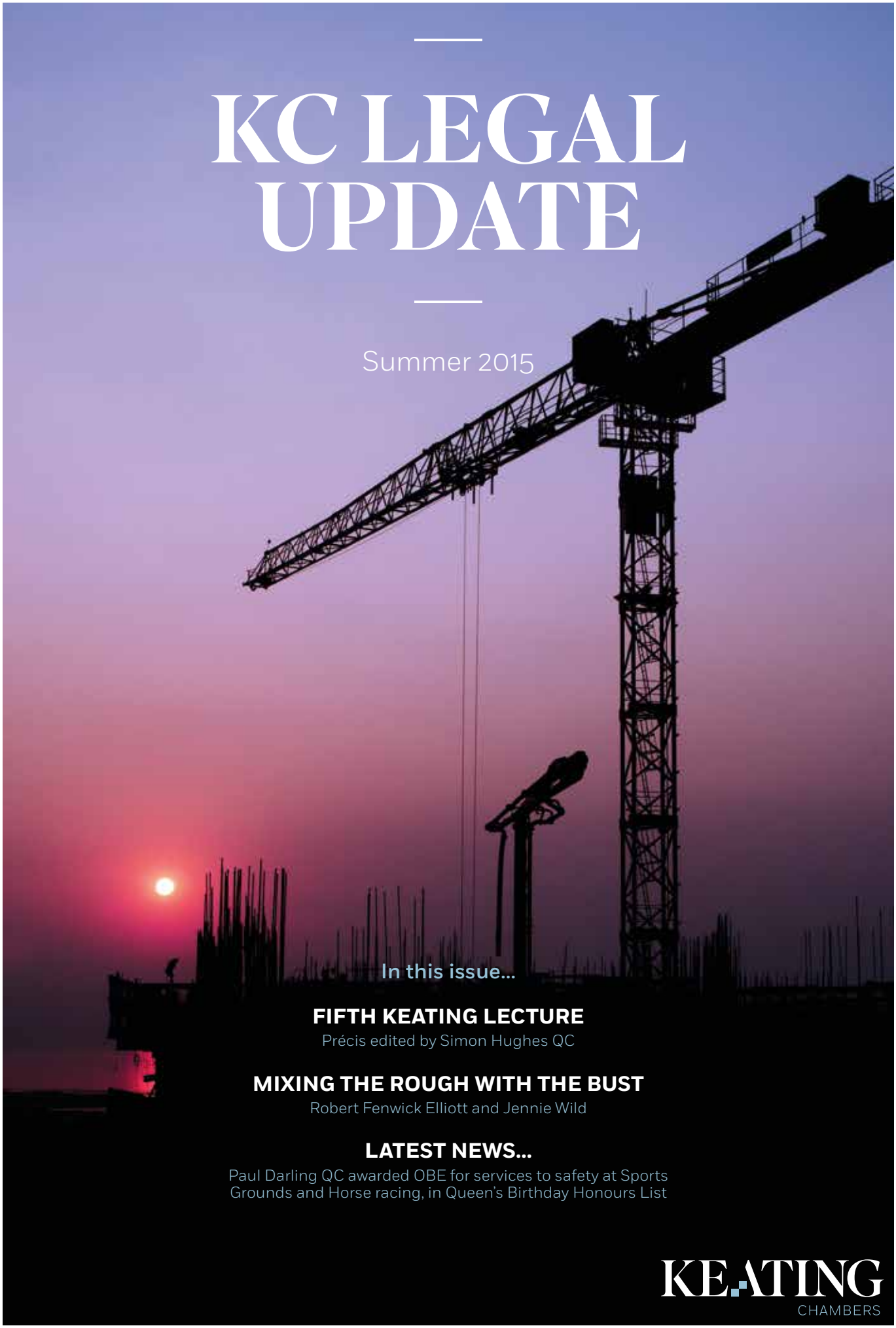

KC LEGAL UPDATE

Summer 2015

In this issue...

KEATING CHAMBERS

WELCOME

TO THE SUMMER 2015 EDITION OF KC LEGAL UPDATE

The new livery of KC Legal Update (on which we welcome feedback) prompts reflection on change.

Most obviously, this page carries news of a change in leadership, with the announcement of Paul Darling QC's term as Head of Chambers ending in October, after five great years in that role. The news of Paul's OBE has delighted his many friends within and outwith Keating Chambers.

Change is not at all an alien concept at Keating Chambers. Some more senior readers may recall its earlier home and name at 11 King's Bench Walk and the move in 1984 to Essex Street. Change in the form of growth has marked the period since 2002 in 15 Essex Street; the inside door at 11 KBW had 19 names on it – the last being that of Peter Coulson – whereas the equivalent list in Reception today has 57 members of Chambers. The figure, which represents a tripling since coming to Essex Street, includes no fewer than 29 silks and does not take account of door tenants in Australia, Hong Kong, Ireland and Singapore. But this Summer Issue is also a reminder of constants through the changes. That constancy is firmly grounded in the name of Keating. Contained in these pages is a version, edited by Simon Hughes QC, of the Keating Lecture, delivered by a most distinguished alumnus in the Master of the Rolls. Paul offers personal memories of Donald Keating himself and some timeless lessons learned.

The selection of articles in this Issue reflects both tradition and change. Dipping into John Uff QC's 'Keating Chambers: A Short History', one learns that for construction lawyers in the 1950s "such cases as there were tended to involve local authorities". "Digging and filling: an everlasting liability?" by Gaynor Chambers considers the questions of limitation rules for road and street works, a very current topic in a traditional core subject area.

John's chapter "Chambers at the Millennium" gives a snap-shot of Keating Chambers' work in 2000 and there were plenty of examples back then of international arbitration engagements, both for advocates and as members of tribunals. In this issue, Jane Lemon QC, elevated to silk earlier this year, takes a fresh view of the task of "Choosing the right arbitrator" in the light of international guidelines and institutional rules on independence and impartiality, as well as other essential attributes.

Mandatory management of litigation costs and specifically costs budgets were hardly recognised in former times but in the 'post-Jackson' era are amongst the most rapidly-developing areas of procedure. Indeed, it can be said that the law is still literally being made and Adam Constable QC , who led Richard Coplin in the *CIP Properties v Galliford Try* litigation, sets out the current position in his article.

Dealing with change is a fact of life for those who work in construction and in construction law; the challenge for us is to maintain and enhance the core strengths and core values associated with the name 'Keating'.

Professor Anthony Lavers
Director of Research & Professional Development

My time as Head of Keating Chambers comes to an end in October. The role, which is honorary, is demanding and time consuming. Happily, though, barristers are reasonable, courteous and farsighted at all times. Otherwise, the job would have been even more difficult. I admit that I am looking forward to the extra time that I will be able to devote to practise.

The key thing for me has been the honour of being invited to lead what I still regard as Donald's Chambers. With that in mind, I would like to reflect on the Fifth Donald Keating Lecture given by Lord Dyson MR, a former member of Chambers and an adored and admired protégé of Donald. Over the years and since Donald's untimely death, the Keating Lecture has been delivered by a band of very distinguished speakers – Sir Michael Kerr, Lord Phillips, then MR, Lord Neuberger, then MR and Lord Hoffmann. And now Lord Dyson.

The stellar quality of the speaker list is, of course, a tribute to Donald's importance and reputation. Lord Dyson's address was fascinating, chronicling the, it was clear, considerable contribution of construction law cases to the commercial law.

It was also a very enjoyable occasion, with many members of the Keating family present, as well as old friends of Chambers. It was a chance to remember some of the wonderful stories about the remarkable character that was Donald Keating. I was particularly pleased that Donald's granddaughter, Lily Friend, now doing pupillage after topping her year at Donald's Inn, Lincoln's, was with us. She has Donald's wig, presented to her by Ros, Donald's widow, in a ceremony that no one who witnessed it will forget.

The occasion caused me to reflect on Donald and what I learnt from him. I think I learnt three things from Donald:

- First, whilst the law is important, never forget the facts, which often matter more.
- Second. If you are arguing about a contract, particularly a standard form, never think that you can remember what is in it. Re-read it every time.
- Third and most importantly, always find the real point in a case and then go for it.

When I stand down, my pride at having been Head of Donald's Chambers will be complete.

Paul Darling OBE QC

CONTENTS

FIFTH KEATING LECTURE

A PRECIS OF THE FIFTH KEATING LECTURE GIVEN BY THE RT. HON. LORD DYSON, MR
The Contribution of Construction Law to the Development of Common Law

Edited by Simon Hughes QC

Lord Dyson's lecture has been reported in several locations; the official text is to be found at https://www.judiciary.gov.uk/announcements/speech-by-master-of-the-rolls-keating-lecture-2015/

"... I shall seek to dispel the idea that construction cases are somehow different and apart from the general law and that they only concern Scott Schedules, lists of defects and delay claims. On the contrary, I hope to demonstrate the wide range of issues that arise in construction cases as in any other area of the law and mention a few of the many important cases in the construction field that have found their way into the general law reports.

... An issue that commonly arises in construction cases, as in contract cases more generally, is the question of whether a contract was formed at all. Construction contracts more than many tend to be complex and detailed. Negotiations can drag on interminably. Work often starts before all the details have been sorted out. This may be done pursuant to a letter of intent which states that there is an intention to enter into contractual negotiations; or pursuant to an agreement which is said to be "subject to contract". Sometimes, work starts pursuant to authority for work to be carried out up to a specified limit. Difficult issues may arise as to whether and, if so, on what terms a contract has been created where the project proceeds without formal documentation being drawn up and a dispute arises mid-way through performance.

I hope to demonstrate the wide range of issues that arise in construction cases as in any other area of the law and mention a few of the many important cases in the construction field that have found their way into the general law reports.

In 1974, I appeared before Lord Denning MR, Lord Diplock and Lord Justice Lawton in *Courtney and Fairbairn v Tolaini Brothers (Hotels) Ltd* [1975] [1] WLR 297. Developers had approached my client, a contractor, seeking an introduction to a financier to fund a project in Hertfordshire. The contractor wrote to the developer stating it was prepared to make such an introduction but asked whether, if the introduction led to a financial arrangement, the developer would negotiate fair and reasonable sums with the contractor for the construction works, based on agreed estimates of net cost and overheads with a margin for profit of 5%. The developer wrote agreeing to the contractor's proposal, the contractor introduced the developer to the financier and the developer obtained the financial backing it needed for the development. However, after failing to agree on the cost of the construction works, the developer engaged other contractors. The contractor claimed that its letter and the developer's response gave rise to a binding and enforceable contract.

