

MIKE KEENAN'S POWER PLAY - A SLAP SHOT AGAINST THE RANGERS AND A SLAP ON THE WRIST BY THE NHL

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I. INTRODUCTION

On June 14, 1994, a curse was exorcised from the New York Rangers and their long-suffering fans. After 54 years of futility, the team won the Stanley Cup — the trophy awarded to the National Hockey League's Championship team.² As the ghost of 1940 (the last year the team won) no longer haunted the team, the Rangers

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2. See *After 53 Years of Failure, the New York Rangers Finally Hoist the Stanley Cup*, SPORTS ILLUSTRATED, June 20, 1994, at 24.

and its legion of fans rejoiced in unabashed enthusiasm as their team carried the century-old trophy around Madison Square Garden, and embraced the holy grail of professional hockey.

Players like team captain Mark Messier, goaltender Mike Richter and other stars such as Brian Leetch, Adam Graves, Alexei Kovalev and Stephan Matteau contributed to the winning of the cup. General manager Neil Smith and coach Mike Keenan both deserved credit; the former for building a winning nucleus by making shrewd trades and signing free agents and the latter for coaching the team to the Stanley Cup Championship.

Despite the Ranger's success, Smith and Keenan did not develop a warm relationship; in fact, they barely tolerated each other and did not talk to one another for periods of time.³ Their dislike would result in a contract dispute which would lead to significant implications for the National Hockey League and other sports leagues. On an even broader level, this matter involves the very sanctity of personal services sports contracts.

When the dust settled after six frenetic weeks of press conferences, lawsuits, news leaks and fan opinions on sports radio stations, Keenan was the coach and general manager of the St. Louis Blues (another NHL franchise), the Rangers obtained a potential star player from the Blues in a trade, and Keenan, the Blues, the Detroit Red Wings and the Rangers were fined by the NHL for actions detrimental to the sport of hockey.⁴

The saga and resolution of this bazaar state of affairs is the subject of this article. The first section outlines the background and history of Keenan's relationship with the Rangers. The second part discusses the facts of the dispute. The third section details the resolution of this matter by the Rangers, the Blues and NHL Commissioner Gary Bettman. The fourth and fifth sections offer a critique of the "settlement" and a proposed liquidated damages clause for resolving such cases in the future.

II. PRE-GAME CEREMONIES — THE COMING OF KEENAN

To say that the New York Rangers and their fans desired a Stanley Cup is an understatement. Before 1994, the team won three previous championships, the most recent in 1940.⁵ With the

3. See *Keenan Abruptly Quits a Month After Cup Victory*, THE NEW YORK TIMES, July 16, 1994, at 29; *The Thawing of Mike Keenan*, THE SPORTING NEWS, Oct. 3, 1994, at S-3.

4. See *The Keenan Affair*, SPORTS ILLUSTRATED, July 17 1994, at 9; *Keenan Case Closed*, THE NEW YORK POST, July 25, 1994, at 71; *Bettman Justice: Everyone Loses, Everyone Gains*, THE NEW YORK TIMES, July 26, 1994, at B7.

5. *Rangers Defeat Toronto to Win Stanley Cup*, THE NEW YORK TIMES, Apr. 14, 1940, at C1.

exception of baseball, this period of time without a championship was the longest by any team in any sport.⁶

Many fans wondered if the Rangers would win another Stanley Cup Championship in their lifetimes. Their failures had given their fans a sense that the team had been "cursed."⁷ In 1950, the Rangers lost to the Detroit Red Wings in the seventh game of the final round on a goal in the second overtime period.⁸ In 1972, their best forward, Jean Ratelle, broke his ankle one month before the playoffs were to begin after being hit with a puck shot by another Ranger player. The team lost in the finals to a highly-talented Boston Bruins team.⁹ In 1979, the most recent year the Rangers were in the final round, they were defeated by the Montreal Canadiens in five games.¹⁰

In 1992, the team compiled the best record in the NHL and many thought that the Rangers would win the cup.¹¹ However, a players' strike was called at the end of the season, the first in the history of the league. After the strike ended, the Rangers lost their momentum and suffered defeat at the hands of the Pittsburgh Pen-

6. See *Titles Few and Faaaar Between; Rangers not only Team in Drought*, DAYTON DAILY NEWS, June 9, 1994, at 5D. In the history of the four professional team sports in the United States — baseball, football, basketball and hockey — there are 26 current teams that have played 25 seasons or more without winning a championship within the city and league they inhabit. Of those, the franchises with longer streaks of futility than the Rangers are the Chicago Cubs, who last won a World Series title in 1908; the Chicago White Sox who last won in 1917; and, the Boston Red Sox who won in 1918. *Id.*

7. See *Curses . Will They Be Foiled for Rangers in Stanley Cup Finals?*, CHICAGO TRIBUNE, June 5, 1994 at 6, Zone C. The "curse" was supposedly created in 1941 by Red Dutton, the manager of the rival New York Americans when his team was forced out of Madison Square Garden in 1941. It was claimed that he stated "The Rangers will never win another Cup in my lifetime." Before his death in 1987, Dutton was quoted as saying that "A lot of that [the curse] was newspaper stuff. But newspapers can be right sometimes." Another curse involved the burning of the mortgage of Madison Square Garden inside the Stanley Cup when the team won in 1940. This sacrilegious act supposedly offended the Gods of hockey. See also, *The Curse of the Cup*, SPORTS ILLUSTRATED, June 6, 1994, at 30.

