Neutral Citation Number: [2014] EWHC 1176 (QB)

Case No: IHQ/14/0217

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2014

Before :

MR JUSTICE CRANSTON

- -

Between :

Ashworth and Others	**Claimant**
- and -	
The Royal National Theatre	**Defendant**

- -
- -

James Laddie QC and Claire Darwin (instructed by **Slater & Gordon**) for the **Claimants**
David Reade QC and Jeremy Lewis (instructed by **Harbottle & Lewis**) for the **Defendant**

Hearing dates: 10 April 2014

- -

Judgment

Mr Justice Cranston :

Introduction

1. The claimants are professional musicians; the defendant, the National Theatre, needs no introduction. The claimants are supported by the Musicians' Union, formed over 120 years ago to improve the pay and working conditions of professional musicians, particularly those working in the theatre orchestras of the time. The claimants were engaged in March 2009 to play their instruments in the National Theatre's production of War Horse at the New London Theatre. Through this application they seek an interim injunction, or alternatively specific performance, to require the National Theatre to continue to engage them in the production of War Horse until the trial of their claim.

2. The test for interim relief is set out in American Cyanamid Co v Ethicon Ltd [1975] AC 396. In this case the issues are first, whether there is a serious question to be tried with a real prospect that the claimants will obtain specific performance or a final injunction in substantially the form of the interim relief sought; secondly whether, if there is, damages would be an adequate remedy for them for the interim period; and thirdly, if not, whether the balance of convenience lies in favour of the interim relief they seek. Determining where the balance of convenience lies requires consideration of a range of matters, including the prejudice to the claimants on the one hand if relief is not granted or to the National Theatre on the other if it is. The underlying principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. While a mandatory order of the type sought here will often be more likely to cause irremediable prejudice than a negative order, what is required is an examination of what on the particular facts of this case are the likely consequences of granting or withholding relief: National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] UKPC 16; [2009] 1 W.L.R. 1405.

3. In addition the right to artistic expression protected by Article 10 of the European Convention on Human Rights has a significant role in the application of the American Cyanamid test, not only in considering the claimants' prospects at trial but also in deciding where the balance of convenience lies. This aspect of the case seems not to have been considered previously.

Background

4. War Horse opened at the Olivier Theatre in October 2007 and was revived for a second season in autumn 2008. As with other successful National Theatre productions it transferred to the West End. Since March 2009 it has played at the New London Theatre. It is one of the most popular and critically acclaimed productions in the history of the National Theatre. The upshot has been a considerable profit for the National Theatre in an age of declining public subsidy. However Nick Starr, the chief executive of the National Theatre, explains in his witness statement that the profitability of the play has fallen when compared with the height of its success in the first two years of its run at the New London Theatre. He states that War Horse is an expensive play to stage with its cast (prior to March 2014) of 36 actors and the five claimants and their deputies (who cover in their absence).

5. The composer of the musical score of War Horse, Adrian Sutton, describes it as an orchestral epic. In the absence of a full orchestra, that has meant recorded music. Between March 2009 and March 2013 the claimants played wind instruments to accompany the recorded music throughout the performance from the opening trumpet solo beginning the play to the military band accompanying the final song closing it. They did that in the main from the band room in the theatre with the music being conveyed electronically to the audience. The band also appeared on stage, in costume, for the so-called sequestering scene. During that scene they played for 2-3 minutes, on top of the recorded score. The song man, accordionist and bugler roles in the play have always been performed by actors, not musicians.

6. Productions of War Horse in other parts of the world have not involved a live band and have relied wholly on recorded music. In light of that, and because both the co-director of War Horse and the composer concluded that it was better for accuracy and impact to deliver the score through recorded music, the National Theatre took the decision to move to a production in London where no live band was necessary and all the music was recorded. There were financial benefits in this course as well. In early December 2012 the National Theatre informed the Musicians' Union that it proposed to terminate the claimants' contracts in March 2013 and move to recorded music. In mid-December that year the Union invoked the conciliation process under the collective agreement between the Society of London Theatres and itself ("the SOLT/MU Agreement"). The Conciliation Board met on 6 February 2013 and decided unanimously that the National Theatre would be in breach of the SOLT/MU Agreement if it terminated the claimants' contracts. From March 2013 the claimants' roles were reduced to playing in one short scene only lasting approximately 15 minutes although the understudy bugler played two additional cues each lasting somewhere around three minutes. All of what they had previously played was now recorded.