Overturning the trial judge's conclusion that a contract had been formed by the letters, Lord Denning MR, who gave the lead judgment, pointed to a lack of agreement on the price or any method by which the price was to be calculated. He said that an agreement to "negotiate" fair and reasonable contract sums based on estimates that were yet to be agreed could not be enforced by the court.

In a statement that is of universal application to the general law of contract, Lord Denning MR commented that the price: [2]

...is so essential a term that there is no contract unless the price is agreed or there is an agreed method of ascertaining it, not dependent on the negotiations of the two parties themselves...

On a question on which there was scant authority at the time, Lord Denning dismissed the suggestion, and the tentative opinion by Lord Wright some 40 years earlier in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, 515, that a basis on which the claim could succeed was that there was an enforceable contract to negotiate. He stated: [3]

If the law does not recognise a contract to enter into a contract ... it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or, if successful, what the result would be.

Lord Diplock said [4] "*the dictum, for it is no more, of Lord Wright... though an attractive theory, should in my view be regarded as bad law*". I recall this case well after 40 years. The combination of Lord Denning and Lord Diplock was fairly terrifying for a young barrister. They dispatched my appeal in a couple of hours in ex tempore judgments. Lord Diplock's was particularly withering. And I lost a case which Donald Keating had won at first instance.

The fact that this was a construction case was irrelevant. The important point is that it was undoubtedly a case of general significance for the general law of contract. The holding that an agreement to negotiate cannot constitute a legally enforceable contract was subsequently applied in a number of first instance decisions.[5] It was ultimately approved by the House of Lords in *Walford v Miles* [1992] 2 AC 128. Whilst *Walford v Miles* is undoubtedly the better-known case on the topic, the reasoning expressed in a construction dispute had been influential in shaping this area of the law.

A question which often arises in commercial disputes where parties have started to perform before a formal contract has been executed is whether they have entered into contractual relations at all. Quite often A starts work pursuant to a letter of intent from B. It is by no means uncommon, for example, if things go awry, for A to walk away. In that situation, (where allegations of repudiation tend to abound) it is crucial to determine whether the parties made a contract and if so on what terms. This problem often occurs in the world of building and engineering disputes. The inherently complex nature of building and engineering projects is such that the problem is particularly likely to occur in relation to them.

The applicable principles are now well known. They have been stated in a number of leading cases, many of which have been construction cases. A now fairly elderly authority is the construction case of *Atomic Power Construction v Trollope and Colls* [1963] 1 WLR 333. Megaw J said that the defendant had to establish

1 At p300H
2 At p301B-C
3 At p301H.
4 At p302 B.
5 *Albion Sugar Co Ltd v Williams Tankers Ltd* [1977] 2 Lloyd's Rep 457; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1981] 2 Lloyd's Rep 425; Trees Ltd v Cripps (1983) 267 EG 596; *Nile Co for the Export of Agricultural Crops v H & J M Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep 555; *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep 547; and *Star Steamship Society v Beogradska Plovidba* [1988] 2 Lloyd's Rep 583.

The fifth Keating Lecture in memory of Donald Keating QC, was given by the Rt. Hon. Lord Dyson, MR on 25th March in central London, to an invited audience of clients, colleagues and friends of Keating Chambers.

"not only that the parties were ad idem on all terms which they then regarded as being requisite for a contract, but also that they had not omitted to agree any term which was, in law, essential to be agreed in order to make the contract commercially workable".

I think today's judges could strive a little harder to emulate this commendably succinct statement of the relevant principles. These were also helpfully summarised by Lloyd LJ in the Court of Appeal in *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at p 619, which was cited with approval by the Supreme Court in the construction case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 1 WLR 753. RTS is a typical case of its kind. The claimant negotiated with the defendant, a dairy product supplier, to design and install two production lines in one of the defendant's factories. The defendant sent the claimant a letter of intent setting out a draft contract, providing the price, completion date and standard terms. It was common ground that by the letter of intent the parties formed a limited contract to enable work to commence, but the agreement was subject to a formal contract being concluded and would come to an end after four weeks. The parties did not sign or execute the contract, yet they proceeded with the project. They later re-negotiated the proposed terms, but never executed a formal contract. Following completion of the work, and after the claimant had received 70% of the price stated in the letter of intent, a dispute arose as to whether the equipment supplied by the claimant complied with the agreed specification. The claimant sought the remaining sums from the defendant. It was in these circumstances that the court was asked to consider, as a preliminary issue, whether and if so on what basis a contract had arisen and on what terms.

As Lord Clarke noted, the relevant principles for determining whether a contract has been formed in such circumstances apply to all contracts, including construction contracts.[6]

Inevitably, the application of those principles is highly fact specific. Here, like in *Courtney & Fairbairn*, whether the parties had reached agreement on the price was highly influential in determining whether a contract had been concluded at all. Lord Clarke adopted the price as a form of yardstick, commenting: [7]

We agree with the judge that it is unrealistic to suppose that the parties did not intend to create legal relations. This can be tested by asking whether the price of £1,682,000 was agreed. Both parties accept that it was. If it was, as we see it, it must have formed part of a contract between the parties. Moreover, once it is accepted (as both parties now accept) that the LOI contract expired and was not revived, the contract containing the price must be contained in some agreement other than the LOI contract. If the price is to be a term binding on the parties, it cannot, at any rate on conventional principles, be a case of no contract…

I agree that, if the parties have not agreed the price (or a mechanism for determining the price), it is difficult to see how there can be a binding contract between them. But of course the corollary does not follow. There may be other essential terms without whose agreement there is no contract. The important point for present purposes, however, is that construction law cases have made a significant contribution to the development of this area of contract law.

Implied terms

Construction cases have also made a considerable contribution to the law of implied terms. I wish to briefly mention two: *Young & Marten v McManus Childs* [1969] 1 AC 454 and *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601.

The facts in *Young & Marten* were that a contractor required sub-contractors to use specified roofing tiles that could only be obtained from one manufacturer. Owing to faulty manufacture, the tiles had a latent defect that made them liable to break in frosty weather. The owners of a number of houses successfully sued the builders for the cost of reroofing; and the builders (McManus Childs) claimed an indemnity by way of damages from the roofing subcontractors (Young & Marten). The claim was heard by an experienced Official Referee, HHJ Norman Richards QC. The case eventually went to the House of Lords.

"… construction law cases have made a significant contribution to the development of this area of contract law."

Lord Reid said that there was not very much authority on the matter, so that it might be well first to consider it from first principles. He started by saying that no warranty ought to be implied in a contract unless it is in all the circumstances reasonable. Here we see straight away, at work the hand of one of the masters of the common law of the 20th century. He said that there were good reasons for implying a warranty against latent defects unless it was excluded by the terms of the contract. These were that, if the contractor's employer suffers loss by reason of the emergence of a latent defect, he will generally have no redress if he cannot recover damages from the contractor. But if he can recover damages, the contractor will generally not have to bear the loss: he will have bought the defective material from a seller who will be liable under the law of sale of goods because the material was not of merchantable quality.

So far, so good. But the particular problem in this case was that the tiles that had been specified were only made by one manufacturer. The contractor had to buy them from the manufacturer or from someone who bought from him. Did that make any difference? The House held that, whilst the sub-contractors did not warrant that the tiles were fit for purpose, the fact that the tiles had been specified by the contractor did not exclude the ordinary implied warranty of quality on the part of the subcontractors.

This was on the basis that the sub-contractor could claim against the manufacturer of the tiles creating a *"chain of liability from the employer who suffers the damage back to the author of the defect".* [8]

Of wider application, Lord Reid reasoned that where both the contractor and subcontractor knew at the time when the contract was made that the sole manufacturer of the materials would only sell on terms excluding the warranty of quality, it would be unreasonable to make the sub-contractor liable for latent defects and such a term would not be implied. [9] One can see that this decision was driven by policy considerations, based on their Lordships' assessment of what was reasonable.

The reasoning in *Young & Marten* has been applied further afield. For example, in *Rutherford v Seymour Pierce* [2010] IRLR 606, Coulson J rejected an employer's contention that it was not obliged to pay a bonus to an employee for the quarter before it dismissed him, on the basis that it was an implied term that he still had to be employed on the date of payment. In addition to the need for a term to be necessary or obvious before it would be implied, Coulson J held, relying on *Young & Marten:* [10]

Although these authorities and many others demonstrate that the emphasis must be on the necessity of the term, and not merely reasonableness, a term will not be implied unless it is equitable and reasonable.

On the facts, in addition to the term being neither necessary nor obvious, Coulson J held that such a term was "manifestly unreasonable" and so ought not to be implied.[11]

Whilst the idea that the concept of reasonableness is relevant to whether a term will be implied was well established,[12] it is perhaps no surprise that Coulson J, a former member of Keating Chambers, drew on the reasoning in a construction case to support his conclusion.

The second case I wish to mention, *Trollope & Colls Ltd,* is one in which two other well-known former members of Keating Chambers appeared, Donald Keating and Sir Anthony May. This is another important case in the development of the law on implied terms. It concerned whether a term could be implied into a building contract that the completion date for a third phase of a project should be read as amended by the addition of a particular extension of time to the first phase. If the terms of the contract were to be construed literally and no such term were to be implied, the period in which the third phase had to be completed would have been reduced from 30 to 16 weeks. Unusually, the contractors wanted the period to be reduced, as the employer was unable to nominate any sub-contractor that was prepared to assume an obligation to complete in 16 weeks, with the result that a new contract would have to be made at prevailing rates that were considerably higher than at the time of the original contract.

Having set out what he found to be a conflict of judicial opinion, Lord Pearson said this: [13]

…the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity,

6 At [48].
7 At [58].

8 Per Lord Reid at 466E
9 Per Lord Reid at 467B-C
10 At [17]

11 At [22]
12 See the authorities summarised in *Exxonmobil Sales and Supply Group v Texaco* [2003] EWHC 1964 Comm

13 At 609

"Construction disputes do not always relate to the physical construction of a building, bridge, railway, ship or oil rig. They often arise from the financial and insurance arrangements that make the projects possible."

there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended the term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.

It was this reasoning on which Lord Hoffmann relied in the later case of *AG of Belize v Belize Telecom* [2009] 1 WLR 1988 at para 19. After citing Trollope & Colls, Lord Hoffmann said this: [14]

The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority...

