Neutral Citation Number: [2020] EWCA Civ 1228

Case No: A1/2019/2769

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
Mrs Justice O'Farrell DBE
Insert Lower Court NC Number Here

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2020

Before:
LORD JUSTICE HENDERSON
LORD JUSTICE COULSON
and
LADY JUSTICE CARR

- -

Between:

(1) PRIMUS INTERNATIONAL HOLDING COMPANY	**Appellants**
(2) PRIMUS INTERNATIONAL INC.	
(3) PRIMUS INTERNATIONAL CAYMAN CO	
- and -	
(1) TRIUMPH CONTROLS - UK LIMITED	**Respondents**
(2) TRIUMPH GROUP ACQUISITION CORPORATION	

James Morgan QC and Kirsty White
(instructed by **Harrison Clark Rickerbys**) for the **Appellants/Defendants**
Rajesh Pillai QC and Nathaniel Bird (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents/Claimants**

Hearing date: 31st July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on the 22nd September 2020.

LORD JUSTICE COULSON:

1 INTRODUCTION

1. The issue in this appeal is whether the claims brought by the claimants/respondents ("Triumph") were claims "in respect of lost goodwill" and therefore excluded by a clause in the relevant share purchase agreement ("SPA"). O'Farrell J ("the judge") concluded that the exclusion clause did not apply to the claims brought by Triumph. The defendants/appellants ("Primus") challenge that conclusion.

2 THE FACTUAL BACKGROUND

2. In late 2012, the parties began discussions relating to the potential sale to Triumph of two aerospace manufacturing companies, one based in Farnborough in the UK, and the other based in Rayong in Thailand ("the companies"). As part of these discussions, Primus - who owned the companies, sometimes referred to in the papers as the Target Group - provided Triumph with a set of financial forecasts for the companies extending to 2017. These were known as the "Long Range Plan" ("the LRP"). The LRP predicted that the companies would be profitable in the future. That was important because, at the time of the sale, the companies were making a loss.

3. On 27 March 2013, the parties agreed the SPA. Pursuant to its terms, Triumph purchased shares in the companies, which ultimately conferred ownership upon them. The sale was completed on 3 May 2013. The original purchase price was $63,530,145. Following an adjustment to reflect changes in the book value of the companies' assets, the final purchase price increased by $13 million to $76,530,145.

4. Subsequently, Triumph discovered significant operational and business problems at the companies. They failed to achieve their forecasted earnings and their performance was nothing like that predicted by the LRP. As a result, Triumph had to inject some $85 million to keep the companies afloat.

5. In August 2015, Triumph commenced these proceedings against Primus, alleging breach of the warranties given by Primus in the SPA. One of the claims alleged that, contrary to the warranty at paragraph 19.5 of Schedule 3 to the SPA ("the 19.5 warranty"), the LRP had not been "honestly and carefully prepared".

6. Amongst the terms in Clause 9 and Schedule 8 of the SPA on which Primus relied to exclude or limit their liability to Triumph after the purchase was paragraph 3.1(f)(i) of Schedule 8 ("the 3.1(f)(i) exclusion"), which excluded liability "to the extent that…the matter to which the claim relates… is in respect of lost goodwill".

7. The trial in the TCC before the judge took five weeks in 2018. She had to deal with a raft of issues which do not arise on this appeal. She concluded that Primus were in breach of the 19.5 warranty because the LRP failed to take into account, properly or accurately, key operational and financial assumptions relating to planned transfers of production lines from the Farnborough company to the Thai company. As a result, the LRP overestimated the rate at which production could be transferred and overstated the future profitability of the companies. The judge found that the purchase price paid by Triumph for the companies would have been lower if they had been provided with a proper LRP.