7. On 4 March 2014 the National Theatre sent the claimants letters giving notice of termination of their contracts to expire on 15 March 2014. In the letters the National Theatre stated that the grounds were redundancy. "The reason for your redundancy is that we wish to bring the London production into line with other productions of War Horse that now exist, and this is the wish both of NT management and the creative team". On 15 March 2014 the claimants affirmed their contracts. Subsequently they attended the New London Theatre to perform their usual obligations but were turned away. They remain willing and able to attend work and to perform their contracts. The National Theatre has confirmed that they will not take any point on affirmation of their contracts by the claimants not attending for work. Consequently they no longer do so.

8. In March 2014 there were significant changes in the production, not only with the removal of the musicians but because some fifty percent of the cast changed. These new cast members rehearsed the play over 7 weeks without musicians and have no experience of a production with live music. In his witness statement, Robin Hawkes, the director of artistic administration for the National Theatre, explains the changes and how the "tracks" – the defined paths for each member of the cast during the play - have altered. No band appears in the sequestering scene at present, and the direction and lighting has been changed to reflect that. The cast has increased to 38 so there is

greater flexibility in accommodating the holidays and illnesses of the cast, which is especially important in a long running play like War Horse.

The claimants' contracts

9. The claimants have worked on War Horse in the New London Theatre under standard form National Theatre contracts based on that drawn up by the Society of London Theatres and the Musicians' Union for use by musicians engaged to perform in West End productions. The contracts are between the National Theatre as Manager and each musician. These they signed in March 2009. Clause 1 provides that the musician is engaged to play in the Manager's orchestra for the production of War Horse at a specified salary, now between £1200 and £1500 per week. (I note in passing that the salary of the claimants and that of their deputies represents more than a quarter of the £1 million the National Theatre pays musicians each year). Clause 2 of the contract reads:

> "The engagement shall commence on the [23rd] day of March 2009 and shall continue until either the Musician gives the Manager on any Saturday two weeks' notice in writing to terminate engagement, or, the Manager gives the Musician on any Saturday two weeks' notice in writing of the closure of the production, or otherwise as in accordance with clause 15."

10. The standard form contracts incorporate provisions of the SOLT/MU Agreement. The 2007 and 2010 versions of the SOLT/MU Agreement are identical in material respects. Clause 5.3 authorises the Manager to reduce the size of a band on a musical production being transferred to a smaller theatre. Clause 9 of the 2010 Agreement (equivalent to clause 15 of the 2007 Agreement) provides:

> "9. DURATION OF A MUSICIAN'S ENGAGEMENT
>
> 9.1 Duration
>
> The duration of a Musician's engagement shall be subject to the following:
>
> 9.1.1 The Musician giving the Manager on any Saturday 2 weeks' notice on writing to terminate the engagement.
>
> 9.1.2 The Manager giving the Musician on any Saturday notice in writing in accordance with 9.2 below of the closure of the production. A copy of such notice shall be sent to the Musician's Union.
>
> 9.1.3 The Manager giving the Musician on any Saturday no later than twenty six weeks after the official Press Night notice in writing in accordance with 9.2 below to terminate the engagement. Provided that in the case of a disciplinary matter, such notice shall be given only after the procedure in Appendix 4 has been exhausted.
>
> 9.2 Notice Provisions

> The Musician shall be entitled to one week's notice for each year of continuous employment in the production subject always to a minimum of two weeks' notice and a maximum of twelve weeks' notice."

