IN THE HIGH COURT OF JUSTICE **Claim No: 8CH50066**

QUEEN'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

MERCANTILE LIST

BETWEEN

HIGHWATER ESTATES LIMITED

Claimant

- **and –**

EVELYN GRAYBILL

Defendant

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC

(sitting as a Judge of the High Court)

Neil Berragan (instructed by Aaron & Partners LLP, Solicitors) for the Claimant
Susanne Muth (instructed by Shammah Nicholls LLP, Solicitors) for the Defendant

Hearing date: 5 March 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. In this matter, I am asked to determine a number of preliminary issues arising out of claims made by the Claimant company ("Highwater") for breach of warranty and misrepresentation in relation to a written share sale agreement made on 20 June 2006 ("the SPA").

2. The Issues are as follows:

   (1) Did a statement made in the Disclosure Letter dated 20 June 2006 ("the DL") against Warranty 7.1 itself amount to an actionable contractual warranty?

   (2) If such a statement was a representation, does any claim based upon it fail because it was not notified in time pursuant to and in accordance paragraph 3.1 of Schedule 4 to the SPA ("the Notification Clause")?

   (3) If the statement was also a warranty does any claim based upon it fail because it was not notified in time pursuant to and in accordance with the Notification Clause?

   (4) Are certain of the <u>other</u> breach of warranty claims time-barred because they were not notified in time pursuant to and in accordance with the Notification Clause?

BACKGROUND

3. The target company was Majorstage Limited ("Majorstage") whose entire share capital was sold by the Defendant, Mrs Evelyn Graybill to Highwater. Majorstage owned a substantial property called Peckforton Castle ("the Castle") and its business was the operation of the Castle as a venue for conferences and weddings, with leisure and accommodation facilities. It was this property and business which was in effect being acquired by Highwater.

4. The consideration payable by Highwater to Mrs Graybill was £4.9m. All of that sum has now been paid save for part of a sum of £250,000 payable by way of instalments. The last instalment has not yet fallen due. There was the usual price adjustment mechanism in the form of Completion Accounts.

5. Following the acquisition Highwater made a number of complaints to the effect that the level of wedding business at the Castle was not what it had been led to believe and that there were serious problems with the fabric of and equipment at the Castle. The relevant claim letter is dated 4 June 2007 ie nearly one year after the acquisition ("the Claim Letter"). These proceedings were commenced on 24 June 2008. There are other disputes between the parties concerning the Castle but not within this action. One such dispute concerns a challenge to a decision of an expert who has determined the net asset value of Majorstage for the purses of the Completion Accounts and price adjustment process under the SPA.

6. In relation to the wedding business it was said that the purchasers were told that as at the date of the SPA there were 150-200 wedding contracts whereas in truth there were at that time only 87, so 63 less than the lower figure of 150.

THE EVIDENCE

7. At this trial I received in the form of a hearsay statement, a witness statement dated 19 December 2008 made by Mr Edwards, a solicitor with Aaron & Partners LLP, who act for Highwater in this action and who acted for it on the acquisition. I also heard from Mrs Graybill. She made a witness statement on 29 January 2009 and was cross-examined briefly upon it. I refer to her evidence in context below.

THE SPA

8. This contained the following material terms:

(1) Clause 1: **DEFINITIONS AND INTERPRETATION**:

(a) A "**Claim**" meant "a claim (whether in contract, tort or otherwise) by the Purchaser under or in relation to the Warranties or the Tax Covenant or for misrepresentation";

(b) "**Disclosure Letter**" meant "the disclosure letter (together with all the documents attached or referred to in it) from the Vendor to the Purchaser signed and delivered immediately prior to the execution of this Agreement";

(c) "**Warranties**" meant "the warranties contained in Schedule 3 and references to a **Warranty** are to be construed accordingly;

(2) Clause 5: **WARRANTIES**,

(a) By Clause 5.3, "the Vendor warrant to the Purchaser that each of the Warranties are true and accurate at the date of this Agreement";

(b) By Clause 5.4, "The Warranties are qualified to the extent, but only to the extent, of those matters fairly disclosed in the Disclosure Letter."

(3) Clause 6, **LIMITATIONS ON VENDOR'S LIABILITY**, "The Vendor's Liability for Claims shall be limited or excluded (as the case may be) as set out in Schedule 4 (Limitations on Vendor's Liability)";

(4) Schedule 4, **LIMITATIONS ON VENDOR'S LIABILITY**, provides that

"3. Time Limits for Bringing Claims

3.1 The Vendor shall not be liable for a Claim unless it receives from the Purchaser written notice of the Claim stating in reasonable detail the matter giving rise to the Claim and the nature and amount of the Claim…

3.1.2 on or before 31 October 2007 in respect of any other Claim."

