

## Giving notice of a warranty claim – the importance of getting it right

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A claim for breach of a share purchase agreement (SPA) warranty is only as good as the notice by which it is made, so it is essential to get it right or it may invalidate an otherwise perfectly good claim. Below is a brief discussion of the context in which a warranty claim might arise, the importance of observing the SPA's notice requirements, and some of the guiding principles that the English courts apply in determining whether notice requirements have been fulfilled.

### When do warranty claims arise?

In most share purchase agreements (SPAs) the buyer will protect their position by requiring the seller to give certain warranties about the company being purchased, such as in relation to the financial/accounting information that they have supplied. If the buyer discovers, post-acquisition, that one or more of those warranties have been breached, the buyer may be entitled to seek damages from the seller by making a warranty claim. The warranties can be time limited (typically 12 to 36 months) and subject to a minimum financial threshold, with notice of the breach to be given in a particular manner and certain requirements as to their content.

Often, payment of a portion of the purchase price for the acquisition is deferred and held in a 3<sup>rd</sup> party escrow account until certain conditions are satisfied, effectively providing the buyer with security for potential warranty claims. It is normally stipulated that the deferred element of the purchase price will be released to the seller on a specified date unless a valid notice of a warranty claim has been given beforehand.



## Getting the notice right

Getting the notice right is essential for the buyer. If the notice does not contain the information required by the SPA, is not delivered prior to the deadline, or in the manner specified in the SPA, the buyer may lose its ability to bring a warranty claim altogether, or it could mean that the deferred portion of the purchase price is released from escrow, with the result that the buyer loses its security. This can sometimes make the task of recovering damages much harder for the buyer, particularly if the seller is based overseas.

The English courts have traditionally taken a hard line in terms of assessing compliance with warranty claim notice requirements. They take the view that, provided what is agreed is lawful, contracting parties are entitled to make their own commercial arrangements without outside interference and the courts' reluctance to interfere applies equally to notice requirements for warranty claims found in SPAs. They will not change or interpret the provisions of the contract to make it fit the circumstances and this means that it is important that notice requirements are followed to the letter, or the notice may be invalid.

Although contracts differ, and contractual disputes therefore tend to be assessed by the courts on their own merits with only limited assistance drawn from prior cases, certain guiding principles as to how the courts will approach the issue of whether the content requirements for a notice of warranty claim have been satisfied can be gleaned from case law. These include the following:

- When a buyer gives notice of a warranty claim, the notice must clearly specify that a claim is actually being made by way of the notice, rather than merely indicating that a claim might be made in the future, or reserving the buyer's rights to do so [*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540].
- When interpreting what a buyer's notice means, the courts will consider how it would be understood by a reasonable recipient with knowledge of the context in which it was sent [*Laminates Acquisition Co v BTR Australia Ltd* [2003] EWHC 2540].
- When (as is commonly the case) the SPA specifies that a notice must give "reasonable detail" of the basis for the claim, although precisely what this means will vary depending on the circumstances, as a general rule identifying the particular warranty or warranties that are alleged to have been breached will normally be a minimum requirement, for commercial certainty [*RWE Nukem Ltd v AEA Technology Plc* [2005] EWCA Civ 1192].
- The purpose of a notice includes ensuring that the seller knows, with a sufficient degree of formality, that a warranty claim is to be made, so that financial provision can be made for it [*Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm)].

It is for the buyer to establish that it has complied with the notice requirements specified in an SPA. In addition, the buyer must ensure that the notice is served (i) within the time limit given in the SPA, and (ii) precisely in the manner specified by the SPA; for example, in hard copy by registered post to a particular address, or emailed to particular email addresses.

Observing notice clause requirements to the letter will help to reduce the risk of a dispute as to whether notice has been validly given, allowing the parties to focus on the underlying substantive warranty claim.

## How we can help

If you would like advice in relation to giving notice of a warranty claim under an SPA, or if you have recently received notice of a warranty claim and require guidance on how to respond, please do not hesitate to contact our [commercial dispute resolution team](#), who have experience of post-transactional disputes.



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