

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GLIDEPATH LIMITED, a New Zealand	:	
entity, and SIR KEN STEVENS, KNZM,	:	
	:	
Plaintiffs,	:	
	:	
v	:	Civil Action
	:	No. 12220-VCL
BEUMER CORPORATION, a Delaware	:	
corporation, GLIDEPATH LLC, a	:	
Delaware limited liability	:	
company, THOMAS DALSTEIN, and	:	
FINN PEDERSEN,	:	
	:	
Defendants.	:	

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, November 26, 2018
10:03 a.m.
- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

- - -
PARTIAL RULINGS OF THE COURT ON POST-TRIAL ORAL
ARGUMENT
- - -

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 FRANCIS G. X. PILEGGI, ESQ.
3 GARY W. LIPKIN, ESQ.
4 Eckert, Seamans, Cherin & Mellott, LLC
5 for Plaintiffs

6 BENJAMIN A. SMYTH, ESQ.
7 McCarter & English, LLP
8 -and-

9 WILLIAM D. WALLACH, ESQ.
10 STEPHANIE A. PISKO, ESQ.
11 of the New Jersey Bar
12 McCarter & English, LLP
13 for Defendants

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1 THE COURT: I'm going to give you two
2 rulings today, and then I'm going to take the rest of
3 it under advisement.

4 The first issue I'm addressing is the
5 defense based on the release that appears in
6 Section 8.3.2 of the operating agreement. This is not
7 an issue that I believe was appropriately raised at
8 this stage.

9 First, in terms of language of the
10 contract, it contemplates that a general release would
11 be executed and delivered. It doesn't spell out that
12 in any greater detail. Regardless, and more
13 importantly, I think this is an instance of judicial
14 estoppel. There is absolutely no reason for us to be
15 here or for us to have had a trial or for me to have
16 already written a decision if this argument had any
17 purchase. Nor would I have allowed this deal to close
18 and not granted some form of injunctive relief against
19 the exercise of the call if I believed that by doing
20 so I was essentially rendering the litigation
21 ineffective and moot without giving the plaintiffs any
22 chance ever to prove their claims.

23 I thought this release was
24 interesting, and said so at the hearing, because it

1 has this ostensibly all-encompassing effect where
2 simply by exercising the call, the buyer can give
3 itself a free pass for any misconduct that has gone
4 before. I think that is dubious in itself, but the
5 fact that I was told at that time that money damages
6 could be a suitable remedy and I went forward on that
7 basis means that the release concept is no longer in
8 play.

9 If the release was in play, I wouldn't
10 have allowed the deal to close, and if I had allowed
11 the call to close, we would not have been here. We
12 would not have spent four days together having a
13 trial. I would not have spent a lot of hours writing
14 a decision on your reformation claim, and I would not
15 be now looking at a lot of hours writing a post-trial
16 decision on the earn-out claim.

17 The second argument that I think is
18 perhaps not equally strained but similarly strained is
19 the assertion of the \$500,000 cap. It is a cap on
20 indemnification as a remedy. It is not a broad
21 liability cap. It is a cap that is part of the
22 indemnification provision, which is keyed off reps and
23 warranties and, yes, covenants. I addressed this in
24 the *Curo* case. I hope this will not become an

1 argument that people start creatively raising.

2 A payment provision is not a covenant.
3 If I have agreed to pay you a hundred million dollars
4 for your company and we agree to an indemnification
5 regime in which there's a million-dollar cap on
6 indemnification for breach of any rep, warranty, or
7 covenant, and we close and I refuse to pay you the
8 hundred million dollars that I owe you, that is not a
9 breach of a covenant to which the \$1 million
10 indemnification cap applies. That is a breach of a
11 payment provision. Otherwise, everyone would go
12 around breaching acquisition agreements constantly
13 because the standard acquisition agreement has an
14 indemnification provision. The indemnification
15 provision covers covenants. The indemnification
16 amount is usually set at 5 to 10 percent of the deal
17 value. So if this argument worked, it would be the
18 biggest windfall for acquirers known to mankind
19 because they could walk on any deal, refuse to pay,
20 and then invoke the claim that the payment provision
21 was a covenant to which the indemnification cap
22 applied and, therefore, they didn't have to pay any
23 more than whatever the indemnification cap is.

24 The earn-out and the other contingent

1 forms of consideration in this deal are payment
2 provisions. They're part of the consideration for the
3 deal that the sellers get. They're not covenants.
4 They're not reps or warranties to which this type of
5 indemnification cap applies.

6 Now, to the extent there is an
7 indemnification remedy, yes, the cap applies, just as
8 the other provisions of the indemnification regime
9 apply. But it doesn't apply to the earn-out, just
10 like it wouldn't have applied to the original
11 \$1 million paid at closing.

12 So both of those arguments I am
13 rejecting as a matter of law.

14 As to the rest of the disputes, I am
15 going to take the matter under advisement, and I will
16 give you-all a post-trial ruling that works through
17 all the issues you've presented.

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 6 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 10th day of December 2018.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter