THE LAWYER BRIEFING EMPLOYMENT

BREACH OF CONTRACT

Casualties of War Horse

It is time to look again at the principles of interim relief and specific performance

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War Horse, the National Theatre's critically acclaimed production, set the unlikely stage for the High Court's consideration last month of the circumstances in which an alleged breach of an employment contract might be restrained by the grant of interim relief or alternatively specific performance. The time is ripe for a re-examination of the appropriate principles.

The claimants in *Ashworth & Ors v The Royal National Theatre* were professional musicians engaged in the production. In December 2012 the National Theatre informed the Musicians' Union that it proposed to terminate the claimants' contracts based on the artistic judgement that it was better for accuracy and impact to deliver the score through recorded music rather than a live band. Notice of termination was given to expire on 15 March on the ground of redundancy, following which there were substantial changes to the production.

The musicians sought interim injunctive relief or alternatively a decree of specific performance to require the theatre to engage them in the production of War Horse until the trial of their claim.

The court considered the detail of the musicians' contracts. For present purposes it is not necessary to set out those contracts in detail, save to say Cranston J was satisfied that the plain words of the contract did not cover what the National Theatre had purported to do. He was satisfied there was a serious issue to be tried and that the claimants' prospects on the contract point were strong.

It is well-established that, as a rule of thumb, a court will not order specific performance of a contract which calls for personal service where a) trust and confidence has broken down, b) a continued relationship is unworkable for some other reason or c) constant supervision by the Court might be required.

The grant of interim injunctive relief will follow the well-trammelled test set out in *American Cyanamid v Ethicon Ltd,* with particular consideration of the adequacy of damages and the balance of convenience. The court will take the course likely to cause least irremediable prejudice to either party.

In a less hierarchical world

Equity has taken the view that the remedy of specific performance should not be available to require an employer who had wrongfully dismissed employees to take them back, on the basis that such agreements are strictly personal in nature. This classic view was restated by Lord Wilson in *Geys v Société Générale*. He asked, however, "whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees requires review of the usual unavailability of specific performance…"

This was an exception posited by Stephenson LJ in *Chappell v Times Newspapers Ltd* to address the requirements of a "changed and changing world".

So what counts as exceptional? Authority indicates that the requirement for "sufficiency of confidence" is crucial. This needs to be judged with reference to the circumstances of the case, the nature of the work and the likely effect upon the employer and their operation if the injunction is granted. The problem, as set out in *Chappell*, is that where one side has no faith in the honesty or loyalty of the other, forcing the one to employ or serve the other is a recipe for disaster.

The court will not, it appears, require much persuasion that insufficient confidence remains. While this will always be fact-sensitive, Cranston J was persuaded there had been a loss of confidence in that the producers and directors of War Horse no longer believed the musicians could contribute positively to the play and that the production was better off without them.

In these sorts of questions the judgement of the employer will be given a wide margin of discretion. Practically, however, in such applications employers will want to make sure the court is given plausible and considered evidence on the confidence issue.

The key may be the nature of the employment relationship. While injunctive relief has been sparingly ordered (see, for example, *Powell v Brent London Borough Council*, where the local authority employer was considered "vastly different" from a small firm with a small staff and where the claimant had a good working relationship with her superior), in *Ashworth* the Court considered that a role in War Horse was "miles away" from an impersonal organisation. Claimants will have an uphill struggle unless the employer and its operation is large and the ongoing working relationship is good. These are difficult criteria to meet.

When ordering an interim injunction the Court will always strive to do what is just. As *Ashworth* shows, damages will frequently be an adequate remedy and trump non-pecuniary concerns such as loss of security and pride. In that case there was no evidence of stigma in the industry consequent on the alleged unlawful dismissal. On the right facts and with the right employment relationship, it may be possible that such a loss would tip the balance.

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