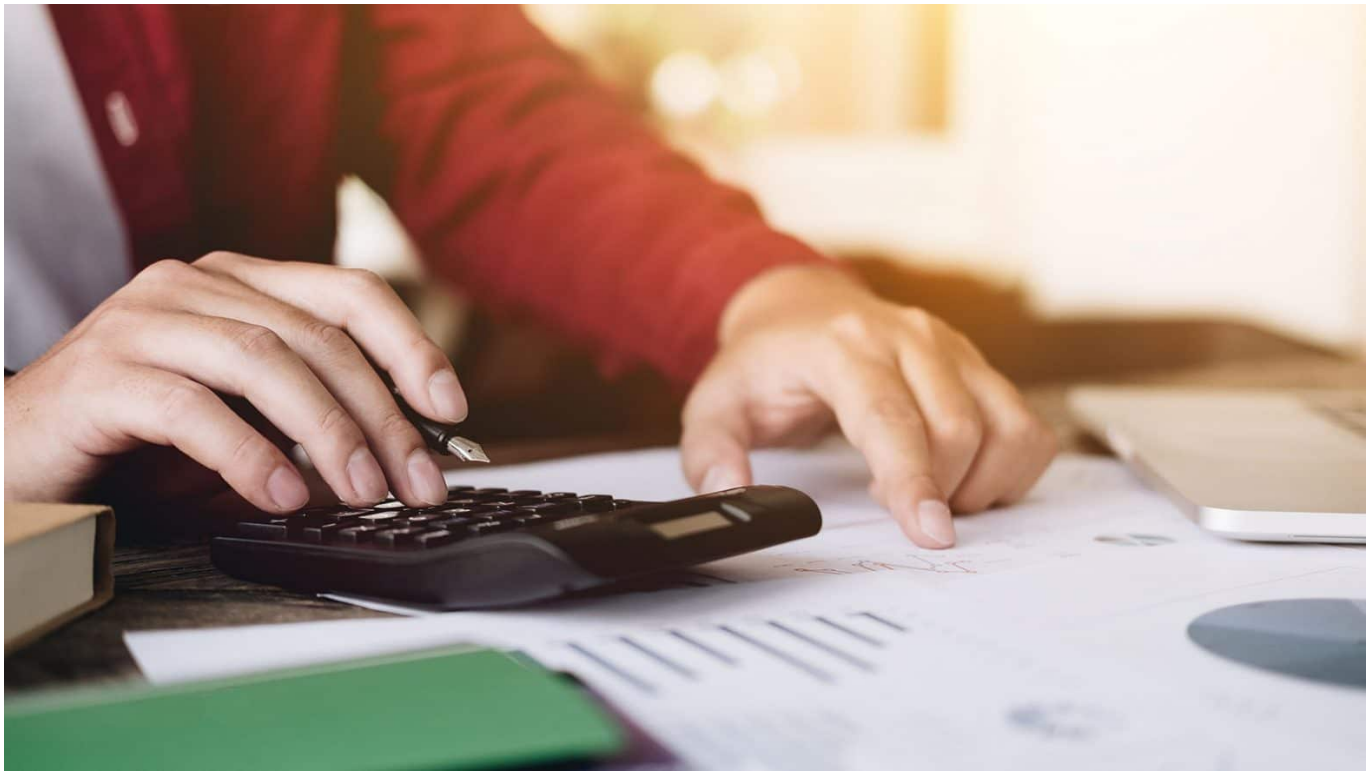
# Update on Claims under Sale and Purchase Agreements



A recent case in the High Court examined the meaning of the phrase "as soon as possible" in the context of claims made under a Sale and Purchase Agreement (**SPA**). It is to be assumed that a lawyer drafted the SPA in question but, as this writer knows all too well, drafting legal documents that are in plain and simple terms is not always easy. Disputes as to interpretation do happen and phrases such as "as soon as possible" become the object of scrutiny by beady eyed barristers seeking an interpretation that best suits their argument in the hope the Judge agrees.

In this case the High Court found that the claimant buyer could not pursue a claim against the seller because it had not given notice of its claim "as soon as possible", as it was required to do under the SPA.

