

**FENWICK
ELLIOTT**

The construction &
energy law specialists

25TH
EDITION

Annual Review 2021/2022

A round-up of key developments
in the construction, engineering
and energy arena



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November 2021

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Published November 2021



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Welcome to the 25th edition of our Annual Review. As always, our Review contains a round-up of some of the most important developments from our clients' points of view over the past 12 months including, from pages 52-63, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter Dispatch as well as the Construction Industry Law Letter.

As usual, the Review features a wide range of articles, reflecting the typically diverse range of issues we have found ourselves looking at over the past year. But looking back 25 years, to the very first Summer Review as it was then known, we noted amongst the key legal developments that: *"the provisions for compulsory adjudication in the Housing Grants Construction and Regeneration Bill will represent a major shake-up in the way disputes are resolved in the construction industry."*

Interestingly, we also commented that: *"As originally drafted, the Government Scheme provided that the results of the adjudication, to take place within 14 days, would be final and binding, but with numerous opportunities for the parties to apply to the Court on procedural points, but after extensive lobbying, the Government adopted a somewhat more realistic approach, extending the timescale to 28 days or longer if agreed ..."*

Since 1996, our Review has always included adjudication updates. On pages 20 - 21, George Boddy looks at one of the perennial challenges to adjudicators' decisions – breaches of natural justice, whilst

Adele Parsons asks, on pages 22 - 23, whether collateral warranties fall within the Housing Grants legislation.

In November 2021, COP 26 takes place in Glasgow. The Review goes to press before the outcome is known, but we look at a number of key issues for the construction industry. At pages 46 - 47, Rebecca Ardagh considers policies around Net Zero, at pages 44 - 45, Lucinda Robinson considers the UK government's hydrogen strategy, and at pages 48 - 49, I consider the impact of climate change on construction contracts.

One of the biggest cases of 2021 was the *Triple Point* decision about liquidated damages in the Supreme Court. Karen Gidwani explains what you need to know at pages 8 - 11. One of the biggest cases of 2020 was the *Halliburton* decision of the Supreme Court about bias and conflicts of interest in international arbitration. James Mullen considers this on pages 37 - 39 together with a related decision in 2021 concerning experts.

In our first Review, we covered the case of *Abbey National v Key Surveyors* where HHJ Hicks QC had selected a court expert in a case about the valuation of 29 houses. 2020-2021 has seen a number of cases involving experts, particularly where the courts have been critical of the approach of certain experts. Huw Wilkins explains more at pages 28 - 29, whilst Katherine Butler delves into expert shopping at pages 30 - 31.

There was a major change in arbitration in October 2021 in Dubai, when the DIFC-LCIA Arbitration Centre and Emirates Maritime Arbitration Centre, was transferred to the Dubai International Arbitration Centre. Grace Lee-Tuck explains more at page 36. This article is part of the Fenwick Elliott Blog – *Our Collective Thoughts*. Claire King contributed another blog piece looking at witness evidence in international arbitration. You can find that at pages 40 - 41. You can find more blog content at <https://www.fenwickelliott.com/blog> or please contact Andrew Davies, adavies@fenwickelliott.com.

Continuing our international theme, Sana Mahmud looks at Investment Treaty Arbitration on pages 32 - 35 whilst on pages 42 - 43, Thomas Young reviews the UNCITRAL Expedited Arbitration Rules which came into force in September 2021.

Following the temporary restrictions on winding-up petitions brought in under the Corporate Insolvency and Governance Act 2020 being lifted, and with the prospect of insolvency related terminations of building contracts taking place over the coming months, on pages 26 - 27 Jatinder Garcha considers some of the implications of taking over and completing a half done construction project.

On pages 12-13, Edward Foyle considers recent developments surrounding bonds. Then on pages 14 - 15, Catherine Simpson looks at when terms can be implied into contracts, whilst on pages 24 - 25, Mark Pantry looks at liability for unforeseeable ground conditions.

Finally, the private finance initiative commenced in the 1990s, at pages 16 - 18 Ted Lowery explains more about the special features of PFI contracts, whilst at page 19 Gemma Essex looks at a (rare) PFI case from 2021.

Our website (www.fenwickelliott.com) keeps track of our latest legal updates You can also find details of our popular webinar series at <https://www.fenwickelliott.com/research-insight/webinars>. Recent episodes have included a look at liability for design issues, the new Building Safety Bill and tackling "boilerplate clauses".

As always, I'd welcome any comments you may have on this year's Review: just send me a message by email to jglover@fenwickelliott.com or on Twitter @jeremyrglover.

Stay safe

Jeremy



Simon Tolson
Partner

It is my great pleasure to introduce our 2021/22 *Annual Review*. This is our quarter century edition!

Thus far, 2021, like 2020 before, has been a hell of a year. After all of the world's catastrophic events, it will be difficult to walk away unchanged. Is anyone out there feeling normal? Are we recovered from turning our living rooms into offices and bedrooms into classrooms? For many, the morning commute came to be measured in metres not miles. And many did not even have to travel that far!

Personal finance website, Forbes Advisor UK, estimates that around 7 million UK households spent an extra £900m on gas and electricity working from home during the pandemic. Its research showed almost 12.5 million (38%) Brits are working from home, with the majority of these (82%) doing so as a direct result of the pandemic.

We now face an energy crisis with grid capacity issues, profound shortages of construction materials for sites, continuing shortages of lorry drivers to shift gear and plant, and now maybe stagflation? The construction industry in some areas now has more work than it can handle. It just needs to be able to hit its capability mark.

The RICS Construction and Infrastructure Survey for Q2 2021, in response to the question of what factors limit activity, over 80% cited shortage of materials, with close to two-thirds identifying issues around labour. Significantly, in the case of the former, this is a record high and by some margin (previous peak 63%) since the question was first asked in 2012. What is particularly encouraging is that the construction and infrastructure sector is hiring once again and profit margins are beginning to turn around – provided

inflationary pressures can be managed. Total workloads are showing strong growth after +38% (net balance) of respondents reported a rise. The number of vacancies reached a record high between July and September 2021 at 1.1m and the ONS say the current ratio of 3.7 vacancies per 100 jobs was the highest on record, underscoring the difficulty hiring labour.

I detect the construction sector is facing a crossroads with the impact of Covid-19 and as the consequences of climate change intensify in public consciousness and law.¹ The way we plan and build is entering a new phase. The major challenge for the construction sector globally is around shortages of building materials and finding labour with the requisite skills. The biggest hurdle and opportunities that the sector faces longer term are balancing between short-term imperatives, such as labour and material scarcity, inflation, pressure on the public sector budgets and the political realities of the post-covid and Brexit world, with the long-term aspirations of using construction as a vehicle for social and environmental change.

That said, our ranch this last year, notwithstanding Covid complications, has not been dented and resulted in the best year ever for the business. We also made it again to the top spot in "Tier 1" in *The Legal 500* for Contentious Construction for 2021/2022. You may recall we also hit this spot last year and the year before too. *Chambers & Partners* have the firm in Band 1 too for 2022. So, we are delighted to be in the top tier in both main directories concurrently.²

We are also, again, in the prestigious *The Times Best Law Firms 2022*, which recognises the best lawyers for business, public and private-client law across England, Wales and Scotland, as chosen by lawyers.

We are delighted by this news, and I want to thank all my partners and staff for the huge work put in as well as adapting, running case work virtually, and servicing our clients' needs through the pandemic.

From FE's inception 35 years ago, we have grown from 2 partners to 21 partners and our staff numbers have grown nearly 15-fold to a 100 or so. I am immensely proud of our achievements which are a testament to hard work and determination and the loyalty of everyone.

As a business, we are undertaking more heavy weight international arbitration than

ever before. Somewhat fewer disputes are going to the High Court than the past (a national trend), but they are still happening in complex domestic disputes, but, in our engine rooms, we have continued our active involvement and growth in complex and high value construction and engineering litigation international arbitrations in the fields of renewable and alternative energy and infrastructure operations.

This last year, our investment in legal tech has continued with fee earners using Solomonic litigation analytics, tracking and predictive tools and Ayfie for our text-analytics and data mining solutions. In addition, we continue to see the rise of contract and document automation across the industry, as well as the use of connected technologies and platforms to enhance productivity and insight, and minimise risk.

I am hoping 2022 brings life back to close to normal for all of us. Last October, I reported our offices officially re-opened on 15 June 2020, once the Covid lockdown started to ease (things then reversed from September 2020 and the country was in lockdown again and pretty well stayed there until June 2021). Since June in London and Dubai, we have been open in the physical sense. But, like most professional businesses, we are probably operating a 30:70 ratio of office to WFH with that ratio increasing steadily to more to the office. The picture in our business is in a micro sense reflective of the change in the outside world. We have had to adapt and serve our clients' wants and needs in the new look marketplace.

I have to thank all my partners and every single member of staff for their huge contributions made to make this happen.

We have taken significant steps on EDI within the firm over the last 18 months. Central to our EDI policy is building an inclusive and sustainable pipeline for succession in leadership and promotion within Fenwick Elliott. This means we value differences and promote respect, support, and a sense of belonging to retain talent across all lawyer and personnel levels. Fenwick Elliott is committed to promoting equality, diversity, and inclusion and to eliminating unlawful discrimination policies, practices, and procedures in the areas in which it can influence.

We are, at heart, an inclusive firm in which each individual has the opportunity to shine and in which everyone pulls together as a team. We foster an open, challenging,



participative and rewarding environment, for all our employees. We identify employee development expectations and opportunities through regular reviews and endeavour to ensure that pay and benefits are competitive.

This is not just good business; it is people-sense and one I am proud we invest in.

Fenwick Elliott is committed to delivering its services according to rigorous ethical, professional and legal standards. This ethos governs every element of our business and social interactions. We always operate with a strong sense of integrity, critical to maintaining trust and credibility with our clients, business partners, employees, and stakeholders. We strive to review and continuously improve our corporate social responsibility programme.

During lockdown, in recognition of the work The Lighthouse Club focus on, providing mental health support, we organised the "FE Stay Active Challenge" for the Lighthouse Club, where team members, friends and clients could run, cycle, walk the dog or conduct any exercise of their choice.

Recently, we have been peer reviewing contract clauses for The Chancery Lane Project (a project aligned with and supporting the achievement of the UN Sustainable Development Goals relating to climate action and the UK's emissions reduction target, enshrined in law, to reach net zero by 2050) as they develop new contracts and model laws to help fight climate change.

A word on Grenfell

Grenfell has, again, occupied a number of partners and fee earners on various fronts this year and we have led a number of important webinars on it (as well as many other fields) including The Building Safety Bill.

So much is coming out of Phase 2 of the Inquiry for the industry to learn from, and when combined with the Building Safety Bill, the reforms are truly set to

create lasting generational change and a clear pathway for how future residential buildings should be constructed and maintained – the Golden Thread amongst them.

The law of limitation will change too. An extension of liability (which will apply retrospectively) will flow through the Defective Premises Act 1972 and, therefore, any entities who can bring a claim under that DPA may now have an extra nine years in which to do so, or, given latest amendments proposed in the Bill's Committee Stage - 27 more years!

This is all the product of public policy in the absence of a collateral warranty or third-party rights. Subsequent homeowners have only a very limited recourse for defects against the original contractor/developer outside of the DPA. Often defects can take some time to manifest themselves, so the change to the DPA limitation period does give some additional protection to homeowners. Well, potentially, at least.

These limitation changes will result in claims brought chiefly against contractors, architects and subcontractors involved in the construction process concerning cladding and external wall systems failing to comply with Building Regulations.

Lastly for now

We have much in this Review for you to read.

As a sector-focused law firm, we pride ourselves on our deep industry expertise. So, rather than us talk about ourselves and the work we have been doing for our clients, this Annual Review is instead based on articles which give our take on cases and developments in our market over the past 12 months – and where things are heading.

If you would like to discuss any of the points raised in these pages in more detail, please do not hesitate to contact any of us. As always, we are here to help.

Simon

1. The Climate Change Act 2008 (Credit Limit) Order 2021.
2. I note that our Summer Review for 1996 records that we were ranked that year in the top tier for the first time in what was known then as the Construction and Civil Engineering category of the Chambers Directory of the Legal Profession.

Triple Point: more than simply 'liquidated damages'

The Supreme Court judgment in *Triple Point* has perhaps received the most coverage in relation to the findings concerning liquidated damages. However, two other issues were considered by the Supreme Court in this important case, as explained in more detail by **Karen Gidwani**.

Summary of the case

By a contract dated 8 February 2013 ("the Contract"), PTT Public Company Ltd ("PTT"), a commodities trading company, engaged Triple Point Technology Inc ("Triple Point") to provide it with a Commodities Trading Risk Management and Vessel Chartering System ("CTRM system"). The works were to be carried out in two phases, and payment was to be made against milestones.

Article 5 of the Contract provided that, if Triple Point failed to deliver the work within the time specified and the delay was not caused by PTT, then Triple Point was liable for liquidated damages at the rate of 0.1% of "undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work". Article 12.3 of the Contract provided, amongst other things, that the total liability of Triple Point to PTT under the Contract was limited to the Contract Price received by Triple Point (this limitation was referred to as the "cap" in the litigation). However, the limitation on liability was stated not to apply to Triple Point's "liability resulting from fraud, negligence, gross negligence or wilful misconduct".

The work proceeded slowly. In March 2014, Triple Point achieved completion of Stages 1 and 2 of Phase 1, 149 days late. Triple Point submitted an invoice in respect of this work which PTT paid. Triple Point then asked PTT to pay further invoices in respect of other work that had not yet been completed. PTT refused to make any further payments, relying on the contract terms which stated that payment would be made against milestones. PTT argued that Triple Point had not achieved any of the milestones except the completion of Stages 1 and 2 of Phase 1. In late May 2014, Triple Point suspended work and left the site. PTT maintained that Triple Point had wrongfully suspended work and terminated the Contract for negligent breach and fundamental breach.

In February 2015, Triple Point commenced court proceedings seeking the sums claimed under the invoices. PTT responded by way of defence and counterclaim, claiming liquidated damages for delay to the date of termination and general damages for losses arising upon termination of the contract.

The trial took place in the TCC in late 2016 and judgment was handed down by Jefford J in August 2017. The judge dismissed Triple Point's claim and awarded PTT \$4,497,278.40 made up of an award of approximately \$3.4m for liquidated

damages and \$1m for general damages. The judge found that the delay to the project was caused by Triple Point's negligence in carrying out its obligations under the Contract¹ and that PTT had been entitled to terminate due to Triple Point's breaches of contract which also comprised negligent performance.² The judge found that PTT was entitled to liquidated damages for delay up to the date of termination and to its general damages arising from the termination.³ The judge also found that, whilst liquidated damages liability was not caught by the limitation of liability in Article 12.3, the general damages liability was capped as the exclusion for "negligence" only related to a breach of a duty of care in tort rather than a breach of the contractual duty to take reasonable skill and care.⁴ Imposing that cap reduced the amount recoverable as general damages significantly, to approximately \$1m.

Triple Point appealed and PTT cross-appealed against the finding that general damages were capped. Interestingly, the issue on liquidated damages that was then determined by the Supreme Court, and which has excited so much comment, was not part of the parties' prepared arguments. During oral argument in the Court of Appeal, Triple Point was invited to make submissions on liquidated damages and, in particular, the proposition that it was not liable to pay any liquidated damages for delay because the work in question was never completed or accepted by PTT.

In its judgment, the Court of Appeal (Lewison and Floyd LJJ and Sir Rupert Jackson) considered this question on liquidated damages and held that, following termination of the contract, PTT was not entitled to claim liquidated damages in respect of incomplete work.⁵ Liquidated damages were, therefore, only available to the point where works have been completed (i.e. Stages 1 and 2 of Phase 1), reducing the amount of liquidated damages to which PTT was entitled from over \$3m to approximately \$154,000.

With regard to the cap on liability, the Court of Appeal found, firstly, that the exception for "negligence" applied only to independent torts and not to breaches of the contractual obligation to exercise due skill and care;⁶ and, secondly, that liquidated damages were also subject to the limitation on liability in Article 12.3.⁷

The net result was that PTT could not claim the liquidated damages that had accrued at the time of termination other than in

1. [2017] EWHC 2178 (TCC) paragraph 198
2. *Ibid*, paragraph 240(i)
3. *Ibid*, paragraphs 285 and 286
4. *Ibid*, paragraph 262
5. [2019] EWCA Civ 230, paragraphs 112 and 113
6. *Ibid*, paragraph 120
7. *Ibid*, paragraph 127
8. [1913] AC 143
9. *Ibid*, paragraph 113
10. *Ibid*, paragraph 112
11. *Ibid*, paragraph 109
12. [2021] UKSC 29, paragraph 35
13. *Ibid*, paragraph 42
14. *Ibid*, paragraph 48
15. *Ibid*, paragraph 52
16. *Ibid*, paragraphs 54 and 55
17. *Ibid*, paragraphs 57 and 63
18. *Ibid*, paragraph 97
19. *Ibid*, paragraph 108
20. *Ibid*, paragraph 113
21. *Ibid*, paragraph 71

respect of the one completed milestone, and to the extent Triple Point was liable to PTT, all such liability was subject to the cap on liability under Article 12.3. As this cap had already been used up by the general damages awarded in the TCC, PTT could not recover any liquidated damages. PTT appealed to the Supreme Court.

In July 2021, the Supreme Court (Lady Arden, Lord Leggatt, Lord Burrows, Lord Sales and Lord Hodge) handed down judgment. On the issue of liquidated damages liability, the Supreme Court unanimously allowed the appeal, finding that the right to liquidated damages remained an accrued right as at termination regardless of whether the works had been completed. The Supreme Court judges were also unanimous in finding that the cap on damages did extend to liquidated damages and, therefore, dismissed the appeal on this issue. However, in respect of the exclusion to the cap, the meaning of “negligence”, the Court was split 3:2, with the majority (Lady Arden, Lord Leggatt and Lord Burrows) finding that the reference to “negligence” in Article 12.3 of the Contract did not exclude breach of a contractual duty of care. The result was that PTT was awarded its liquidated damages accrued to the date of termination, and whilst the liquidated damages were subject to the limitations in Article 12.3, these damages and PTT’s termination losses were found not to be capped as they were losses arising from breaches of the contractual duty to take due care.

Liquidated damages: recoverability when a contract is terminated

It is worth summarising the reasoning of the Court of Appeal before turning to the judgment of the Supreme Court.

In the Court of Appeal, Sir Rupert Jackson considered the authorities and concluded that there were three different approaches to the entitlement to liquidated damages following termination: the first approach was to say that the liquidated damages clause did not apply (as in *British Glanzstoff Manufacturing Co Ltd v. General Accident, Fire and Life Assurance Corpn Ltd*⁸); the second approach was to treat the liquidated damages clause as only applying up to the termination of the contract; and the third approach was to apply until completion of the works

by a second contractor. Sir Rupert noted that the textbooks generally treated the second approach as the orthodox analysis but found that this was “not free from difficulty” for, if a contract is abandoned or terminated, then this, in Sir Rupert’s view, was “new territory” for the employer for which the liquidated damages clause may not have made provision. Sir Rupert went on to find that the liquidated damages clause in the Contract was focussed specifically on delay between the contractual completion date and the date when Triple Point actually achieved completion, that this was like the liquidated damages clause in *Glanzstoff* and that, as in *Glanzstoff*, the liquidated damages clause had no application in a situation where the contractor never hands over the completed work to the employer. PTT was, therefore, awarded its liquidated damages in respect of the delay in completing stages 1 and 2 of Phase 1 (work to a milestone that had been competed) but was found not to be entitled to recover liquidated damages for any of the other delays. Instead, such damages were at large to be assessed on ordinary principles.⁹

There was a sharp intake of breath among many construction lawyers following the decision of the Court of Appeal on this issue. Whilst there was no absolute authority, received wisdom based on first principles was that the second approach applied: that is to say that an entitlement to liquidated damages once accrued would remain in place at termination and could be sued upon regardless of state of completion of the works. This was reflected in the textbooks and in practice. Whilst the Court of Appeal stated that each case must turn on its facts, the reasoning underlying the finding that damages would now be at large if termination occurred was that the liquidated damages clause was focussed on delay between the contractual completion date and the date when completion was actually achieved,¹⁰ with no express words to say that liquidated damages could still be claimed should the contract be terminated. It could be said that most, if not all, liquidated damages clauses were focussed or drafted in this way.

The judgment was criticised for not being clear as to the circumstances in which the different approaches should be applied. Additionally, whilst the Court of Appeal premised its decision on the basis that each case must turn on its facts, the inference was that the first approach adopted by the Court of Appeal was the appropriate approach, not least because

when Sir Rupert Jackson reviewed the authorities, he stated that some might have been decided differently had the *Glanzstoff* case been considered.¹¹

The immediate effect of this decision was for those making claims for liquidated damages following termination to be met with the argument that the case fell within the principles of *Glanzstoff* and no liquidated damages relief was available (often coupled with an argument that no general damages for delay were available either as they could not be proved or were excluded under the contract). Parties who had negotiated and agreed fixed damages for delay were now being told that the bargain that they had struck had changed. Having agreed a rate of liquidated damages, the employing party (whether employer to contractor or contractor to subcontractor) were being put to the time and cost of proving their actual loss as a result of delay.

This was dealt with head on by Lady Arden in her leading judgment in the Supreme Court. Lady Arden stated that the difficulty with the approach taken by the Court of Appeal was that it was inconsistent with commercial reality and the accepted function of liquidated damages. Further¹²:

“Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 844 and 849). After that event, the parties’ contract is at an end and the parties must seek damages for breach of contract under the general law. That is well-understood: see per Recorder Michael Harvey QC in Gibbs v Tomlinson (1992) 35 Con LR 86, p 116. Parties do not have to provide specifically for the effect of the termination of their contract. They can take that consequence as read. I do not, therefore, agree with Sir Rupert Jackson when he holds in the second sentence of para 110 of his judgment that “If a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision.”

The territory is well-trodden, and the liquidated damages clause does not need to provide for it."

Lady Arden went on to state that reading a liquidated damages clause in this way meets commercial common sense and prevents the unlikely elimination of accrued rights. She also made clear that, in her judgment, *Glanzstoff* was not a case of significance and was confined to its particular facts.¹³ The correct approach to liquidated damages clauses is to adopt the usual principles of interpretation and the interpretation accepted by the Court of Appeal in effect "threw the baby out with the bathwater".¹⁴

The result of this decision is that construction lawyers can now breathe more easily, and clarity at the highest level has been given on this point. Parties to contracts now know that the orthodox position is that where fixed damages are agreed then, absent clear words to the contrary, those damages will apply up to the point of termination. This provides certainty which drives down cost and the potential for dispute. It also leaves it open to parties to use clear words to agree either the first or third approach outlined by the Court of Appeal should they so wish.

The meaning of "negligence"

There has been a lot of focus on the liquidated damages element of the *Triple Point* judgment; however, the findings concerning the cap on liability are also of importance.

Article 12.3 of the Contract consisted of four statements. Article 12.3.1 stated that Triple Point was liable for any damage suffered by PTT as a consequence of Triple Point's breach of contract. Article 12.3.2 stated that the Triple Point's total liability to PTT under the Contract was limited to the Contract Price. Article 12.3.3 stated that, except for the specific remedies expressly identified in the Contract, PTT's exclusive remedy for any claim arising out of the Contract was for Triple Point to use best endeavours to cure the breach at its expense or, failing that, return the fees paid to Triple Point for the services or deliverables related to the breach. Finally, Article 12.3.4 stated that the limitation of liability would not apply to Triple Point's liability resulting from fraud, negligence, gross negligence or wilful misconduct.

As noted above, the judge at first instance had found that all Triple Point's breaches of contract had been breaches of the contractual duty of care (negligence). It was, therefore, important for PTT to establish that the exclusion to the cap on liability for negligence also covered contractual negligence. Accordingly, the courts considered whether the term "negligence" in Article 12.3 referred only to independent torts or whether it extended to breaches of the contractual duty to take care. Both the judge, at first instance, and the Court of Appeal considered that "negligence" in this context must mean independent torts only.

Central to the reasoning of the judge at first instance and the Court of Appeal was the concern that if "negligence" included a breach of the contractual duty then this made the imposition of a cap in the first place almost meaningless. The cap was imposed on liability arising due to Triple Point's breach of contract. The contract was for the provision of services which were to be provided with skill and care. The lower courts considered that there was little point in imposing a cap on liability for such services to then remove that cap later in the clause by carving out from the limit on liability breaches of the contractual obligation to take care.

The Supreme Court were divided on this issue but ruled by a majority of 3:2 that "negligence" did include the contractual duty to take care. Lady Arden and Lord Leggatt, who were in the majority, gave judgments on this issue and Lord Sales provided a dissenting judgment on this point.

Lady Arden's starting point was the meaning of negligence. She held that "negligence" has an accepted meaning in English law, covering both the separate tort of failing to use due care and also breach of a contractual provision to exercise skill and care. Accordingly, the matter was quite simple: unless some strained meaning could be given to the word "negligence" in the context of the final sentence of Article 12.3, the effect of the clause was that negligence did not exclude the breach of a contractual duty of care.¹⁵ This was a short and simple analysis of the true construction of the Contract, but Lady Arden also went on to deal with the findings of the lower courts.

In respect of the central argument, that Article 12.3 could not limit liability on the one hand and then take away the

majority of that limit on the other, Lady Arden accepted the submissions of PTT that the contract was not solely about the provision of services and that there were certain matters which Triple Point had agreed to do or provide as an absolute covenant, rather than as an obligation subject to skill and care. That being the case, the cap did not render the limitation of liability in Article 12.3 meaningless.¹⁶ Further, neither the lower courts nor Triple Point had been able to provide a realistic example of an independent tort to which the exclusion on the cap would apply if the cap was only limited to tort rather than contract. Perhaps more fundamentally, Lady Arden also could not see how the exclusion in Article 12.3 could relate to tort at all given that the Article only referred to limiting damages arising under the contract.¹⁷

Lord Leggatt was of similar opinion. His starting point was that the clause was clearly dealing with liability under the law of contract and not with liability in tort.¹⁸ He also agreed with Lady Arden as to the natural meaning of the term "negligence". Lord Leggatt noted that the approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) had changed markedly in the last 50 years and, following a consideration of the authorities, he went on to say¹⁹:

"The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations."

Lord Leggatt concluded that, by declining to interpret the term “negligence” in Article 12.3 as bearing its ordinary legal meaning, this would involve a substantial departure from the obligation to exercise reasonable skill and care implied by law into contracts for services such as the Contract²⁰, the inference being that the parties could not have intended to do this in the absence of clear words.

These aspects of the *Triple Point* judgment are important. Firstly, there is now Supreme Court authority on the ordinary and natural meaning of “negligence” in commercial contracts. Secondly, through Lord Leggatt’s judgment, very clear guidance has been given in relation to how to construe exclusion clauses.

Cap on liquidated damages

This point was decided relatively shortly: the Supreme Court agreed with reasoning of the Court of Appeal that Article 12.3 covered both liquidated damages and general damages.²¹ In particular, the structure and drafting of Article 12.3 was such that it imposes an overall cap on Triple Point’s total liability, including for liquidated damages.

Conclusion

This case has clarified the law in a number of different areas and the three separate judgments given by Lady Arden, Lord Leggatt and Lord Sales are all worth reading. The uncertainty that existed in respect of liquidated damages claims following the Court of Appeal decision is now resolved and this, in turn, should reduce the scope for unnecessary argument and cost to be expended on this issue in litigation.

Resisting bond calls in the English courts: do recent developments provide hope for contractors?

In an article that first appeared in *Financier Worldwide* (Corporate Disputes, July-September 2021), **Edward Foyle** considers the utility of emergency arbitration procedures for parties seeking to resist calls against on demand bonds and the possible implications of the English Commercial Court's recent decision in *Shapoorji Pallonji & Company Private Ltd v Yumn Ltd*.¹

It is standard practice in international construction projects for a contractor to provide its employer with an on demand guarantee (also known as an on demand bond) issued by its bank as security for performance of its contractual obligations. On-demand bonds are typically for 10 percent of a contract value and provide powerful leverage for an employer. The ability for it to make a call on the bond without having to prove that it has an entitlement to monies under the underlying contract between the parties provides the employer with security that the contractor will perform its contractual obligations and not, for example, abandon its works in the event of a dispute. A call on the bond will enable the employer to recover monies from the contractor without the delays and legal costs that it would otherwise incur recovering the amounts through arbitration proceedings under their contract.