8. The judge's first judgment was lengthy ([2019] EWHC 565 (TCC)), running to a total of 101 pages and 498 paragraphs. When she came to assess the quantum of the claim, the judge had regard to the speech of Lord Hoffmann in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] WLR 1438. When addressing the measure of loss in a case of this kind, he said that "…the crucial question...is the ascertainment of what a properly prepared forecast would have been". The judge adopted that approach. She went on to explain that there was a dispute between the experts as to the methodology for valuing the companies and the impact of the breaches of warranty, and noted at [494] that, because the experts had not quantified the loss in accordance with the *Lion Nathan* guidance, she would direct them to carry out that exercise.

9. The judge dealt tersely in this part of her judgment with Primus's argument that the claim was excluded because it was in respect of lost goodwill. She said:

> "496. Primus relies on paragraph 3.1(f) of Schedule 8 to the SPA, which provides that the Sellers shall not be liable in respect of any claim to the extent that the matter to which the claim relates is in respect of lost goodwill. I reject the submission by Primus that the claims made by Triumph for breaches of warranty are claims for lost goodwill. The plain and natural meaning of goodwill in a commercial contract is business reputation. The losses sustained by reasons of the breaches are lost revenues and increased costs, leading to reduced profitability and loss of share value. The exclusion relied on by Primus does not affect the claims for breaches of warranty."

10. In her second judgment ([2019] EWHC 2216 (TCC)), having considered the experts' recast calculations, the judge made findings as to the amounts by which the LRP should have been adjusted. She determined that Triumph would have reduced the purchase price by a total of $5,701,570 to reflect the reduction in the forecasted performance of the companies, and that Primus would have accepted that reduced price. There was a deductible of $1.5 million stipulated in the SPA, which left the damages awarded by the judge to Triumph in the sum of $4,201,570.

11. Primus sought permission to appeal on a wide range of matters, including the judge's calculation of quantum, and a separate dispute about the proper construction of the exclusion clause relating to lost goodwill. They were refused permission to appeal on all matters save for the argument about the true meaning and effect of the 3.1(f)(i) exclusion.

3 THE TERMS OF THE SPA

12. By reason of the limited nature of this appeal, it is only necessary to set out a few of the terms of the SPA.

13. Schedule 3 set out the warranties provided by Primus as the Seller. The 19.5 warranty was in these terms:

> "19.5 So far as the Sellers are aware, the forward-looking projections relating to the Companies have been honestly and carefully prepared."

It is this warranty which the judge found Primus to have breached.

14. The 3.1(f)(i) exclusion at Schedule 8 was in the following terms:

> "3.1 No Claim, claim under the Tax Warranties or, where specifically referenced, an Indemnity Claim, shall be admissible and the Sellers shall not be liable in respect thereof to the extent that…
>
> (f) The matter to which the claim relates:
>
> (i) Is in respect of lost goodwill…"

15. 'Goodwill' is referred to in a number of other places in the SPA. In particular, Clause 13 of the SPA itself is entitled "Protection of Goodwill" and contains detailed undertakings by Primus not to carry on competitive activity or employ particular executives of the companies for set periods. At the end of clause 13, clause 13.4 provided:

> "The Sellers agree that the undertakings contained in this clause 13 are reasonable and are entered into for the purpose of protecting the goodwill of the business of each member of the Target Group and that accordingly the benefit of the undertakings may be assigned by the Buyers and their successors in title without the consent of the Sellers."

4 THE ISSUE ON APPEAL

16. The issue before this court is the true construction of the 3.1(f)(i) exclusion. Before the judge, Triumph alleged that 'goodwill' meant the good name, business reputation and connections of a business and that, since their claims were for overpayment due to the careless LRP, and not for lost business reputation, the exclusion clause did not apply. The judge agreed. Triumph maintained that construction on appeal.

