Interpretation of PFI Contracts: the Long and Winding Road

Tom Coulson discusses how the Court of Appeal has grappled with the complexities and inconsistencies of a PFI contract.

Do long-term contracts need to be construed in a particular way? Do contracts that require the parties to work together and cooperate over a period of many years have their own special rules? Do they demand special treatment when it comes to questions of contractual interpretation? These are some of the questions raised by the judgment in *Amey Birmingham Highways Ltd v Birmingham City Council*.[1]

Amey Birmingham Highways Ltd v Birmingham City Council

Amey Birmingham Highways Ltd ("Amey") entered into a PFI contract with Birmingham City Council ("the Council") by which it agreed to undertake the rehabilitation, maintenance and management of the road network in Birmingham for a 25 year period ("the Contract"). The court's description of the Contract as *"massive and convoluted"* is one that might be thought to be apt to describe many PFI contracts. This one ran to over 5,000 pages, excluding the obligatory discs, plans, models and other documents that were incorporated by reference.

The issue in dispute was whether or not Amey was under an obligation to update certain tables in a computer model of Birmigham's road network. The data in that model was of practical importance because it fed into a computer programme that identified the maintenance works which Amey then had to undertake. If the tables were not updated, the practical effect was that Amey did not have to do some of the maintenance work (unless the Council instructed a variation and paid it extra to do so).

The detail of the plethora of individual arguments relied upon by the parties in support of their rival contentions as to the interpretation of the key contractual provisions are unlikely to be of great interest to anyone other than those who Jackson LJ referred to as *"aficionados of this litigation"*. Suffice it to say that Amey had marshalled a series of detailed arguments to the effect that it was obliged only to update certain of the tables in the computer model with accurate survey data but that it was not obliged to do so for other of the tables. The Council's best point in response was that such a conclusion lead to bizarre results: Amey would have to maintain a hypothetical road network rather than the road network which actually existed. The practical consequences would be that, at certain random points, Amey could leave potholes unremedied because the data in that part of the model had not been updated.

Amey had won at first instance in front of HHJ Raeside QC, but the Court of Appeal preferred the Council's interpretation and allowed its appeal. There are three points of general interest and significance arising out of Jackson LJ's judgement.

Subsequent Conduct of the Parties

As a matter of law, the parties' conduct after they have entered into their contract is irrelevant and inadmissible when it comes to questions about its meaning and proper interpretation.[2] However, many practitioners will have their suspicions that such matters frequently do influence tribunals, whether adjudicators, arbitrators or judges. In this case, it is hard to escape the conclusion that Jackson LJ was very much influenced by the fact that Amey had operated the Contract in accordance with the Council's approach for several years at the outset. As he said in his conclusion:

> *"... the PFI contract worked perfectly satisfactorily for the first three and a half years. Things only went wrong in 2014 when [Amey] thought up an ingenious new interpretation of the contract..."*

His judgment suggests that, even in our higher courts, the rule that subsequent conduct is irrelevant is sometimes more honoured in the breach than in the observance.

Text and Context

The second point of general interest is the weight the court gave to the words of the Contract on the one hand and arguments concerning its commercial purpose and business common sense on the other. The tension between those competing considerations is recurrent in commercial disputes. The issues of contractual interpretation in this case were certainly ones of the sort *"designed to separate the purposive sheep from the literalist goats"* as Lloyd LJ once memorably put it.[3] Unsurprisingly, Amey relied on the Supreme Court's decision in *Arnold v Britton* and emphasised that it was not the court's function to rescue parties from bad bargains.[4]

> *"Perhaps the most interesting thing about the judgment was the court's reference to the academic debate on the concept of "relational contracts", that is, contracts that are based upon a long-term relationship of trust between the parties."*

Since *Arnold v Britton*, many have felt that the courts have been less willing to depart from the apparent meaning of the words used in favour of an interpretation more consistent with commercial common sense. Although in *Wood v Capita Insurance Services Ltd*[5] the Supreme Court itself sought to denounce those sorts of easy generalisations in favour of a more nuanced understanding of the relative importance of text and context in different circumstances, it does sometimes feel that the broad direction of travel in the last few years has been to reassert the primary importance