(5) Clause 14: **ENTIRE AGREEMENT**.

(a) By Clause 14.1: This Agreement (together with the documents referred to in it or executed at Completion) constitutes the entire and only agreement and understanding between the parties with respect to its subject matter and replaces and supersedes all prior oral and written agreements understandings representations and correspondence regarding such subject matter.

(6) By Clause 14.2, "Without limitation to the generality of Clause 14 .1, the purchaser represents and warrants that in entering into this Agreement, it has not relied upon, nor been induced to enter into this agreement by any representation or statement (whether of fact, intent opinion or otherwise) made by the Vendor or the Company or any of its officers, employees and advisers or agents (for the purposes of this Clause, each a "**Representation**"), which has not been included expressly in this Agreement."

9. Schedule 3 contains a discrete list of particular warranties, grouped in the usual way, by reference to subject-matter; two such warranties are relevant here:

(1) Warranty 5.3: **ASSETS**: Condition

"The machinery, plant, vehicles and equipment owned by the company are in satisfactory condition and working order, given their age and usage";

(2) Warranty 7: **CONTRACTS AND COMMITMENTS**

"7.1 The Company is not a party to any agreement, arrangement or obligation which:

7.1.1 was made otherwise than in the ordinary and usual course of the business of the Company as carried on at the date of this Agreement; or

7.1.2 is not terminable by the Company on 120 days notice or less, without payment of compensation; or

7.1.3 Involves a capital commitment or annual expenditure in excess of £20,000.

THE DISCLOSURE LETTER

10. This provided, among other things, as follows:

"1. We refer to the ..Agreement .. proposed to be entered into immediately following the delivery of this letter between the Vendor.. and the Purchaser relating to the sale and purchase of the whole of the issued share capital of Majorstage Limited.

2. This letter, together with all the documents matters and information contained or referred to in or attached to this letter is the Disclosure Letter as referred to in the Agreement and the Tax Covenant. In the event that any inconsistency exists between any provisions of either the Agreement or the Tax Covenant and any part of this letter, this letter shall prevail.

3. This letter makes disclosures for the purpose of limiting the scope of the Warranties, and the covenants contained in the Tax Covenant. The Warranties and the Covenants are made and given subject to the documents, matters and information contained in or referred to in or attached to this letter and the vendor or shall not be deemed to be in breach of any of the Warranties or Covenants in respect of the documents matters and information contained or referred to in or attached to this letter.

Specific disclosures.

Without prejudice to the generality of the disclosures above, we disclose to you the following…."

In relation to Warranty 7.1:

"The Company has approximately 150 - 200 contracts for weddings relating to various periods.

The Company has a contract with [Western Telephones] for the provision of a telephone system. The term of this contract is seven years."

11. The penultimate paragraph of the DL reads:

"The matters disclosed in this letter are listed against the paragraph numbers of the Warranties and Covenants to which the disclosure is considered most appropriate. But each disclosure weather made it generally or specifically, directly or by reference to any document or other source will apply to each of the Warranties and Covenants to which it is or may be appropriate. And no such disclosure will be restricted or limited in any way to the specific Warranty or Covenant to which it refers."

ISSUE 1: DID THE STATEMENT MADE IN THE DL AGAINST WARRANTY 7.1 ("THE WEDDING STATEMENT") ITSELF AMOUNT TO AN ACTIONABLE CONTRACTUAL WARRANTY?

Introduction

12. This question arises because paragraphs 14 and 15 of the Particulars of Claim allege that the Wedding Statement was a warranty and there was a breach of it because there were only 87 wedding contracts. It is not suggested that the Wedding Statement was a collateral

warranty, given in exchange for the making of the main contract. Rather it is said that it was simply a term of the SPA, in warranty form though not one of the Warranties listed in Schedule 3. This is in addition to contending that it was a representation.

The Facts

13. On the face of it the Wedding Statement is not obviously a qualification to Warranty 7.1. Such a contract would be made in the ordinary course of business, nor is it suggested that it was not terminable on less than 120 days notice, without payment of compensation, although presumably there would be some financial exposure if a wedding contract was cancelled near to the wedding date. No evidence on this point was adduced before me. Conceivably a wedding contract could have involved Majorstage in a capital commitment or annual expenditure in excess of £20,000 (ie for each wedding booked) but there was no real evidence on this point before me either. Mrs Graybill did say in evidence that wedding deposits of £1,000 would usually be taken although this would include an amount for accommodation as well, but I do not think I can thereby infer that a wedding contract would typically fall within Warranty 7.1.3.