For the contractor, the potential threat of a call being made on the bond will be a great concern. A call on the bond will result in the issuing bank making a call against the contractor's counter indemnity provided to the bank, depriving the contractor of credit. The contractor's reputation will also be damaged, even if the contractor can later establish by bringing arbitration proceedings against its employer that the employer had no entitlement to the bond monies, such that the call on the bond was wrongful, the contractor will likely be required to disclose the fact of the bond call on bids for future projects, potentially jeopardising its prospects of winning future contracts.

Bond documents are subject to the jurisdiction of the courts, with the courts of England and Wales a popular choice. Historically, when a contractor fears a bond call is imminent it has two options: (i) to obtain an injunction against the beneficiary restraining a call on the bond being made; or (ii) if it is too late to prevent a call being made, injunctioning the bank from paying out against the demand.

In either scenario, the contractor must move quickly to obtain injunctive relief. While the issuing bank would prefer to avoid paying against the demand (and thus avoid assuming the risk of recovering the bond monies under a counter indemnity provided to the bank by the contractor) the bank will also be anxious to protect its commercial reputation. A bank is therefore likely to delay paying out against a demand on the bond only for a matter of days.

Emergency arbitrators are now widely provided for in institutional arbitration rules. While an emergency arbitrator may, in theory, have the power to injunction the beneficiary from making a call on the bond (depending on the scope of the arbitration agreement), an emergency arbitrator typically requires two to three weeks to issue a decision and therefore cannot do so within the required time frame. The contractor's only option is to seek injunctive relief from the courts.

Obtaining relief from the English courts

It is famously difficult to obtain an injunction from the English courts against a bank making payment following a call on a demand bond. The English courts have a long history of robustly rejecting such applications, recognising the importance for commercial parties of payment obligations under on demand bank guarantees being honoured, such that on demand guarantees are considered 'as good as cash'. While in some jurisdictions, notably Singapore and the United Arab Emirates (UAE), relief can be obtained from the courts on slightly broader grounds, the circumstances in which a bank's payment against a call can be injunctioned by the English courts are limited to the beneficiary's call failing to comply with the bond document's formal requirements (which occasionally arises, but should never occur) and (when the court is satisfied that "the only realistic inference" that it can draw based on the evidence before it is that the employer's call was fraudulent and that the issuing bank is aware of the fraud. The high evidentiary threshold to establish fraud has only been satisfied in a handful of exceptional cases.

It is famously difficult to obtain an injunction from the English courts against a bank making payment following a call on a demand bond.

While it is by no means easy, contractors have had more success in obtaining relief from the English courts restraining beneficiaries from making a call on an on-demand bond. The Technology and Construction Court (TCC) has produced a number of decisions preventing calls being made on the basis that the call was precluded under the terms of the contract giving rise to the payment obligation (see the 2011 and 2013 judgments *Simon Carves v Ensus and Doosan Babcock v Comercializadora de Equipos y Materiales Mabe Limitada*). More recent judgments,

1. [2021] EWHC 862 (Comm)

however, appear to have applied a stricter test for establishing that a call on a bond be restrained, with Stuart-Smith J in *MW High Tech Properties v. Biffa Waste Services Ltd* stressing the high threshold that must be met in stating that “it must be positively established [by the applicant] that [the beneficiary] was not entitled to draw down under the underlying contract”.

Nevertheless, given the extreme difficulty of obtaining an injunction against a bank (by establishing that a bond call is fraudulent), obtaining an injunction restraining a beneficiary from making a call on a bond remains a contractor’s best prospect of preventing a bank from being required to pay the bond monies. An obvious practical difficulty with obtaining such an injunction is that the contractor may not be given notice that a call is about to be made or, if it is given notice, may not be able to move quickly enough to obtain relief from the courts before the call is made. This difficulty appears to have been removed by the Commercial Court’s acceptance in *Shapoorji Pallonji and Company Private Ltd v. Yumn Ltd* that it had the power to grant an injunction requiring a beneficiary to reverse a call that had already been made against a bond by a beneficiary.

Does Shapoorji give hope to contractors?

Shapoorji concerned an application to the English courts for an injunction prohibiting payment against a call that had been made on an on-demand performance bond. *Shapoorji* argued that the employer’s entitlement to the bond monies arose in respect of liquidated damages due for delays to the completion of a power plant in Rwanda for which *Shapoorji* claimed it was due an extension of time. *Shapoorji* had referred its disputed entitlement to an extension of time to emergency arbitration.

In accepting that the court had the power to order the bond call be reversed, Pelling QC considered that authorities relating to applications to restrain a bond call were relevant to deciding whether the relief should be granted. However, his review of those authorities provides contractors with less cause for optimism. His judgment makes no mention of, let alone endorses, *Simon Carves* and *Doosan Babcock*, drawing only on authorities from the Commercial Court and Stuart-Smith J’s judgment in *MW High Tech v. Biffa Waste*. Relying on those authorities, Pelling QC held that an injunction reversing a bond call being made could

only be made when an applicant had shown to an “enhanced merits” standard that contractual pre-conditions (express or implied) to a call on the bond had not been met.

Emergency arbitration proceedings will only be of relevance to restraining a call on a bond when the bond in question is not an on-demand bond but expressly stated to be conditional upon a decision by an emergency arbitrator.

The “enhanced merits” standard identified by Pelling QC would appear the same as Stuart-Smith J’s requirement that a contractor must “positively establish”, rather than demonstrate on the balance of probabilities, that a call on the bond was precluded by the terms of the contract. However, the decisions in *Simon Carves* and *Doosan Babcock* have not been overturned and a TCC judge might have more regard to them in considering an application that a bond call be reversed. Furthermore, time is a precious commodity when obtaining relief against a bond call. By applying to reverse rather than prevent a call on a bond, a contractor will have a little more time to prepare the supporting evidence required to “positively establish” that the employer was not permitted by the terms of the underlying contract to call the bond.

What if the entitlement under the main contract is about to be resolved by emergency arbitration?

Shapoorji also illustrates the futility of emergency arbitration proceedings in preventing payment of on-demand bonds. *Shapoorji* argued that whether the employer was entitled to make its demand – and whether its demand must be withdrawn – was a matter to be decided by the emergency arbitrator. Accordingly, *Shapoorji* applied under section 44 of the Arbitration Act 1996 (pursuant to which the English courts may grant interim relief in aid of arbitration) for the court to grant orders preserving the status quo until the emergency arbitrator’s decision was issued. *Shapoorji* further argued that in deciding whether the employer was entitled to call the bond the emergency arbitrator would not apply the same high standards as the courts when determining applications under section 37 of the Senior Courts Act 1981, such that the court should not apply those principles in deciding the application under section 44.

Unsurprisingly, *Shapoorji*’s application was emphatically rejected by the court. The court held that, even on the assumptions that an emergency arbitrator had jurisdiction to issue an order and would apply a more relaxed standard in reaching his or her decision (both of which are highly debatable but were accepted for the purposes of the application), a court must nevertheless apply the same “enhanced merits” principles in determining an application for an injunction preventing a call on a bond irrespective of whether the application was made under section 37 of the Senior Courts Act or section 44 of the Arbitration Act. As *Shapoorji* demonstrated, the reality is that an emergency arbitrator cannot issue an order restraining a bond call quickly enough, such that relief must be sought from the courts and the courts’ principles must be satisfied. As such, emergency arbitration proceedings will only be of relevance to restraining a call on a bond when the bond in question is not an on-demand bond but expressly stated to be conditional upon a decision by an emergency arbitrator.

Future trends?

Shapoorji provides a reminder of the English courts’ robust approach to upholding on demand payment obligations and why making bank guarantees subject to the jurisdiction of the English courts is such a popular choice for beneficiaries. However, the possibility of obtaining an order reversing a bond call will provide encouragement to contractors seeking to prevent payment of bond monies as it removes the need to satisfy the fraud exception after a call is made. Given the drastic consequences of a bond call, contractors may look to test whether the TCC will apply an “enhanced merits” threshold to reverse a bond call as strictly as the Commercial Court.

An injunction reversing a bond call being made could only be made when an applicant had shown to an “enhanced merits” standard that contractual pre-conditions...to a call on the bond had not been met.

A practical guide to implied terms

An implied term is a contractual term which has not been recorded in the written provisions of a contract, because it has not been expressly agreed. Parties should be mindful of the terms capable of being implied, as well as whether or not they can be expressly excluded. **Catherine Simpson** looks at some common implied terms in construction contracts, relating to quality, fitness for purpose, skill and care, and good faith.

The parties to a contract will often not give much thought to the fact that terms can be implied, usually by common law or by statute.¹ Terms can also be implied by trade or industry custom and use, based on the conduct of the parties, or based on the intentions of the parties at the time the contract was entered into (although not if they are unreasonable or at odds with the express contract provisions).

Quality of goods and materials

Most construction contracts will contain an express term that the materials used are to be new and of satisfactory quality. However, where express wording has not been used, common law has found that a contractor will impliedly warrant that the materials supplied will be of good and proper quality. This will be the case unless it can be shown that the parties intended otherwise, which might be where, for example, the contractor is specifically directed to use a particular material and they have no control over its suitability.

There may be building standards or legislative requirements against which “quality” can be assessed, but generally it can be inferred that goods/materials will not be of satisfactory quality if they have been used for their normal or intended purpose and fail shortly after use. The implied obligation to use good and proper materials will be breached even if the contractor was unaware at the time of supply that they were inappropriate or defective. This is a key point to note for contractors, who will be unable to use, as a defence, the fact that they had no reasonable basis for knowing that the supplied materials were defective. In such circumstances, a contractor who is found liable would need to pursue their supplier.

There is similarly legislation which provides that contracts for the sale or supply of goods are subject to an implied term that they will be of satisfactory quality – see, for example, Sale of Goods Act 1979, section 14(2) and Supply of Goods and Services Act 1982, section 4(2). However, there are usually qualifications. Focusing on the sale of goods, an implied term of satisfactory quality might be qualified if the seller makes any limitations in the physical characteristics of the goods known to the purchaser, and the purchaser still chooses to accept the goods. Similarly, if the purchaser examined the goods before the contract for sale was entered into, or purchased on the basis of a supplied sample and any limitations in the goods were apparent at the time, the implied term as to quality may be qualified to the extent of the limitations.

Fitness for purpose

At common law, if the contractor assumes responsibility for design, there will usually be an implied warranty that the result of the work will be reasonably fit for the agreed or known purpose, provided the contractor was aware of the purpose at the time the contract was entered into. Such a warranty may also be implied where it is apparent that the employer is relying on the contractor to exercise skill and judgement to achieve a particular result.

Where a contractor is aware of the general purpose of the design but is not made aware of specific requirements as to the final performance or specification, the contractor will be required to exercise reasonable skill and care in performing its obligations. It is possible for a contract to expressly provide that the contractor does not warrant fitness for purpose, and that it only undertakes to exercise reasonable skill and care in performing its obligations. This is often the case where a contractor’s insurance policy does not cover the contractor against any liability it may have for breach of a fitness for purpose obligation. Few insurers cover this, so many parties will expressly exclude any fitness for purpose warranty.

it is the duty of the contractor to draw to the attention of the employer the fact that they are unable to perform the work satisfactorily.

If the contractor does not assume design responsibility, the implied warranty as to fitness for purpose will usually only relate to the supplied materials and the workmanship, to the extent that they are within the contractor’s control. An implied warranty to ensure that materials are reasonably fit for purpose is usually more onerous than an implied obligation that they be of satisfactory quality.

Quality of work

It will generally be an implied obligation of a contractor to perform and complete its work in a good and workmanlike manner. The contractor will typically be required to carry out its work with the skill and care of an ordinarily competent contractor in the circumstances of the actual contractor. Although the obligation will be implied at common law, it is often set out in an express contractual term (such as clause 2.1 of the JCT Standard Building Contract, 2016 edition and clause 7.1(b) of the FIDIC Red Book (2nd edition, 2017).

1. Such as the Late Payment of Commercial Debts (Interest) Act 1998 implying the right to interest on late payments at the rate of 8% over base unless the contract already contains a “substantial contractual remedy for late payment”, the Contracts (Rights of Third Parties) Act 1999 implying a right for a third party to enforce a contractual term if the contract expressly provides for it, and the Defective Premises Act 1972 implying for the provision of a new dwelling a term that the dwelling, when completed, will be reasonably fit for human habitation.

A contractor might be in breach of this obligation if they have used unsatisfactory materials. The fact that a contractor supplies labour, but not materials, does not excuse them should the works turn out to be defective due to the use of incorrect materials, or use of materials in an incorrect manner, where the contractor knew, or ought to have known, that by performing the work in the manner they did, there would be a defect. Nor does the fact that the contractor was not responsible for the preparation of the design excuse them from responsibility for defects in the works, where it ought to have been clear that the design was materially deficient.

There is no overarching principle of good faith applying to contracts governed by English law.

Of important note is that it is the duty of the contractor to draw to the attention of the employer the fact that they are unable to perform the work satisfactorily. So, where a contractor knows, or ought to know, that the works they have been asked to perform will be defective or unsatisfactory for their known purpose, the contractor should draw this to the attention of the employer and seek instructions on how to proceed before carrying out any work.

Duty to exercise reasonable skill and care

At common law, it is the implied contractual duty of a professional person who holds themselves out as possessing a particular skill that, when employed to do work that requires the application of that skill, they will exercise reasonable skill and care in the art they profess.

Similarly, under the Supply of Goods and Services Act 1982, where services are supplied pursuant to a contract as part of a business, it will be an implied term that the supplier will carry out their services with reasonable skill and care – see section 13.

Duty to act in good faith

Although there is no overarching principle of good faith applying to contracts governed by English law, the obligation to act in good faith may be inferred into construction contracts on a piecemeal basis. This is namely to overcome problems of unfairness. An obligation to act in good faith generally requires the parties

to cooperate to achieve the contractual objectives and compliance with honest standards of conduct or those that are reasonable having regard to the interests of the parties.

There have been moves to introduce the concept of good faith into construction contracts by express terms. For example, the NEC4 contains a requirement on the parties to act “in a spirit of mutual trust and cooperation” (clause 10.2). However, the law will not usually fill gaps in the contract by implying a term that the parties are to act in good faith where the contract already contains detailed terms setting out the respective rights and obligations of the parties. Accordingly, this will be rare in practice.

Are there other terms which may be implied?

The common law does not generally imply an obligation into construction contracts that the contractor is required to perform its works in accordance with all applicable laws. Such a term may, however, be implied ad hoc in the particular circumstances of the parties. For example, it may be an implied term that the contractor’s works, when completed, will be of sufficient quality to comply with the applicable building laws or regulations concerning such work.

There are a number of other terms which may be implied by common law, including a duty to co-operate, a duty to give possession of the site within a reasonable time for certain types of contract, and an obligation on the employer not to hinder or prevent the contractor from carrying out its obligations and executing the works. Many of these terms can be excluded expressly or by surrounding circumstances.

What does this mean?

The fact that terms can be implied is a valuable reminder of the need for careful negotiation and drafting. Parties should be mindful of the terms capable of being implied and consider whether any can, or should, be expressly excluded. If they can be excluded, the contractual exclusion terms must be clear and unambiguous to minimise the risk of a later dispute. It is also worth noting that an express term will only be upheld if it is reasonable for the purposes of the Unfair Contract Terms Act 1977.

The parties would also be wise to consider an entire agreement clause. Entire agreement clauses provide that only those terms set out in the signed agreement form part of the contract. However, note that the inclusion of an entire agreement clause will not always preclude the bringing of a claim for implied terms.

Parties should be mindful of the terms capable of being implied and consider whether any can, or should, be expressly excluded. If they can be excluded, the contractual exclusion terms must be clear and unambiguous.

Infelicities and oddities in PFI contracts

As **Ted Lowery** explains, the private finance initiative programme commenced in the 1990s and was conceived as a means of reducing public borrowing. The private sector, in the form of a special purpose vehicle project company, assumes the risk of financing and constructing new infrastructure assets and thereafter manages the assets and provides complementary services for a fixed period, usually 25 years. In return during the services period the project company receives a monthly amount from the public authority – the unitary charge – intended to cover the project company's profit, capex and financing costs. At the end of the services period the assets are handed back to the control of the authority and the authority assumes responsibility for continuing delivery of the services.

1. *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 (22 February 2018). At paragraph 93 in Jackson LJ's judgment.
2. An apt analogy would be a couple who divorce after 10 years of marriage but find themselves obliged to live together in the same house for the next 15 years.
3. [2021] EWHC 2015 (TCC) (16 July 2021). Before Mr Alexander Nissen QC sitting as a judge of the High Court.
4. [2013] EWHC (TCC) – upheld on appeal and cited with approval in *Alexander v West Bromwich Mortgage Company Ltd* [2015] EWHC 135 (Comm).

Introduction

PFI contracts are notoriously lengthy and complex. Examination of the arrangements for a medium sized PFI hospital project will typically show a project agreement with around 20 schedules totalling some 2000 pages. In addition, the project company will simultaneously enter into comparably sized sub-contracts for the construction of the assets and for the delivery of services during the services period. The PFI documents suite will also include a host of satellite arrangements such as collateral warranties, guarantees, financing instruments and interfacing agreements.

In these circumstances it is not surprising that PFI contracts frequently include anomalies and discrepancies and often fail to achieve the intended seamless dovetailing of interlocking rights and obligations. In one of the few PFI contract disputes to come before the Court of Appeal, Lord Justice Jackson's judgment included the following warning:

I do, however, make this comment. Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain.¹

Problems caused by the infelicities and oddities referred to by Lord Justice Jackson can be compounded by one particular aspect of PFI contracts that arises out of the long-term nature of the arrangements i.e., the tendency of the parties to enter into ancillary agreements over the lifespan of the project.

Mr Justice Akenhead: If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one.

Ancillary agreements

Given the duration of PFI contracts, it is not surprising that the parties' respective rights and obligations are not expected to remain immutable over a 25-year period. Ancillary agreements entered into during the services period usually fall into three

broad categories (albeit that whatever the label they may cover similar ground):

- Variations;
- Supplemental agreements; and
- Settlement agreements

Variations

PFI contracts will ordinarily provide for variations (in the sense that the word "variation" is commonly understood in construction contracts) during the services period that concern physical works to change or enhance the infrastructure assets. These variations will typically encompass works such as the installation of new IT services and cabling, upgrading ventilations systems and the internal reorganisation of functional spaces. In some cases, the authority will require substantial new constructions and extensive works may also be required to ensure that the asset reflects developments in statutory requirements, for example concerning fire safety legislation. As well as confirming the capex sum to be paid to the project company for procuring the physical works, the variation documents will usually provide for any necessary consequential adjustments to the scope of the services, the unitary charge and the amounts payable to the services sub-contractor.

Supplemental agreements

It is also common for the authority and the project company to enter into substantive supplemental agreements during the services period in order to alter the services provision, for example where the authority wants to take cleaning back in-house or in consequence of any benchmarking or market testing exercises. If the services provision is altered there will need to be like for like amendments to the project agreement and to the services sub-contract and again, supplemental agreements will usually provide for any necessary adjustments to the unitary charge and the amounts payable to the services sub-contractor.

Settlements

In a PFI context, the outcomes of formal dispute procedures can have disproportionately detrimental effects on the project overall given that save in (rare) cases of termination, the parties will still be required to work together for several years to come.² In these circumstances formal settlement agreements that look to confirm the impact of any adjudication

decisions, arbitration awards and judgments on the project going forward (and hopefully palliate any post-dispute rancour) are common in the PFI sector.

Surrey v Suez

Where detailed variations, supplemental agreements and settlements are intended to overlay what are already complex and lengthy PFI contracts there is an enhanced risk of ambiguity. The recent judgment in *Surrey County Council v Suez Recycling and Recovery Surrey Ltd*³ provides a good example of how ancillary agreements can inadvertently create fresh uncertainty.

Background

During 1999, Surrey County Council entered into a PFI project agreement with Suez for the management of elements of its domestic waste services to include the construction and operation of two mass burn waste-from-energy plants. In the project agreement, the dispute resolution schedule established an expert procedure for specific types of disputes for example in connection with accountancy and planning issue but otherwise provided for arbitration. Clause 63 in the project agreement stated that English law applied and confirmed that the parties submitted to the exclusive jurisdiction of the courts of England and Wales.

In the event the plants were never built due to planning difficulties and in consequence, Surrey and Suez entered into successive deeds of variation that re-focused the project upon the construction of an Eco Park in Sunbury. In relation to disputes, these deeds of variation generally provided for court proceedings.

Lord Justice Jackson: Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract.

The construction of the Eco Park was significantly delayed and in early 2021, Surrey commenced court proceedings, relying upon the dispute provisions in the deeds of variations. In reply, Suez cited the arbitration clause in the project agreement and applied to have the proceedings stayed to arbitration.

The decision

The judge found in favour of Suez on the grounds that notwithstanding the references to court proceedings, the deeds of variation essentially remained servants to the master project agreement. Therefore, looking at the documents overall then the references to court proceedings in the deeds of variation could be construed as merely re-stating the provision in clause 63 of the project agreement that the courts of England and Wales would have exclusive jurisdiction, and this would be the case should court intervention ever be necessary to supervise any arbitration or expert procedure.

Comments

The background facts in *Surrey v Suez* were unusual given that the principal PFI assets were never built but the judge's approach of scrutinising all relevant documents in an effort to make the contract work is still of general application. Of course, the idea of seeking to reconcile ostensibly competing provisions in order to identify a clear and sensible commercial interpretation that avoids ambiguity is not unique to PFI contracts. However, it is worth noting the judge's characterisation of the project agreement as the "master" document and the deeds of variation as the "servants", (notwithstanding that one of the key objectives of the project agreement had been thwarted by planning issues). If in accordance with Lord Justice Jackson's warning set out above, the parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract then in a PFI scenario, the primary source of those purposes should always be the project agreement.

The judgment in *Surrey v Suez* was consistent with an earlier decision in *RWE Npower Renewables Ltd v JN Bentley Ltd*⁴ when in relation to a contract based upon the NEC 3 Engineering and Construction Contract conditions, Mr Justice Akenhead observed as follows:

What one cannot and should not do is to carry out an initial contractual construction exercise on each of the material contract documents on any given topic and then, so to speak, compare the results of that exercise to see if there is an ambiguity. If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one;

Whilst not made with reference to a PFI contract, Mr Justice Akenhead's observations clearly chime with Lord Justice Jackson's warning in *Amey v Birmingham*.

Summary

PFI contracts tend to prove the rule of thumb that the longer and more numerous the contract documents the greater the likelihood of inconsistencies. The decisions cited above cannot amount to a panacea for chronic ambiguity but should render some comfort for those faced with ambivalence on the face of PFI contract documents, including where complications arise because of subsequent variations, supplemental agreements and settlements. Lord Justice Jackson's recommendation that the parties should (at least try to) adopt a reasonable approach and not seek to exploit infelicities and oddities for their own commercial gain amounts to manifestly sound advice for everyone involved with PFI contracts.

Where detailed variations, supplemental agreements and settlements are intended to overlay what are already complex and lengthy PFI contracts there is an enhanced risk of ambiguity.



PFI disputes in the courts

As **Gemma Essex** discusses, PFI disputes in the Technology and Construction Court are an increasingly rare beast. The time, cost, not to mention risk of an unfavourable outcome associated with complex multiparty litigation, is enough to dissuade even the most litigious of parties to consider an alternative method of dispute resolution. To date, a single judgment in respect of a PFI procured contract has been handed down by the TCC in 2021.

Surrey County Council and Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC)

Surrey County Council issued a claim against Suez in relation to delays that had arisen in completion of their Ecopark project. Surrey sought declarations to identify the contractual completion date, longstop date and a declaration that Suez had failed to meet the requirements for an acceptance certificate. In each case to determine whether, in consequence, Surrey is entitled to terminate their agreement based on Suez's default.

As a practitioner with a keen interest in PFI, waste projects and pedant¹, the hearing of this claim in the TCC was much anticipated, as with last year's decision in *Essex County Council v UBB Waste (Essex) Ltd (Rev 1)* [2020] EWHC 1581 (TCC). However, parties and practitioners alike are unlikely to learn the outcome of the determination of the Surrey dispute following Suez's successful application to stay court proceedings for private and often confidential arbitration.

Surrey sought to argue that the arbitration clause in its contract was inconsistent with or superseded by subsequent Deeds of Variation, such that some disputed aspects of the contract were to be determined by arbitration and other by court proceedings. Surrey's argument was given short shrift by Alexander Nissen QC, sitting as Judge of the High Court, highlighting the commercial sense of resolving in one forum all substantive disputes about matters arising from the obligations under the one contract as obvious; clearly concluding that the parties in this case must be taken to have agreed to arbitration under the contract for reasons of neutrality, expertise, and privacy.

Internationally, arbitration remains the preferred method of resolving cross-border disputes for 90% of respondents to the London School of International Arbitration twelfth major International Arbitration Survey, published in May 2021. Domestically, as the courts have become increasingly congested with a backlog of matters delayed by Coronavirus restrictions, parties have increasingly turned to arbitration.

Arbitration can offer contracting parties' certain benefits over court proceedings including privacy, neutrality, greater procedural autonomy, selection of a technically appropriate arbitrator and sometimes – but by no means always

– cost. Privacy is a key consideration for many parties and, whilst not always the case internationally, under English law confidentiality is implied making arbitration well suited to parties who do not want their commercial arrangements to become wildly known.

At the far reaches of the privacy scale, the International Arbitration Centre now offer "a confidential VIP entrance with a private driver drop off, underground car park and private lift" to parties wishing to keep their disputes private. VIP private entrances are not the hallmarks of dispute between public sector parties and thinly capitalised private sector SPVs; however, PFI projects have been the subject of both public scrutiny and political unpopularity, warranting consideration of the potential reputational damage and precedent created by a public hearing.

At the outset of a project, the dispute clause is unlikely to be as hotly negotiated as the parties' obligations of performance and payment.

The public nature of court proceedings may represent a strategic choice for litigating parties. For example, a public sector party accountable to local government and taxpayers wanting to create a precedent for future decisions may consider court proceedings a preferable forum. A prudent defendant will consider if the claimant's choice is correct or preferable and, where appropriate challenging and denying the claimant the venue of their choice.

At the outset of a project, the dispute clause is unlikely to be as hotly negotiated as the parties' obligations of performance and payment. The majority of PFI disputes do not reach the stage of final determination. The standard form PFI contract recognises a party's need to consider arbitration, and both SoPC4 and PF2 state that parties "may refer the matter either to arbitration (itself a form of ADR) or to the courts for a final and binding decision". Long term relational contracts such as PFI contracts now require the parties to deal with disputes impliedly in good faith² nevertheless disputes often arise. Pragmatic relationship management and meaningful engagement with the cascade of dispute resolution procedures PFI contracts typically contain, facilitate the resolution of disputes before reaching final proceedings.

1. The word "Recycling" in the defendant's name in the approved judgment is missing a "c".

2. *Alan Bates & ors v Post Office Ltd* [2019] EWHC 606 (QB)

Update on natural justice in adjudication

Construction practitioners will be well aware that there are two main grounds upon which it is possible to resist the enforcement of an adjudicator's decision: a jurisdictional challenge and a breach of the rules of natural justice. Indeed, it is rare for an adjudication to proceed without submissions being made on one or both of these issues. Most of the time, such arguments are speculative and unsuccessful as the courts have taken a robust approach to the enforcement of the decisions since adjudication was introduced. However, as **George Boddy** explains, in one of the first reported cases in the TCC of 2021, *Global Switch Estates 1 Ltd v Sudlows Ltd*¹, the Court refused to enforce the decision of an adjudicator because he breached the rules of natural justice, demonstrating that it is still worth running these arguments.

Recap on natural justice

There are two key underlying principles from which the case law on natural justice in the context of adjudication has developed:

- (i) A party should be informed of the allegations that have been made against it and be given an opportunity to answer those allegations.
- (ii) A party is entitled to have its case heard by an unbiased and impartial tribunal.

The Court of Appeal confirmed in the cases of *Construction v Devonport Royal Dockyard*² and *Amec v Whitefriars*³ that the rules of natural justice do apply to adjudicators and made a number of observations regarding natural justice in the context of adjudication. The Court of Appeal commented that there should be a limit to the requirements of natural justice in adjudication given that the procedure was designed to be speedy and that there is, therefore, an inbuilt unfairness in it. The fact that it is open to an unsuccessful party to attempt to overturn an adjudicator's decision by litigation or arbitration also justified imposing such limits. It would, therefore, only be in the case of serious breaches that the Court would intervene and refuse to enforce the decision of an Adjudicator.