17. Primus submitted to the judge that 'goodwill' meant "an intangible asset recorded when a company acquires another company and the purchase price is greater than the sum of the fair value of the identifiable tangible and intangible assets acquired and the liabilities that were assumed". At the appeal hearing, Mr Morgan QC put it slightly differently, submitting that loss of goodwill was "a loss of share value, where that value represents the difference between the cost of acquisition and the fair value of its identifiable net assets and/or where that loss of share value is caused by the impairment of the value of non-identifiable assets." It was agreed that, in either of the appellants' formulations, this was essentially an accounting definition.[1]

18. Mr Morgan QC suggested early on in his oral submissions that there was no real conflict between the definitions proffered by either side. I disagree. Triumph's definition is aimed at a specific element of any business: its reputation, its brand recognition, its good name. That definition explains why goodwill is normally the

[1] This was confirmed by a paper prepared by PwC called 'Business combinations and noncontrolling interests' to which the court was taken in argument. This used a similar definition to describe the proportion of the purchase price not referable to assets on the acquisition of a business. On one view, the PwC definition of 'goodwill' went even further than the definition proffered by Mr Morgan QC, and included, amongst other things, "assets and liabilities that are not measured at fair value."

proprietary right at the heart of any passing-off dispute, because of the attraction of the brand or good name of the business to a competitor.

19. On the other hand, Primus's definition, in either iteration, is much broader, and could cover anything beyond the net book value of the identifiable assets, up to the price paid for the business on acquisition. That may well include the narrower definition of 'goodwill', but it would also include anything else that might have led to an increase in the purchase price not referable to the value of the identifiable assets. Mr Morgan QC accepted the breadth of the accounting definition when he submitted that goodwill was "anything that adds value". Of course, because 'goodwill' is used in the 3.1(f)(i) exclusion, the broader the definition of 'goodwill', the wider the range of Triumph's claims which are or might be excluded.

20. I have concluded that the judge was right to prefer Triumph's definition of 'goodwill' and their construction of the 3.1(f)(i) exclusion. There are four reasons for that, each developed below:

(i) The ordinary legal meaning of 'goodwill' (Section 5);

(ii) The relevant authorities (Section 6);

(iii) The other parts of the SPA (Section 7); and

(iv) The nature of Triumph's claims (Section 8).

5 THE ORDINARY LEGAL MEANING OF 'GOODWILL'

21. When considering the ordinary legal meaning of 'goodwill', it is important to record two matters at the outset, because they greatly reduce the scope of the debate.

22. First, there is no dispute between the parties as to the applicable principles of contractual interpretation. It is agreed that those principles can be found in the copious recent guidance emanating from the Supreme Court, represented by *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173. Those principles were adopted by the judge and no point arises on this appeal as to any alleged error of law in the judge's approach to the construction of the SPA.

23. Secondly, although it is always necessary to have regard to the factual background when construing a contract (as per Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896), neither side sought to identify or rely upon any particular part of the factual background to the SPA in order to assist their submissions or to undermine the submissions of the other side. Accordingly, this is one of those rare cases where the dispute about the meaning of a contractual term hinges on the words actually used in that term, read in the context of the contract as a whole and not on any extraneous matters.

24. It is also important at the outset to make the obvious point that 'goodwill' in this commercial context does not mean friendliness, or a desire to help. That type of goodwill rarely arises in claims for breach of contract. An exception was *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, where one of the

heads of claim. following the defendants' failure to manufacture the special containers for cosmetics they had agreed to supply, was the loss of the co-operation of beauty editors of newspapers. Hallett J said at 399C-E:

> "It is the loss of the goodwill of the editresses - the goodwill in the sense of friendliness and a desire to help - which is the subject of this claim. It is not the loss of the goodwill of the public. No such loss is alleged in a statement of claim, and no such loss has been proved. *It is a loss quite different from the loss of goodwill in the legal sense* which results when a butcher sells bad meat, or when a vendor of another kind sells poisonous ice cream, because the goodwill there damaged or destroyed is goodwill in the sense of the probability that the customers will resort once more to the same source of supply." (Emphasis added)

25. As Hallett J noted, in a commercial context, the ordinary legal meaning of goodwill is the good name and public reputation of the business concerned. I have no doubt that that is what the judge was referring to in the present case when, at [496] of her first judgment, she referred to "business reputation". Such goodwill is defined by the Oxford English Dictionary as the "established reputation of a business regarded as a quantifiable asset and calculated as part of its value when it is sold." It is similarly defined at Volume 80 (2013) of *Halsbury's Laws of England* at 807:

> "The goodwill of a business is the whole advantage of the reputation and connection formed with customers together with the circumstances, whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any business or business product the value of the attraction to customers which the name and reputation possesses."

