

THE COMPLEX
COMMERCIAL
LITIGATION LAW
REVIEW

Editor
Steven M Bierman

THE LAWREVIEWS

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ENGLAND & WALES

*Oliver Browne, Ian Felstead and Mair Williams*¹

I OVERVIEW

Courts of England² are some of the most established fora for dealing with complex commercial litigation. The Civil Procedure Rules (CPR) that govern litigation are robust and provide a clear framework for the cost-effective resolution of disputes – governing every aspect of cases from pleadings to evidence, witnesses and costs. Models of alternative dispute resolution are also well established. England boasts experienced professionals and practitioners and the courts operate specialist courts, such as the Commercial Court and the Technology and Construction Court, where judges have particular expertise.

When deciding on matters involving contracts, the courts have always sought to uphold the terms of valid contracts, particularly in situations where the contracting parties were involved in the negotiation of terms. There has always been a focus on the need for certainty when looking at contracts, so that each party understands the entirety of its obligations. It is for this reason that the courts have repeatedly rejected an implied term of good faith in commercial contracts. Much of the law governing commercial disputes has evolved through case law rather than through statute, with the Misrepresentation Act 1967, Unfair Contract Terms Act 1977, Limitation Act 1980 and the Contracts (Rights of Third Parties) Act 1999 being notable exceptions.

In addition to breach of contract claims, alternative causes of action are available, including economic torts, which offer claimants the opportunity, in some instances, to seek remedies beyond the terms of the contract.

1 Oliver Browne and Ian Felstead are partners, and Mair Williams is an associate at Latham & Watkins.

The authors would like to acknowledge the kind assistance of their colleagues Tom Watret, Ciara Faughnan-Moncrieff, Faris Shoubber, Rachel Kwong and William Price in the preparation of this chapter.

2 References in this chapter to ‘the courts of England’ and ‘the courts’ are references to the courts of England and Wales. References to ‘English law’ are references to the law of England and Wales.

II CONTRACT FORMATION

Under English law, most contracts can be formed simply, without specified formality, and contracts do not have to be written to be enforceable. Parties can create even complex contracts merely by satisfying the following criteria:

- a offer;
- b acceptance;
- c consideration;
- d an intention to create legal relations; and
- e certainty of terms.

A contract can be made orally, and by conduct, provided that these criteria are met. It is, however, often more difficult to evidence oral contracts – and the terms of any alleged agreement – without a document in writing.

i Offer and acceptance

The parties must have reached an agreement, objectively assessed. This is ordinarily done when an offer from one party is accepted by the other.

In order for there to be an offer, it must be communicated to the offeree, specific, complete, capable of acceptance and made with the intention of being bound by that offer. As such, an offer is distinguishable from an invitation to negotiate or an ‘invitation to treat’, such as an advertisement, where a seller of goods is inviting a buyer to contract but it is the buyer that makes the offer. An offer may be terminated by withdrawal, rejection³ or lapse of time.

Acceptance is a final and unqualified expression of assent to the terms of an offer. It must be communicated to the offeror and, to be effective, it must correspond exactly with the terms of the offer with no variation. Acceptance can take place by conduct, but it must be clear that the offeree did the act in question with the intention of accepting the offer.

ii Consideration

Consideration is an essential component of a contract.⁴ Though consideration does not have to be proportionate or adequate, it must have some value in the eyes of the law. An agreement without consideration is merely an agreement to make a gift.

As a general rule, past consideration will not constitute good consideration.⁵ If a party is simply satisfying a pre-existing obligation, it cannot rely upon that as consideration for new obligations being assumed by the other party. Some doubt was cast upon this rule by the decision of the Court of Appeal in *Williams v. Roffey Bros.*⁶ In that case, a party came into financial difficulties and sought additional payment to perform the contract without delay.

3 A counter-offer is also considered to be a rejection of the original offer (*Hyde v. Wrench* (1840) 3 Beav 334).

4 Unless the contract is made by way of a deed, the requirements of which are outside the scope of this chapter.

5 *Stilk v. Myrick* (1809) 2 Camp 317.

6 *Williams v. Roffey Bros* [1989] EWCA Civ 5.