The Court of Appeal's statements were later developed in the Technology and Construction Court in the case of *Cantillon v Urvasco*.⁴ In that case, Akenhead J set out the approach the Court should take when considering alleged breaches of natural justice in the context of challenges to the enforcement of adjudicators' decisions:

- (i) The Court should not take an over-analytical approach to questions of natural justice in adjudications;
- (ii) The challenge must be plain, clear and comprehensible; and
- (iii) The Court should adopt a two-stage test: (1) has the adjudicator failed to apply the rules of natural justice; and (2) the breach must be serious and more than peripheral.

Global Switch Estates 1 Ltd v Sudlows Ltd

In *Global Switch v Sudlows*, the TCC refused to enforce the Adjudicator's decision on the basis that he had materially breached the rules of natural justice by failing to consider a claim for loss and expense that Sudlows had raised as a defence to Global Switch's claim for payment.

The facts

Sudlows was appointed pursuant to a JCT Design and Build 2011 with amendments to undertake the fit out and upgrade of Global Switch's specialist data centre at East India Dock in London. Various disputes arose between the parties and four adjudications followed, the fourth of which was the subject of the enforcement decision.

In the fourth adjudication, Global Switch sought a decision as to the true value of parts of Interim Application 27 and an order that Sudlows should pay the sum of £6.8 million to Global Switch. In the Notice of Adjudication, Global Switch sought to expressly exclude certain matters from the scope of the adjudication. These matters included Sudlows' entitlement to further extensions of time and further loss and expense in connection with the question of liability for two alleged defects in Sudlows' works: (i) the high voltage cables installation; and (ii) potential overloading of the roof.

Sudlows disputed Global Switch's attempt to restrict the scope of the adjudication in the Notice. Its position on the true value of Interim Application 27 included claims arising from the matters that Global Switch had tried to exclude. It argued that it was entitled to raise any defence open to it to defend its position in respect of Interim Application 27 and to defend Global Switch's claim for payment. Sudlows proceeded to defend Global Switch's claim for payment by seeking a determination from the Adjudicator as to its entitlement to further extensions of time and loss and expense arising from the alleged defects.

The Adjudicator decided that Global Switch was entitled to limit the scope of his jurisdiction to the specified parts of Interim Application 27. He decided that he did not have jurisdiction to consider or award further extensions of time and loss and expense to Sudlows that Sudlows had raised to defend the true valuation case and the claim for payment.

1. [2020] EWHC 3314 (TCC)
 2. [2005] EWCA Civ 1358
 3. [2004] EWCA Civ 1418
 4. [2008] EWHC 282 (TCC)

The Adjudicator reached a decision on the true value of the elements of the account referred to adjudication and awarded the sum of £5 million to Global Switch.

The law

Mrs Justice O'Farrell emphasised that the Courts take a robust approach to adjudication enforcement and made the following observations:

- "i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.*
- ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.*
- iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.*
- iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.*
- v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.*
- vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.*
- vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.*

viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.

ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced."

Mrs Justice O'Farrell: Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

The decision

In the adjudication, Global Switch had sought a declaration as to the true value of Interim Application 27 and an order for payment that followed. In defence to that claim for payment, Sudlows had relied on its own claims for loss and expense arising from extensions of time. Sudlows' claims involved the high voltage cables works and the overloading of the roof that Global Switch had attempted to exclude from the adjudication by submitting that the Adjudicator could proceed on the assumption, in Sudlows' favour, that they were not defective.

However, while the Judge agreed that this exclusion addressed Global Switch's defects claims against Sudlows, it did not address Sudlows' claims for additional payment for rectification costs and the consequential loss and expense. These claims were clearly relevant to the valuation of Interim Application 27 for the purposes of any claim for payment as they were potential valid defences to it.

Therefore, the Adjudicator ought to have considered whether the rectification costs and loss and expense claims were valid. However, the Adjudicator wrongly assumed that he did not have jurisdiction to do so.

As Global Switch sought not only a true valuation of specific parts of the account, but also an award of payment, the Adjudicator should have considered Sudlows' potential defence to the claim

for payment. The determination of the claim for payment required the Adjudicator to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation. The Adjudicator's failure to take into account Sudlows' defence based on its additional claims for loss and expense amounted to a breach of the rules of natural justice.

The Adjudicator's failure to exhaust his jurisdiction meant that he failed to consider a very large part of Sudlows' defence to Global Switch's claim for payment. This amounted to a serious and material breach of the rules of natural justice and rendered the decision unenforceable.

Conclusion

Referring parties often seek to carefully define the scope of the dispute to be referred to adjudication, and there are very good reasons for doing so. However, great care must be taken when drafting the Notice of Adjudication and the relief sought.

This case confirms that where the referring party has sought an order for payment in addition to a declaration as to the value of an account or certain items within it, then it must be aware that the responding party will be entitled to bring in any other valid claims it may have as a defence to the claim for payment.

The responding party's claims must be considered by the Adjudicator as a defence to the referring party's claim for payment. If the Adjudicator fails to do so, then the decision will not be enforceable on the grounds of a breach of natural justice.

The determination of the claim for payment required the Adjudicator to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation.

Prater Ltd v Sisk – when cherry picking is and isn’t fruitful

A recent TCC decision has confirmed that parties may strategically cherry pick elements of a larger existing dispute and refer to them in a single adjudication without that party falling foul of the well-established rule that only a single dispute may be referred to adjudication at any one time. The judgment serves as a useful authority for those parties unable to refer an entire dispute to adjudication due to its size and complexity.

As **Adele Parsons** makes clear, the case is also a valuable reminder that a party cannot strategically cherry pick the timing of its objection to an Adjudicator’s jurisdiction, confirming that this must be done promptly and in accordance with the applicable terms of the parties’ contract.

The facts

In April 2018, specialist building envelope contractors, Prater, entered into a NEC3 Option A Subcontract with Sisk for the former to design, deliver and install the cladding and roofing to a new Boeing Fleet aircraft maintenance hangar, office and plant room at Gatwick Airport.

The Subcontract Works were subject to a series of delays and changes which resulted in a number of disputes that ultimately fell under a larger final account dispute between the parties. These included the adjustment to the Subcontract Completion Date, extension of time entitlement, prolongation costs and Compensation Events. These disputes resulted in a total of four adjudications between the parties. It is the second and fourth of these adjudications that concerned the TCC in this instance.

Following completion, Sisk issued a payment certificate which certified Prater’s works at £7m less than Prater had applied for. Prater commenced what was then a second adjudication against Sisk (the first one concerning an amendment to the original subcontract completion date). In the second adjudication, Prater sought declaratory decisions alone on the following discrete issues:

- (i) The correct Subcontract Completion Date;
- (ii) Whether the Subcontract included provisional sums; and
- (iii) Sisk’s entitlement to deduct certain indirect losses from sums due to Prater.

The reason for Prater’s approach was that it considered the entire final account dispute between the parties to be too cumbersome to be decided by way of a single adjudication.

The Adjudicator found in favour of Prater and a further two adjudications followed.

During the fourth adjudication Prater sought payment of circa £2.2m plus VAT based, in part, on the Adjudicator’s decision in the second adjudication. The Adjudicator subsequently awarded Prater £1.7m plus VAT and decided that Sisk pay its fees.

While Sisk paid the Adjudicator’s fees, it refused to pay anything further on the basis that the decision in the fourth adjudication was unenforceable. Its reason for this was that the decision was based, in part, on the decision in the second adjudication. Sisk claimed that the Adjudicator had no jurisdiction to reach his decision in the second adjudication as Prater had referred multiple disputes to adjudication rather than a single dispute; there being no clear link between the three discrete issues claimed by Prater.

You must take any position on an adjudicator’s jurisdiction quickly and clearly as soon as you become aware of any such issue.

Conversely, Prater argued that the genesis of the dispute within the second adjudication, as with the fourth, was Sisk’s assessment of Prater’s account. The dispute referred in the second adjudication simply included a number of issues that were part of a much larger dispute between the parties, namely Sisk’s assessment of Prater’s account, and therefore amounted to a single dispute. Accordingly, the Adjudicator had the requisite jurisdiction, and his decision was enforceable.

Cherry picking disputes – a matter of common sense

The court found in favour of Prater. Deputy Judge Veronique Buehrle QC held that, each of the matters referred to the Adjudicator in the second adjudication could have been decided independently. You need to look at the facts of the case and use some common sense, as a “single dispute” in the context of a construction contract may include several distinct issues, such as determining appropriate deductions for the purposes of a payment application or final account.

The court sympathised with Prater’s position and the practicalities of adjudication, particularly when addressing complex account disputes by stating that:

“it would not be desirable for a party to be forced into raising the entirety of the dispute in a single adjudication when that might be oppressive or the entire dispute too complex and extensive to be dealt with in the context of a single adjudication”

1. Clause W2.3(11) of the NEC Option A Subcontract
 2. Clause W2.4(2) of the NEC Option A Subcontract

Ultimately, a single adjudication was not suitable for resolving all the issues arising from Sisk's assessment of Prater's account. Indeed, the court found that it would be:

"arbitrary to treat distinct issues forming part of a single dispute as each giving rise to a separate dispute because the whole of the dispute itself had not been raised in the context of a single adjudication or because there were other issues that also needed to be resolved to determine the real dispute."

When cherry picking turns sour

As to the timing and manner of Sisk's jurisdictional challenge, the court found this to be something of a "novel argument", agreeing with Prater that it was not open to Sisk to challenge the Adjudicator's decision in the second adjudication in the context of the fourth adjudication.

The dispute resolution provisions within the parties' subcontract clearly stated that the decision in the second adjudication was binding on the parties unless and until revised by a Tribunal (in this case the court) and enforceable as a matter of contractual obligation between the parties.¹ In order for any such revision to take place, it was incumbent on the dissatisfied party to provide a Notice of Dissatisfaction to the other party.²

Although Sisk served a Notice of Dissatisfaction in relation to the Adjudicator's second decision, it did not take any further steps to refer that decision to the Court. Therefore, the decision in the second adjudication was binding on Sisk as a matter of principle, as well as contractual obligation unless and until revised by the Court. If Sisk wanted to avoid the findings in the second adjudication being relied upon in a subsequent adjudication, it was for Sisk to not only issue a Notice of Dissatisfaction but to refer its challenge to the Court in a timely manner. It could not pick and choose when to challenge an adjudicator's jurisdiction such as to suit its needs.

Implications of the decision

The decision serves as a helpful authority for those who may wish to cherry pick several parts of a larger single dispute over a number of adjudications. The extent of a dispute is, of course, a matter of fact and parties need to be certain that the issues they choose to adjudicate on at any

one time are part of the same dispute. However, this case demonstrates that this can be done strategically without jeopardising the adjudicator's jurisdiction and decision.

Practically, this piecemeal manner of dispute resolution grants the referring party the freedom to adjudicate on certain key issues without stretching internal and consultant resources which seemingly go hand-in-hand with the typically lengthy and time consuming submissions that can accompany final account disputes. This is a matter that Prater highlighted in its submissions to the court where it argued that to bring a final account "kitchen sink" adjudication would be both lengthy and complex, and in the circumstances inappropriate, not least given the summary nature of the adjudication procedure.

In respect of a party seeking to challenge an adjudicator's decision, the case is an important reminder for parties to follow the terms of their contract regarding any notices, and to ensure that action is taken both assertively and in a timely manner.

A party's position as regards an Adjudicator's jurisdiction should be made quickly and clearly as soon as that party becomes aware of any such issue.

It was not open to Sisk to challenge the Adjudicator's decision in the second adjudication in the context of the fourth Adjudication.

What lies beneath: ground risk and site conditions

As **Mark Pantry** explains, unforeseen site conditions cause delay and cost overruns for projects of all sizes. In 2019 Allan Cook, the chairman of HS2 Ltd, blamed (in part) increased costs for the flagship infrastructure project on ground conditions which were *"significantly more challenging than predicted"*.

1. [2018] EWHC 312 (TCC)

The nature of the conditions that are encountered or could be encountered on site will vary from project to project. For HS2 a major issue was the changing soil types across the route. Projects redeveloping brownfield sites may encounter existing structures or contamination below ground, while projects refurbishing buildings may discover services not shown on a drawing or in the wrong place.

In circumstances similar to the above examples, we are often asked: who takes the risk for unforeseen ground or site conditions encountered by a contractor carrying out works on site and what is the standard negotiated position? The answer, unfortunately, is often as varied as the types of condition that are encountered on site but it usually starts with all parties looking at the contractor.

The standard position is that, in promising to undertake works for a fixed price, the contractor is promising to complete those works even where the works are more difficult or more expensive for the contractor to complete. This is true even where the designs are supplied by the employer; there is no implied warranty from the employer that the designs provided are feasible or that the site is fit for the works intended on it. The employer is relying on the contractor's professional expertise in determining the buildability of the works.

The common law position puts the risk for unforeseen physical conditions with the contractor without any mitigating foreseeability criteria

There is a long history of case law which states that the courts will not help a contractor escape a bad deal. If a contractor cannot build what he has promised to build it is, on the face of it, in breach of contract. Accordingly, it is on the contractor to determine the potential ground risks or site conditions and price for them accordingly or to ensure that its tender is qualified sufficiently.

As a general principle, parties to a construction contract are free to allocate risk how they see fit. On that basis, rather than rely on the common law position many parties negotiate contracts which expressly allocate the risk for adverse site conditions, and those contracts which do not are unlikely to have such a term implied into their contracts by the courts.

Many standard form engineering contracts include specific provisions on ground conditions; the two main domestic forms of standard form contract in the United Kingdom, the JCT and NEC contracts, adopt different approaches.

The NEC4 Engineering and Construction Contract includes as a compensation event (entitling the contractor to additional time and money) the encountering of "physical conditions" within the site which an experienced contractor would have judged to have such a small chance of occurring, having regard to all the information available to it, that it would have been unreasonable to allow for such conditions.

While, from an initial review, giving physical conditions as a compensation event sounds a beneficial position for the contractor, in reality this is quite a high hurdle for a contractor to leap over to get its compensation event. By introducing a concept of foreseeability of site conditions, the contract is requiring contractors to prove that an experienced contractor would not have foreseen the conditions encountered.

The JCT Design and Build Contract and the majority of JCT contracts are silent on site conditions and ground risk. This is intentional – the common law position applies which puts the risk for unforeseen physical conditions with the contractor without any mitigating foreseeability criteria.

A construction contract is not, however, just the terms and conditions but also includes the various contract documents. In *Clancy Docwra Ltd v E.ON Energy Solutions Ltd*¹, the court held that a scope of works had been modified by a document appended to the contract which clarified the contractor's tender in relation to adverse ground conditions. This modification of the allocation of the risk for ground conditions was regardless of an express term of the contract which allocated ground risk to the contractor.

The above decision shows the importance of parties to a construction contract ensuring that all contractual documentation is consistent with the terms and conditions. It also shows that risk allocation clauses are not the "get out of jail free" card they are often thought of as being. It is a reminder for the parties to give due thought to the potential impact of adverse site conditions and how this risk should be allocated between the parties.

Taking over a part done job

Following the temporary restrictions on winding-up petitions brought in under the Corporate Insolvency and Governance Act 2020 being lifted, as **Jatinder Garcha** sets out, we are left with a contracting market still working its way through the ripples of Brexit, Covid-19, labour and material shortages, price fluctuations and just about the toughest Professional Indemnity insurance market we have seen.

With the prospect of insolvency related terminations of building contracts taking place over the coming months, this article considers some of the implications of taking over and completing a half done construction project.

Patience is golden

Seeing your completion date drift further and further away is frustrating and can trigger knee-jerk reactions. Employers need to be very careful not to instruct another contractor to undertake works that are already contracted to the existing contractor under a live building contract.¹

All of the formalities and notice requirements for terminating the building contract must first be met before instructing a third party to undertake such works – failure to do so will almost certainly put the employer on the wrong end of a repudiatory breach of contract argument from the existing contractor.

Mitigation of losses

Employers are under a duty to minimise their losses and avoid taking unreasonable steps that increase their losses. There is a good argument that early engagement of a third party to assess procurement options and assist in supply chain management for completing the project would fall under this heading. Such appointments do, however, need to be carefully worded.

Performance security

Performance security can soften the blow of what is often an expensive transition.

A 3 to 5% retention will usually be held by the employer and, increasingly, the JCT's fiduciary obligations in respect of retention are deleted, meaning this sits in the employer's back pocket.

Performance bonds should be checked carefully and typically provide security for up to 10% of the contract sum. The go-to bond in the UK market is the Association of British Insurers' form. This is a default bond giving the employer an entitlement to recover damages only once the contractor becomes liable under the building contract. In cases of contractor insolvency, the employer's losses are unlikely to be ascertained until the works are completed, meaning recovery can be delayed. As a result, we have seen an increase in clauses being inserted into the JCT whereby, on

1. *Sweatfield v Hathaway Roofing* (1997) CILL 1235
2. See for example JCT Design & Build Contract 2016 Clause 8.7.2.3
3. *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and others* [2020] EWHC 2537 (TCC)

termination for insolvency, the employer is able to forecast its likely losses and recover them immediately as a debt on the basis it will repay back to the contractor any overcharge once the project is completed. This provides a quick means for the employer to get its hands on money to complete the project.

Under the JCT, contractor insolvency is a termination right but not an automatic breach of contract. Bespoke amendments are, therefore, made to the ABI form of bond so that any debt or other sum payable under the building contract following insolvency is recoverable under the bond.

Parent Company Guarantees ("PCG") can provide added security against subsidiary companies. The drafting of the PCG needs to be checked carefully; the preference for an employer (but not the guarantor) is always for the PCG to be drafted as a primary obligation independent of the building contract. This allows the employer to claim directly against the guarantor without first having to pursue the contractor.

Supply chain engagement

In an insolvency scenario, often the supply chain will not have been paid by the contractor and will be owed money. Appointing the supply chain usually becomes more of a commercial horse trade to get the job done. That said, collateral warranties should be checked to ensure the extent of any "step-in" rights, allowing the employer to step in and pay any sums due to the sub-contractor and complete the project under the terms of the sub-contract. This has the potential to preserve existing warranties and guarantees; however, the danger is always that the employer is stepping into a contract riddled with claims.

Assignments

The standard provisions of the JCT allow for the employer to request the assignment of the benefit of any contract for the execution of work and/or goods and materials, so far as they are capable of being assignable.²

However, standard provisions of this nature have come under increased scrutiny following a decision where the Court³ held that the assignment of a sub-contract from the contractor to the employer on termination of the main building contract transferred the benefit of all accrued and

future rights, leaving the contractor with no contractual claim against the sub-contractor. Going forwards, contractors will be wary of such provisions and will, no doubt, look to expressly qualify the basis on which such assignments take place, i.e. only the future benefit of the sub-contract is to be assigned.

Appointing the incoming contractor

It can be tempting to want to appoint the incoming contractor on the same terms to finish off the same job. The big question is always what, if any, liability is the incoming contractor expected to take for the existing contractor's works? This discussion is often linked to the engagement of the existing supply chain and the extent to which the incoming contractor is getting their full warranty for works undertaken to date. As is always the case in construction, taking on additional risk comes at a premium.

It is always advisable for a full condition survey of the site to be undertaken at the time of termination. Not only can this assist the employer in its claims following insolvency, often the condition survey can be used as a contractual 'benchmark' with the incoming contractor. Where the incoming contractor is not willing to warrant all of the works (including latent defects) done before it, a common compromise is that it takes on liability for what was reasonably foreseeable to a competent contractor based on a site inspection and the condition surveys provided to it.

Alternative procurement options?

When a procurement route has not worked once, it is surprising how often a party will be willing to try it again. Design and build procurement by its nature seeks to allocate enhanced risk to the contractor and comes at a premium.

Depending on the nature and the status of the project, a construction management procurement route can be an effective option for completing the project. Here, the key sub-contract packages can be taken on as Trade Contracts directly by the employer that are then managed by the construction manager. This option can come with big cost and time savings when taking over a complicated and part-completed project, even though the employer takes on more risk directly and obtains less price certainty than through a design and build approach.

Expert Evidence: the English courts send a message to experts (and their instructing solicitors)

Expert evidence can be crucial to the success, or failure, of a construction dispute; for example, a case can turn on a judge's preference for one expert's delay analysis over the other. Consequently, as **Huw Wilkins** explains, it is important that experts, as well as instructing solicitors and clients, understand the rules regulating expert evidence in dispute resolution procedures.

The Rules and Guidance

Part 35 of the Civil Procedure Rules deals with experts. Part 35.3 provides that an expert's duty is to help the court on matters within his or her expertise. That duty overrides any obligation to the person from whom an expert has received instructions or by whom the expert is paid. Part 35 also includes (for example) rules about the contents of an expert's report. Practice Direction 35 provides further detailed rules as to the conduct of experts and those instructing them. At the forefront of those rules are that:

- experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate (Part 2.2);
- experts should consider all material facts, including those which might detract from their opinions (Part 2.3); and
- if, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court (Part 2.5).

Further guidance is set out in the Guidance for the Instruction of Experts in Civil Claims 2014 and the relevant Court Guides (e.g. Section 13 of the TCC Guide), as well as the Academy of Experts and Expert Witness Institute Joint Code of Practice and any code from a relevant professional body.

Experienced experts will be familiar with the rules and guidance, but should nevertheless refresh their memories regularly. Those undertaking the role of an expert for the first time should review all the relevant guidance so that they understand what is expected of them from the outset.

There are also cases in which the court has been asked to, or has otherwise felt it appropriate to, comment on the conduct of experts and those instructing them. We now turn to some of the more recent examples of these cases.

*Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*¹

Mr Justice Fraser dedicated a significant portion of his judgment in this case to his assessment of the parties' quantum experts, their role in the litigation process and their duties to the court. He said:

"The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts in stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Part 35, Practice Direction 35. Every expert should read it."

He then went on to identify certain practical matters for experts to bear in mind, including, for example, that experts of like discipline should have access to the same material, before concluding:

"There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence."

*Dana UK AXLE Ltd v Freudenberg FST GmbH*²

In this case, after the court had heard from the parties' witnesses of fact and the Claimant's technical experts, the Claimant applied to exclude the Defendant's technical expert evidence. This was the culmination of what appears to have been a longstanding and complex exchange regarding that technical expert evidence.

The Defendant served evidence from three technical experts eight days' late. Whilst the Claimant did not take issue with the late service, it did object to defects in that expert evidence, including:

- None of the expert reports identified the documents on which the experts relied or included a list of documents provided to each expert.
- Two of the experts had undertaken site visits, without giving the Claimant notice of those visits, or affording the Claimant's technical experts a similar opportunity. Furthermore, no photographs, notes or other documents were provided with their reports evidencing the information collected.
- When referring to data or other information, the reports did not always provide references to the document or source of data relied upon, thereby causing prejudice to the

1. *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC)

2. *Dana UK Axle Ltd v Freudenberg FST GMBH* [2021] EWHC 1412 (TCC)

3. *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* [2021] EWHC 1116 (TCC)

4. *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* (No. 2 Costs) [2021] EWHC 1414 (TCC)

Claimant's legal team in trying to read and understand those reports.

By a Pre-Trial Review Order, the Court ordered that the Defendant could rely on its technical expert evidence so long as it complied with certain conditions (including, providing full details of all materials provided to the experts). Although the Defendant served revised reports from two of its three technical experts, the Claimant considered they did not comply with the Pre-Trial Review Order. Of particular concern to the Claimant was the apparent contact and exchanges of information directly between the technical experts and client without any oversight from the legal team. Ultimately, the Claimant made an application to exclude the Defendant's technical expert evidence in full. Mrs Justice Smith held that:

- There had been a serious breach of the requirement to provide full details of all the materials provided to the experts. The Defendant had never identified all of the materials provided to the experts and had provided a significant, amount of information to its experts that had never been disclosed to the Claimant's experts. This was not just a "technical or unimportant breach". It was essential for the Court to understand what information had been provided to each side's experts to check whether their opinions were based on the same information.
- The Defendant's experts had access to the Defendant's various sites which had not been shared with the Claimant's experts. In the Judge's view, it was difficult to come to any conclusion other than that the guidance in the TCC Guide as to the need for experts to "co-operate fully" with one another, including, in particular "where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed", had been ignored.

As a result of the Defendant's breaches of the Pre-Trial Review Order, the Judge held that the Defendant could not rely on those reports - the expert evidence was excluded in full. Whilst this decision turned on breaches of a Court Order, Mrs Justice Smith also commented on these breaches in the context of CPR 35 and the 2014 Guidance and concluded that in that context too they would justify the refusal of permission by the Court to the Defendant to rely on its technical expert reports. She noted that the provision of expert evidence is a matter of permission from the Court, not an absolute right

(see CPR 35.4(1)) and such permission presupposes compliance in all material respects with the rules. The purpose of those rules is to establish a level playing field, without which the fair administration of justice is put at risk. In order to ensure that level playing field, careful oversight and control is required from the lawyers instructing those experts - especially in cases involving experts from other jurisdictions who may not be familiar with the rules that apply in the courts of England and Wales.

Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd³

The Claimants, having sought £3.7million in damages (and having turned down two Part 36 offers for £50,000 and £110,000), were awarded just £2,000 and were subject to a number of criticisms in the judgment, including about one of their experts. The court noted that the parties' structural engineering experts were "similarly and highly qualified" but it preferred the evidence of the Defendant's structural engineer because the Claimants' expert (amongst other things):

- persistently embellished (and exaggerated) his criticisms of the Defendant;
- constantly introduced new concepts or issues during his oral evidence which were not identified in his report;
- relied on material that had no relevance to the issues under consideration;
- went beyond his own expertise; and
- changed his agreement with, and reliance upon, the work of his associate whose report and work formed an appendix to his written report, about which the judge said "This suggests to me that because the eccentric loading point did not assist the claimants' case, he disavowed it".

By contrast, the Defendant's structural engineering expert: "sensibly agreed with points put to him, whether they advanced [the Defendant's] case or not. He had, in any event, already agreed in the Joint Statement that, in certain respects, [the Defendant] had been negligent. He approached his expert exercise applying, and his cross-examination demonstrated, a completely objective approach to the expert issues."

In summary: the Defendant's expert gave the impression that his evidence would have been exactly the same had he been instructed by the Claimants, whilst the Claimants' expert sought to advance the Claimants' case at the expense of his own objectivity.

The case returned to the TCC for a decision on costs.⁴ Under the conventional operation of the rules on Part 36 offers, the Defendant would have been entitled to its costs from the last date for acceptance of its first Part 36 offer. But, instead, the Defendant sought all of its costs. Several reasons were given for this, including the criticisms of the Claimants' expert.

Insofar as the expert's conduct was concerned, Mr Justice Fraser noted that, although the Claimants' expert's approach left much to be desired, it did not, by itself, justify an award of indemnity costs. But he did sound a note of caution about experts' compliance with their duties generally, saying there is a "worrying trend" developing of failures by experts generally in litigation to comply with their duties. He then emphasised that CPR 35.3 makes clear that an expert's duty is to the court and that this overrides any duty to his or her client.

As a result of the Defendant's breaches of the Pre-Trial Review Order, the judge held that the Defendant could not rely on those reports - the expert evidence was excluded in full.

Conclusion

The role and duties of experts in litigation in the Courts of England and Wales are clearly set out in the Civil Procedure Rules and accompanying Practice Direction. Other guidance is also available from the Courts and professional bodies. Over more recent years, there has been increasing scrutiny of compliance with those rules. The cases above illustrate that it is crucial that all parties to litigation (including clients and instructing lawyers) understand those duties and comply with them. The consequences of breaching these rules can be significant.

Dana UK AXLE Ltd v Freudenberg FST GmbH involved parties and experts from multiple jurisdictions - a scenario common to international arbitration disputes. In all disputes, no matter what forum, it is important from the outset for parties to understand the applicable rules to an expert's involvement and to establish procedures to ensure compliance with those rules. These procedures must then be complied with throughout. Failure to do so might have consequences as to the credibility, or (in extreme circumstances) even the admissibility, of that expert evidence.

The 'price' of expert shopping

In the recent decision of *Matthew Rogerson (t/a Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Limited*¹, Mr Alexander Nissen QC (sitting as a Judge of the High Court) provides yet more reasons to be cautious when it comes to dealing with expert evidence. **Katherine Butler** discusses the Court's reasoning when it comes to the 'price' to be paid by any party seeking to 'expert shop' and, through which, how such practices are to be discouraged.²

The Facts

In June 2018, there was a catastrophic fire at the Cottesmore Hotel, Golf and Country Club (the Claimant), causing millions of pounds worth of damage and business interruption losses. At the time of the fire, Eco Top Heat (the Defendant), a contractor, was carrying out works to install windows in a first floor area, directly above a ground floor tunnel where the fire originated. The Claimant alleged that the fire was started by a) an employee of the Defendant discarding a cigarette or b) a loose spark from an angle grinder being used as part of the works. The Defendant denied these allegations and instead claimed that the fire was started by one of the Claimant's own employees discarding an unextinguished cigarette.