14. It is of course not unknown for a Vendor in a company sale (or his advisers) to disclose matters against particular warranties out of an abundance of caution. It is not clear whether this was the case here.

15. It is common ground that there were numerous discussions between the parties prior to the sale of Majorstage as one would expect. In a six month negotiation period bookings were discussed, and lists of current bookings for all functions were produced to the Naylor family (the effective purchasers) and their advisers. They would have been provided with something like the list which can be seen at p170-171 of the Trial Bundle which is itself a revised version of an earlier list.

Mrs Graybill's Evidence

16. In her oral evidence Mrs Graybill said that Mr Anderson of the valuers Edward Symons asked if she had a list of current bookings, which she did and he received it. She would not have said to him in the course of negotiations that she had 150-200 bookings. She would have referred him to the bookings set out in the list at that particular date. They had done 142 weddings in the financial year 1 November 2004 to 31 October 2005 and the wedding business was growing so they would expect more in 2006. But the booking lists would go beyond the current financial year. On a day to day basis, bookings did not change very much. The main surge in bookings came after New Year and Valentine's Day. She did not accept that it was important to the vendors to know how many bookings she had, because she understood that they were very confident in their own operational abilities, ie once they had acquired the business, and they had worked for numerous hotels. She then said that they were interested in the figures, but were going to bring in their own management team anyway. They picked up the lists and saw the bookings and they knew they would have to honour them, but while still intending to run the wedding trade, their main objective was the conference business. For weddings they would need to know the bookings because they were confirmed contractual bookings. She was aware that she had to say how many contracts she had at the time of entering the SPA. She understood that the purchaser would seek to earn revenue from the wedding contracts – though whether they would be profitable depended on them. Certainly, the contracts under her were profitable. In her witness statement she rejected the proposition that she was giving any kind of warranty as to future bookings by reference to what was said in the DL.

17. Taken in the round, I am not sure how far this evidence really assists. One can assume that the purchasers were interested in the booking figures because they asked for and saw the booking lists. Mrs Graybill understood that figures needed to be given, and at least some significance was attached to them. But to an extent she saw this in terms of what contracts would have to be fulfilled by the purchasers after they bought the company. I certainly do not think that this evidence provides any real support for the contention made here, namely that the Wedding Statement amounted to a term of the SPA (in addition to, or opposed to, a representation). The proximity of giving figures close to, or as at, the date of making the SPA does not impel that conclusion without more.

Was the Wedding Statement a representation?

18. The question of a claim for misrepresentation is a separate matter but it is relevant here as well. Ms Muth for Mrs Graybill concedes that the Wedding Statement amounted to a representation but only of a very attenuated kind. It did not amount to some free-standing representation that there were 150-200 wedding contracts but served only as a qualification to Warranty 7.1. That does seem to me to be somewhat less than the admission contained in paragraph 10.2.1 of the Defence that "the information in the Disclosure Letter constituted representations made by or on behalf of the Defendants", albeit that the claim based in misrepresentation here is denied later in the Defence on various grounds including non-reliance.

Analysis

19. I am not asked in this trial to decide what representation if any is constituted by the Wedding Statement. But in my judgment the resolution of that issue does not affect what I do have to decide. Suppose that the Wedding Statement was a representation to the effect that there were 150-200 wedding contracts relating to various periods. That does not in itself entail the conclusion that such representation was also a term of the contract. The fact that it relates to a matter of some importance to the purchaser, without more, simply means that it could well be the subject of a representation. In reality of course, this DL would have been made available in draft unsigned form at least some time before execution, so it is perfectly meaningful to speak of a (pre-contractual) representation here.

20. Nor do I consider that the evidence given by Mrs Graybill can possibly amount to evidence of her intention that there should be "contractual liability in respect of the accuracy of the statement." (see *Heilbut Symons v Buckleton* [1913] AC 30). It simply does not go that far and of course the burden of establishing the term rests upon Highwater which chose to adduce no direct evidence of its own on the point at all.

