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**INSUFFICIENT TIME SPENT PROPERLY ASSESSING A CASE BEFORE COMMENCING PROCEEDINGS IS A FALSE ECONOMY: JAMES KEMBALL LIMITED V KAWASAKI KISEN KAISHA LTD AND “K” LINE (EUROPE) LIMITED [2022] EWHC 2239**

**Introduction**

MFB is pleased to have assisted its clients Kawasaki Kisen Kaisha Ltd (“**KKK**”) and “K” Line (Europe) Limited (“**K-Euro**”) in defeating claims brought against them by James Kemball Limited (“**JKL**”), for sums exceeding £40 million, in the High Court in London.

The long-running dispute stemmed from the establishment of Ocean Network Express (“**ONE**”), the container liner service created from the liner services of KKK, MOL and NYK, which commenced business in April 2018.

JKL is a road haulier. It had a contract with K-Euro under which K-Euro undertook to provide a minimum number of road haulage jobs to JKL for the carriage of containers to and from UK ports. The creation of ONE meant that KKK no longer had a container liner service, and thus K-Euro had no haulage jobs to offer to JKL for the final contract year, which ran from April 2018 to March 2019.

**The first issue: service outside the jurisdiction**

This was a challenge by KKK to the jurisdiction of the Court. JKL had obtained leave to serve KKK out of the jurisdiction in Japan. This was obtained on the basis of their assertion that ONE emerged from an unlawful conspiracy between KKK, MOL and NYK. Since an essential element of that tort is that the conspirators intended to cause damage to the claimant, the line of argument was, unsurprisingly, abandoned: it was simply not credible that ONE was established with the intent to cause damage specifically to JKL.

JKL re-formulated the claim to allege that KKK had induced or procured K-Euro to breach its contract with JKL, along the lines of the well-known *Lumley v Gye* case, of 1853. The plain fact of the matter, however, was that there was no need for any inducement – once KKK had folded its liner service into ONE, it no longer had any containers for K-Euro to offer to JKL. The creation of ONE might have *prevented* K-Euro from performing its obligations to JKL, but there was arguable case that that involved *procurement* or *inducement*.

The Court of Appeal accepted our clients’ arguments and set aside the leave to serve out: [2021] 3 All ER 978. This effectively removed £36 million from the amount claimed.



**The second issue: the claim for breach of contract**

The second element of the claim was JKL’s claim for breach of contract against K-Euro. Judgment on that claim was handed down on 3 October 2022. His Honour Judge Pelling KC dismissed JKL’s claim in its entirety.

The decision was founded on the manner in which JKL purported to terminate their contract with K-Euro. One of terms of the contract was that one party could terminate in the event of a wilful, persistent or material breach by the other, having given the other 30 days’ notice to remedy to the breach. It was not disputed that K-Euro would be unable to perform for the whole of the final period, but at the time JKL served its notice, K-Euro was not in breach at all, far less a wilful, persistent or material breach.

**What can we learn from this case?**

The decision itself turns on the interpretation of a contractual term, but some “take-aways” from the decision will be instructive for those involved in litigation:

1. The importance of reading the contract accurately, carefully and as a whole.
2. The risks of not having a back-up plan, or an alternative case (JKL had been told, at the time, of the issue K-Euro had with the notice of default).
3. The critical importance of a realistic assessment of losses suffered by reason a breach of contract. JKL’s claim was initially pleaded at about £7 million, based on loss of revenue, rather than loss of profit. It then see-sawed down to £4.5 million, back up to £7 million, down to less than £2 million (when their expert reported), down to less than £1 million after the experts met and, finally down again to £550,000 by concessions made during the trial.
4. The value of making an early Part 36 offer. K-Euro made a pre-action offer and, as a result, were awarded costs on the indemnity basis.

As always, time spent properly assessing the merits of one’s case at the outset (including obtaining early expert evidence, where appropriate) is usually wisely spent and will avoid the potential costs and management time spent patching up cases at a later stage.

*Senior partner Edward Gray and Solicitor Ben Middleton acted for KKK and K-Euro. Counsel were James Collins KC and Richard Hoyle of Essex Court Chambers.*



If you have any questions in relation to the issues covered above, please contact:

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