Drawing on *Trollope & Colls*, Lord Hoffmann concluded (in a passage that is commonly relied on by counsel): [15]

It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

I do not wish to suggest that *Trollope & Colls* caused a marked shift in the law of implied terms. But it did resolve a conflict of judicial opinion that had emerged on the question of whether, in deciding whether a term should be implied, the court decides according to what is fair and reasonable or according to what the parties must be taken to have agreed. It resolved it in favour of the latter approach. This is the approach that Lord Hoffmann supported emphatically. It is not surprising that he drew on *Trollope & Colls* in reaching his conclusion in the later case.

Contractual interpretation

In this whistle-stop tour, I move to the hugely important topic of contractual interpretation. Contracts are the cornerstone of commercial life. In principle, construction contracts are no different from any other commercial contracts. It is extraordinary how many cases are still being reported in the law reports in the 21st century on how to interpret a contract. I cannot help thinking that the great Lord Mansfield, who was perhaps the founding father of modern commercial law, would have been disappointed and probably astounded too.

I shall single out for mention two important decisions, one of the House of Lords and the other of the Supreme Court. Both involved construction contracts. They are both well known, although not for the fact that they were construction cases. *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101 concerned a dispute about the proper interpretation of a pricing formula in a contract for the development of a mixed commercial and residential development. After a comprehensive review of the law, Lord Hoffmann said: [16]

What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and it should be clear what a reasonable person would have understood the parties to have meant.

This decision reflects the important trend that rectification and interpretation are simply different aspects of the single task of interpreting a contract in its context, [17] rather than discrete principles. The House of Lords was also invited to overrule the long-standing rule that pre-contract negotiations are inadmissible as an aid to the proper interpretation of a contract. The House held that there was no clearly established case for departing from this exclusionary rule despite the superficially attractive argument in favour of doing so. This is an important decision, because a head of steam had been building to get rid of the rule.

14 At [19]

15 At [20]

16 At [25]

"It is extraordinary how many cases are still being reported in the law reports in the 21st century on how to interpret a contract."

The second case is *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900. It may be said that this was not a construction case at all. In fact, it was a shipbuilding contract and the case was heard at first instance in the Commercial Court. In essence, a shipbuilding contract is a construction contract. It is a contract for the supply of materials and carrying out of construction work. Construction disputes do not always relate to the physical construction of a building, bridge, railway, ship or oil rig. They often arise from the financial and insurance arrangements that make the projects possible.

Rainy Sky was one such case. It concerned the interpretation of six bonds issued by the defendant bank under six shipbuilding contracts. Each contract required the builder to refund the buyer with the full amount of all advance payments made in the event of the builder's insolvency. The Supreme Court was asked to consider whether this obligation was covered by the bonds, and in particular to decide the proper interpretation of the obligation to pay *"all such sums due to you under the contract"*. The buyers contended that *"such sums"* referred back to *"pre-delivery instalments"* mentioned in the first line of the paragraph, meaning that the builder's insolvency was covered. In contrast, the bank claimed *"such sums"* referred back to the sums mentioned in the previous paragraph, which did not include sums paid prior to insolvency of the builder. The issue for the Supreme Court was the role to be played by business common sense in determining what the parties meant.

Lord Clarke stated: [18]

If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other.

He held that, since both constructions were arguable,[19] and although the buyers did not advance a good reason for the inclusion of the previous paragraph of the bonds,[20] the buyers' construction was to be preferred because it was consistent with the commercial purpose of the bonds.[21]

This provides confirmation of the general shift away from "black letter law" to a more purposive approach to interpretation of contracts. It also provides a helpful steer for the court in circumstances where the arguments for both sides are very finely balanced.

Damages

Finally on contract law, I shall mention briefly two decisions in construction cases which contain important statements about damages. Many of you will be familiar with the case of *Sempra Metals Limited v Inland Revenue Commissioners* [2008] 1 AC 561 which established, amongst other things, that interest can be awarded at common law as damages for losses caused by late payment of a debt and that such losses were subject to the principles governing all claims for damages for breach of contract. This was not a construction case. But perhaps you might be surprised to learn that the same principles had been considered and distilled some time earlier in the construction case of *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1. Here a dispute arose as to the amount of direct loss and expense to which a contractor was entitled under a term of a construction contract due to delays for which the employer was responsible.

The Court of Appeal considered whether interest and finance charges fell within the proper interpretation of "direct loss and expense". In doing so, it was necessary to grapple with the long-standing hostility of the common law to awards of interest. Both Lord Justice Stephenson and Lord Justice Ackner concluded that, in the context of building contracts, interest and finance charges were properly characterised as falling within the first limb of *Hadley v Baxendale* (1854) 9 Ex 341 and therefore were "direct" [22]. Lord Justice Ackner said [23]

Building Contractors in the ordinary course of things, when they require capital to finance an operation, either have to pay charges for borrowing that capital, or if

17 See Lord Hoffman at [23]

18 At [21] and [23]

19 See [31]

20 See [34]

21 At [45]

22 At p15 – 16 per Stephenson LJ; at p23 per Ackner LJ

23 At p23

they use their own capital, lose the interest which it otherwise would have earned. Accordingly, where a variation requires the expenditure of capital, not only is the primary expense – the money actually expended by reason of the variation – the direct loss or expense but so also is the secondary expenditure, the amount paid for or lost by the obtaining or the use of such capital....what the appellants here are seeking to claim, is not interest on a debt, but a debt which has as one of its constituent parts interest charges...

In *Sempra Metals*, Lord Hope drew on the case of *FG Minter*, concluding that the House of Lords: [24]

...should hold that at common law, subject to the ordinary rules of remoteness which apply to all claims of damages, the loss suffered as a result of the late payment of money is recoverable. This is already the law where the claim is for a debt incurred by a building contractor to raise the necessary capital which has interest charges as one of its constituents: see F G Minter Ltd v Welsh Health Technical Services Organisation (1980) 13 BLR 1, 23, per Ackner LJ ...

I would not, however, wish to overstate the importance of the *Minter* case. The House of Lords were in a mood to sweep away the old common law rule anyway. As Lord Nicholls put it, "legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again". The unsound rule for consideration concerned the negative attitude of English law to awards of compound interest on claims for debts paid late. Nevertheless, the *Minter* decision did point the way. The second damages case is *Ruxley Electronics v Forsyth* [1995] 3 WLR 118, known to many as "the swimming pool case". The plaintiffs contracted to build a swimming pool for the defendant. The contract specified that there should be a diving area 7 feet 6 inches deep. On completion, the pool was suitable for diving, but the diving area was only 6 feet deep. The estimated cost of rebuilding the pool to the specified depth was £21,500. The Court of Appeal held that the measure of damages for the breach of the contract was the cost of rebuilding the pool. The House of Lords held that, where the expenditure was out of all proportion to the benefit to be obtained, the appropriate measure of damages was not the cost of rebuilding, but the diminution in value of the work occasioned by the breach. Rebuilding would have been unreasonable, as it was out of all proportion to the benefit that would result. The House therefore concluded that the appropriate measure of damages was the difference between the value of the pool as built and the value of the pool as it ought to have been built. Lord Jauncey said: [25]

Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate.

This decision may now seem to be not only reasonable, but obviously right. But that is not how it appeared to everyone at the time. At all events, the principle that a claimant is not entitled to the cost of doing whatever is necessary to place him in the position he would have been in if the contract had not been broken, where it would be unreasonable, to do so, has since been applied in many decisions spanning all areas of commercial law. For example, in the shipping cases of *The Maersk Colombo* [2001] 2 Lloyd's Rep 275 and *The Baltic Surveyor and the Timbuktu* [2002] 1 Lloyd's Rep 623 and in the solicitor's negligence case of *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] 4 All ER 1397. [26] *Ruxley* therefore made a considerable contribution to the general law.

Duties of care

The last topic to which I wish to refer is the issue of when a common law duty of care will arise. This is an area of the common law which has been the subject of much development in the last few decades and in which there has been a significant number of important construction cases. Cases such as *Anns v Merton LBC* [1978] AC 728 and *Junior Books v Veitchi* [1983] 1 AC 520 come to mind, but there are several others. I want to focus on *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd & Ors* [1985] AC 210, partly because I was in this case. I am afraid that it was another of my failures.

The case concerned the construction of drainage for a housing development owned by my client. Plans had been submitted by the owners' architects to the local authority and approved. Subsequently, the architects instructed the contractors to depart from the approved design. The local authority drainage inspector became aware of this departure from the approved plans during installation but he took no action. It later became apparent that the drains were unsatisfactory and had to be re-constructed, causing the development to be delayed and the owners to incur losses. The House of Lords considered whether my client could recover its losses from the local authority on the basis it breached a duty of care owed to the owners. We had succeeded at first instance before Judge Oddie, sitting as an Official Referee. He had held that the local authority owed a duty of care to the owner because there was proximity and it was reasonably foreseeable that, if the drainage inspector permitted the contractors to depart from the approved plans, the drainage would be defective and the owner would suffer damage as a result. This all seemed pretty straightforward to me. The Court of Appeal did not like the decision and allowed the appeal. The lack of merit in our case did not appeal to them. Nor did it appeal to the House of Lords. I battled away valiantly, but to no avail. Lord Keith gave the only substantive speech. He referred to a passage in the speech of Lord Morris in *Dorset Yacht v Home Office* [1970] AC 1004, 1039, a passage to which no reference had been made during the argument. Lord Morris said:

"....it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were it not so.....the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink from being the arbiter."

So it was that Lord Keith said: [27]

in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

I am not sure that the significance of this passage was appreciated at the time. I do, however, recall thinking when I read the speech with that awful sinking feeling that this was a really important turning point. Recourse to what is fair and reasonable was not commonplace in those days, perhaps because it was uncertain and difficult to control. This approach to the question of whether a duty of care arises in a particular situation is now orthodox. It has been firmly cemented into our law since the House of Lords decision in *Caparo v Dickman* [1990] 2 AC 605.

On the facts, Lord Keith concluded that it would not be just or reasonable to impose a duty on the council given that my client, the owner, had a statutory duty to ensure that the drainage scheme conformed to the design approved by the local authority; the owner's loss resulted from reliance on the advice of its own architects, engineers and contractors. [28]

Lord Keith expanded on his expression of when a duty of care arises in the later construction case of *Murphy v Brentwood District Council*; a case with which you are all no doubt familiar and the last on which I wish to comment.

