KC LEGAL UPDATE

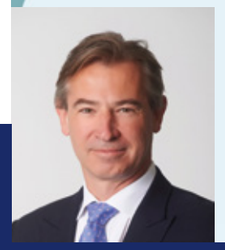
Spring 2019

In this issue...

KEATING CHAMBERS

WELCOME

to the Spring 2019 Edition of KC LEGAL UPDATE



This autumn saw the publication of *Litigation in the Technology and Construction Court*, a practical guide authored by my colleagues, Lucy Garrett QC, Calum Lamont and me.

Since the TCC's inception, there have been four presiding Judges in charge, it has become part of the Business and Property Courts, and Lucy has taken silk. Whilst every case in the TCC is different with the challenges it may bring, there are, obviously, similar issues which arise again and again, in relation to procedural, strategic and evidential issues – the pure legal ones may be the least of a client's problems. So, as much as there will never be a 'one size fits all' approach, there are practical ways in which the management of litigation can be improved, together with the chances of a successful outcome for your client.

The discussion in the book covers the broad spectrum of TCC work, but we have focussed on those cases which the TCC sees most regularly – those projects which give rise to claims for money and time, defective work, and, in the most significant growth area for the TCC in recent years, procurement claims. A keen feature of all litigation in the TCC is that it has been at the forefront of innovation in the management of litigation, from protocols to costs management, standardised directions to e-disclosure; and the evolution of civil procedural practice does not seem set to end any time soon, as the latest review of the rules on factual witness evidence in the Business and Property Courts shows.

In March 2018, the Witness Evidence Working Group was convened to review the current rules and practice for factual witness evidence in commercial court trials. Led by Mr Justice Popplewell, it includes judges and court users drawn from across the full range of the work of the Commercial Court. The purpose of the group is to examine whether or how the use of witness statements should be amended. It has recently issued a survey, intended for all users of all the Business and Property Courts, including of course the TCC.

The most common complaint historically has been that witness statements have become needlessly weighty documents produced by legal teams, at significant cost, rather than being the authentic product of the witness. We have all experienced those statements which appear to consist almost completely of detailed commentary and argument on documents, including those from the opposing side's disclosure which the witness did not know at the time of the relevant events, and therefore about which the witness could not give any true factual evidence. As often, a witness statement might be artfully drafted to avoid dealing with a key point which the legal team may know will be the subject of concession upon cross-examination, but which has been side-stepped for strategic purposes. On the other hand, the inefficiencies caused by evidence in chief being proffered orally – the mischief which witness statements were intended to address - would remain real should such a system be re-introduced.

The tricky question, therefore, will be whether a balance can be struck which will preserve the essence of the purpose of the exchange of written factual evidence in advance of trial, standing as a witnesses' testimony, whilst eliminating or at least reducing the costly abuse of the present rules which is so often, pointlessly, seen in practice. It remains to be seen how significant the changes might be; and which will have to be discussed in a next edition of Litigation in the TCC.

Adam Constable QC

CONTENTS

The Evolution of Notice Provisions in the FIDIC Suite

Simon Hughes QC is a well-known FIDIC specialist who has conducted FIDIC contract arbitrations in over 25 countries. He co-authors (with Jeremy Glover) a leading commentary on the Red Book, which has recently been published in its 3rd edition as a Red/Yellow Book commentary on the 2017 Amendments.

Introduction

One of the most notable trends in successive editions of the FIDIC Red Book is the increasingly onerous and prescriptive nature of the notice requirements. This article analyses the evolution of notice provisions from the 1987 FIDIC 4th Edition to the recent 2017 Edition. The failure to comply with such provisions can prove fatal to a claim and so contractors should make every effort to ensure compliance with them. There remain, however, some potential means by which a contractor may still bring a claim despite failing to give notice within the prescribed time.

The Purpose of Notice Provisions

Whilst notice provisions are often regarded as punitive only, the modern view is that they are a legitimate means of controlling chains of supply/claims management. That trend is reflected in the increasingly detailed notice provisions.

Seppälä gave an insight into the rationale behind the introduction of the more stringent notice provisions in the 1999 forms:

> *"The notice of claim alerts the Engineer and the Employer to the fact that the Employer may have to pay the Contractor additional money or grant him an extension of time by reason of a specified event or circumstance. The requirement to keep contemporary records is intended to ensure that there will be contemporary documentary evidence to support the claim. Once a notice of claim has been given, the parties can then agree on the particular contemporary records the Contractor must keep, to avoid future argument, and there may still be time for the Engineer to instruct alternative measures to reduce the effects of the claim. When claims are notified early, they may be resolved early, in the interests of both parties."*[1]

The judiciary has also made clear that notice provisions serve a valuable purpose. Jackson J, as he then was, famously remarked in *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No. 2*[2]*)*:

> *"Such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."*

Nevertheless, rules aimed at ensuring discipline within the supply chain are open to abuse and/or excessive use. The increasingly prescriptive nature of the notice provisions in the FIDIC forms represents an attempt to prevent and/or limit such abuses.

The 4th Edition Red Book

The 1987 form, still much used in the UAE, contains relatively simple notice provisions.

Sub-Clause 1.5 provides that a notice must, unless otherwise specified, be in writing.

Clause 44 deals with extensions of time and provides that in the event of one of the circumstances described in (a)-(e) being such as "*fairly to entitle the Contractor*" to an EOT, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and notify the Contractor accordingly.

Clause 53 is headed the "Procedure for claims". Sub-Clause 53.1 provides:

> *"Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen."*

A failure to comply with Sub-Clause 53.1 results in the contractor's entitlement being limited to the amount which the engineer or arbitrator considers to be verified by contemporary records (Sub-Clause 53.4).

The 1999 Red Book

The 1999 Red Book introduced significant changes in relation to notices and the claims procedure.

Sub-Clause 1.3 covers communications and provides that notice must be in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any agreed electronic means of communication set out in the Appendix to Tender.

Whilst the newly introduced Sub-Clause 2.5 is titled 'Employer's Claims', it is in fact a contractor-friendly clause. It is designed to prevent an employer from summarily withholding payment or unilaterally extending the Defects Notification Period (DNP). Under Sub-Clause 2.5 the employer has to give notice and particulars to the contractor if he considers himself entitled to any payment under any Clause of the Conditions or otherwise in connection with the contract and/or to any extension of the DNP. Importantly, such notice only has to be given "*as soon as practicable*" after the employer becomes aware of the event or circumstances giving rise to the claim.

Sub-Clause 20.1 imposed a time bar on contractor's claims and caused serious concerns amongst contractors. Frank Kennedy of Carillion, Chairman of the European International Contractors Working Group on Conditions of Contract, described the time bar as 'unduly harsh'.[3]

The reason for such criticism was that, under Sub-Clause 20.1, the contractor must give notice to the engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the contractor became aware, or should have become aware of the relevant event or circumstance. This time limit is more stringent than that imposed on employers. A failure to give notice within this time limit results in any claim for time or money being lost.

Even if a claim is notified within the 28-day period, a contractor still has to submit a fully particularised claim within 42 days of expiry of that period. The engineer then has to respond within 42 days or another agreed period.

Akenhead J provided clarification on a number of points in relation to Sub-Clause 20.1[4]:

(a) A Notice must be intended to notify a claim for extension and/or additional payment and must be recognisable as a claim. He held that a progress report stating "*the adverse weather condition (rain) have [sic] affected the works*" was nowhere near a notice whereas a letter stating "*the foregoing will entitle us to an extension of time*" would be sufficient. This should have spelled the end of the still frequently encountered argument that progress reports or meeting minutes constitute a Notice;[5]

(b) The words "*is or will be delayed*" in Sub-Clause 8.4 give rise to an entitlement to claim an EOT at two distinct points. Either when it is clear that there will be delay (a prospective delay) or when the delay had already begun to be incurred (retrospective delay).[6] A contractor is therefore entitled to notify a claim for an EOT within 28 days from the occurrence of either prospective or retrospective delay.

(c) The time bar represents a condition precedent and so a failure to comply with the prescribed time limit results in the employer being discharged of any liability. Indeed, Akenhead J held that the contractor had not given an appropriate Notice and so was not entitled to an EOT.

Sub-Clause 20.1 was drafted broadly as demonstrated by the Contractor having to give a notice if he considers himself entitled to "any" EOT and/or "any" additional payment under "any" Clause of the Conditions or "*otherwise in connection with the Contract*". Such broad drafting has unfortunately failed to prevent contractors from advancing questionable ways around the notice provisions such as claiming that variations are not covered.

1 Christopher Seppälä, - Contractor's Claims Under the FIDIC Contracts for Major Works, paper given at the International Construction Contracts and Dispute Resolution Conference in Cairo, April 2005. Paper available on FIDIC website.

2 BLR 195 TCC, [2007] Bus LR D109, [2007] CILL 2458, [2007] EWHC 447 (TCC) and 111 Con LR 78

3 Frank M Kennedy, 'EIC Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Projects (The Silver Book)' (2000) International Construction Law Review Part 4 531

4 *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC)

5 Ibid at [313]

6 Ibid at [312]

2017 Red Book

A notable addition to the 2017 book is the introduction of a definition for a 'Claim'. 'Claim' is defined extremely broadly to mean "*a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.*"

Sub-Clause 1.3 requires the written notice to be identified as a Notice. This provision means that meeting minutes or progress reports cannot constitute a Notice unless they are identified as such.

Sub-Clause 20.1 has been redrafted to provide an exhaustive regime for claims that applies to both employers and contractors. Sub-paragraphs (a) and (b) refer to employer's and contractor's claims that were previously found at Sub-Clauses 2.5 and 20.1 of the 1999 edition.

Sub-paragraph (c) refers to a claim for another entitlement or relief. The guidance provides that such other relief may include matters such as the interpretation of a provision of the contract or a declaration in favour of the claiming party. The final paragraph of Sub-Clause 20.1 sets out a separate procedure for a claim under sub-paragraph (c).

Sub-Clause 20.2 provides that either party must follow the procedure contained in the sub-clause if he considers himself entitled to any additional payment, a reduction in the Contract Price (in the case of an employer) and/or to EOT (in the case of the contractor) or an extension of the DNP (in the case of an employer) under any Clause of the Conditions or otherwise in connection with the contract.

The first paragraph of Sub-Clause 20.2.1 is tighter than its equivalent in Sub-Clause 20.1 of the 1999 book since it requires the Notice to describe the event or circumstance giving rise to the "*cost, loss, delay or extension of DNP*".

The intention behind Sub-Clauses 20.1 and 20.2 appears to be to provide an exhaustive regime applicable to any potential claims. This regime should spell a definitive end to the argument that claims for damages, as claims for breach and not under the contract, are not caught.

The 28-day time limit remains and a failure to comply with it still absolves the other party of liability. The remainder of Sub-Clause 20.2 provides a far more prescriptive claims procedure that both parties as well as the engineer must heed.

Sub-Clause 20.2.5 provides the engineer with a significant new discretion to treat late notice or late service of the fully detailed claim as valid, taking into account the circumstances. Potentially relevant circumstances are set out in the sub-clause. Sir Rupert Jackson recently noted that Sub-Clause 20.2.5 will require the engineer to consider reasonableness and proportionality when exercising this discretion.[7] Considering the clarity with which the time bar is set out, it is difficult to see how the claiming party could justify the lateness of the Notice except where there is some ambiguity as to when the period began to run from. Such arguments are likely therefore to hinge on when the claiming party became aware or should have become aware of the event or circumstance giving rise to the claim.

