TERMINATION AND BREACH: TERMINATION RIGHTS AND THE CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020. REMEDIES FOR BREACH OF CONTRACT AND EXCLUSION OF LIABILITY

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The subject-matter of this seminar is broad but it also includes one rather specific issue, namely the changes which have been introduced by the Corporate Insolvency and Governance Act 2020 in relation to the content of termination clauses. In essence, the new law places significant limits on the ability of a supplier of goods or services to terminate a contract where its contractual counterparty has entered into a relevant insolvency procedure. Before examining the Act, it is necessary to consider the nature of termination and to examine termination more generally before turning to the changes which have been introduced by the 2020 Act. As was the case with the first seminar in this series, we shall proceed by asking a series of questions. The recent cases to which reference is made in the text are discussed in more detail in the Appendix which is to be found at the end of this paper.

1. TERMINATION

What is termination?

This may seem too elementary a place to start. But it is important to ensure that we clearly identify our subject-matter. Termination for this purpose is the prospective discharge of the contract so that the parties are released from the time of termination from their primary obligations to perform under the contract. We are not here concerned with the retrospective unwinding of the contract which occurs in the case where the contract is set aside for misrepresentation or duress (to give but two examplesAc). Given that discharge is prospective in nature, rights which have accrued before the time of discharge are not divested or discharged as a result of the termination of the contract. Furthermore, it is possible for the parties to agree that certain terms of their contract will survive the termination of their contract (for example an arbitration clause or a confidentiality clause).

Does a breach of contract operate of itself to terminate the contract?

The general answer at common law is that a breach of contract does not operate to bring about the prospective discharge of the contract. Where the breach is a repudiatory breach of contract at common law, the effect of the breach is to give to the innocent party an option either to terminate or to affirm. Where the innocent party elects to terminate the contract, then the exercise of that election will operate to bring about the prospective discharge of the contract. But where the innocent party elects to affirm the contact (or does not take the step of bringing the contract to an end) the contract will remain in existence so that both parties in principle remain bound to perform their obligations under the contract. In the case where termination takes effect under an express term of the contract, it is always necessary to pay careful attention to the wording of the termination clause. While the clause may confer upon one party the

entitlement to bring the contract to an end, it is also possible for the parties to draft a clause which will bring the contract automatically to an end on the occurrence of a certain event. In the latter case the occurrence of the event will of itself bring the contract to an end without the need for any action to be taken by the parties to the contract.

When does the right to terminate arise?

The answer to this question depends in large part on the terms of the contract between the parties. Contracts generally contain with them a termination clause which sets out the circumstances in which the contract can be terminated and the financial consequences of a decision to terminate the contract. But the law also sets out circumstances in which the contract may be terminated and we shall consider these first before turning to the express terms of the contract.

The grounds on which a contract may be terminated at law

There are a number of grounds on which a contract may be terminated under the general law of contract. These include discharge by (i) performance, (ii) agreement, (iii) breach and (iv) frustration. In this seminar our principal focus will be on discharge for breach.

When does the general law of contract confer on an innocent party the right to terminate the contract on the ground of the other party's breach of contract?

The answer to this question depends upon the nature of the term broken, that is to say whether the term broken is a condition, a warranty or an innominate (or intermediate) term. We can deal with breach of a warranty quickly. A warranty is a lesser, subsidiary term of the contract and a breach of such a term gives rise to a right of action for damages (as do all breaches of contract) but it does not give rise to a right to terminate the contract. By contrast, a breach of a condition always gives rise to a right to terminate, whereas in the case of a breach of an intermediate term, the existence of the right to terminate will depend upon the consequences of the breach.

When will a term be held to be a condition?

A term will be held to be a condition in one of three circumstances: (i) where the term has been classified as a condition by statute (eg ss 12-15 of the Sale of Goods Act 1979), (ii) where the term has been classified as a condition by a prior judicial decision (eg certain time stipulations in cif and fob contracts), but note not the time of payment) and (iii) where the parties have agreed to classify the term as a condition.

The important point to note in relation to (iii) is that the parties are free in principle to classify any term of the contract as a condition. In other words, the parties can classify as a condition a term which would not otherwise so qualify. Concern is sometimes expressed as a result of the decision of the House of Lords in *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 where a term described as 'condition' was held not to be a condition in law. But the case may be explained on the basis that the contract was poorly drafted (particularly in connection with its relationship to a material breach provision in the contract) and the majority of the court was not convinced that the parties had intended to use the word condition in its technical sense (part of the problem with the word condition is that it can be used in a non-technical sense, such as 'terms and conditions of business'). However, provided that the contract clearly provides that the term is a condition of the contract, a court should give effect

to the term as it stands. An alternative to describing the term as a condition is to state that performance of the obligation is 'of the essence of the contract'. The effect of making an obligation 'of the essence of the contract' is to turn the obligation into a condition, breach of which will give to the other party the right to terminate further performance of the contract (*Lombard North Central plc v Butterworth* [1987] QB 527).

Although it is possible to turn every term in a contract into a condition, it is more sensible only to draft a term as a condition where it is likely that you will wish to terminate the contract in the event of breach. If too many terms are drafted as conditions, and termination does not follow upon breach of the condition, the risk is that a court may conclude that a party has waived its right to terminate because of the practice that has grown up of permitting a breach to occur without termination taking place.

When will a term be held to be an innominate term?

If a term has not been previously classified as a condition, the likelihood is that the term will be classified as an innominate term of the contract. As Hamblen LJ observed in *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep 447, [93] 'the modern approach is that a term is innominate unless a contrary intention is made clear.' The decision whether a term is a condition or an innominate term depends upon an evaluation of all the facts and circumstances of the case. A recent example of this balancing process is to be found in the recent decision of the Court of Appeal in *Ark Shipping Company LLC v Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep 603 (discussed further in the Appendix) in which the Court of Appeal overturned the decision of Carr J at first instance and held that the term in dispute was an innominate term and not a condition. The decision of the Court of Appeal is more consistent with current judicial practice than the decision of Carr J (and so the safest assumption to make in relation to a contract term which has not been classified by the parties is that it is an innominate term, not a condition).