In this case, the House of Lords considered whether a local authority exercising building control powers conferred on them by statute for the purpose of securing compliance with building regulations owed a duty of care to purchasers of houses to safeguard them against purely economic loss in remedying a dangerous defect in the building.

In holding that *Anns v Merton* was wrongly decided, a decision which Lord Keith described as *"a remarkable example of judicial legislation,"* [29] the House of Lords held that in such a situation the loss suffered was economic and the council were not liable for the negligent application of the building regulations where the resulting defects had not caused physical injury.

At one level, the case may be considered to be only about the duty local councils owe to building owners. But at a higher level, the case is an authority of general importance for the law more generally, not only for the law of negligence, but also as indicating the court's views as to the proper limits of its powers.

Conclusion

I am delighted to have been asked to give this lecture. As I have said, I was led by Donald Keating many times and occasionally appeared against him. He was a formidably good lawyer. He would have been so proud to have his chambers named after him and this lecture too. I am also delighted that members of his family are here tonight. I have no doubt that they are proud too.

He was a perfectionist. He demanded much of his juniors and himself. The book that he wrote (now in its ninth edition) is testament to that. The early editions (written entirely by him) contained a masterly analysis of the basic principles of law as they affect construction disputes. As good an introduction to the general law of contract as you could wish to find. Succinct and not a word wasted. If only we could say that about the judgments that many of us write today. I cannot resist the observation that the latest edition of the book has a number of editors and a huge array of contributors..."

24 At [16]

25 At p357E

26 This decision was reversed in part by the Court of Appeal [2008] EWCA Civ 84 but on other grounds

27 At p241C

28 At p241E - F

29 At p471G

Choosing
the right arbitrator

by Jane Lemon QC

***Jane Lemon QC** took silk in February 2015 and specialises in international arbitration involving construction, engineering, energy, shipbuilding and technology disputes. She regularly acts on disputes involving FIDIC contracts and has acted on a number of disputes in Oman.*

In international arbitration, parties often rely heavily on their legal advisers not only for guidance on matters of law, evidence and procedure but often also, importantly, for advice on selecting the tribunal who will be deciding the case.

A major advantage of arbitration is that parties can participate in that selection, either by proposing an individual as sole arbitrator or by nominating one of the two arbitrators who then choose the President on a three member tribunal.

Selecting an arbitrator is one of the most important decisions a party will take, particularly given that the grounds for appealing any award are usually very limited. Indeed, it has been observed that *'arbitration is only as good as its arbitrators'*.

There are a number of factors to take into account when advising a client on the selection of an arbitrator.

Independence and Impartiality

First, ensuring that a potential arbitrator is free from any conflict of interest, independent and impartial is fundamental. The concept of independence addresses any relationship between the arbitrator and the parties. Impartiality is a more subjective concept that is aimed at the behaviour of an arbitrator and ensuring that he or she will not be prejudiced towards either party.

A requirement for independence and impartiality is found in many arbitration rules. Thus, for example, Article 11 of the ICC Rules 2012 provides that every arbitrator must be and remain impartial and independent of the parties involved in the arbitration and must disclose in writing to the Secretariat any facts or circumstances which might call into question this independence in the eyes of the parties. Equally, Article 5.4 of the LCIA Rules 2014 provides that every candidate shall sign a written declaration stating whether there are any circumstances currently known which are likely to give rise to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration.

Furthermore, at the end of 2014 the IBA published its new Guidelines on Conflicts of Interest in International Arbitration, replacing their 2004 predecessor. The Guidelines still contain at Part I a short list of General Standards, followed by, a series of explanatory notes for each, together with "traffic light" red, orange and green lists of practical examples of potential conflicts at Part II. The basic approach has not been altered, with an obligation upon an arbitrator to decline to accept an appointment where he or she has any doubt as to his or her ability to be impartial and independent, together with a duty to give full disclosure of any circumstances which may give rise to doubts in this regard.

However, there are some noteworthy changes in the 2014 Guidelines. For example, in terms of waiver, General Standard 3(b) provides more clearly that advance declarations or waivers of possible conflicts relating to circumstances that may arise in the future do not "*discharge the arbitrator's ongoing duty of disclosure.*" Furthermore, General Standard 4(b) now explicitly states that acceptance by the parties of conflicts contained in the Non-Waivable Red List cannot cure that conflict and any appointment will be invalid. General Standard 6(a) now requires an arbitrator to "*bear the identity of his or her law firm*", thereby allowing a party to consider potential conflicts of interest involving an arbitrator's loyalty to his or her firm's clients and the arbitrator's duties in the arbitration. The new Guidelines also now make clear that they apply equally to non-lawyers sitting as arbitrators.

In terms of the practical examples at Part II, the Non-Waivable Red List, which contains examples of conflict which preclude a candidate's appointment, has been expanded to confirm that (i) an arbitrator cannot be an employee of a party (ii) he or she cannot have a controlling interest in a third-party funder and (iii) his or her firm cannot regularly advise a party.

The Waivable Red List, which gives examples of when the arbitrator can only act if he or she first makes disclosures and the parties expressly agree to the appointment, has also been expanded so that (i) the definition of an arbitrator's "*close family member*" who has a significant financial interest in the outcome of the dispute has been widened to include not only a spouse, sibling, child, parent or life partner but also "*any other family member with whom a close relationship exists*" and (ii) regular advice by the arbitrator to any party (as opposed to the appointing party) which is not a significant source of income has also been included. The Orange List gives examples of when the arbitrator has a duty to disclose but can nonetheless act unless the parties make a timely objection. New entries include (i) where enmity exists between an arbitrator and counsel, a senior representative of a party or a third party funder, witness or expert and (ii) where the arbitrator, within the past three years, has acted as co-counsel with another arbitrator or counsel for one of the parties.

Finally, the Green List, which gives examples of minor conflicts that do not normally require disclosure, has been expanded to include situations where (i) an arbitrator teaches or has spoken at conferences with another arbitrator or counsel or (ii) has a relationship through a social media network with one of the parties.

Whilst not legally binding unless agreed by the parties, the 2014 Guidelines are intended as an expression of best practice in international arbitration. Parties considering a potential candidate can therefore request disclosure by reference to the Guidelines in order to flush out any potential conflicts and reduce the opportunities for future challenges to appointments.

In addition to considering any disclosures made by a potential arbitrator, legal advisors should make enquiries of colleagues and carefully review CVs, articles and other publications to ascertain an arbitrator's opinions. If a candidate has strong views on an issue which is central to the dispute, they need to be identified and appraised. A party does not want to appoint an arbitrator who is strongly against its position on a particular issue. Conversely, while a degree of sympathy for a party's case is desirable, an arbitrator who merely adopts positions helpful to the interest of the appointing party will be unlikely to gain the respect of other members of the tribunal and so will command little influence.

Relevant Skills, Qualifications and Experience

A further important consideration is choosing an arbitrator with the requisite skills, qualifications and experience. An arbitrator needs to have a good judicial demeanour, intelligence, integrity and attention to detail. In addition, he or she will need to be familiar with the arbitral process, including relevant rules and procedures, together with the cultures of the parties involved. While none of the arbitration rules contain specific requirements regarding the qualifications and expertise that an arbitrator should possess, many parties prefer to choose a legally qualified arbitrator who will be familiar with complex procedural, legal and factual issues and able to draft potentially lengthy, reasoned awards. A lawyer is also likely to have strong case management skills which are invaluable in the more flexible procedures adopted in arbitration. The advantage of this flexibility is that procedures can be adapted to suit the parties' particular requirements but if not properly managed delays will occur and costs inevitably increase.

In disputes involving difficult technical arguments or very specialist industries, parties may prefer to appoint a technically qualified arbitrator. However, it should be borne in mind that the tribunal is likely to have the benefit of expert evidence and therefore any lack of technical qualification may not be of as much importance as, for example, familiarity with the arbitration process itself.

Ongoing Caseload

Parties should also ensure that a potential arbitrator has a manageable caseload. Well-known and popular arbitrators are much in demand and may be extremely busy for many months, if not years, in advance. It is important to ensure that the arbitrator is able to devote sufficient time to the client's case, so as to avoid proceedings being delayed and costs inevitably increasing.

This issue has been expressly dealt with in the new 2014 LCIA Rules, which provides at Article 5.4 that prospective arbitrators must declare not only that they are independent and impartial, but also that they are "*ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration*". Equally, under Article 13 of the ICC Rules 2012, the ICC Court will consider a candidate's availability when confirming or appointing an arbitrator.

Nationality

A final consideration is the nationality of a potential arbitrator. Parties may want their appointed arbitrator to have the same cultural background and outlook as they do and may see the appointment of an arbitrator of the same nationality as a means of achieving that aim. Whilst the nationality of a candidate is not usually a problem for a party appointed expert on a three man tribunal, in arbitrations where the parties, are of different nationalities, arbitral institutions often direct that a sole arbitrator or president of the arbitral tribunal cannot be the same nationality as one of the parties, so as to prevent any real or perceived bias in the proceedings. This requirement can be found, for example, at Article 13 of the ICC Rules 2012 and Article 6 of the LCIA Rules 2014. It is also worth noting that, where nominated co-arbitrators are of differing nationalities, an institution is more likely to select a chairman of a different nationality to avoid any suggestion of favouritism.

Conclusion

There are many aspects of a case in international arbitration which need careful consideration. Getting the right tribunal is, or should be, high on the list of priorities.

Mixing the Rough with the Bust —

By Robert Fenwick Elliott
and Jennie Wild

Adjudication was always intended to be "pay now, argue later." What is its place where there is no possibility of an argument later, because the claimant is insolvent? Some recent Australian authority has shown that adjudication arrangements can offend against the insolvency scheme. How does that authority compare with the position in England and Wales?

Adjudication of construction disputes, introduced into England and Wales by the Housing Grants Construction and Regeneration Act 1996, was always intended to be rough justice, designed to address cash flow issues, and described in the House of Lords in debate and later by the courts as a "pay now, argue later" scheme. It has since spread around the world, including every state and territory of Australia, New South Wales leading the way with its Building and Construction Industry Security of Payment Act 1999.

There are numerous differences between the Australian versions of adjudication and the UK version. First, under the Australian "East Coast Model" which operates in most states, if a respondent fails within a short period of time (typically 10 working days) to respond to a payment claim by means of a "payment schedule", then the claimant becomes automatically entitled to enter judgment for the full amount claimed, and the respondent is expressly prohibited from raising any defence or cross-claim. Secondly, if the claimant obtains an adjudication determination in its favour, it can register that determination as a judgment as of right, and without having to make any application for summary judgment. Again, any defences or cross claims which arise out of the construction contract may not be brought into account.