Are There Any Ways Around the Time Bar?

The answer to this question will depend on the facts but also on the governing law of the contract. In England & Wales the only credible arguments to avoid the time bar appear to be those based on waiver and estoppel. In civil law jurisdictions, good faith or other provisions in the relevant civil code may provide a means to escape the application of the time bar.

Waiver/Estoppel

The Scottish case of *City Inn Ltd v Shepherd Construction Ltd*[8] held that an employer has the power to waive or dispense with procedural requirements. The court of first instance held that waiver had occurred as a result of the employer and architect both making clear that the contractor was not entitled to an extension of time but failing to invoke the condition precedent clause that would have barred the claim. The Inner House affirmed this decision with Lord Osbourne stating:

> "*Silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case.*"

Such an argument could potentially fly in England & Wales but any waiver argument inevitably rests on the specific words and/or conduct of the employer: close analysis of the facts is central to success with waiver (and estoppel) arguments.

An argument in estoppel could also arise as a result of the words and/or conduct of the employer but the contractor would also have to satisfy the court/tribunal that he relied on the employer's words/conduct and such reliance was detrimental. Henderson LJ endorsed the following formulation of the requirements of promissory estoppel: a party must freely make a clear and unequivocal promise or assurance that he will not enforce his strict legal rights, the promise must be intended to affect legal relations or be reasonably understood by the other party to have that effect, and, before it is withdrawn, the promisee must alter his position such that it would be inequitable to permit the promisor to withdraw the promise.[9] An estoppel argument is likely to encounter disputes as to whether there was a clear and unequivocal promise and whether the contractor changed his position in reliance on the alleged promise.

Good Faith/Relevant Civil Code Provisions

A similar argument can be made in civil jurisdictions by relying on good faith provisions contained in the relevant civil code.

Article 246(1) of the UAE Civil Code provides that the contract must be performed in a manner "*consistent with the requirements of good faith.*" Further, Article 70 is a manifestation of the maxim *venire contra factum proprium* and states that "*no person may resile from what he has (conclusively) performed.*" As a result of these provisions, arbitral tribunals in the UAE can be reluctant to permit an employer to argue that claims are inadmissible due to the failure to comply with notice requirements where the employer has failed to raise the notice point before the commencement of the arbitration or where the employer has consented to the claims being adjudicated by the engineer on their merits.

Similarly, much Arab jurisprudence owes a significant debt to Egyptian jurisprudence which appears to recognise such principles. The Cairo Court of Appeal has held that:

> "*In arbitration, and by virtue of the doctrine of good faith which permeates commercial practice, the doctrine of estoppel, which is known in Arab legal terminology as the rule of 'non-contradiction to the detriment of others', has been firmly established.*"[10]

A contractor should also be aware that the relevant civil code may provide a means to bring a claim despite the time bar being enforceable. For example, in Poland the Supreme Court suggested that the time bar present in Sub-Clause 20.1 of the 1999 book did not deprive the contractor of the opportunity to claim, pursuant to art.405 of the Civil Code, the return of the undue benefits that the employer obtained at the contractor's expense, i.e. the performance of additional work.[11]

Compliance Should Always Remain the Priority

Contractors should not be lulled into thinking that the availability of such arguments renders compliance with the notice requirements inessential. Such arguments are by no means certain to succeed. Only compliance with the notice provisions can definitively ensure that a claim is not time-barred.

Conclusion

FIDIC's introduction of the time bar in the 1999 Edition ensured that contractors must be acutely aware of the need to comply with notice provisions. FIDIC's drafting of the relevant provisions in the 1999 and 2017 Editions should serve to discourage contractors from running weak arguments such as that variations are not covered by the provisions. If contractors are in the undesirable situation of having failed to comply with notice requirements, concerted efforts should be made to consider whether, in light of the governing law of the contract and the particular circumstances of the case, arguments based on waiver, estoppel, good faith or provisions of the relevant civil code are capable of success.

7 Sir Rupert Jackson, Notices, Time Bars and Proportionality, a talk to the Hong Kong Society of Construction Law on 21 September 2018

8 [2007] CSOH 190 and on appeal, [2010] CSIH 68

9 *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60; [2017] Bus. L.R. 784

10 Cairo Court of Appeal, Cases Nos 35,41, 44 and 45 of JY129 (Commercial) (Consolidated), 5 February 2013

11 Judgment of the Supreme Court of 23 March 2017, case no. V CSK 449/16

Case Analysis: Burgess v Lejonvarn

*In this article, **David Sheard** discusses the recent High Court decision in Burgess v Lejonvarn, in which he acted for the Defendant.*

Introduction

Recently, Judge Martin Bowdery QC handed down judgment following the final hearing in this long-running, and fairly unique, professional negligence claim (*Burgess v Lejonvarn*).[1] Previously, the claim had been the subject of a preliminary issues hearing at which it was determined that, whilst the parties had not entered into any contract, Mrs Lejonvarn owed the Claimants a duty of care in tort to carry out those services which she did provide with reasonable skill and care.[2] In this article, I will consider the determination of the preliminary issues which formed the back-drop to the final trial, before concentrating on some of the salient aspects of Judge Bowdery QC's final judgment.

Background to the Claim

In early 2012, the Claimants had decided that they wanted to re-landscape their garden. They obtained a design for the garden from a renowned landscaper, Mark Enright, together with a quote for implementing it. That quote (being for over £150,000) was more than the Claimants were willing to pay. In the Defendant, however, they had a friend with experience and contacts in the building industry. In particular, they had previously carried out at least one significant refurbishment project with Hardcore, a builder who often worked with the Defendant.