When will a breach of an innominate term give rise to a right to terminate?

In order to be entitled to terminate further performance of the contract following on from a breach of an innominate term, the innocent party must establish either that it has been deprived of 'substantially the whole benefit' of the contract or that it has been deprived of a 'substantial part of the benefit to which [it] is entitled under the contract' (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26). The test sets a high standard and it is not easily satisfied (see *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377, [48]). Thus a number of cases can be found recently in which a party has purported to terminate the contract following a breach by the other party of an intermediate term, only to find that the court has held that the breach was not of sufficient gravity to entitle it to terminate the contract. A party who purports to terminate the contract when not entitled to do so will generally be held to have repudiated the contract and will face an exposure to a claim for damages for wrongful termination which could be very expensive. The price of making the wrong call can be a very high one and it is of the utmost importance that a party establish, as far as it can, that it has an entitlement to terminate before it takes the step of seeking to terminate the contract. The classification of a term as an innominate term carries with it an inherent risk that a court may conclude that there was no entitlement to terminate on the facts because the breach was not of sufficient gravity. This risk can be avoided

either by classifying the term as a condition (on which see above) or by relying upon an express termination clause in the contract and it is to express termination clauses that we now turn.

When will an express term of the contract give to a contracting party the right to terminate the contract?

The answer to this question depends upon the wording of the termination clause. It is common for express termination clauses to extend beyond breaches of contract and to include a range of matters such as termination on the giving of notice and the insolvency of a party to the contract (although the latter term must now be read in the light of the Corporate Insolvency and Governance Act 2020, on which see below). But before turning to consider the application of an express termination clause to matters which do not involve a breach of contract, we shall first examine the case in which the express termination clause deals with the right to terminate further performance of the contract as a result of a breach of contract committed by the other party to the contract.

What approach to the courts take towards the interpretation of express termination clauses?

At times the courts have taken a rather restrictive approach to the interpretation of express termination clauses and it is therefore important to proceed with care before seeking to terminate a contract following a breach of one of the terms of the contract. The most infamous example of the restrictive approach of the courts is to be found in the case of *Rice v Great Yarmouth Borough Council*, *The Times*, 26 July 2000, where the local authority purported to terminate the contract under a term of the contract which stated that

> if the contractor commits a breach of any of its obligations under the contract, the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.

The Court of Appeal concluded that the notion that this term entitled the Council to terminate the contract at any time for any breach of any term flew in the face of commercial common sense (the contract was one which was designed to run for 4 years). The clause was held only to give the Council the right to terminate the contract on the occurrence of a repudiatory breach of contract and the Court of Appeal held that the trial judge had been entitled to conclude on the facts that there had not been a repudiatory breach of contract so that the Council was not entitled to terminate the contract. It was therefore liable in damages to the contractor.

Three points should be noted here. The first is that the word 'any' was held not to mean 'any' but to mean 'any repudiatory breach'. It is unlikely that this is what the parties intended but it is the conclusion that the court reached on the evidence before it. The second is that the local authority was held liable in damages as a result of its wrongful termination of the contract, thus illustrating the point that the price of making an incorrect call on the decision to terminate can be a high one.

The third is that there is evidence post *Rice* that the court may take a more relaxed approach to the interpretation of an express termination clause where the ground on which it is sought to terminate the contract is one that does not involve a breach of contract by the other party to the contract. In *Looney v Trafigura Beheer BV* [2011] EWHC 125 (Ch) a contract gave a party an

entitlement to terminate the contract on the payment of an early termination fee of £1 million. The defendants purported to exercise their right under the clause but the claimant submitted that they were not entitled to do so because the defendants lacked reasonable and proper grounds to invoke the clause. Newey J held that wording of the clause suggested, on its face, that the defendants had an untrammelled right to terminate the contract provided that they paid the relevant fee. It was held that there was 'nothing nonsensical' about giving the defendants an unfettered right to terminate provided that they paid the relevant fee. The clause was held to be analogous to a break clause in a lease. The important point to note here is that the termination clause was not tied to the existence of a breach of contract. In the event of the claimant committing a repudiatory breach of contract, the defendants could have decided to bring the contract to an end by accepting the repudiatory breach rather than by invoking the termination clause. Acceptance of such a repudiatory breach would not have required the defendants to pay the early termination fee to the claimant, but it would have required them to prove that a repudiatory breach of contract had been committed. But an alternative course of action would be to invoke the early termination clause and so remove the need to prove the existence of a repudiatory breach by the claimant, although the price would be a liability on the part of the defendants to pay the early termination fee.

When is a breach of contract 'material'?

It is not uncommon to find that an express termination clause gives a right to terminate the contract only upon breach of a 'material' term of the contract. While confinement of the right to terminate to breach of a 'material' term of the contract may be sensible in commercial terms (by confining the right to terminate within proper limits), it is not without its difficulties in legal terms because of a lack of clarity as to the meaning of the word 'material' in this context. In particular, it is not easy to discern the extent to which it sets a lower threshold than that applicable at common law when seeking to establish the existence of a repudiatory breach. A court will have regard to all the facts and circumstances of the case when deciding whether or not a breach is material, including the nature of the breach, the consequences of the breach and its effects on the innocent party (*Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599). It is possible to reduce the uncertainty by stipulating that breaches of certain terms are to be regarded as 'material' breaches for the purposes of the contract. But beyond that it is difficult to be certain whether or not a particular breach will be accepted by the court as a material breach (and similar problems arise if the right to terminate is confined to a 'substantial' breach of contract). This being the case, there is a risk inherent in terminating a contract on the ground of material breach because a court may conclude after the event that the breach was not in fact material at all with the consequence that the termination will be held to have been wrongful.

Can an express termination clause extend to matters that are not breaches of contract?