There is also this important difference: that the "security of payment" legislation, as it is known in Australia, is state legislation, in contrast to the Corporations Act 2001, dealing with corporate insolvency, which is federal legislation. Under the Australian Constitution, state legislation which is inconsistent with federal legislation is ineffective.

Against this background, the courts in Australia have considered the position where the claimant is insolvent. If the respondent fails to serve a payment schedule in time, or if an adjudicator makes a determination in favour of the claimant, the security of payment legislation requires the respondent to pay, regardless of the cross-claim. As against that, the Corporations Act contains provision – very similar to the UK provisions[1] – whereby debtors of the insolvent company are entitled to a mutual dealings set off. There has from the outset been a power of the courts to stay execution in cases of an insolvent claimant. But does the analysis go further, invalidating the whole adjudication scheme in insolvency cases?

The issue first arose in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1230, which concerned the enforcement of an adjudicator's determination. The relevant timeframe was as follows: –

- The adjudication application was made in early October 2003
- The adjudicator made his determination on 16 October 2003
- Dasein went into voluntary administration on 31 October 2003
- Dasein became the subject of a deed of company arrangement on 4 December 2003.

Young CJ in Equity declined to allow the adjudicator's determination to be enforced. He approached the matter in two ways.

Firstly, he took account of the respondent's set-off. Section 553C of the Corporations Act applies where there are mutual credits, mutual debts or other mutual dealings, and he asked himself the "vital question" of whether in the light of prohibitions of set-off under the security of payment legislation, section 553C of the Corporations Act could be applied. He found that there was a conflict:

There is a conflict of legislative provisions in the instant case and the scheme set out in the BCISP Act and the scheme set out in the Corporations Act where a company is under a DOCA do conflict. However, in my view, the two methods of approaching the problem each give the same result, and that is that the scheme set out in s 553C of the Corporations Act prevails.

The first reason is s 109 of the Australian Constitution. It provides that:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The Corporations Act is a Commonwealth Act, the BCISP Act is a State Act, so if there is any inconsistency, the former prevails.

His second approach is of rather wider application. He looked at the mischief addressed by the security of payment legislation, and found that it was never intended to operate in favour of a claimant which had ceased to be a going concern:

...[The security of payment legislation] only intends to operate when the head contractor and the subcontractor are going concerns. Once the subcontractor ceased to be a going concern, it no longer needs cash flow and the mischief to be covered by the Act is not present in that situation. No-one forced the subcontractor to go into voluntary administration. It elected to do so and in my view the protection of the BCISP Act ceased at that point and the Commonwealth law as to adjustments of rights under administration and later under a DOCA came into play.

The matter came back before the court in *Veolia Water Solutions v Kruger Engineering* [2007] NSWSC 459. McDougall J was invited not to follow the *Brodyn v Dasein* decision on the basis that it was plainly wrong. He did not go down that path, but found that the insolvency scheme took preference by a slightly different route. In that case, the claimant, Kruger, had obtained the benefit of an adjudication determination after it had become subject to a deed of company arrangement. Again, there was a cross-claim, Veolia contending that this exceeded the amount of the adjudication determination. Veolia had already obtained a temporary stay, on the back of security provided by it, and was seeking a permanent stay coupled with the return of its securities. In these circumstances, McDougall J did not think that there was any conflict between the

[1] Insolvency Rules 1986 rule 4.90 (liquidated companies); Insolvency Act 1986 section 323 (bankrupt individuals); Insolvency Rules 1986 rule 2.85 (administration where a notice of distribution has been given).

Rough justice, it might be said, is acceptable where the parties have the opportunity of putting it right in due course, but less so where there is no practical possibility of any later correction.

security of payment legislation and the insolvency scheme: the obligation to pay and the adjudication determination could be satisfied by set-off under section 553C. In part, McDougall J's approach was to identify the purpose of administration, designed to maximise the chances of a company continuing to exist:

Cash flow is of obvious importance to the first aspect of this statutory object; and getting in debts in an orderly manner is of obvious importance to the second. It is at least arguable that the purpose underlying the Security of Payment Act is as relevant to a company in administration, in that it will tend towards achieving the statutory object of administration, as it is to a company that is trading as a going concern.

It was not necessary for McDougall J to consider the position of a company in liquidation, with no prospect of continued existence. There is certainly nothing in his judgment inconsistent with the view that the security of payment legislation has no place where a claimant has ceased to be a going concern. But McDougall J's essential approach was that the potential conflict could be resolved by means of staying the execution of any judgment based on the adjudicator's determination until the insolvency scheme in relation to set-off could be applied.

These two cases did not prevent the regular practice of liquidators and administrators making use of the security of payment legislation to collect in debts. If successful in adjudication, or if the respondent failed to get a payment schedule in on time, the liquidators and administrators have sometimes had to run the gauntlet of a stay application [2], and sometimes not.

Much more recently, however, Vickery J has rejected the *Veolia* approach in *Facade Treatment Engineering v Brookfield Multiplex* [2015] VSC 41. The sequence was that Facade made payment claims, Multiplex failed to respond by way of payment schedule to at least one of them, Facade went into liquidation, and, following liquidation, sought judgment on the basis of Multiplex's failure to provide a payment schedule. The judge followed the approach of *Brodyn v Dasein* in finding that there was a conflict between the security of payment legislation and the insolvency scheme, and rejected the notion that this conflict could be avoided merely by imposing a stay:

For a company in liquidation to enter a judgment for a monetary entitlement claimed under s 16(2)(a)(i) of the Victorian BCISP Act without taking into account any cross-claim or defence by way of set off, as provided for in s 16(4(b)) of the BCISP Act, would fly directly in the face of the scheme established by s 553C of the Corporations Act.

Unlike the Australian "East Coast Model", in England & Wales a successful party will need to make a summary judgment application to enforce an adjudication award.

The BCISP Act, being a state law, if applied to the facts, would alter, impair or detract from the operation of the Corporations Act, a law of the Commonwealth Parliament. The further consequence is that there would be a conflict in the application of the legislative provisions between the scheme set out in the BCISP Act on the one hand, as provided for in s 16(2)(a)(i) and s 16(4)(b), and the scheme set out in s 553C of the Corporations Act. In both circumstances, State Act must yield to the provisions of the Corporations Act.

Further, the entry of a judgment for a monetary entitlement claimed under s 16(2)(a)(i) of the BCISP Act would itself give rise to the inconsistency. It is not open to avert this consequence by the device of imposing a stay on the judgment.

Accordingly, to the extent that the provisions of the BCISP Act are inconsistent with the provisions of the Corporations Act, those provisions to the extent of the inconsistency are determined to be invalid. On this basis, no judgment should be entered under s 16(2) of the BCISP Act in favour of the Plaintiff.

Having reached that conclusion, Vickery J found that it was not necessary to consider the second and alternative line of the reasoning in *Brodyn v Dasein:* i.e. the security of payment legislation only operates where the parties are going concerns.

So where do these authorities leave us in Australia? The paradigm case is that of a company already in liquidation before seeking to make use of the security of payment legislation. In this paradigm case, it now seems reasonably clear that the security of payment legislation is not available, at any rate where the respondent has a set-off arising out of a mutual dealing. There is no scope for any discretionary considerations – such as arise on a stay application – and thus it will not avail an insolvent claimant to say that its financial problems were all caused by the respondent. The argument is less strong where there is no set-off asserted, but the second line of reasoning in *Brodyn v Dasein* would still apply in these circumstances and remains unchallenged by any subsequent authority. It is arguable that the "pay now, argue later" nature of the adjudication process is inapplicable where there is no opportunity to argue later, and inconsistent with the insolvency scheme for the treatment of debts owed to the insolvent company. Rough justice, it might be said, is acceptable where the parties have the opportunity of putting it right in due course, but less so where there is no practical possibility of any later correction. Similarly, there are several shades of grey between the paradigm case and the case where the insolvency occurs after the security of payment process has been completed and judgment obtained. There is further disharmony as to whether companies in administration should be treated in the same way as companies in liquidation.

Unlike the Australian "East Coast Model", in England & Wales a successful party will need to make a summary judgment application to enforce an adjudication award. This has provided a mechanism, and sufficient judicial discretion, to address difficult questions of legislative incompatibility.

Generally, the courts of England & Wales have recognised two categories of claimant. [3]

First, where the claimant is in liquidation, the subject of appointment of administrative receivers, or in administration and a notice of distribution has been given, the court will not enforce a temporarily binding adjudicator's decision by way of summary judgment *(Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2001] All ER (Comm) 1041; *Straw Realisations (No 1) v Shaftsbury House (Developments)* (2010) 133 ConLR 82 at [89(3)]; *Mead General Building v Dartmoor Properties* [2009] BLR 225 at [11]; *Hart v Fidler* [2006] EWHC 2857 (TCC)). As the Court of Appeal reasoned in *Bouygues v Dahl-Jensen*, this is because the legal effect of the mutual dealing set-off is to alter the parties' substantive legal rights as between

2 In which case the applicable principles are not dissimilar from those in England and Wales – see below.

3 It might be suggested that Straw Realisations (No 1) v Shaftsbury House (Developments) (2010) 133 Con LR 82 has created some uncertainty as to this division. However, it is submitted that the preponderance of authorities follow the categories set out.

themselves and to replace them with the accounting provisions in the Insolvency Rules (see [32] per Chadwick LJ). Chadwick LJ explained as follows (at [35]):

Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires.