This form of the clause dates from the time of the 2003 SOLT/MU Agreement. Prior to that the comparable clause permitted Managers to give a musician appropriate notice in writing to terminate after the official press night except with disciplinary matters where, as with the current form of the clause, notice could only be given after the relevant procedure had been exhausted. In his witness statement the assistant general secretary of the Musicians' Union, Horace Trubridge, asserts that the clause was cast in its present form so as to bring it into line with custom and practice. He adds that a review of the Union's personnel files has uncovered no case where a SOLT producer has terminated a musician's contract, without the musician's agreement, for any reason other than illness or old age, disciplinary action or the closure of the production.

11. The plain words of the contract do not cover what the National Theatre has purported to do in this case. Clause 2 provides that the engagement shall continue until certain events occur - if the musician gives two weeks' notice, if the National Theatre gives the musician two weeks' notice of the closure of the production, and otherwise in accordance with clause 15 of the 2007 SOLT/MU Agreement. That clause, materially identical to clause 9 of the 2010 SOLT/MU Agreement, restates the grounds in the contract but adds the right for the National Theatre to give notice to a musician within 26 weeks of press night. The clause seems designed as a 6 months' probationary period. Significantly, once that 26 week period has concluded, the engagement continues under the contract unless the claimants give notice or the National Theatre gives notice that it will be closing the production. Thus under the contract the National Theatre had no power to give the claimants the notice it did in the letters of 4 March 2014. This construction seems supported by the variation in 2003 of the SOLT/MU Agreement.

12. To avoid this conclusion the National Theatre points to clause 1, with the claimants' engagement to perform in the National Theatre's orchestra for the production of War Horse. The argument is that since the National Theatre has abandoned its orchestra for the play the claimants' engagement is at an end. The National Theatre had a right to terminate necessarily implicit in the purpose of the engagement or on the basis that the contract was discharged by performance. In argument I pointed to one difficulty with this submission, that it enables the National Theatre to abolish its orchestra overnight to avoid the specific provisions of termination by notice set out in the claimants' contracts. A further difficulty is that clause 5.3 of the SOLT/MU Agreement refers to a reduction in the orchestra when moving to a smaller theatre. The National Theatre submitted that that was concerned with musicals, where the orchestra is an integral part of the production, rather than a play such as War Horse. To my mind the clause lends some support to the argument that the authors of the standard contract gave attention to the issue of dismissing musicians when no longer required but did not regard it necessary to provide for that other than by reason of a reduction of the orchestra.

13. Another of the National Theatre's submissions is that a term can be implied in the contracts conferring the power on it to give notice of termination in the event of a

creative decision such as the present to dispense with an orchestra. It was not a commercial sensible outcome that the claimants should have a continuing right to be paid in circumstances where there was no longer any need for an orchestra and so no longer a part for them to contribute to the play. Moreover, an available construction of the contract which avoids an unreasonable result is to be preferred: Lewison, "The Interpretation of Contracts" (2011) 5th ed, para 7.14. The construction advanced by the claimants would have a highly unreasonable result in that it would constrain the creative decision as to how the play should be produced, or it would require that musicians continue to be engaged indefinitely when there is no role for them. The defendant's argument continues that clause 9.1.2 of the SOLT/MU Agreement provides that notice of termination may be given on the closure of the production, and that is effectively what has occurred with the production since March 2014, with the new cast, no orchestra, and the changes to the production's tracks.

14. To my mind none of these arguments overcome the plain words of the contract. Clause 2 of the contract, read with clause 9 of the 2010 SOLT/MU Agreement, expressly set out the circumstances in which the claimants' engagement may be terminated. It does not seem possible to imply any further circumstances in which the giving of notice would be permitted, since such implication would negate the specific circumstances for which express provision had been made: see Chitty on Contracts (2013), 31st ed, vol 1, at para 13-029. If the parties had wanted a termination provision in the event of creative decisions as to staging the play, it would have been an easy enough task to include it. As to the attempt to stretch the meaning of clause 2 of the standard form contract, and clause 9.1.2 of the 2010 SOLT/MU Agreement, by no stretch of the imagination can War Horse be regarded as having closed.

