Consuming Deals

M&A trends
In the consumer products sector

Our latest
Consumer products deals

A sting in the tail?
The importance of clarity in financial adviser engagement letters
Welcome to the latest edition of Consuming Deals

What is happening in the market?

The consumer products sector continues to perform strongly across Europe and was third highest by completed deal volume in 2014. This issue includes recent M&A trend data which indicates that the sector’s recovery in Western Europe was marked during 2014, with significant increases in total deal values being seen in particular in the UK and Ireland, the Germanic countries and France. Whilst total deal values have suffered setbacks in Southern and Eastern Europe, high volumes of deals are still being done, indicating that there are opportunities for businesses in the sector right across the continent.

The months and weeks leading up to a transaction are invariably an exciting time for our clients, as they look to expand and grow their businesses. In light of two recent judgments, in which the courts interpreted uncertainty in engagement letters in favour of financial advisers, this issue’s specialist article highlights the importance of taking time at the outset to mitigate post-transaction risks.

CMS has continued to advise on high profile deals in the sector and we are pleased to announce that this had been recognised by the market, with CMS once again winning the M&A Today European Consumer Products Law Firm of the Year, now for the third time running. With the relaunch of our knowledge-sharing platform Law-Now, we look forward to sharing the benefits of our sector experience with you.

We hope that you enjoy this latest issue of Consuming Deals and look forward to working with you in the future.

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Our recent consumer products awards

- M&A Today Global Winner 2015
- European Consumer Products Law Firm of the Year 2014
- Ranked no.1 for M&A in Europe 2013
- Bloomberg

Law Firm of the Year 2015
Consumer Products – Europe
Central & Eastern Europe
Legal Advisors of the Year 2014
**M&A TRENDS**

in the consumer products sector

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**Consumer products deal values – back on track?**

Following a drop in overall deal values in 2013 (compared with 2012), the consumer products sector seems back on track as a “hot” area of deal activity in 2014, with the overall value of deals up by more than 50% in comparison with 2013 and 20% above 2012 levels. Whilst countries in CEE (including Russia) and Southern and Eastern Europe saw declines in total deal values, the UK and Ireland, the Germanic countries and France all experienced notable and welcome growth.

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**Completed M&A by sector – heat chart**

By deal volume, the consumer products sector performed strongly in 2014. Consumer products was the third highest sector in terms of completed M&A transactions, with the key CMS jurisdictions of the UK and Ireland and the Germanic countries seeing particularly high deal volumes.

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Source: Mergermarket. The completed M&A heat chart is based on ‘companies sold’ tracked by Mergermarket in Europe during 2014. Deals are captured according to the dominant geography and sector of the target company.

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Source: Mergermarket. The consumer products deal values chart is based on ‘companies sold’ tracked by Mergermarket in Europe. Deals are captured according to the dominant geography and sector of the target company.

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Source: Mergermarket. The completed M&A heat chart is based on ‘companies sold’ tracked by Mergermarket in Europe during 2014. Deals are captured according to the dominant geography and sector of the target company.
A Sting in the Tail?

The importance of clarity in financial adviser engagement letters

During the process of negotiating a financial adviser’s engagement letter it is all too easy to gloss over uncertainty or ambiguity in a desire to achieve an agreement and move swiftly on to dealing with the transaction in hand. However, clarity of wording is crucial, particularly when dealing with the matter of fees. Whilst the financial adviser and client may each believe they understand what has been agreed, a few weeks or months later, they may find that the language of the contract does not precisely capture their intention. Two recent cases before the High Court demonstrate the problems that can arise when the parties dispute terms of an engagement letter. This article analyses these cases and highlights some important lessons to bear in mind when agreeing engagement letters, particularly in relation to common concepts such as tailgunners, success fees and the right of first refusal.


Renaissance Capital Limited (“RenCap”), an investment bank, brought proceedings against African Minerals Limited (“AML”), a former client and natural resources firm listed on AIM which owned rights to develop and exploit mineral assets in Sierra Leone. The proceedings concerned fees claimed to be due to RenCap under a number of engagement agreements with AML.

Tailgunner

One of the engagement agreements provided that a fee would be payable to RenCap if AML “consummated” a sale transaction within one year of terminating the engagement. This is known as a “tailgunner” clause, the purpose of which is to ensure that the adviser is rewarded for work done in the retainer period where the transaction that was the subject of the engagement letter completes shortly after the end of the retainer period or after the client has terminated the engagement.

The dispute arose because AML entered into negotiations with a steel company for the sale of a stake in each of AML’s Sierra Leone subsidiaries after the expiry of the engagement with RenCap. This resulted in AML signing a number of agreements, including a subscription agreement, during the period set out in the tailgunner clause. Accordingly, RenCap sent an invoice to AML requesting payment of the fee due under the engagement agreement in respect of the transaction. However, the transaction only completed after the expiry of the tailgunner period and so AML refused to pay the invoice.