26. It could not be suggested that the somewhat convoluted definition advanced by Primus is the same as the ordinary legal meaning of goodwill. There is no reason for this court to depart from that ordinary legal meaning of the word when construing the 3.1(f)(i) exclusion, or to utilise the accounting definition of the term instead. Mr Morgan QC does not contend that any part of the factual background to the SPA, or any part of the SPA itself, points to or justifies the adoption of the accounting definition. If a contract contains a term to which the parties intend to give an unusual or technical or non-legal meaning, that must be spelt out. That did not happen here.

27. To counter this, Mr Morgan QC's central submission was that the accounting definition of 'goodwill' made it synonymous with 'value'. He said that goodwill was something which fell to be valued when a business was acquired, and that the normal accounting methodology valued it as the difference between the value of the assets, on the one hand, and the purchase price, on the other. He expressly said that 'goodwill' and 'value' were "interchangeable".

28. I reject that proposition. Merely because something - in this case 'goodwill' - is of value and is capable of being valued, does not mean that it is the same thing as 'value'. They are different things. It is quite possible to envisage a situation in which a business being sold has goodwill in the ordinary legal sense, but where, for unconnected reasons, the purchase price is the same as the value of the net assets. That does not mean that there was no commercial goodwill in the business; it just makes that goodwill much harder to value. In my view, the long-accepted ordinary

legal meaning of 'goodwill' should not be complicated and extended by muddling it together with the concept of 'value'.

29. Although I accept that [496] of the judgment might, in hindsight, have benefitted from an explanatory sentence or two[2], it is clear that the judge was giving the word 'goodwill' its ordinary legal meaning in a commercial context. She used the expression 'business reputation' as shorthand for good name, reputation, and business connections. I consider her interpretation was correct. Furthermore, I consider that the authorities support that conclusion.

6 THE RELEVANT AUTHORITIES

30. In *Austen v Boys* (1858) 2 De G & J 626, the Lord Chancellor was concerned with a claim on retirement for a share of the goodwill in a solicitor's practice. He said at page 1136:

> "It is very difficult to give any intelligible meaning to the term 'goodwill' as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'goodwill' is something distinct from the profits of a business, although in determining its value the profits are necessarily taken into account; and it is usually estimated at so many years' purchase upon the amount of these profits."

31. This early case is relevant for two reasons. First, it identifies goodwill as relating to the local reputation of the business in question, and therefore the chance to carry it on in that same location. Secondly, it appears to draw a distinction between goodwill and value. At the very least, it militates against the suggestion that the two things are interchangeable.

32. The best-known case as to the meaning of 'goodwill' is *IRC v Muller and Co's Margarine Limited* [1901] AC 217. At 223, Lord MacNaghten said:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. *It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom.* It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry

[2] That is not a criticism. In view of the length of the trial and the raft of issues that the judge had to decide, her judgment is a model of clarity and organisation. A certain amount of explanation fatigue can be forgiven by the time the judge reached paragraph 496.

> residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such." (Emphasis added)

33. In the same case, Lord Lindley said at 235:

> "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. *In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things*, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it[s] adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own." (Emphasis added)

34. A more recent definition of 'goodwill' can be found in the judgment of Lord Dyson MR in *Breyer Group Plc and Others v Department of Energy and Climate Change* [2015] EWCA Civ 408, [2015] 1WLR 4559. That was a case concerned with the particular meaning of "a possession" under Article 1 of the First Protocol to the ECHR ("A1P1"), and the difference between goodwill (which was capable of being a possession and therefore the subject matter of an A1P1 claim) and loss of future earnings, which was not a possession under the ECHR, and therefore not something for which a claim could be made. At [45], Lord Dyson said:

> "The same idea was expressed by the ECtHR in *Van Marle* at para 41 (see para 28 above). A possession comprising the goodwill of a business is the product of past work: "by dint of their own work, the applicants had built up a clientele". Goodwill is the present value of what has been built up. It is to be distinguished from the value of a future income stream. From an accountants' point of view, this distinction may make little practical sense. But it is the distinction that has been clearly drawn by the ECtHR for the purposes of A1P1."