The Court of Appeal found that good consideration had been given for a promised additional payment as the promisee receives a benefit in continuing the contract and avoiding delay. Many subsequent judgments have been critical of this decision.⁷

The case law on this was reviewed by the High Court in 2017 in *Blue v. Ashley*.⁸ In that case, Leggat J provided clarification, asserting that although some might be concerned that *William v. Roffey Bros* opens the window for a party to seek extra payment while threatening to renege on a contract, parties can take comfort that they are protected from this potential mischief by other doctrines such as economic duress and public policy.

iii Intention to create legal relations

Without a mutual intention to create legal relations, a contract is not formed. When assessing whether there is such an intention, the court will consider the 'objective conduct of the parties as a whole' rather than the 'subjective states of mind' of the parties.⁹ In respect of commercial parties, there is a rebuttable presumption that there was an intention to create legal relations.

iv Certainty of terms

There must be no ambiguity to the material terms of an alleged contract. Unless all the material terms are agreed with certainty, a contract is not binding.¹⁰

v Conditions precedent and subsequent

Parties entering into a contract may wish for certain requirements to be satisfied first, known as conditions precedent. Conditions precedent do not need to be labelled as such, but the wording must be clear that the performance of all or part of the contract is reliant on the conditions precedent being satisfied.

Conditions subsequent are conditions that provide for a binding contract to be terminated (or no longer binding on one or both of the parties) if specified future events do or do not happen.

vi Third-party beneficiaries

Under the Contracts (Rights of Third Parties) Act 1999, any contract, with a few exceptions, made after 11 May 2000 may confer an enforceable benefit on a third party, but no contract can impose a duty on a third party. In order for a third party to obtain rights it must be expressly identified in the contract by name, description or as a member of a class.

The beneficiary cannot be implied. However, in the 2017 case of *Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank)*,¹¹ the High Court held that a third party beneficiary might be identified by analysis of the construction of the express terms of the agreement, provided that the process of the construction did not involve implied identification.

7 *South Caribbean Trading Ltd v. Trafigura Beheer BV* [2004] EWHC 2676; *Adam Opel GmbH, Renault SA v. Mitras Automotive (UK) Ltd* [2008] EWHC 3205 (QB).

8 *Blue v. Ashley* [2017] EWHC 1553 (Comm), 26 June 2017.

9 *Barbudev v. Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548.

10 See, for example, *RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Company KG (UK Production)* [2010] UKSC 14.

11 *Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank)* [2017] EWHC 2177 (Comm).

vii Other ways of establishing commercial rights and obligations

In the event that no binding contract exists, it is still possible for the putative parties to that alleged contract to enforce their rights. Examples are given below.

Quantum meruit

A supplier of goods or services who has not been compensated by the recipient of those goods or services may be able to bring a claim of *quantum meruit* ('as much as he has earned') in order to be paid for the goods or services provided, so long as it is able to show that the goods or services were either expressly requested or freely accepted by the recipient.

Promissory estoppel

In circumstances where, notwithstanding that no consideration has been provided for a promise, the courts consider that it would be unjust to refuse to enforce the promise, the equitable doctrine of promissory estoppel can be relied upon. There are three key elements to promissory estoppel:

- a a promise by one party that it will not enforce its strict legal rights against the other;
- b an intention on the promisor's part that the other will rely on that promise; and
- c actual reliance by the promisee on that promise.

III CONTRACT INTERPRETATION

In English law, contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. Notwithstanding this apparent simplicity, there have been a number of changes to the English courts' approach in recent years.

In *Arnold v. Britton*,¹² Lord Neuberger recently summarised and clarified the approach that the English courts will now take. He explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context', in the light of the following considerations:

- (i) *the natural and ordinary meaning of the clause;*
- (ii) *any other relevant provisions of the [contract];*
- (iii) *the overall purpose of the clause and the [contract];*
- (iv) *the facts and circumstances known or assumed by the parties at the time that the document was executed; and*
- (v) *commercial common sense; but*
- (vi) *disregarding subjective evidence of any party's intentions.*

This decision is seen by many commentators as a move away from the more 'purposive' approach set out (primarily by Lord Hoffmann) in previous Supreme Court (and House of

12 *Arnold v. Britton* [2015] UKSC 36.