In contrast, where a company is or may be insolvent but is not yet in liquidation the statutory right of mutual set-off has not yet arisen, such that the court will ordinarily grant summary judgment enforcing the adjudication decision. However, the probable inability of the claimant to repay the judgment sum may constitute "special circumstances" under CPR r83.7(4), rendering it appropriate to grant a stay *(Wimbledon Construction Co 2000 Limited v Derek Vago*, [2005] BLR 374). That does not mean a stay will be granted as a matter of course. Recent decisions suggest the courts will exercise such discretion sparingly. In particular:

a) The courts are sceptical of arguments that a party is "nearly insolvent". As HHJ Seymour QC stated in *Rainford House v Cadogan Ltd* [2001] BLR 416 "*vague fears or unsubstantiated rumours of insolvency" will not "merit much attention*" (at p442);

b) The claimant's probable inability to repay the judgment sum will not usually justify the grant of a stay if:

i) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made *(Herschell Engineering Limited v Breen Property Limited* (unreported, 28 July 2000) as cited in *Wimbledon Construction Co 2000 v Derek Vago* [2005] BLR 374 at [19] and [26]); or

ii) The claimant's financial position is due, either wholly or in significant part, to the defendant's failure to pay the sums which were awarded by the adjudicator *(Absolute Rentals v Glencor Enterprises Ltd* (unreported, 16 January 2000) as cited in *Wimbledon Construction Co 2000* at [26]))

Where a company is subject to a Company Voluntary Arrangement ("CVA"), the court will not automatically infer that a claimant will be unable to repay a sum awarded

(*Mead General Building Ltd v Dartmoor Properties Ltd* [2009] BLR 225 at [12]).

c) Where a company is subject to a Company Voluntary Arrangement ("CVA"), the court will not automatically infer that a claimant will be unable to repay a sum awarded *(Mead General Building Ltd v Dartmoor Properties Ltd* [2009] BLR 225 at [12]). In deciding whether a stay ought to be granted, the court will consider the: circumstances of the CVA; the claimant's current trading position and; whether the CVA and/or the claimant's financial position is wholly or significantly due to the defendant's failure to pay the sums awarded by the adjudicator *(Mead General Building Ltd* at [12]; *Wimbledon Construction Co 2000* Ltd v Vago (2005) 10 Con LR 99); and

d) The provision of security equivalent to the claimant's financial position at the time the contract was made, such as a bond or parent company guarantee, will generally address the difficulties of recovering a judgment sum, meaning a stay will not be granted *(McConnell Dowell Constructors (Aust) PTY Limited v National Grid Gas Plc* [2007] BLR 92 at [52 – 53]; *Wimbledon v Vago* at [26(f)(i)]; *FG Skerritt Ltd v Caledonian Building Systems Ltd* [2013] EWHC 1898 (TCC)) at [35]).

Summary

—

In no jurisdiction where the adjudication of construction disputes has been legislated for does there seem to have been much, if any, legislative thought to this issue. The mind of the legislature appears to have been firmly fixed on the cash flow needs of going concerns. In England & Wales, the use of adjudication as a shortcut for collecting debts is shut off for liquidators and may well prove difficult where a company is headed for liquidation and appropriate security cannot be offered. In Australia, a rather more radical approach has been taken: not only are stays of execution available in appropriate cases, but the courts have determined that the legislative provisions for adjudication have no place in the insolvency scheme.

KEATING CASES

SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Reported case summaries

Heron Bros Ltd v Central Bedfordshire Council [2015] EWHC 604 (TCC) and Heron Bros. Ltd v Central Bedfordshire Council (No 2) [2015] EWHC 1009 (TCC)

This litigation arose from a challenge under the Public Contracts Regulations 2006 to a procurement decision by the Council, in awarding a contract for the construction of a leisure centre.

The Council made an application to strike out the claim by Heron Bros, an unsuccessful tenderer, on the grounds that the claim form had not been served within seven days after the date of issue (as required by Regulation 47F).

The unsealed claim form was sent to the court with the request that it be sealed and returned for service "at your earliest convenience". At the same time, a copy of the letter to the court and unsealed claim form was emailed to the defendant. The unsealed claim form was therefore received within the 7 days but by the time the sealed claim form had been sent back by the court and then served on the defendant the 7 day period had expired.

The Regulations give no power to extend the time limit and case law states that a statutory time limit cannot be extended using the rules of the court.

The court rejected the argument that Regulation 47F allowed insufficient time to satisfy the EU requirement of an effective remedy and that it offended the EU principle of "equivalence", as judicial review (which has an extendable 7 day period for service) is not an equivalent remedy. However, the court concluded that the "claim form" which was required by Regulation 47F to be served within 7 days did not have to be a sealed claim form and while the service within the time limit of an unsealed claim form was defective, that defect was capable of being cured. The court felt able to cure the procedural defect because there had been a delay by the TCC Registry originally in returning the forms (though the agent was also at fault) and the Council knew where it stood, since it had been informed of the steps being taken. Accordingly, the application to strike out failed.

The court also took the opportunity to confirm that the 7 day service requirement means that, provided the relevant step under CPR 7.5 is performed within the 7 day period, that counts as valid service for the purpose of Regulation 47F and that the deeming provisions in CPR 6.14 do not operate to reduce that already short period to 5 days.

Sarah Hannaford QC appeared for Heron Bros.

—

Simon Cockell v Marrin Holton [2015] EWHC 459 (TCC) and Simon Cockell v Martin Holton (No 2) [2015] EWHC 1117 (TCC)

The claimant contractor, Simon Cockell, was engaged by the defendant, Martin Holton, to carry out works to a fire-damaged Grade II listed house. The claimant brought this action for sums alleged to be due to him from the defendant for work done. The defendant counter-claimed, alleging overpayment and joined the claimant's father, Keith Cockell, on the ground that they had been trading in partnership. The court found that there was no evidence of partnership and that the applications for disclosure of documents were mere fishing expeditions. Indemnity costs were awarded in favours of Keith Cockell and costs in favour of Simon Cockell.
The second hearing in the case concerned the defendant's application for relief from sanctions following his failure to comply with an 'unless' order to serve a re-pleaded counter-claim. Although the delay by the defendant's solicitors in submitting the re-pleaded counter-claim was brief, the lateness of the effort was inexplicable and the re-pleaded elements of the counter-claim were struck out. The court allowed the material from the counter-claim (though not newly included material) to be used in an amended defence, so that if proved, the allegations of over-payment could be set off against the claim for sums due.

William Webb appeared for the claimant.

—

Geodesign Barriers Ltd v The Environmental Agency [2015] EWHC 1121 (TCC)

Geodesign Barriers, the claimants, were unsuccessful tenderers for a temporary flood barriers system contract let by the defendant, the Environment Agency. Geodesign brought a claim alleging that the Agency had committed manifest errors in the evaluation of the winning tender. The Agency denied these errors of assessment and asserted that Geodesign could not have won the contract in any event because four other tenders, besides the winning tender, had been scored higher than Geodesign's.

The claimants sought orders for the specific disclosure of evaluation documents, the identities of the four other tenderers and permission to amend its particulars of claim following disclosure. Coulson J observed that ultimately applications for specific disclosure of documents must be decided by balancing "the claiming party's lack of knowledge of what actually happened" against "the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost". In this case, he found that the absence of a contemporaneous evaluation report raised question marks as to the transparency of the tender process and made it difficult for unsuccessful bidders to understand whether it was conducted fairly. He made no order for the production of evaluation reports, as the evidence was clear that these did not exist, but made it clear that the defendant could not produce these later. He ordered that evaluator guidance and any other evaluation documents should be disclosed, as well as the bids of the four unsuccessful tenderers, which were put in issue by the causation defence. These would be disclosed into a confidentiality ring. The identity of the other tenderers would not be revealed, since it was irrelevant. An expert advisor, as well as legal advisors, could be added to the confidentiality ring, but the judge emphasised that this should not be seen as the first step towards the admission of expert evidence. The court would not give directions as to the amendment of the particulars of claim until the substance of the intended amendments was known.

Sarah Hannaford QC and Simon Taylor appeared for Geodesign Barriers Ltd and David Gollancz and Paul Bury appeared for the Environment Agency.

—

CIP Properties v Galliford Try Infrastructure Ltd [2015] EWHC 481 (TCC)

This case arose from allegations of defective construction in the development of a former children's hospital in Birmingham, made against the contractors, Galliford Try, who issued third party proceedings against architects and sub-contractors.

The first hearing resulted from the Case Management Conference (CMC) reported at [2014] EWHC 3546 (TCC). The claimants, as assignees to the action, had sought to oppose a window for ADR and had also unsuccessfully resisted the requirement that they produce a costs budget.
The latter point developed into the area of dispute dealt with in the second hearing, namely the costs budget which the claimants had been obliged to submit, and its contents.

In what Coulson J described as a "standard TCC defects claim" worth £18 million on the claimant's case, they had submitted a costs budget in excess of £9 million. He criticised a number of specific features of the budget, notably the high number of assumptions and alleged contingencies, pre-action costs, rates, costs of experts, trial preparation and attendance and disclosure and CMC costs.

The judge chose not to order the claimants to produce a new costs budget, but preferred a model which would involve a phase-by-phase budget with overall totals for incurred and forecast figures, but giving effect to his overall conclusion, which was that the claimant had already expended the amount (at pleading stage) which ought reasonably be permitted as proportionate for the whole litigation.

Adam Constable QC and Richard Coplin appeared for Galliford Try Infrastructure Ltd. This case is considered in more detail in Adam Constable's article on page 22.

—

Khurana v Webster Construction [2015] EWHC 758 (TCC)

The claimant owners of a substantial detached house in Cheshire engaged the defendant contractors for works on the property, using a bespoke agreement. On the ADR provisions of the contract being ineffective, when a dispute arose as to final payment and defects, the parties, by their solicitors, entered an ad hoc adjudication agreement and referred the dispute.

The adjudicator gave a decision in favour of the defendants and the court, granting summary judgment, suspended execution, provided that the claimants paid the sum due into court and commenced court proceedings for a final determination. The defendants sought to rely on the agreement between the respective solicitors that the decision should be 'binding'. The claimants maintained that all that was meant by the agreement was that a decision by the adjudicator be of temporary binding effect only. The court was satisfied that the parties had reached agreement on the finally binding nature of the decision, and that the court proceedings should therefore be stayed or dismissed. The agreement between solicitors was freely made and did not contravene the Unfair Terms in Consumer Contracts Regulations 1999. The claimants could not have the decision of the adjudicator on the final account re-opened.

Samuel Townend appeared for the defendant contractors.

—

Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)

GTB, the contractor, was engaged by Estura, the employer, to carry out extensive works to a West Country hotel under an amended version of the JCT Design and Build Contract 2011. A dispute arose following an interim application by GTB for payment, and since Estura did not serve a payment/ pay less notice, an adjudicator held that GTB would be entitled to be paid some £4 million. Estura sought to resist summary judgment of the adjudicator's decision on the ground that the adjudicator should have permitted the challenge of the interim application, which was palpably wrong, since it took the anticipated final account sum to £12.66 million, almost £5 million more than the agreed contract sum. The court held that it was open to Estura to commence proceedings to determine the correct valuation of the final account, but that it was not open to Estura to resist the enforcement of the adjudicator's decision.