35. In this passage, Lord Dyson touched on the tension between the commercial approach to goodwill, and the way it is treated by accountants. That tension has arisen in other cases to which this court was referred. Thus, in *Balloon Promotions Limited v Wilson (Inspector of Taxes)* [2006] STC (SCD) 167, the Special Commissioner held that the accounting definition of goodwill was "deficient" for the purposes of construing the meaning of 'goodwill' in the Taxation of Chargeable Gains Act 1992. He used the ordinary legal meaning instead. So too did the Supreme Court of Canada in *Veuve Clicquot Ponsardin v Boutique Clicquot Ltée* [2006] SCC 23 when, by reference to a Canadian statute concerned with trademarks, the court defined 'goodwill' as "promoting the positive association that attracts customers towards its owner's wares or services rather than those of its competitors… the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business."

36. Thus far, I consider that all of the authorities to which I have referred point in the same direction, namely that 'goodwill' has the legal meaning ascribed to it in the present case by Triumph and by the judge. The only authority which, so Primus say, may point the other way is *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067, a decision of Kenneth Parker QC (as he then was). He said at paragraph 72:

> "72. It seems to me that "goodwill" in this context is not being used in the technical accounting sense of the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities (see, for example, Financial Reporting Standard 10). Goodwill is there used to fill a gap in the balance sheet that would otherwise arise, may well be transient, is exclusively the result of acquisition and cannot be internally generated. It appears that "goodwill" is being used rather in the economic sense of the capitalised value of a business or part of a business as a going concern which, according to modern theory of corporate finance, is best understood as the expected free future cash flows of the business discounted to a present value at an appropriate after tax weighted average cost of funds (see Brealey and Myers, Principles of Corporate Finance, 7th edition, 2003 at sections 4.5 and 19.1). There is, of course, a connection with the accountancy concept of goodwill, which arises simply because the present value of net future cash flows on the economic model exceeds, or is thought to exceed, the aggregate of the fair values of the identifiable net assets that will be employed to generate those cash flows."

37. In reliance on this passage[3], Mr Morgan QC submits that the reference to the difference between the fair value of the net assets of a business and the cost of acquisition, being a methodology which all companies use to value goodwill when a business is acquired, was the interpretation of 'goodwill' that should be applied to the 3.1(f)(i) exclusion.

38. I do not consider that the decision in *Nicholds* is of any assistance in the present case. Like *Breyer Group*, it was solely concerned with whether goodwill (as opposed to loss of future income) was a 'possession' for the purposes of A1P1 of the ECHR. That is a very particular question in European law, with its own set of rules and considerations. The judge in *Nicholds* was not concerned with the ordinary legal meaning of the term 'goodwill' in domestic law. He was instead distinguishing between what he called "the technical accounting" definition, and the term when used in the "economic sense of the capitalised value of a business…as a going concern". Even then, he appeared to recognise that the "technical accounting" definition was different to the way in which 'goodwill' is commonly understood in a commercial context.

39. In summary, therefore, I am satisfied that the authorities point overwhelmingly to the conclusion that 'goodwill' in a contract for the sale of a business refers to a type of proprietary right representing the reputation, good name and connections of a business, and is different to the particular or specific meaning attributed to the term by accountants.

[3] This passage was cited with approval in *Breyer Group*.