The short answer to this question is 'yes'. As *Looney v Trafigura Beheer BV* (above) demonstrates, it is common practice for contracting parties to include a range of events within a termination clause, some of which do not depend for their exercise upon proof that the other party to the contract has committed a breach of contract. The scope of the clause will, of course, depend upon the wording of the particular clause. It was common practice to include within a termination clause the entry by one of the parties to an insolvency process (the exact scope of the clause varied from clause to clause). But the ability to rely on clauses of this nature has

been severely curtailed as a result of the enactment of the Corporate Insolvency and Governance Act 2020, to which we now turn.

What changes have been made by the Corporate Insolvency and Governance Act 2020?

The Act has introduced a new s 233B into the Insolvency Act 1986 which will have a significant impact on the validity of contractual terms which purport to entitle a contracting party to terminate a contract when its counterparty enters into an insolvency procedure. The provisions of the Act, while relatively few in number, are rather technical and detailed and no more than a brief overview can be provided here. If your present practice is to include terms of this nature in your standard terms of contract, then you should take further professional advice as to what is to be done with that standard clause.

In broad terms section 233B provides that a term in a contract for the supply of goods or services to a company which provides for the termination of the contract in the event that the company goes into a relevant insolvency procedure shall cease to have effect when the company becomes subject to such a procedure. In short, terms which purport to confer a right to terminate the contract in such circumstances will not be effective. The policy behind this provision is to further encourage the rescue culture by placing a firm limit on the ability of suppliers to terminate its contract with a contracting party that is experiencing significant financial difficulty or to use the termination clause as a mechanism to extract a 'ransom' from the other party to the contract. To this extent, the legislation impinges upon the contractual freedom of the parties by limiting their entitlement to terminate the relationship between the parties at the onset of insolvency. As we shall see, the scope of the Act extends beyond this category of case into a broader category, but it is best to start with what might be termed the 'core' case to which the new provision applies.

To which contracts does s 233B apply?

The section states that it applies to 'a contract for the supply of goods or services' to a company. It is, however, important to note that Schedule 12 to the Act enacts a new Schedule 4ZZA to the Insolvency Act 1986 which excludes a range of contracts from the new requirements. Contracts excluded include those entered into by people in financial services (such as insurance, banking, payment systems, investment exchanges and securitisation), contracts involving financial services (such as lending, finance leasing, guarantees, securities contracts, commodities contracts, futures contracts, swap agreements, inter-bank borrowing agreements and master agreements relating to any of the above, securities financing transactions, derivatives, spot contracts, capital market investments and contracts forming part of a public-private partnership). Nor does the new provision affect existing legislation relating to financial markets and insolvency, set off and netting arrangements under section 48 of the Banking Act 2009 and contracts that fall within the provisions dealing with aircraft under the Cape Town Convention on Mobile Equipment. The list of exclusions is extensive and it will be important to examine contracts with some care to see whether or not they fall within the list of exclusions or whether they are caught by s 233B. The quality of the drafting of these exclusions has been the subject of some criticism and so it will be important to pay careful attention to the wording of the relevant exclusion. It may also be possible to re-draft the contract in such a way as to bring it within one of the exclusions. If this can be done, then the termination clause will not be open to challenge.

The Act does not apply to the right of the customer to terminate the contract on the entry of a supplier into a relevant insolvency procedure. Such termination clauses are unaffected by the Act.

From what point in time does the Act apply?

The Act came into force on 26 June 2020 and so will apply where the relevant insolvency procedure commenced after that date. The important point to note here is that the section will therefore apply contracts concluded prior to the coming into the force of the Act because the relevant date for the purposes of the Act is the date of entry into the relevant insolvency procedure, not the date of entry into the contract. This being the case, it will be necessary to consider the impact of the Act upon existing contracts which have a termination provision in them and not simply contracts entered into after the coming into force of the legislation.

What is 'a relevant insolvency procedure'?

Section 233B(2) sets out a list of procedures that for this purpose will constitute 'a relevant insolvency procedure.' A number of points should be noted here. First, the section only applies where 'a company' is subject to one of these procedures. Second, the company must become 'subject to' the relevant procedure. Third, the list of relevant procedures is extensive and consists of a moratorium under Part A1 of the 2020 Act, administration, administrative receivership, company voluntary arrangements, liquidation, provisional liquidation or a reconstruction plan under s 901C(1) of the Companies Act 2006. The list is thus extensive but does not include a scheme of arrangement. Fourth, the point in time at which the relevant insolvency procedure ends is set out in s 233B(8).

What does the Act prevent you from doing?

The section provides that a term of the contract ceases to have effect to the extent that, when the company becomes subject to the relevant insolvency procedure, the term provides that 'the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure' (see 233B(3)(a)). In other words, contracting parties can no longer effectively provide that the contract shall cease to have effect when the company becomes subject to the relevant insolvency procedure.

It does not matter for this purpose whether the termination occurs automatically on the occurrence of the company being subject to a relevant statutory procedure or whether termination occurs at the election of the supplier: in both cases the term is rendered unenforceable.

Not only that, the parties cannot agree that 'any other thing' will take place as a result of the company being subject to the relevant insolvency procedure. The scope of the latter phrase is not at all obvious. The example given by the government in its explanatory note is that it is not permissible to change payment terms on the entry into the relevant procedure. But 'any other thing' is not confined to this example and would appear to encompass the exercise of any contractual right which is triggered by entry into the relevant insolvency procedure. Thus stipulating for some penalty to be paid by the company would appear to amount to some 'other thing' for this purpose. More difficult perhaps is the case where the contract term provides for redress against another member of the corporate group. For example, it is not clear whether 'any other thing' might extend to the triggering of a parent company guarantee.

Given that the statute states expressly that the term shall cease to have effect, it would appear to be impossible to draft around it in the sense of trying to find some way to give the term legal force. The statement in the section that the term shall cease to have effect therefore places a significant limit on the ability to draft around the provision. The emphasis may well switch to doing due diligence prior to entry into the contract rather than enter into the contract and rely on the right to terminate in the event that the company gets into financial difficulty.