Shortly after the fire, solicitors for the Defendant confirmed to their counterparts that the "instructed expert for the fire investigation is Mr Nagalingam". Mr Anil Nagalingam proceeded to visit the site on at least two occasions, one of which was in the company of the experts similarly instructed for the Claimant and his insurer. Further to these visits, Mr Nagalingam attended conferences with his instructing solicitors as well as engaging in correspondence with the other experts through to October 2020.

The Claimant sent its Pre-Action Protocol for Construction and Engineering Disputes (the "Protocol") Letter of Claim on 4 February 2020. In its Letter of Response, the Defendant made no reference to any expert being instructed on its behalf. Following the issue of proceedings in August 2020, various pleadings had been exchanged and the parties were preparing for the Costs and Case Management Conference ("CCMC") in March 2021. As part of these preparations, the Defendants presented draft directions which included seeking the Court's permission to call on the expert testimony of Ms Emma Wilson, and not Mr Nagalingam.

Given this about turn in respect of the Defendant's forensic fire expert, the Claimant applied to the Court, not in order to challenge the substitution of Mr Nagalingam for Ms Wilson, but to seek conditions for the substitution. Such conditions being the disclosure of reports and/or other records detailing Mr Nagalingam's opinions as to the cause of the fire.

In resisting this application, the Defendant argued that such conditions were not warranted as this was not a case of expert shopping. Rather, Ms Wilson had

been instructed because of her greater experience in respect of cigarette ignited fires. The Defendant further asserted that there was a material difference in the advice procured from an expert in the pre-Protocol period and that it would be unfair to reach so far back in time. It was also argued that the only document in which Mr Nagalingam asserted any opinion (having not, in fact, produced any reports, draft or otherwise) was the solicitor's attendance note of a conference in October 2020. The Defendant asserted that it would be a step too far to order the waiver of privilege over such a document, not least because such a note (necessarily authored by another) may not be representative of the expert's actual views.

The Claimant countered these arguments by stressing what it considered to be clear evidence of expert shopping and pointing to a consistent lack of openness regarding the terms on which Mr Nagalingam was appointed and in what role. The Claimant specifically raised the fact of the interactions between Mr Nagalingam and his counterparts to rebut the assertion that he was involved in an advisory rather than expert witness capacity.

The Law

In *Beck v Ministry of Defence*³, the Court of Appeal was clear that expert shopping was "undesirable" and to be discouraged. Shortly thereafter, the Court of Appeal considered the form that such discouragement should take in *Hajigeorgiou v Vasiliou*.⁴ Here, their Lordships considered the competing arguments between protecting legal privilege as against the benefit to the Court (and potentially the other party's case) of the reports of any substituted expert being disclosed. The Court ultimately considered that its case management powers could extend to ordering the disclosure of previous advice and/or reports as a condition of the leave required to substitute an expert. Such an order, as Dyson LJ stated (in obiter comments), would not undermine the overall principle of privilege, but would require such privilege to be waived in the event that the party in question wished to present the evidence of an alternative expert. Ultimately, the decision rests with the party seeking the substitution.

The 2011 decision of *Edwards-Tubb v JD Wetherspoon Plc*⁵, again from the Court of Appeal, was the judgment which began to describe such a condition as the 'price' to be paid for the option to switch experts. Hughes LJ's judgment also clearly directs that whether a substituted

1. [2021] EWHC 1807 (TCC)
2. Following the decision in *Beck v Ministry of Defence* [2003] EWCA Civ 1043
3. *Ibid*
4. [2005] EWCA Civ 236
5. [2011] EWCA Civ 136
6. [2013] EWHC 3183 (TCC)
7. This reasoning was following in the case of *Vilca v Xstrata* [2017] EWHC 1582 (QB) concerning an expert stepping down due to ill health
8. *Ibid*, at paragraph 38
9. *Allen Tod Architecture Ltd v Capita Property and Infrastructure Ltd* [2016] EWHC 2171 (TCC)
10. *Coyne v Morgan* [2016] BLR 491
11. [2017] EWCA Civ 1016, at paragraph 15
12. At paragraph 47
13. [2015] EWHC 3074 (TCC)
14. [2015] EWHC 3455 (TCC)
15. [2021] EWHC 1413 (TCC)

expert's report is prepared pre or post issue of proceedings was of little or no importance when it came to questions of whether it should be disclosed. In doing so, his Lordship emphasised that an expert's overriding duty is to the Court and there is, therefore, a high bar to deny access to his or her opinions by reason only of who instructed them.

Whilst, at this point, the rule appears crystal clear, there must always be room for an exception, such as was seen in the case of *BMG (Mansfield) Ltd v Galliford Try Construction Ltd*⁶. In this case, the reason for the substitution was that the expert wished to retire. In such circumstances, and where evidence can be presented to refute any allegation of expert shopping, no such waiver of privilege and/or disclosure will necessarily be ordered.⁷ Mr Justice Edwards-Stuart put it succinctly where he held:

"I appreciate that the policy of imposing a condition requiring disclosure of a previous expert's reports is to deter the practice of 'expert shopping', but it seems to me that there has to have been 'expert shopping' or at least a very strong appearance of it, before disclosure of the type sought on this application should be ordered".⁸

There followed further cases of the lower courts which clarified the principles to be applied in the setting of conditions for substituting an expert. Specifically, that the power extends to requiring the waiving of privilege over previous draft reports, notes or other documents where the first expert expresses his or her opinion on the matter.⁹ Further, that this power is to be exercised reasonably on a case-by-case basis, having regard to all the circumstances.¹⁰ This reasoning was followed and built upon in the judgment of Gross LJ in *Murray v Devenish*, where his Lordship laid down two key principles:¹¹

"(1) ordinarily a party will not be deprived of his or her expert of choice and will not be forced to rely on an expert in whom that party has lost confidence; but (2) 'expert shopping' is to be and will be discouraged. In applying those principles the court will plainly have regard to the state of the litigation at the time, the consequences of permitting a change of expert and the conduct of the party concerned in the litigation to date. At some point a party having nailed its colours to one expert must find that it is simply too late to be permitted to change tack."

The Decision

Taking the factual circumstances together, Judge Nissen discerned that Mr Nagalingam had been instructed to inspect, evaluate and provide a report concerning the cause of the fire at the Cottesmore Hotel. Further, such an appointment should be made within the remit of CPR 35 for no lesser reason than a party would wish to rely on the evidence of an expert with first hand, detailed knowledge of the site and the issues. Judge Nissen went on to detail the matters which led him to doubt the Defendant's stance that it was not, in fact, expert shopping. Specifically, there being little, if any, difference in the qualifications of the two experts, the overall lack of openness concerning Mr Nagalingam's appointment, and the fact that his services were dispensed with following a meeting where views as to causation were expressed.

Judge Nissen also detailed a useful sliding scale to be considered more generally in terms of the extent of the conditions that would be appropriate in given circumstances:

"... there would seem to be a sliding scale where, at one end, might sit a flagrant case of expert shopping simply because a party does not like the damaging views expressed by his current expert, and at the other end might be the unexpected need to replace the expert for objectively justifiable reasons such as illness or retirement of the expert in question. The closer the circumstances are to the former, the more likely it is that a Court will impose conditions commanding a high price e.g., in respect of the waiver of any privilege and the scale of material to be disclosed. The closer they are to the latter, the less onerous such conditions, if any, as may be imposed will be. A faint appearance of expert shopping would not justify the disclosure of solicitor's attendance notes of telephone calls with the expert, not least because of the risk that they do not properly record the expert's actual words."¹²

In making his order, Judge Nissen clearly considered that the circumstances here went well beyond a "faint appearance of expert shopping" but rather one where "the inference [of expert shopping] can clearly be drawn". Accordingly, it was ordered that:

a) The Defendant was permitted to rely on the expert evidence of Ms Wilson in substitution for that of Mr Nagalingam; and

b) As a condition of such, privilege is to be waived in respect of the solicitor's attendance note of the October conference.

Commentary

Matters concerning expert evidence, both in terms of expert conduct and the nature of the evidence itself, have been fertile ground for the TCC in recent years. Judge Nissen's decision and the above authorities, together with other cases discussed in Huw Wilkins' companion article in the 2021 Review, *'Expert Evidence: English courts send a message to experts (and their instructing solicitors)*, show that the Courts are becoming much more interventionist when it comes to expert testimony.

The direction of travel in the case law indicates that judicial patience with experts (and associated legal teams) is wearing decidedly thin. As was seen in the scathing rebuke offered by Coulson J (as he then was) of the expert quantum evidence offered in *Van Oord v Allseas*,¹³ the significant control over the scope of expert testimony exerted by Judge Nissen in *Wattret v Thomas Sands Consulting Ltd*¹⁴ and the complete exclusion of expert evidence, mid-way through a trial, for breaches of the Pre-Trial Order in *Dana UK Axle Ltd v Freudenberg FST GmbH*.¹⁵

The stance taken by the Courts in this area is not surprising. The quality and credibility of expert evidence, particularly in the highly technical field of construction, can decide entire disputes. It is, therefore, vital that rules and conditions are enforced in order to maximise the assistance offered to the Court whilst maintaining a level playing field between the parties. Experts and lawyers alike need to work well within these rules to avoid the sanctions and conditions which the Courts are more than ready to impose. Stepping outside the rules can have serious repercussions for a client's case and can be no less devastating to an expert's reputation.

We have (repeatedly) been warned...

Investment treaty arbitration: another avenue for international construction disputes

Most contractors will, of course, be familiar with international commercial arbitration as a means of resolving their disputes, but where an employer is a national government or government entity, consideration should also be given to the possibility of bringing claims under an international investment treaty. Investment treaty arbitration is arbitration between a company or an individual investor against a state for breach of that state's obligations under international law to protect the investor's investment. **Sana Mahmud** explains further.

Introduction

Whilst international commercial arbitration is usually prescribed by contract, an investment treaty claim is based on rights arising from bilateral or multilateral investment treaties ("BITs" or "MITs"). These are treaties between two or more states for the promotion and protection of investments of foreign nationals.

Investment treaty arbitration is generally underused in international construction disputes, sometimes because contractors are unaware that the basis of their contractual claims may also constitute breaches of treaty protections for which a host state could be liable. A BIT is a treaty between two states under which each state agrees to afford rights and protections to investors from the other. There are 2,290 BITs currently in force globally.¹ An MIT is a similar treaty but between more than two states. These apply regardless of whether there is a contractual relationship between the state and investor.

Broadly, the following types of treaty claim might arise in the context of an international project:

- Claims under a relevant construction contract with the state where the state has failed to carry out its contractual obligations;
- Claims against a state for the conduct of its public authorities if the actions of those authorities have adversely affected works under a relevant contract;
- Claims against the state for legislative changes, including changes to taxation or other industry regulations, which make the performance of a contract significantly more onerous;
- Claims for the expropriation of companies or assets; and
- Denial of justice claims where the courts in the host state have, without legitimate reason, refused to enforce a valid commercial arbitration award.

Most claims concerning construction contracts often fall into the first category and that is the focus of this article. In that context, the first step when considering an investment treaty claim is to establish whether events that have occurred under the framework of a commercial contract can form the basis of claims under an applicable treaty.

Considering an investment treaty claim

In order to commence an arbitration under a relevant investment treaty, contractors must ensure that the following conditions are met:

- A BIT or other investment treaty must be in force between the employer's state and the state in which the contractor is incorporated;
- The contractor must qualify as an investor under the terms of the relevant treaty;
- The works contract must qualify as an investment under the terms of the relevant treaty;
- The employer must be a state or an organ of state;
- The employer, as either a state or an organ of state, must have breached the obligations contained in the relevant treaty; and
- Those breaches resulted in damage and/or loss to the contractor as an investor.

Is there a relevant investment treaty in force?

The United Nations Conference on Trade and Development (or UNCTAD) retains a database of investment treaties currently in force globally.² The database is free and can be searched by country.

With respect to EU member states, however, it should be noted that, in 2018, the European Court of Justice decided that investment treaty arbitration between a member state and an investor from another member state was not compatible with EU law.³ Based on the ECJ's decision, the majority of EU countries entered into an agreement, effective from 20 August 2020, that terminated "intra-EU BITs". This means that construction projects in the EU carried out by companies incorporated in other member states may no longer benefit from the protections afforded by "intra-EU BITs".

Is a contractor an investor?

Only an investor, as defined in a treaty, can bring an arbitration claim pursuant to that treaty. Depending on the treaty's

1. <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy>
2. <https://investmentpolicy.unctad.org/>
3. *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*): <https://www.italaw.com/cases/417>
4. *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey*
5. *Jan de Nul NV v Egypt*
6. *Biwater Gauff (Tanzania) v Tanzania, Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Kingdom of Spain, Tecnicas Medioambientales Tecmed SA v United Mexican States, David Minnotte and Robert Lewis v Republic of Poland, and Dan Cake v Hungary*.
7. See *SGS v Pakistan*, *SGS v Philippines*, *Bayindir v Pakistan*, *Helnan International Hotels A/S v Egypt*, *Duke Energy Electroquil Partners & Electroquil SA v Ecuador*, *Hamester v Ghana*
8. <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/>
9. <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20282020-1%20Edition%29%20ENG.pdf>
10. <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf>

definition of an investment, construction companies that carry out works under an infrastructure contract with a foreign state or public authority may qualify as investors.

Investment treaties define investors as nationals of a state other than the state where the investment occurs. Typically, this includes corporate entities such as companies incorporated in the investor's home state. As is often the case on large infrastructure projects, international companies sometimes register local subsidiaries to carry out the contract works in another country, and depending on the wording of the treaty, it may be possible for a foreign parent to claim on behalf of a local subsidiary.⁴

The dispute resolution clauses in investment treaties normally contain provisions under which the host state grants the investor the right to choose to settle disputes relating to its investment through national courts or arbitration. In most cases, arbitration is provided pursuant to the ICSID or UNCITRAL Rules. Where the treaty provides for arbitration under the ICSID rules, jurisdiction is also limited to investors as defined in the ICSID Convention. Where the treaty definition of an investor differs from the ICSID Convention definition, both must be satisfied if the arbitration is to be under the ICSID Rules.

Is the construction contract an investment?

To commence an investment treaty arbitration, the claim against the state must relate to an investment as defined in the relevant treaty. These definitions are normally widely drafted and include things like tangible and intangible property, shares, bonds, licenses, IP and concessions that might be required to construct and operate an infrastructure project.

Whether a project can be defined as an investment is a question of fact and can vary depending on the precise nature of the works and activities. The leading method used by ICSID tribunals is the *Salini* test, which considers whether the investment:

- Involves a contribution of money or other assets of economic value;
- Is for a certain duration;
- Includes an element of risk; and
- Provides a contribution to the host state's development.

The *Salini* test has often been applied loosely, as indicative of the characteristics an investment might have, and caution is advised when applying this definition outside the ICSID framework. However, it now appears to be settled that, if a project involves the contribution by a contractor of large sums, know-how and personnel over a significant period, then it will likely qualify as an investment for the purposes of a treaty claim.

Is the employer a state or an organ of state?

The answer to this question is relatively straightforward when the employer is a national government. It is sometimes less clear cut where it is a distinct publicly owned corporate entity. A host state will, however, be liable for the actions of an entity where those actions have been taken under the effective control of the state, or where the state has had significant involvement in the commission of the act.⁵ Whether a national authority can be defined as an organ of state will depend on the nature of its control, which will need to be assessed on a case by case basis.

Has the employer, as host state, breached the obligations set out in an applicable treaty, and have those breaches caused damage?

Treaties include an undertaking by a state towards another that the investments of its nationals on the other's territory will enjoy certain rights. Common protections afforded to investors under BITs and MITs include:

- Protection against unlawful expropriation or nationalisation, unless the state can show that it was for a public purpose and on payment of reasonable compensation.
- Fair and equitable treatment ("FET"). There is no standard definition of this term and it is often regarded as a broad "catch-all" heading for claims in investment treaty arbitration. Generally, it requires a state to maintain predictable investment environments consistent with reasonable investor expectations. The basic aim of the FET standard is to ensure that host states do not hamper or interfere with the lawful conduct of business by foreign investors. Depending on the facts of a case, the standard could apply to claims relating to denial of justice, procedural fairness, due process and

transparency, freedom from coercion and harassment, and good faith and protection of investors' legitimate expectations.⁶

- Full protection and security. This obligation concerns the physical protection and provision of security for investments by the host state. The host state is obliged to prevent harm to investments either as a direct action of its state officials or indirectly by the actions of others.
- National treatment. This standard obliges a state to treat foreign investors no worse than local investors. It should be noted that it may be unhelpful in circumstances where local investors are not guaranteed any protection.
- Most-favoured nation treatment ("MFN"). This provision requires the state party to one investment treaty to provide investors with treatment no less favourable than the treatment it provides to investors under other investment treaties.
- Umbrella clauses. These clauses broadly provide that a state must comply with its obligations to foreign investors. Investors have often relied on umbrella clauses to enable them to elevate a claim under an investment contract to the level of a claim under a BIT on the basis that obligations in this context includes those under the investment. Whether an umbrella clause elevates domestic law obligations in this way, and, if so, which ones, depends on the interpretation of the particular wording of the clause.

There is a legal distinction between claims made under a commercial contract to which domestic law applies and claims under a BIT or MIT to which international public law applies. To bring a claim, contractors must, therefore, either be able to show that:

- The actions of the state that led to breaches of the parties' commercial contract also amount to breaches of the above treaty obligations; or
- An umbrella clause exists in the applicable treaty or can be imported via an MFN clause that can be used to elevate contractual claims to treaty claims.

If there is no viable umbrella clause, contractors will have to go through a process of reformulating their contractual claims as relevant breaches of treaty obligations. Failure to do so properly may mean that tribunal lacks jurisdiction. Whilst there is no express bar on a contractor pursuing both contractual and treaty arbitration concurrently, there are inconsistencies in the approach investor-state tribunals have taken in circumstances where there is a prospect of parallel proceedings.⁷

If a project involves the contribution by a contractor of large sums, know-how and personnel over a significant period, then it will likely qualify as an investment for the purposes of a treaty claim.

This is a complex area of law and the process of reformulating contractual claims into treaty claims is not straightforward where a claimant's claims can also be determined in accordance with a contractual dispute resolution procedure. Whilst there is no doctrine of precedent under the investor-state regime, inconsistent judgments in such cases mean that careful consideration needs to be given to the way in which contractors' claims are presented in an investment treaty dispute and whether those claims would withstand a jurisdictional objection by the state.

If, however, a contractor has been through a commercial arbitration process and is unable to enforce the resulting award because the courts of a host state refuse to do so, it may be able to bring a denial of justice claim under the FET provisions of a relevant treaty without the need to reopen those claims.

What are the advantages of investment treaty arbitration over commercial arbitration?

The ICSID Convention has a self-contained regime for enforcement of awards. Where the host state is a Contracting State, an award is easily enforceable in many other jurisdictions using the mechanism found at Article 51(1) of the Convention, which requires any Contracting State to enforce the award on presentation of a certified copy by the Secretary General of ICSID. A commercial arbitration award has to be enforced under the New York Convention by a state in which the employer's assets

are found. The ICSID regime is an arguably easier process.

Where the party to an infrastructure contract is a separate corporate entity controlled by the state, issues may arise if that entity is constrained in its ability to reach a commercial settlement or pay sums pursuant to a commercial arbitration award because it lacks authority or direct funds. A claim under an investment treaty offers a contractor a direct avenue to the state, bypassing the separate contracting entity.

Finally, the commencement of an investment treaty arbitration is a matter of public record. The threat or commencement of an investment treaty claim may, therefore, also assist a contractor in exerting political (as opposed to simply commercial) pressure towards a reasonable settlement.

Conclusion

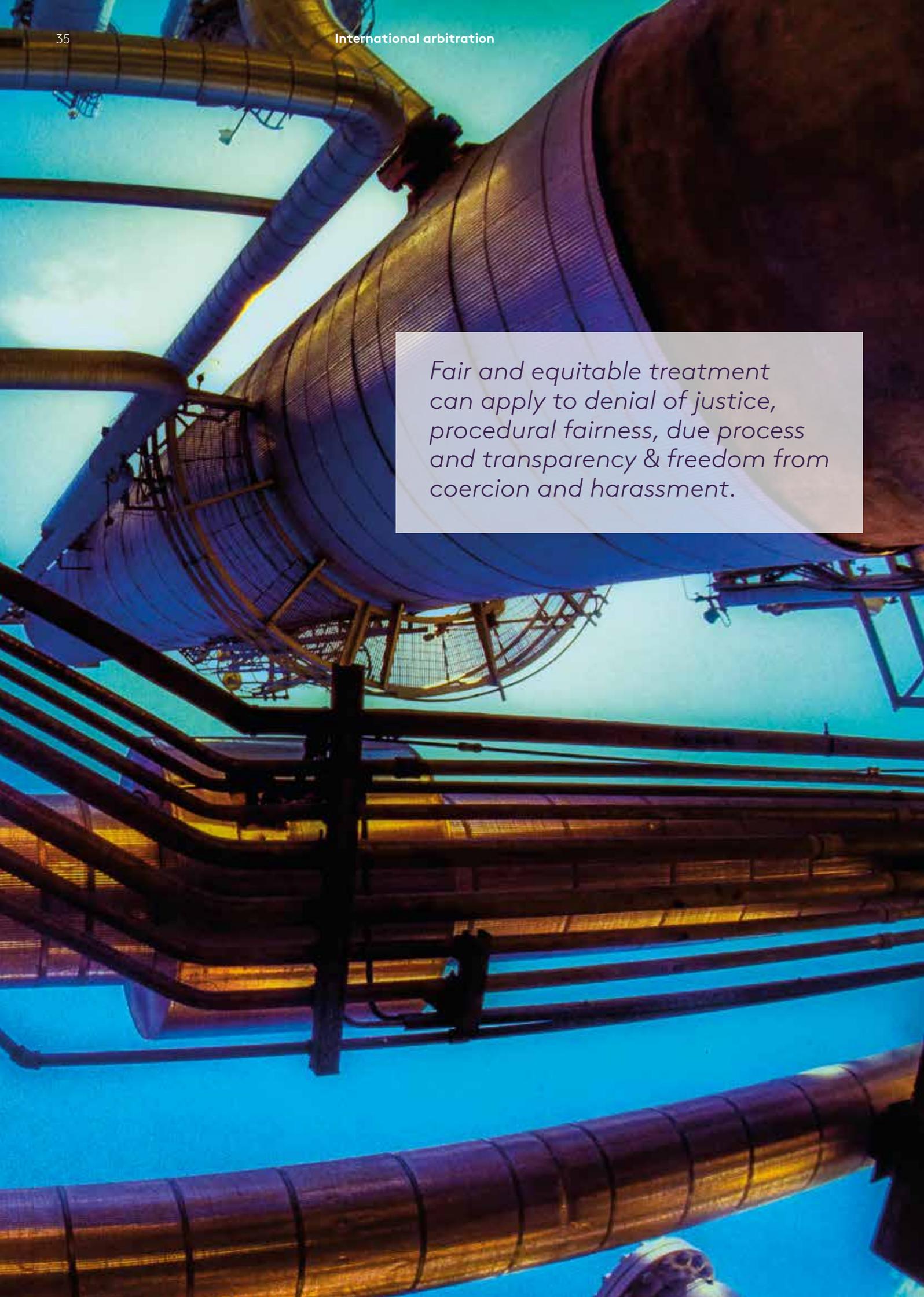
Investment treaty arbitration in the construction sector is used less frequently compared to the prevalence of commercial arbitration as a method of resolving international disputes. There have been good reasons for this, some of which are touched on above, such as the potential for jurisdictional issues arising where a contract exists between the parties.

Another criticism has been that investor-state disputes tend to run for longer, which makes them a costly alternative (or addition) to a contractual commercial arbitration route. The average duration of ICSID arbitrations (including Additional Facility proceedings) was 3.6 years according to ICSID data previously analysed by the Global Arbitration Review. The average duration of an ICC arbitration in 2020 was 26 months.⁸ It is arguable that treaty arbitration has not yet been able to adopt timely and cost-effective procedures in the same way that international commercial arbitration has done, and it will be interesting to see whether it follows suit.

Annual ICSID statistics show a rise in construction related treaty claims. For example, in 2020, of all new cases registered with ICSID, 15% related to the construction sector.⁹ So far, in 2021, that figure is 17%.¹⁰ When the oil, gas and mining, and power and energy sectors are included, this makes up the majority of treaty claims registered with ICSID in 2019 and 2020.

It would be useful to perhaps think about how treaty protections can be maximised at the outset of a project by considering the corporate structure of the entity that carries out the works. This way, the contractor's position is protected should the need for a treaty claim arise in the future. The COVID-19 pandemic is a good example of an unexpected event that could give rise to treaty claims where changes in national legislation have resulted in losses to contractors.

This is certainly a growth area for international construction disputes, and contractors should carefully consider whether a treaty claim might be a useful tool in seeking the resolution of disputes on international projects alongside the usual commercial arbitration route.



Fair and equitable treatment can apply to denial of justice, procedural fairness, due process and transparency & freedom from coercion and harassment.

DIFC-LCIA Arbitration Centre subsumed into DIAC

In an article in September 2021 from our blog, *Collective Thoughts*, **Grace Lee-Tuck**, provided an update on reforms to streamline arbitration in Dubai.

In a move to strengthen Dubai's position as a global centre for alternative dispute resolution, on 14 September 2021, the Ruler of Dubai issued Decree No. 34 of 2021 to abolish the DIFC-LCIA Arbitration Centre and Emirates Maritime Arbitration Centre, and to transfer all property, employees and cases from these centres to the Dubai International Arbitration Centre ("DIAC").

To ensure a smooth transition for disputes from the abolished arbitration centres over to DIAC, the Decree has provided the following directions:

Arbitration agreements that refer disputes to the abolished arbitration centres will remain valid and effective and are eligible to be considered and determined by DIAC, unless otherwise agreed by the parties.

Arbitral tribunals and committees formed under the abolished arbitration centres will be able to continue to consider and determine the disputes pending before them. However, this will be under the supervision of DIAC, unless otherwise agreed by the parties.

Dubai Courts and the DIFC Courts will continue to consider cases, requests and challenges relating to any arbitration award or procedure issued by an arbitral tribunal within the abolished arbitration centres or DIAC.

Under the Decree, parties to a DIAC arbitration may choose whether they want the arbitration to be seated "onshore" in the Emirate of Dubai, or "offshore" in the Dubai International Financial Centre ("DIFC") free zone. If an arbitral seat is not explicitly chosen by the parties, then the default seat will be DIFC. To accommodate for this option, DIAC has been permitted by Article 2 of the Decree to open a branch in the DIFC free zone in addition to its existing premises in mainland Dubai.

A Court of Arbitration will also be established within DIAC, which will determine the application of the Decree and the arbitration rules and procedures, supervise DIAC arbitrations, including the appointment of arbitral tribunals and fixing of arbitration costs and expenses, and propose policies for the management of DIAC, DIAC arbitrations, and other training and education to be provided by DIAC within Dubai. The Court of Arbitration forms part of a wider restructuring of DIAC, which also includes a new board, a new administering body, and new rules to be published within six months.

The decision to restructure and reform DIAC is well aligned with the recent recognition of Dubai as one of the top ten arbitration destinations globally, and is intended to offer a wider suite of arbitration specialists with a centralised structure

DIAC was established in 2004 and is a popular choice for UAE based parties, particularly parties from Dubai. DIAC cases are overseen by the Dubai Courts, which are Arabic speaking and operate under UAE Law.

By contrast, the DIFC-LCIA Arbitration Centre was intended to attract international parties due to the use of the DIFC free zone, which is a common law jurisdiction. This enables cases to be overseen by English-speaking common law courts, and by arbitration law based on the UNCITRAL Model Law.

The decision to restructure and reform DIAC is well aligned with the recent recognition of Dubai as one of the top ten arbitration destinations globally, and is intended to offer a wider suite of arbitration specialists with a centralised structure.

Bias and conflicts of interest in international arbitration

During the last 12 months, there have been two significant cases in the English courts which considered the issues of bias and conflicts of interest in international arbitration. **James Mullen** explains further.

In November 2020, the Supreme Court handed down its much-anticipated judgment in *Halliburton Company v Chubb Bermuda Insurance Ltd*¹ which considered whether there was unconscious bias on the part of an arbitrator that had been appointed on the tribunal of three separate arbitrations, but which had clear overlap in terms of parties and subject matter. The *Halliburton* case on the law of arbitrator bias was of such interest to the arbitration community that several arbitral institutions including the ICC, LCIA, Clarb, LMMA and GAFTA were permitted to make submissions as intervening parties.