However, the court was persuaded to grant a partial stay of the summary judgment awarded, by the fact that if GTB was paid its interim application in full, it would have little incentive to remain on site or finish the works, nor to submit a final account for scrutiny. GTB would have achieved virtually all its expectations by its interim application. In the circumstances, the court stayed enforcement of the judgment above the sum of £1.5 million.

Adrian Williamson QC appeared for the defendant, Estura Ltd
—

Transformers and Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC)

This case arises out of the supply of some gaskets by the defendant, said to be defective, pursuant to two orders issued by the claimant. The defendant disputed liability, relying (in part) upon standard terms excluding or limiting its liability.

The matter was originally listed for a trial of all issues of liability and quantum. The principal interest in the case lies in the fact that the judge granted a late application made by the defendant at the PTR (without any prior notice of the application) to adjourn the trial on the grounds that its insurer had withdrawn cover at a relatively late stage of the proceedings, and on the grounds that the defendant needed to join its own supplier to the proceedings After that decision at the PTR adjourning the trial, there then followed a furious exchange of further applications under CPR rule 23.10 (application to set aside order without notice) and counter applications, seeking to modify the order made at the PTR trial in the fast diminishing period of time between the order and the trial date. The outcome of that interlocutory process was a direction that there be a the trial of just one issue to be heard within the original trial dates, namely whether the defendant's standard terms were incorporated into the two contracts for the sale of goods. The parties had traded regularly together for about 20 years. Throughout that period the claimant's terms were printed on the reverse of its orders; however the claimant's orders were usually faxed to the defendant (top side only), including the two orders the subject of the litigation There was no reference to the claimant's terms on the front of its orders. About half way through the parties' commercial relationship (ie at about the 10 year point), the defendant devised some standard terms of its own, including its limitation clauses; these it referred to on its acknowledgements of order. Whilst the claimant provided copies of its terms (albeit in a minority of instances) but did not refer to them anywhere, the defendant referred to its terms on its acknowledgements of service but never provided a copy of them to the claimant.

The judge held that neither party's terms had been incorporated.

Justin Mort QC appeared for the claimant buyer.
—

Goldswain and Hale v Beltec Ltd [2015] EWHC 556 TCC

The claimants, who held a long lease over the ground floor flat and cellar of a property in North London, sought to convert the cellar into living accommodation The essential under-pinning and other structural works were designed by the first defendant engineers and carried out by the second defendant contractor Just over a month after construction, cracks began to develop, followed by a sudden, major collapse of the fabric of the house, necessitating an emergency evacuation. The local authority deemed that the main part of the house constituted a dangerous structure and ordered that it be demolished.

The claimants brought actions against both the engineers and contractor, obtaining a judgment in default against the latter. The hearing concerned the extent of the obligations of the first defendant as professional engineers for the design of the temporary works. The decision is important for its consideration of the circumstances in which, in the absence of an express contractual obligation, an engineer may owe a duty to advise on temporary works, design. The judge also considered the circumstances where an engineer might be under a duty to warn about the contractor's work and gave a helpful review of the authorities on this issue. On the facts, the court found that professional negligence by the engineers was not established. Breaches of contract by the contractor in failing to provide propping and in failing to construct the basement slab in accordance with the engineer's design "undoubtedly caused the collapse".

Gideon Scott Holland appeared for the claimants.
—

MW High Tech Projects UK Ltd v. Haase Environmental Consulting GmbH [2015] EWHC 152 (TCC)

Contractors Biffa Waste had undertaken to design, build and operate a recycling facility for West Sussex County Council. Biffa awarded the EPC Contract to MW, who appointed Haase Environmental Consulting (HEC) as consultant engineers for the design work. A dispute arose because of design changes/ enhancements proposed by HEC, which MW regarded as exceeding the terms of HEC's appointment and inconsistent with the original basic design proposed, on which MW's tender was based.

Following an adjudication, MW sought declarations as to the proper interpretation of its contractual agreement with HEC. The court held that HEC had an overriding obligation to design with reasonable care and skill and its additional specific design obligations were subject to their overriding duty. Accordingly, if compliance with the original basic design proposal was impossible without being negligent, HEC would not be obliged to comply with it in their design. Conversely, if HEC could comply with the original basic design proposal without negligence, they had a duty to use reasonable care and skill in so complying. Prima facie, HEC would be liable to MW for modifications to the design not complying with the original basic design proposal subject to issues of fact, including any alleged approval or consent.

The court invited the parties to agree the declarations sought by MW.

Vincent Moran QC appeared for MW High Tech Projects UK Ltd.
—

COSTS MANAGEMENT:

a wake-up call from the courts

By Adam Constable QC

The courts have had the ability to partake actively in the management of the costs of litigation since 1 April 2013. These changes were introduced following a pilot exercise in the Birmingham Mercantile Court and TCC. Within the guidance for that pilot exercise, the objective was stated as being,

> *'to control the litigation in such manner that the costs of each party are proportionate to the amount at stake and to ensure that the parties are on an equal footing.'*

It is well known that the basic regime is that the parties are required to submit detailed budgets of their 'estimates of costs' as attachments to their Case Management Information Sheets. Pursuant to CPR 3.15, where costs budgets have been filed and exchanged, the court will make a costs management order, unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective, without such an order being made. By a costs management order, the court will either record the extent to which the budgets are agreed between the parties; or, in respect of budgets or parts of budgets which are not agreed, record the court's approval, after making appropriate revisions. At the conclusion of the litigation, pursuant to CPR 3.18, when assessing costs on the standard basis, the court will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings, and '*not depart from such approved or agreed budget unless satisfied that there is good reason to do so*'.

Section 3.14 states that '*Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees*'. There was an early wake up call to many practitioners in the form of the decision at first instance, upheld by the Court of Appeal, in *Mitchell v News Group Newspapers* [2014] 1 WLR 795. In this case, the claimant's solicitors had failed to file the costs budget 7 days prior to the date of the first hearing and an order was made deeming the budget to comprise only the applicable court fees; and which dismissed the application for relief from this sanction. The Master concluded, amongst other things, that '*...the parties were well aware that this was a case for which budgeting would be required from the start and that the mere fact that a date is set for CMC is not supposed to be the starting gun for proper consideration of budgeting. Budgeting is something which all solicitors by now ought to know is intended to be integral to the process from the start, and it ought not to be especially onerous to prepare a final budget for a CMC even at relatively short notice if proper planning has been done.*' The Court of Appeal, in dismissing the appeal, endorsed the approach of Jackson LJ in the 18th Implementation Lecture on the reforms, which indicated that there was to be a shift away from exclusively focussing on doing justice in the individual case. In the lecture, Jackson LJ had set out the modern approach, as follows:

> *"The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases."*

This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds. More importantly, they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.'

The initial shockwaves of this decision no doubt did much to ensure proper compliance, but also led in practice to a number of decisions in which significant penalties were imposed for minor breaches which of themselves were unlikely to upset the proceedings or the wider judicial process. The decision in *Mitchell* has since been 'clarified' (*in Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others* [2014] EWCA Civ 906), in which it was made clear that the breach should need to be 'significant' (rather than 'trivial'). Whilst giving a little more comfort to practitioners, compliance with costs management procedures remains a significant part of modern litigation.

One piece of ongoing litigation has recently given rise to two judgments of the TCC in respect of costs management. In *CIP Properties v Galliford Try Infrastructure Ltd & Others* [2014] 156 Con LR 202, the defending parties sought the court's involvement by way of costs management in a case where the amount in dispute was around £18m, in excess of the (newer) £10m threshold under which all TCC litigation is subject to the costs management regime. It was argued on behalf of the claimant that the court had no discretion to impose the costs budget regime in such cases. First, CIP argued that the words "*or the court otherwise orders*" in the original r3.12(1) operate only to allow the court to disapply costs management provisions from a multi-track case that would otherwise fall within CPR 3.12; they do not permit the court any discretion to order costs management in cases which are excepted from the rule by sub-paragraphs (a) to (c). In addition, the claimant contended that the words "this Section and the Practice Direction 3E will apply to any other proceedings...where the court so orders", do not give the court the necessary discretion in this case because "other proceedings" can only be a reference to non-multi-track claims. The defendant's contention that this was an obviously strained construction was accepted, and the court concluded that the more natural meaning of the original CPR 3.12 was that the court has an overriding discretion to order the provision of costs budgets in all cases where, under the original regime, the claim was for over £10 million. The attempt to persuade the court that it had no discretion at all might always have been a somewhat ambitious submission, running counter to the general purpose of its introduction in the first place. It might be noted that in exercise of their powers referred to in sub-paragraphs when initially setting the £2m threshold (later increased to £10m in the TCC), the Chancellor of the High Court and the President of the Queen's Bench Division had expressed the view that "*...it is envisaged that costs management orders would be made in all cases except where there is good reason not to do so.... Even when the exceptions in the rule and the direction apply, the use of costs management should always be considered.*" The court also concluded that there was no presumption against costs management for cases over £10m upon application, nor any presumption in favour. The discretion was wholly unfettered.

It having been made clear that a discretion existed, a full day's argument then took place following submission of the parties' budgets. The decision is reported at [2015] EWHC 481 (TCC) and [2015] 158 Con LR 229. CIP's costs budget stated that (at a point in the litigation where the pleading had not fully closed) it had incurred costs of £4,226,768.16 and that its total estimated costs were in excess of £5m, taking the total towards £9.5 million. These figures were to be contrasted with those of the other parties. The defendant, who had also commenced proceedings against the third, fourth, fifth and sixth parties ("the additional parties"), had incurred costs of just under £1.5 million, and estimated incurring future costs of approx. £3 million, making a total of approximately £4.4m. The third party's total costs (incurred and estimated) were put at approx. £2.4 million; the fourth party's total costs at approx. £1.15 million; and the fifth and sixth party's costs at some £1.9 million. As pointed out in argument, the claimant's incurred and estimated costs were broadly equivalent to the costs of all four other parties combined.