The resolution of this particular issue turned upon the meaning of “consummate”. AML argued that the parties intended the word “consummated” to refer to completion of the relevant transaction. RenCap
contended that “consummate” in this context referred to agreement of material terms of the proposed sale. The judge found in favour of RenCap on the basis that the term “completion” was used in several places within the agreement and there was therefore a strong presumption that “consummation” had a different meaning from “completion”. It had to mean something that occurred prior to completion and the only realistic meaning was “agreement”, whether or not the agreement was subject to any conditions precedent. The judge further accepted RenCap’s argument that the reason “consummation” rather than “agreement” or the execution of a definitive agreement was chosen was because the definition of “Sale” included “tender or exchange offer”, which would not have involved an agreement. Accordingly, RenCap was entitled to a fee in respect of the sale of the interest in the Sierra Leone subsidiary which fell within RenCap’s commission entitlement under the engagement agreement.

**Right of first refusal**

A second issue that arose in the Renaissance case was whether the agreement between AML and RenCap provided for a “right of first refusal” for RenCap to act for AML in further transactions. This time, the judge found in favour of AML, because the relevant clause in the agreement merely said that AML would give RenCap “the first and reasonable opportunity to submit a proposal to the Company”. The judge observed that there was no mention of a right of first refusal (i.e. a right to receive and accept an offer on terms AML was prepared to accept, or a right to match any third party offer which AML might be minded to accept) and such a right could not be inferred from the language used. The more natural interpretation was that the clause gave RenCap a potential advantage over competitors in that RenCap’s proposal would be the first submitted to AML, but the clause did not oblige AML to engage in negotiations with RenCap and AML were free not to accept a proposal from RenCap for any reason. Even if the clause did oblige AML to negotiate with RenCap in good faith, which it did not, the clause would be unenforceable on grounds of uncertainty.

**Implications**

The lesson here is clear: parties should take care to draft their agreements with as much clarity as possible. In particular, synonyms should be treated cautiously as the courts’ view is that “[T]he habit of a legal draftsman is to eschew synonyms. He uses the same words throughout the document to express the same thing or concept and consequently if he uses different words the presumption is that he means a different thing or concept” (Diplock LJ, Prestcold (Central) Ltd v Minister of Labour [1969] 1 WLR 89 at 97B (CA)). If there is any doubt as to what a word or phrase means, the ambiguity can be resolved by giving the word an explicit definition. Moreover, in choosing terms to be defined, clear, mechanical expressions should be favoured over quasi-metaphorical ones such as “consummate”, as these tend to obscurity.

**Edmond De Rothschild Securities (UK) Ltd v Exillon Energy plc [2014] EWHC 2165 (Comm)**

Edmond De Rothschild Securities (UK) Ltd (“Rothschild”), a company which provides corporate advisory services, applied for summary judgment on its claim for the payment of a success fee pursuant to...
a contract it had entered into with Exillon Energy plc ("Exillon"), an energy company. In January 2013 one of Exillon’s shareholders, Worldview Capital Management ("Worldview"), was publicly criticising Exillon’s board and had requisitioned an extraordinary general meeting ("EGM") to remove the chairman and appoint three of its own nominees.

**Tailgunners and success fees**

Rothschild was engaged to assist Exillon in dealing with the forthcoming EGM and specifically to “develop and implement a strategy to persuade Worldview to withdraw from activism against Exillon”. Rothschild was to be paid a monthly retainer, with a success fee if a “resolution” was achieved either during the term of the engagement or within 18 months after termination of the engagement. Resolution depended on the occurrence of one or more of the events listed at clause 3(b) of the letter of engagement. One of those events was Worldview reducing its shareholding in Exillon to below 5 per cent.

The EGM took place in March 2013 and Worldview’s motions were defeated. Thereafter, Rothschild continued to provide some services but ceased to carry out any such work in May 2013 and the engagement was treated as being effectively terminated at this time. In the autumn of 2013, Exillon received two takeover bids and began a formal auction process which led to Worldview selling its entire shareholding in Exillon to one of the potential bidders. This prompted Rothschild to seek payment of the success fee, as the sale had occurred within the period set out in the tailgunner clause.

The issue for determination was whether the success fee was conditional on proof that Rothschild’s activities were an effective cause of the success in question being achieved. Exillon argued that Worldview had sold its shares as a result of the favourable price that was on offer pursuant to the auction process, and not because of the work done by Rothschild which had ceased some five or six months before. The judge found in favour of Rothschild.