21. There are other reasons why in my judgment the parties should not be taken to have intended that a statement like this should constitute a separate contractual warranty (even assuming it amounted to a representation that there were 150-200 contracts for weddings for various periods):

    (1) The logical place for such a statement, *qua* warranty, is in the list of Warranties in Schedule 3, where it would be subject to the same regime, procedural and otherwise, as all the other warranties; if Highwater had wanted to get Mrs Graybill on the contractual hook, as it were, an express Warranty in Schedule 3 was the obvious way to do it. Where one has a contractual structure which has a discrete list of Warranties, the inference, or at least starting point must be that if the parties had

wanted to include a further warranty this is where it would go; (I note that the usual warranties were there given in respect of audited and management accounts);

(2) Although the SPA expressly contemplates the possibility of claims in misrepresentation (although limited by Clause 14) in addition to claims for breach of the Warranties, that does not mean that an intention to have other warranties outwith the Schedule should be inferred. It is one thing to have the potential liability for a misrepresentation claim, and another to have a liability for breach of warranty. In a misrepresentation claim, there are various hurdles which the Claimant will face – meaning, reliance, lack of reasonable care on the part of the Defendant (albeit that the burden will rest on the Defendant here) – all the sorts of issues that have indeed arisen here. And here the Claimant has the additional hurdle of proving fraud. A claim for breach of warranty is much simpler and easier to prove;

(3) The fact that the Wedding Statement is in the DL does not itself make it a term. I do not accept the proposition that Clause 14.1 of the SPA (see paragraph 8(5)(a) above) means that every part of the DL is thereby rendered a term of the SPA. The obvious purpose of Clause 14.1 is to limit the material which can be used to mount a claim in contract or misrepresentation in relation to the SPA. Typically, such clauses are used to prevent collateral warranty claims based on some pre-contractual discussion. But that does not mean that any statement within the permitted materials (including the DL) must then be a term;

(4) Equally the fact that Clause 14.2 (see paragraph 8(6) above) excludes reliance on any representation which is not included expressly in the SPA, hardly means that any representation which is included, is also a further contractual warranty. Rather, the purpose of this clause is to cut down the type of misrepresentation claim which can be brought;

(5) The whole thrust of this DL militates against the Wedding Statement being a further contractual warranty. Its purpose (as stated by Clause 5.4 of the SPA – see paragraph 8(2)(b) above - and in the DL's Preamble – see paragraph 9 above) is to qualify or limit what would otherwise be operative Warranties to the extent stated in the DL. So if the complaint is that there is an onerous contract which would otherwise entail a breach of a Warranty, it is no breach if purchaser was informed of the existence of that contract in the DL. It would of course have been open to the parties to agree, as is sometimes done, that the content of the DL itself is true, or even warranted to be true so as to become the subject of a further formal warranty . But that was not done here;

(6) Paragraph 3 of the DL at p1 equally does not help Highwater. It simply resolves any inconsistency for the purpose of the making of disclosure; the same goes for paragraph 3 at p2 under "General Disclosures". The point of that paragraph is simply to give wide scope to the material which can be called in aid to qualify any particular Warranty, here for example, to include information provided to advisers: the purchaser cannot complain that a Warranty is broken because of matter X if his advisers were told about matter X; the whole exercise is thus defensive in nature;

(7) The penultimate paragraph of the DL (see paragraph 10 above) does not assist Highwater here. All it means is that if disclosure is given specifically against Warranty X, it must also be taken to be disclosure against (and hence qualify)

Warranties Y and Z as well, if it is or may be appropriate to them. It is not suggesting that disclosure also goes to some other warranty, not a Warranty.

(8) The fact that both parties have signed off on the DL takes the matter no further. It just means that it is an agreed document, important since on any view the Warranties may be qualified or limited as a result of the DL;

(9) Although not conclusive, the language of the Notification Clause, (see paragraph 8(4) above), in referring to a "Claim," suggests that the types of claim in contemplation by the parties are (a) claims for breach of Warranty and (b) misrepresentation;

(10) Mr Berragan referred me to Clause 6.2 of Schedule 4: " The purchaser confirms to the Vendor that at the date of this Agreement it is not aware of any breach of Warranty or of any circumstances which might give rise to a Claim." I do not see how this helps Highwater. The apprehended Claim is still a claim for breach of Warranty or misrepresentation, not a claim for breach of some other warranty.

22. For all those reasons, I reject the contention that the Wedding Statement constituted a contractual warranty within the SPA and I resolve Issue 1 against Highwater.

ISSUE 2. IF SUCH A STATEMENT WAS A REPRESENTATION, DOES ANY CLAIM BASED UPON IT FAIL BECAUSE IT WAS NOT NOTIFIED IN TIME PURSUANT TO AND IN ACCORDANCE WITH CLAUSE 3.1 OF THE SPA?

Introduction

23. It is common ground that for the purpose of the Notification Clause in Schedule 3 paragraph 5, the correct approach is to examine the claim as put in the Particulars of Claim and see whether that claim was properly notified in the Claim Letter, in other words whether it contained reasonable details of (a) the matter giving rise to that claim and (b) the nature and amount of that claim.

