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Without more, warranties are warranties, not representations

Introduction

In *Idemitsu Kosan Co Ltd v Sumitomo Corporation*[1], the High Court followed the previous decision of Mann J in *Sycamore Bidco Ltd v Breslin and another*[2] that a contractual warranty, without more, would not constitute an actionable claim for damages in misrepresentation under the Misrepresentation Act 1967. Concluding a contract on terms which include mere contractual warranties does not mean that the warrantor makes any statement which the counterparty could characterise as a misrepresentation. The judge declined to follow the previous High Court decision of *Invertec Ltd v De Mol Holding BV and another*[3].

The judgment provides useful guidance for parties engaged in negotiating share purchase agreements ("SPAs") or other contracts. If it is intended that breaches of warranties are to be actionable as misrepresentations, in addition to contractual remedies, express wording should be included to that effect in the contract.

Background

The Claimant ("Idemitsu") claimed damages for misrepresentation under s.2(1) of the Misrepresentation Act 1967 against the Defendant ("Sumitomo"). Idemitsu alleged that some of the matters warranted by Sumitomo pursuant to a SPA relating to the sale of an energy company were untrue as at the date of the acquisition. Idemitsu accepted that it was too late to bring a claim for breach of warranty as it had missed the time limits under the SPA for bringing such claims. Instead, Idemitsu contended that the contractual warranties were also representations made by Sumitomo, thereby actionable under the Misrepresentation Act 1967.

Idemitsu initially asserted that the warranties contained in the SPA itself were actionable misrepresentations, before putting forward its draft amended case: pre-contractual misrepresentations were made by Sumitomo providing the execution copy of the SPA to Idemitsu and/or offering to sign the SPA and/or signing it. Idemitsu alleged that it relied upon those representations and was induced by them to execute the SPA.

Sumitomo applied under CPR Part 24 for summary judgment to dismiss the claim, on the basis that it had no real prospect of success at trial (however formulated) and that there were no other compelling reasons why it should be disposed of at trial.

Andrew Baker QC sitting as a judge of the High Court held that Idemitsu's claim, whether as originally pleaded or as proposed to be pleaded in the draft amended particulars, did not have any real prospect of success at trial. If a contractual provision states that one party is giving a warranty, that party does not by concluding the contract make any statements to the counterparty that might found a misrepresentation claim. As there was no other compelling reason why Idemitsu's claim should be disposed of at trial, Sumitomo was granted summary judgment under CPR Part 24, thus dismissing the claim.

The High Court's reasoning

Andrew Baker QC's reasoning included the following notable observations.

1. If a seller warrants something about the subject matter sold in a SPA, he does not impart information and is not making a statement to a buyer. The seller is making a promise, to which he will be held as a matter of contract. The fact that the subject matter of a warranty is capable of being a representation is not enough.

1 *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm)
2 *Sycamore Bidco Ltd v Breslin and another* [2012] EWHC 3443 (Ch)
3 *Invertec Ltd v De Mol Holding BV and another* [2009] EWHC 2471 (Ch)

2. It is possible to override the principle set out in point 1 by, for example, including express provisions making it clear in the SPA that the warranties are also to take effect as representations[4].

3. The act of concluding a contract on terms which include contractual warranties does not amount to the warrantor making any relevant statement to the counterparty. The act of concluding a contract amounts to a communication of assent to, and intention to be bound by, the terms agreed.

4. In principle, it is possible that language found in the communication of a negotiating position, or draft wording of a contract which passes between the parties during negotiations, might amount to a pre-contractual representation capable of being actionable under the Misrepresentation Act 1967[5]. This was not the case here, as it would be artificial to view the schedule of warranties in the execution copy of the SPA as statements of fact made by Sumitomo to Idemitsu. Rather, provision of the execution copy (etc.) communicated nothing more than a willingness to give a certain set of contractual warranties in a concluded contract.

5. In any event, Idemitsu's claim was bound to fail, since by clause 12.12 of the SPA Idemitsu acknowledged that it had not relied on or been induced to enter into the SPA by anything other than the warranties contained in the SPA.

Summary – points to note

This judgment provides useful guidance and clarity on the existing conflicting case law: a warranty is, without more, only actionable as a breach of contract rather than a misrepresentation under the Misrepresentation Act 1967. However, it is possible to make express provision otherwise.

Parties should consider the potential consequences of how they characterise warranties, in view of the additional remedy of rescission available for misrepresentation claims and the different methodologies for assessing damages under misrepresentation and breach of contract claims.

Idemitsu Kosan Co Ltd v Sumitomo Corporation also provides a useful reminder of the importance of entire agreement clauses as a mechanism for excluding misrepresentation claims.

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4 *Bottin (International) Investments Ltd v Venson Group plc et al.* [2004] EWCA Civ 1368 and *Bikam OOD v Adria Cable Sarl* [2012] EWHC 621 (Comm)

5 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235