Then, in January 2021, the Court of Appeal gave judgment in *Secretariat Consulting Pte Ltd & ors v A Company*² which considered whether a conflict of interest arose where one company within a group providing expert witness services was engaged to act for a party in one arbitration, and another company within the same group which had been appointed to act against the same party in a separate arbitration concerning the same project.

Unconscious Bias

Halliburton Company v Chubb Bermuda Insurance Ltd

The disputes arose from the explosion and fire on the Deepwater Horizon drilling rig in 2010 in the Gulf of Mexico. Chubb refused to cover Halliburton under an insurance policy and so Halliburton commenced arbitration proceedings against Chubb. Mr Kenneth Rokison QC ("the Arbitrator") was appointed as chairman for the tribunal. He was then appointed on two further arbitrations:

- (i) An arbitration between the rig's owner, Transocean, and Chubb.
- (ii) An arbitration between Transocean and another insurer.

The Arbitrator failed to disclose his appointment on these two further arbitrations to Halliburton. When they found out, Halliburton applied to the court under section 24 of the Arbitration Act 1996³. It is important to point out that the issue related to unconscious bias and/or the appearance of bias, not actual bias by the Arbitrator. The High Court and Court of Appeal dismissed Halliburton's application and Halliburton appealed to the Supreme Court.

The issues to be determined

The Supreme Court identified the two principal issues that needed to be determined:

- (i) Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.
- (ii) Whether and to what extent the arbitrator may do so without disclosure.

As to the first principal issue, the Supreme Court held that where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, *this may*, depending on the relevant custom and practice, give rise to an *appearance* of bias.

As to the second principal issue, the Supreme Court held that, unless the parties to the arbitration otherwise agree, arbitrators have a *legal duty* to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias. The fact that an arbitrator has accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed, depending upon the customs and practice in the relevant field. In cases in which disclosure is called for, the acceptance of those appointments and the failure by the arbitrator to disclose the appointments taken in combination might well give rise to the appearance of bias.

The Supreme Court's guidance on bias

In its decision, the Supreme Court gave guidance on five issues regarding bias:

- (i) The test for apparent bias was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.
- (ii) That disclosure of particular matters was a *legal obligation*, not just good practice.

1. [2020] UKSC 48

2. [2021] EWCA Civ 6

3. S.24 allows parties to apply to the court for the removal of an arbitrator on certain grounds, including the existence of circumstances which give rise to justifiable doubts as to the arbitrator's impartiality.

4. For example, article 11(2) of the ICC rules which says that before appointment the prospective arbitrator shall disclose in writing to the ICC Secretariat any facts or circumstances which might call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

- (iii) Where information that needs to be disclosed is subject to the arbitrator's duty of privacy and confidentiality, disclosure can only be made with the consent of the parties to whom the duty of privacy was owed. The consent may be express or inferred from the arbitration agreement.⁴ If the arbitrator seeking appointment in a later arbitration does not obtain the consent, they must decline the second appointment.
- (i) A failure to disclose matters is a factor for a fair-minded and informed observer to take into account when there was a real possibility of bias.
- (ii) Whether there has been a failure in a duty to disclose is to be assessed by the fair-minded and informed observer having regard to the facts and circumstances *at the time the duty to disclose arose*. As to the possibility of bias, the relevant time to assess was *the time of the hearing to remove the arbitrator*, not the time of the arbitrator's acceptance of the appointment.

Applying the principles - was there bias on the part of the Arbitrator?

Applying its guidance, the Supreme Court decided at the time of the hearing in the High Court to remove the Arbitrator, and taking into account the facts and circumstances known at the date of the hearing, it could not be said that a fair-minded and informed observer would infer from the Arbitrator's failure to disclose that there was a real possibility of bias. However, the Arbitrator had breached his legal duty to disclose.

A useful test of 'independent' is that the expert would express the same opinion if given the same instructions by another party. Civil Justice Council, 2014 Guidance for the Instruction of Experts to give Evidence in Civil Proceedings.

Conflicts of interest in international arbitration

Fiduciary relationships

A fiduciary relationship arises where one party (X) has undertaken to act for or on behalf of another (Y) in a particular matter in circumstances which give rise to a relationship of trust and confidence. One of the key duties of a fiduciary is loyalty. The other key duties are no conflict, no profit (X must not profit from its position at the expense of Y) and confidentiality.

There are several settled categories of fiduciary relationship; for example, trustees and beneficiaries, agents and principals, and solicitors and clients. Importantly, there is no legal authority in England and Wales saying that an expert witness in legal proceedings has a fiduciary relationship with its client. Indeed, one of the underlying principles of expert evidence in legal proceedings is that, even though the expert is appointed and paid by a party, they must be independent and their overriding duty is to assist the court or the tribunal.

Secretariat Consulting Pte Ltd & Ors v A Company

The Secretariat Group are an international organisation which provides expert witness services for litigation and arbitrations, including delay and quantum expert services in construction disputes. They have offices in North America, Europe, Asia and Australia.

The project in question concerned the development of a petrochemical plant by Party A. The project manager for the project was TP.

Disputes arose between Party A and a subcontractor commenced ICC proceedings against Party A ("Arbitration 1"). Party A approached Secretariat Consulting Pte Ltd ("SCL"), one of the companies within the Secretariat Group and based in Singapore, to provide delay expert services and support in Arbitration 1. SCL undertook a conflict check across the Secretariat Group and concluded that there was no conflict. In the letter of engagement, SCL confirmed it had no conflict of interest and that it would maintain that position for the duration of the engagement.

Subsequently, TP commenced ICC proceedings against Party A for unpaid fees ("Arbitration 2"). TP approached

Secretariat International UK Ltd ("SIUL"), another company within the Secretariat Group based in the UK, to provide quantum and delay services on Arbitration 2. Party A told SCL that it considered SIUL's engagement by TP to create a conflict of interest but SCL disagreed. Without Party A's knowledge, SIUL began working for TP in Arbitration 2.

Later, when Party A sought to expand SCL's works in Arbitration 2, TP informed the tribunal that it had already engaged someone from Secretariat as its quantum expert. Party A alleged that there was a conflict.

High Court

Party A applied to the High Court for an injunction preventing the Secretariat Group from acting for TP in Arbitration 2, arguing that the Secretariat Group had breached their fiduciary relationship.

The High Court granted the injunction, finding that a clear relationship of trust and confidence arose between Secretariat and Party A which give rise to a fiduciary duty of loyalty and there was plainly a conflict of interest for Secretariat in acting for Party A in Arbitration 1 but against Party A in Arbitration 2. Secretariat appealed.

Unless the parties to the arbitration otherwise agree, arbitrators have a *legal duty* to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias.

There was a clear conflict of interest given the overlap of parties, role, project and subject matter.

Court of Appeal

The Court of Appeal ("CA") dismissed Secretariat's appeal, but not on the grounds that it owed a fiduciary duty to Party A. The CA said that, in principle, the relationship between an expert and their client may have one of the characteristics of a fiduciary relationship, such as duty of loyalty or a duty to avoid conflicts. Further, an expert's overriding duty to the court or tribunal did not necessarily mean that an expert could not owe a fiduciary duty to their client.



However, the CA did not consider it necessary or appropriate to decide whether an expert owed a fiduciary duty to their client because, in this particular case, there was a *contractual* obligation in SCL's retainer with Party A whereby SCL owed a contractual duty to avoid conflicts of interest for the duration of its retainer. That provision was based on conflict checks undertaken in respect of all Secretariat entities and so it extended to all entities within the Secretariat Group, not just SCL. This conclusion was supported by the fact that the entities within the Secretariat Group marketed themselves as one global firm operating under the Secretariat brand. There was a clear conflict of interest given the overlap of parties, role, project and subject matter. Accordingly, there had been a breach of the contractual obligation to avoid conflicts of interest.

Commentary

It is common for arbitrators to be appointed on several international arbitrations running at the same time. However, in *Halliburton*, the issue was the same arbitrator being appointed on three arbitrations where there was overlap in terms of parties and subject matter.

The decision in *Halliburton* was based on the facts of that specific case but, in reaching its decision, the Supreme Court confirmed principles for broader application. In international arbitration, there are different arbitral institutions and rules and international parties that will have different customs, practices and perceptions. The Supreme Court recognised this and so it resisted being too prescriptive with these principles, instead adopting flexibility which can then be applied to the facts of each specific case. Of those principles, one that may be surprising is that the time to assess whether there has been bias by an arbitrator is the time of the hearing to remove them, not, for example in the *Halliburton* case, the time that the Arbitrator accepted his appointment on the second arbitration. Another important aspect of international arbitration is its confidential nature (as opposed to Court proceedings which are public) and the *Halliburton* decision clarifies the relationship between an arbitrator's duty to disclose and any duties of confidentiality that an arbitrator may owe to the parties.

As to the *Secretariat* case, given the lack of legal authority on whether an expert witness in legal proceedings has a fiduciary relationship with their client, it may be surprising that Party A raised

such a novel argument in seeking an injunction. Although the CA said that, in principle, the relationship between an expert and their client may have one of the characteristics of a fiduciary relationship, they were clearly reluctant to create another category of fiduciary relationship if it did not have to, saying that it might not be appropriate to import all the "legal baggage" that may be imported into the expression "fiduciary" into a relationship between a client and an expert. In *Secretariat*, the CA was able to avoid having to make a decision on that issue on the basis that SCL had a *contractual* obligation to avoid conflicts of interest.

While companies that provide expert witness services will be pleased that the CA declined to find that experts have a fiduciary relationship with their clients, it is common for large companies that offer expert witness services across multiple jurisdictions to be involved in international arbitrations and the *Secretariat* case highlights the importance for parties who engage such companies (and, indeed, any company that offers expert witness services) to check the conflict of interest provisions within the expert's terms of engagement. Indeed, such large companies may wish to make clear in their appointment that other companies within the group are considered to be separate from each other to try to avoid the situation in *Secretariat* arising again.



Do you really remember that? Witness evidence in international arbitration

In an article from Fenwick Elliott's blog, *Collective Thoughts*¹, **Claire King**, looks at the future of witness evidence in the UK and International Arbitration.

Published in November 2021, the ICC Commission Report *The Accuracy of Fact: Witness Memory in International Arbitration* is fascinating and provides real food for thought for arbitral practitioners who are about to engage in the process of taking witness statements. At its heart is the increasing scientific evidence, originally derived from criminal trials, that human memory is relatively fragile and can be "unwittingly corrupted".

So, what does the science say?

The historical research into memory was primarily focused on criminal trials where individuals had to recall specific incidents. That data suggested that not only was human memory very unreliable but also a witness's exposure to pre- and post-event information could add to, detract from or even change a memory of the event in question.

In light of this the ICC commissioned a study (*The Accuracy of Fact Witness Memory in International Arbitration*) by Dr Wade of the University of Warwick to consider the pertinence of these issues to international arbitration and a commercial setting. She developed a witness memory experiment involving 316 adults across a broad range of industries who were asked to read about a contractual agreement between two companies, revolving around the installation of an industrial floor, ultimately leading to a dispute. Some participants were then asked to imagine they were the MD of one party and some the MD of the other party. Controls were not asked to imagine anything.

A detailed summary of that study can be found in the report, but the results were consistent with the findings from criminal trials. In particular, "*biassing people in favour of a particular company and exposing them to suggestive post-event information affected their memory reports*".

In other words, memory is malleable. As the report notes it is not a fixed image that can be retrieved when required. Instead, it is a "*dynamic process that can be affected by subsequent events*".

Why does this matter to international arbitration?

Although civil law jurisdictions have traditionally relied less on witness evidence than those in common law systems, harmonisation over the years has resulted in a default approach of providing witness evidence in international arbitrations. The

report notes in particular the impact of the IBA guidelines in levelling the playing field when it comes to the presentation of witness and expert evidence. General practice is then that narrative statements from each witness are prepared and exchanged often at considerable expense. However, the rules on how such witness evidence is taken are not so clear.

Obviously the value of witness evidence, and the weight that arbitrators should put on it, is called into question if the memories contained within are not as reliable as thought historically. That may not matter so much where witness statements are to provide context or are essentially procedural. However, for witness statements where memory is key, the question then becomes how to avoid memory distortion.

So how can witness evidence be made more reliable?

Helpfully, the report goes on to provide an "open list" or menu of ideas that can be considered, where appropriate, in order to increase the accuracy of a witness's memory. Suggestions include (but are in no way limited) to:

- (i) Ensuring interviews are carried out as early as possible when memories are fresh.
- (ii) Avoiding interviews in a group where discussions modify memories.
- (iii) Ensuring that someone not conducting the interview makes notes or a recording is made.
- (iv) Explaining that it is what they remember that is key rather than what another person may have told them or what they may have read.
- (v) Assuming it is true, reassuring witnesses that there will be no personal consequences to telling what they actually recall.
- (vi) Avoiding steering witnesses to a particular version of the facts.
- (vii) Using neutral language. For example, don't say "*How aggressively did they react?*" but instead "*How did the discussion progress?*".
- (viii) Asking if there are notes from the time.
- (ix) Asking for their recollections before providing them with documents.

1. Further insights from the Fenwick Elliott blog, headed by Andrew Davies can be found at <https://www.fenwickelliott.com/blog>

The report also emphasises the training of in-house counsel to ensure that, as “first-responders”, steps are taken to reduce the risks of false memories creeping in at an early stage.

“for witness statements where memory is key, the question then becomes how to avoid memory distortion.”

Overview

The report emphasises that training of both in-house counsel, external counsel and arbitrators is important in order to understand: (a) the strengths and weaknesses of the “recounting process”; and (b) how to aid that process to ensure the end product is as close as possible to an accurate understanding of what happened.

That said, it is clear that the ICC intends to adopt a flexible approach to the issue of how witness statements are taken. This is in line with the ethos of party autonomy which sits at the heart of the arbitration process. The ICC’s approach is in stark contrast to the line now being adopted by the Business and Property Courts. Practice Direction 57A of the Civil Procedure Rules lays down very strict rules for the process of taking witness evidence on the basis that: *“human memory is a fluid and malleable state of perception concerning an individual’s past experiences, and therefore is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration”*.

One thing is clear, those taking witness statements need to be aware of the fluidity of human memory and how best to ensure that the risks associated with that are mitigated. As such, reading this report is highly recommended and it will certainly be interesting to watch developments in this area of practice going forwards.



“human memory is... vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration”

The UNCITRAL Expedited Arbitration Rules enter into force

On 19 September 2021, the UNCITRAL Expedited Arbitration Rules entered into force. As **Thomas Young** explains, the introduction of these expedited rules reflects the increased use of expedited arbitration procedures, the value of simplified procedures for resolving disputes in shortened timeframes, and the need to balance efficiency against parties' rights to due process.

The expedited rules are set out over 16 Articles and form an appendix to the UNCITRAL Arbitration Rules. The full text of the UNCITRAL Expedited Arbitration Rules is set out at Annex IV to the *Report of the United Nations Commission on Internal Trade Law for the fifty-fourth session*¹ and the key features of the expedited rules are set out below.

When do the expedited rules apply?

As noted in Article 1, an important feature of the expedited rules is that they are only applicable where the parties have agreed that this is the case. The application of the rules are, therefore, not tied to any particular financial threshold or other criteria.

Are there circumstances in which the expedited rules may cease to apply?

There are circumstances in which the expedited rules may cease to apply.

Article 2 recognises that the expedited rules will no longer apply if the parties agree that they should not.

However, a less straightforward situation arises if only one of the parties considers that the expedited rules should no longer apply. In this situation, Article 2(2) empowers the arbitral tribunal "in exceptional circumstances and after inviting the parties to express their views" to determine that the expedited rules shall no longer apply. The reference to "exceptional circumstances" indicates that, once there has been an initial agreement to apply the expedited rules, it may be quite difficult for a party to convince an arbitral tribunal to move away from this.

Further, as discussed further below, the expedited rules may also cease to apply if the arbitral tribunal is unable to make its award within the prescribed time limits.

In any circumstance where the expedited rules shall no longer apply, the arbitration shall proceed thereafter by reference to the UNCITRAL Arbitration Rules, and the existing arbitral tribunal shall remain in place.

Focus on expeditious conduct and use of technology

Article 3 enshrines an obligation on the parties to act expeditiously throughout the

proceedings, and also an obligation on the arbitral tribunal to conduct the proceedings expeditiously.

The expedited rules are not prescriptive about how to achieve this, but Article 3(3) does provide that the arbitral tribunal may, after inviting views of the parties, make use of "any technological means" to conduct the proceedings. This recognises that, in appropriate circumstances, significant efficiencies can be achieved by holding consultations and hearings remotely.

Notice of arbitration and statement of claim

In keeping with the focus on expeditious conduct, Article 4 provides that when the claimant communicates its notice of arbitration to the respondent, it is also required to communicate its statement of claim.

As part of its notice of arbitration, the claimant needs to make a proposal of an appointing authority (unless this has already been agreed by the parties) and make a proposal for the appointment of an arbitrator.

As soon as the arbitral tribunal is constituted, the claimant is required to communicate both its notice of arbitration and statement of claim to the arbitral tribunal.

Response to the notice of arbitration and statement of defence

The respondent is obliged to submit its response to the notice of arbitration within 15 days of receipt and provide responses to the proposals of an appointing authority (if applicable) and arbitrator.

The time period for the respondent to communicate its statement of defence only begins to run once the arbitral tribunal has been constituted. However, once the arbitral tribunal is constituted, the respondent must communicate its statement of defence within 15 days.

Can counterclaims and claims for set off be made?

Provided that the arbitral tribunal has jurisdiction over it, Article 12 provides that a counterclaim or claim for a set off shall be made by no later than in the statement of defence.

1. See page 107 of the Report of the United Nations Commission on Internal Trade Law for the fifty-fourth session (28 June-16 July 2021).

A party is not permitted to make a counterclaim or claim for a set off at a later stage in the proceedings, unless the arbitral tribunal considers it appropriate to allow such a claim. In considering whether it is appropriate to allow such a claim, the arbitral tribunal is to have regard to the delay in the party making such a claim and the prejudice to other parties or any other circumstances. As such, the only way for a party to be confident that it will be permitted to advance a counterclaim or set off is to make it no later than in the statement of defence.

Default number of arbitrators and constitution of the arbitral tribunal

Article 7 provides that absent any agreement by the parties otherwise, the default number of arbitrators under the expedited rules is one.

The sole arbitrator shall be appointed jointly by the parties. However, as noted in Article 8, if the parties are unable to agree on an appointment within 15 days after a proposal has been received by all other parties, then, at the request of a party, the appointing authority shall appoint the sole arbitrator.

As to who the appointing authority is, that is a matter which may be agreed by the parties. However, if the parties are unable to agree, then Article 6(1) provides for a party to request that the Secretary-General of the Permanent Court of Arbitration either designate the appointing authority or serve as the appointing authority itself.

Procedure following constitution of the arbitral tribunal

After constitution, the arbitral tribunal has an obligation to consult the parties on the manner in which it will conduct the arbitration within 15 days.

The arbitral tribunal has the discretion, after inviting parties to express their views, to decide whether any further written statements are required or may be presented. In relation to evidence, the arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. It is notable that the arbitral tribunal is able to reject any request that a procedure be established for document production, unless that request is made by both parties. Finally, if neither party requests that a hearing be held, after inviting the parties to express their views, the arbitral tribunal may decide

that a hearing shall not be held. All these provisions within the rules are aimed at providing the arbitral tribunal with the necessary tools to shape the arbitration procedure so that the arbitration can be conducted expeditiously.

Can a party amend or supplement its claims or defences during the arbitration?

The default position is that a party may not amend or supplement its claim or defence during the course of the arbitral proceedings.

However, there is the facility to allow amendments if the arbitral tribunal considers that it is appropriate to do so having regard to when the amendment is requested or the prejudice to the other parties. Because such changes have the ability to impact how expeditiously the case can proceed, a party is likely going to need to show a good reason to introduce an amendment at a late stage.

How quickly will an arbitration award be made?

The default position is that an award shall be made within six months from the constitution of the arbitral tribunal.

However, there are circumstances in which an award may be issued later. In this regard, it may be that the parties agree otherwise. Separate to this, the arbitral tribunal may "in exceptional circumstances", after inviting the parties to express their view, extend the 6 month period, by up to a further 3 months, such that the total time period is no more than 9 months.

In circumstances where the arbitral tribunal still remains concerned it will not be able to make its award within 9 months, the arbitral tribunal may propose a final extended period in which it is to make its award, but that further extended period can only be adopted if all parties agree to it.

If the parties do not agree to the further extension beyond 9 months, any party may request that the expedited rules no longer apply and that the arbitration continue by reference to the UNCITRAL Arbitration Rules.

Subject to the obligations on the arbitral tribunal to make its award within 6 months or an extended period as outlined above, the arbitral tribunal has the discretion,

after inviting the parties to express views, to extend or abridge other periods of time set out in the UNCITRAL Arbitration Rules or expedited rules or agreed by the parties.

UNCITRAL has now taken a step to close the gap between its rules and the other major sets of institutional rules which had already embraced the need for expedited procedures.

Model arbitration clause for contracts

Should parties wish to provide for arbitration under the expedited rules in their contracts UNCITRAL has proposed the following model clause:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Rules."

UNCITRAL also notes that parties may wish to supplement this clause in order that the appointing authority, place of arbitration and language to be used in the arbitral proceedings is agreed, and proposes the following potential additions:

"(a) The appointing authority shall be... [name of institution or person];"

(b) The place of the arbitration shall be... [town and country];"

(c) The language to be used in the arbitral proceedings shall be...;"

Conclusion

The addition of the Expedited Arbitration Rules to the existing UNCITRAL Arbitration Rules are a welcome response to arbitration users' growing appetite to have their disputes resolved effectively in a short time period. In this regard, UNCITRAL has now taken a step to close the gap between its rules and the other major sets of institutional rules which had already embraced the need for expedited procedures. While arbitration under the UNCITRAL Arbitration Rules has been and remains a flexible process, the expedited rules now provide a more certain framework against which expedited proceedings can be achieved.

The UK Hydrogen Strategy: one roadmap to Net Zero

The UK's destination? Net Zero. Its arrival time? 2050. The Climate Change Act 2008 (as amended in 2019) set this target, but will, **Lucinda Robinson** asks, the UK achieve it? The government's Ten Point Plan for a Green Industrial Revolution, published in November 2020, set out a commitment to channelling £12 billion of public money, and three times that amount of private investment, to generate a green recovery. The second of the Ten Points is "Driving the Growth of Low Carbon Hydrogen", cementing hydrogen's place as a key part of the UK's journey to Net Zero.

The UK Hydrogen Strategy (released in August 2021) is the self-proclaimed roadmap, directing the UK towards unlocking the potential of hydrogen as a major sustainable energy source this decade. It is certainly ambitious. Currently, there is almost no production of, or demand for, hydrogen. The vision for 2050 is a "booming" hydrogen market, supporting over 100,000 jobs and providing around 35% of the UK's energy supply. The interim target is the production of 5GW of low carbon hydrogen capacity by 2030, supporting 9,000 jobs. The Hydrogen Strategy boldly asserts that the UK will be at the forefront of hydrogen technology use and demand. It sees the UK as an international leader in this field as it is with windfarms. Fuelling all of this is the imperative of this generation, the quest for Net Zero to (putting it bluntly), save the planet.

There is huge scope for innovators and investors to participate in this drive towards a hydrogen economy because there is a lot to do in a short space of time; 2030 is less than a decade away. The key features of the UK Hydrogen Strategy are summarised here.

The strongest demand up to 2030 is expected to come from industrial users, as manufacturing plants and then industrial centres consider using onsite or local hydrogen facilities as their energy source.

Creating a Market – Supply

Innovation and investment in the design and construction of the technology and plant needed to produce hydrogen is essential. These are some of the principal ways the government is seeking to encourage private investment in the development of a hydrogen market.

Hydrogen Business Model

Investors need to be assured of a decent return on their investment, so to attract private investment, the government will provide some level of revenue support, particularly at the outset when costs of production are high, but demand and revenue generation are low. Exactly how the business model will work is subject to a consultation, the paper for which was published at the same time as the Hydrogen Strategy. The intention is that hydrogen production facilities will benefit from some form of subsidy to manage the risk. Five alternatives are suggested,

with the government's current preference for a sliding scale mechanism similar to the contracts for difference model. The expectation is that this would help to cover upfront and fixed costs until volumes supplied and purchased increase and revenue is sufficient to enable the amount of support to reduce.

Net Zero Hydrogen Fund

A further investment incentive is the £24 million Net Zero Hydrogen Fund announced in the Ten Point Plan. The number of new low carbon hydrogen projects will have to escalate in the early 2020s if the UK is to reach its 5GW production target for 2030 and that will require private sector investment. This fund aims to combine public and private funding to support the anticipated new CCUS-enabled and electrolytic hydrogen projects and related FEED studies, focusing on those that could realistically result in hydrogen production this decade.

A consultation on the Net Zero Hydrogen Fund was launched at the same time as the Hydrogen Strategy, seeking views on the scope of the fund, eligibility criteria, technologies capable of meeting it, and the effectiveness of capital grant funding.

"Twin Track" Approach

Whilst all of this demonstrates that the government is keen to support the supply of hydrogen, it falls short of specifying exactly how hydrogen should be supplied. The actual technologies and how they can be scaled up from the current pattern of small-scale hydrogen technology is unclear. What is clear is that, unlike the EU, the government intends to support both "blue" and "green" hydrogen. It calls this the "twin track" approach.

"Blue" hydrogen production is where hydrogen is produced using fossil fuel methods, but the carbon that would otherwise be released is captured and stored. The process is often referred to as "CCUS", standing for carbon capture, utilisation and storage. Investment in blue hydrogen causes some controversy because it continues to support the non-renewable sector. The government's retort is that blue hydrogen production is essential if the UK is to hit its target by 2030 because the technologies are more advanced so more readily deployed in the early 2020s.

"Green" hydrogen is made from the electrolysis of water, ideally using renewable energy sources such as wind

turbines to power the process. It is considered to be the most sustainable form of hydrogen production and favoured by many on this basis. The UK government is concerned that it will take too long to develop green hydrogen technologies at scale and that blue hydrogen options will have to assist with reaching the target in the interim.

The UK Hydrogen Strategy demonstrates a clear commitment to supporting investors and innovators in the hydrogen production space, whether blue or green. Initially, early adopters are expected to set up small electrolyzers linked to the end use for that power supply. For example, small facilities could be developed close to industrial sites they power, with larger hydrogen projects supporting larger industrial clusters as the decade progresses.

The number of new low carbon hydrogen projects will have to escalate in the early 2020s if the UK is to reach its 5GW production target for 2030

Creating a Market – Demand

The Hydrogen Strategy identifies the creation of a demand as another obstacle to be navigated. It refers to hydrogen's "chicken and egg" problem of needing to generate demand and supply simultaneously, as one cannot succeed without the other.

It is anticipated that demand may be driven by the evolution of the hydrogen networks and the storage infrastructure, which will provide alternative power supplies for industry in the first instance and then businesses and consumers over time as hydrogen becomes more available and familiar. The strongest demand up to 2030 is expected to come from industrial users, as manufacturing plants and then industrial centres consider using onsite or local hydrogen facilities as their energy source.

Looking ahead outside of industry, plans are afoot, for instance, to assess the safety, technical and cost implications of introducing hydrogen into the gas system and for a street, then a village and eventually a town to be powered exclusively by a hydrogen distribution network.

In terms of incentives to switch to or adopt hydrogen energy sources, the Hydrogen

Strategy focuses on industry first as the expected early adopter. Its initiatives to help foster demand include (i) carbon pricing which increases energy costs to industry for supplies of unsustainable sources and thereby encourages the businesses to adopt low carbon energy sources; (ii) financial incentives including the £315m Industrial Energy Transformation Fund schemes; (iii) a Low Carbon Hydrogen Standard to reassure users that the hydrogen they are purchasing is indeed low carbon and (4) sector specific policies to encourage the adoption of low carbon hydrogen.

Regulation

At present, numerous regulatory regimes impact on hydrogen projects, from (for example) planning, safety, environment and sector specific spheres. It is not easy for trailblazers in emerging markets to navigate the various regulatory regimes set up for other markets. Furthermore, regulatory barriers to the development of new hydrogen projects and uncertainty around the regime going forwards may detract investors. The government intends to review and assess the regulation of hydrogen and will need to provide clarity on what the framework will be as early as possible to encourage investment.