8. See *Detroit Beats Rangers in Second Overtime and Wins Stanley Cup*, THE NEW YORK TIMES, April 24, 1950, at 28. Detroit Red Wing Pete Babando scored the winning goal at 8:31 of the second overtime period to give Detroit a 4-3 victory. The Rangers led earlier in the game by a score of 2-0. In another interesting twist, the Rangers were forced to play their "home" games at Toronto because the circus came to Madison Square Garden — a problem that haunted many Rangers' teams until the late 1960s when a new kind of floor was invented so that the ice could remain. The Rangers led the series 3 games to 2, but they were forced to play the last two games in Detroit because of an NHL rule that no deciding game of a series could be played on neutral ice. Would the Rangers win if they played any of the games at "home"? We will never know. See *Curse of the Cup*, *supra* note 7, at 42.

9. See *Ratelle Injured in Rangers Victory by 4-1 Over Seals*, THE NEW YORK TIMES, March 2, 1972 at 49; See *Bruins Trounce Rangers, 3-0, and Capture Cup in Six Games*, THE NEW YORK TIMES, May 12, 1972, at 33.

10. See *Canadiens Beat Rangers, 4-1 for 4th Stanley Cup in Row*, THE NEW YORK TIMES, May 22, 1979, at C11.

11. See *The Messiah of New York: Can Messier Lead the Rangers to their First Cup in 52 Years?*, THE FINANCIAL POST, March 30, 1992, at 51.

guins in the second round of the Stanley Cup playoffs.¹² The following season, things got even worse when the team failed to make the playoffs.¹³

General Manager Smith realized that changes had to be made, especially in improving the players' motivation. He hired Mike Keenan, a successful NHL coach for the last decade. Keenan had previously coached the Philadelphia Flyers (from 1984 to 1988) and the Chicago Blackhawks (from 1988 - 1992). Although very successful with those teams (he took both to the Stanley Cup finals) he was dismissed from Philadelphia due to unresolved contract differences with the General Manager and resigned from Chicago after he was replaced as coach but retained as general manager.¹⁴

Keenan's contract with the Rangers was indeed a lucrative one. Reflecting the team's desire to win the Cup, the then-owners of Madison Square Garden were ready to pay and pay big. The five year contract paid Keenan a rate starting at \$750,000 for the first year, climbing to \$850,000, \$900,000, \$950,000 and \$1,000,000 annually for the next four years.¹⁵ Also included was a signing bonus of \$660,875 and a loan of \$400,000 or 75 percent of the cost of purchasing a residence in the New York Metropolitan area at a low interest rate of five percent per year.¹⁶ The agreement contained a substantial amount of incentive clauses. If the team attained these goals, Keenan would be paid the following:

Best overall record in the NHL — \$50,000; or if the team finished second — \$25,000; and

First in the eastern Conference — \$40,000

First in division — \$25,000

If the team participated in the NHL post-season playoffs the bonuses came to the following:

Wins first round — \$50,000

Wins second round — \$75,000

Wins third round — \$100,000

12. See *From Dream to Nightmare*, NEW YORK NEWSDAY, May 14, 1992, at 174. The Penguins defeated the Rangers in six games, playing without the services of their star player Mario Lemieux, whose hand was broken by a slash from the Rangers' Adam Graves in the second game of the series. *Id.*

13. See *53 Skiddoo: Rangers Exit With No Goals and One Explanation*, THE NEW YORK TIMES, April 13, 1993, at 11. The Rangers were able to achieve this dubious distinction despite having the highest payroll in the NHL. The team lost nine of their last ten games. *Id.*

14. See *Keenan Abruptly Quits a Month After Cup Victory*, THE NEW YORK TIMES, July 16, 1994, at 29. (Chart accompanying article).

15. *New York Rangers Hockey Club. v. Keenan*, 94 Civ. ____ (), SDNY July 18, 1994, Exhibit A, p. 16.

16. *Id.* at 16.

Wins Stanley Cup — \$200,000¹⁷

if Keenan received the “Coach of the Year” award — \$25,000; if second — \$12,500; third — \$7,000.¹⁸

Additionally, the club was willing to provide an annuity of \$50,000 per year commencing when he reached the age of 55 and continuing until his death.¹⁹ The contract specified that Keenan’s bonus payments were to be sent within 30 days after the conclusion of the NHL season.²⁰

In return, Keenan was required to devote “substantially all of his time, attention, skills and energies to coaching the team, in consultation and subject to the prior approval of the General Manager of the club.”²¹ He warranted “extraordinary and unique” skills and ability with regard to the sport of professional hockey. His services were therefore exclusive and irreplaceable to the club. Because of Keenan’s status, the contract specified that any loss or breach could not be adequately compensated for with money damages, thereby granting the team injunctive relief to stop the questionable activities.²² The contract specifically forbids any services and duties for any other professional hockey team, or any business venture competing with the Rangers or the team’s corporate parent at the time, Paramount Communications.²³

Keenan could be discharged for cause — meaning material breach, unreasonable neglect, conviction of a felony or a plea of *nolo contendere* with respect to a felony charge. If such cause was involved, the contract gave him 20 days to cure in the event of the material breach and neglect. If no cure occurred, the team’s obligations would cease.²⁴ The agreement also provided that the team could discharge Keenan without cause at any time during the contract term, provided there was delivery of written notice. In this event, Keenan would receive a lump sum of 75 or 50 percent of his remaining base salary, depending on the date of notice.²⁵

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *New York Rangers Hockey Club. v. Keenan*, 94 Civ. ____ (), SDNY July 18, 1994, Exhibit A, p. 16.

22. *Id.* at 6.

23. *Id.*

24. *Id.* at 10.

25. *Id.* at 11.

