- Warranty claims barred by notice requirement in limitation of liability - [Teoco UK Ltd v Aircom Jersey 4 Ltd \[2018\] EWCA Civ 23](#)
- Court orders rectification of a share purchase agreement and disclosure letter - [Persimmon Homes Ltd v Hillier \[2018\] EWHC 221 \(Ch\)](#)
- Payment obligation under an SPA was dependant on the transfer of shares - [Doherty v Fannigan Holdings Ltd \[2018\] EWCA Civ 1615](#)
- Clear words are needed to exclude misrepresentation claims under an SPA - [Al-Hasawi v Nottingham Forest Football Club Ltd \[2018\] EWHC 2884](#)
- Requirements and scope of a power of attorney must be sufficient for its intended purposes - [Katara Hospitality v Guez \[2018\] EWHC 3063 \(Comm\)](#)

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Warranty claims barred by notice requirement in limitations of liability

Teoco UK Ltd v Aircom Jersey 4 Ltd [2018] EWCA Civ 23

The claim related to a share purchase agreement under which the sellers sold to the buyer the issued shares of Aircom for approximately £41 million. The buyer issued proceedings in which it claimed to be entitled to, among other things, damages for breach of warranty or an indemnity in relation to tax said to be owed by two subsidiaries of Aircom.

The Court of Appeal held that claims under the SPA were barred by a contractual limitation of liability that required the buyer to give the sellers written notice of the claims, including reasonable details of the claims and the grounds on which they were based. The buyer's purported notice failed to make explicit reference to the specific warranties alleged to have been breached. The "*omnibus reference to Warranty Claims or Tax Claims*" being "*not nearly sufficient to inform the Sellers, as the reasonable recipients, of what they had done wrong and what consequences flow*".

Comment: It is important to take particular care when preparing a notice of a warranty or indemnity claim to ensure it complies with all applicable requirements of the SPA. If an SPA includes an express requirement for the buyer to supply details of its claim when giving the seller notice of a claim, the notice should refer explicitly to the particular warranties or provisions of the tax covenant relied upon. Buyers when negotiating an SPA will want to resist over complicating notification provisions, so as to avoid post-completion claims being barred.

The judgment is available at:

<https://www.bailii.org/ew/cases/EWCA/Civ/2018/23.html>

Court orders rectification of an SPA and disclosure letter

Persimmon Homes Ltd v Hillier [2018] EWHC 221 (Ch)

Persimmon sought to rectify an SPA under which it had acquired shares in two companies holding interests in four of six plots of land making up a development site. Another of the seller's companies owned the two remaining plots (including the plot that provided access to the site). Those shares were not acquired by Persimmon under the SPA. Persimmon argued that the course of negotiations demonstrated that the parties were in agreement that Persimmon would acquire the site in its entirety, including the two remaining plots, and that the drafting of the SPA and the disclosure letter did not represent a departure from the commercial deal. On that basis, the SPA and, if necessary, the disclosure letter should be rectified.

The court found that the correspondence and negotiations demonstrated a common intention that Persimmon would acquire the whole site and that the seller had entered into the SPA under the same mistaken apprehension as did Persimmon and sought to take advantage of the situation when the mistake was discovered. The court granted an order rectifying the SPA so as to include within the scope of the property warranties the two plots of land Persimmon had not acquired; with the consequence that seller was in breach of warranty. The court also ordered rectification of the related disclosure letter to omit the two missing plots from the seller's disclosures concerning the ownership of the site, which meant the seller's liability for breach of warranty was not excluded by the disclosure letter. Persimmon were therefore entitled to damages representing the difference as at the date of the SPA between the value of the acquired company as warranted and its actual value.

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Comment: This is a rare example of the rectification of an SPA. It is also worth noting the court's willingness to rectify the terms of the disclosure letter as well as the SPA, "so as to give effect to the common intention". It is important to ensure that the contractual provisions reflect the commercial deal, however if a mistake is discovered, the injured party should act quickly to see if it can be remedied. When conducting due diligence, parties need to be careful not to make assumptions about what is and is not included as part of a transaction.

The judgment is not available on BAILII, but we can send you a copy on request.

Payment obligation under an SPA was dependant on the transfer of shares

Doherty v Fannigan Holdings Ltd [2018] EWCA Civ 1615

This dispute followed Mr Doherty's breach of his obligation under an SPA to pay £2m to Fannigan as the price for the transfer to him by Fannigan of a tranche of shares in a company. Because of the breach, Fannigan did not transfer the shares. The question for the Court of Appeal was whether Mr Doherty's breach resulted in his incurring an immediately enforceable liability to Fannigan in "*debt ... for a liquidated sum*", namely the unpaid £2 million price. If it did, Fannigan was entitled to serve the demand; and, if Mr Doherty neither complied with it nor had it set aside, he would be presumed to be unable to pay the debt, so entitling Fannigan to present a bankruptcy petition. If Mr Doherty's breach did not result in his incurring such a liability, Fannigan was not entitled to serve the demand.

