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Not Such a Wonderful Thing?

MDW Holdings v Norvill: Hindsight and the Assessment of Damages

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Where the seller of a company gives a false warranty, but the risk in question never materialises, how should compensation be assessed? Separately, should it make a difference if the buyer would still have proceeded with the transaction anyway, even if they knew the true state of affairs?

This article considers the recent Court of Appeal decision in *MDW Holdings Limited v Norvill*,[1] which addressed these issues. As will be seen, these are legal questions with discernible practical consequences for those buying and selling companies and business assets.

The claimant in the case had acquired the entire issued share capital of a waste disposal company from the defendants in 2015. It later transpired that various aspects of the company's business had been operating in breach of the consents issued to it by regulators. The company had also, on occasion, provided false information to those regulators. The lead defendant/warrantor had been complicit in this conduct.

The trial judge thus found that the defendants had breached various warranties provided to the claimants under the share purchase agreement (SPA) and, separately, that they had made fraudulent representations that had ultimately induced the claimant into purchasing the company.[2] Against this backdrop, the questions above came before the Court of Appeal.

Should Damages for Breach of Contract be Affected by Subsequent Events?

Central to the defendants' appeal was the fact that there appeared to have been no harm done from the false warranties. The company had not been prosecuted, it did not appear to have suffered any reputational harm and it had not lost any of its licences to carry on business. This, the defendants argued, should have been factored in when the trial judge assessed the relevant damages. The risk otherwise was that the claimant would receive a windfall.[3]

The aim of damages in claims for breach of contract is to put the claimant in the position they would have been in had the contract been properly performed.[4] Where a warranty has been falsely given, this involves a comparative exercise between the value of the shares if the warranty had been true (*i.e.* the bargain the claimant reasonably thought they were getting) and what they were worth in reality.[5] This calculation is generally made as at the time of the breach – in this case, when the SPA was entered into.[6]

What if something happens after this point in time that can be shown to affect these figures? Here, matters can become complicated. *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* was a prominent House of Lords decision concerning a charter agreement brought to an end in 2001, after a repudiation (an indication of an intention not to be bound) by the charterer. Applying the normal rule, loss would have been assessed there and then, giving the shipowner the benefit of the four years the contract had left to run at that point. As it happened, war broke out just two years later, an event that both parties agreed would have entitled the charterer to end the contract early. The House of Lords, by a majority, decided that the compensatory principle in this case required it to take this subsequent development into account.[7] Damages were measured as if the contract had continued to the outbreak of war, not for the full length of the agreement.

It was this reasoning that the defendants sought to apply here: the 'real' value the judge had attributed to the company was too low, because it had since become clear that the risk in respect of which the warranty had been given (falsely) had come to nothing. The court had to take this into account or risk overcompensating the claimant.[8]

The court rejected this submission. It agreed that while it might be appropriate to consider what had happened, or would have happened, after the point of breach in cases involving 'anticipatory' breaches (i.e. where a contract was brought to an end before the time for performance),[9] it would be a "*rare case*" where that would apply to the sale of shares.[10]

1 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883.

2 *MDW Holdings Limited v Norvill and others* [2021] EWHC 1135 (Ch) [277]-[279].

3 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [19].

4 *Robinson v Harman* (1848) 1 Ex 850, 855.

5 *McGregor on Damages* (21st ed.), ¶ 29-008; *Ageas (UK) Limited v Kwik-Fit (GB) Limited* [2014] EWHC 2178 (QB) [14].

6 *The Hut Group Limited v Nobahar-Cookson* [2014] EWHC 3842 (QB), [180(1)], [184].

7 *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 [38] (*per* Lord Scott) [83] (*per* Lord Brown).

8 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [19].

9 In doing so, confirming a previous decision of a different Court of Appeal in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102 [83], finding future contingencies in any event ceased to become relevant in circumstances where a party had actually failed to perform its obligations, rather than simply indicating it is not prepared to do so.

10 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [49(v)].