Lords) decisions.¹³ Although two Supreme Court decisions in 2017¹⁴ suggest that all of these cases ‘were saying the same thing’ in relation to contractual interpretation, and though there has never been an entirely literal or purposive approach to contractual interpretation, there does appear to be a greater emphasis at present on the primacy of the language used by the parties in their agreement.

Indeed, in a 2017 extrajudicial speech, Lord Sumption suggests that those older cases did adopt a different approach and that they failed to attach sufficient weight to the language of the contract.¹⁵ Later that year, the Court of Appeal ruled in *Teva Pharma – Productos Farmaceuticos LDA v. Astrazeneca – Productos Farmaceuticos LAD*¹⁶ that the judge in the lower court had failed to have regard to the principles in *Arnold v. Briton* and had erred by subverting the natural meaning of the contractual provisions in favour of commercial common sense.

Other important points to note regarding the courts’ approach to contractual interpretation include the following:

- a the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law;¹⁷ and
- b where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the *contra proferentem* rule).¹⁸

Implied terms

Under English law, the courts have the power to imply a term into a contract. The test for doing so is laid out in *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd.*¹⁹ A term may be implied if:

- a it is necessary to give the contract commercial or practical coherence;
- b it can be clearly expressed;
- c it does not contradict an express term;
- d reasonable parties would have agreed the term was needed; and
- e it passes the officious bystander test.

The 2018 case of *Bou-Simon v. BGC Brokers LP*²⁰ reiterated the narrow approach that the courts take when implying terms, finding that an implied term could not be read in to a contract simply because it appears fair.

13 *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1997] UKHL 28, *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38 and *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50.

14 *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 and MT.

15 Lord Sumption, ‘A Question of Taste: The Supreme Court and Interpretation of Contracts’ 8 May 2017. (<https://www.supremecourt.uk/docs/speech-170508.pdf>).

16 *Teva Pharma – Productos Farmaceuticos LDA v. Astrazeneca – Productos Farmaceuticos LAD* [2017] EWCA Civ 2135.

17 In that regard, the Unfair Contract Terms Act 1977 requires limitation clauses to be ‘reasonable’.

18 This principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power – see *Persimmon Homes v. Ove Arup* [2017] EWCA Civ 373.

19 *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.

20 *Bou-Simon v. BGC Brokers LP* [2018] EWCA Civ 1525.

IV DISPUTE RESOLUTION

Dispute resolution in England is largely conducted through the court system.

i Jurisdiction

The court must have jurisdiction to hear a dispute. Whether a court has jurisdiction may be decided by the courts, although contracting parties may include a jurisdiction clause in their agreement that allows them to choose which court has jurisdiction and such provisions will be given effect by the English courts.

There are three principal types of jurisdiction clauses:

- a An exclusive jurisdiction clause specifies a jurisdiction in respect of disputes, and prevents either party from bringing proceedings against the other in the courts of any jurisdiction other than the one specified in the contract.
- b A non-exclusive jurisdiction clause enables either party to bring proceedings against the other, either in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided that court has jurisdiction over the dispute under its own rules).
- c An asymmetrical jurisdiction clause permits one of the parties (party A) to sue the other party (party B) in any competent jurisdiction, but restricts party B to bringing proceedings in only one jurisdiction.

There have been a number of decisions regarding jurisdiction clauses in the courts over the past year. In particular:

- a In *China Export & Credit Insurance Corp v. Emerald Energy Resources*,²¹ it was held that although a non-exclusive jurisdiction clause allows for a choice of jurisdictions, once proceedings are issued in the courts that are stated in the contract to have non-exclusive jurisdiction in relation to disputes, the parties are bound to submit to the jurisdiction of that court.
- b In *AMT Futures Limited v. Karim Boural*,²² it was held that breach of an exclusive jurisdiction clause is not a 'once and for all' breach, but a continuing breach or series of breaches, meaning that any claim for relief in relation to such a breach is unlikely to be dismissed on the basis that those claims are statute-barred under the Limitation Act 1980.

ii Threshold requirements

When bringing a claim in the courts, a claimant must have regard to any threshold requirements litigating such a dispute. These will dictate whether a claim can be brought, and, if so, which court it should be brought in.²³

Specialist courts in England may have further threshold requirements. For example, the Technology and Construction Court can only hear claims that are 'technically complex'. Despite this, a number of the specialist courts have a wide scope, and will hear a range of disputes.²⁴

21 *China Export & Credit Insurance Corp v. Emerald Energy Resources* [2018] EWHC 1503 (Comm).

