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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Case update: injunctions: meaning of "adequate remedy"

AB v CD

[2014] EWCA Civ 229

We reported on this case in Issue 163. In this appeal, the CA had to consider a point of principle about the proper approach to the granting of interim injunctions. When deciding whether to grant an injunction, the well-known principles set out by Lord Diplock in the *American Cyanamid* case will be applied. These include whether there is a serious question to be tried and whether damages would be an adequate remedy. Here this led to consideration of the impact of limitation of liability clauses when an interim injunction is sought in an attempt to prevent one party terminating the agreement. Clause 11.4 of the agreement limited the damages either party could recover and excluded certain heads of loss altogether, including loss of profit.

Mr Justice Stuart-Smith had decided that the injunction should not be granted because the damages were an adequate remedy. The commercial expectations of the parties were set by the package of rights and obligations that constituted the agreement (namely clause 11.4). On appeal, Underhill LJ noted that where the parties to a commercial contract have agreed that in the event of a breach damages for certain heads of loss will be irrecoverable, it is right in considering whether an injunction should be granted, to ignore the fact that the innocent party may suffer loss falling under those heads. He then broke down clause 11.4 into two elements: first, liability was excluded for a number of types of loss, including "lost profits" and heads of damage; and second, there was a cap on such damages as might nevertheless be recoverable.

There was therefore a serious risk that AB's claim for damages would be excluded or limited by it. Underhill LJ then went on to consider the 2004 case of *Bath and North East Somerset DC v Mowlem plc*, which was itself a decision of the CA. On behalf of AB, it was submitted that the Bath case constituted binding authority that an applicant for an injunction was entitled to argue that damages would not be an adequate remedy for a threatened breach of contract because the recoverable damages were limited by a clause excluding or limiting liability for the kind of loss which was likely to be caused by the breach.

However, it was also submitted that this was in any event the correct position in principle. The primary obligation of the party to a contract was to perform his contractual obligations. The obligation to pay damages in the event of breach is a secondary obligation, and an agreement to restrict the damages recoverable in that event (whether by excluding certain types of loss or imposing a cap on the amount recoverable) did not constitute an agreement that a party could walk away from his primary obligations even in circumstances where an injunction would otherwise be workable.

On behalf of CD, the focus was on the rule that the court would not normally grant an injunction where damages would be an adequate remedy. The damages with which the rule was concerned were the damages "recognised by the contract". For a court to hold that damages were not an adequate remedy for a breach because the parties had agreed – in a clause that affected both parties equally – to restrict the damages recoverable would indeed fail to give effect to their commercial expectations.

Underhill LJ noted that the *Bath* case did not decide anything to the contrary. It was indeed an unusual case, but also constituted binding authority on the point and was right in principle. There is a distinction between a claim to recover damages and a claim for an injunction which is designed to avoid any cause for a claim to such damages. The parties' agreement as to the quantification of loss is conclusive to the first point but not the second. Thus the purpose of clause 11.4 here is to deal with what damages a party can recover when the other is liable for a breach of contract.

However, the primary obligation of a party is to perform the contract. The requirement to pay damages in the event of a breach is a secondary obligation, and an agreement to restrict the recoverability of damages in the event of a breach cannot be treated as an agreement to excuse performance of that primary obligation. Therefore Underhill LJ concluded that there was no question of the commercial expectations of the parties being undermined. The primary commercial expectation must be that the parties will perform their obligations. The expectations created (indeed given contractual force) by an exclusion or limitation clause are expectations about what damages will be recoverable in the event of breach, something rather different. He therefore allowed the appeal. The other two Appellate Judges agreed, providing their own short statements of principle to reinforce the point. Ryder LJ noted that he favoured:

"re-casting the question to be asked on an application for injunctive relief, which is: 'Is it just in all the circumstances that a [claimant] be confined to his remedy in damages?' "

Whilst Laws LJ succinctly dealt with the issue in this way:

"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."

Case update: net contribution clauses

West and another v Ian Finlay & Associates

[2014] EWCA 316 Civ

We reported on the first instance decision in Issue 155. In that decision, the Wests had previously been awarded damages and interest totalling £649,251.06 and £243,688.89 respectively against IFA in connection with the renovation and improvement of a property in Putney. IFA appealed.