The Wedding Bookings Claim in the Particulars of Claim

24. Paragraph 12 of the Particulars of Claim refers to the information contained in the disclosure against warranty 7.1 ie the Wedding Statement. It was said to have been a record and repetition of information given by the Defendant to the officers of the Claimant prior to the date of the acquisition. It said that the acquisition of the shares by the Claimant depended on the availability of a loan financed from its bankers. It went on to say "in proceeding with the transaction and the loans to finance it, both the Claimant and Barclays Bank PLC relied on the projections (including sustainable earnings figure of £620,000 on an annual basis), which in turn relied on the information given by the Defendant as to the number of wedding contracts.

25. Paragraph 13 refers to information that £250,000 of advance booking deposits had been paid and that in the order of 150 weddings and functions were catered for in each year. The Claimant relied on this for the purposes of making its financial projections and purchasing the shares.

26. Paragraph 14 reads thus: "the Defendant repeated in the disclosure letter by specific disclosure 7.1 the warranty and representation that Majorstage had 150-200 contracts for weddings. The Claimant relied on that information in entering into the SPA."

27. Paragraph 15 alleges that this assertion was untrue because there were only 87 contracts, giving a shortfall of at least leased 63. Paragraph 16 alleges that the Defendant "knew or should have known that the number of bookings was not between 150 and 200; alternatively, the Defendant gave that information to the claimant without honest belief in its truth, without caring whether it was true or false, without any reasonable grounds for believing it to be true, and without having sought to verify it."

28. Paragraph 17 recites that with an average profit of £6,156 per wedding, and a shortfall of 63 wedding contracts, the value of that shortfall was £387,828.

29. There then followed these paragraphs:

> 18. The wedding contracts booked out at 20 June 2006 covered a period from 23 June 2006 until 24 November 2007. The total amounts recorded as paid by way of deposit for the booked weddings was £171,464.50 as against the figure stated by the Defendant of £250,000.
>
> 19. Making the assumption that the at least 63 weddings representing the shortfall against the figure represented/warranted by the Defendant would (if the statement had been true) have taken place in the period of 18 months up to 20 December 2007 (ie a slightly longer period than that covered by the actual bookings as at 20 June 2006), produces an annualised loss of profit of at least £258,552.
>
> 20. Adjusting the figure for maintainable earnings for Majorstage downwards by this amount from £620,000 per annum, reduces the maintainable earnings to £361,448. Applying the price/earnings ratio of 8 would give a value for the shares in Majorstage on a debt free basis of £2.89 million as against the SBA figure or £4.95 million bracket (on the same basis). A difference in value of £2.06 million.
>
> 21. The Claimant seeks damages in an amount to be assessed by the court for the loss arising from the Defendant's breaches of warranty and/or misrepresentation.

30. So there is an allegation of negligent or fraudulent misrepresentation yielding a damages claim based on diminution of value of £2.06m being 40% of the entire contract price of £4.95m.

The Claim Letter

31. This letter, sent on 4 June 2007 some 12 months after the SPA and 5 months before the cut-off date of 31 October 2007 reads as follows, insofar as is material to this issue:

> **"Majorstage Limited**
>
> 1. As you know, we act on behalf of Highwater.. This letter sets out our clients claim's against you for breach of warranty under the Sale and Purchase agreement.
>
> 3.3 Our clients have a substantial claim for damages for breach of warranty as set out below..
>
> 7. Clause 5 of the SPA provided for warranties to be given by you to Highwater, and for those warranties to be further developed or qualified by the contents of the disclosure letter.
>
> **Breach of Warranty Claims**
>
> 35 Our clients believe that there have been breaches of the warranties as set out below, which entitle Highwater to compensation.
>
> **Wedding bookings**.
>
> 48. Disclosure 7.1 says *"The company has approximately 150-200 contracts for weddings relating to various periods."*.

In fact, the total number of contracts for weddings, as at the date of completion was 87, a deficiency of at least 63 bookings compared to the position stated. Appendix 10 contains an analysis of historic profitability and the value of the shortfall of 63 contracts at an average profit of £6,156, a total of £387,828.

Summary of warranty claims

52. Accordingly, the total warranty claims amount to £738,407, and we await your response.

Action required

56. Accordingly, we would request the following action from you

56.1 Payment without further delay of the overdrawn loan account, currently £49,925, up to 10 May 2007

56.2 Confirmation without delay that you will not seek to take enforcement action in relation to the loan notes or the security relating to them..

56.5. Your response to the breach of warranty claims and proposals for payment."

32. The rest of the letter contained other allegations of breaches of warranty to which I shall refer below, which is why the total sum claimed was £738,407. The letter also alleged that certain loan notes from Majorstage had been unlawfully issued and that the final sums due under the SPA of £250,000 were not payable, and that charges given as security for the loan notes should be released.