III. FIRST PERIOD: THE SUCCESSFUL SEASON AND THE KEENAN SHUFFLE

Under Keenan and General Manager Smith, the Rangers, compiled the best regular-season record in the league, led by their captain Mark Messier and stellar performances by Adam Graves, Brian Leetch and Mike Richter.²⁶ With the addition of some key veteran players, such as Craig McTavish, Stephane Matteau, Brian Noonan and Glenn Anderson, all obtained on the final day of the trading period,²⁷ the Rangers won the Stanley Cup after recording playoff victories over the New York Islanders, Washington Capitals, New Jersey Devils and Vancouver Canucks.²⁸

Fifty-four years of frustration ended when the Rangers finally won the Stanley Cup. The long wait was over and the celebration began, including a ticker-tape parade on Broadway and a ceremony at City Hall.²⁹ Despite what should have been a perfect season, rumors of tensions between Keenan and General Manager Smith surfaced throughout the year. As the season progressed, they gradually distanced themselves to a point where Keenan and Smith were often not on speaking terms.³⁰ Keenan did not want to report to Smith and desired more management control; Smith was not about to give Keenan such control.

Only one month after the team won the Stanley Cup, Keenan stunned the Rangers, their fans and many in the NHL by announcing that he was terminating his relationship with the Rangers. Despite the fact that he had four years left on his five year contract,

26. See *NHL-Final Standings After Games Played on Thursday*, REUTERS, April 15, 1994, at 1. The Rangers finished the season with a record of 52 wins, 24 losses and 8 ties, for a total of 112 points, the best record in the league and in the team's history.

27. See *Gartner and Amonte Go in Rangers' 5-Deal Flurry*, THE NEW YORK TIMES, March 22, 1994, at 9.

28. See *Rangers Gain Finals*, CHICAGO TRIBUNE, May 28, 1994, at 99; *Rangers Bless the Mess; New York Lives Thanks to Awesome Performance*, MONTREAL GAZETTE, May 27, 1995, at F1. The last two rounds — the Eastern Conference Finals against the Devils and the Stanley Cup Finals against the Canucks — ended in dramatic seventh games, producing two of the most exciting hockey games seen in New York in many years. The Rangers defeated New Jersey after trailing in the best of seven playoff series, 3 games to 2. In the 6th game, the Rangers rallied, on three goals by Mark Messier to tie the series. Messier had earlier predicted this victory. In game 7, the Rangers held a 1-0 lead until just seven seconds in regulation time, when the Devils tied the score. The game went into overtime and concluded in the second overtime period on a goal by the Rangers' Stephane Matteau.

In the final-series against Vancouver, the Rangers held a three games to one lead, but Vancouver tied the series, forcing a seventh game in Madison Square Garden. The Rangers won that nailbiting game 3-2, thereby attaining the Stanley Cup. See NEW YORK TIMES, June 15, 1994, at A1.

29. See *A Celebration 54 Years in the Making; New Yorkers Bask in Rangers' Glory*, BOSTON GLOBE, June 18, 1994, at 34.

30. See *supra* note 3.

Keenan unilaterally decided to leave the team, calling himself a "free agent" that was willing to seek employment with other teams.³¹

Speaking at a hastily convened press conference in Toronto, the reason Keenan gave was that the Rangers "failed to honor the obligations of the contract" because the team sent him a performance bonus check of \$608,000 one day later than prescribed in the contract.³² The Rangers, who only found out about Keenan's intentions two hours before his press conference, assured Keenan and his lawyer/agent Robert Campbell that the check had been cut and was "immediately" available.³³

As discussed, the employment contract stated that this bonus was payable within 30 days of the conclusion of the season. The period began on the night of June 14th when the team won the Stanley Cup. He did not receive the check by July 14th, and used that as justification to terminate his obligations. The team alleged that a "clerical oversight" resulted in a delay with the sending of all bonus checks.³⁴ When the Rangers found out about the Keenan press conference, Robert Gutkowski, then President of Madison Square Garden, was attempting to contact Campbell 20 minutes before the conference. According to the Rangers' statement, Gutkowski was disconnected by Campbell.³⁵

Adding to this scenario were persistent rumors that Keenan made "contacts" with the Detroit Red Wings, another NHL team, during the Stanley Cup Playoffs, a direct violation of his contract. Although Keenan denied these rumors and stated that he planned to coach the Rangers the next season, many at Madison Square Garden and in the press did not believe him.³⁶ If true, such activities would constitute "tampering" with an employee under contract, a violation of the league's constitution.³⁷

31. See *Keenan Abruptly Quits a Month After Cup Victory*, THE NEW YORK TIMES, July 16, 1994, at 29.

32. See *New York Rangers Hockey Club v. Keenan et al.*, 94 Civ. ____ () (S.D.N.Y.), at page 12.

33. See *supra* note 28.

34. *Id.*

35. *Id.*

36. *Id.* It was admitted that Keenan and his agent met with representatives of the Detroit Red Wings to discuss employment opportunities one day before they met with the St. Louis Blues. See also *Keenan Denies He's Leaving New York*, SAN FRANCISCO CHRONICLE, June 14, 1994, at D2; *Keenan Says Rumors are Not True*, HARTFORD COURANT, June 14, 1994, at E4.

37. See *Bylaw 15*, NHL Constitution.

IV. SECOND PERIOD: THE EXTENT OF THE BREACH

Keenan, through his agent, argued that the failure to pay the bonus on time constituted a material breach, giving him the right to terminate the agreement. The Rangers countered that the actions of Keenan constituted the breach. Just four days after Keenan's announcement, the team filed suit in the United States District Court for the Southern District of New York on the basis of diversity, since Keenan was a resident of Connecticut. The team sought monetary and injunctive relief. The Rangers also requested a hearing in front of NHL Commissioner Gary Bettman.