The net contribution clause (the "NCC") stated:

"Our liability for loss and damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you."

Mr Justice Edwards-Stuart had held that the NCC did not operate to limit IFA's liability to the Wests in a situation where the other party liable was the main contractor, Maurice Armour (Contracts) Ltd ("Armour"), therefore, he did not reduce the Wests' damages on account of the fact that Armour was also responsible for some of the losses. Here, IFA submitted that the Judge should have held that the NCC did operate to limit IFA's liability when any other contractor was responsible for some of the loss and that the case should be remitted back to the TCC to reassess the amount it was reasonable for IFA to pay. The Wests agreed with the Judge's view, but even if he was wrong, the NCC cannot operate to exclude the principle of joint and several liability. If the NCC was to have that effect, it should be held unenforceable under (a) the requirement of good faith in the UTCC Regulations 1999; and (b) the reasonableness requirement in UCTA 1977.

The key question for Vos LJ in considering the Judge's reasoning regarding construction was the context upon which he (and the Wests) placed such reliance. Vos LJ held that the normal meaning of words was clear: the NCC stated that IFA's "liability for loss or damage" was to be limited to the amount that it was reasonable for it to pay having regard to "the contractual responsibilities of other consultants, contractors and specialists appointed by [the Wests]". There was, in his view, no limitation on the words "other consultants, contractors and specialists appointed by [the Wests]", and they must be taken to mean any such persons, including any appointed main contractor, but excepting IFA (because of the use of the word "other". The fact that IFA was a consultant and not really a contractor was immaterial to the analysis.

The meaning of the NCC was clear and the relevant factual matrix did not lead Vos LJ to conclude that the parties should be taken to have used the wrong language to express their agreement. Consequently, there was no need for the Judge to resort to the provisions of 7(2) of the UTCC Regulations which state that:

"[i]f there is doubt about the meaning of a written term, the interpretation which is more favourable to the consumer shall prevail."

The second issue concerned the questions of unfairness under Regulation 5 of the UTCC and reasonableness under UCTA. The Wests submitted that the Judge was wrong for the following main reasons:

(i) The Judge wrongly equated lack of good faith with bad faith, and failed to have regard to all relevant matters under regulations 5 and 6 of the UTCC Regulations.

(ii) The NCC placed the risk of Armour's insolvency on the Wests, and this was especially disadvantageous taken together with the arbitration provisions. The adverse consequences were not drawn to the Wests' attention as recommended by the RIBA.

(iii) The NCC was a clause of a type listed in schedule 2 to the UTCC Regulations, in that it inappropriately limited liability, and required the Wests to sue other parties to obtain full recompense.

(iv) The NCC caused a significant imbalance in the parties' rights and obligations arising under the agreement to the detriment of the Wests. Where IFA and the contractor were liable in law for the same loss, IFA could escape responsibility for a significant proportion of that loss making it disadvantageous for the Wests to sue IFA at all, and shifting the risk of others' insolvency from IFA to the Wests.

Vos LJ noted that whilst each case turned on its own facts, here the openness of the presentation of the NCC, IFA's fair dealing in relation to it and the reasonable equality of bargaining power of the parties, were to be weighed in favour of a finding that the inclusion of the NCC satisfied the requirement of good faith.

Vos LJ did not consider that, viewed in isolation, the imbalance was significant due to the fact that the inclusion of such clauses was commonplace in standard RIBA forms, and that a NCC would not be considered unusual in a commercial contract. The Wests also had the final say over the choice of main contractor. In such circumstances, the NCC could not be seen to be so weighted in favour of IFA as to tilt the parties' rights and obligations under the contract significantly in IFA's favour. Furthermore, the NCC did not cause a significant imbalance in the parties' rights and obligations in a manner or to an extent that was contrary to the requirement of good faith. Vos LJ therefore rejected the contention that the NCC was not binding on the Wests under the UTCC Regulations. He was also satisfied that the NCC fulfilled the requirement of reasonableness within the meaning of UCTA and was therefore an effective limitation on IFA's liability.

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