33. Appendix 10, which deals with the wedding bookings did indeed set out a total loss of profit figure of £387,799, which was based on taking the average profit from one wedding at £6,156 and multiplying it by the alleged shortfall of 63.

Improper Notification

34. Mrs Graybill contends that there was no proper compliance with the Notification Clause because the Claim Letter makes no mention of any misrepresentation claim at all and the claim for diminution of value now made of £2.06m is not set out substantially or at all in the letter.

The Law

35. There have been a number of cases dealing with clauses such as this. Some are referred to in the decision of the Court of Appeal in *Forrest v Glasser* 31 July 2006. That case is itself of limited assistance here since the key question concerned a clause which, in contradistinction to another clause which required detailed information about the claim, only required the bald information that a claim was going to be made.

36. Although it is a first instance decision, I found the statement of principles set out by Gloster J in *Nukem v AEA Technology* 28 January 2005 to be most helpful:

"i) Every notification clause turns on its own individual wording.
ii) In particular due regard must be had to the fact that where such notification clauses operate as a condition precedent to liability (as in this case) it is for the party bringing a claim to demonstrate that it has complied with the notification requirement in that it gave proper particulars of its claims and did give those specific details as were available to it (see paragraph 30 of the judgment in the *Laminates Acquisition* case).
iii) That wording must, however, be interpreted by reference to the commercial intent of the parties; that is to say, the commercial purpose that the clause was

> to serve. In a case such as this "the clear commercial purpose of the clause includes that the vendor should know at the earliest practical date *in sufficiently formal written terms* that a particularised claim for breach of warranty is to be made so that they may take such steps as are available to them to deal with it"; in other words "that the notice should be informative"; see per Stuart-Smith L.J. in *Senate Electrical* at paragraph 90, citing with approval (and with his emphasis) from the decision of May J at first instance.
> iv) Where the clause stipulates that particulars "of the grounds on which a claim is based" are to be provided:
> "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 claim"
> (per Stuart-Smith LJ in *Senate Electrical* at paragraph 91)
> v) In all cases it is important to consider the detailed claim being made in terms of both the breach complained of and the remedy being sought, to ensure that it was a claim which was properly notified."

37. In *Laminates Acquisition Co. v BTR Australia,* 31 October 2003, Cooke J noted that clauses of this kind are usually inserted to give some certainty to the party to be notified and a failure to observe their terms can rarely be dismissed as a technicality.

38. The clause in *Laminates* was similar to the one here. The purchaser had to give "written notice of such claim specifying (in reasonable detail to the extent that such information was available at the time of the claim) the matter which gives rise to the claim, the nature of the claim and the amount claimed.." The parties in that case agreed (unsurprisingly) that the reference to the "nature" of the claim meant "notification of what is being claimed and the basis for it by reference to the SPA – namely the form and substance of the claim." They also agreed that the reference to "amount claimed" required a calculation on the part of [the purchaser] of the loss which was allegedly suffered.

39. All the general observations set out above seem to me to be consistent with the modern approach to contractual construction taken in the well-known cases of *Mannai Investment v Eagle Star* [1997] AC 749, *ICS v West Bromwich* [1998] 1 WLR 896 and *BCCI v Ali* [2001] 1 AC 251. I of course follow that approach when considering this clause.

Analysis

Failure to mention misrepresentation

40. In my view the clause here required the prior notice to state whether a claim was being made in misrepresentation by express reference to that cause of action. That is especially so where the notice on its face is clearly confining itself to claims for breach of the warranties. It is true that Highwater could not assert in the letter that the Wedding Bookings claim was a claim directly under Warranty 7.1 – it was not – but it tied it to the Warranties as much as possible by asserting that the DL "further developed or qualified" those Warranties.

41. Mr Berragan contends that the simple reference to the failure to state that the correct number of bookings was 87 (and not 150-200) was sufficient. In relation to this clause I disagree. It may have constituted the "matter" giving rise to the claim but the clause does not stop there. The "nature" of the claim must surely require a reference to the type of

claim it is. In many cases the claim may be a straightforward breach of warranty and then no doubt what is required is a reference to the relevant warranty broken, how broken and so on. But the Notification Clause here specifically contemplates misrepresentation claims as well. Such claims are different from warranty claims for the reasons given above. And that is especially so where a fraud claim is being made. It would be absurd to suggest that notice of this should not be given. The riposte that it is not required here because Mrs Graybill would realise from what was said in the letter that since she knew the correct figures, it would be said that she knowingly or recklessly made the Wedding Statement, is no answer. The vendor needs to know what he faces in sufficient detail to enable him to deal with it properly. In my judgment even within the confines of the "matter giving rise to the Claim" there should have been a reference to the statement being made negligently or fraudulently (albeit that the burden in relation to reasonable care rests upon the Defendant) and reliance, but if I am wrong about that, such matters should unquestionably have been included under the rubric of the "nature" of the claim. A vendor's approach to a claim (and the legal advice given) is very likely to differ depending on whether it is a "straight" breach of warranty claim or the more complex claim in misrepresentation.