As such, the Claimants asked the Defendant whether she thought the project could be delivered by Hardcore for less than Mark Enright had quoted. This set in motion a chain of events that would sadly lead to a complete breakdown in the parties' friendship, and a protracted legal battle.

Hardcore was asked by the Defendant to price the job, and duly provided a quotation of £78,500. Given that various aspects of the design remained uncertain, however, the price was not fixed or all-inclusive. Whilst Hardcore could not provide the Claimants with a fixed price for the project, the Defendant suggested that a reasonable budget for completing the works with Hardcore would be £130,000. The Claimants decided that they wanted to proceed with Hardcore on that basis, and shortly thereafter works got underway.

The garden was set on a steep slope, and the first part of the project required significant groundworks and the construction of a set of retaining walls. Hardcore therefore engaged a specialist subcontractor for these works. The work proceeded relatively smoothly until, about 6 weeks into the project, the parties had an almighty falling out. For whatever reason, the Claimants assumed that the budget for the project was £78,500, whereas the Defendant understood it to be £130,000. Believing that costs were overrunning, the Claimants called any involvement of Hardcore and the Defendant in the project to a halt.

Nevertheless, the Claimants then continued to try and complete the project by working directly with the specialist subcontractor. This, unfortunately, did not have a happy ending: after paying a large sum of money over a period of a further two months, the Claimants became concerned with the quality of some of the work being carried out. In the end, Mark Enright was therefore hired to remedy any defective work and to complete the project, at significant cost. All in, the Claimants paid some £360,000 for the finished product, significantly more than Mark Enright's original quote, albeit only a small portion of that expenditure (around £60,000) had been incurred whilst the Defendant had any involvement in the project.

The Claimants blamed the Defendant for their overspend, and so started proceedings against her. They alleged that she had contracted with them to perform a wide range of architectural services in connection with the work or, alternatively, that she had in fact provided those services and owed the Claimants a duty to carry them out with reasonable skill and care. Broadly speaking, the areas of alleged breach concerned advice in relation to the initial budget, the absence of detailed design drawings for the works, an alleged failure to identify defects in the works which should have been apparent on inspection, and the instruction of payments exceeding the value of work carried out by Hardcore by the time they (alongside the Defendant) were ordered off site.

"There was no contractual relationship between the parties for a whole host of reasons, not least that there had been no offer and acceptance, no intention to create legal relations and no consideration."

The Preliminary Issues

Given the fundamental disagreement between the parties both as to the existence (or otherwise) of any contract, and as to what the Defendant's involvement in the project had been, Edwards Stuart J ordered that there be a preliminary issue tried to determine: (i) whether any, and if so what, contract had been entered into; and (ii) whether the Defendant owed the Claimants a duty of care and, if so, what the nature and extent of that duty was.

These issues were determined at First Instance by Judge Alexander Nissen QC.[3] There was no contractual relationship between the parties for a whole host of reasons, not least that there had been no offer and acceptance, no intention to create legal relations and no consideration. It was concluded, however, that the Defendant had agreed to provide a range of architectural services and was, to some extent at least, performing those services during the period in which she was involved with the project. As such, a duty of care in tort arose.

On the issue of inspection, for example, Judge Nissen QC concluded that the Defendant provided the service of "*[attending] site at regular intervals to project manage the Garden Project and to direct, inspect and supervise the contractor's work, its timing and its progress*"[4] and that she owed the Claimants a duty to exercise reasonable skill and care in doing so.

Judge Nissen QC's judgment on the duty of care issue was then the subject of an appeal.[5] The appeal was dismissed, albeit with a qualification. Whilst the nature of the Defendant's involvement in the project was such that she owed a duty of care to the Claimants, that duty did not import positive obligations to carry out particular services. Rather, the relevant obligation was to take reasonable skill and care insofar as a service was in fact carried out. As Hamblen LJ said, the relevant duty was "*to exercise reasonable skill and care in the provision of professional services as architect and project manager* ***when she performed those services***" (emphasis added). There was, for example, no duty "*to inspect*", only a duty to exercise reasonable skill and care insofar as an inspection was in fact carried out. This set the backdrop for the final hearing, to determine in detail what the Defendant actually did during the course of her involvement with the project, and whether she acted in a way that was negligent whilst doing what she did.

The Final Judgment

As a starting point, it is notable that despite the judgment of the Court of Appeal, the parties remained in dispute as to what the relevant duty of care previously defined actually required. For example, the Claimants maintained that irrespective of the fact that there was no retainer to define any services that the Defendant was to provide, if she was carrying out (in general terms) the broader service of 'periodic inspection/supervision' during the relevant period, a failure to attend site *at all* on any given occasion should be classified as a negligent omission.

There were, however, various difficulties with this argument:

- First, it was inconsistent with the Court of Appeal finding that a duty of care would only arise when the service was performed. Where no inspection took place, it would be artificial to classify this as the negligent performance of the service of inspection. Rather, on days when the Defendant was not on site, she was not providing the 'service of inspection' at all.
- Second, even if individual 'inspections' were to have taken place, the Defendant could not following each one have been subject to any positive duty to inspect in future, since there was no contract requiring her to do so. To the extent that she did then carry out an 'inspection' at some point thereafter, it is difficult to see why this should have generated a duty to have inspected on another occasion in the past.
- Third, whilst it is clear that in circumstances in which there has been an assumption of responsibility, liability

1 [2018] EWHC 3166 (TCC)

2 see the first instance judgment at [2016] EWHC 40 (TCC), as clarified by the Court of Appeal: [2017] EWCA Civ 254

3 [2016] EWHC 40 TCC

4 at [194]

5 [2017] EWCA Civ 254

"It is crucial, in relation to each individual defect, to consider why any reasonably competent architect would have identified it on inspection, and required its correction."

can arise for negligent omissions as well as negligent acts (see e.g. *Henderson v Merrett Syndicate)*,[6] this needs to be squared with the equally fundamental principle that the law does not recognise the enforceability of a gratuitous promise (*The Zephy)*.[7] Clearly, where there has been an assumption of responsibility to achieve a specific result, the resulting duty of care can be breached by a failure to do anything to achieve that result (as with, for example, the failure to take any steps to issue a claim form having agreed to do so). That is very different from a more general requirement to 'carry out inspections' over a protracted period.