In its complaint, the Rangers sought a declaratory judgment to determine whether the contract between Keenan and the team was valid and enforceable.³⁸ They claimed that the late payment was a minor transgression in a long-term contract, a *de minimus* delay of less than a day to effectuate delivery of a check.³⁹ According to the club, one late payment out of many over the life of the contract does not add constitute a breach to justify a discharge by the other party. The team also denied Keenan's allegations that the late payment was an example of bad faith.⁴⁰

The Rangers claimed that it was Keenan who acted in bad faith.⁴¹ The team's complaint got right to the point when it stated at the outset: "Defendant Mike Keenan is a great hockey coach. He is also a faithless employee, one who has betrayed the . . . club, its management and millions of Rangers fans."⁴² The complaint further alleged that Keenan, as an employee with "unique and irreplaceable hockey skills" breached his obligation and created imminent harm by attempting to sign a contract with one of the Rangers' NHL competitors to the detriment of the Stanley Cup champions.⁴³ It noted that Keenan warranted that he would not perform any services for any other team during the contract and that he was "extraordinary and unique" and "cannot be replaced." It added: "while Keenan may once again wish to sell his services to the highest bidder, he cannot wish away his contractual obligations to the Club, particularly those provisions that prevent Keenan from doing precisely that which he is imminently threatening to do: employing his unique and irreplaceable hockey skills for the benefit of one of the Rangers' NHL competitors."⁴⁴

38. See complaint at 13.

39. *Id.* at 12.

40. *Id.* at 20.

41. *Id.*

42. *Id.* at 1.

43. *Id.* at 5.

44. See complaint at 13.

In addition to the request for a declaratory judgment on the merits of the contract and injunctive relief, the complaint stated causes of action for breach of good faith, tortious interference with contract, damages, and the disparagement of the team's reputation.⁴⁵ At the same time, Commissioner Bettman, exercising his powers under Section 6.3(b)(5) of the NHL constitution, scheduled a hearing on this matter after the Rangers filed the complaint.⁴⁶

V. TIME OUT: IF A COURT WOULD DECIDE

Basic common law states that in order for a party to a contract to be excused from performance, a breach by the other party must be deemed "material."⁴⁷ Although there is no set definition of the term encompassing all circumstances, courts have concluded that a material breach occurs when there is "a failure to perform a substantial part of the contract or one or more of its essential terms and conditions, or if there is such a breach as substantially defeats its purpose."⁴⁸ The Restatement (Second) of Contracts lists the following factors as a presumption of materiality:

- A) the extent to which the injured party will be deprived of the benefit which he reasonable expected;
- B) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- C) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- D) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- E) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.⁴⁹

45. *Id.* at 15-24.

46. See NHL Constitution, Art. 6.3. which provides in pertinent part: which grants him "exclusive jurisdiction over any dispute between a member club . . . or any employee of . . . any member club . . . that in the opinion of the Commissioner is detrimental to the best interests of the NHL,"

Id.

47. See RESTATEMENT (SECOND) OF CONTRACTS, § 241-42.

48. Comment (a) of the RESTATEMENT (FIRST) OF CONTRACTS, § 274 states that "it is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem — when does a failure to perform a promise discharge the duty to perform the return promise for an agreed exchange . . . if the failure of a promisor occurs after part performance by him, the questions becomes one of degree." *Id.* Thus each case must stand upon its own facts and circumstances. See also *Decker v. Juzwik*, 255 Iowa 358; 121 N.W.2d 652 (1963), quoting the above provision.

49. See RESTATEMENT (SECOND) OF CONTRACTS, § 241; *UHS-Qualicare, Inc., v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 756 (Miss. 1987), (quoting *Gulf South Capital Corp. v. Brown*, 183 So.2d 802, 805 (Miss. 1966)). In the area of commercial law, the Uniform Commercial Code retains this standard when it enunciates a standard of "substantial

The next question involves what constitutes a material breach in a personal services contract, such as the one between Keenan and the Rangers. Applying the Restatement definition, the breach must injure the other party substantially, lack good faith and substantially deprive the victimized party of the benefits to be received under that contract.⁵⁰ If such is the case, then the other party would be discharged from any obligations. However, if a breach is considered non-material and the performance deemed "substantial," a party cannot simply walk away from his obligation, unless that action was done intentionally.⁵¹

Applying these basic standards to Keenan's claim and resulting action, it seems obvious that, unless Smith plotted to oust Keenan, the late payment was a minor breach that did not give Keenan the right to terminate the whole contract. Keenan hardly was "deprived" of the benefit (the bonus) which he reasonably expected, as the team cured the failure by simply sending the check one day late. Rather, it was Keenan who acted in bad faith by using the late payment as an excuse to terminate his duties after one year of a five year obligation.

So Keenan's unilateral and intentional action constituted a material breach, as he announced that he was no longer obligated to perform his duties for the team. Although the Rangers did initially breach (albeit in a very minor way), the team could seek more drastic contract remedies — in law and in equity — for Keenan's flagrant conduct.⁵² The Rangers' lawsuit in the district court, sought injunctive relief to prevent Keenan from assuming his position with the Blues, since specific performance is not available in contracts involving personal services.⁵³ It has been well settled

non-conformity" as a requirement for a repudiation of a contract involving installment contracts. However, two well-known commentators note that there is little case law on what constitutes "substantial non-conformity." See UCC § 2-612(2); WHITE & SUMMERS, UNIFORM COMMERCIAL CODE (1988).