42. I agree that it is not necessary for a Claim Letter to go into as much detail as a Particulars of Claim might need to do. But that does not render the Claim Letter sufficient here. It is noteworthy that when Highwater did decide that it had a claim in misrepresentation, it chose to articulate it in a later letter dated 22 April 2008 (too late for notification purposes). That letter referred back to the Claim Letter relating to various breaches of warranty and articulates what is quite clearly seen as a further and different claim in misrepresentation in relation to the Wedding Statement. It goes into considerable detail about that claim and the question might forensically be posed as to why all of this was not put into the Claim Letter. It is not suggested that this could not in fact have been done.

43. Given that the commercial purpose of such clauses is to enable the vendor to know in sufficient detail what he is up against (not least because it might then enable the parties to settle without recourse to litigation) I cannot see how a claim letter which confines itself to breaches of warranty without any reference to misrepresentation at all, can comply with the Notification Clause here.

44. I do not accept the further argument made by Mr Berragan that if (as I have found) the Wedding Statement did not amount to a contractual warranty, it must follow that the Claim Letter should be taken to be referring to a claim for misrepresentation in relation to it since there was in truth nothing else left. That hardly follows. The fact that a party a asserts one claim which in fact is later found to have no basis does not mean that he was really asserting an alternative claim all the time.

Amount of the Claim

45. I also take the view that the discrepancy between the amount claimed in the Particulars of Claim (£2.06m) and that claimed in the Claim Letter (£387,000) is a further ground for non-compliance. The sums are vastly different and the vendor might obviously take a different view when he knows that he is facing a claim of those proportions in relation to one particular matter. It is no answer to say that the Court will decide damages in the round. The Court might dismiss the claim altogether, but the vendor's need is to see what he is <u>facing</u> from the purchaser.

46. Mr Berragan says that the two amounts have the same starting point. I agree, but that is no answer when they end up at very different destinations. Moreover the type of damages claim is different. In the letter it is based on what profit Majorstage would have made if there were 150 bookings. In the Particulars of Claim it is the familiar “overpayment” claim based on an assertion that because of the matter complained of the true value of the company, as acquired by Highwater, is very much less than the price paid. That involves detailed explanations of how the price paid was arrived at and what the true value was, explanations in fact given in the letter of 22 April 2008 albeit that at that stage it was said that the claim was worth “at least” £800,000 and maybe up to £2m.

47. Where a clause expressly requires the amount of the claim to be given and in truth the amount of the claim pursued in the Particulars of Claim is simply missing from the Claim Letter to a very substantial extent, which cannot be described as a mere difference in detail, the clause has not been complied with.

48. Mr Berragan suggested that if this were the only item of non-compliance (which it is not) the Court could simply cap the claim as made in Particulars of Claim. I do not agree. The claims made are fundamentally different for the reasons given above, and on the facts of this case, the failure to state the amount of the claim is such that the whole claim as such has not been properly notified. To permit it to amend to make the claim as set out in the Claim Letter would probably not help Highwater since it wishes to put the claim now on the usual diminution in value basis. Moreover, a significant amendment of that kind gives rise to the further problem that a claim on that basis was not made within the contractually defined period for starting proceedings, namely 4 June 2008.

Conclusion on Misrepresentation

49. For those reasons, the claim in misrepresentation was not properly notified in time, and I resolve Issue 2 against Highwater as well.

3. IF THE STATEMENT WAS ALSO A WARRANTY DOES ANY CLAIM BASED UPON IT FAIL BECAUSE IT WAS NOT NOTIFIED IN TIME PURSUANT TO AND IN ACCORDANCE WITH CLAUSE 3.1 OF THE SPA?

50. This does not arise given my conclusion under Issue 1. But I should add that even if the Wedding Statement was a warranty, there would have been insufficient notification because of the failure to state the amount being claimed.

4. ARE CERTAIN OF THE OTHER BREACH OF WARRANTY CLAIMS TIME-BARRED BECAUSE THEY WERE NOT NOTIFIED IN TIME PURSUANT TO AND IN ACCORDANCE WITH CLAUSE 3.1 OF THE SPA?