This is consistent with previous decisions by the High Court.[11] The fact remained that had the claimant known the true situation when entering into the deal, the price would have been different, and lower. That was what the claimant was entitled to compensation for. It was irrelevant that the contingency in question never took place. Seen in this way, there was no "*windfall*" for the buyer.[12]

This confirms that the extent to which a court will be prepared to look at post-contractual events when assessing the level of damages will depend on the factual context. The key focus of the law will always be on compensating the claimant for the value of the contractual benefit they have been deprived of.[13] In some contexts, that has led courts to take events after the date of the breach into account.[14] In others, it has not. Share sales are an example of a particular context where—as even the House of Lords acknowledged in *The Golden Victory*[15]—it will often not be necessary, or appropriate, to consider post-contractual matters when assessing damages.

As such, the fact that a risk ultimately did not materialise is unlikely to provide assistance to a seller who has given a false warranty over it.

Damages for Fraud: Would the Transaction Have Still Proceeded?

This was only part of the story, however, as the trial judge had also found the defendants to be liable in the tort of deceit.[16] In knowingly providing false representations regarding particular aspects of the company's waste disposal operations, the defendants were found to have fraudulently induced the claimant to enter into the SPA.

Damages are measured differently in fraud claims to those for breach of contract. Rather than restoring the claimant to the position they would have been in had the contract been performed, the claimant must be compensated for all loss directly and factually arising from the fraud.[17] So, for a fraudulently induced share sale, the claimant should be put in the position they would have been in had they never entered into the transaction. This would involve damages equivalent to what the claimant paid over, less an amount representing the real value of what they obtained, again measured at the point of breach (i.e. when the SPA was executed).[18]

As the Court of Appeal recognised in this case, it is well established that a defendant cannot appeal to events after the wrong has been committed to reduce the amount of damages they are liable to pay.[19]

This leads onto the second issue. What if the claimant would still have proceeded with the transaction, even if they had known about the fraud, perhaps just at a lower price? Here, the court believed it should be prepared to adjust the amount of damages to reflect such a hypothetical sale if this was what the evidence showed would have happened, rather than automatically compensate the claimant as if the deal had never taken place.[20] This, in the court's opinion, was the "*better view*", notwithstanding the fact that it might risk benefitting the perpetrators of a fraud through a lower award of damages.[21] The court remitted the case to the trial judge to decide on a final damages figure.

This is an interesting development.[22] It could conceivably lead to greater scrutiny over the parties' pattern of negotiations where fraud is alleged, as defendants try to substantiate allegations that the claimants would have accepted a lower purchase price, rather than walk away altogether, if they had known the reality. It remains to be seen how courts and arbitral tribunals interpret this decision. Does it represent a more accurate application of the compensatory principle—as the Court of Appeal believed to be the case[23]—or does it risk passing an undue benefit to defendants who still, at the end of the day, will have by this point been found to have defrauded the buyer?

On a practical level, whether or not a deal would have gone ahead will surely be a question of fact, and therefore vary from case to case, depending on the evidence. Here, then, is perhaps one takeaway for those buying and selling businesses. What parties do or say over the course of their negotiations—while still irrelevant when interpreting an English law contract—might still come under the microscope further down the line, in the context of assessing damages.

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11 *See e.g. Ageas (UK) Limited v Kwik-Fit (GB) Limited* [2014] EWHC 2178 (QB); *The Hut Group Limited v Nobahar-Cookson* [2014] EWHC 3842 (QB).

12 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [53]-[54].

13 *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 [36]: "*The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more.*"

14 Such as *The Golden Victory* and *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082.

15 *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 [80]: "*Where goods or shares are sold, the breach date rule is at its strictest*."

16 *MDW Holdings Limited v. Norvill and others* [2021] EWHC 1135 (Ch) [259]-[262], [279].

17 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167.

18 *Smith New Court Securities Ltd v Citibank N.A.* [1997] AC 254, 267.

19 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [43], [49(iii)], [56].

20 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [77]-[79].

21 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [77].

22 *OMV Petrom SA v Glencore International AG* [2017] 3 All ER 157 is an example of a court declining to consider this kind of hypothetical transaction: *see* [59].

23 *MDW Holdings Limited v Norvill and others* [2022] EWCA Civ 883 [78].

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