- Fourth, the Claimants' contention could have had far-reaching implications for professionals of all kinds. Take, for example, an architect not appointed to inspect, but who agrees to carry out an inspection. Presumably this could not create the 'duty to inspect' capable of breach by omission in the manner contended for by the Claimants. But what if the architect were to carry out two inspections, or three, or four? At what point would they be considered to be carrying out a 'service' of periodic inspection, and so be branded 'negligent' for not inspecting on any other occasion? This could have introduced great uncertainty.

In any event, the Claimants' contention was rejected by Judge Bowdery QC. He made clear that a claim in negligence could lie only if the Defendant had on any given occasion carried out a particular service in a way that no reasonably competent architect would have, and thereby caused damage. Such negligence could be by omission if, for example, an inspection were carried out and a defect not spotted that any reasonably competent architect in the Defendant's position would have identified; but the possibility of breach would only arise if and insofar as the Defendant had actually provided advice or carried out the service in question.

Judge Bowdery then went on to consider each claim on its own merits, dismissing them all in turn. Indeed, in relation to many of the claims, the judge struggled to understand the basis on which they had been pursued.

In relation to the Defendant's 'budget advice', the Claimants contended that the suggested budget of £130,000 was negligent on the basis that the project could not have been completed for less than £188,000. But this did not make sense, in circumstances in which Mark Enright himself had quoted around £150,000 for the job. In addition, given that the budget was built up around a price which Hardcore had given, the Defendant could not be criticised for the way in which the task of preparing the budget was approached.

In relation to the allegedly negligent design, the claim "*lack[ed] credibility and conviction*". This was because, at one point, the Claimants had accepted in terms that such drawings as were produced by the Defendant were not themselves negligent, but that further designs should have been produced. Following the Court of Appeal ruling, however, the Claimants alleged that the drawings which the Defendant produced were actually negligent, in that they did not contain numerous details that detailed design drawings for construction would be expected to contain. In determining whether the drawings had been produced negligently, however, it was necessary to consider the purpose for which they were carried out; and once that was taken into account, there could be no question of negligence on the facts.

In relation to the allegations of negligent inspections, the Claimants had fallen into the classic trap which Coulson J cautioned against in *McGlinn v Waltham Contractors Ltd*,[8] namely to assume that any claim for bad workmanship against the contractor must be reflected in a claim for negligent inspection against an architect. Clearly, that does not follow: it is crucial, in relation to each individual defect, to consider why any reasonably competent architect would have identified it on inspection, and required its correction. Most of the alleged defects were structural issues, but the structural adequacy of the walls in question would have been outside the competence of an average architect.

Finally, the Claimants alleged that the Defendant negligently approved payments in excess of the sums due as the works progressed. This claim was also beset with numerous difficulties, not least the fact that there was no agreement that interim payments had to be made based on a 'measure and value' assessment of the work carried out, and the payments made up until when Hardcore was dismissed from site were well within the anticipated £130,000 budget.

"The final result will no doubt be of some comfort to professionals who may have become embroiled in 'friendly favours' for others."

Conclusion

Whilst turning on its own unique facts, the final result will no doubt be of some comfort to professionals who may have become embroiled in 'friendly favours' for others. It is one thing to establish that a duty of care is owed in such circumstances; without some specific act or piece of advice which can be shown to have been negligent, establishing breach may prove more difficult.

6 [1995] 2 AC 145
7 [1985] 2 Lloyd's Rep 529
8 [2007] 111 Con LR 1

BRIEF *Encounters*

Paul Buckingham discusses some of the influences on and highlights of his career at the Bar.

As a qualified engineer, what inspired you to move from your career in industry to the Commercial Bar?

Whilst working for a multinational oil company as a process engineer, I became involved in a contractual matter concerning an oil pipeline and later worked on a number of projects which were subject to an in-house patented process design. I started to find the legal aspects more interesting than the technical side, so ultimately decided to re-qualify as a barrister knowing that I wanted to work in construction and engineering disputes.

You recently successfully appeared in the Supreme Court in *E.ON v MT Hojgaard*, what impact do you think this case has had on the construction industry?

It is typical in construction contracts for the purpose of the project to be defined in the technical requirements of the contract (see the approach in the FIDIC Yellow Book and the IChemE Red Book). This case confirmed that there is nothing inherently wrong with allocating risk in this way, although parties would be well advised to ensure that the operative words are clear and unambiguous. The Supreme Court also confirmed that in contracts of double obligation, where there is a performance warranty in addition to a requirement that the contractor complies with a particular specification put forward by the employer, the more onerous of the obligations is enforceable, even where the defect that arises is the result of the employer's selection of the specification. This very much places the contractual risk on a contractor, who would thus be well advised to scrutinise the specifications carefully prior to contract execution and make sufficient allowance for that risk.

What was the most challenging aspect of taking a case to the Supreme Court?

By the time a matter has reached the Supreme Court, the arguments remaining are the tip of the iceberg of those canvassed below. It can make an extremely complex case appear to be a relatively straightforward matter, yet that is of course the very product of the process. In my experience, the most challenging part is obtaining permission to appeal to the Supreme Court, particularly on construction cases. I believe that it was the multiplicity of ongoing windfarm disputes that persuaded the Supreme Court to consider the matter and provide greater certainty on the meaning of a key contractual term.