## Background

In August 2008, the buyer, Towergate Financial, acquired a company which provided financial advice to retail customers. Amongst other things, the SPA contained protections, specifically indemnities, for Towergate in respect of professional negligence claims arising out of the mis-selling of financial products.

A number of mis-selling claims emerged in early 2013. These claims entitled the buyer to bring a claim for indemnity against the seller in respect of losses arising out of the mis-selling claims. However, in order to be able to bring a claim under the SPA, the buyer had to give notice "*...as soon as possible and in any event.....on or before the seventh anniversary of the date of the Agreement.*" (SPA, Clause 6.7).

Towergate gave notice to its insurers of the mis-selling claims early in 2014, but it did not give notice to the seller until July 2015, shortly before the seventh anniversary of the SPA. The seller defended the claim arguing that the

buyer had failed to meet the contractual requirement of the SPA to give notice "as soon as possible" after becoming aware of the claim.

The buyer and the seller agreed that giving notice in a timely manner as required by the SPA was important, but they disagreed on two counts. Firstly, they disagreed over whether the SPA only imposed a requirement to give notice within seven years from the date of the SPA, or whether it imposed an additional condition to do so "as soon as possible", and, secondly, they disagreed over whether the buyer had given notice "as soon as possible" as required by the SPA.

The answers to these questions would determine whether the buyer could proceed with its claim against the seller, or whether the claim under the SPA was out of time.

## Decision of the High Court

The Judge in this case, Cockerill J, ruled against the buyer on both counts. Accordingly, their claim against the seller failed.

*How did the Court interpret clause 6.7?*

The court found that, on its construction, clause 6.7 of the SPA contained two separate conditions: first, notice must be given on or before the seventh anniversary of the date of the SPA and, as a separate condition, that any notice must be given as soon as possible.

The court was satisfied that the wording of clause 6.7 was not ambiguous and rejected the argument that the words "as soon as possible" were insufficiently certain to be a condition precedent. The court noted that similar wording is used in the Civil Procedure Rules and is commonly used in commercial contracts.

*Was notice given "as soon as possible"?*

On the basis of the facts of this case the court concluded that the notice given in July 2015 was not given "as soon as possible". In reaching that conclusion, the court sought to identify the point at which the buyer knew, or which any reasonable person would know, of any matter or thing which might give rise to a claim under the SPA. The court took into account that that buyer had prepared detailed spreadsheets identifying potential claims in 2013 and had made internal estimates of the value of the claims by February 2014.

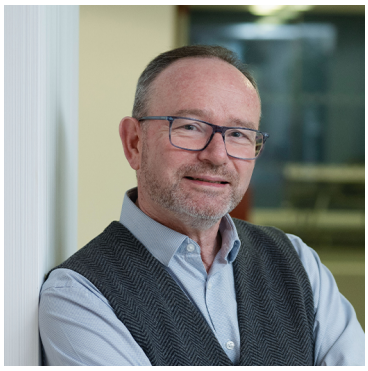
Moreover, and as it was required to do under its policy of insurance (which required claims to be notified "as soon as practicable"), the buyer had notified its insurers in February 2014, and then again in March, April, October and December 2014, of potential claims. No credible explanation was given by the buyer as to why a claim against the seller was not made until July 2015.

On its facts, the outcome of this case is not wholly unsurprising. The buyer clearly felt that it would be safe to notify the seller of a claim any time up until the seventh anniversary of completion. If the mis-selling claims had come to light earlier than the seventh anniversary of completion then the buyer may have thought that there was a chance the losses, in whole or in part, would have been met by its insurer in which a claim under the SPA may not have been necessary or, if necessary, only for that element of the losses not borne by its insurer.

However, what this case demonstrates is that by imposing a secondary condition in the SPA that indemnity claims be made "as soon as possible", the buyer cannot use the limitation period in the SPA before bringing his claim against the seller. In other words, if the SPA stipulates that claims must be brought "on or before the seventh anniversary" and the buyer becomes aware of a potential claim in year following completion, if the SPA requires claims to be made "as soon as possible" then the buyer must give notice to the seller at the time he

becomes aware of the matters or things giving rise to the potential claim.

If you would like any more information about this case or more generally then please do not hesitate to contact Noel Ruddy or the corporate team.



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