Litigation

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English Law: When Contractual Limitations on Damages Can Backfire

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In AB v. CD *[2014] EWCA Civ 229, the Court of Appeal for England and Wales addressed an issue with surprisingly little precedent. It held that a claimant seeking an injunction to prevent an alleged wrongful termination of a contract was entitled to argue that damages could not be an adequate remedy because recoverable damages were limited or excluded under the contract.*

The Claimant AB instituted arbitration proceeding against CD, and also sought an interim injunction before Stuart-Smith J. of the English High Court Queen's Bench Division under Section 44 of the Arbitration Act 1996 requiring CD to continue to perform his obligations under the contract and preventing termination of a licence of certain intellectual property rights pending the conclusion of the Arbitration proceedings. The Claimant argued in support of its application for injunctive relief that damages would not be an adequate remedy at law since the contract excluded liability for a number of types of loss and otherwise capped the total damages recoverable.

Judge Stuart-Smith concluded that AB's application should be refused because CD did have an adequate remedy in damages. He proceeded nevertheless to consider whether, if he had reached the opposite conclusion, the balance of convenience would have favored the grant of an injunction. He held that it would, relying on the decision in *Ericsson AB v. EADS Defence and Security Systems Ltd.* [2009] EWHC 2598 (TCC). However, he believed that there was a tension between that decision and other authority and therefore gave AB permission to appeal.

The Court of Appeal first noted that it is axiomatic that an injunction will not be granted if damages would be an adequate remedy for the wrong. But how does that apply in cases of an alleged breach of contract where the contract contains a provision limiting the recoverable damages to below what might otherwise have been awarded as a matter of general law? The court then applied the logic in *Bath v. Mowlem*, [2004] EWCA Civ 115, to accept the appellant's argument that an injunction should be granted where damages as limited under the contract at hand could not be considered an adequate remedy barring that relief. The Court began by holding that the primary commercial expectation in any contract must be that the parties will perform their obligations. A clause which restricts the entitlement to recover damages for breach is a

secondary obligation that cannot be treated as a licence to breach or an agreement to excuse the primary obligation to perform. Injunctive relief, at least where not expressly excluded by the terms of the agreement, is a remedy available to the court to give effect to commercial expectations where it is a just result that agreed obligations should continue to be binding on the parties, whether for an interim period or the term of the contract.

However, the Court also held that the party applying for an interim injunction would still have to show that if the threatened breach occurs there is (at least) a substantial risk that he will suffer loss that would otherwise be recoverable, but he will (or at least may) be prevented from recovering in full, or at all, by the limitation or exclusion in question. If he does, then the claimant will indeed have established that his remedy in damages may not be adequate. But that only opens the door to the exercise of the court's discretion; and the fact that the restriction in question was agreed may, depending on the circumstances of the case, be a relevant consideration—as may the scale of any shortfall and the degree of risk of it occurring.

This conclusion may disappoint some who would argue that the commercial expectations of the parties were set by the entire package of rights and obligations in the agreement, including any limitation or exclusion of liability, even if that barrier might be effective to block a claim for loss of profits that would otherwise accrue to a party if termination is unjustified. That is simply part of the bargain that the parties struck when executing the agreement, and it would not be unjust to consider the agreed scope of damages when determining whether there is an adequate remedy available.

Ultimately, the Court of Appeal felt that the justice of the case required an injunction lest otherwise a party could potentially breach a contract with impunity and without effective consequences. It is, therefore important for contracting parties to keep in mind that typical limitation of liability clauses may not prevent injunctive relief. As Lord Justice Laws succinctly put it: 'Where a party to a contract stipulates that if he breaches his obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which in justice tends to favour the grant of an injunction to prohibit the breach in the first place.'

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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