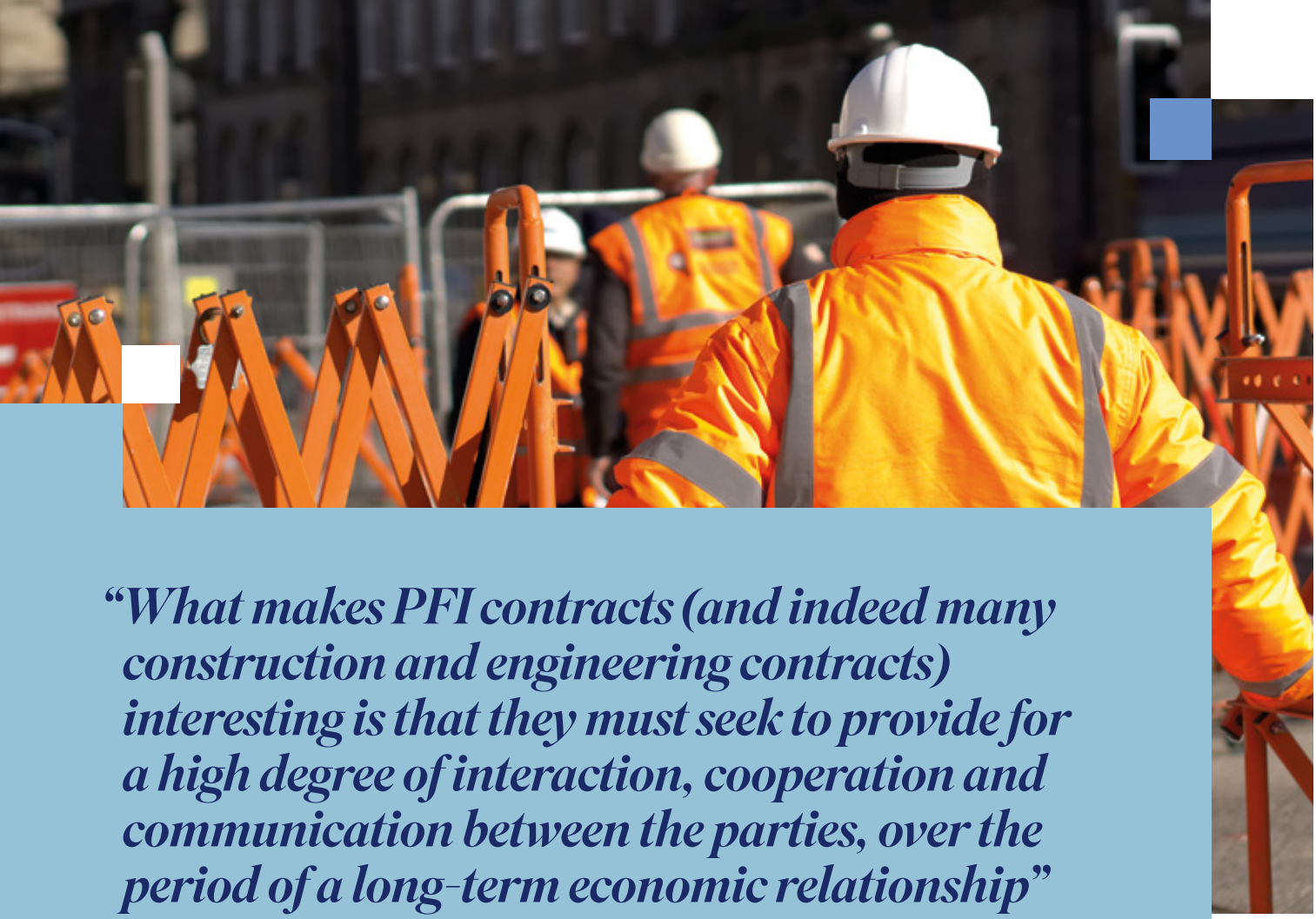
1 [2018] EWCA Civ 264.

2 See James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583.

3 Summit Investment Incorporated v British Steel Corporation (The Sounion) [1987] 1 Lloyd's Rep. 230 at 235.

4 [2015] A.C. 1619.

5 [2017] A.C. 1173.



"What makes PFI contracts (and indeed many construction and engineering contracts) interesting is that they must seek to provide for a high degree of interaction, cooperation and communication between the parties, over the period of a long-term economic relationship"

of the words used over the commercial purpose of the contract.[6]

Here, there was no doubt that considerations of business common sense were at the centre of the court's reasoning. The court described Amey's approach as "most bizzare" and was clearly significantly influenced by the "remarkable" practical consequences of Amey's construction of the Contract. Clearly in certain circumstances, arguments based on the commercial purpose of the agreement or on 'business common sense' can still carry great weight.

Relational Contracts?

However, perhaps the most interesting thing about the judgment was the court's reference to the academic debate on the concept of "relational contracts", that is, contracts that are based upon a long-term relationship of trust between the parties.[7] Although Jackson LJ said that he was not going to *"venture into those contentious issues"*, he nevertheless made this important observation:

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

In terms of the development of the general law of contract, this is a significant further example of the courts appearing to recognise the concept of a "relational contract". Whether such contracts require their own special rules is another question. That question had previously arisen in the cases only in the context of disputes about the part that concepts of 'good faith' should play in relational contracts.[8] The *Amey* case, however, hints that such contracts might require their own particular approach to contractual interpretation.

What makes PFI contracts (and indeed many construction and engineering contracts) interesting is that they must seek to provide for a high degree of interaction, cooperation and communication between the parties, over the period of a long-term economic relationship, and despite the infinite variety of issues and difficulties that can arise after the contract has been agreed. There is certainly a good argument that the courts should be (even) more concerned with the commercial purpose of such agreements than they are when addressing more everyday contracts of exchange, such as contracts of sale or carriage. Or, to be more precise, when construing PFI contracts in an attempt to give effect to all relevant provisions and to divine a cohesive and consistent contractual scheme, the courts should be more willing to accept that such contracts contain *"infelicities and oddities"*, i.e. provisions which run contrary to, or cannot be easily reconciled with, what otherwise appears to be the long-term purpose of the agreement.

Returning to the *Amey* case, however, the lesson for practitioners working with the *"infelicities and oddities"* of PFI contracts is clear. Jackson LJ's message is to focus on the big picture: when it comes to the interpretation of these sorts of PFI contracts, the courts are going to be less interested in the state of the roads than their place on the map.

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6 In addition to Arnold v Britton [2015] A.C. 1619, see Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts', Harris Society Annual Lecture, 8 May 2017.

7 See, in particular, I R Macneil, 'Whither Contracts?' (1969), 21 Journal of Legal Education 403; Hugh Collins, 'Is a relational contract a legal concept?', in Degeling and ors. eds, Contracts in Commercial Law (2016).

8 See Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] 1 Lloyd's Rep 526; and, in the particular context of PFI contracts, Portsmouth City Council v Ensign Highways Ltd [2015] BLR 675