It is also important to note that the section renders ineffective a term of a contract where the breach (or the relevant termination event) has occurred prior to entry into the relevant insolvency procedure (and even if the right to terminate arises from an event that is unrelated to the insolvency of the company) but the attempt to invoke the clause occurs after entry into the procedure. It may therefore be important to exercise a right to terminate quickly because a delay may prove to be fatal in the case where the company subsequently enters into a relevant insolvency procedure.

It is important to emphasise that the question here is not whether the **breach** occurred prior to the entry into the relevant procedure. It is whether the **termination** took place before entry into the procedure. This being the case, if the aim is to ensure that the Act does not apply, it will be important to ensure that termination takes place before the entry into the procedure.

Is it possible to provide that future supplies will be subject to the repayment of outstanding liabilities?

The answer is 'no'. Section 233B(7) provides that a supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

Is the right to terminate lost in all circumstances upon entry into a relevant insolvency procedure?

The right to terminate is not lost in all circumstances. The Act makes provision for two situations in which termination remains possible. The first is in the case where the relevant office-holder or the company consents to the termination of the contract (the person who can consent depends on the insolvency procedure which the company is in). The second is where 'the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract.' It is not clear how effective the latter procedure is going to be. First, it is not clear what will constitute 'hardship' for this purpose and, second, the supplier will have to go to the trouble of getting the permission of the court. It is also the case that there will be a right to terminate the contract in respect of fresh breaches of contract that occur after the company has become subject to the relevant insolvency procedure and where the breach is one that gives rise to a right to terminate.

The legislation also does not apply to a right of termination which arises and is exercised prior to the company being subject to a recognised insolvency procedure. So there is no statutory objection to a term which creates a right to terminate when a company gives notice of its intention to appoint an administrator or if its financial standing has deteriorated in a significant respect (for example, its credit-rating has been downgraded) and the right is exercised prior to entry into the relevant procedure. It may also be possible to impose on the customer an

obligation to keep the supplier informed of changes in its financial position so that the supplier has the information it requires to terminate the contract prior to the point in time at which the Act bites.

What about the existing essential supplies provisions?

Section 233A of the Insolvency Act 1986 already prohibits the termination of contracts and supplies in relation to certain 'essential supplies' (such as gas, water and electricity). These existing prohibitions remain in place and so the new restrictions must be read alongside these existing prohibitions.

What about the exemption for small suppliers?

There is a temporary exemption for small suppliers through to 30 September 2020. A small supplier for this purpose is a supplier who meets two of the following three criteria in its most recent financial year: (i) turnover of no more than £10.2 million; (ii) a balance sheet of no more than £5.1 million and (iii) an average of no more than 50 employees.

Is it worth retaining provision in an express termination clause for the termination of the contract in the event of entry by one party into an insolvency procedure?

On the face of it, there is not. The clause is not enforceable and so what is the point or retaining it? On the other hand, it has been argued by some that it might be worth retaining such a provisio non the ground that it may help to persuade the office holder or, in an appropriate case, the court to give consent to the termination of the contract after the company has entered into the relevant insolvency procedure.

REMEDIES FOR BREACH (OTHER THAN TERMINATION)

There has been relatively little recent case law of significance on remedies for breach of contract. The aim of damages remains the same, namely to put the innocent party as far as money can do it in the position which he would have been in had the contract been carried out according to its terms. Nor has there been any change in relation to the penalty clause rule or the availability of specific performance remedy. Rather than deal with the law in relation to these well-known areas, the focus in the next section will be upon those areas of the law of remedies, particularly damages, which have been the subject of recent cases of some significance.

Is it possible to recover damages in respect of the loss that has been suffered by a sister company or another member of the corporate group?

A claim of this nature failed on the facts of *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2020] QB 551 (discussed further in the Appendix). Such a claim could be put on one of two possible bases. First, as a claim to recover for the loss suffered by the sister company but here the problem is that the law of contract does not generally enable a contracting party to recover damages in respect of a loss suffered by a third party. The second is to claim that the contracting party has itself suffered a loss but this can be difficult to prove at least in the case where the defendant's breach of contract has not caused the claimant to be in breach of its contract with the sister company. On the facts the Court of Appeal held that the claimant was not entitled to recover damages in respect of the

losses sustained by its sister company because it had not been the common intention of the parties or a known object of theirs to benefit the sister company.

When will a loss be held to be too remote a consequence of a breach of contract?

In *Attorney-General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18 (discussed further in the Appendix) the Privy Council re-stated the law relating to remoteness of damage in breach of contract cases. On the facts it held that an employer who was in breach of a contract to design and build a plant as a result of its failure to make the site available to the contractor was liable for the loss of profit suffered by the contractor under a separate agreement between the parties which had been entered into on the same day to manage, operate and maintain the plant once it had been built. The loss was held not to be too remote a consequence of the breach of the design and build contract notwithstanding the fact that it was a loss that arose under a contract which was legally separate from the design and build contract. The justification for holding the employer liable was that these losses were held to be within the reasonable contemplation of the employer at the time at which it entered into the design and build contract as liable to result from the breach of that contract. This being the case, the losses were not too remote a consequence of the breach of contract.

When is a claim in unjust enrichment inconsistent with the contractual allocation of risk?

The courts will not generally permit a claimant to bring a claim in unjust enrichment where such a claim would subvert the contractual allocation of risk. However, the Court of Appeal in *Barton v Gwyn-Jones* [2019] EWCA Civ 1999 (discussed further in the Appendix) held that the fact that the estate agent had not achieved the price for the sale of the property which triggered his contractual right to payment did not preclude him from bringing a claim in unjust enrichment for the reasonable value of the services that he had rendered in bringing about the sale at a lower price. The parties had not agreed in their contract that the claimant would only receive payment if the stipulated price for the sale of the property had been achieved. Rather, they had agreed that the contractual fee would only be payable in that event and that was not a bar to recovery on a different base, namely in unjust enrichment, when the agreed price had not been achieved.