15. In summary there is in my judgment a serious issue to be tried on the question of whether the National Theatre was contractually entitled to terminate the claimants' contracts on the grounds set out in its 4 March 2014 letters. Although an authoritative interpretation of the contract can only be given at trial, it seems to me that the claimants' prospects on this aspect of the case are strong. That, however, is not the position regarding remedy; I am not convinced that on this they have any prospects of success at trial.

Specific Performance/Final Injunction

16. The claimants submit that they have real prospects of obtaining at trial an order for specific performance of the March 2009 contracts or an injunction to like effect. As a matter of form, they seek either an order for specific performance or a negative injunction preventing the National Theatre from breaching the contracts, the practical effect of which would be to require the claimants' reengagement. The principles applicable to either remedy in this context are the same: Snell's Equity, 32 nd ed, para 17-005. The claimants acknowledge as a rule of thumb that a court will not order specific performance of a contract calling for personal service where trust and confidence has broken down, a continued relationship is unworkable for some other reason, or constant supervision by the court might be required.

17. The claimants contend that in this case none of these obstacles to specific performance or an injunction are present and there is no reason why such an order should not be made, even though the contracts have an element of personal service. The National Theatre has not raised any issue regarding the claimants' honesty, integrity or loyalty which could go to trust and confidence. Each of them is a professional musician

whose engagement with the National Theatre has not been tainted by any allegation of misconduct or incompetence. The existence of the current proceedings does not alter the position: Hughes and others v London Borough of Southwark [1998] IRLR 55, [7], per Taylor J. The National Theatre's preference for other forms of providing the services previously provided by the claimants is not analogous to a situation where one party doubts the honesty, integrity or loyalty of the other party.

18. Moreover, in this case the claimants submit that it is difficult to see what would not be workable about requiring the National Theatre to re-engage them. They are professionals and have performed their changing roles in War Horse over many years without criticism. They are familiar with the arrangements and are capable of adapting their performances to take account of any alterations in artistic direction with their replacement by recorded music. At present their roles within the show have not been replaced by actors and there is no reason why they cannot be reinstated with ease. Only one or two short rehearsals would be required and the cast and crew of War Horse are likely to be delighted to welcome them back. If actors now occupy different parts of the stage in the sequestering scene, there is no threat of their colliding with the musicians given the professionalism on both sides. There is no issue of continuous supervision by the court since the parties have operated under these contracts for more than 5 years and done so without any difficulty. The claimants are fully aware of their obligations and all that the National Theatre would be required to do is to re-engage and pay them. In theory the National Theatre could reduce the claimants' role under the contract to playing one note during the interval and that surely would require no court supervision.

19. Before addressing these submissions, let me outline the key authorities in the area. In Geys v Société Générale [2012] UKSC 63; [2013] 1 A.C. 523 Lord Wilson restated the long held view that the remedy of specific performance, or an analogous injunction, should not be available to require an employer who had wrongfully dismissed employees to take them back. The rationale is that the court would not enforce agreements strictly personal in nature: [77]. Lord Wilson added that there was a "big question" whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees required a review of the usual unavailability of specific performance: [78] That issue, said Lord Wilson, had been raised by Stephenson LJ in Chappell v Times Newspapers Ltd [1975] 1 WLR 482.

20. In Chappell Stephenson LJ said that relations between employers and employed were still developing and there may arise cases in which it is proper for the court to exercise its discretion in favour of an employee and grant an injunction to hold the employer against his will to the continued performance of the contract of employment.

> "Like Stamp L.J. dissenting in Hill v CA Parsons & Co [1972] Ch 305, 323: "I would be far from holding that in a changed and changing world there can be no new exception to the general rule" that a court will not grant an injunction in aid of specific performance of a contract of personal service, so that if the servant has been wrongfully dismissed, it will consider his contract unilaterally terminated by the master and leave the servant to his remedy in damages. I would not, however, look for new categories in which to pigeonhole new exceptions to this rule as it works either for the employer or the employee,

> but I would make exceptions in accordance with the general principle on which discretionary remedies are granted, namely, where, and only where, an injunction is required by justice and equity in a particular case, and, at the interim stage, by the balance of convenience": at 503H.