You spent a period of time working in the international arbitration group of a large London law firm. How has that experience influenced your work as a barrister?

It has made me appreciate just how much work goes on behind the scenes in running a complex claim. This is not just a question of case strategy but dealing with vast quantities of documents, witnesses, experts and clients. Solicitors are the first port of call for most clients and therefore have to field a huge variety of questions and deal with a multitude of challenges, many of which can go unnoticed.

What has been the most rewarding experience of your career thus far?

Successfully defending a small family-owned building contractor in a dispute arising out of a residential building conversion. It was 'save the company' litigation, bristling with legal and factual issues despite its relatively modest value. The personal element made the outcome that much more rewarding.

What do you think are the biggest challenges currently facing the construction industry?

In my experience, most disputes arise from a contractor underestimating the complexity of a project or overpromising its likely performance. As the market tightens and becomes more competitive, those problems are magnified as parties attempt to win contracts. Unfortunately, if there was an easy answer to the problem it would have been found a long time ago.

You recently triumphed at the Chambers UK Bar Awards, where you were awarded Construction Junior of the Year. What attributes do you think make for a successful construction barrister?

A lot of hard work and a sense of humour!

Paul Buckingham was called to the Bar in 1995 and has practised at Keating Chamber since. His dual qualification as an engineer means that he is in constant demand for high profile engineering and construction projects. Clients routinely praise his active engagement and the skill with which he is able to stay on top of the key issues in a case. Paul won Construction Junior of the Year at the Chambers UK Bar Awards 2018.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Jonathan Mortimore v United Utilities Water Ltd [2018] (Manchester Commercial Court)

This was a claim brought against United Utilities as statutory undertaker under section 209 of the Water Industry Act 1991. Section 209(1) provides that the statutory undertaker shall be liable for any damage caused by an escape of water from a pipe vested in the undertaker irrespective of fault, subject to certain limited defences. United Utilities accepted liability and the only matter in issue between the two parties at trial was therefore quantum.

The claim concerned damage to property as a result of a flood caused by an escape of water on 25 October 2014. Mortimer Enterprises Ltd ("MEL") provided training services to the construction industry from the premises which they used as a workshop and the claimant was the principal shareholder. MEL ceased trading in January 2015 and the claimant argued that this had been because of the damage caused by the flood. The claimant therefore sought damages for the loss of the business.

It was agreed that the appropriate method of quantifying the loss was the value of the business at the time of the flood and that the best way of valuing the business was an agreed multiple of annual maintainable earnings. The claimant argued that the annual maintainable earnings, and therefore the value of the business, were considerable, and claimed £1.5 million in compensation for the loss and damage said to be caused by the flood. The defendant argued that the business was in trouble regardless of the flood and that it therefore had a limited value.

The judge accepted the defendant's forensic accountant's evidence that the maximum value of the company at the time of the flood was £116,085. He also accepted the defendant's argument that the diminished profits before the flood were not an anomaly but were rather an indication of a continuing decline.

The judge therefore valued the claim at £116,085 less £107,540 already paid by the defendant, leaving a net liability of £8,545.

Gaynor Chambers represented the defendant.

DHL Supply Chain Ltd v Secretary of State for Health and Social Care [2018] EWHC 2213 (TCC)

This was an application for summary judgment and an application to lift the automatic stay imposed by the Public Contracts Regulations 2015.

The case concerned a procurement exercise for the provision of logistic services for the NHS and social care services with a value of £730 million. Since 2006, DHL has provided NHS supply chain services under the Master Services Agreement (MSA). DHL's contract is due to expire on 28 February 2019. The MSA is to be replaced by the Future Operating Model (FOM) which is a reorganisation of the NHS supply chain. DHL challenged the decision to award the logistics contract under the FOM to Unipart.

DHL alleged that the authority had acted unlawfully in relation to SQ 6.9 which required the bidders to demonstrate "experience of managing a service in the Health and Social Care Environment of similar size, complexity and scope". Unipart had been awarded a score of 3 and DHL argued that there was no lawful basis upon which such a score could have been awarded. DHL argued that on a proper interpretation of the ITT, Unipart should have failed SQ 6.9 and been excluded from the rest of the process.

O'Farrell J refused to order summary judgment. The judge held that on the documents before the court, the defendant had a real prospect of successfully defending the claim. SQ 6.9 would have to be interpreted according to the factual matrix known to the parties and the court could not speculate as to what such an exercise would show. In particular, there were factual disputes as to what was said to tenderers at the pre-bid meetings, what would be required to show the relevant experience, whether there were other bidders that could meet the criteria, and whether Unipart's response satisfied the criteria.

O'Farrell J further held that the suspension on awarding the contract should be lifted. The judge held that the disruption caused to patients could not adequately be compensated for by the cross-undertaking in damages. The balance of convenience also favoured keeping the stay in place. The public interest would be served by having the cost saving measures implemented and it would not realistically be possible to hold a trial without causing a delay.

Sarah Hannaford QC represented the defendant.
Fionnuala McCredie QC represented the interested party.

Arcadis Consulting (UK) Ltd ("Hyder") v AMEC (BCS) Ltd [2018] EWCA Civ 2222

Hyder appealed part of a decision of Coulson J ([2016] EWHC 2509 (TCC)), relating to the incorporation of certain terms and conditions into a contract which included a limitation of liability provision. The Judge had rejected the argument that there was a cap on damages of £610,000, and this conclusion was not appealed by Hyder. However, Hyder appealed on the basis that there was a cap on damages limited to "…the reasonable direct costs of repair, renewal and/or reinstatement …", which arose by virtue of certain terms and conditions becoming incorporated by reference into the contract which the Judge had found existed.