The Hydrogen Strategy takes a holistic approach, looking at the full ambit of a hydrogen economy from technology design, investment, production, infrastructure and end user.

Full Speed Ahead

Underpinning the UK Hydrogen Strategy is the government's acceptance that it needs to generate a hydrogen economy fast if it is to cut carbon emissions significantly by 2030 and then 2050.

The intent and the ambition are there. The Hydrogen Strategy takes a holistic approach, looking at the full ambit of a hydrogen economy from technology design, investment, production, infrastructure and end user. It makes significant financial commitments to supporting the innovation and investment. There will be a regulatory framework. However, given the number of unknowns pending the consultations, and inability to see the future, the government has not been overly prescriptive as to how the new hydrogen economy will work. Instead, it

has retained some flexibility by identifying the principles that will guide future policy, including value for money for taxpayers and cutting emissions whilst growing the economy.

The government has provided a roadmap, but now it must build the road. It must progress the consultations, ensure the resulting decisions are attractive to investors and can be implemented swiftly. Then the private sector will need to step up and put their cars on the road. The opportunity is there, in the planned consultations, for investors to influence how the business model and finance for future hydrogen projects will work and there are (and will be) significant incentives to invest.

Will the roadmap take us to destination Net Zero? It is going in the right direction – let's hope it stays on track.



“Net Zero by 2050. Blah, blah, blah.”

Greta Thunberg did not hesitate to deem the “net zero by 2050” goal of a number of world governments to be no more than an empty catchphrase devoid of any tangible action at the Youth4Climate summit on 28 September 2021.

This is a commitment the United Kingdom Government was one of the first to make by way of its 2019 amendment to the Climate Change Act 2008. Since codifying this commitment, the Government has implemented new policies concerning multiple industries, particularly construction and energy, in line with this goal.

However, as **Rebecca Ardagh** explains, the Committee on Climate Change’s 2020 Progress Report to Parliament makes it clear that much more is needed if this pledge is going to be anything more than “blah, blah, blah”.

The Committee on Climate Change singled out the construction industry as being responsible for 40 per cent of the United Kingdom’s emissions and noted that the long-term focus of the government needs to be “investing in climate-resilient low-carbon infrastructure ... Public money should not support industries or infrastructure in a way that is not consistent with the future net-zero economy or that increase exposure to climate risks”. It is clear that, if the government is ever to reach its “net zero by 2050” goal, significant changes to the legal and political framework that governs the construction industry are not far off.

Legislative change

So, what do we know so far? In order to meet the target of net zero by 2050, the changes in the construction industry are going to be significant in nature and wide reaching. A number of these are currently being developed and include changes to approved documents and the introduction of the Environment Bill.

Approved Document L

Approved Document L (“conservation of fuel and power”) relates to regulation 26 of the Building Regulations 2010, which provides that “where a building is erected, it shall not exceed the target CO₂ emission rate for the building ...”. Approved Document L provides the means by which these calculations can be carried out as well as guidance to facilitate the government’s roadmap to its new future homes standard. The future homes standard aims in part to ensure homes are not overheated or using fossil fuel heating, reducing emissions by 75 per cent compared to current emissions.

There have been numerous criticisms of Approved Document L in its current form, particularly that it does not go far enough to ensure the net zero by 2050 target will be met. There have been amendments made to Approved Document L in 2013 and 2016 and there are new standards expected to be released in 2025 which will significantly increase the obligations when compared to the current standards. In order to ensure progress is being made whilst these new standards are being finalised, the government is releasing interim measures aimed at reducing emissions across domestic and non-domestic buildings, focussed particularly on building fabric and the use of low carbon materials and heating technologies.



The practical implications of Approved Document L and the interim measures are mostly limited to design and testing.

At the design stage, particular attention will need to be paid to the notional specification of the dwelling; where the design meets the notional specification, it will pass. If the design does not meet the notional specification, it will not necessarily fail but savings will need to be shown elsewhere to ensure that the actual building is either the same as, or better than, the target building. There are additional measures required if gas heating is intended to be used, though the 2025 standards will likely move away from this entirely and require heat pumps to be used as the heating source. Essentially, low carbon materials, insulation and energy efficient technology are to be the focus of any new build design.

Testing requirements include air testing, photographic evidence of insulation and plant installation, more accurate energy usage predictions, better handover and more onerous commissioning requirements.

Environment Bill

The Environment Bill is part of the post-Brexit legislative framework intended to fill the gaps left by EU law. The purpose of the Environment Bill is to address the biodiversity and climate emergency by requiring targets, plans and policies to address waste reduction and resource efficiency, improve air quality, biodiversity and water quality.

At clause 18 of the Environment Bill (at the date of this article), the Secretary of State is required to prepare a policy statement on environment principles setting out how they are to be interpreted and applied by ministers when making policy and provides at (4) that:

“the Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to –

(a) the improvement of environmental protection, and –

(b) sustainable development.”

The requirement to contribute to sustainable development, in particular, is demonstrative of the intended impact of the Environment Bill on the construction industry specifically.

Two of the provisions of the Environment Bill that will impact the industry are the provisions concerning biodiversity targets and conservation covenants.

Biodiversity Targets

The Environment Bill introduces the idea of a biodiversity gain; a mandatory provision by which a development will need to achieve a 10 per cent biodiversity net gain in order to proceed. For the first time, this requires biodiversity to be a feature of the design and construction of a project from the beginning. Where this gain may not be able to occur on site, there are some limited options to provide for a portion of the net gain off-site, such as through the development of off-site biodiversity or by buying government biodiversity credits, though it is likely this is going to be discouraged in favour of on-site biodiversity options.

The anticipated biodiversity gain of a construction project will need to be proved in some way, whether it is to be achieved on site or through a combination of on-site and off-site efforts. There is a tool being developed where the details can be input to calculate whether this requirement has been complied with.

There is an acknowledgment in the Environment Bill that the impact of a project on biodiversity will often continue after the practical completion stage of construction, and therefore this projected impact can be considered as part of the 10 per cent net gain, though this will need to be secured in some way and maintained for 30 years. In light of this, the initial stages of the project will need to consider these long-term management and maintenance issues, who will be responsible for them, how they will occur, and how they will be secured.

These biodiversity gain requirements are highly relevant for developers, designers and architects and need to be at the forefront of any initial planning considerations for any new project.

Conservation Covenants

Another consideration that will impact the industry moving forward is the concept of a conservation covenant. This will be a legally binding agreement between the landowner and a “responsible body” to conserve the natural or heritage features of the land (possibly including long-term proposals to comply with the biodiversity net gain requirements) which will bind successors of title. Developers will need

to be mindful of these covenants when purchasing land moving forward and, whether these covenants are inherited or negotiated and agreed to by the developer, the obligations need to be carefully understood and communicated to each member of the construction and supply chain to ensure compliance. Potential remedies for a breach of a conservation covenant could include injunctions or damages, for example.

The Environment Bill establishes the Office for Environmental Protection which will be responsible for oversight and enforcement, though it is not yet clear how the OEP will operate and whether, for example, it will have the jurisdiction to investigate companies, individuals of its own accord, or whether it will be limited to responding to complaints.

What does the government’s commitment to net zero by 2050 mean for the construction industry?

This commitment is likely to be the most significant driver of change in the construction industry in the foreseeable future. The changes to legislation and policy governing the industry, some of which are highlighted above, will require strict attention by developers, designers and architects in particular. They will be assisted by the simultaneous developments being made when it comes to technologies and materials available to the industry that can be utilised to reduce emissions, increase efficiency and contribute to air quality and biodiversity as part of a construction project as well as over the lifetime of the resulting building or piece of infrastructure.

It will certainly be a task to reach the goal of net zero by 2050 and, given the proportion of current emissions that are attributable to the construction industry, a large amount of this burden will fall to the construction industry. Developers, designers, architects and contractors will all need to make sure they stay on top of legislative and policy changes (which are likely to be frequent) to ensure compliance. These obligations should be incorporated into contracts where possible (which, at this stage, will likely require bespoke clauses to be added to standard form contracts) and communicated down the construction and supply chain to protect against any inadvertent breaches.



The impact of climate change on contracts and the law

Writing this article, as **Jeremy Glover** is, just before COP 26 means that it must start and end with the obvious disclaimer that everyone should look out for details of any agreements that are made at the end of the Glasgow summit. More particularly, everyone should look for the small print and finer details of any agreements made and lauded by the politicians in attendance. What do they really mean, in practice? That is not to say that that there will not be progress.

The Paris Agreement, adopted on 12 December 2015 and ratified by the UK on 17 November 2016, provided that countries should hold the increase in global average temperature to: “well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.” The UK then went further than that. In order to reflect the change in temperature target set by the Paris Agreement, the Climate Change Act 2008 was amended in 2019 to read: “(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.”

It is, therefore, likely that further primary and secondary legislation will follow COP 26.

The role of the UK Government

The UK Government is, of course, a major employer or client within the construction industry and it may¹ be that the government will take the lead in making changes to construction contracts and practice. An obvious source of pressure to achieve net zero and similar environmental objectives could come from investors requiring that their capital is invested in a sustainable way. Whilst there is no UK legislation currently requiring companies to fall within certain carbon emission limits, something the forthcoming Environment Bill will not really change, the comments made by the then UK construction minister on 21 July 2020, Ann-Marie Trevelyan² suggest one way forward:

“It’s likely that, going forward, government tenders will place greater emphasis on climate change. We have made it very clear that whole-life value rather than upfront cost is key, and carbon impact is a critical element in assessing broader value.”

The minister listed three government actions to ensure contractors commit to reducing carbon contributions:

- A “carbon exclusion measure”, or warning that companies without net-zero plans, or not committed to net-zero by 2050, will be barred from bidding for public sector work. The policy will apply to contracts above £5m.
- National Procurement Policy statement: public sector buyers must consider how their procurement can tackle climate change and reduce waste.

1. Many would say “should” or “will”.
2. On 23 September 2021, Lee Rowley became the sixth construction minister in 2 years.
3. One potential baseline is the Greenhouse Gas Protocol Corporate Accounting and Reporting Standards
4. <https://chancerylaneproject.org/>
5. Shell said on 21 July 2021 that: “We agree urgent action is needed and we will accelerate our transition to net zero... But we will appeal because a court judgment, against a single company, is not effective. What is needed is clear, ambitious policies that will drive fundamental change across the whole energy system. Climate change is a challenge that requires both urgent action and an approach that is global, collaborative and encourages coordination between all parties.”
6. The UK National Contact Point (UK NCP) deals with complaints that the Organisation for Economic Co-operation and Development (OECD) guidelines have not been met.
7. [2021] UKSC 3

- A requirement for central government departments to “expressly evaluate environmental, social and economic benefits” during the procurement process.

These actions came into force at the beginning of October 2021 and all companies bidding for government contracts worth more than £5m a year must commit to achieving net zero emissions by 2050.

This demonstrates an area where contracts will continue to evolve – pre-tender qualification. Known as *green baseline clauses*³, companies may, by way of example, need to identify their carbon footprint with those not meeting current standards being excluded from tendering. Only those who can demonstrate a real commitment to net-zero and/or any new government requirements can bid for work. This is not the only way.

Contractual commitments

In time, there are likely to be new contractual obligations which go beyond a simple requirement similar to that which can be found in subclause 4.18 of the 2017 FIDIC Red Book that the contractor will take all necessary measures to: (a) protect the environment (both on and off the Site); (b) comply with the environmental impact statement for the Works (if any); and (c) limit damage and nuisance to people and property resulting from pollution, noise and other results of the contractor’s operations and/or activities.

The obligation continues that the contractor shall ensure that emissions, surface discharges, effluent and any other pollutants from their activities shall exceed neither the values indicated in the Specification, nor those prescribed by applicable laws. Note the reference to the Specification. The Specification or Employer’s Requirements are another area where firmer environmental requirements might be imposed.

The contractor will need to comply with obligations of measurement, monitoring, management, mitigation, prediction and then reporting.

Recently, I, along with colleagues at Fenwick Elliott, have provided pro bono support to the Chancery Lane Project⁴ (a project aligned with and supporting the achievement of the UN Sustainable Development Goals relating to climate

action and the UK’s emissions reduction target, enshrined in law, to reach net zero by 2050). The headline on their website reads: “Start using new contractual clauses that help fight climate change.”

Organisations with parent companies in the UK who have a degree of control or influence in the management of their subsidiaries leave themselves directly open to legal challenges from overseas claimants or action from the SFO

One thing we all noted was the potentially onerous reporting requirements. Perhaps this is an inevitable consequence of the need to comply with new requirements. The contractor will need to comply with obligations of measurement, monitoring, management, mitigation, prediction and then reporting. These might prove to be a burden to all parties to the contract. The contractor, in the first place, and then the employer, contract administrator, or perhaps the Dispute Board, who has to police compliance with reporting and then the accuracy of the reporting. This raises the possibility of a green termination clause, a failure to meet the required standards as well as the creation of a new role, a third-party assessor to provide independent audits to check compliance.

In the UK, the Government’s *Construction Playbook*, released in December 2020, notes in the section headed, Build Back Greener, that:

“All contracting authorities should set out strategies and plans for achieving net zero GHG emissions by or ahead of 2050 for their entire estate/ infrastructure portfolio. These should be aligned under an overarching sustainability framework, and systems and processes should be in place to ensure their projects and programmes deliver on the targets set.”

In time, contractual emissions targets may be introduced into contracts, in line with the march to a net zero obligation. The emissions will relate not only to the construction process itself but may need to cover whole-life emissions for a project, something for the party tasked with the engineering or design obligation to consider. The sustainability of projects will become an increasingly relevant part of the overall design life requirements of every building.

Proof that these requirements or targets

have been met is likely to become another pre-condition to completion or takeover. In the UK, this will align with the UK Government Soft Landings approach to completion. With GSL, much of the focus is on functionality and effectiveness (meeting the needs of their occupiers with effective, productive working environments) and environmental factors (meeting government performance targets in energy efficiency, water usage and waste production).

It is possible that liquidated or delay damages’ clauses may include sums based on an assessment of the remediation costs (a climate remediation fee) needed to repair a failure to meet sustainability requirements or climatic obligations. Or, equally, there could be bonuses for meeting specified standards.

Another way that environmental obligations might ultimately be imposed on companies is through the courts.

Caselaw

On 26 May 2021, a district court in the Hague found that Shell:

- Owed a duty of care to citizens to reduce its emissions; and
- Had a climate policy but it was “not enough” to satisfy that duty, namely it was “not concrete” and was “full of conditions.”

The court ordered:

“Royal Dutch Shell, by means of its corporate policy, to reduce its CO2 emissions by 45% by 2030 with respect to the level of 2019 for the Shell group and the suppliers and customers of the group.”

The case was brought jointly by several NGOs and more than 17,000 Dutch citizens, who alleged that Shell was threatening human rights (under the European Convention on Human Rights) by not reducing its emissions sufficiently. It is also one of a number where, typically, claims are brought on behalf of a large number of citizens by an NGO. The courts have found that the governments in question owed an obligation to take necessary measures against climate change and that they had failed this obligation. The obligation arose as a matter of fundamental human rights within national laws but also the European Convention on Human Rights.

Similar cases are likely, and companies need to take care that they do not make extravagant promise about their green credentials. To “greenwash” is defined by the Cambridge dictionary as to: “make people believe that your company is doing more to protect the environment than it really is.” In December 2019, ClientEarth made a complaint to the UK NCP⁶ that BP’s global corporate advertising, “Keep Advancing” and “Possibilities Everywhere”, misled the public in the way that it presented BP’s low-carbon energy activities including their scale relative to the company’s fossil fuel extraction business. BP withdrew the adverts in February 2020 and the NCP did not pursue the complaint. However, again, similar cases are likely.

Companies also need to consider carefully the extent of their obligations. If your organisation is based in the UK and has overseas subsidiaries which may face claims from claimants overseas, then the 12 February 2021 decision of the Supreme Court in *Okpabi and Others v Royal Dutch Shell Plc and Another*⁷ is of some importance. The case added to the growing body of case law concerning the use of a UK-domiciled parent company as an “anchor defendant” to obtain the jurisdiction of the English courts to hear claims brought against an overseas subsidiary.

The Supreme Court considered the jurisdiction of the English courts to hear claims in tort brought against a UK-domiciled parent company for liability arising from actions of its overseas subsidiary. The Supreme Court, in contrast to the lower courts, held that there was, in fact, a real issue to be tried, which meant that the requirements for jurisdiction were established and there would be a full trial.

In a different forum, in September 2021, Petrofac entered into a plea agreement with the UK Serious Fraud Office and indicated that it will plead guilty to seven bribery offences under the 2010 Bribery Act over payments for contracts in the Middle East. It was also ordered to pay £77million. The charges related to bribes or offers made to agents between 2011 and 2017 and contracts awarded in the Middle East during the same period.

Both cases provide a reminder that organisations with parent companies in the UK who have a degree of control or influence in the management of their subsidiaries (for example, monitoring compliances with company-wide policies) leave themselves directly open to either legal challenges from overseas claimants or action from the SFO. The global rise in

activism surrounding environmental issues may see an increase in environmental legal actions against UK-domiciled parent companies in the English courts.

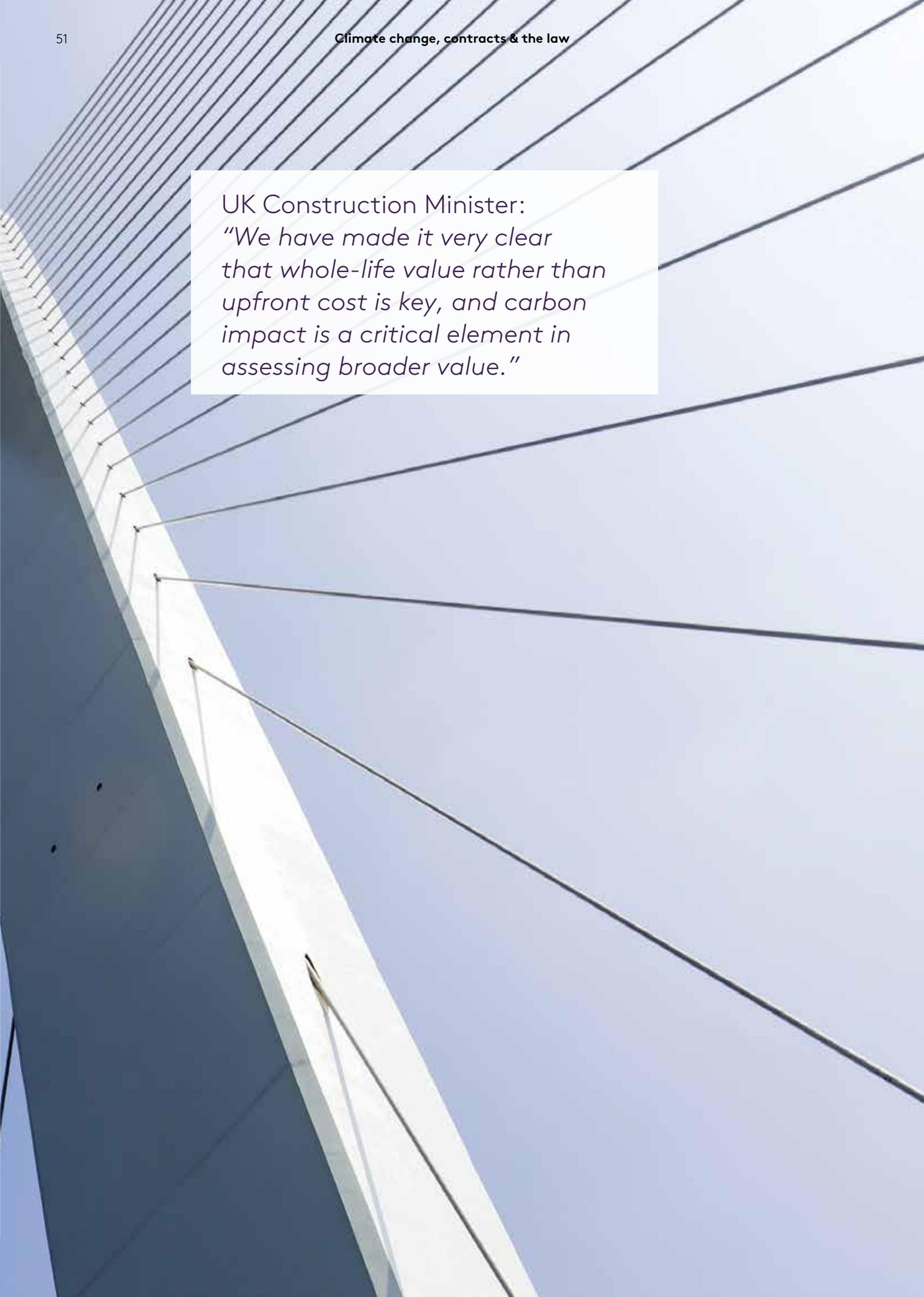
If we are to work towards a net zero target in 2050, this cannot be achieved without considering the whole-life costs and carbon emissions of projects being built right now. Emissions reduction policies in the design and construction phase contribute to the overall lifecycle carbon footprint of the completed building. Design, construction, operation and maintenance need to be considered together if real progress is to be made.

Conclusion

So, of course, we await the outcome of COP 26. However, the majority of the those who work within the construction industry are already taking steps to address environmental concerns and work to a more sustainable future. Many have been doing so for some time. The result of COP 26 is likely to be a move to more regulation, both imposed by government and to be found within project requirements.

And this will affect us all, whether client, contractor, funder, consultant or ... lawyer.

Liquidated or delay damages’ clauses may include sums based on an assessment of the remediation costs (a climate remediation fee) needed to repair a failure to meet sustainability requirements or climatic obligations.



UK Construction Minister:
"We have made it very clear that whole-life value rather than upfront cost is key, and carbon impact is a critical element in assessing broader value."

Case law update

Our usual case round-up comes from two different sources. As always, we highlight here some of the more important cases which may not be covered in detail elsewhere in the Review. First, there is our long-running monthly bulletin entitled Dispatch. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.com. If you would like to receive a copy every month, please contact **Jeremy Glover** or sign up online <https://www.fenwickelliott.com/research-insight/newsletters/dispatch>. We begin by setting out some of the most important adjudication cases as taken from Dispatch.

Second, there is the Construction Industry Law Letter (CILL), edited by Fenwick Elliott's **Karen Gidwani**. CILL is published by Informa Professional. For information on subscribing to the Construction Industry Law Letter, please contact Kate Clifton by telephone on +44 (0)20 3377 3976.

Settlement Agreements

Aqua Leisure International Ltd v Benchmark Leisure Ltd [2020] EWHC 3511 (TCC)

This was an adjudication enforcement application to enforce a decision dating back to July 2017. The adjudicator had ordered that Benchmark pay £200,537.35 within 7 days. Payments of £94,139 had been made, leaving a balance of £119,288.25. Benchmark said that the relevant dispute had been determined "by agreement" so that the adjudication was no longer binding.

The adjudication followed the failure of Benchmark to serve a pay less notice against Aqua's final interim payment application. The sum awarded did not represent the full amount due to the claimant as there was a retention payment of £48k to consider following completion

of warranty works. The parties started discussions about a final settlement in August 2017. The negotiations included the following steps:

- Benchmark offered to pay a "fixed and final" payment of £120,000 plus VAT on or before 22 August 2018 "underwritten by a guarantee ... to wording written by [Aqua's] advisers".
- Aqua proposed by email a "payment resolution" for the total sum over a longer period, with a guarantee. The "payment resolution" was expressed to be "without prejudice and subject to contract" and the email ended with the words "please confirm your agreement to this settlement by return".
- Benchmark sent a reply saying: "agreed".
- Aqua replied noting that they would "contact our lawyer to draft the settlement and guarantee wording" and that they would forward this "as the binding agreement once signed by all the parties".

Benchmark made payment of three parts of the agreed sum, but not the final amount some £110k. In the interim, Aqua sent a "deed of settlement and payment guarantee" to Benchmark for "review and completion". Whilst payments were made, between December 2017 and May 2018, Aqua chased Benchmark asking it to sign the written agreement on no fewer than six occasions. The issue seems to have been that no guarantee would be provided.

The final position was this. The sums due under the adjudication had not been paid in full and neither had the sums set out in the "payment resolution". The "payment resolution" itself was never committed to writing and no guarantee was ever signed.

Aqua said that the compromise arrangement was expressly made in the context that it would not become binding until it was reduced to writing. That never happened and so it was never binding. It did not matter that payments were made under the non-binding arrangement or that works were done. If the arrangement was not "subject to contract" it was in any event at best conditionally binding, the condition being the provision of a guarantee. No guarantee was ever given. HHJ Bird said that the key question was

whether the parties had agreed to enter into a binding contract without the need for all terms to be reduced to writing.

The Judge agreed that the parties reached an agreement (in the sense that there was meeting of minds) at the end of August 2017. In the normal course of events the agreement would have been treated as binding. That agreement was made on the basis of a common understanding that the agreement would not be binding until reduced into writing and signed as a contract.

Benchmark said that both parties "obviously considered themselves bound by the [payment resolution] Agreement and conducted themselves in reliance on that common understanding being that the Decision was no longer 'in play'".

The reduction to writing was a mere formality and it was always intended that the payment resolution agreement would be acted upon. Performance of the warranty works itself is good evidence that the agreement was seen as binding. Aqua banked the payments made and gave credit for them when the deed of settlement was prepared.

HHJ Bird disagreed. In the absence of a compromise, sums were still due under the 2015 contract and under the terms of the binding adjudication award. The fact that monies were paid and "banked" was not evidence that there was a new contract. It was evidence that the parties were working together to try to settle debts that had arisen and move forward.

The evidence strongly pointed to the conclusion that Aqua wanted the original compromise agreement (albeit on slightly different terms) to be finalised. The parties agreed that there would be no binding contract until the terms were reduced to writing and signed off. The Judge therefore entered judgment for Aqua on the adjudication sums.

Did the referral concern disputes under two separate contracts?

Delta Fabrication & Glazing Ltd v Watkin Jones & Son Ltd [2020] EWHC 1034 (TCC)

Delta sought summary enforcement of an adjudicator's decision. Watkin said that the adjudicator did not have jurisdiction because Delta had referred disputes under

two separate contracts to the adjudicator in the same adjudication. It was agreed that if the referral did concern disputes under two separate contracts, the adjudicator did not have jurisdiction and the award should not be enforced. Delta also agreed that they entered into two separate contracts. Watkin subcontracted both brick slip cladding work (order 3197/S7200) and roofing works (order 3197/S7218) to Delta.

Delta said that the award was valid because the parties later agreed, by their conduct, to vary the contracts so that they were amalgamated and so that there was only one contract with effect from 21 February 2020 and that if that conduct did not amount to a variation so that there was only one contract for all purposes, it had the effect of amalgamating the contracts into one contract for the purposes of the HGCR.

Finally, Delta said that Watkin was estopped from denying that there was a single contract within the meaning of the HGCR.

Delta argued that the parties reached agreement by their conduct in the way they dealt with payment applications. One of Watkin's assistant quantity surveyors issued a payment notice, which related to both contracts. Delta said that it accepted that offer to amalgamate the contracts by issuing its request for payment of 21 February 2020 as one payment application relating to both the contracts.

HHJ Watson said that to find for Delta she had to be satisfied that the parties' conduct was unequivocal and consistent only with the parties having agreed to vary the contracts so that a single contract came into existence. Here, where the contracts were originally separate written documents, the Judge would need to be satisfied that, despite the existence of the separate written contracts, the parties had agreed that the contracts be amalgamated.

In fact, here the evidence suggested that Delta wanted the payment applications to be combined, not that they wanted the contracts themselves to be combined. The payment notice too contained references to both subcontract orders. Therefore, although the payment notice was for one figure for both contracts, the supporting documentation did not confuse or amalgamate the contracts but dealt with the calculations separately.

Further, when the parties agreed variations to the contracts, they numbered them consecutively under each of the separate contracts or work packages. Variations for the cladding work were prefaced "VO" and those for the roofing work were prefaced "RVO". In each case, the variations were numbered consecutively. That was indicative of the fact that the parties viewed the contracts as distinct.

The referral stated that all payment notices had been issued under one payment notice, and that the final account had been agreed as a single agreement "making it difficult to differentiate between the 'sub' contract agreements and the figures in relation to each element and as such, we consider the monies deducted in relation to all elements and agreed under the 1 nr agreement, can be administered under the 1 nr adjudication procedure as it is our consideration that it was WJSL intention of all elements to be treated and administered as one nr contract". Again, this submission did not include any statement that the parties agreed by their conduct to vary the contracts so as to amalgamate them. The position was that Delta considered, as a result of the way the final account statement was prepared, that Delta intended the subcontracts to be "treated and administered" as one contract.

