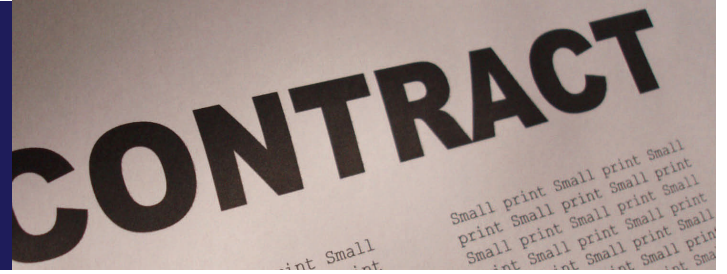


Case law: Repudiatory Breach of Contract

July 2011



AstraZeneca UK Limited v Albemarle International Corporation and Albemarle Corporation and the impact on the ruling in 'Net TV'

In the recent case of *AstraZeneca UK Limited v Albemarle International Corporation and Albemarle Corporation* [2011] EWHC 1574 (Comm) (*AstraZeneca*), which was published last week, a High Court judge has indicated that, if necessary, he would decline to follow the finding in the controversial case of *Internet Broadcasting Corporation Ltd (t/a NetTV) and NetTV Hedge Funds Ltd (formerly MARHedge TV Ltd) v MAR LLC (t/a MARHedge)* [2009] EWHC 844 (Ch) (*NetTV*).

NetTV

In *NetTV* a Deputy High Court Judge ruled that:

- i. there is a presumption that an exclusion clause should not apply to a deliberate repudiatory breach of contract; and
- ii. very clear and strong drafting of the exclusion clause would be required to persuade a court that the parties intended it to cover such a deliberate repudiatory breach.

The defendant decided without any explanation or justification that it was not going to perform its contractual obligations any more. In other words, it decided to walk away from the contract putting it in deliberate repudiatory breach of the contract. Normally, this would expose a party to substantial claim for damages to compensate the innocent party for its loss of bargain. The defendant relied on the exemption clause in the contract to protect it.

Quite rightly, the Judge in *NetTV* thought that the defendant had behaved appallingly. He bent over backwards to find in favour of the innocent party, *NetTV*. In doing so, he gave a judgment which, in effect, ignored two long standing House of Lords decisions. These decisions meant that:

- i. an exemption clause (or exclusion or limitation clause, if you prefer) will survive termination of a contract for repudiatory breach; and
- ii. it is a matter of construction whether the clause covers the breach in question to shield the breaching party from the full force of the damages that would otherwise be payable.

Before these two House of Lords cases, the rule was that if there was a "fundamental breach" of Contract, such as a party deliberately deciding to walk away from the contract, then the party in breach could not rely on the exemption clause to shield it from liability for its breach.

As we advised clients last year, the effect of *NetTV* was to restore the old law of "fundamental breach".

Two of the principles set out by the Judge in *NetTV* were suspect although, ironically, the judge did not in fact need to have developed these two principles in order to find in favour of *NetTV*. The effect of the judgment was to change the law. Not unnaturally, this caused considerable interest and, in some circles, concern.

That concern has now been allayed by the decision in *AstraZeneca*.

AstraZeneca

In *AstraZeneca*, the Commercial Court Judge held on the facts that Albemarle's breach of contract was not a deliberate repudiatory breach. However, if it had been, he considered that the question of whether Albemarle's liability for that breach was limited by the exclusion clause would simply have been one of "construing the clause, strictly, but without any presumption".

In his judgment, Flaux J states that:

- i. the conclusion in *NetTV* was "*wrong on the modern authorities and effectively seeks to revive the doctrine of fundamental breach (which the House of Lords in both Suisse Atlantique Societe d'Armement Maritime v NV Rotterdamschke Kolen Centrale* [1967] 1 AC 361 and *Photo Production v Securicor* [1980] 1 AC 827 concluded was no longer good law), albeit under the guise of "deliberate repudiatory breach";
- ii. developments in contract law since *Photo Production* showed that the rejection of any doctrine of fundamental breach by the courts had continued;
- iii. the judgment in the *NetTV* case was "*heterodox and regressive and did not properly represent the current state of English law...*"; and
- iv. he concludes, "*If necessary, I would decline to follow it. Even if the breach by Albemarle of its obligation to deliver DIP had been a deliberate repudiatory breach as AZ contends, the question whether any liability of Albemarle for damages for that breach was limited by clause M would simply be one of construing the clause, albeit strictly, but without any presumption. Since it states: "No claims by [AZ] of any kind, whether as to the products delivered or for non-delivery of the products" it seems to me it is sufficiently clearly worded to cover any breach of the delivery obligations, whether deliberate or otherwise.*"

Of course, it should be noted that the judge in AstraZeneca did not need to directly determine the issue of whether the exclusion clause applied in this case, and therefore Flaux J's comments are not binding. However, it does represent a better understanding of the legal position and, we consider, is more likely to be followed, in favour of NetTV, going forward.

What does this mean?

If AstraZeneca, rather than NetTV, is a correct statement of the law, it can be assumed that an exclusion clause will apply to a deliberate breach of contract. As such, when negotiating contracts as a customer, it would be appropriate to include an acknowledgement that any exclusion/limitation clause(s) is not intended to exclude or restrict liability for deliberate breach. Of course, any such statement is likely to apply to both parties.

For more information on this case and how it might affect your organisation, please contact Justin Byrne or another member of the technology team.



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