

# Commercial Court—share purchase breach of warranty—correct measure of loss (Oversea-Chinese Banking Corp Ltd v ING Bank NV)

01/04/2019

**Dispute Resolution analysis: Matthew Bradley of 4 New Square analyses the decision of Mrs Justice Moulder in the Commercial Court to dismiss a claim for breach of warranty in a share purchase agreement (SPA). The primary basis for that decision was that the claim as pleaded was unsustainable in law. The claimant, Oversea-Chinese Banking Corp Ltd (OCBC), alleged that its loss was referable to a hypothetical indemnity which it would have negotiated and obtained, but for the breach of warranty, and the amount which could have been claimed under that hypothetical indemnity. This way of putting the loss rendered the claim unsustainable in law. The warranty breached was in the nature of a warranty of quality, and as such the only loss which could be claimed was the diminution in value measure, ie the difference between (i) the true value of the shares and (ii) the value of the shares as warranted. Separately, the court held that neither causation nor a breach of warranty was established in any event. Written by Matthew Bradley, barrister at 4 New Square Chambers.**

*Oversea-Chinese Banking Corp Ltd v ING Bank NV* [\[2019\] EWHC 676 \(Comm\)](#)

## What are the practical implications of this judgment?

- Measure of loss in SPA warranty claims: This decision reaffirms a number of decisions, including *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] Bus LR 1338, *The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB), and *Zayo Group International Ltd v Ainger and others* [\[2017\] EWHC 2542 \(Comm\)](#). Together with those decisions, it underlines that, where the warranty relied upon is in the nature of a ‘warranty of quality’—as is very often the case in the SPA context—then the correct measure of loss is the diminution in value measure, ie the difference between the value of the shares as warranted (‘warranty true’ value) and the value of the shares in fact (‘warranty false’ value).
- Nature of warranty of quality: The decision elucidates how the concept of a ‘warranty of quality’, borrowed from the sale of goods context, is applied in the SPA context. Certain terms are implied by statute into contracts for the sale of goods—that they be of satisfactory quality and reasonably fit for their purpose etc. The measure of loss in those cases is usually the difference in the value of the goods as sold, with their defects, and the value of the goods as they should have been, with no defects. Many warranties in the SPA context are analogous in nature, speaking to the quality of the company sold under the relevant SPA, and a like approach to the measure of loss is adopted.
- Widespread applicability: The warranty at stake in this decision is commonly seen in SPA warranty claims; to the effect that the accounts of the company sold had been properly drawn up, so as to give an accurate picture of the affairs and results of the company. This is a matter going to the quality of the company, and no argument was advanced to the contrary. By reaffirming the appropriate measure of loss in such cases, the decision (unless appealed) will be relevant to a large number of SPA warranty claims.

## What was the background to the decision?

OCBC purchased ING Asia Private Banking Limited (IAPBL) from ING Bank NV (ING) for \$1.466bn under an SPA dated 15 October 2009. The SPA contained a warranty to the effect that the accounts of the company had been properly drawn up, so as to give a true and fair view of the state of affairs and results of the company as at end 2008.

It was alleged that this warranty was breached, because the accounts failed to disclose a liability to Lehman Brothers Finance SA (LBF). Following completion of OCBC’s purchase of IAPBL in January 2010, this liability became an issue, IAPBL reaching a settlement of it with LBF to the tune of \$14.5m

in November 2012. OCBC alleged that, had the liability to LBF been properly accounted for, it would have obtained an indemnity for it within the SPA, under which it would have been able to recover the entirety of the \$14.5m paid out to LBF.

### What did the court decide?

The court's essential decision, in relation to OCBC's reliance on an incorrect measure of loss has been summarised above. OCBC accepted that the diminution in value measure would usually be the correct measure of loss for a breach of warranty of quality, but argued that this was only a *prima facie* position, which could be departed from if the facts justified it. That argument was rejected.

It is important to grasp the limits of the court's decision in these respects. At times (in particular at para [28]) the case may be thought to stand for a broader proposition than that which it truly stands for (as is clarified by paras [36] and [39]). This case does *not* decide that the measure of damages for *all* SPA breach of warranty claims will be the diminution in value measure. There may be warranties in the SPA context which are not warranties as to quality.

In *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438, Lord Hoffmann held that a warranty to the effect that a forecast of profits had been prepared with reasonable care was not a warranty as to quality, and that the proper measure of loss was not the diminution in value measure, but was instead referable to the price that would be negotiated by the actual buyer and seller, had an accurate forecast been used in the negotiations as to price. Moulder J's decision does nothing to alter this often overlooked analysis.

The court's decision on causation was also of some interest. Perhaps unsurprisingly, the court took the view that a \$14.5m liability, in the context of a \$1.466bn transaction, was not as causally potent as such a number might in other contexts suggest. The court examined the evidence of how hard OCBC pushed ING in negotiations for a widespread range of warranties and indemnities. It effectively took the view that OCBC was prepared to entertain a degree of give and take in this process, such that it was not satisfied that OCBC would have held out for the indemnity which was central to its pleaded claim.

The court lastly held, on the basis of expert accounting evidence, that there was no breach of warranty on the facts of the case.

### Case details

- Court: High Court, Queen's Bench Division, Commercial Court
- Judge: Mrs Justice Moulder
- Date of judgment: 26 March 2019

[Matthew Bradley](#) is a barrister at 4 New Square Chambers and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact [caseanalysis@lexisnexis.co.uk](mailto:caseanalysis@lexisnexis.co.uk).

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

FREE TRIAL