7 THE OTHER PARTS OF THE SPA

40. The third reason why I consider that the judge was right to reach the conclusion that she did concerns the other provisions of the SPA. It is trite law that, as Tomlinson LJ put it in *Interactive Investor Trading Limited v City Index Limited* [2011] EWCA Civ 837 at [29], "it should ordinarily be presumed that language is used consistently within the four corners of an agreement". It is therefore helpful to look at other parts of the SPA to see how the term 'goodwill' is used.

41. The starting point is clause 13, set out at paragraph 15 above. The undertakings referred to in clause 13.4 were plainly designed to protect the companies' goodwill, in the sense of their good name, reputation and business connection. It was for that reason that, for example, certain named employees of the companies were prohibited from working for Primus for a period of 2 years after the sale of the companies. As Mr Pillai QC rightly pointed out, that was inconsistent with Mr Morgan QC's interpretation, that 'goodwill' always fell to be valued at the date of the sale. Clause 13 emphasises that the companies were an ongoing concern and that what was being protected by these provisions was their ongoing goodwill, at least for the two year period after the sale.

42. Furthermore, the agreed facts mean that clause 13.4 could not be construed as referring to 'goodwill' in the accountancy sense. It was common ground between the experts at trial that the companies had no goodwill recorded in their balance sheets at the time of the sale. In those circumstances, if 'goodwill' were given the accountancy definition, there would have been no goodwill to protect, and the entirety of clause 13 would have been otiose.

43. Some other parts of the SPA should also be noted. Clause 1.1 defines intellectual property rights as including "rights to goodwill or to sue for passing off". That would again indicate 'goodwill' in the proprietary commercial sense previously referred to, where claims usually depend on evidence of business reputation, not the contents of an accountant's report.

44. It is also instructive to look at some of the other warranties at Schedule 3. Warranties 4.1 and 6.1 are concerned respectively with the accuracy of the register of members of the companies, and compliance with licences, permits and consent. Those are general: breach of those warranties would give rise to a claim, regardless of whether or not the breach was connected to the assets in the balance sheet (which, if Primus' construction of the 3.1(f)(i) exclusion was correct, they would have to be). Even more importantly, warranty 12 is entitled 'Assets' and again draws no distinction between assets on the balance sheet and any other type of assets. Warranty 12 would have to be completely rewritten if Primus' interpretation was correct. Indeed, as Mr Pillai QC correctly observed, if all claims were excluded except in relation to the value of the identifiable assets on the balance sheet, the warranties would have been very differently expressed.

45. Accordingly, a consideration of the other parts of the SPA shows that 'goodwill' is consistently given the meaning ascribed to it by the judge at [496] of her judgment.

8 THE NATURE OF TRIUMPH'S CLAIM

46. The fourth and final reason for my conclusion that the judge was right in her interpretation of 'goodwill' concerns the nature of Triumph's successful claim in these proceedings. Although there was some debate about the general nature of Triumph's claims, for the purposes of this appeal, it is only necessary to look at the claim for breach of the 19.5 warranty. Paragraph 43 of the reamended particulars of claim alleged that "as a consequence of the breach of warranty 19.5 the Claimants have suffered loss and damage which is to be measured by reference to what the Claimants would have done had the LRP been carefully prepared."

47. This was the claim which the judge upheld. At [498(ix)] of her first judgment, she said:

> "Triumph is entitled to damages based on the difference between the price agreed on the assumption of the LRP and what the price would have been, using the same method of calculation, if the properly adjusted LRP had been made, subject to the contractual cap of $15 million".

That was the head of loss which the judge then went on to value in her second judgment.

48. Mr Morgan QC was anxious to suggest that this was a claim for loss of share value which, he said, supported his interpretation of the term 'goodwill' as having the accounting definition. I disagree. This was not a claim for loss of share value: it was a claim for overpayment as a result of the careless LRP. The loss was the difference between the price actually paid, and the lower price which Triumph would have paid if they had known the true position. A businessman or a lawyer would consider that such a claim was an entirely different sort of claim to one for loss of goodwill. This was therefore not a claim where "the matter to which the claim relates … is in respect of lost goodwill", so it was not excluded by the 3.1(f)(i) exclusion.