22 *AMT Futures Limited v. Karim Boural* [2018] EWHC 750 (Comm).

23 For example, proceedings may not be started in the High Court unless the value of the claim is more than £100,000 and claims for £100,000 or less must be commenced in the County Court.

24 This has recently been confirmed in *Mezvinsky and another (acting through their litigation friends) v. Associated Newspapers Ltd* [2018] EWHC 1261 (Ch).

iii Alternative dispute resolution

There are a number of alternative dispute resolution (ADR) mechanisms, which allow parties to avoid court litigation completely or that aim to achieve an early settlement. ADR can be prescribed as part of a contract and the English courts will give effect to such an agreement.

The CPR encourage parties to consider settlement at all times, or risk costs sanctions being imposed against them. In the preliminary stages of litigation, parties will be asked by the court whether or not they have considered ADR and, if they have not, adverse costs consequences may follow.²⁵

The principal methods of ADR used in England are detailed below.

Negotiation

Settlement negotiations can take place on a 'without prejudice' basis (meaning that the court cannot be informed of the content of those negotiations) or 'without prejudice, save as to costs' (meaning that the court cannot be informed of the content of those negotiations until after substantive determination of the dispute, and then only for the purposes of deciding the appropriate order as to the costs of the court proceedings).

Mediation

Settlement negotiations facilitated by an independent third party mediator.

Early neutral evaluation

A relatively recent development in English litigation is early neutral evaluation (ENE). ENE is where a neutral person, appointed either through the courts or through a private provider by the parties, is invited to evaluate and opine on the case (or issues within it) on a non-binding basis. Both parties can then consider the evaluation, with a view to facilitating more constructive negotiations.

Arbitration

A private and binding dispute resolution process before an impartial tribunal, which is contract-based, but which is regulated and enforced by the state (under, in England, the Arbitration Act 1996, as supplemented by any institutional rules chosen by the parties). Choosing arbitration means that the role of the English courts is limited to supervising the proceedings (rather than deciding on the dispute).

V BREACH OF CONTRACT CLAIMS

When one party to a valid contract is not complying with a particular term, its conduct may amount to a breach. When a breach of contract occurs, the innocent party is entitled to bring a claim in relation to the breach and seek compensation – usually in the form of damages.

The burden is on the claimant to show, on the balance of probabilities, that there has been a breach of contract that has caused loss. The value of the loss claimed will most

²⁵ In the recent case of *Thakkar and another v. Patel and another* [2017] EWCA Civ 117, the Court of Appeal reaffirmed this view, finding that where one party had frustrated the mediation process, a costs sanction against them was merited.

likely determine which type of court in England hears the case.²⁶ Before bringing a breach of contract claim, the claimant should comply with the applicable pre-action protocols, annexed to the CPR.

i Termination for breach

Under English law, a breach of contract does not automatically entitle the non-breaching party to terminate the contract. A repudiatory breach, however, is a breach of contract that allows the non-breaching party to treat the contract as being at an end.²⁷ The most common example of a repudiatory breach is a breach of condition (although a fundamental breach of an innominate term may also be a repudiatory breach) that allows the non-breaching party to terminate the contract and claim damages, regardless of what the consequences of the breach are. Breaches of warranties do not terminate contracts and the correct remedy in that situation is damages. Parties are also entitled to explicitly state breach of a term results in termination, even if that right would not be a right under common law.

It is for the non-breaching party to elect whether it will accept the breach and treat the contract as terminated or affirm the contract and require continued performance.

ii Anticipatory breach

An anticipatory breach is where one party indicates, either by words or conduct, that it will not perform all or some of its obligations under the contract, such that the result of its performance will be substantially different from the requirements of the contract. If the anticipated breach would be a repudiatory breach (and it would be for the claimant to prove this), the non-breaching party is immediately entitled to terminate – without waiting for actual performance or breach.

iii Causation

In order to bring a breach of contract claim, the non-breaching party must show that there is sufficient causation between the breach and the loss it has suffered. The breach must be the effective or dominant cause of a loss.²⁸

Causation may be complicated by a third party's intervening act or other event. If there is such an act or event between the breach of contract and the harm suffered that 'breaks the chain of causation', then the court may hold the party in breach not to be liable for the loss.