When will the courts grant relief against forfeiture when an interest in land is forfeited as a result of a breach of contract?

In *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2019] UKSC 46, [2019] 3 WLR 852 (discussed further in the Appendix) the Supreme Court held that the jurisdiction to grant relief from forfeiture of rights relating to land did extend to possessory rights and was not confined to proprietary rights in relation to land. The inclusion of possessory rights within the scope of the jurisdiction was held not to introduce an unacceptable degree of uncertainty into English law.

When can a claim for negotiating damages be brought and what is the relationship between a claim for negotiating damages and the availability of an injunction?

In *Priyanka Shipping Ltd v Glory Bulk Carriers Pty Ltd* [2019] EWHC 2804 (Comm), [2019] 1 WLR 6677 (discussed further in the Appendix) it was held that negative covenants (such as the covenant not to trade further with the vessel) are ordinarily, but not invariably, enforced by means of an injunction. It is not a precondition to the grant of an injunction that the party

seeking the injunction must prove that it would otherwise suffer damage. In exercising its discretion whether or not to grant an injunction, the court may decline to grant an injunction where it would be unconscionable or oppressive to grant the remedy but the burden of proof lies on the party bound by the negative covenant to show why the remedy should not be granted on this ground. On the facts of the case damages would not have been an adequate remedy and so an injunction was granted. However, the judge declined to make an award of negotiating damages because this was not a case in which the breach of the negative covenant had caused the loss of any profit nor had it resulted in further expenditure being incurred. Nor was it a case concerned with the breach of a restrictive covenant over land or of a contractual right to control the use of land, or with the breach of an intellectual property agreement or a confidentiality agreement. Negotiating damages are typically available in cases of the latter type and, given that the present case did not fall within this list of cases, it was held not to be appropriate to award negotiating damages.

EXCLUSION CLAUSES

There has been surprisingly little litigation of significance over the validity of exclusion and limitation clauses in the last year. But there are two points of significance to which it is worth drawing attention.

Does the contra proferentem rule still apply to exclusion and limitation clauses?

In *The Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), [2019] 1 CLC 207 (upheld by the Court of Appeal: [2019] EWCA Civ 1641 and discussed further in the Appendix) Andrew Burrows QC, sitting as a Judge of the High Court, confirmed the limited role that the *contra proferentem* rule now plays in English contract law. This is so for three reasons. The first is there is some doubt about who, for this purpose, is the proferens (is it the party who drew up the clause or simply the party seeking to rely on it?). Second 'the modern objective and contextual approach to the meaning of words, with business common sense and purpose also being relevant in some cases, renders it unnecessary to regard there as being a separate *contra proferentem* rule.' Third, the 'force of what was the *contra proferentem* rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words.'

If a clause excludes liability for 'indirect or consequential loss' what types of liability have been excluded?

In *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC) (discussed further in the Appendix) O'Farrell J affirmed that the words 'indirect or consequential loss' will generally be held to mean those losses that are recoverable by virtue of the fact that they fall within the second limb of the rule in *Hadley v Baxendale*. That is to say, they are not losses that flow naturally from the breach but are nevertheless recoverable because they were within the reasonable contemplation of both parties at the time of entry into the contract. It is important to note that indirect or consequential loss is not to be equated for this purpose with loss of profit. It will only exclude losses of profit that are indirect or consequential and in many cases the loss of profit will be held to flow naturally from the breach and so not be within the scope of the exclusion clause.

APPENDIX: RECENT CASES

CLASSIFICATION TERM HELD NOT TO BE A CONDITION

In *Ark Shipping Company LLC v Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep 603 one of the issues before the court was whether clause 9A of an amended standard BARECON '89 form was a condition or an innominate term. The clause provided:

> The Vessel shall during the charter period be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and~~, except as provided for in Clause 13 (I)~~, they shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter.

The issue in dispute before the Court of Appeal was whether the obligation to keep the vessel with unexpired classification of the class indicated and with other required certificates in force at all times was a condition or an innominate term. At first instance, Carr J held that the term was a condition, whereas the Court of Appeal held that it was an innominate term.

The Court of Appeal confirmed that the question of the classification of the term was one of construction of the contract. For a number of reasons it was held that the term was not a condition. First, the term was not expressed as a condition. Second, the clause was not a time clause (the type of clause where the courts have been most willing to classify a term as a condition). Third, there was no inter-dependence between the obligations of the parties. Fourth, an examination of the clause as a whole confirmed that the clause was unlikely to be a condition given that it was accepted that the maintenance obligation was not a condition. Fifth, the obligation extended to keeping 'other required certificates in force at all times' and if this obligation was a condition, it could result in the termination of the contract even if there was only a single failure in relation to a particular certificate. Sixth, the breach of the term could result in trivial, minor or very grave consequences. Seventh, the obligation was a continuing one running for a 15 year period and courts are generally slow to conclude that a continuing obligation has the status of a condition.

There were, however, factors which pointed the other way – for example, the nature of the breach was such that either the vessel was in classification or it was not and the classification status of the vessel was a matter of some importance to the parties. But these factors were not enough to outweigh the factors pointing in the direction of the term being innominate.

The importance of the case lies in the court's balancing of the various factors which were taken into account when deciding whether the term was a condition or an innominate term. No one factor predominates in that balancing process. It is necessary to have regard to all the facts and circumstances of the case and, as the present case demonstrates, the courts do disagree when

seeking to classify the status of a particular term (with Carr J concluding it was a condition and the Court of Appeal that it was innominate). Contracting parties who wish to have a greater measure of certainty would be well advised to classify the term as a condition if that is what they wish to agree. Otherwise, the default position of a court asked to rule on the status of the term may be that it is innominate.

