



DAMAGES: VALUATION AND EVIDENCE IN POST-M&A DISPUTES

A PRACTICAL EXAMPLE

ASA CONFERENCE, 16 SEPTEMBER 2016

STEFAN MÖSLI

BUILDING TRUST



BASIS

■ SET-OFF

- If the Purchaser gives notice of a potential claim under this Agreement in accordance with paragraph 2.1 of Schedule 7 (a "**Claim**"), then, the following provisions of this Clause 7 shall apply.
- If a Claim has not been settled to the Vendors (an "**Outstanding Claim**"), then subject to the Purchaser delivering to the Vendors a copy of a satisfactory Counsel's opinion, the Purchaser shall be entitled to withhold from the amount so payable an amount up to the Estimated Liability (the "**Retained Amount**").
- A Counsel's opinion shall be regarded as satisfactory for the purposes of Clause 7.4 if:
 - the opinion is provided by a Queen's Counsel of at least five years' standing;
 - the opinion is in writing;
 - the opinion states that in the opinion of Counsel, on the balance of probabilities, the Outstanding Claim will succeed; and
 - the opinion contains Counsel's estimate of the maximum amount for which the Vendors are likely to be liable pursuant to the Outstanding Claim (the "**Estimated Liability**").

BASIS

Completion Accounts

Dear

During the process of preparing the Completion Accounts circumstances have surfaced in the overseas subsidiaries of _____ which make it impossible for us to submit the final version of the Completion Accounts today. These circumstances were already present before the Completion Date.

We hope to have more information and possibly a final version of the Completion Accounts ready by the end of this week.

Yours sincerely,

Sika AG

BASIS

Notice of claims under Vendor Warranties pursuant to paragraph 2 of Schedule 7 of the Share Purchase Agreement between the Vendors and Sika in respect of (the "Company") dated 27 January 2009 (the "SPA" and the "Notice", respectively)

1. Introduction

1.1 This document constitutes notice of Sika's claims against the Vendors in respect of the Vendors' breach of Vendor Warranties given as an important and integral part of the acquisition of the Company and on which Sika relied. The Vendors are asked to keep both the existence and the content of this Notice and the exhibits thereto confidential in accordance with their obligations under paragraph 15 of the SPA.

1.2 In summary, the essence of Sika's case is that the Vendors failed to Disclose, and/or to make any, or any adequate, provision or disclosure in the relevant company accounts for, certain material liabilities and/or third party claims against certain subsidiaries of the Company, the essential facts of which were known to the Vendors prior to Completion (the "Relevant Underlying Liabilities"). As a consequence, the Vendors are in breach of Vendor Warranties 6.1-6, 7 and 18.1-3 in Schedule 6 of the SPA.

Sika expressly reserves its right to bring additional claims in respect of the same Relevant Underlying Liabilities under other Vendor Warranties in the event that further facts should emerge making this necessary.

1.3 Sika estimates that the value of the Vendor Warranties breached by the Vendors by reference to the Relevant Underlying Liabilities is as follows:

ISSUES

- How to assess damages of (serial) claims?
 - Pressure to settle with customers of acquired company
 - Root cause of failure not known
 - No exact determination of cost of known failures
 - No determination of damages for future claims
- Extreme time pressure

APPROACH

- Immediate gathering of available evidence (e-mail search)
- Appointment of multi-discipline teams in relevant countries
 - Legal
 - Outside expert (engineering, accountants)
 - Involvement of key people of target (R&D)
- Maintain high pressure on sellers
 - Considerable leverage with retained purchase price
 - Strict compliance with process according to SPA
- In total some 30-40 internal and external persons on the case in 5 countries
- Closely managed
 - Numerous telephone conferences
 - Many physical meetings

RESULT (1)

40. Independent reports have been obtained by Sika/ from roofing experts, , and a chemist, Professor . Internal reports have also been obtained from within the Sika/ . The views are consistent in condemning the product.

41. An internal Sika/ report has recently advised that if the problem is solved by fastening a Sikaplan thermoplastic single ply membrane the cost will be of the order of US \$1,800,000. If the layer is removed and the roof recoated with , the cost would be of the order of US \$3,242,000.

42. On the other hand, the Vendors have received (and provided me with a copy of) a lengthy, careful and detailed report from Mr. and Mr. of which points out that the roofing problems are not uniform in nature or extent over various areas of the roof. They express the view that problems are or may be attributable to poor storage of the and/or the manner in which it was applied.

RESULT (2)

59. Whilst the extent of [redacted]'s liability to Sika (if any) is hotly contested, there is at the least a coherent and highly arguable case against [redacted] described in [redacted]'s memoranda and in the internal and external reports sent to me with my original instructions. I emphasise that what I am asked to advise upon is the maximum amount for which the Vendors are likely to be liable. In my view the maximum likely sum is the figure of US \$3,242,000 to which I have referred at paragraph 41 above.

RESULT (3)

SETTLEMENT AGREEMENT

THIS AGREEMENT IS MADE on the 4th day of ~~December 2009~~ ^{January 2010} (effective from 27 December 2009)

BETWEEN:



THANK YOU FOR YOUR ATTENTION

Sika AG
Zugerstrasse 50
6341 Baar
Switzerland
www.sika.com

Stefan Mösli
T: +41 58 436 68 00
moesli.stefan@ch.sika.com

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