The Court of Appeal allowed the appeal. It concluded that the Judge had erred in finding that the terms and conditions referred to in Buchan's offer had not been accepted by Hyder's conduct. The Judge had failed to distinguish between the interim contract under which the parties were currently working and the final formal contract that they continued to negotiate (but in fact never agreed). The parties had agreed a set of terms and conditions which were incorporated by reference into the contract, including the limitation of liability. Applying *British Steel Corp v Cleveland Bridge* ((1984) 24 BLR 100 at p.119 per Goff J), the contrary result would have been harsh and extraordinary as it would have left Hyder with unlimited liability contrary to their intentions.

Marcus Taverner QC & Gideon Scott Holland represented the appellant.
Simon Hughes QC & Calum Lamont represented the respondent.

Heron's Court v NHBC Building Control Services Ltd [2018] EWHC 3309 (TCC)

This case establishes that Approved Inspectors, the private sector providers of building control, do not owe the duty under s1(1) of the Defective Premises Act 1972. The TCC identified that where this duty is applied to professionals, (the duty requiring work "for or in connection with the provision of a dwelling" to be carried out in a professional manner), it is to be dealt with as akin to a professional negligence claim. Waksman J. stated that *res ipsa loquitor* was not an available plea to a claimant in such a claim (or more generally in relation to professional negligence claims).

This case concerns the Heron's Court block of flats in Radlett, Hertfordshire. The claimants in this action were the lessees and the management company of the block. They asserted that the construction of the flats was defective. One of the defendants to this action was NHBC Building Control Service Ltd ("BCS"). BCS had Approved Inspector status, which meant that they were authorised to carry out inspection of the plans and building work for the purposes of the Building Act 1984. BCS could certify whether the relevant building regulations had been complied with.

The claimants alleged that BCS had a duty under s1(1) of the Defective Premises Act 1972 ("the 1972 Act") namely that it had taken on work "for or in connection with the provision of a dwelling" and, therefore, was required to see that the work which it took on was done in a workmanlike or professional manner with proper materials so that the dwelling would be fit for habitation when completed. BCS applied to strike out the claim on the basis (1) that the particulars disclosed no reasonable grounds for bringing the claim as a matter of law and (2) that it was so devoid of particulars that it amounts to an abuse of process.

Mr. Justice Waksman struck out the claim. He found BCS did not owe the duty alleged as an Approved Inspector. The statutory duty was targeted at architects and designers and other professionals who were contributing to the design and construction of the building. In contrast, Approved Inspectors' essential function was rather to certify whether that design or construction is lawful in a building sense. The Court relied upon 'illuminating' dicta in speeches in the House of Lords in *Murphy v Brentwood* which expressly rejected the proposition that the 1972 Act imposed a liability on local authority building control. The Judge regarded Approved Inspectors as carrying out the same regulatory function as local authority building inspectors and are to be regarded as in the position in relation to the s1(1) duty notwithstanding that they work for profit.

Mr. Justice Waksman indicated that he would not have completely struck out the claim on the basis of the second ground alone. The particulars were vague and inchoate. *Res ipsa loquitor* is not an appropriate doctrine for a professional negligence case. However, the proper response would have been to order the required particulars to be provided, probably with an unless order.

Sam Townend represented the fourth defendant.

Burgess v Lejonvarn [2018] EWHC 3166 (TCC)

In this claim, it was alleged that an architect had acted negligently in the provision of professional services for which there had been no payment. It was established at a preliminary issues hearing that, whilst there was no contract between the parties, the defendant did owe the claimants a duty of care. Following the preliminary issues hearing, the Court of Appeal clarified that any duty of care did not import positive obligations to act, only an obligation to take reasonable skill and care insofar as a service was actually carried out. The case was remitted back to the High Court to assess whether the Defendant had breached this duty of care.

Judge Martin Bowdery QC dismissed the claim. The claim for alleged negligent design and project management was described as lacking credibility and conviction, and the judge had difficulty understanding how the claim for allegedly negligent budgeting was maintained. In relation to the allegations of negligent inspection, the judge remarked that the claimants had fallen into the trap suggested by Mr. Justice Coulson in *McGlinn v Waltham Contractors*, of assuming that any alleged defect in the works must have been the result of negligence. In fact, each allegation of negligent inspection has to be considered on its own merits. On the facts, all of the allegations of negligence made by the claimants were dismissed.

David Sheard represented the defendant.

University of Warwick v Balfour Beatty Group Ltd [2018] EWHC 3230 (TCC)

The University of Warwick contracted with Balfour Beatty to design and build the National Automative Innovation Centre ('NAIC') on their campus. The issue at trial was whether, on the proper construction of the contract, the entire works were to be complete before a single section could be certified as complete.

The contract particulars provided for the works to be divided into sections. Sections 1-4 were due to be completed on 10th April 2017. Section 4 was due on 5th July 2017. Different liquidated damages figures applied for each section.

The adjudicator accepted the submissions made on behalf of the defendant. He concluded that the ordinary and natural contractual meaning of practical completion meant that it was not possible to achieve practical completion of any section in isolation.

HHJ McKenna disagreed with the adjudicator. In his view, the adjudicator had overly focused on the meaning of one word 'property' at the expense of what the parties plainly meant with regard to the rest of the contract.

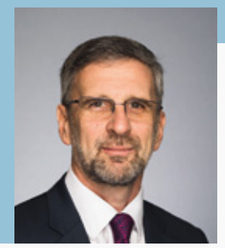
The contract particulars provided for different completion dates and different rates of liquidated damages for each section. It could be inferred from this that one or more of the sections could be completed before completion of the works as a whole. Equally, there would be no purpose in treating the sections separately if practical completion could only be achieved when the works as a whole were complete.