NO RECOVERY FOR LOSS SUSTAINED BY A SISTER COMPANY

The claimant in *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2019] 3 WLR 1113 brought a claim for damages against the defendant after the defendant had suspended performance of the contract between the parties. It included within its claim for damages a claim for loss of profits sustained by its sister company who would have supplied some of the products which were the subject-matter of the contract of sale. The question of law for the Court of Appeal was put in the following terms: whether, if a contract of sale is performed partly by the seller as the contracting party and partly by a non-contractual party but with the consent of the buyer (the counter-party to the contract) the contracting party can recover for both its own losses and those of the non-contracting party, in the event that the buyer, in breach of contract, refuses to perform.

The Court of Appeal held that on the facts of the present case the claimant was not entitled to recover damages in respect of the losses sustained by its sister company. The reason for this was that it was not the common intention of the parties or a known object of theirs to benefit the sister company. At the time of entry into the contract, the defendant was not aware of the existence of the sister company and so it could not have known that that company would be supplying some of the products under the contract. The sister company was in essence a sub-contractor of the claimant and its involvement in the performance of the contract with the defendant was entirely a matter for the claimant. If the claim had been allowed it might have entitled a contractor to bring a claim against its employer for losses suffered by its sub-contractor even if the employer had no knowledge of the existence of the sub-contractor or that the sub-contractor was going to be used on the project. A contractor has no entitlement to recover on behalf of the sub-contractor in such cases and the claimant had no entitlement to recover in respect of its sister company on the present facts. The fact that the claimant and the sister company were owned by the same family did not change the legal analysis. This was so for two reasons. First, the claimant and its sister companies were separate legal entities who traded with one another on commercial terms. Second, the family members were not entitled to rely on the separate corporate form when it suited them but then 'seek to break down the barriers when it creates difficulties.' The claimant was therefore not entitled to recover damages in respect of the losses suffered by its sister company.

REMOTENESS OF DAMAGE IN CONTRACT

In *Attorney-General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18 the Government of the British Virgin Islands entered into two contracts with Global Water Associates Ltd (GWA) relating to a proposed water reclamation treatment plant. The first contract was a Design Build Agreement (DBA) under which GWA agreed to design and build the plant. The second contract was a Management, Operation and Maintenance Agreement

(MOMA) under which the Government engaged GWA to manage, operate and maintain the plant at the site. In breach of the DBA the government failed to provide a prepared project site to enable the installation of the plant so that the plant was never built. The issue before the Privy Council was whether GWA could recover its losses under the MOMA in its claim for damages for breach of the DBA. The Privy Council held that it could and that such losses were not too remote a consequence of the government's breach of the DBA.

Lord Hodge, giving the judgment of the Privy Council, derived from the authorities a number of principles to be applied by the courts when considering whether a loss is too remote a consequence of a breach of contract. First, the purpose of an award of damages for breach of contract is to put the innocent party, as far as money can do it, in the position it would have been in had its rights under the contract been observed. Second, the innocent party is 'entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach.' To be recoverable 'the type of loss must have been reasonably contemplated as a serious possibility.'

Third, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed. Fourth, the test to be applied is an objective one so that the focus of attention is not on what the defendant actually contemplated but on what the defendant 'must be taken to have had in his or her contemplation' and so 'one assumes that the defendant at the time the contract was made had thought about the consequences of its breach. Finally, the criterion for deciding what the defendant must be taken to have had in contemplation as the result of a breach of the contract is a factual one.

Applying these principles to the facts of the case, Lord Hodge held that the losses resulting from an inability of GWA to earn profits under the MOMA were within the reasonable contemplation of the parties to the DBA when they entered into the contract. This was so for a number of reasons. First, the two contracts were entered into between the same parties on the same day and they both related to the same plant. On this basis the losses under the MOMA were losses which could reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. In other words, they were losses that fell within the second limb of the rule in *Hadley v Baxendale.* Second, the Government when it entered into the DBA knew and intended that the performance of each party's obligations under the DBA would lead to the commencement of the MOMA (as evidenced by the terms of the DBA which included provision for the issue by GWA of a Commencement Certificate which would indicate the commencement of the management, operation and maintenance phase of the plant). Third, the Design Build Documents which were incorporated into the DBA were the same documents as had been incorporated into the MOMA. Fourth, there was no express term in the DBA which limited the Government's liability in damages to GWA's loss of earnings under the DBA and there had been no finding by the arbitrators that such a term was to be implied into the DBA. The losses were therefore not too remote a consequence of the breach of contract.

One final factor worthy of note is the marginalisation of the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 where Lord Hoffmann and Lord Hope held that the test to be applied when considering whether a loss is too remote a consequence of a breach of contract was whether the defendant

had objectively assumed responsibility for the loss in question (in which case the loss was not too remote a consequence of the breach). In the present case Lord Hodge sought to limit the significance of *The Achilleas* in two respects. First, he concluded it was a case concerned with 'the recoverability of damages caused by unusual volatility in the market or questions of market understanding.' Second, the assumption of responsibility test was described by Lord Hodge as 'a further limitation on contractual damages' or as 'a further restriction on recoverability.'

UNJUST ENRICHMENT CLAIM NOT INCONSISTENT WITH CONTRACT

In *Barton v Gwyn-Jones* [2019] EWCA Civ 1999 the Court of Appeal held that to permit the claimant to bring a claim in unjust enrichment was not to subvert the contractual allocation of risk, nor was it inconsistent with the terms of the contract between the parties.

The claimant entered into an oral agreement with Foxpace under which the latter agreed to pay the claimant £1.2 million if Nash House was sold for £6.5 million to a purchaser introduced by the claimant. The claimant subsequently introduced a purchaser who was willing to pay £6.5 million. However, as a result of the blight created by HS2 which affected the property, the sale actually completed for £6 million. Foxpace subsequently entered into liquidation and the defendant to the present proceedings was the sole director of Foxpace. The claimant sought to prove his debt of £1.2 million but the defendant denied a liability to pay that amount.