50. *Id.*

51. See Mack, Linda McCauley, *Chapter 11 Movie Studio Bankruptcy and Negative Pickup Deals*, 17 COLUM.-VLA J.L. & ARTS 127, (quoting *In re Fastrax*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991); *In re Rooster, Inc.*, 100 B.R. 228, 232 (Bankr. E.D.Pa. 1989)).

52. See NEW YORK TIMES, July 16, 1994 at 29. It is interesting to note that during his press conference, Keenan's explanation was vague as he never specified the reasons for his actions. In their response, the Rangers actually confessed to their minor transgression and took steps to correct the problem. *Id.*

53. See A. CORBIN, CORBIN ON CONTRACTS 1204 at 400-01 (1964). The policy that equity will not award specific performance for contracts for personal services is said to be based on the difficulty of gauging proper performance, the American commitment to personal liberty, and the undesirability of forcing cooperation between the parties if confidence and loyalty have already been destroyed. The Thirteenth Amendment to the U.S. Constitution specifically states: "Neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. 13, § This prohibition precludes the use of specific performance, since one cannot be forced to engage in personal ser-

that injunctive relief is appropriate, if it is to prevent a "unique and extraordinary" person from going to a rival, when money damages are inadequate to compensate the victimized party.⁵⁴ New York Courts have been particularly strict about enforcing injunctive relief, only doing so under compelling circumstances, including a material breach.⁵⁵ Even a clause in a contract stating that a person is "unique" will not necessarily result in an injunction.⁵⁶

If this matter had been determined by a court, a strong case could be made for an injunction. Keenan unjustifiably committed a material breach, and it is arguable that Keenan can be considered "unique" and money damages alone may not have been adequate to remedy the situation. Of course, if it could be shown that the Rangers intentionally failed to pay Keenan on time, the result would be different. The Rangers would not have any grounds to seek redress, since an intentional inducement to breach would be grounds for a complete discharge of duty by the breaching party.⁵⁷ This last point has been the focus of rumors that the Rangers were not exactly innocent victims of Keenan's actions and that the management sought to rid themselves of Keenan by intentionally giving Keenan an "out" by making this late payment.⁵⁸

These allegations have not been confirmed by any on the record statement. If the allegations are true, then the Rangers would not only lose their equitable remedies in this breach by Keenan, but they may very well lose any remedy at all, since this would constitute an intentional act and a material breach, thereby giving Keenan the right to leave.

vices against their will. *See also* Sanquirino v. Benedetti, 1 Barb. 315 (Sup. Ct. 1st Dept. 1847); De Rivafinoli v. Corsetti, 4 Paige Ch. 264 (N.Y. Ch. 1833).

54. *See* Madison Square Garden v. Carnero, 52 F.2d 47 (2d Cir. 1931); Lumley v. Wagner, 42 Eng. Rep. 687 (1852); RESTATEMENT (SECOND) OF CONTRACTS § 360.

55. *See* Wolf v. American Broadcasting Companies, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981); Iman v. Wilhemna Models, 67 A.2d 853, 413 N.Y.S.2d 21 (1st Dept., 1979). In *Wolf*, a local television station sought to enjoin a popular sportscaster from joining a rival local station in the same market. WABC-TV claimed that Wolf violated a "first negotiations/first refusal" clause that required Wolf to enter into good-faith negotiations and prohibited the sportscaster from negotiations with any other company for 45 days. The court agreed that Wolf violated the clause, but concluded that since the contract had already terminated by the time the case was brought, there was no point in granting the injunctive relief. *Wolf*, 52 N.Y.2d at 394.

56. *See* Iman, 67 A.2d at 859.

57. RESTATEMENT (SECOND) OF CONTRACTS § 385.

58. *See* As Keenan's World Turns: Chapter 2 is a Doozy, THE NEW YORK TIMES, July 27, 1994, at B7.

VI. THIRD PERIOD: THE LEAGUE DECISION

Against a backdrop of newspaper columns and discussion in the broadcast media (especially on the New York based all-sports station WFAN), the Rangers and the Blues began to discuss a solution to this problem before the formal hearing scheduled for Monday, July 25th, was to begin. The teams agreed on a "settlement trade" whereby the Rangers would send forward Esa Tikkanen and defenseman Doug Lidster to the Blues in return for Petr Nedved, a young and talented player from then-Czechoslovakia with star potential. The Rangers also agreed to drop their district court action claims, relinquish any claims to Keenan and to pay him the bonuses due in the amount of \$608,000. Keenan would have to repay the \$400,000, representing four-fifths of the signing bonus he previously had received when he signed with the team in 1993.⁵⁹

After eight hours of meetings with representatives of the teams, NHL Commissioner Gary Bettman issued a series of decisions.⁶⁰ He approved this trade, but not as a complete settlement of the dispute. He suspended Keenan from acting as coach and general manager of the Blues for a period of 60 days from the date of the decision and fined him \$100,000 (the maximum allowed under the League Constitution) for "conduct detrimental to the league."⁶¹ Bettman also fined the Blues \$250,000 (the maximum allowed) for negotiating with and signing Keenan while he was under contract with the Rangers.⁶² The Detroit Red Wings were fined \$25,000 for negotiating with Keenan.⁶³ and the Rangers were fined the same amount for bringing their lawsuit in Federal Court, thereby circumventing the jurisdiction of the Commissioner.⁶⁴ The eleven page decision also discussed Bettman's rationale for these determinations. At the outset, he asserted sole jurisdiction for making the series of determinations,⁶⁵ as per his position as commissioner of the NHL. Getting into the substance, he approved the "trade settlement" between the Blues and the Rangers, but noted that the trade settlement alone did not adequately resolve the issues in this dis-

59. See *Keenan Dispute is Resolved*, News Release and Opinion and order of the Commissioner, July 24, 1994. As cited in Appendix.