Stephenson LJ held that Chappell was not an exceptional case, since the employees seeking relief there would not give an undertaking not to engage in disruptive activities. The other members of the court agreed. Geoffrey Lane LJ said that very rarely indeed would a court enforce either by specific performance or by injunction a contract for services, either at the behest of the employers or of the employee, since if one side has no faith in the honesty or integrity or the loyalty of the other, to force it to serve or to employ that other was a plain recipe for disaster: at 506B. In his judgment Lord Denning MR said that in that case if an injunction were granted no one could have any confidence that the employment would continue peaceably: at 501G-H.

21. Powell v Brent London Borough Council [1988] ICR 176 was an unusual case where interim relief was ordered. There an employee having applied for a higher grade post in the council was orally informed that she had been successful. Another applicant for the post objected and the council refused to confirm her appointment while the dispute was investigated. In the meanwhile she fulfilled the post pending resolution of the dispute. She sought to restrain the council from re-advertising the position pending trial. Knox J refused since she had not shown that she had a real prospect of succeeding in her claim for a permanent injunction at trial because she had not demonstrated continued confidence between her and the council. The Court of Appeal allowed the appeal and granted relief. Ralph Gibson LJ held the court would not grant an injunction

> "when the employer had sought to terminate [the employee's] employment and to prevent [her] carrying out [her] work under the contract, unless it was clear on the evidence not only that it is otherwise just to make such a requirement but also that there exists sufficient confidence on the part of the employer in [the employee's] ability and other necessary attributes for it to be reasonable to make the order. Sufficiency of confidence must be judged by reference to the circumstances of the case, including the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employer's operations if the employer is required by injunction to suffer the plaintiff to continue in the work": at 194B-C.

22. Ralph Gibson LJ continued that the council was a large organisation employing many people in different departments and vastly different from a man or woman with a small business, partnership or small firm with a small staff. The council was also a rational and fair-minded organisation well able to accept the independent view of the court. There was a good working relationship between the employee and her superior. Nicholls LJ agreed that in the unusual circumstances of the case, and although the matter was finely balanced, common sense and justice dictated that the situation which had operated without apparent difficulty, where the employee was fulfilling the role, should continue until trial by grant of an injunction: at 199H.

23. In light of these authorities I am not at all persuaded that specific performance or a mandatory injunction will be granted at trial. This is not an exceptional case; it is a standard case where on a traditional analysis loss of confidence is the primary block to this type of relief. (I accept the claimants' submission that supervision would not be an obstacle). Loss of confidence is fact specific. A role in War Horse is miles away from the impersonal organisation referred to by Lord Wilson in Geys v Société Générale [2013] 1 A.C. 523 and from the situation in Powell v Brent LBC [1988] ICR 176, where the employee had been performing the superior role, and had the confidence of her superior. The plain fact is that the production of a play necessarily entails close cooperation between all those involved, the actors and those directing and producing the play.

24. Mr Starr, executive director of the National Theatre, says in his witness statement that there has been a loss of confidence in the sense that the producers and directors of War Horse do not believe that the musicians can contribute positively to the play and that the play is better off without them. The National Theatre's artistic judgment, made by those with the expertise to assess such matters, is that a live band does not provide the same quality and impact of performance as can be produced through the use of recorded music and professional actors. (Mr Starr is clear that this is not a matter of questioning the claimants' ability as musicians). There is a real risk, Mr Starr says, that in circumstances where they are imposed on the production by court order, and know that those running the play do not believe that they should be there, there could be a destabilising impact.