VI DEFENCES TO ENFORCEMENT

There are several ways in which parties may seek to avoid enforcement of contractual obligations or challenge claims of breach of contract in England.

If a party is able to argue that a purported contract is invalid, it may have a complete defence to any attempted enforcement of that contract. A party's challenge to the validity of a contract may render that contract void (i.e., immediately ineffective) or voidable (valid and effective, unless and until rescinded).

26 CPR 26.

27 *Heyman v. Darwins Ltd* [1942] AC 356.

28 *Galoo Ltd v. Bright Grahame Murray* [1994] 1 WLR 1360.

A contract that lacks any key element required for the formation of a valid contract is void. For example, a party who has not provided any consideration under a contract will be unable to enforce that contract's terms against another party. Other common instances that render a contract void include when a party lacks capacity or authority to enter that contract (such as an individual purporting to contract on behalf of a corporate entity without requisite authorisation).

i Force majeure and frustration

Contracting parties may choose to include a *force majeure* clause, which excuses performance of a contract following certain events that are beyond the control of the parties. *Force majeure* clauses must be certain in order to be effective and so must include reference to specific events (such as natural disasters, acts of war and acts of terrorism) or be specific enough as to be certain. Wording equivalent to 'usual *force majeure* clauses shall apply' will be considered void.²⁹

If there is not an explicit *force majeure* clause then parties may be able to rely on the common law principle of frustration, although this is very narrowly construed by the courts. Frustration is the principle that a contract may be set aside if the performance of the contract becomes impossible, illegal or pointless by virtue of an unexpected event that is beyond the control of the contracting parties. The courts have been slow to find that contracts have been frustrated and have been clear that changes to market conditions that mean that the performance of the contract is more onerous do not amount to frustration.³⁰

ii Illegality

An illegal contract is void and will not be enforced by the courts as a matter of public policy, in accordance with the courts' duty to uphold the law. As such, in contrast to other defences, courts may invoke a defence of illegality even when no party has raised it. Illegality is well established as a defence, and reflects the principle elucidated by Lord Mansfield that 'no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'³¹ However, more recently the law on illegality of contracts was criticised as being unnecessarily complex, uncertain and arbitrary.³² In 2016, the Supreme Court evaluated the law in this area in *Patel v. Mirza*.³³ Although consensus was not reached, the majority of the Supreme Court deemed the key issue to be whether upholding the relevant contract would 'produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system'. In 2018, the Court of Appeal found in the case of *Singularis Holdings Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd*³⁴ that the defence of illegality was not available to a bank to defeat a claim brought by a customer in negligence and breach of contract. In that case, the bank had made payments to an individual shareholder of the corporate client who was acting fraudulently, but the Court of Appeal found that the actions of that individual could not be attributed to Singularis as an entity and so the defence of illegality.

29 *British Electrical and Associated Industries (Cardiff) Ltd v. Patley Pressings Ltd* [1953] 1 WLR. 280.

30 *Davis Contractors Ltd v. Fareham Urban District Council* [1956] UKHL 3.

31 *Holman v. Johnson* [1775] 1 Cowper 341 at page 343.

32 'The Illegality Defence' [2010] The Law Commission (LAW COM No 320).

33 *Patel v. Mirza* [2016] UKSC 42.

34 *Singularis Holdings Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84.

iii Limitation and exclusion

Even if a contract is valid, a party may seek to avoid enforcement on other grounds. A complete defence is available if the claimant does not commence his or her claim within the relevant limitation period. If a defendant raises this defence, the claimant has the burden of proving that the relevant limitation period has not expired. The limitation period for contract claims is six years. This limitation period commences from the date on which the cause of action occurred.

Commercial parties are also likely to limit their potential liability under a contract when negotiating and drafting its terms. For example, parties may protect themselves by excluding liability in certain respects, imposing financial limits on liability, restricting terms implied into contracts by statute and alleviating the parties' obligations of performance if prevented by forces outside of their control. English courts will generally uphold such provisions, and so they will serve as a defence, as long as they are not prohibited by legislation³⁵ or common law principles such as illegality.

iv Other defences

A party who is induced into entering or varying a contract by threats or other illegitimate means may rely on duress or undue influence, and the contract will be voidable by that party. For instance, a party may be subject to physical duress (such as actual or threatened violence against the party or to its property) or economic duress (e.g., threats to terminate the contract).

