The Court of Appeal's decision in *Dobson* is the latest episode in a long legal saga. Whether it proves to be the last remains to be seen. Ramsey J., the trial judge in *Dobson* who has some difficult decisions to make, is unlikely to see it as such.

STELIOS TOFARIS

PROTECTING CONTRACTUAL EXPECTATIONS: AN AUSTRALIAN PERSPECTIVE

As a prerequisite to an award of compensatory damages for breach of contract, the loss sustained by the injured promisee must be identified and translated into monetary terms. A recurring difficulty with this exercise relates to the basis upon which damages should be assessed. Should damages be awarded to cover the cost of curing the breach, or simply to compensate the difference in value between the promised performance and the performance actually rendered? In many situations, the difference resulting from these two alternative measures will be small. In some cases, however, they will produce markedly different outcomes.

An illustration of the scope for divergence between the two measures of damages is presented by a recent Australian case, *Tabcorp Holdings Ltd.* v. *Bowen Investments Pty. Ltd.* (2009) 83 A.L.J.R. 390. It concerned the breach of a negative leasehold covenant which forbade alterations to the demised commercial premises without the prior consent of the landlord. Well aware that such consent had not been granted and with "contumelious disregard for the landlord's rights" (para. [4]), the tenant destroyed the existing foyer and replaced it with a new one. It did so clandestinely and without the landlord's knowledge, effectively precluding the landlord from applying for a prohibitory injunction.

At first instance, the trial judge ordered the tenant to pay AUS$34,820 in damages. This represented the difference between the value of the property with the old foyer and the value with the new foyer. On appeal, the Full Federal Court increased the award to AUS$1.38m, comprising AUS$580,000 to meet the cost of restoring the foyer to its original condition and AUS$800,000 for loss of rent while the restoration was taking place.

Unsurprisingly, in view of the Full Court's substitution of difference in value damages with a cost of cure award nearly 40 times greater, the tenant appealed. The High Court of Australia dismissed the appeal and upheld the cost of cure award. In so doing, it rejected the assumption underlying the tenant's case, described as being based on "the doctrine of efficient breach" (para. [13]), that a contracting party should be at

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complete liberty to breach contractual obligations provided that adequate compensation is paid to the injured counterparty.

Although the High Court did not consider "efficient breach" in detail, it is generally understood as being founded on the premise that breach of contract should be encouraged where the resulting benefit will exceed any potential compensatory liability. If, after a contract is made, the promisor finds a better opportunity for the use of his resources, he should be allowed to breach the contract subject to the full compensation of the promisee. To breach a contract in such circumstances equates to making a rational economic choice.

The High Court held that the assumption of the tenant took no account of the existence of remedies like specific performance and injunctions, or at the very least underrated the extent to which they are available. However, the reasoning of the court on this point may be open to question. Specific performance and injunctive relief, particularly mandatory injunctions, which are equitable in origin and discretionary in nature, are only available in limited circumstances. On one view, the relative rarity with which they are granted tends to support rather than undermine the tenant's assumption.

More compellingly, the High Court held that the tenant's case misunderstood the seminal principle stated by Parke B in *Robinson* v. *Harman* (1848) 1 Exch. 850 that damages for breach of contract seek to place the injured promisee in the same situation as if the contract had been performed. Relying on an important English case, *Radford* v. *De Froberville* [1977] 1 All E.R. 33, the court stated that this principle should not be reduced to meaning "as good a *financial* position as if the contract had been performed" (para. [13]). The landlord had a "legitimate interest" in the preservation of the physical character of the premises, which it had sought to protect by the incorporation of the negative covenant (para. [12]), and was entitled to have this interest upheld. Its status as a property investment company which rented the premises for commercial purposes, and the old foyer not being a more effective leasing tool than the new foyer, were irrelevant. Nor was the destruction of the new foyer to reinstate the old foyer, in the court's view, an unnecessary or unreasonable course of action. Citing Oliver J.'s reference in *Radford* to the maxim *pacta sunt servanda*, the High Court held that the landlord was entitled to insist upon the tenant complying with the terms of the lease.

Interestingly, the tenant had sought to rely on another key English case, *Ruxley Electronics Ltd.* v. *Forsyth* [1996] A.C. 344, in support of the argument that only diminution in value damages should be awarded. In *Ruxley*, the House of Lords refused to order cost of cure damages for the demolition and reconstruction of a swimming pool which did not conform with contractual specification on the ground

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that such steps would be unreasonable. The cost of curing the breach was thought to be disproportionate to the benefit that would accrue to the promisee and it was found that the promisee did not intend to use the damages that were sought in order to cure the defect. On these bases, the House of Lords made a relatively small award for loss of amenity.

The High Court distinguished *Ruxley* on its facts, albeit without providing a detailed explanation. It also noted possible inconsistency between the citation in that case of *Radford* with approval and the award actually made. This observation is not without foundation. The promisee in *Ruxley* was refused the funds needed to obtain the swimming pool for which he had contracted and had to tolerate non-compliant performance. Whilst he was not left without a remedy, the loss of amenity award could in no way be equated with the bargained-for performance.

Some may argue that as the contractual purpose of the promisee was purely financial and in view of the vast divergence in outcome between the cost of cure and difference in value measures of damages, the decision of the High Court of Australia leads to economic waste, overcompensates and is incongruous with the duty to mitigate loss. It is submitted, however, that the decision should be welcomed for providing wider protection of the performance interest. In awarding the promisee the funds necessary to secure actual performance, the court gave great weight to the interest of the promisee in obtaining the bargained-for performance. This has the merit of avoiding the promisee being required simply to tolerate the breach of contract. It also recognises that contracting parties usually enter into agreements to obtain performance and reinforces the security of transactions.

SOLÈNE ROWAN

ARBITRATION AND ANTISUIT INJUNCTIONS IN EUROPE

No longer can English courts restrain proceedings before the courts of other EU Member States on the ground that they infringe an English arbitration agreement. In Case C-185/07 *Allianz SpA* v. *West Tankers Inc.* (10 February 2009), the Court of Justice held that such relief is incompatible with Regulation 44/2001, the Brussels I Regulation ("the Regulation").

Allianz, subrogated insurers of an Italian insured, had sued West Tankers in Italy, contrary to the insured's contract with West Tankers, which bound Allianz to submit any disputes to arbitration in England. They claimed damages in delict, asserting jurisdiction under Article 5(3) of the Regulation. West Tankers countered by seeking an

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