The Judge concluded that if the parties had intended that the contracts be amalgamated or understood that they had been, then it was surprising that there was not a single document expressly referring to the fact that the contracts had been amalgamated or giving the new contract a new purchase order number or reference number.

Further, it was far from clear that, by adding together the two individually calculated amounts claimed in respect of the contracts and claiming the total in a single payment application supported by detailed breakdowns by reference to the separate contracts or work packages, the parties had "unequivocally operated and administered two purchase orders as one" so that they should "qualify as a single contract for the purposes of the Construction Act".

In terms of the estoppel argument, Delta tried to argue that Watkin's representation, by its payment notices, amounted to a representation that the contracts were to be treated as one contract; Delta relied on the representation and that Delta had

suffered detriment. Perhaps unsurprisingly in light of the comments above, this argument failed. As a consequence, the Judge dismissed the application for summary enforcement.

Delta also asked that Watkin should be required to make a payment into court of the adjudication award as a condition of defending the claim. The basis for this was that if the adjudicator was right, Watkin was in breach of its lawful obligation to pay the amount awarded, because the adjudicator's decision is "right until it is proved otherwise" and the only challenge is jurisdiction.

The Judge considered that, based on the evidence before her, Watkin's prospects of defending the claim on the grounds of jurisdiction were strong. Watkin also disputed the adjudicator's substantive decision as to repudiatory breach and the financial awards that followed, and the Judge was not persuaded that it was appropriate to make leave to defend conditional on a payment into court.

Was there a single contract under which the works were performed or multiple contracts?

Ex Novo Limited v MPS Housing Ltd [2020] EWHC 3804 (TCC)

MPS sought to resist enforcement of an adjudication decision in the sum of £310k. The key issue was whether there was a single contract with multiple instructions under it or multiple contracts. MPS said that the adjudicator did not have jurisdiction as it was a reference of sums due under and of disputes in relation to multiple contracts rather than a single contract.

HHJ Eyre QC considered that the proper approach to take would depend on whether the reference to the adjudicator necessarily involved the adjudicator having jurisdiction to determine jurisdiction. If that was an integral part of the reference then the decision as to jurisdiction was unchallengeable. On the other hand, if it was only being determined as a preliminary to determination of the reference proper, then the decision of an adjudicator as to jurisdiction was not unchallengeable.

Here, the adjudicator did have to make a decision as to whether there was a single contract or multiple contracts. This was

for the purpose of determining whether they had jurisdiction and should proceed with the adjudication. However, the adjudicator did not have to determine that question in order to answer the substantive issue between the parties. That issue was the effect of the absence of a pay less notice. Therefore the decision of the adjudicator about their jurisdiction was potentially challengeable.

This meant that HHJ Eyre QC had to consider whether there was a single contract under which the sundry works were performed or multiple contracts, or whether, on an application for summary enforcement, there was a real prospect that MPS would defeat the argument that there was a single contract.

The Judge said that the best guide to the parties' intentions and to the effect of their dealings was the contemporary documents. Here they "strongly" and "persuasively" indicated that there was a single contract. There was no real prospect of a finding that there were multiple contracts. "Commercial common sense" suggested that what was happening here was that there was a single contract with the placing of orders under it, effectively a calling off of work on particular properties, with a subsequent variation reducing the discount applicable. This meant that the adjudicator was correct in that there was a reference under a single contract. Therefore, the decision was enforceable.

Under the NEC form, is adjudication a mandatory pre-condition of the right to bring a claim before a tribunal?

The Fraserburgh Harbour Commissioners Against McLaughlin & Harvey Ltd [2021] ScotCS CSOH_8

The question for Lady Wolffe was whether clause W2.4 of the NEC 3 Contract in the form agreed between the parties operated as a contractual bar to preclude resort to the court (or to arbitration) if a dispute between the parties falling within the scope of clause W2 had not first been referred to adjudication.

FHC wanted to carry out works to deepen part of Fraserburgh Harbour. After completion of the works, FHC identified what it said were defects in the works, arising from the failure to conduct the works in conformity with the contract and the specified methodology. FHC brought

an action before the court for damages in excess of £7 million. M&H said that the terms of clause W2 of the contract were a mandatory step prior to the issue of court proceedings. FHC had not referred the current dispute to adjudication. In fact there was a further issue. The "tribunal" provided for in the Contract was "arbitration".

Clause W2 provided as follows:

"W2.4 (1) ...A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract.

(2) If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision."

M&H referred to the *NEC Guidance Notes* which state that:

"The intention is that all disputes are first referred to and decided by the Adjudicator, who is jointly appointed by the Employer and Contractor and is to act independently of them."

"[A] dispute cannot be referred to the tribunal unless it has first been decided by the Adjudicator."

Therefore FHC had agreed not to litigate about the present dispute before a court (or, indeed, by way of arbitration) without having first adjudicated upon it. The requirement imposed by clause W2.4 was that adjudication is a mandatory step in a dispute before there can be any referral of that dispute to another tribunal (be that a court or arbitration). FHC had not complied with that mandatory requirement.

FHC said that the law of Scotland was that an arbitration clause does not entirely exclude the jurisdiction of the court to entertain the suit. It prevented the court from deciding the merits of any dispute. FHC said that clause W2.4 referred "any dispute" arising under the Contract to a private dispute resolution mechanism – i.e. to private judges. Clause W4.1(1) permitted a party to refer a dispute to adjudication. This was to ensure compliance with the right to go to adjudication at any time provided for

by section 108 of the HGCRA. Further, given that the contract data defined "the tribunal" as "arbitration", the words of this clause required that an arbitration could not commence without an adjudication having taken place. The adjudication was therefore a precondition for having the merits of the dispute determined by arbitration. But the clause did not exclude the ability of the court to entertain a suit, even if the merits of any dispute in relation to the matter were to be decided by a private decision-making process. There were no words which sought to exclude or alter the normal jurisdiction of the court, other than by the reference of the dispute to the process of adjudication followed by arbitration.

FHC maintained that the Contract did not preclude a party from essentially side-stepping the contractually agreed route to resolve any dispute in order to advance directly to the court to do so. Clear words were required to oust the court's jurisdiction.

The Judge disagreed. The contract "simply" required that a precondition to resort to the "tribunal" of choice was that there was first an adjudication on the matter in dispute, which was followed by a timeous notice of dissatisfaction with that determination. This was a contractual bar.

FHC's view was inconsistent with the express words of the Contract, which provided for "any dispute" to be resolved in accordance with the specified procedure, being an adjudication and, if a party was dissatisfied with that determination, an appeal from that to the stipulated "tribunal" (here, arbitration) within the time period specified in clause W2.4 (2). Lady Wolffe said that:

"it is clear from the language used, as well as its interrelationship with other parts of Clause W4.2, that these provisions were intended to be definitive as to the means for determining any disputes between the parties and the sequence in which they were to be taken. On the pursuer's approach, these provisions could simply be ignored in favour of an unqualified right of direct recourse to the Court without any stipulated timeframe. This would, in effect, permit a parallel regime of dispute resolution which is wholly at odds with the clear words and detailed specification of the means for dispute resolution provided for in the Contract."

FHC's approach also made no allowance for and cut across the right to refer a dispute to adjudication. The Judge noted that:

"so important is the right to refer a dispute to adjudication, that any provision of a contract which frustrates this right is displaced in favour of the adjudication provisions of the Scheme".

Had the adjudicator failed to consider matters of loss and expense relied on as a defence to the claim? If so, was that a breach of natural justice?

Global Switch Estates 1 Ltd v Sudlows Ltd
[2020] EWHC 3314 (TCC)

GSEL sought summary enforcement of an adjudication decision in the sum of just over £5 million plus the adjudicator's costs of £80k. Sudlows said that the adjudicator:

- (i) had failed to consider matters of loss and expense relied on as defences to GSEL's claim which was a breach of the rules of natural justice;
- (ii) had failed to consider and deal with an allegedly fraudulent call on a bank guarantee, again a breach of the rules of natural justice; and
- (iii) had wrongly come to decisions contrary to the decision of a previous adjudicator, thereby acting in excess of jurisdiction.

The dispute arose out of a fit-out project at a specialist data centre in London. The contract was a JCT Design and Build 2011 with amendments. Mrs Justice O'Farrell emphasised that the courts take a robust approach to adjudication enforcement, observing that:

"i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.

ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is,

of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.

iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.

iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.

v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.

vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.

vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.

viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.

ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced."

GSEL said that, in the adjudication GSEL claimed payment of the balance due to it from Sudlows based on a true valuation of Interim Applications 27.

In its defence, Sudlows relied on its claims for loss and expense as part of its true valuation case. This included claims in respect of the high voltage cables and overloading of the roof. GSEL's position was that the adjudicator could proceed on the assumption, in Sudlows' favour, that the high voltage cable was not installed defectively by Sudlows and that it had not overloaded the roof. On that basis, questions of liability for these defective works were excluded from the scope of the adjudication.

The Judge agreed that this addressed any claims that might be made by GSEL for contra charges in respect of the defective works but it did not address the claims made by Sudlows for additional payment in respect of the rectification costs and consequential loss and expense. These claims raised a potential defence to GSEL's claim for payment in the adjudication. The adjudicator was required to determine whether, as submitted by GSEL, the loss and expense claims were unsubstantiated and invalid, or whether, as submitted by Sudlows, they amounted to a defence to the sum claimed by GSEL.

Unfortunately, as the Judge said, the adjudicator did not consider these arguments because he assumed, wrongly, that he did not have jurisdiction to do so.

The Judge accepted that the adjudicator was entitled to limit the declaratory relief to the issues of valuation identified by GSEL but the determination of the claim for payment required the adjudicator to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation. The failure to take into account Sudlows' defence based on its additional claims for loss and expense amounted to a breach of the rules of natural justice.

This plain and obvious breach of natural justice arose as a result of GSEL's erroneous submission that the adjudicator did not have jurisdiction to consider Sudlows' claims for loss and expense. GSEL's position was that Sudlows should pay to it the sum of £6.8 million; Sudlows' position in the adjudication was that GSEL should pay the sum of £5.5 million. The adjudicator awarded GSEL £5 million. The adjudicator's jurisdictional error precluded any consideration of a very substantial part of the defence. In those circumstances, that amounted to a material breach of the rules of natural justice and rendered the decision unenforceable.

In respect of the bank guarantee issue, the adjudicator did consider the substance of Sudlows' claims, holding that the material presented by Sudlows in the adjudication did not demonstrate that the call on the guarantee was illegitimate. That was a finding of fact that he was entitled to make on the evidence before him. It was irrelevant whether that finding was right or wrong because the adjudicator asked the right question. It follows that this issue would not render the decision unenforceable.

Sudlows also said that the adjudicator wrongly came to decisions that were contrary to the decisions of a previous adjudicator and so exceeded his jurisdiction. Once an adjudicator has reached their decision then, unless and until challenged in arbitration or the courts, it is binding on the parties: it is the decision that binds the parties; that includes the essential components or basis of the decision but not the adjudicator's reasoning for the decision.

This was not a case in which the adjudicator "trespassed" on an earlier decision. The second adjudication was solely concerned with determining Sudlows' entitlement to extensions of time in respect of the main fit-out works. The adjudicator did not consider or adjudicate on Sudlows' entitlement to loss and expense. In the current adjudication, the adjudicator valued Sudlows' claims for loss and expense in respect of the extensions of time, rejecting most of them.

The Judge stressed that those findings were ones that the adjudicator was entitled to make on the evidence. Even if he was wrong in the contractual analysis or assessment of the evidence, those errors would amount to errors of law and/or fact which on their own would not render the decision unenforceable.

In conclusion, the Judge held that the adjudicator was misled by GSEL and wrongly failed to consider and deal with matters relied on by Sudlows as defences which amounted to a breach of the rules of natural justice. Crucially, this jurisdictional error was critical to the determination of the dispute as it led to the exclusion of loss and expense claims which were material to the true valuation of Interim Applications 27 and the amount of any payment due between GSEL and Sudlows.

Application of the Bresco principles

John Doyle Construction Ltd v Erith Contractors Ltd [2020] EWHC 2451 (TCC)

This was one of the first post-*Bresco* decisions. Indeed, the case here was adjourned to be heard after that decision was handed down. JDC, who had been in liquidation since June 2013, made a claim for the summary enforcement of an adjudicator's decision. The claim was for sums JDC claimed to be due on its Final Account for hard landscaping works before the 2012 Olympic Games. (And, it should be noted, the Judge questioned whether the streamlined, fast-track TCC procedure for enforcement of decisions was designed to deal with issues that arise where decisions are, like this one, years, not months, old.) JDC commenced the adjudication in January 2018, claiming approximately £4 million, a sum the adjudicator reduced to £1.2 million.

In August 2016, the liquidators contacted Henderson Jones ("HJ") whose primary business was described as being to "purchase legal claims from insolvent companies". Under the agreement:

- HJ paid JDC £6,500 for the assigned claims, with a further payment to JDC dependent upon outcome;
- HJ had conduct and control of any proceedings pursued in relation to the assigned claims;
- Recovery of any claims was to be paid to HJ;
- 45% of net recovery in those subsequent proceedings (meaning recovery less costs) was to be paid out to JDC by HJ.

Mr Justice Fraser explained that following *Bresco*, the principles to be applied when considering summary enforcement in favour of a company in liquidation are:

- Whether the dispute is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.
- Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.

- Whether there are other defences available to the defendant that were not deployed in the adjudication.
- Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available. In *Meadowside* three mechanisms of security were considered: undertakings by the liquidators; a third party providing a guarantee or bond; and After the Event (ATE) insurance.
- Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

With particular regard to the first point, the Judge noted that small disputes, or tightly defined disputes which had been referred for tactical reasons, would not, if the referring party is in liquidation, be suitable. This would mean that "the type of overly-technical dispute concerned with services of notices within particular number of days that are called 'smash and grab' adjudications would rarely if ever ... be susceptible to enforcement by way of summary judgment by a company in liquidation". The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties. So where, as here, the dispute referred was the valuation of the referring party's final account, summary judgment would potentially be available.

The mere fact that a responding party has a claim on another contract, or arising under other mutual dealings, against the party seeking to enforce its adjudication decision, was not itself sufficient to defeat enforcement. It would depend on the size of the claim. Here there was a small claim of £40k on another project. That was not enough. The "real battleground" here was whether there was a real risk that the summary enforcement of an adjudication decision would deprive the paying party of its right to have recourse to that claim as security for its cross-claim.

JDC sought to rely upon what was said to be a draft letter of credit from HJ's bankers, and an ATE policy. Mr Justice Fraser said that the primary concern, when considering whether there was a real risk that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim, was recovery of the sum paid by way of satisfying the adjudicator's decision. A secondary concern was the costs incurred

in winning the money back. Both of these concerns could, in theory at least, be met by appropriate safeguards.

Here, no undertakings at all were offered from the liquidators. No ring-fencing was available, so no security was offered by the liquidators in any respect. JDC relied upon security from HJ which was said to provide "reasonable assurances" to Erith that, should it successfully overturn the adjudicator's decision in later proceedings, JDC would be able to (i) repay the capital sum and (ii) meet any adverse costs orders.

This security was said to be by way of letter of credit, and an ATE insurance policy. The former was to deal with recovery of the sum awarded in the adjudication; the latter was to deal with the litigation costs. Erith relied upon the agreements that JDC and the liquidators had with HJ under which HJ retained at least 55% of the sums recovered including any costs recovered. This prima facie would contravene Regulation 4 of the Damages Based Agreements Regulations 2013 and hence be unenforceable.

For the Judge, it was the quality of the security that was of central importance. Here, there was no letter of credit available. Instead there was "a so-called letter of intent" from HJ's bankers. This led to a number of difficulties. For example, the bank's letter required the whole judgment sum to be paid to HJ when about 45% of that belonged to the liquidator. There was no evidence of the bank's own detailed conditions for granting letters of credit, which HJ would have to satisfy. JDC were effectively accepting that no security was available but also saying that HJ would provide it. But HJ said it would only provide it if Erith paid over the money, and even then, all HJ could do was promise to apply for it.

This did not equate to any safeguard that sought to place Erith in a similar position to the one which it would be in were JDC solvent. The Judge then turned to the security said to be available in respect of Erith's costs. Here, the ATE cover available was not sufficient. Again, it would not place Erith in a similar position to that which it would occupy were JDC solvent.

The result of this was that the security available (or which was said to be potentially available, were the judgment sum to be paid to HJ) was insufficient and the summary enforcement application was refused.

The Judge stressed that this did not mean that no company in liquidation could ever enforce an adjudicator's decision in its favour. Liquidators may offer appropriate undertakings, such as to ring-fence any enforcement proceeds. These would be powerful points in a claimant's favour on an enforcement application. There were also a variety of different methods and models available to liquidators. Simply because one party to a construction contract is in liquidation, this does not entitle the other party to that contract to a windfall. The enforcement here fell on its own facts.

Note: the Court of Appeal rejected JDC's appeal in October 2021 - [2021] EWCA Civ 1452.

Is a collateral warranty a "construction contract" for the purposes of the adjudication legislation?

Toppan Holdings Ltd & Anr v Simply Construct (UK) LLP [2021] EWHC 2110 (TCC)

THL sought summary enforcement of an adjudication decision. Simply said, the Adjudicator did not have jurisdiction to decide the dispute because the contract in question, a collateral warranty, was not a "construction contract".

In the case of *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd*, Mr Justice Akenhead had said that the collateral warranty in question was to be treated as a construction contract. He noted that the recital to the warranty set out that the underlying construction contract was "for the design, carrying out and completion of the construction of a pool development" and that clause 1 of the warranty related expressly to carrying out and completing the Works. Further, clause 1 contained express wording whereby LOR "warrants, acknowledges and undertakes":

"One should assume that the parties understood that these three verbs, whilst intended to be mutually complementary, have different meanings. A warranty often relates to a state of affairs (past or future); a warranty relating to a motor car will often be to the effect that it is fit for purpose. An acknowledgement usually seeks to confirm something. An undertaking often involves an obligation to do something. It is difficult to say that the parties simply meant that these three words were absolutely synonymous."

The collateral warranty here did not include the verbs "acknowledges" or "undertakes". Simply warranted that:

- (i) It "has performed and will continue to perform diligently its obligations under the Contract";
- (ii) In carrying out and completing the works, it "has exercised and will continue to exercise" reasonable skill, care, and diligence; and
- (iii) In carrying out and completing any design for the works, it "has exercised and will continue to exercise" reasonable skill, care, and diligence.

Deputy Judge Bowdery QC, whilst noting that the collateral warranty referred to both a past state of affairs and future performance, did not consider that it could be construed as a "construction contract". It was not an agreement for "the carrying out of construction operations". Mr Justice Akenhead had accepted that not all collateral warranties would be agreements for the carrying out of construction operations. For example, in *Parkwood*, the warranty was executed before practical completion which meant it partly related to future works.

Here, the collateral agreement was executed, 4 years after practical completion, 3 years 4 months after the Settlement Agreement, and 8 months after the remedial works had been completed by another contractor. The only matter left after the Settlement Agreement was any potential liability for latent defects. The only latent defects discovered after the date of the Settlement Agreement were defects which had been remedied months before the collateral warranty had been executed.

Therefore, the Judge considered that, where a contractor agrees to carry out uncompleted works in the future, it will be a very strong pointer that the collateral warranty is a construction contract, and the parties will have a right to adjudicate. However, where the works have already been completed and, as in this case, even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate. The Judge could not see how "applying commercial common sense", a collateral warranty executed four years after practical completion, and months after the disputed remedial works had been remedied by another contractor, could be construed as an agreement for carrying out of construction operations.

Other cases: Construction Industry Law Letter

Assignment – Application to join assignor as claimant – Application to strike out – JCT Design and Build Contract, 2005 edition

Aviva Investors Ground Rent Group GP Ltd and Another v Shepherd Construction Ltd

Technology and Construction Court; Before Mrs Justice Jefford DBE; Judgment delivered 9 July 2021

The facts

On or about 6 July 2007, Camstead Ltd ("Camstead"), as employer, engaged Shepherd Construction Ltd ("Shepherd") to demolish an existing building and construct a new building of self-contained student apartments in Cambridge. The contract was a standard form JCT Design and Build contract, 2005 edition, with bespoke amendments ("the Contract").

Clause 7.1.1 of the Contract provided that the Employer was entitled to assign the benefit of the Contract, subject to the giving of 14 days written notice to Shepherd and to Shepherd not making reasonable objection in writing within those 14 days.

Clause 7.2 of the Contract provided that in the event of transfer by the Employer of the freehold or leasehold interest in the whole of the premises comprising the Works or any Section then the Employer might at any time after practical completion grant or assign to any such transferee or lessee the right to bring proceedings in the name of the Employer to enforce any of the terms of the Contract for the benefit of the Employer.

On 20 November 2009, Camstead sold the freehold interest in the property to RMB GP Ltd and RMB GP (Nominee) Ltd. On 16 April 2012, those companies sold

the freehold interest in the property to Aviva Investors Ground Rent Group GP Ltd and Aviva Investors Ground Rent Holdco ("Aviva").

Following the Grenfell Tower fire in 2017 and updated government guidance in January 2020 relating to fire risk assessment in buildings under 18m, Aviva commenced investigations into the cladding and any fire risks in the building. A number of defects were identified and on 24 September 2020, Aviva commenced proceedings against Shepherd.

Also on 24 September 2020, a deed of assignment was entered into between Aviva and Camstead purporting to assign to Aviva the full benefit of the Contract and the right to bring proceedings. No notice of the assignment was given to Shepherd and no consent to the assignment was sought from Shepherd.

On 5 January 2021, Aviva issued an application to join Camstead as a Claimant to the proceedings. It was argued that the assignment was an equitable assignment and therefore the addition of the assignor as claimant was necessary.

On 10 February 2021, Shepherd issued an application to strike out the claim on the basis that there was no valid assignment and there was no basis to join Camstead. In particular, Shepherd argued that, in so far as cl 7.1.1 was concerned, no notice had been given and in so far as cl 7.2 was concerned, the assignment could only be valid in respect of the person to whom the employer had transferred the property (here, the RMB GP companies), not a subsequent transferee.

Issues and findings

Had the Contract and the right to bring proceedings been validly assigned?

No. Accordingly the claim was struck out.

What is the extent of the right under cl 7.2?

This clause only confers the right to bring proceedings in the name of the Employer, thus the only claims a transferee could advance are the Employer's claims and not its own claims or losses.

Commentary

In this case, concerning the provisions of the JCT standard form, the Employer

attempted to assign the Contract and the right to bring proceedings against the Contractor. However, the Contract set out a regime in respect of assignment. Either notice had to be given and the assignment not objected to by the Contractor or assignment of the more limited right to pursue the Employer's claims was permitted following Practical Completion.

The Employer, Camstead, did not serve notice on Shepherd of the assignment and the court also held that the more limited assignment of claims had not been validly effected as such assignment could only be made to the entity that the Employer had transferred the property to. In this case the property had been subsequently transferred, breaking that link.

Clause 7.2 of the JCT standard form concerning the limited right to assign was in this case unamended and this case therefore provides guidance on the operation of that provision.

Adjudicator's Fees – UCTA

Davies and Davies Associates Ltd v Steve Ward Services (UK) Ltd

Technology and Construction Court; Before Mr Roger Ter Haar QC sitting as a Deputy High Court Judge; Judgment delivered 19 May 2021

The facts

Between late 2019 and early 2020, Steve Ward Services Ltd ("SWSL") carried out construction operations at a restaurant in Stanmore, Middlesex. A contract was drawn up but not signed. The "Client" was named in the contract as Ms Vaishali Patel.

Disputes arose in relation to defects and payment and SWSL commenced adjudication proceedings. Communications in relation to these disputes were carried out between SWSL and its solicitors and Bhavishya Investment Ltd ("BIL") and its solicitors on the basis that BIL was the contracting party liable for any sums due to SWSL. At no stage did BIL suggest that Ms Patel was personally liable instead.

In September 2020, SWSL commenced adjudication proceedings against BIL and an adjudicator, Mr Nigel Davies, was

appointed. The adjudicator's terms and conditions were issued to the parties and included a term that stated that save for any act of bad faith by the adjudicator, he would be entitled to payment of his fees and expenses in the event that the Decision was not delivered and/or proved unenforceable.

The Referral, Response and Reply were provided to the adjudicator. BIL did not raise the issue of jurisdiction in its Response. Following receipt of the Reply, the adjudicator made enquiries of the parties as to whether the contract had been novated to BIL. The adjudicator subsequently concluded that the contract was between SWSL and Ms Patel and resigned on the basis that he did not have jurisdiction. The adjudicator issued an invoice to SWSL for his time spent on the adjudication.

SWSL refused to pay the invoice. The adjudicator issued proceedings to obtain payment. WSL defended the proceedings on the basis that: (a) the adjudicator's resignation had represented an abandonment of his appointment and was a deliberate and impermissible refusal to provide a decision; (b) the adjudicator's terms and conditions did not entitle him to payment in the circumstances; and (c) alternatively, the relevant payment terms were void under s3(2)(b) of the Unfair Contract Terms Act 1977 ("UCTA") as they allowed the adjudicator to render performance substantially different from that contracted for.

Issues and findings

Was the Adjudicator entitled to be paid his fees?

Yes. The terms of the adjudicator's appointment were **clear and UCTA was not applicable**.

Commentary

The amount in dispute in this case was modest but the judge recognised that the case raised interesting points as to the circumstances in which an adjudicator's fees are or are not payable.

In this case, the adjudicator of his own accord and without inviting submission from the parties resigned on the basis that he did not consider he had jurisdiction. He then claimed his fees incurred in carrying out the appointment. The issue of the recoverability of adjudicator's fees was considered in *PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWCA

Civ 1371; [2013] BLR 1, where the Court of Appeal held that an adjudicator is not automatically entitled to fees where the adjudicator's decision cannot be enforced. Here, Mr Davies had sought to address that judgment by including an express term in his appointment to the effect that he would be paid regardless of whether the Decision was not provided or was found to be unenforceable.

The judge held that the adjudicator's resignation was outside the ambit of the statutory scheme, but that the terms and conditions were effective such that payment should be made. The judge also rejected SWSL's argument that the adjudicator's appointment contravened UCTA.

Validity of liquidated damages clause – General damages – Application of cap on liquidated damages to general damages

Eco World-Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd

Technology and Construction Court; Before Mrs Justice O'Farrell DBE; Judgment delivered 3 August 2021

The facts

By a contract dated 11 July 2016 ("the Contract"), Eco World-Ballymore Embassy Gardens Company Ltd ("EWB") engaged Dobler UK Ltd ("Dobler") as a trade contractor to design, supply and install the façade and glazing works for Building A04, part of the Embassy Gardens development in Nine Elms, London. The Trade Contract Sum was £8.6 million.

Building A04 comprises three residential blocks (Blocks A, B and C) arranged around a ground-level courtyard. The Works under the Contract were to be completed within 54 weeks following design, procurement and materials delivery. There was no provision in the Contract for the Works to be carried out or completed in Sections. However, cl 2.33 of the Contract did allow the Employer to take over parts of the Works.

The Contract provided that no liquidated damages would be payable for the first four weeks of delay in completion and that liquidated damages thereafter would be

applied at the rate of £25,000 per week or pro rata for part of a week up to an aggregate maximum of 7 per cent of the Trade Contract Sum.

On 8 August 2016, Dobler commenced work on site. The original contract completion date was 21 August 2018 but by a Deed of Variation with an effective date of 23 January 2018 the parties agreed an extended New Completion Date of 30 April 2018 and that liquidated damages at the rates stated in the Contract were to be levied from the New Completion Date onwards where applicable.

The Works were not completed by 30 April 2018. During the week ending 15 June 2018, EWB took over Blocks B and C. EWB did not issue a practical completion certificate in respect of these parts of the Works. On 20 December 2018, the Works were certified as having achieved practical completion.

Disputes arise between the parties including in relation to EWB's entitlement to liquidated damages. EWB argued that the liquidated damages clause was void and/or unenforceable on the basis that the Contract permitted EWB to take partial possession of the works in advance of practical completion but it did not contain any mechanism for reducing the level of liquidated damages to reflect such early possession. Accordingly, EWB argued that it was entitled to claim general damages for delay including any substantiated damages above the contractual liquidated damages cap.

Dobler argued that the liquidated damages clause was valid and operable, in particular that there was an effective mechanism for reducing liquidated damages when partial occupation was taken by EWB. Alternatively, if the liquidated damages clause was penal and void then the general damages were nevertheless capped at the level of liquidated damages in the contract.