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Fraud and misrepresentation

In England, fraud associated with breach of contract is claimed as either fraudulent misrepresentation or as a claim in the tort of deceit.

The tort of deceit has four elements:

- a* a false representation (of fact or law);
- b* the defendant knows the representation is false (or is reckless);
- c* the defendant intends that the claimant acts in reliance on the representation; and
- d* the claimant acts in reliance on the representation and, as a consequence, suffers loss.³⁶

If the tort of deceit is made out, then the claimant is entitled to damages in tort (with no remoteness limitation) and to rescission of the contract.

Misrepresentation is governed by the Misrepresentation Act 1967. A claim of misrepresentation requires the claimant to show that a statement made by the defendant was false (either dishonestly made for fraudulent misrepresentation or negligently made for negligent misrepresentation); that they entered in to the contract as a result of that statement and that damage was suffered as a result. It is a defence for the defendant to show that it had

35 In particular, the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015.

36 *Eco 3 Capital Ltd and others v. Ludsin Overseas Ltd* [2013] EWCA Civ 413.

a reasonable belief in the truth of its statement, although this may still give rise to a claim of innocent misrepresentation.³⁷ In successful claims, the court may award damages in tort and rescission of the contract (or damages in lieu of rescission).

ii Inducing a breach of contract

The economic tort of inducing a breach of contract involves the claimant suffering loss as a result of a party being knowingly induced to breach a contract by the defendant. A claim for inducing a breach of contract requires that the contract actually be breached; mere interference with the performance of a contract will not be enough.³⁸ The only other element required is intention, which is usually shown by the defendant having knowledge of the existence of the contract and its specific terms.

iii Good faith

Historically, the courts have refrained from implying obligations of good faith in commercial contracts, on the basis that such an implied term would interfere with the certainty of the contract. The courts take a more favourable view of express terms requiring the parties to act in good faith in commercial contracts, provided such clauses are certain enough to be enforceable.

In 2013, the High Court appeared to move towards the idea of a more pervasive implied term of good faith in the cases of *Yam Seng Pte Ltd v. International Trade Corporation Ltd*³⁹ and *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt*,⁴⁰ but the Court of Appeal overturned the first instance decision and Moore-Bick LJ noted 'there is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.'⁴¹ The courts are, however, more willing to find an implied duty of good faith in certain types of contractual relationships, such as employer/employee contracts, insurance contracts and most recently in joint ventures.⁴²

VIII REMEDIES

When a contract has been breached, there are various remedies that may be available to the injured party in England.

i Compensatory damages

The primary remedy for breach of contract is an award of monetary damages, which is generally awarded to compensate for the injured party's loss, and put it in the position it would have been in had the contract been properly performed.⁴³

37 Innocent misrepresentation (also governed by the Misrepresentation Act 1967) is where the representor is without fault because they had reasonable grounds to believe in the truth of its statement and, if a claim is successful, the claimant is entitled to rescission or damages in lieu of recession.

38 *OBG v. Allan* [2007] UKHL 21.

39 *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB).

40 *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2015] EWHC 283 (Comm).

41 *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2016] EWCA Civ 789.

42 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Neyaban v. Kent* [2018] EWHC 333 (Comm).

43 *Robinson v. Harman* (1848) 1 Ex 850.

The burden of proof lies on the claimant to prove factual causation of its loss (i.e., it must prove that but for the breach, the loss complained of would not have occurred). Accordingly, when the court assesses the extent of any loss, it will consider the claimant's position compared to the position it would have been in but for the breach. This analysis may account for profits that would otherwise have been earned, costs that would otherwise have been avoided, and non-financial benefits that might have been received, while also acknowledging any benefits which otherwise would not have been received by the claimant.

ii Limitations to recovery of damages

A key restriction on the recovery of damages for breach of contract is remoteness.⁴⁴ Only losses that are 'in the contemplation of both parties'⁴⁵ will be recoverable by the claimant. This principle can be summarised as follows:⁴⁶

A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach.

