

MDW Holdings Ltd v Norvill [2022] EWCA Civ 883 Case Summary

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INTRODUCTION

In *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883, the Court of Appeal grappled with the question of the extent to which events that took place following completion of a Share Purchase Agreement could be taken into account when determining share value for the purpose of quantifying damages arising out of a claim in deceit and for breach of warranty.

BACKGROUND

On 14 October 2015, MDW Holdings Limited (“MDW”) purchased the entire issued capital of G.D. Environmental Services Limited (“GDE”) from the defendants, James Norvill and his parents Jane and Stephen Norvill (together, the “Sellers”), for £3,584,224 pursuant to a share purchase agreement (the “SPA”) of the same date.

By clause 6.1, the Norvills acknowledged that MDW was entering into the agreement in reliance on the warranties set out in schedule 5, which, by clause 6.2, the Norvills warranted to be true and accurate on the date of the agreement, except as disclosed by a disclosure letter.

Schedule 5 included, among others: (1) warranties that GDE had conducted its business in accordance with all applicable laws and regulations (paragraph 5.1); (2) that GDE held the requisite consents and was not in breach of any of their terms and conditions (paragraphs 6.1 and 6.2); (3) that no proceedings against GDE had been threatened and there were no circumstances likely to give rise to any such proceedings (paragraph 9.2); (4) that GDE’s accounts showed a true and fair view (paragraph 18.1); and (5) that GDE had complied with environmental laws and permits and there were no facts or circumstances likely to lead to the breach of any such law, to the revocation, suspension,

variation or non-renewal of such a permit or to any claims, investigations, prosecutions or other proceedings (paragraphs 29.2, 29.3 and 29.4).

THE HIGH COURT DECISION

The Court held that: (1) the Sellers were in breach of the warranties; and (2) the Judge found that MDW was induced to enter into the agreement due to James Norvill's deceit.

The Judge found that the value of the business at the time of purchase if the warranties were true was £3,341,276 (the "Warranty True"). The Judge found that the value of the business on the basis that the warranties were false was £2,958,676 (the "Warranty False").

Those valuations included a reduction, which took account of the fact that Norvill's breach of warranty had risked reputational damage to GDE; a risk which ultimately did not materialise.

The Court awarded damages calculated on the contractual basis, reflecting the difference between the two: £382,600.

COURT OF APPEAL DECISION

The Appeal and Cross-Appeal

The Norvills argued that, in assessing the Warranty False, the Judge had erred in taking account of risks that had not materialised following the execution of the SPA, rather than having had regard to how matters had actually unfolded.

By doing so, the Norvills contended that the Judge gave MDW a windfall, which was inconsistent with the principle that an award of damages should put the innocent party in the position it would have been in had the contract been performed and, more specifically, with case law relating to the significance of contingencies.

MDW also cross-appealed, arguing that, as MDW's case had proceeded on the contractual and tortious basis and because, as a matter of fact, the Norvills had acted fraudulently and deceitfully, the correct measure of damages was on the tortious, not the contractual, basis.

The Judgment

On the valuation issue, the Court rejected the Norvills' argument.

Having conducted an in-depth survey of the relevant case law (see [23] to [49]), Newey LJ summarised the position as follows (at [49]):

- Where damages fall to be assessed in respect of an anticipatory breach of contract that was accepted, it is appropriate to consider what would have happened if the breach had not occurred and, in that context, events subsequent to the breach may be relevant.
- That principle has, however, no application where a party to a contract has, by failing to supply goods or services, committed an actual, rather than anticipatory, breach of contract.
- Where a claimant has been induced by deceit to buy something, the defendant cannot reduce its liability by showing that a contingency that served to reduce the value of the item at the date of assessment did not eventuate.
- There is a strong case for saying that, in general at least, the position should be similar in relation to warranties given on a share sale. Events subsequent to the purchase cannot affect the value at the time of the transaction. If a particular risk does, or does not, occur, the price may rise or fall, but that will not retrospectively change the value of the share at an earlier date.
- Cases in which account can be taken of what happened subsequently as regards a contingency that existed on the date of assessment when determining what, if any, damages are payable for breach of a warranty on a share sale, will be rare.
- The mere fact that the value of the relevant shares has increased since the date of assessment cannot demonstrate such a “windfall”: it is inherent in the selection of a date of assessment that subsequent changes in value can fall to be disregarded. Still less could it be appropriate to categorise a post-assessment rise in value as a “windfall” if it were attributable to steps that the purchaser had itself taken since the transaction.
- Further, it would be “*important to keep firmly in mind any contractual allocation of risk made by the parties*”.
- There is no similar bar on using events subsequent to the date of assessment to cast light on events that had happened by that date.

On the measure of damages issue, the Court accepted MDW's argument that damages on the tortious measure were available to MDW, remitting the question of whether had MDW known the truth, it would still have purchased GDE, back to the High Court.

COMMENT

This case suggests that a buyer of shares would be wise to document its decision-making process; in particular, in respect of those warranties that, if false, would prevent the buyer from proceeding.

This case also reaffirms that, when considering the quantification of damages: (1) the Court will be slow to interfere with the contractual allocation of risk; and (2) that instances where the Court may take account of events subsequent to an actual breach, will be rare.

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Please do not hesitate to contact us with any questions.

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