25. That to my mind is precisely the type of situation where on the authorities it would be inappropriate for the court to enforce a contract by specific performance or analogous injunction. There is clearly an absence of personal confidence on the part of the National Theatre. In addition the claimants themselves would be affected by knowing that the National Theatre does not want them and believes that the play is better without them.

26. As to workability I am also doubtful about the claimants' assertion that they could easily be reintegrated into the play and that all they would need are limited rehearsals. In his witness statement Robin Hawkes, director of artistic administration at the National Theatre, explains that the play has been produced and rehearsed to take into account the production without a live band. The changes have become embedded. Since March this year over one half of the cast are new and would have to be rehearsed, at some expense, to accommodate a live band. Although this will be a matter of evidence at trial, it seems to me that the order the claimants seek would entail compelling the National Theatre to make more significant changes to the play than this and that it would cause not insignificant practical difficulty.

27. In addition to the breakdown of trust and confidence and the concern about workability, there is another consideration, and an important one, which tells against the grant of specific performance or an analogous injunction at trial. Sections 12(1) and 12(4) of the Human Rights Act 2010 provides that, in considering whether to grant any relief which may affect the right of freedom of expression in Article 10 of the European Convention on Human Rights, the court must have particular regard to the importance of that right. Section 12(4) refers to artistic and related material and the Strasbourg jurisprudence is clear that Article 10 protects artistic expression: see Lester, Pannick and Herberg, Human Rights Law and Practice, (2009), 3rd ed. para

4.10.15. The decisions of producers and artistic teams in staging plays are protected by Article 10. Here the effect of the order sought would be to interfere with the National Theatre's right of artistic freedom. It would prevent it from continuing with the play in the form which it judges to be artistically preferable and would involve the court in dictating how the play can be produced by requiring it to incorporate a live band. That is a clear interference with the right and is not necessary or proportionate to the protection of the rights of the claimants under Article 10(2), which (as I explain in a minute) are adequately protected by a claim in damages. The claimants' own rights to freedom of expression are not in any way curbed, since they can continue to play their instruments, albeit not in War Horse. In my view a key factor telling against the exercise of the court's discretion at trial to grant equitable relief in the form of specific performance or injunctive relief would be the breach of Article 10 which would be entailed.

28. In the course of their submissions, the claimants invoked section 236 of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides that no court shall compel an employee to do any work by ordering specific performance or by restraining the breach of a contract by injunction, and sections 113-116 of the Employment Rights Act 1996, which provide that an employment tribunal must consider an order for reinstatement of an employee in any case in which it has found her dismissal to be unfair (subject to whether it is practicable for the employer to comply with an order for reinstatement): (s.116(1)(b)). The claimants made the obvious point that Parliament recognises a distinction between cases in which it is the employer who seeks specific performance, and those in which it is the employee who does so. There are no examples of the former obtaining specific performance, but many of the latter, the reason for the prohibition on the former being that it is thought that such an order would interfere unduly with a person's liberty but requiring a corporate body to employ an individual does not engage this right.

29. I am puzzled where this submission leads, especially since the tribunal ordering reinstatement under section 116 has no power to enforce an order. The 1996 legislation simply has no application in the context of this case. Section 236 actually seems to favour the National Theatre, since the effect of the order sought would be to compel its employees, the creative team, to work with the claimants against their will. That, as the National Theatre submitted, would seem to be in tension with the principle underlying the requirement contained in that section that the court should not, by way of injunction, compel an employee to do any work. The claimants disavowed any attempt to modify common law doctrine by analogical reasoning with either legislation. In my view their submissions on the law are no further advanced by reference to it.