The court first considered the reliability of the budget itself, and secondly the question of proportionality. Of most significance to practitioners in the former point was the round condemnation of a large schedule of 'assumptions and contingency' which attached to the budget. One such assumption was that the cost budget had been prepared on the basis that the defendant and additional parties would serve witness statements less then 20 pages in length. The judge remarked that this *'is an entirely arbitrary limit and appears designed solely to ensure that, if the statements were longer, the claimant's legal team could claim more by way of costs at a later date....It is a wholly illegitimate exercise in avoiding the certainty and clarity that comes from costs management orders; it is designed to undermine the whole basis of such orders.*' Particularly in a specialist court, the expectation will rightly be that a party's experienced representatives will have a good understanding of the likely risks and contingencies that must be readily built into the estimate; if there are particular real contingencies at the time of budgeting (e.g. a real uncertainty, yet to be resolved about whether expert evidence would be required) this could be separately identified and, when resolved, no doubt the parties required to update their budgets accordingly.

As to proportionality, the court considered complexity and value, although complexity was a more important guide to the appropriate level of costs than value. The reason is obvious: a very high value dispute could turn on a simple point of contract interpretation; alternatively, a technically complex defect might well be the same to unravel and determine, irrespective of whether it caused damage to one house, or an entire housing estate. In this case, the overall costs budget was 50% of the £18m claim (and this ratio of costs to value obviously assumes a full recovery in the face of significant pleaded criticisms as to the required remedial works etc). These sums were obviously disproportionate. In broad terms, the court found that the overall budget should be in line with the defendant's budget, the consequence being that the budget had in fact then been already spent. The practical difficulty presented by this is that the rules are clear that the court cannot, on costs budgeting, assess costs incurred (although it can comment on them, and take them into account in respect of costs yet to be incurred). Various options were then presented as to how the court should deal with the situation.

The court produced its own solution, comprising a budget for total costs and a sum for prospective costs. This included a formula of working providing that, should the incurred costs be assessed at a sum greater than his indication, it would mean more had been done at an earlier stage, so that the judge's assessment of future costs would be reduced by the same amount.

Conclusion

Whichever solution the court adopted, however, the end point remained the same: that at a stage a long way from the trial itself, a party had been told by the court that on assessment it was unlikely to recover more than it had already spent even if it was successful in full. This is a decision which should, in practical terms, send a further wake up call to practitioners and, indeed, their clients. The court has shown itself to be robust in costs management even in cases in excess of the £10m threshold, where it considers it appropriate to be so. High value litigation is not an open cheque book for lawyers, and where proportionality is driven by complexity, and determined by judges with considerable practical experience of how such litigation should and can be run, the court will have a real influence over the shape of the cases as well as the dynamics of the commercial forces in pursuing and defending it.

DIGGING AND FILLING:

AN EVERLASTING LIABILITY?

By Gaynor Chambers

We've all experienced it. BT, or the local water authority, digging up the street. The red triangle showing a man digging, the notable absence of any actual men doing so, the congestion and disruption caused, and the common aftermath of poor reinstatement and uneven surfaces (particularly notable for the cyclists amongst us).

Street works affect us all, and due to the deregulation of the various utility sectors there are now over 200 utilities with a statutory right to dig up the road. Their right to do so is governed by the New Roads and Street Works Act 1991 ("the NRSWA"), which places a duty on the relevant street authority to co-ordinate street works of all kinds on the highway and a duty on undertakers to co-operate in this process.

The purpose of this article is to discuss the apparent lack of any cut-off point for limitation purposes for reinstatement works, which appears to flout what we all view as the usual general limitation principles for construction works (and indeed statutory liability), namely that time starts to run at the date of practical completion. Insofar as reinstatement works are concerned, however, the works are not "complete" until they are properly reinstated, creating a continuing and seemingly everlasting liability.

Taking, for example, a water authority, which is a relevant undertaker for the purposes of the Water Industry Act 1991 ("the Water Act"). Let's call it the Green Water Company Limited, or Green. The main sewerage pipe in the High Street of Redtown needs replacing. Green can carry out the works pursuant to its powers under section 158 of the Water Act, which permits it to break open the street, tunnel and bore under it, break open the sewer and remove earth or other materials.

However, High Street, and the land underneath it, do not belong to Green. These are generally vested in the local council pursuant to section 263 of the Highways Act 1980, and are maintainable *"at the public expense"*. Therefore, if Green digs up the street and doesn't repair it properly, the costs of doing so are ultimately paid by the public purse.

The NRSWA contains a series of provisions which are intended to ensure that Green permanently reinstates the street after its works are complete to an adequate standard, so that it is Green rather than the local council which foots the bill.

If Green does not reinstate to the required standard, the street authority can carry out the relevant works and recover the costs of doing so, provided it gives Green notice to carry out the necessary remedial works and Green does not do so. A notice is not necessary if the reinstatement is causing damage to other users of the street. Therefore, in theory, if my bicycle wheel is buckled due to faults in the trench caused by Green's poor reinstatement of the street, Redtown could immediately carry out the works and bill Green.

In practice, there is more likely to be a protracted period of testing and discussions, and, if necessary, a reference of the matter for resolution by a third party. The ultimate means of doing so is by arbitration, although there are a number of potential steps along the way. In particular, the parties can refer disputes to a local or regional Highway Authorities and Utilities Committee (HAUC) for guidance on technical issues. There is also the option of pursuing the criminal route, although this is of no assistance if compensation is sought, as the highway authority's damages are likely to be both unliquidated and contested by the undertaker.

However, the investigation process prior to any reference can often be lengthy, which leads to the question of the cut-off date for limitation purposes, or, in simple terms, the date by which any action must be taken by Redtown or any other street authority, if the reinstatement carried out by the utility is not up to standard.

The relevant standard for reinstatement is set out in the "Specification for the Reinstatement of Openings in Highways", known as "the Code". By section S1.2.1 of the Code, the Undertaker is required to ensure that reinstatement conforms to the prescribed standard throughout the guarantee period, which begins only on completion of the permanent reinstatement and runs for two years (S1.2.2).

This might lead one to believe that if Green completed the permanent reinstatement of its trenches in Redtown High Street on, say, 30th April 2013, the guarantee period would expire by 30th April 2015 and that Redtown would have to bring any action, whether criminal or civil, by that date. However, when the matter was discussed in *British Telecommunications Plc v Nottinghamshire County Council* [1998] EWHC Admin 989, the court determined that if the reinstatement works had never been carried out properly, there was a continuing offence, so that the two year guarantee period set out in S1.2.1 of the Code had not elapsed.

This is rather odd when compared with the general rule for the date when time starts to run for limitation purposes for construction works. We are all familiar with the idea of temporary disconformity up to and including the date of practical completion of the works, which means that generally the commencement date for limitation purposes pursuant to a construction contract is six years from the date of PC. This applies not just to buildings, but also to infrastructure works, including roads, under most standard form contracts. There are, of course, many exceptions to this general rule but there is a clear principle.

Equally, the time limit for actions pursuant to statute is generally six years. For example, in *Torridge District Council v Turner* (1991) 90 LGR 173, the court determined that an offence committed pursuant to the Building Act 1984 and Building Regulations 1985, namely the use of an agricultural exhibition centre and farm produce unit contrary to the 1985 Regulations and section 35 of the 1984 Act, was committed *"when the building works are completed and when those works are completed in a way which does not comply with the relevant requirements of the regulations"*. See the judgment of Woolf LJ at page 183.

However, in *BT v Nottinghamshire*, it was successfully argued that there was no finite moment at which the duty was to have been completed. Therefore, if the undertaker reinstates a street using materials or workmanship which do not comply with the specification, the duty to reinstate in accordance with the specification continues indefinitely, so that there is a continuing offence for which it can be prosecuted at any time until the street is reinstated in accordance with the specification.

This was an argument which had found favour with the stipendiary magistrate at first instance, and his judgment was upheld on appeal by no less than the Lord Chief Justice (Lord Bingham of Cornhill), although this was a question which he described as *"difficult"* and one on which *"my mind has altered more than once in the course of argument"*. In Bingham LCJ's view, the obligation to reinstate meant to reinstate properly, *"both because the definition section refers to the street being made good and because the code of practice which is incorporated by reference indicates that compliance with proper standards is inherent in the concept of reinstatement"*. There was also the wording of section 95(2), which provides that a further offence is committed if the failure to comply continues after conviction: *"On BT's argument the duty to reinstate properly would have come to an end on purported completion, yet here in section 95(2) we find reference to a failure to comply with a duty being continued after conviction and that seems to me to point strongly towards the continuation of the duty"*.

Although this case was decided on the basis of criminal liability, the principal appears equally applicable to civil liability arising out of the relevant provision. There is therefore, in effect, no time limit: the failure to reinstate the street in accordance with the duty contained in the NRSWA creates a continuing offence.

This may seem odd but the reasoning in *BT v Nottinghamshire* is entirely logical. Moreover, it accords with the general policy-led attitude of the courts to matters involving highways authorities, which is to minimise the burden on the public purse when interpreting the relevant legislation.

For example, in the decision of the Supreme Court in *Cusack v Harrow London Borough Council* [2013] UKSC 40. Mr Cusack had been using the forecourt to his property for parking for staff and clients. This involved cars crossing the footway to gain access, and backing into the road when leaving. Harrow sought to erect barriers to prevent vehicles from driving over raised kerbs and footways. Mr Cusack sought injunctive relief to prevent this, arguing that it would affect the profitability of his business. This was granted in the court of first instance but overturned on appeal, meaning that the council could carry out the relevant works.

The question which remained was what compensation, if any, Mr Cusack was entitled to. The works could be carried out under two provisions of the Highways Act. The first, section 66, gave the council power to erect posts or fences where necessary for the safety of highway users, with a right to compensation to any person who suffered damage as a result of the works. The second, section 80, gave the council, as highway authority, power to put up and maintain fences and posts without paying compensation, subject to certain restrictions under section 80(3), which did not apply to accesses which had become immune from enforcement under planning legislation.

The council sought to rely on its powers under section 80 (and thus to avoid paying compensation). The Supreme Court held that it was legitimate for it to do so. Where the council had two alternative statutory methods of achieving the same objective, it was entitled to adopt the one which imposed the least burden on the public purse, even though this meant that Mr Cusack was out of pocket.

This may seem rather harsh, but it is arguably no less so than the imposition of an everlasting liability on utilities carrying out reinstatement works, and reflects the objective of lessening the burden on the public purse which often underlies decisions of the higher courts on appeal.

Keating Chambers
15 Essex Street
London WC2R 3AA
DX: LDE 1045

Tel: +44 20 7544 2600
Fax: +44 20 7544 2700
Email: clerks@keatingchambers.com
Web: keatingchambers.com
Follow us: @keatingchambers

Providing dispute resolution services to the construction, engineering, shipbuilding, energy, procurement and technology sectors worldwide