The Court of Appeal held the payment obligation under the SPA was dependant on the transfer of shares. It was not an independent obligation. The intention of the parties was

the completion of the sale and purchase and the shares was to take place on the same day and at the same time; and that the making by Mr Doherty of his payment was dependent upon his receiving the transfer document in exchange, just as the performance of Fannigan's obligation to transfer the documents was dependent upon receiving the price. Therefore, Fannigan was not entitled to serve a statutory demand when Mr Doherty defaulted, as the liability was not a debt for a liquidated sum.

Comment: This was a pragmatic outcome and it acts as a useful review of the law relating to the distinction between independent and dependent obligations. When structuring the payment obligation, the potential remedies if a party were to default must be kept in mind. It does not automatically follow that non-payment will result in an enforceable debt. The case shows why most M&A deals are completed by the simultaneous transfer of the consideration and the shares. Straying from this customary practice can give rise to issues of enforceability.

The judgment is available at:

<https://www.bailii.org/ew/cases/EWCA/Civ/2018/1615.html>

Clear words are needed to exclude misrepresentation claims under an SPA

Al-Hasawi v Nottingham Forest Football Club Ltd [2018] EWHC 2884

The action arose out of an SPA by which NF Football Investments agreed to buy Nottingham Forest Football Club. The Club was heavily indebted, so the structure of the SPA was that the shares were sold for a nominal consideration of £1 and the liabilities were addressed by (a) limiting the amount of liabilities in respect of loans made by Mr Al-Hasawi and (b) by Mr Al-Hasawi

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indemnifying the buyer against any liabilities of the Club in excess of £6.6 million. While the transaction was under negotiation, Mr Al-Hasawi provided to the buyer documents by way of disclosure through a virtual data room. These included a spreadsheet setting out various liabilities totalling £6,566,213. The figure of £6.6 million was the starting point for the indemnity. The buyer's case was that at the relevant date, the Club's liabilities were in excess of £10 million.

Part of the claim was pleaded in misrepresentation. It was argued that the information contained in the spreadsheet provided through the virtual data room was a representation that the relevant liabilities amounted to the sum of £6,566,213, this representation was false because the true amount of liabilities was higher as stated above and that the buyer relied on it.

An application was made to strike out the misrepresentation claim on the basis that the SPA contained the following entire agreement clause:

"This agreement (together with the documents referred to in it) constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter."

The High Court found that the entire agreement clause did not exclude misrepresentation claims.

Comment: The decision confirms the current judicial approach that clear words are needed to exclude claims in misrepresentation. If you want to exclude

misrepresentation claims, then the clause should expressly say so.

The judgment is available at:

<https://www.bailii.org/ew/cases/EWHC/Ch/2018/2884.html>

Requirements and scope of a power of attorney must be sufficient for its intended purposes Katara Hospitality v Guez [2018] EWHC 3063 (Comm)

In 2008, Katara entered into an agreement with Mr Guez and Mrs Rose (the sellers) to acquire approximately 37% of a hospitality business for the total price of €113.4 million. Completion of the transaction was delayed and eventually completed in the sellers' absence by way of powers of attorney.

The powers of attorney were drawn up by the sellers' Californian lawyer, were described as powers of attorney and the sellers' execution of the powers was signed and sealed by an attesting witness. However, the word "deed" was not included in the documents.

As part of the completion formalities, a guarantee agreement was drawn up where the sellers allegedly agreed with a third party to guarantee that Katara would recover the purchase price by way of dividends or distributions within eight years. The third party signed the guarantee on behalf of the Sellers using the powers of attorney.

Katara sought to recover the sum of £65 million from the sellers under the guarantee. The sellers refused any liability under the guarantee, claiming:

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- The powers of attorney were not valid deeds as they did not make it clear on their face they were intended to be deeds (section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989);
- The powers were therefore invalid under section 1(1) of the Powers of Attorney Act 1971, which provides that a power of attorney must be executed as a deed; and
- The scope of the attorney's power was limited to signing agreed documents in connection with the share sale. As the guarantee had not been agreed by the sellers and was not for their benefit, its execution

was outside the scope of the power conferred by the powers of attorney.

The judge found in favour of the sellers.

Comment: This case is a reminder to (a) check that a power of attorney has been validly executed as a deed (for example, checking that it is described as a deed in various places) and (b) ensure that the actions of the attorney fall clearly within the authority conferred by the power.

The judgment is available at:

<https://www.bailii.org/ew/cases/EWHC/Comm/2018/3063.htm>

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James Hutchinson
Partner
+44 (0) 20 7469 0408
j.hutchinson@beale-law.com