The innocent party must also ensure that it has taken reasonable steps to mitigate its loss, and the court will apportion damages between the parties if they result partly from the claimant's own fault and partly from the fault of any other person.⁴⁷

iii Other potential damages

Aside from the general compensatory function of damages, in certain circumstances damages may be awarded on other grounds. For example, restitutionary damages may be recoverable if the claimant has not suffered any loss, but the defendant has derived a benefit from breaching the contract.

Separately, though in similar instances, a claimant may be able to recover 'negotiating damages', being the hypothetical sum the defendant would have paid the claimant, had the defendant negotiated a release of his or her obligations before breaching the contract. This principle was established in *Wrotham Park Estate Ltd v. Parkside Homes Ltd*,⁴⁸ but has recently been re-considered in *Morris-Garner and another v. One Step (Support) Ltd*,⁴⁹ where the Supreme Court found that negotiating damages may be a tool for determining the economic value of a right that has been breached.

Punitive damages, intended to penalise the defendant, cannot be awarded for breach of contract.⁵⁰

In addition, 'penalty' clauses (clauses that specify an amount to be paid where there is a breach of contract), are rarely enforceable save where they are not punitive or exorbitant. In the 2015 case of *Cavendish Square Holding BV v. Talal El Makdessi (El Makdessi) and ParkingEye*

44 See *Hadley v. Baxendale* (1854) 9 Ex. 341; *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* 4 [1949] 2 KB.528; *Koufos v. C. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

45 *Hadley v. Baxendale* [1854] EWHC Exch J70 at page 151.

46 Chitty, J (2012), *Chitty on Contracts: General principles*. 31st ed. Sweet & Maxwell.

47 Section 1, Law Reform (Contributory Negligence) Act 1945.

48 *Wrotham Park Estate Ltd v. Parkside Homes Ltd* 1 WLR 798.

49 *Morris-Garner and another v. One Step (Support) Ltd* [2018] UKSC 20.

50 *Johnson v. Unisys Ltd* [2003] 1 AC 518 at paragraph 15.

Ltd v. Beavis, the Supreme Court held that the test for whether or not a penalty clause was enforceable was as follows: ‘whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation’.⁵¹

iv Indemnification

A party to a contract that includes indemnities may have an alternative remedy available for breach of the contract, which may provide quicker and easier recovery than a contractual claim for damages. Under an indemnity, one party promises to compensate another party on the occurrence of a specified event. The contract needs to be explicit about what events may trigger the indemnity and the extent of any recovery available under it.

v Non-monetary remedies

In some cases, the courts have discretion to award non-monetary remedies where this would be more appropriate. For example, an order for specific performance requires a party to perform his or her positive obligations under the relevant contract. Specific performance may only be ordered where damages are inadequate as a remedy.⁵²

IX CONCLUSIONS

As noted above, the English courts are some of the most established fora for dealing with complex commercial litigation. And, from the discussion above, it should be clear that English law is a sensible and commercial choice of governing law. The combination of the two – English courts and English law – is one of the best ways for contract drafters to ensure that what is contained in their contracts will be upheld.

Going forward, and despite the impact of Brexit on the United Kingdom in political and economic terms, it is very likely indeed that the English courts will retain their reputation for delivering high quality justice in the context of complex commercial litigation. With well-trained and respected judges (often specialists in their fields) and the efficiencies delivered by the CPR, English courts are among the world’s pre-eminent courts for complex commercial disputes.

With a Supreme Court currently in the ascendancy, addressing the remaining grey areas of English law with clear and detailed judgments, the future looks bright for the English courts and English law. Parties can expect few dramatic changes, but, rather, further consistency and placing party autonomy and freedom of contract centre stage. As indicated above, however, one important change to keep an eye on over the next decade is whether English law will embrace more wholeheartedly the concept of good faith to match other major international legal systems. In the end, that seems more likely than not, although it is a development that will be heralded no doubt by a very clear judgment.

51 *Cavendish Square Holding BV v. Talal El Makdessi (El Makdessi) and ParkingEye Ltd v. Beavis* [2015] UKSC 67 (ParkingEye).

52 *Beswick v. Beswick* [1968] AC 58.

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