On a proper construction of the terms of the letter of engagement, Rothschild’s right to a success fee was not dependent upon a requirement that Rothschild’s services should be an effective cause of a “resolution”. The relevant part of the agreement was expressed in the passive voice ("a resolution … has been achieved") and so in fact did not require that Rothschild should achieve this result by its efforts. That interpretation was supported by two factors. First, it would be difficult for Rothschild to prove that its work was an effective cause of Worldview’s sale of its shares as Worldview was a hostile party and therefore it was reasonable to assume that an explanation for any decision on its part to sell its shares was unlikely to be forthcoming. Consequently, the parties must have contemplated that it might be impossible to evaluate how much Worldview had been influenced by any strategy devised by Rothschild. Secondly, a proper construction of the terms of the letter of engagement indicated that the reason for the sale did not matter to Exillon; all that mattered was that the shares had been sold.

At first glance, this appears to be a case where Rothschild was provided with a windfall. However, on closer inspection, it is apparent that the wording of the letter of engagement was simple and certain. If Exillon had wanted to qualify the right to a success fee, it should have included wording that required some proof of a causal link between the activities of Rothschild and any of the events which was considered to be a “resolution”, or that excluded a sale as part of a takeover offer.

This case also emphasises the significance of the duration of a tailgunner clause. The party responsible for the fees under the engagement letter will presumably prefer a shorter period. However, if a party has to agree to a longer tailgunner clause, the effects of this can be mitigated through careful consideration of the risks and appropriate drafting. After all, the longer the period between the end of the adviser’s services and the success in question being achieved, the more likely it is that the transaction in question may occur independently of the adviser’s original efforts.

**Conclusion**

The two cases above show that careful drafting to avoid ambiguity in an engagement letter is crucial for both the financial adviser and client, especially where fee arrangements are applicable after the termination of the engagement. Taking the time to ensure clarity at the outset of the engagement (and thinking about alternative possible scenarios) will be to the benefit of both parties and will help to mitigate the risk of costly and time consuming disputes.

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Our latest deals

Some recent examples of deals CMS has advised on in the consumer products sector

**Finsbury Foods**
Advised AIMquoted baker Finsbury Foods on its acquisition of the Fletchers Group of Bakeries, which created one of the UK’s largest retail and wholesale bakery groups.

**Butcombe Brewery**
Advised LGV Capital on the Liberation Group’s acquisition of Butcombe Brewery, the award-winning brewer and pub management group.

**Furniture Village**
Advised the Business Growth Fund on its acquisition of a minority stake in Furniture Village, the sofa specialist with annual revenues of £200 million.

**Dixons Retail**
Advised Dixons Retail, the UK-based multi-channel electrical retailer on the sale of its ElectroWorld operations in the Czech Republic and Slovakia, comprising 26 stores, to Slovak electronics retailer NAY.

**Sofa.com Limited**
Advised CBPE Capital LLP in relation to the acquisition of Sofa.com Limited, the cutting-edge online furniture retailer.

**TGI Fridays**
Advised Electra Partners on its acquisition of the UK TGI Fridays franchise, the American-style restaurant chain currently with 66 locations in the UK.

**Hollywood Bowl**
Advised Electra Partners on its acquisition of The Original Bowling Company, the UK’s largest ten-pin bowling operator, which trades under the Hollywood Bowl and AMF brands.

**Sofa specialist with annual revenues of £200 million**

**Restaurant chain currently with 66 locations in the UK**

**One of the UK’s largest retail and wholesale bakery groups**

**Award-winning brewer and pub management group**

**The UK’s largest ten-pin bowling operator**

**UK-based multi-channel electrical retailer**

**The client service is exceptional and the corporate team’s commercial awareness is also second to none.**

*Chambers & Partners 2015 (Corporate/M&A)*
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Opportunities from CMS to gain insight into the consumer products sector

12 May 2015
Roundtable Breakfast Series
‘Social media’
Mitre House, London

4 June 2015
Annual Consumer Products Conference
Soho Hotel, London

Autumn 2015
Consumer Products Client Drinks Reception
Cannon Place London

For further information or to register please contact events@cms-cmck.com

Consumer products bulletins

Taking Stock covers current legal issues affecting the consumer products and retail sectors.

CMS European M&A Study 2014
An analysis of over 2,400 European M&A deals on which CMS advised between 2007 and 2014, giving unique insight into recent M&A deal trends.
Meet some of the

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Please feel free to contact any of the team members above, should you be interested in any of the matters included in this publication

Excellent - very professional and reactive.

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(Corporate/M&A)

Their pragmatism is excellent, and they maintain good client relationships.

Chambers & Partners 2015
(Retail)
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