60. *Id.*

61. *Id.* at 9-10.

62. *Id.* at 10.

63. *Id.* at 10-11. Although Bettman's decision stipulated that no evidence was presented that the contacts occurred before July 15, there has been much speculation that their "contacts" occurred during the Stanley Cup Playoffs). *Id.*

64. *Id.* at 11.

65. NHL Const., art. 6.3(j) § (1) (a-d). Bettman noted that the commissioner has the authority to issue certain disciplinary sanctions and that all determinations are final and not subject to any review. *Id.* at 2.

pute.⁶⁶

Commissioner Bettman took pains to note that this conduct is "not what may reasonably be expected of the member clubs of the National Hockey League and their employees. "The NHL and its member clubs are not merely bound by the strictures of contract law," he added, "but rather, they are also bound by a higher standard of conduct expressed both in the NHL constitution and by-laws."⁶⁷ He stated that tampering will not be tolerated, since that kind of conduct suggests that employment contracts are not the "serious commitments" they actually are.⁶⁸ Continuing along this vein, the commissioner chastised the clubs for engaging in "a kind of frontier justice, where every question of a contract's validity becomes an invitation to self-help in the form of unilateral declarations of free agency and the immediate entering into of inconsistent contractual obligations."⁶⁹

Then came criticism of Keenan. "[T]hat individual . . . , knowing that a club may still believe him to be under contract and that, at the least, reasonable minds could differ as to his contractual status, may not, without violating the NHL Constitution, unilaterally declare himself a 'free agent' and shop his services without first seeking a determination from the League as to his actual eligibility to be employed by other clubs."⁷⁰ Without such permission, the decision continued, an employee acts at his peril. Bettman reiterated that Keenan never sought a determination from the League about his contract status before he claimed his "free agency."

The commissioner also criticized the Detroit Red Wings for negotiating with Keenan on July 15th (one day before Keenan and his agent met with representatives of the Blues) without inquiring about Keenan's contract status. However, he noted that the Red Wings refused to make any agreement with Keenan without League approval.⁷¹ The failure by Keenan, the Blues and to a lesser extent, the Red Wings to resolve the matter through League machinery, created the "unseemly spectacle of the coach of the Stanley Cup champions, barely a month after the end of the playoffs, declaring his own free agency and publicly shopping himself to

66. *Id.* at 3.

67. *Id.*

68. *Id.* at 3-4. Bettman stated that this would apply to the negotiation, discussion or offer of employment to a person by one club when that person is then employed by another club. *Id.*

69. *Id.* at 4.

70. *Id.* at 7.

71. Citing Article 6.3(j) (1) (a-d) of the NHL Constitution, Bettman noted that the commissioner has the authority to issue certain disciplinary sanctions and that all determinations are final and not subject to any review. *Id.* at 8.

the highest bidder.⁷² Since Keenan, the Blues, and the Red Wings acted improperly (that is, without notifying the league), the commissioner imposed the series of fines described earlier.

VII. THE POST-GAME RESULTS

On the surface, everyone seemed to gain. Keenan, after the two month suspension (which occurred during the off-season) took control of a new team as both coach and general manager, with almost absolute control. The Blues gained an experienced and hard-working hockey professional in Keenan with a proven track record. With his intensity personality (which has resulted in clashes with management), he took three NHL teams to the Stanley Cup finals and received one Stanley Cup ring, an achievement that appealed to the Blues, which had a history of underachieving teams. The Blues also gained two veteran players. The Rangers gained a promising young player and recouped \$400,000 of the \$608,000 signing bonus they gave Keenan. Viacom, the then-owner of Madison Square Garden, the New York Knicks basketball team and the Rangers, got an embarrassing episode off his back and was able to sell all three to Cablevision and ITT, Corp., as a partnership.⁷³

Underneath this facade, the decision raised troublesome questions regarding a professional sports league's powers to curtail such misconduct and the resolution of such a dispute. There have been few reported disputes of this kind, where a coach suddenly quits a team claiming "free agency" status without any warning. Because of this decision, the chances for this kind of unprofessional conduct have increased.

First, the commissioner failed to specifically define how deleterious the transgression was. He "accepted" the trade settlement between the clubs, which was essentially the key element to the resolution of this dispute. If the situation was as wrongful as Bettman ruled, why did he consent to the trade as part of the settlement? He was not under any obligation to do so and rejecting it would have more dramatically shown his displeasure over the whole state of affairs.⁷⁴

72. *Id.* at 8-9.

73. See *Madison Square Garden Deal Is a Victory for Viacom*, THE NEW YORK TIMES, Aug. 29, 1994, at A1; *ITT Focuses on Long Term*, THE NEW YORK TIMES, Aug. 29, 1994, at D1; *Cablevision's Craving for Sports*, THE NEW YORK TIMES, Aug. 29, 1994, at D8. Viacom sold the properties to a partnership of the Cablevision Systems Corporation and the ITT Corporation for a total purchase price of \$1.075 billion. Cablevision, a leading cable television operator and sports programmer in the New York-Metropolitan area, and ITT, a conglomerate which owns hotels, insurance and financial services.

74. *Finley v. Kuhn*, 569 F.2d 527 (7th Cir. 1978)

Second, the commissioner skirted the issue of whether the Rangers' late payment constituted a material breach. Even though he criticized Keenan for declaring himself a "free agent," the admonition was based on the standard of conduct amongst clubs and employees under the NHL constitution and by-laws, rather than the legal standards enunciated earlier. Indeed, Bettman referred to the issue as a "narrow one" in his decision, although a court could have based its decision and resulting relief on that very question.