Under the terms of the contract the claimant was only entitled to the fee of £1.2 million if the property was sold for £6.5 million. But it was held that the parties had not agreed that the claimant would be remunerated if, and only if, the property was sold for £6.5 million or more. Thus there was found to be nothing in the contract, objectively construed, which had the consequence that the claimant should receive nothing at all unless the price of £6.5 million was achieved. The contract was held to be 'silent as to what was to happen if the sale completed for a purchase price of less than £6.5 million.' While the claimant took the risk that there would be no sale at all, it had not been expressly agreed that he would not be entitled to recover at all in the event that there was a sale but at a price less than £6.5 million. This being the case, there was held to be 'nothing which would preclude [the claimant] from seeking remuneration on the basis of unjust enrichment' and in making such an award 'the court would not be undermining the contractual allocation of risk negotiated by the parties.'

It was held that Foxpace had been enriched by the receipt of a benefit as a result of the introduction of a purchaser who was willing to, and did, complete the purchase of the property. The service provided by the claimant was held to have been rendered 'in circumstances in which the specific fee had not been agreed but it was not expected that the agent would be unpaid.' The figure of £1.2 million was held not to be a reliable measure of that value because it was linked to the recoupment by the claimant of the lost deposits on the two purchases which had not proceeded to completion. The judge had decided that the proper valuation of the services should be determined by reference to other agreements for introduction fees entered into by Foxpace in relation to failed transactions for the sale of Nash House. He took as the midpoint of those figures the sum of £435,000 which was held to be the sum to which the claimant was entitled. This was held to be the correct approach on the basis that the judge had relied upon 'the only reliable evidence as to the objective value of the services which was available to him.' On this basis the claimant was held to be entitled to recover £435,000.

RELIEF FROM FORFEITURE AND POSSESSORY RIGHTS

In *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2019] UKSC 46, [2019] 3 WLR 852 the Supreme Court held that the jurisdiction to grant relief from forfeiture of rights relating to land did extend to possessory rights and was not confined to proprietary rights in relation to land. The inclusion of possessory rights within the scope of the jurisdiction was held not to introduce an unacceptable degree of uncertainty into English law.

The defendant granted to the claimant a licence in perpetuity which entitled the claimant to discharge surface water and trade effluent into the defendant's canal through a drainage system which was constructed by the claimant on the defendant's land. The consideration payable by the claimant for this licence was £50 per year. The claimant failed to pay the £50 and also failed to respond to reminders sent by the defendant which led to the defendant exercising its right to terminate the licence.

In these circumstances the claimant sought relief from forfeiture of the licence. Relief was granted at first instance and in the Court of Appeal and the Supreme Court dismissed the defendant's appeal. As Lord Briggs noted, the jurisdiction of the courts of equity to grant relief from forfeiture is a remedy of 'ancient origin.' The modern restatement of the jurisdiction is to be found in the judgment of Lord Wilberforce when giving the judgment of the House of Lords in *Shiloh Spinners Ltd v Harding* [1973] AC 692 where he affirmed 'the rights of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result.'

On behalf of the claimant it was submitted that the use of the concept of possessory rights in relation to chattels in the decided cases was to be equated with something 'more akin to ownership, and therefore a proprietary interest, in relation to land.' This submission was rejected by the Supreme Court on the ground that the 'frequent use' in the case law of the words 'proprietary or possessory' as alternatives in relation to rights over personalty clearly pointed to a recognition that a purely possessory right is something falling short of ownership, or of a proprietary interest. Given that what matters is the nature of the right rather than the identity of the property over which it may be exercised, there was held to be 'every good reason to apply a jurisdiction applicable to possessory rights as much to rights over land as to rights over other forms of property.'

On the facts of the case it was held that Vauxhall had the requisite degree of possession and control over the land to bring the jurisdiction to grant relief against forfeiture into play and so the appeal was accordingly dismissed.

INJUNCTIONS AND NEGOTIATING DAMAGES

In *Priyanka Shipping Ltd v Glory Bulk Carriers Pty Ltd* [2019] EWHC 2804 (Comm), [2019] 1 WLR 6677 the parties entered into a contract for the sale of a bulk carrier vessel. Clause 19 of the contract provided:

> The vessel is sold for the purpose of demolition only and the Buyers hereby guarantee that they will not trade the Vessel further nor sell the vessel to a third party for any purpose other than demolition and will, on completion of demolition, furnish to the Sellers a certificate stating that the vessel has been totally demolished.'

The claimant buyer found it difficult to sell the vessel for demolition as a result of changes in the market. So it began to look for alternatives, including the use of the vessel to carry a cargo. It sought a release from the defendant sellers from its obligations under clause 19 but the defendant declined to give its consent. The claimant nevertheless entered into two trading fixtures involving the vessel and entered into a third immediately before the hearing. The claimant's case was that the defendant was only entitled to recover nominal damages in respect of any breach of contract by the claimant, while the defendant sought an injunction to restrain the claimant from committing any further breaches of contract and it also sought to recover damages in respect of these breaches.

David Edwards QC, sitting as a Deputy Judge of the High Court, first considered whether the defendant was entitled to the injunction which it sought. He distilled the following principles from his review of the authorities: (i) negative covenants will ordinarily, although not invariably, be enforced by means of an injunction; (ii) it is not a precondition to enforcement by injunction that the party seeking the injunction should prove that it would otherwise suffer damage; (iii) an injunction is an equitable, discretionary remedy; (iv) so far as the exercise of the discretion is concerned, there may be cases where the circumstances are such that the grant of an injunction would be unconscionable or oppressive and in such circumstances an injunction should be refused (although the courts here do not adopt a mechanistic approach and inconvenience or hardship to the defendant is not to be equated with unconscionability or oppressiveness); and (v) the burden lies on the party bound by the negative covenant to show why the ordinary rule should not apply, ie why the covenant should not be enforced by injunction.

