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English Court Finds Where There is a Breach, Damages Do Not Always Follow

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The recent case of *Asher v Jaywing Plc* [2022] EWHC 893 (Ch) serves as a reminder of the need for parties to not only consider whether there has been a breach of contract, but also to critically assess whether that breach will translate into an award of damages.

In *Asher*, while the court found that the defendant, Jaywing Plc, had breached the Sale and Purchase Agreement ("SPA"), the court concluded, on the facts, that no loss arose from the breach and the claimants were not entitled to any damages.

The breach

Under an earn-out provision in the SPA, the buyer (defendant) was required to deliver to the sellers (claimants) a statement "*prepared by the Buyer's auditors*" showing its calculation of the company's revenue and any resulting earn-out payment — i.e., the Earn-Out Statement.

The claimants alleged that the defendant had breached the terms of the SPA as the Earn-Out Statement was not prepared by the defendant's auditors. Rather, it was prepared by the defendant's CFO, with input from a separate firm of accountants, as the statutory auditors had declined to prepare the statement, citing independence concerns.

The court was prepared to imply a term into the SPA that the defendants could appoint a suitably qualified independent firm to prepare the Earn-Out Statement, should its auditors be unwilling to prepare the statement. The court found this was necessary to give business efficacy to the contract, as without it the earn-out mechanism, which

had been the subject of detailed negotiation between the parties, would lack commercial or practical coherence.

On the facts, however, the court found that the Earn-Out Statement was "*prepared*" by the CFO, who chose not to accept all of the changes that were proposed by the accountants assisting him. In essence, the buyer had prepared the Earn-Out Statement, rather than its auditors (whether as contemplated by the SPA) or an alternative accountant (as permitted by the implied term) in breach of the SPA.

What's the damage?

The court then went on to assess the calculation of the Contribution of the earn-out based on the terms of the SPA. After a thorough review of the calculation, the court found that the Contribution fell short of the minimum level required for an earn-out payment. On that basis, the court concluded that the claimants were not entitled to any damages in respect of the defendant's breach.

Document any modifications to a contract

The court did express that it was impossible not to have sympathy with the claimants. The claimants' primary case was that an agreement had been reached with the buyer whereby new conditions were set for the payment of the second and third earn-out (on the basis of which the claimants would have been due an earn-out payment). However, like most commercial agreements, the SPA contained a provision requiring any amendments to be in writing and signed by the parties. The court concluded that the discussions that took place between the parties were not and were not intended to be a legally binding agreement amending the SPA. This is another salutary reminder that if parties intend for any changes to their agreement to be legally binding then the safest course of action is to record the revised agreement in writing.

The outcome in this case is particularly stark, as the result of the different calculations on the Contribution meant that the claimants would either be entitled to an earn-out payment or they would not. However, the key takeaway, that parties should critically assess their damages claims to consider the cost-benefit of litigating, rings true for all but the most straightforward of cases.

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