49. This ties back to what I consider to be the proper purpose of clauses like the 3.1(f)(i) exclusion. They are designed to exclude liability for any loss of goodwill caused by a breach of warranty. Goodwill is a proprietary right, the loss of which can, in certain circumstances, give rise to a claim for damages for breach: see by way of example *Anglo-Continental Holidays v Typaldos Lines* [1967] 2 Lloyds Rep 61 and *Kudos Catering (UK) Limited v Manchester Central Convention Complex Limited* [2013] EWCA Civ 38. However, as Lord Denning emphasised in *Anglo-Continental Holidays*, such claims are unusual. They are difficult to formulate and hard to quantify. A claim for loss of goodwill can therefore be seen as the sort of marginal or speculative claim which a seller might reasonably want to exclude in a SPA like this.

50. In my view, the purpose of this exclusion clause was to exclude any claim by Triumph for damages to Triumph's own reputation, good name or business connection arising from a breach of the SPA. Primus were seeking to exclude their liability for any possible damage to Triumph's business reputation which might arise, for example, if - in breach of warranty - the companies had been convicted in the past of money laundering or corruption, but Primus had not disclosed that information to Triumph. If the convictions had become known after the sale, that could have affected Triumph's business reputation, because they were by then the sole owners of the discredited companies. Primus were seeking to exclude their liability for such a claim through the 3.1(f)(i) exclusion.

51. Triumph's claims in the present proceedings involved no such considerations. They were of a completely different character. As my Lord, Lord Justice Henderson, observed during argument, the 3.1(f)(i) exclusion does not engage with this claim for breach of warranty at all.

52. Finally on this point, I consider that Mr Pillai QC was right to say that, if Primus's construction of the 3.1(f)(i) exclusion was right, there was a very real risk that claims for breach of the 19.5 warranty might never succeed. Take the facts of this case. There was a failure to prepare an LRP for the companies with proper care. Such a failure inevitably affected the overall value of those companies. If Primus were right in their construction, such a claim would be caught by the exclusion clause, because it went to that part of the purchase price not covered by the value of the net assets of the companies at the time of the sale: what Mr Morgan QC called "the top slice over and above net assets"[4]. On Primus's construction, any claim for breach of warranty not relating to existing assets would be covered by the all-encompassing accounting definition of 'goodwill' and thus excluded by the 3.1(f)(i) exclusion.

53. That is not a commercially sensible construction. It is trite law that, as Briggs LJ put it in *Nobahar - Cookson and Another v Hut Group Ltd* [2016] EWCA Civ 128:

> "…the parties are not likely to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect: see *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 per Lord Diplock at 717H, applied in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691; [2010] 1 CLC 934 by Moore-Bick LJ at paragraph 29."

In my view, if Primus's construction of the 3.1(f)(i) exclusion is correct, Triumph would have deprived themselves of most of the force and protection of the warranties in the SPA, without any clear words to that effect. In particular, Triumph would have lost any realistic prospect of claiming damages for breach of the 19.5 warranty, because it would be almost inevitable that such breaches would not relate to the value of assets, but rather to over-optimistic promises for the future. That would negate a fundamental element of the SPA and rob the 19.5 warranty of any real value.

9 CONCLUSIONS

54. For the four separate reasons which I have outlined above, I conclude that the judge was right in her construction of the word 'goodwill' and the effect of the 3.1(f)(i) exclusion. I would therefore dismiss this appeal.

LADY JUSTICE CARR

55. I agree.

LORD JUSTICE HENDERSON

[4] This again demonstrates the significant difference between the ordinary legal meaning of the term 'goodwill' and the accounting definition. The PwC (accounting) definition of goodwill, referred to at paragraph 17 and footnote 1 above, expressly includes within that definition "assets and liabilities that are not measured at fair value". On its face, that would cover, and thus exclude, Triumph's claim in these proceedings.

56. I also agree.