Although the decision criticized the "frontier justice" nature of the events, Bettman essentially endorsed the backbone of that "frontier justice", namely the trade.⁷⁵ At a time where contracts are frequently broken or modified, this result is more a political settlement than a legal punishment. Brett Hull, a star player with the Blues summed up the action in this flippant statement: "I can guarantee you that not one player cares who got fined."⁷⁶

Finally, if Keenan improperly declared himself free of his obligation to the Rangers, as was concluded in the decision, why did Bettman permit a relatively short suspension to take place before the hockey season starts? While the fees imposed against the Blues and Keenan were the maximum available under the league constitution, the commissioner certainly had discretion to suspend Keenan for a much greater period of time. In fact, he has used suspension powers more sternly in cases of player misconduct.⁷⁷ In the case of an obvious action that hurt the integrity of the league, he essentially approved a player trade, with some additional fines and a suspension that is relatively meaningless.

Although, as mentioned earlier, some reports have circulated that the Rangers' intentionally made a late payment to induce Keenan's breach, this has not been proven, nor even discussed in Bettman's decision. If that was the case, then it could be argued that the Rangers acted in bad faith and deserved more punishment. More importantly, the Blues would be able to sign Keenan with no threat of legal sanction and certainly would not have to meet to consider any "settlement trade."

75. See NEW YORK TIMES, July 26, 1994, p. . Dave Anderson, in a column that appeared in the July 26th issue of THE NEW YORK TIMES, noted that Keenan and the Blues received slaps on the wrist and stated that "Keenan and every other NHL coach also discovered that a current contract does not mean much if there's a better offer out there from a franchise willing to pay the price." *Id.*

76. See *NHL Notes - Hull, Keenan: Peaceful Coexistence*, THE WASH. POST, Jan. 18, 1995, at C2.

77. After a vicious behind the back hit that injured New York Islanders' Pierre Turgeon during last year's Stanley Cup playoffs, Bettman suspended Dale Hunter of the Washington Capitals for 21 games (one quarter of the regular season).

VIII. A COMPARISON WITH OTHER LEAGUES

Each of the major sports leagues have constitutions and by-laws that contain provisions granting their commissioner's the power to take disciplinary actions for conduct detrimental to the given sport. In baseball, the commissioner has the power to reprimand, suspend and fine any club, officer, employee or player deemed not to be acting in the "best interests" of the sport.⁷⁸ The fine cannot exceed \$250,000 in the case of a major league club, \$25,000 in the case of any officer or employee and \$500 in the case of a player.⁷⁹ The Major League Agreement also grants the commissioner jurisdiction to arbitrate and decide on such matters.⁸⁰

In the National Football League, the rules are much the same, except that the maximum fines are larger. Under the League's Constitution, the commissioner may suspend or fine an owner, shareholder, partner or any player, coach, officer, director, employee, or official who violates the constitution or bylaws, or is guilty of conduct detrimental to the welfare of the League or professional football.⁸¹ Interestingly, the commissioner also has the power to disapprove contracts between a player and a club if they violate the constitution and by-laws or are detrimental to the sport.⁸² The rules are similar in the National Basketball Association.⁸³

The National Hockey League's Constitution and Bylaws follows this trend. As was stated earlier, at the time of Bettman's ruling, the maximum fines for transgressions committed by a club is \$250,000 and by an employee \$100,000. Those amounts have since been increased. The increases still do not solve the problem created by the Bettman decision. It is very likely that a similar situation may occur in the future and that despite the increased fines, it may still be worth the punishment to sign the coach of the team's choice.

IX. A NEW PENALTY, A NEW HOCKEY GAME: A PROPOSED LIQUIDATED DAMAGES CLAUSE

The NHL, along with other professional sports leagues, should consider the item of a liquidated damages clause in its bylaws to

78. See Major League (Baseball) Agreement, Art I, 3.

79. *Id.*

80. *Id.* At Article VII. As of this date, there is no commissioner of baseball, although Bud Selig, the owner of the Milwaukee Brewers, has, in effect, assumed the duties of commissioner. *Id.*

81. See NFL Constitution and By-Laws, Art VIII, 13(A). The maximum fine is \$500,000. *Id.*

82. *Id.* at § 8.14.

83. The NBA Constitution and By-Laws grants the commissioner the power to impose a fine of up to \$250,000,

adequately issue monetary fines for this kind of conduct. Liquidated damages involves a fixed or determinable sum of money specified in advance by contracting parties as the remedy for certain types of breaches.⁸⁴ While many courts look at these clauses carefully to prevent the stipulation of money payable as damages to be so large as to be characterized as a "penalty,"⁸⁵ such clauses do have some important advantages. Liquidated damages clauses facilitate the calculation of risks and reduce the cost of proof,⁸⁶ and if the amount required can be large enough, the clause may effectively redress the breach by compensating the victimized party.⁸⁷ An effective liquidated damages clause may prevent even the thought of attempting a breach.