INTRODUCTION

51. There are four breach of warranty claims, made in paragraphs 22 – 31 of the Particulars of Claim, of which Mrs Graybill complains proper notification was not given in the Claim Letter. I deal with each in turn. All relate to Warranty 5.3.

Water Supply

52. The allegation in paragraph 23 of the Particulars of Claim is that the water supply at the Castle was not in satisfactory condition. Particulars are given. The claim is for the cost of rectification in the sum of £49,433 plus VAT.

53. The Claim Letter also says that the water supply was not in satisfactory condition by reference to Warranty 5.3. A report on it in the form of a letter is attached as Appendix 1. In paragraph 2 of that letter, it sets out the same matters as are in the particulars given under paragraph 23 of the Particulars of Claim save that it seems to suggest, or might suggest, that only one of the two pumps is broken whereas paragraph 23.4 of Particulars of Claim says that neither was in satisfactory condition. I do not think that this discrepancy, especially given the ambiguity in the report letter, means that the Claim Letter did not comply.

54. The figure claimed in the Claim Letter is the same as that claimed in Particulars of Claim.

55. Accordingly, this claim was duly notified.

Air heaters

56. The Particulars of Claim allege at paragraph 26 that the oil-fired air heaters were corroded beyond repair due to rainwater entry. Rectification costs of £18,648.50 plus VAT were claimed. The body of the Claim Letter says the same about the corrosion, as does a letter report attached to it as Appendix 5. The amount claimed however was stated in the letter to be £15,173.50 plus VAT making £20,598. This was less than the amount stated in Particulars of Claim. The report annexed to the letter however included a further cost of £3,475 plus VAT which has clearly been brought into account in Particulars of Claim. So the actual figures claimed were as set out in Appendix 5 to the letter. In my view even assuming a discrepancy in the figures, the Claim Letter was compliant.

Bathroom Hot Water System

57. Paragraph 28 of Particulars of Claim alleges that there was insufficient operating pressure to operate the showers and £41,915 plus VAT is claimed. The Claim Letter refers to the hot water system not working properly. It is apparent from the brief report at Appendix 6 to the letter that there was an imbalance in the operating pressures of hot and cold water meaning, not that the showers did not work at all, but that one could not have a hot shower. It was accepted by Mr Berragan that paragraph 28 of the Particulars of Claim could be amended to make it clear (if it was not so from the heading "Bathroom Hot Water System") that the complaint is the inability to have a hot shower. The words "so as to make them hot" needed to be added to the end of the first sentence of paragraph 28. If they are, then there is consistency between the claim in the Particulars of Claim and as summarised in Particulars of Claim (the costs claimed being the same). On that basis, as Ms Muth conceded any conceivable objection disappears.

Bedroom Heat Pumps

58. Paragraph 30 of Particulars of Claim alleges that in relation to the air conditioning system, 13 out of the Haier units were not working and 9 of the Airwell units were not working. The Claim Letter refers to repairs to the Airwell units and replacement of all of the Haier units as they were badly installed. On a reading of the report and related documents, all attached as Appendix 7, it would appear as if there was indeed something actually wrong with the Haier Units serving 13 rooms. In any event it seems that all the Haier units were replaced. Whether all had to be replaced or just those which seem to have had some fault is a matter that can only be dealt with at trial. At best there may be a discrepancy in the sense that the 13 were working to some extent but their installation and inability to obtain spare parts meant that they should be replaced. It is not possible to conduct a minute examination

of such matters on a trial of preliminary issues of this kind. In any event, I am quite sure that since the units have now gone, the claim presently advanced is likely to be based on precisely those papers which formed Appendix 7 to the Claim Letter, whatever they meant. Accordingly, the Claim Letter was compliant in respect of the Haier units. No complaint can be made in respect of the Airwell units or the sum claimed, which is the same in the Claim Letter and the Particulars of Claim.

Conclusion on Issue 4

59. Subject to the amendment being made to paragraph 28 of Particulars of Claim, I conclude that all 4 breaches of Warranty were properly notified in the Claim Letter, and so I resolve this issue in favour of Highwater.

OVERALL CONCLUSIONS

60. In the light of my conclusions on Issues 1 and 2 and subject to any further submissions made when this Judgment is handed down, the entire claim in relation to Wedding Bookings as set out in paragraphs 12 to 21 of Particulars of Claim should be struck out. There is also no need any longer for paragraph 9 which should also be struck out.

61. I am grateful to Counsel for their succinct and clear written and oral submissions.