On the facts of the present case there had been three undisputed breaches by the claimant of the negative covenant in clause 19 and, this being the case, the ordinary position was that the defendant was entitled to an injunction to enforce the clause. This was not a case where the grant of an injunction would be oppressive or unconscionable for the defendant. Its breaches of contract had been deliberate, no extraordinary financial consequences would flow from the decision to grant an injunction and damages would not have been an appropriate remedy for the defendant. He therefore granted to the defendant an injunction restraining further breaches of clause 19 and this injunction encompassed the third fixture as well as the first two.

Having decided to grant the injunction in these terms, the only remaining issue in relation to the defendant's claim for damages was in respect of the past breaches of contract committed by the claimant in respect of the first two fixtures. The principal issue to be decided here was whether the defendant was entitled to recover negotiating damages on the basis of the decision of the Supreme Court in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649. The defendant's case was that it was entitled to damages of some US$2.4 million, this being the difference between the value of the vessel subject to the clause 19 restriction and the value of the vessel without that restriction.

It was held that this was not a case in which it was appropriate to award to the defendant negotiating damages. In reaching this conclusion the Deputy Judge attached importance to a

number of factors. First, this was not a case in which the breach of clause 19 had caused the defendant to lose any profit or to incur any additional expenditure. Second, the present case did not fall within any of the situations identified by Lord Reed in *One Step*. This was not a case concerned with the breach of a restrictive covenant over land or of a contractual right to control the use of land, or with the breach of an intellectual property agreement or a confidentiality agreement. The defendant sought to maintain that clause 19 was analogous to a restrictive covenant on the sale of land, but the analogy was rejected by the Deputy Judge. This was not a case where the restrictive covenant ran with the land or property nor was it a case where clause 19 was seeking to protect intellectual property or confidential information. Once the vessel had been sold and delivered to the claimant, the defendant no longer had a proprietary or financial interest in the vessel. The claimant's subsequent use of the vessel, albeit a breach of contract, did not involve the claimant in using something in which the defendant had an interest in the form of a valuable asset to which the defendant was entitled to require payment. The defendant's right was in fact held to be analogous to the non-compete obligation which was broken in *One Step* where the Supreme Court held it was not appropriate to award negotiating damages. Given that the only pleaded claim for damages was one for negotiating damages and such damages were held not to be available it followed that the defendant was only entitled to nominal damages in respect of the claimant's breach of contract in relation to the first and second fixtures. But it is important to note that the Deputy Judge entered a caveat in relation to any future breach of contract committed by the claimant. He was not prepared to give to the claimant the comfort that any future deliberate breach of contract which it committed would only give rise to a claim for nominal damages. It was no part of the court's function to assist a party contemplating what would be a deliberate breach of contract in this way.

INTERPRETING EXCLUSION CLAUSES

In *The Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm) (upheld by the Court of Appeal: [2019] EWCA Civ 1641) Andrew Burrows QC noted the reluctance of the law to conclude that a party has given up a valuable right in the absence of clear words to that effect. This suggests that any judicial abandonment of the *contra proferentem* rule may have little impact in practice given the courts' insistence that clear words are used to exclude liabilities that would otherwise have arisen. This point can be seen in relation to the rules or principles that the courts apply when considering whether one party has effectively excluded liability for its own negligence. On the facts of the case Andrew Burrows QC concluded that, while the *Canada Steamship* guidelines are a 'flexible guide' and not a 'rigid code', 'clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence.'

The point can also be seen in relation to a further argument advance on behalf of the bank when it sought to rely on clause 10.1 by way of defence to the claim brought against it. The clause provided as follows:

> The Depositor hereby irrevocably and unconditionally agrees on demand to indemnify, and to keep fully and effectively indemnified … the Depository, and its directors, officers, agents and employees (the "indemnitees") against all costs, claims, losses, liabilities, damages, expenses, fines, penalties, Tax and other matters ("Losses") which

> may be imposed on, incurred by or asserted against the indemnitees or any of them directly or indirectly in respect of:
>
> (a) the following of any instruction of other directions upon which the indemnitees is authorised to act or rely pursuant to the terms of this Agreement, or arising as a result of entering into this Agreement or their status as holder of the Depository Cash…

It was held that this clause could not be relied upon by the bank because it was dealing with the bank's liability towards third parties and not with its liabilities to its own customers. In any event, even if did apply to customers, it was held not to extend to the liability of the bank in the present case because 'a court should be reluctant to find that a generally worded clause, rather than an explicit reference to negligence, exempts, or indemnifies against, negligence (which would take away a valuable right).' Thus the following of instructions negligently was held not to be covered by the general words of clause 10.1 which did not explicitly refer to negligence.

INDIRECT OR CONSEQUENTIAL LOSS OR DAMAGE

One of the issues that arose on the facts of *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC) was the meaning of the words indirect or consequential loss in a an exclusion clause. The clause provided as follows:

> 'Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business."

There is a consistent line of authority which equates 'indirect or consequential loss' with the second limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341. That is to say, such a clause does not exclude liability for losses that flow naturally from the breach, but rather is confined to those special or exceptional losses which are recoverable only by virtue of the fact that they were in the contemplation of both parties at the time of entry into the contract.

O'Farrell J reviewed these authorities in some detail. Counsel for the claimants submitted that the losses suffered by the claimants flowed naturally from the breach and so were within the first limb of *Hadley v Baxendale* and so had not been excluded by clause 10.3. O'Farrell J held that the first half of the clause (that is the words before 'including') did not on their face encompass claims arising as a direct and natural result of the fire. More difficult was the second half of the clause (that is the words following 'including') where it was held that the effect of the words in parentheses was 'to negate the illustration intended by the words of inclusion.'

O'Farrell J held that there was no definition of 'indirect or consequential loss' in the contract that indicated that the term was used to denote a wider range of losses than those that fell within the second limb of *Hadley v Baxendale.* Given that the losses claimed by the claimants fell within the first limb of *Hadley,* they were not excluded by clause 10.3.