To determine the validity of a liquidated damages clause, the courts make three main inquiries: 1. Did the parties intend to provide for liquidated damages or a penalty;⁸⁸ 2. Does uncertainty in the amount support the provision for liquidated damages in the contract;⁸⁹ 3. Does the amount of damages bear a reasonable relationship to any actual damages that may be sustained as a result of a default?⁹⁰

In recent years, the first prong has been infrequently discussed by the courts.⁹¹ Essentially the last two sections of the test are the prevailing standard. In the area of personal services contracts, the test is the same.⁹² Surprisingly, the courts have given such clauses considerable sympathy. In *Kozlik v. Emelco, Inc.*,⁹³ a former employee (Kozlik) sued his former employer for breach of his employment contract. The court examined the validity of the liquidated damages clause, which provided that if the employee was terminated without cause, his employer was obligated to pay him his entire

84. See C. Knapp and N. Crystal, *PROBLEMS IN CONTRACT LAW, CASES AND MATERIALS* (2d. Ed. 1987).

85. A. Farnsworth, *CONTRACTS — VOL. III*, § 12.18, at 283 (1990).

86. *Id.* For the injured party, it may afford the only possibility of compensation for loss which may not be proven with specific certainty. Furthermore, it may save the time of judges, juries and witnesses, as well as the parties, and may cut the expense of litigation. In the area of arbitrations, it could do the same. *Id.*

87. *Id.* citing *Jasquith v. Hudson*, 5 Mich. 123 (1858) (stating that the "principle of just compensation" must not be disregarded and courts "will not permit the parties by express stipulation, or any form of language, however clear the intent, to set it aside").

88. *Higgs v. U.S.*, 546 F.2d 373 (1976), citing *Wise v. United States*, 249 U.S. 361, 365 (1919).

89. *Id.*, citing *Barnette v. Sayers*, 53 U.S.App. D.C. 169, 289 F. 567, 570 (1923).

90. *Id.* citing *Davy v. Crawford*, 79 U.S.App. D.C. 375, 147 F.2d 574,575 (1945).

91. See CORBIN, *supra* note 53, at 398.

92. See *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (1992), which upheld a liquidated damages clause, despite the fact that money damages based on breach of contract theory could have calculated.

93. *Id.*

salary.⁹⁴ Emelco argued that the concept of stipulated damages did not apply to employment contracts.⁹⁵ While the court did agree that calculating damages without such a clause could be done by showing the difference between the amount of salary agreed less the amount which was actual earned or might have been earned from other employment,⁹⁶ the court did state that "the parties to a contract may override this application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach."⁹⁷

The Kozlik court then discussed the question of whether the amount stipulated (the employee's entire salary) was reasonable under the circumstances, or was deemed to be a "penalty" and therefore unenforceable.⁹⁸ Noting the prevailing judicial rule that the damages agreed to must be a "reasonable estimate of the damages which would probably be caused by a breach or is proportionate to the damages which have actually been caused by the breach,"⁹⁹ and that they would be difficult to calculate without such a clause,¹⁰⁰ the court held that the stipulated damages were reasonable when the contract was formed and the clause was upheld,¹⁰¹ despite the payment of the entire salary without a mitigation of damages.

This bodes very well for the use of such clauses in the constitutions and bylaws of sports organizations. To prevent future situations of the sort that Keenan participated in, a liquidated damages clause with significant penalties, could look like this:

(1) Any employee of the National Hockey League who improperly breaches a contractual obligation with a member club to perform a similar obligation for another member club would be subject to the following sanctions:

A) a period of suspension, without pay, encompassing any or all of the period remaining on the breached contract up to a term of two years;

94. *Id.* at 116.

95. *Id.* at 120.

96. *Id.*

97. *Id.*

98. See *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (1992), which upheld a liquidated damages clause, despite the fact that money damages based on breach of contract theory could have calculated.

99. *Id.* at 121.

100. *Id.*

101. *Id.* at 122. See Also *Williams v. AFLAC, Inv.*, 209 Ga. App. 841, 434 S.E.2d 725 (Ct. App., 1993) (upholding the liquidated damages clause by stating that firm is responsible for 50 percent of the contract price as liquidated damages); *Cullman Broadcasting Co., Inc. v. Bosley*, 373 So.2d 839 (Ala. 1979) (holding that one year covenant not to compete, prohibiting broadcaster not to compete anywhere in the county of the employer was not unreasonable, as was money damages of \$3,000).

and/or

B) a monetary fine of up to twenty five percent of the amount left in the contract at the time of breach to a maximum of \$500,000. For any amounts above \$500,000, the percentage would reduce to five percent.

(2) Any representative of a franchise of the National Hockey League, including an owner, part-owner, general manager, assistant general manager, coach, or other employee who induces an employee under contract with another franchise to breach an obligation by undertaking solicitations or negotiations during that employee's contract period will result in the following sanctions:

(A) Against the franchise:

A fine of up to \$500,000 or up to the amount remaining on the induced employee's contract, whichever is greater.

(B) Against the employee who induced the breach:

(1) a fine of up to \$50,000; and/or

(2) a suspension of up to one year.

All determinations shall be made by the commissioner after a hearing called by him to take place at the league offices in New York or Toronto. All determinations shall be final and not subject to appeal or redress by the courts. Such a provision would strengthen the monetary penalties by using a percentage system so that it would still hurt those who have signed lucrative contracts. Also, the suspension period would be well-defined so that the parties realize that the breaching employee could be out of the sport for up to two years.

X. CONCLUSION

The Keenan saga demonstrates the need for greater sanction power in the NHL's constitution and a more stringent attitude towards the improper termination of personal services contracts. High-caliber professional coaches have demonstrated great ability to command high salaries and have become important participants in the securing of championship titles. Mike Keenan came to the New York Rangers to bring the team a Stanley Cup banner. He was to be paid generously for his employment. After his first year on the job, he did just that, ending a 54-year drought that became a source of greater frustration for the team and its fans with every passing year.

His action in unilaterally breaching to accept a better offer with a rival team demonstrated bad faith, especially after he consistently said he would stay in New York. While the NHL sanctioned him for his action by imposing fines and by accepting a "settlement" trade, its punishment was too lenient in part because its bylaws did not have a clause with teeth to adequately deal with the problem.

With added penalties through a liquidated damages provision, coupled with strong suspension penalties, top-flight coaches would be more careful in announcing their "free agency" at press conferences.