Termination in accordance with contractual terms will prevent subsequent claim for "loss of bargain" damages at common law (Phones 4U Limited (in administration) v EE Limited)

31 January 2018

Restructuring & Insolvency analysis: Samuel Parsons, barrister at Guildhall Chambers, discusses Phones 4U Limited (in administration) v EE Limited, which considered the availability of common law damages pursuant to a contractual termination

Phones 4U Limited (in administration) v EE Limited [2018] EWHC 49 (Comm) (Andrew Baker J)

Practical implications

This case highlights the importance of accuracy in any notices sent between the parties. When things are moving quickly in a commercial environment, even a minor adjustment to wording can have critical ramifications should the matter eventually come before a judge.

Phones 4U v EE also serves to remind practitioners of the importance of good drafting technique and practice. The Defendants were criticised by Andrew Baker J for imprecision in their drafting, which led to various unsustainable allegations of actual breach after termination (at [20]-[21]). Poor drafting will inevitably lead to delays, amendments, and increased costs (see [23]-[25]).

Background

The parties were both well-known fixtures on Britain's high streets, until Phones 4U's dramatic closure and entry into administration in September 2014.

The trading relationship between the parties was governed by two written agreements; one for monthly contracts, and one for pay as you go (PAYG) contracts. The termination provisions (on which this comment focuses) for the monthly contracts also applied to the PAYG contracts. For simplicity, this comment refers to it as the "Trading Agreement".

Clause 14.1 of the Trading Agreement provided:

"*14.1 Either party may at any time by giving notice in writing to the other terminate this Agreement with immediate effect:*

14.1.1 if the other party commits a material breach of this Agreement and either such breach is incapable of remedy or, if capable of remedy, has not been remedied to the reasonable satisfaction of the other party within 30 days of a written request from the other party to remedy such breach; or

14.1.2 if the other party is unable to pay its debts... or takes any steps (or any third party takes any steps in respect of the other party) to: initiate a composition, scheme, or other arrangement with any of its creditors (including any voluntary arrangement); resolve or petition to wind up that other party; appoints an administrator, receiver or manager over all or any part of that other party's business undertakings or assets; pass a resolution for that

other party's winding up, or has a petition presented to any court for its winding up or for an administration order or if any analogous event occurs in any jurisdiction."

A termination letter (the "Letter") was sent by EE to Phones 4U after administrators were appointed September 2014, and stated:

"*We refer to the* [Trading] *Agreement.*

In accordance with clause 14.1.2 of the Agreement, we hereby terminate the Agreement with immediate effect.

As a result, we hereby terminate with immediately [sic.] *effect your authority to sell and promote all EE products and services contemplated by the Agreement...*

Nothing in this notice shall be construed as a waiver of any rights EE may have with respect to the Agreement... Without limiting the generality of the previous sentence, nothing herein shall be deemed to constitute a waiver of any default or termination event, and EE hereby reserves all rights and remedies it may have under the Agreement...

This notice is governed by English law."

The characteristic features of the case were that (i) a contractual right to terminate existed, triggered otherwise than by breach; (ii) that right was expressly exercised; and (iii) at the time of termination, (a) no mention was made of any breach (actual or anticipatory) but (b) a repudiatory breach and/or renunciation in fact existed. (At [83].)

Issues

The focus of Andrew Baker J's decision was on the counterclaims brought by EE (in the context of a summary judgment application) against Phones 4U. Those counterclaims revolved around Phones 4U's alleged inability to meet its obligations to, *inter alia*, market and promote EE's marks and services, procure customers for EE, and to do similar things for Apple products in conjunction with EE's services.

Phones 4U's responses were that:

(1) there had not been any breach of those obligations;

(2) alternatively, (a) none of the obligations alleged were conditions, (b) by 1pm on 17 September 2014, any breach had not deprived EE of substantially the whole benefit of the Trading Agreement and (c) as of 1pm on 17 September 2014, Phones 4U had not renounced the Trading Agreement. Therefore, EE can have no claim for damages for loss of bargain.

(3) In any event, EE had terminated the Trading Agreement under clause 14.1.2 rather than for breach, so EE had no loss of bargain claim even if when EE terminated those arrangements Phones 4U had been guilty of repudiatory breach or renunciation.

This case comment focuses on the third of these issues: did the terms of EE's termination letter prevent EE from later claiming for damages on the common law "loss of bargain" basis?

The Court's decision and reasons

Andrew Baker J decided (at [88]) that in a case where a contractual right to terminate not founded upon breach accrues and is the only right expressly exercised, no common law damages claim for loss of bargain can be sustained.

The judgment builds on a wealth of case law, and in particular *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75. The argument accepted by the Court of Appeal in that case was that the appellant/buyer "*did not elect to treat any of the contracts as repudiated in accordance with the general law, but chose instead to exercise the rights of termination given by the contract itself*" (*per* Moore-Bick LJ at [17]). The difference in *Phones 4U* was that the relevant outcome–in terms of the level of damages available–was radically different: cf. *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm).

Ultimately, Andrew Baker J found that the Letter was "*entirely clear*", and communicated a right to terminate independent of any breach. The alternative was described (at [132]) as permitting EE to "*re-characterise the events after the fact and claim that it terminated for breach when that is simply not what it did*."

What next?

One question mark that remains is what happens in the following scenario: (1) the parties have an express termination clause, which provides for a certain measure of loss; (2) the agreement provides that termination can only take place in accordance with that clause; (3) the notice specifies that termination is on the common law (and not contractual) basis, presumably because it would give a larger measure of damages; and (4) that right to repudiatory damages exists. In other words, can the common law rules on repudiation be completely ousted by contract *ex ante*?

There would be significant tension in such a case between two 'default positions' of contract law: the freedom of the parties to contract, and the "loss of bargain" measure of damages. The court would presumably be reluctant to find that such a valuable right had been excluded: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689, 717. But assuming there was no doubt as to the objective intentions of the parties (and no statutory controls intervened), *Phones 4U* indicates that the former principle should prevail.

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