English Court Awards £14.98 Million in "Loss of a Chance" Damages for Breach of a Confidentiality and Exclusivity Agreement

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In July 2022, the English Commercial Court ruled in *Bugsby Property LLC v LGIM Commercial Lending Limited, Legal & General Assurance Society Limited [2022] EWHC 2001 (Comm)* in favour of Bugsby Property LLC ("**Bugsby**"), the claimant, in a claim for £366 million in damages arising from a failed bid to acquire the Olympia Exhibition Centre in London. The Court awarded Bugsby "loss of a chance" damages of £14.98 million.

The case demonstrates the application of "loss of a chance" principles and the award of damages in claims arising out of a breach of an agreement containing terms of non-disclosure and exclusivity. Agreements of this nature are commonly entered into by parties contemplating a proposed commercial transaction.

Background of the case

In 2016, Bugsby approached two entities in the Legal & General Group ("**L&G**") for finance towards the acquisition of the Olympia Exhibition Centre, including an established exhibition, event and conference business that is run from it (together "**Olympia**"). Bugsby and L&G entered into a confidentiality and exclusivity agreement (the "**Agreement**") whereby L&G agreed to afford exclusivity to Bugsby in relation to the possible acquisition of Olympia for an 18-month timeframe.

In a breach of the exclusivity that had been agreed, a year later L&G was involved in the financing for another bidder for Olympia, known as the Yoo Consortium ("**Yoo**"). Yoo's bid, with financing from L&G, was ultimately chosen by Capital & Counties Properties plc ("**CapCo**"), the sellers of Olympia, over a bid involving Bugsby.

Bugsby claimed for breach of a number of provisions in the Agreement, including the exclusivity and confidentiality provisions and alleged that L&G had misused Bugsby's confidential information.

Judgement

The Court considered and ruled on a number of issues as set out below:

1. Exclusivity and non-circumvention

Clauses 7 and 8 of the Agreement contained a broad exclusivity obligation of 18 months' duration and provided that L&G's involvement in the acquisition of Olympia *"will be exclusively through and with the involvement of Bugsby at all times, except as permitted by Bugsby's prior written consent."*

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Against this background, L&G accepted that its negotiation, arrangement and provision of loan finance to Yoo for the acquisition of Olympia involved repeated and continuous breaches of the exclusivity and non-circumvention clauses of the Agreement, albeit they asserted these were inadvertent breaches.

2. Confidentiality

Clauses 1 and 2 of the Agreement contained the confidentiality obligations and required L&G to keep confidential information confidential and only use it for the purposes of the evaluation of L&G as a lender/joint venture partner to Bugsby.

Bugsby alleged that L&G had misused Bugby's confidential information but this was rejected by the Court. The judge ruled that *"no document showed misuse of Bugsby's confidential information by L&G. Against these findings, the inferences [of misuse] are not made out."*

3. Chance and Loss of a Chance

A preliminary question was whether Bugsby was entitled to claim damages for "loss of a chance." L&G argued that it was not, as the object of the duty that L&G breached was not to provide Bugsby with the chance to acquire Olympia, but rather, it was to protect Bugby's confidential information. The Court rejected this and held that the object of the Agreement was to prevent L&G from providing finance to other parties. Bugsby had to prove as a matter of causation that he/she had a real or substantial chance as opposed to a speculative one.

On the balance of probability, the Court held that Bugsby would have done all that was required of it to the end of CapCo being prepared to sell to Bugsby and of achieving finance for its bid. There was a real and substantial chance that CapCo would have been prepared to sell to Bugsby and of Bugsby being able to finance its bid.

Quantum of damages

Having proved that it had a real or substantial chance to acquiring Olympia, the Court proceeded to assess Bugsby's damages for "loss of a chance". This exercise required the Court to consider a complex series of interdependent contingencies as to what would have happened if L&G had not financed Yoo's Olympia bid. For instance, the Court considered Yoo's ability to finance its bid other than with debt finance from L&G and concluded that there was near certainty of an alternative source of finance.

Ultimately, the judge evaluated the chance of CapCo being prepared to sell to Bugsby and of Bugsby being able to finance its bid as a near certainty. Having evaluated the probability of a number of contingencies, the judge concluded that there was a 35% chance overall that Bugsby would have acquired Olympia if L&G had not offered acquisition finance for Yoo's competing bid.

The Court quantified Bugsby's damages at £14.98 million, and this consisted of a percentage of the fees that Bugsby would have earned from the Olympia acquisition and the return that Bugsby would have obtained on its investment in Olympia.

Separately, Bugsby had also claimed profits that would have been made from a property investment fund that it would have launched had it been successful in acquiring Olympia. However, this was rejected by the Court as the judge found that there was no real or

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substantial chance that Bugsby would have launched a successful property investment fund, even if it had successfully acquired Olympia.

Implications

NDAs and exclusivity agreements are commonly entered into by parties contemplating a proposed commercial transaction. Such agreements often contain a broad suite of “standard” or boilerplate language, the implications of which, may not have been fully considered by the parties at the time of entry. This case is a helpful reminder of the implications of a breach of NDAs and exclusivity agreements, and, in particular, the application of “loss of a chance” principles. As highlighted in this case, significant damages may be awarded if the court finds that the party claiming “loss of a chance” had a “real or substantial chance,” as opposed to a speculative one.

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