Issues and findings

Was the liquidated damages clause void and/or unenforceable?

No.

If the liquidated damages clause had been unenforceable, would general damages be capped at the level of liquidated damages otherwise payable?

Yes.

Commentary

In *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67; [2016] BLR 1, the Supreme Court restated the position to be taken on the enforceability of liquidated damages clauses. There have been relatively few cases since that date that apply those findings.

In this case, the judge considered two points that have been the subject of much debate amongst construction law practitioners.

In the first instance the judge considered the question of the enforceability of a liquidated damages clause where the employer had taken part possession of the works. The judge distinguished this case from others where sectional completion had occurred and the liquidated damages provisions of the contract had been found to be too uncertain to address that situation. In the judge's view, the contract was clearly to be construed that liquidated damages were to apply until the whole of the Works were completed, regardless of the part possession.

The judge then considered whether, if the liquidated damages clause had been unenforceable, the cap on liquidated damages would apply to the general damages for delay which would then be claimed. Whilst acknowledging the authority to the effect that once a clause is void then it is wholly unenforceable the judge considered in this case that the clause could be construed as including a limitation of liability that survived the unenforceability of the liquidated damages clause. This part of the decision was obiter, but it will certainly be cited in cases going forward.

Payment regime of the Housing Grants, Construction and Regeneration Act 1996 (as amended) – Invalid application for payment

RGB Plastering Ltd v Tawe Drylining and Plastering Ltd

Technology and Construction Court; Before His Honour Judge Jarman QC sitting as a judge of the High Court; Judgment delivered 13 November 2020

The facts

By a subcontract ("the Subcontract") RGB Plastering Ltd ("RGB") engaged Tawe Drylining and Plastering Ltd ("Tawe") as its drylining subcontractor for a project in Plymouth.

The Subcontract provided for Tawe to submit to RGB applications for payment on the Interim Application Date referred to in a payment schedule in the Subcontract and further that if the interim application was submitted after the relevant Interim Application Date that it would not be considered and no payment would become due by RGB on the final date for payment.

The payment schedule included a table setting out the relevant dates for each payment cycle including the Interim Application Date. The table also stated the valuation date up to which the interim application should be made and included an email address to which the payment applications were to be made. In respect of April 2019, the Interim Application Date was 28 April 2019.

The April application was emailed to various addresses of RGB employees but not to the email address in the payment schedule. It contained a valuation up to 30 April 2019 which was not the date for valuation set out in the payment schedule.

RGB did not pay the sums applied for and a day or so later notified its intention to terminate the Subcontract.

Tawe argued that even if the application was not valid for April 2019, it was valid for May 2019 and should be paid. RGB argued that the interim application was not valid and therefore there was no obligation to pay.

RGB issued court proceedings for a declaration on the validity of the payment application.

Issues and findings

Was the payment application valid?

No.

Commentary

The judge considered the case in the context of the payment regime set out in the Housing Grants, Construction and Regeneration Act 1996 (as amended) and dealt with this issue quite shortly. Given

the clear terms of the Subcontract and the facts surrounding the issue of the Interim Application, the judge had no difficulty in finding that the payment application was invalid.

A question did arise as to estoppel, however permission was not given to adduce this evidence given that it had been raised very late in the day.

Experts – Fiduciary duty

(1) Secretariat Consulting Pte Ltd (2) Secretariat International UK Ltd (3) Secretariat Advisors LLC v A Company

Court of Appeal; Before Lord Justice Coulson, Lord Justice Males and Lady Justice Carr; Judgment delivered 11 January 2021

The facts

The respondent company ("the Company") was a developer of a petrochemical plant ("the Project").

In 2012, the Company entered into two EPCM contracts with a third party group of companies ("the Third Party") in connection with the Project and further a parent company guarantee and coordination deed with another third party group of companies in respect of those contracts.

In 2013, the Company entered into two contracts with a contractor ("the Contractor"): Contract Package A and Contract Package B, for the construction of facilities in connection with the Project.

Disputes arose between the Company and the Contractor concerning delays to the Package A and Package B works. The disputes were referred to arbitration ("the Works Package Arbitration"). The Company's position was that if, and to the extent that, it was liable to pay additional sums to the Contractor as a result of the Third Party's late issue of IFC drawings then the Company would seek to pass on those claims to the Third Party.

The Company approached Secretariat Consulting Pte Ltd ("SCL"), based in Singapore, with a view to engaging it to provide delay analysis expert services

in connection with the Works Package Arbitration. On 15 March 2019, the Company and SCL signed a confidentiality agreement. By a letter dated 13 May 2019, the Company engaged SCL to provide delay analysis expert services in connection with the Works Package Arbitration and on 26 May 2019, a formal letter of instruction was issued. The delay expert in question was K. K started work on the Works Package Arbitration from about June 2019 and at the time of the High Court case had invoiced approximately US\$ 700,000 for the work carried out.

Further disputes as to payment and delay arose between the Company and the Third Party and in the summer of 2019 those disputes were referred to a second arbitration in London by the Third Party ("the EPCM Arbitration").

In October 2019, Secretariat International UK Ltd ("SIUL") was approached by the Third Party to provide quantum and delay analysis expert services in connection with the EPCM Arbitration. The conflict check revealed the engagement of SCL by the Company. Accordingly, SCL wrote to the Company explaining that it was a European office that had been approached, as distinct from the Singapore office carrying out the services for the Works Package Arbitration. Further, that the parts of the Project under consideration would be different. SCL explained that they did not believe there was a strict legal conflict and could manage the matter with physical and electronic separation between the teams. The proposed quantum expert from the European office was M. Some discussion ensued between the Company and SCL without clear conclusion.

In February 2020, solicitors for the Company and the Third Party entered into discussions in relation to the scope of issues in the EPCM Arbitration. As a part of these discussions, the Third Party's solicitor indicated that the Third Party was in the process of instructing M as its quantum expert. The Company raised the fact that they had engaged K and intended for K to work on the EPCM Arbitration. The Company reserved its right to challenge the Third Party's expert appointment and asked that the appointment be suspended pending a more thorough consideration of the issue by the Company. The Third Party refused on the basis that there was no real conflict given the difference in discipline and location of K and M and the confidential information barriers in place within the expert witness firm.

On 5 March 2020, the Company wrote to K stating that they would like to expand the scope of K's instructions to include expert

witness services in the EPCM Arbitration. On 10 March 2020, the Third Party wrote to the tribunal in the EPCM Arbitration to confirm that M had been engaged as the Third Party's quantum expert and was already working. On 12 March 2020, the Company wrote to SCL to say that there was a conflict which could give rise to a risk that SIUL might use the Company's confidential information.

On 19 March 2020, Secretariat Advisors LLC ("SAL") responded to say that there was no conflict and no risk of confidential information being disclosed, and dealt in detail with barriers between K and his team and rest of the Secretariat companies.

On 20 March 2020, the Company issued an application to injunct SCL, SIUL and SAL against for acting for the Third Party. The injunction was granted and the trial judge held that independent experts engaged in arbitration or litigation proceedings owed a fiduciary duty to their clients and if M was to act for the Third Party this would be a breach of that duty.

SCL, SIUL and SAL appealed.

Issues and findings

Did SCL, SIUL and SAL owe a fiduciary duty of loyalty to the Company?

Not necessarily. The imposition of such a duty is not inconsistent with the expert's duty to the court or the tribunal but given the ramifications of the imposition of such a duty the court was reluctant to impose that duty unless it was necessary for the disposition of the appeal, which in this case it was not. The matter was left that such a duty may arise depending on the circumstances.

If not, did SCL owe a contractual duty to the respondent to avoid conflicts of interest and was that duty owed by other Secretariat entities as well?

Under the terms of SCL's retainer, it owed a clear contractual duty to avoid conflicts of interest from May 2019 onwards. This duty applied to all Secretariat entities.

Was there a conflict of interest in this case?

Yes.

Commentary

As noted by the Court of Appeal, the subject matter of this case is new law and while this appeal resulted in the same

outcome as the trial at first instance, the rationale of the Court of Appeal differed to that of the trial judge.

The trial judge found a fiduciary duty to exist on the part of the Secretariat companies to the Company and had imposed the injunction against providing services as a result of that finding. The Court of Appeal was "reluctant" to impose such a duty on SCL, although it

did not rule out that such a duty could be imposed on an expert.

Instead the Court of Appeal focused on the contractual relationship between the parties and found that the contractual undertakings given by SCL were enough to bind the Secretariat companies to having agreed to avoid conflicts of interest and that there had been a clear breach of this term.

Coulson LJ in his judgment went on to suggest that this outcome might not always be the case depending on the contractual provisions by the parties. This aligns with his comments as to whether or not a fiduciary duty might be imposed which he also linked to the contractual relationship between the expert and its client.

Section 9 Arbitration Act 1996 – Stay of proceedings

Surrey County Council v Suez Recycling and Recovery Surrey Ltd

Technology and Construction Court; Before Mr Alexander Nissen QC (sitting as a Judge of the High Court); Judgment delivered 16 July 2021

The facts

On 22 June 1999, Surrey County Council ("Surrey CC") entered into a Waste Disposal Project Agreement ("WDPA") with Suez Recycling and Recovery Surrey Ltd ("Suez"). The WDPA was a long term waste disposal PFI contract due to last 25 years with the stated objective of securing the most economically advantageous long-term solution for the disposal of all waste by Suez for Surrey CC. Pursuant to the WDPA, Surrey CC was to be responsible for waste collection and delivery, and Suez was to run the recycling centres, waste transfer stations, subcontract haulage, materials recycling, food waste, black bag and

green waste disposal. Part of the works provided for under the WDPAs included the development, construction and operation of two mass-burn energy from waste facilities.

The WDPAs provided for certain types of identified disputes to be referred to final and binding expert determination pursuant to cl 51 of the WDPAs ("Clause 51 Disputes"). Disputes not within the ambit of cl 51 were to be determined in accordance with cl 52 which stated that any dispute arising out of or in connection with the WDPAs, not being a Clause 51 Dispute, was to be resolved initially by conciliation and then by LCIA arbitration. cl 63 of the WDPAs went on to say that the law of the contract was the law of England and that the parties submitted to the exclusive jurisdiction of the courts of England and Wales.

Due to planning difficulties, Surrey and Suez agreed to alter the strategy of building mass energy from waste facilities and instead agreed to adopt an approach using smaller facilities. Working with Suez, Surrey CC concluded that a gasification process delivered within the existing WDPAs would be the most beneficial overall solution. This led to a plan to upgrade an existing waste facility within the WDPAs which became known as EcoPark at Charlton Lane.

The parties entered into three Deeds of Variation to the WDPAs as a result of this change in strategy. The WDPAs remained in full force and effect but was to be read and understood subject to the new provisions applying to it as set out in the Deeds. The second and third Deeds of Variation (referred to in the litigation as "DOV1" and "DOV2" respectively) were made by reference to the EcoPark solution, although the creation of the EcoPark and its construction and development fell to be implemented and operated within the overarching machinery of the WDPAs.

In respect of disputes, cl 13 of DOV1 and cl 15 of DOV2 were identical and stated that the courts of England had exclusive jurisdiction in relation to the Deed and any contractual or non-contractual obligations arising from or connected with the Deed together with any claim, dispute or difference concerning the Deed and any matter arising therefrom. Further, that each party irrevocably waived any right to object to an action being brought in the courts or to claim the courts did not have jurisdiction. The first Deed contained similar terms but was slightly narrower in its ambit in that it did not refer to contractual and non-contractual obligations.

A dispute arose between the parties in relation to the EcoPark works. On 17 September 2019, Surrey CC notified Suez of a dispute under cl 51 of the WDPAs. On 23 September 2019, Suez responded contending that the notice was not valid and that the dispute was suitable for resolution by arbitration under cl 52.

On 10 December 2020, Surrey CC's solicitors issued a Pre-Action Protocol letter of claim to Suez which asserted a claim arising out of the WDPAs as amended by DOV1 and DOV2. The letter set out a dispute concerning the requirements for acceptance, whether the Target Facility Date had passed and whether, in light of the history, Surrey CC was entitled to issue a Notice of Termination. Surrey CC expressed its disagreement with the proposed reference by Suez to arbitration and asserted that the courts had jurisdiction over the dispute by reference to cl 15 of DOV2. Surrey CC contended that the choice of forum in cl 15 was intended to "supersede" the previous choice of arbitration in the WDPAs and agreement to litigation was invited.

On 20 January 2021, Suez's solicitors wrote to Surrey CC's solicitors, disputing the jurisdiction of the courts and the application of cl 15 of DOV2 to the identified dispute. On 29 January 2021, Suez issued a letter of response to the letter of claim on a without prejudice basis.

On 24 March 2021, Surrey CC issued proceedings. Suez acknowledged service stating its intention to dispute jurisdiction and on 22 April 2021 Suez issued an application for a stay of the proceedings pursuant to s9 of the Arbitration Act 1996 ("the AA 1996").

Suez contended that the proceedings were subject to the arbitration provisions contained in cl 52 of the WDPAs which remained applicable. Surrey contended that whilst disputes arising within the original scope of the WDPAs were still subject to arbitration pursuant to cl 52 of the WDPAs, disputes relating to the EcoPark were subject to cl 15 of DOV2 and therefore were to be litigated.

Issues and findings

Did the provisions of DOV2 mean that the parties had agreed to litigate the dispute rather than refer the dispute to arbitration?

No. The proceedings should be stayed pursuant to s9 of the AA 1996.

Commentary

A series of Deeds of Variation with, on the face of it, jurisdiction clauses that contradicted the underlying contract gave rise in this case to the claim by Surrey CC that the matters in dispute were to be litigated rather than referred to arbitration. Following a lengthy consideration of the case law, the Judge set out four principles at para 77 of his judgment.

These principles can be summarised as follows. First, that while the exercise is ultimately one of routine construction, where possible the court should strive to give effect to an arbitration clause in the presence of a competing jurisdiction clause. Secondly, unless expressly and clearly stated otherwise there is a strong presumption that the parties are assumed to have agreed on a single tribunal for the determination of all their disputes. Dispute resolution clauses require certainty. Thirdly, where there are two agreements each containing different provisions for dispute resolution, the outcome may depend on the nature of the second agreement and its relationship to the first. Finally, where a contract contains a hierarchy or conflicts clause, there should be no predisposition to find or not find a conflict between two clauses. The ordinary rules of construction should first be deployed and only if those result in a conclusion that the two provisions are irreconcilable is recourse to the conflicts clause required.

Applying these principles to the case, the judge concluded that the arbitration provision in the WDPAs applied and the litigation was therefore stayed to arbitration.

NEC3 – Adjudication – Notice of Dissatisfaction – CPR Part 11 (Court's jurisdiction)

Transport for Greater Manchester v Kier Construction Ltd (t/a Kier Construction – Northern)

Technology and Construction Court; Before Mrs Justice O'Farrell DBE; Judgment delivered 31 March 2021

The facts

In or around April 2015, Transport for

Greater Manchester ("TfGM") engaged Kier Construction Ltd ("Kier") to design and build a bus interchange in Bolton. The contract was in the NEC3 standard form ("the Contract").

Clause 13.1 of the Contract provided for notifications to be communicated in a way which could be read, copied and recorded. Clause 13.2 of the Contract stated that a communication had effect when received at the last address notified by the recipient for receiving communications or, if none was notified, the address of the recipient in the Contract Data. Clause 13.7 stated that a notification was communicated separately from other communications.

The Works Information Clause WI 920 stated that all communications were to be undertaken using the project extranet "NEC3 Change Management Tool".

Clause W2.3 of the Contract provided for a notice of dissatisfaction to be given within four weeks of an adjudicator's decision, failing which the adjudicator's decision would be final and binding. Clause W2.4 provided that a dispute could not be referred to a tribunal (court) without first being referred to an adjudicator.

On 23 September 2019, Kier commenced an adjudication seeking a decision that the Completion Date be extended to 11 August 2017 and repayment of delay damages in the sum of approximately £600,000. In the adjudication, the parties were represented by their instructed solicitors.

On 25 November 2019, the adjudicator issued his decision determining that Kier was entitled to the full extension of time sought and monies claimed plus interest.

On 29 November 2019, TfGM's solicitors wrote to Kier's solicitors referring to the adjudicator's decision, stating that it was clear that the adjudicator had erred in law but that without prejudice to TfGM's right and intention to seek formal resolution to reverse the outcome of the decision, TfGM was prepared to comply with the decision on a provisional basis. A request was made that invoices be raised in order that payment could be processed.

Payment was made by TfGM. On 3 December 2019, TfGM emailed Kier stating that the payments had been made on a provisional basis only and without prejudice to TfGM's right and intent to seek formal resolution to reverse the decision.

On 12 August 2020, TfGM commenced Part 8 proceedings, seeking declarations that the Adjudicator erred in law in determining that Kier was entitled to the extensions of time claimed and claiming repayment of the sums awarded in the adjudication.

On 9 September 2020, Kier issued an application pursuant to CPR Part 11 (disputing the court's jurisdiction) seeking an order declaring that the Court had no jurisdiction to hear the Claim and setting aside the Claim Form. Kier argued that TfGM had failed to give a valid notice of dissatisfaction within four weeks of the adjudicator's decision and therefore the result was that the decision had become final and binding.

TfGM relied on the letter dated 29 November 2019 or the email dated 3 December 2019 as notice of dissatisfaction. Kier argued that these communications did not constitute valid notices of dissatisfaction either because they were not communicated to the correct address or in the correct way or because they did not properly identify the matters with which TfGM were dissatisfied.

Issues and findings

Had a valid notice of dissatisfaction been served?

Yes, the letter dated 29 November 2019 was a valid notice of dissatisfaction. The email of 3 December 2019 would not have constituted a valid notice of dissatisfaction.

Commentary

This judgment provides guidance on both form and substance of notices of dissatisfaction under the NEC3 standard form.

In relation to form, the judge made clear that the communications provisions (which had been amended through the Works Information) meant that the default position for communications was through the contract management document exchange tool, but that in the case of the adjudication, communications between solicitors had been notified and accepted, providing validity to TfGM's solicitors' letter dated 29 November 2019.

As to substance, the judge rejected Kier's argument that the notice of dissatisfaction was not detailed enough. In considering Clause W2.4, the judge stated that it did not stipulate the form of words to be used

or the level of detail required in the notice of dissatisfaction. The judge held that the purpose of the notice was to inform the other party within a specified, limited period of time that the adjudication decision was not accepted as final and binding. In this regard, a valid notice would have to be clear and unambiguous so as to put the other party on notice that the decision was disputed but did not have to descend to detail to explain or set out the grounds on which it was disputed.



Fenwick Elliott's Top 15 cases of 1996

In the first Fenwick Elliott Summer Review, we identified the 15 most important cases from 1995 to 1996. We thought it might be interesting to summarise them here. You will see that, strictly, there are 14, although number 15 is perhaps the most important development: the Housing Grants Construction & Regeneration Bill.

1. Abbey National Mortgages v Key Surveyors [1996] 1 WLR 1534 concerned an application to appoint 29 expert witnesses for 29 separate properties allegedly negligently valued in various parts of the country, on the basis that local experience was necessary. The Court of Appeal upheld the trial judge's appointment of a single Court Expert and the limitation of one expert for each party.

2. AEG v Translift Monorail [1996] CLC 265 concerned the fitness for purpose of amplifiers for a thrill ride, in which warning lights came on during testing on the steepest uphill section of the ride. The Court held the amplifier was not fit for purpose, even though it was capable of performing the required purpose by swapping a fuse.

3. Alfred McAlpine Homes v Property and Land [1996] 47 ConLR 74 concerned a contractor's claim under JCT80 for loss and expense arising from employer's instruction to postpone the works. The Court held the contractor is entitled to overheads and profits, but the loss cannot be quantified on notional hire rates since it must be actual loss.

4. B Mullan v Ross [1996] N.I. 618 concerns a claim by a contractor's liquidator that Employer's payments to an unpaid subcontractor violated *pari passu* under Insolvency (Northern Ireland) Order 1987. The Court held the employer was not entitled to make direct payments to the subcontractor.

5. Birse Construction Limited v Haiste Ltd and Others [1996] 76 BLR 26 concerned an engineer's liability for "the same damage" as the subcontractor under the *Civil Liability (Contribution) Act 1978* for the contractor's loss rebuilding

a leaking reservoir constructed under a Design and Build Contract. The Court found the employer's loss (disruption during reservoir reconstruction) was not the same as the contractor's (cost of rebuilding new reservoir), and the contribution claim must be to the same party.

6. Balfour Beatty v Docklands Light Railway [1996] 78 BLR 42 concerned a contractor's claim for prolongation costs beyond those certified by the employer under ICE (5th Edition) where the Standard Conditions omitted the disputes clause and replaced the engineer with an employer's representative. The Court held that, where the employer's representative is the same legal person as the employer, it is under an implied duty to act honestly, fairly and reasonably.

7. Bristol & West Building Society v Christie and Others [1996] EGCS 53 concerned a solicitor's claim against valuers under *Civil Liability (Contribution) Act 1978*, from their loss settling the Building Society's claim in full for a negligent valuation in respect of a loan. The Court determined a 50/50 split of the Building Society's recoverable amount (not the agreed settlement figure), excluding sums recoverable under the borrower's insurance policy.

8. Bowmer and Kirkland v Wilson Bowden [1996] CILL 1157 concerned an application for interim payment into Court. The Court held a party is entitled to refer to a payment into Court for an interim payment application. A payment may reflect the odds of success or failure (not an expected outcome), but a "nuisance value" carries minimal weight.

9. Clarksteel v Birse Construction [1996] CILL 1136 concerned the contractor's supply of free issue materials for pipe laying works under the standard FCEC Blue form of subcontract, which included a Schedule for "extra-over" rates where external pipe welds exceeded the relevant British Standard. The Court held the subcontractor was not entitled to damages or a quantum meruit, as the "extra-over" rate is to be treated like a liquidated damages clause.

10. Colt International v Tarmac Construction [1996] CILL 1145 concerned the application for removal of a Chartered Surveyor as Arbitrator for misconduct for not appointing Queen's Counsel for a discovery application involving a waiver of privilege, unless the costs were borne by the Applicant. The Court held the application was groundless, but an

arbitrator is entitled to assistance from solicitors, and counsel for questions to be put to a legal advisor.

11. John Barker v London Portland Hotel [1996] 83 BLR 31 concerned an arbitrator's decision regarding an acceleration agreement after delay to refurbishment works under JCT80. The Court held that the arbitrator was under an implied obligation to act lawfully and fairly. Where the arbitration machinery broke down to such an extent (i.e. the arbitrator made an impressionistic assessment instead of a logical analysis of delay), the Court would substitute its own assessment.

12. Havant BC v South Coast Shipping [1996] CILL 1146 concerned a variation to an ICE Contract to perform potentially noisy work from 6:00am to 11:00pm, after a local resident obtained an injunction restraining the subcontractors making noise outside of 9:00am-5:00pm. The Court held that the contractor was entitled to a variation, as it was required to identify the method pre-contract, so the employer bears the additional costs if the method become unworkable.

13. Hoppe v Titman [1996] 1 W.L.R. 841 concerns claim of professional negligence against an architect following the settlement of an earlier claim where a set off arising from negligence was raised as a defence (i.e. not a counterclaim) to the payment of architectural fees. The Court held the negligence claim was not *res judicata*, so could be pursued.

14. Vascroft v Seaboard [1996] 78 BLR 132 concerned the subcontractor's failure to give notice of Practical Completion in accordance with an amended DOM/2. The Court held Practical Completion is deemed from the date of completion of the main contract works (not treated as a matter of fact), on the basis that the subcontractor's failure to give notice of Practical Completion should not place him in a better position than the main contractor dissenting from the notice of Practical Completion.

15. Housing Grants Construction and Regeneration Bill, which did not become law until after publication. The Act gave any party to a construction contract a right to refer disputes to a quick, impartial and investigative adjudication procedure. A payer would have to give the contractor notice, with reasons, if they wished to set off against the payments due and pay when paid clauses became unenforceable, save in the case of actual ultimate payer insolvency.

Simon Tolson's Top 15 cases of 2021

By way of comparison between 1996 and 2021, we asked Fenwick Elliott's Senior Partner, Simon Tolson, to highlight the 15 cases he considers to be seminal:

1. Balfour Beatty Regional Construction Ltd v Van Elle Ltd [2021] EWHC 794 (TCC) At issue in this case was which terms governed liability for works carried out prior to the execution of a contract. Waksman J in the TCC held that work carried out before a formal sub-contract was executed was, nevertheless, subject to the terms of that sub-contract.

2. Multiplex Construction Europe Ltd v (1) Bathgate Realisations Civil Engineering Ltd (in administration) (2) BRM Construction LLC (3) Argo Global Syndicate 1200 where the TCC considered the scope of a professional design checker's duty of care.

3. JSM Construction Ltd v Western Power Distribution (West Midlands) Plc, [2020] EWHC 3583 (TCC) the TCC (Pepperall J) considered in a summary judgment application whether the absence of a final account provision rendered a contractual payment mechanism inadequate. This case strongly indicates that the absence of a final account provision is not synonymous with a contractual payment mechanism being deemed "inadequate".

4. Optimus Build Ltd v Southall & McManus [2020] EWHC 3389 (TCC) – a cautionary tale on sub-optimal termination. Terminating a contract for repudiatory breach – the TCC highlights again the risks and dangers of wrongful termination.

5. Naylor and others v Roamquest Ltd and another [2021] EWHC 567 (TCC) considered an application to strike out parts of a cladding claim on the grounds that they were insufficiently particularised. The case, which emphasises the importance of proper pleading, will be of particular interest to parties which are, or may become, involved in such claims.

6. Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC), where the TCC considered issues concerning the validity of payment notices, as well as questions of natural justice and the severability of adjudication decisions. HHJ Eyre QC declared that an adjudicator's decision was not enforceable due to a breach of the rules of natural justice and refused to sever the decision. He also declared that the employer's payment notice valuing the interim application at £1 was not valid.

7. Secretariat Consulting PTW Ltd & Ors v A Company [2021] EWCA Civ 6 where the Court of Appeal unanimously upheld the decision of TCC in *A v B* [2020] EWHC 809, granting an injunction to restrain the UK branch of the claimant group from acting as an expert witness for a third party against an existing client of its Singapore branch in related arbitrations.

8. Toppan Holdings Ltd and Abbey Health Care (Mill Hill) Ltd v Simply Construct (UK) LLP [2021] EWHC 2110 (TCC) 27 July 2021. All about the right to adjudicate – when is a collateral warranty a construction contract? Martin Bowdery QC (sitting as a deputy High Court Judge) determined that the collateral warranty was not a construction contract within the meaning of the HGCRA and, therefore, that the adjudicator did not have jurisdiction.

9. Marbank Construction Ltd v G&D Brickwork Contractors Ltd [2021] EWHC 1985 (TCC) 28 June 2021 O'Farrell J. Injunction to restrain adjudication. The Court again re-iterated its reluctance to interfere with, or prevent, the adjudication of construction disputes maintaining the long-standing principle that it was not appropriate for the court to interfere in the adjudication process where the adjudication had not been shown to be unreasonable and oppressive.

10. Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC), where the TCC considered the construction and enforceability of a liquidated damages clause where the employer had taken partial possession. It was found that an employer was entitled to claim the full amount of liquidated damages payable upon contractor delay, notwithstanding the fact that they had taken partial possession of the contractor's works. The decision, which may come as something of a surprise to contractors and employers alike, demonstrates that, ultimately, all depends on the wording of an individual contract.

11. Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29, where the Supreme Court unanimously overturning the Court of Appeal's earlier decision relating to liquidated damages ("LADs") where a contract has been terminated. It provided welcome clarity in relation to the drafting and interpretation of LAD clauses in construction, commercial and technology contracts. The judgment also dealt with the relationship between liquidated damages clauses and caps on liability.

12. Dana UK AXLE Ltd v Freudenberg FST GMBH [2021] EWHC 1413 (TCC), where the TCC considered an application to exclude technical expert evidence midway through a trial!

13. Mott Macdonald Ltd v Trant Engineering Ltd [2021] EWHC 754, where the TCC considered whether an exclusion clause required exceptional wording in order to exclude liability for fundamental, deliberate and wilful breaches.

14. Aqua Leisure International Ltd v Benchmark Leisure Ltd [2020] EWHC 3511 where the TCC considered an application for summary judgment to enforce an adjudicator's decision in circumstances where there was an alleged determination "by agreement".

15. Global Switch Estates 1 Ltd v Sudlows Ltd, the Technology and Construction Court [2020] EWHC 3314 where the TCC dismissed an application for summary judgment to enforce an adjudicator's decision due to material breaches of the rules of natural justice.



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