Adequacy of damages and balance of convenience

30. If contrary to my view the claimants succeeded at trial, would the award of damages to them be an adequate remedy to cover the loss sustained between now and the time of trial in 2-3 months' time arising from their exclusion from playing in War Horse? In considering that question I accept that the issue must be addressed in the context of doing what is just: Evans Marshall & Co v Bertola SA [1973] 1 WLR 349, at 379H, per Sachs LJ. The claimants submit that damages are not an adequate remedy, because the effect of refusing interim relief will make it difficult for them to obtain a final injunction at trial. In two to three months' time, when the case gets to trial, a judge is

very unlikely to be prepared 'to put the clock back' and order their reinstatement in the play: see Leeds Cricket Football and Athletic Co Ltd, 28 January 1993 (unreported), per Colman J. The new style production of War Horse would be too embedded for it to be practicable to order specific performance. Moreover, the claimants' evidence is that if they are not granted interim relief by the time the case comes to trial there is a real danger that some or all of them would have found some other work. The claimants also contend that they are suffering not just financial losses but non-pecuniary losses, including the loss of security, interest and pride which comes with being engaged in a successful and long-running West End production. These are losses not capable of being compensated in damages under the law of contract as it stands. Further, it is very unlikely that any other production in which any of the claimants might work would enjoy anything like the success or longevity of War Horse. All this makes damages a very inadequate remedy compared with an interim order for their reinstatement.

31. Mindful of the need to do what is just in the circumstances I have reached the conclusion that damages are an adequate remedy for the claimants. There is no difficulty in quantifying their loss to an expedited hearing. (Damages at trial, as the claimants submitted, might be more difficult, due to the problem of estimating the length of the play's run and their future involvement, but that difficulty does not apply at the interim stage. In any event judges are accustomed to assessing damages in complex situations, more complex than this). On the evidence about the changes made in staging the play since last month, turning the clock back will be no more difficult in 2-3 months' time than now. As to non-pecuniary loss, I accept the National Theatre's submission that there can be no plausible suggestion of any kudos in being made part of the play as a result of a court order in circumstances where it is against the wishes of the creative team. There would certainly seem to be no kudos to perform in War Horse by playing one note during the interval, as the claimants conceded the National Theatre could require under the contract. It is most unfortunate that in the interim period the claimants will have no equivalent income from the National Theatre as at present, but that is no reason for requiring their reintegration in the play.

32. If the interim relief the claimants seek is, contrary to my view, otherwise appropriate there is a need to consider where the balance of convenience lies. The claimants contend that the balance of convenience in this case overwhelmingly favours the grant of specific performance or an interim injunction. The greater risk of potentially irremediable injustice lies in refusing relief, because the practical effect of this will be to deny the claimants specific performance or a final injunction at trial. Moreover, by virtue of having affirmed their contracts the claimants cannot obtain employment elsewhere, at least to such extent as it would conflict with possible engagement by the National Theatre. Without income until trial, in the event of interim relief being refused, it would be financially devastating for the claimants to remain without employment, notwithstanding redundancy payments and the small hardships payments available for the Musicians' Union. They would be pressured to take any work available, but that would be inconsistent with the continued affirmation of the National Theatre contracts. Thus the claimants contend that the court should preserve the status quo in the relatively short period pending trial and therefore they should remain doing the work they have done and were doing prior to 4 March 2014.

33. In my view the balance of convenience lies firmly against granting the interim relief sought. Refusal is the course which is likely to involve the least risk of injustice if it turns out to be wrongly made. The relief sought would involve unwinding the production of War Horse without the band and forcing the creative team to work with musicians pending trial, despite not believing that they contribute positively to the play. If it is not continued at trial damages would not be an adequate remedy for the National Theatre. There will be little difference in specific performance or an analogous injunction being ordered in 2-3 months time compared with now. The claimants will be without their current income for 2-3 months, and there may be pressure to seek other employment, but the National Theatre has agreed not to take any point about their non-attendance at work regarding affirmation of the contract. Significant in the balance against interim relief is the interference with artistic expression in requiring the National Theatre to reintegrate a band into the production. Sections 12(1) and 12(4) of the Human Rights Act 1998 require me to have particular regard to this aspect of the relief the claimants seek.

Conclusion

34. In my view the claimants' prospects at trial for breach of contract by the National Theatre are strong. However, for the reasons I have given they have not persuaded me of the case to order interim relief pending trial, to reinstate a live band in the production of War Horse and to engage each of them as part of it.