It was not necessary for the works as a whole to be complete or for the property to be ready for completion. The relevant stage of completeness is one which permits such a final stage of completion to be achieved in due course. The use of the words 'the works or a section' in clause 2.27 suggest that they are alternatives and not intrinsically linked.

In any case, business common sense supported the construction advanced by the claimant. Otherwise there would have been no point in providing for the sectional completion regime at all.

Vince Moran QC represented the claimant.
Adam Constable QC represented the defendant.

Keating on Offshore Construction and Marine Engineering Contracts



Jeremy Farr *- Jeremy is a partner in the oil, gas and resources practice group of the K&L Gates London office. He is an energy and EPC lawyer focused on dispute resolution, project advisory and contract formation with a particular focus on offshore upstream oil and gas projects.*

The 2nd edition of "Keating on Offshore Construction and Marine Engineering Contracts" was published in November 2018. The book follows on from the success of the 1st Edition, which was published in 2015 and has become an authoritative text for practitioners involved in the offshore and marine engineering industries.

The book, edited by Adam Constable QC, provides in-depth guidance on the agreements involved in the construction of ships, rigs and other offshore vessels and structures. New features of the 2nd Edition include comparative commentary on the NEC suite, now often used in wind farm construction, an increase in the scope of the dispute resolution chapter, delving further into matters of insurance and expanding jurisdictional coverage to include Australia and Singapore.

Contributors from Keating Chambers are Jane Lemon QC, Lucy Garrett QC, Abdul Jinadu, Calum Lamont, James Thompson, Thomas Lazur, Ben Sareen, Sarah Williams, Peter Brogden, Paul Bury, Jennie Wild, Emma Healiss and James Frampton.

The 1st Edition of this work was the first practitioners' text book to bridge the gap between shipbuilding and traditional land-based construction. The application of construction law principles to shipbuilding came to the fore in the *Adyard*[1] matter in the Commercial Court before Hamblen J., which receives due attention in the book, and in which the General Editor appeared on behalf of the buyer of the ships, instructed by the undersigned. Some have argued in the light of that judgment that the prevention principle had no place in a shipbuilding dispute but, as Sir Nicholas Hamblen and Sir Vivian Ramsey note in their foreword to the 2nd Edition, there is an overlap between the Commercial Courts and the TCC with judges from both courts dealing with similar disputes arising from offshore contracts in the energy field. It should therefore be no surprise that there is also an overlap of legal principles. This book is therefore a very valuable addition to the reference library and particularly instructive to practitioners who come from one or other side of the erstwhile divide and seek an understanding of how the two worlds meet.

The 2nd Edition maintains the structure of the 1st Edition. It starts with chapters outlining the nature of an offshore construction contract and an introduction to the standard forms. These now include the NEC forms which take a rather different approach to that with which shipbuilding practitioners will be familiar and are increasingly used in offshore engineering projects, particularly wind farms. Chapter 3 is a primer on general contract principles but gets more interesting as the authors discuss the important legal developments since the publication of the 1st Edition in construction of contracts, implied terms, oral variation and consequential loss. Consequential loss has a particularly offshore flavour. Chapter 4 deals with payment and damages including discussion as to how standard forms approach adjustments to the contract price.

"The authors have done a sterling job of assimilating the approach of the different standard forms and the court decisions that have considered them."

The real meat of the book, however, and what distinguishes it from others, is to be found in the subsequent chapters. Here, the true offshore engineering and construction flavour of the book is revealed. Chapters 5, 6, 7 and 8 address performance, changes and time for delivery and completion and termination. These are the areas where disputes in offshore engineering and construction contracts generally arise. The authors have done a sterling job of assimilating the approach of the different standard forms and the court decisions that have considered them. These chapters have been expanded to include the NEC forms and recent authorities. In Chapter 7 in particular there is some very interesting discussion of the ambit and effect of the prevention principle.

Chapters 9 and 10 cover guarantees, bonds and insurance, and passing of title, risk, liens and delivery up. These chapters dealt with complex issues extremely well in the 1st Edition and have been expanded and improved further in the current edition. Chapter 11 on dispute resolution has similarly been expanded.

Almost half the 704 pages of the 2nd Edition are taken up by appendices containing the standard forms (save for the NEC forms) to which the book refers. This is a useful source of the standard forms and worth having in one place notwithstanding the size of the appendices which might appear off-putting.

Overall, this book in many respects treads a path that other texts have not trodden. It is both informative and comprehensive, and the General Editor does not shy away from discussing controversies as the law develops in the area of offshore engineering and construction. It is an essential text for practitioners in this interesting cross-over area of law.

Jeremy Farr,
K&L Gates LLP

[1] Adyard Abu Dhabi v SDS Marine Services [2011] EWHC 848 (Comm)

GROVING PAINS

Matthew Finn and **Harry Smith** consider some of the issues arising out of the Court of Appeal's decision in *S&T v Grove Developments*.

Introduction

It is probably an overstatement to describe the Court of Appeal's judgment in *S&T v Grove* ("*Grove*")[1] as exciting. It does, however, address a number of problems concerning the operation of Part II of the Housing Grants, Construction and Regeneration Act 1996, with which practitioners and the construction industry have had to grapple for many years. As Jackson LJ said himself:

> "*We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts.*"

Grove concerned a contract to design and build a new Premier Inn Hotel at Heathrow Terminal 4. There had been three adjudications, the last of which decided that a pay less notice issued by Grove dated 18 April 2017 had been invalid, with the result that S&T was, on the face of it, entitled to be paid some £14 million, being the sum stated as due in its interim application no. 22.

Grove issued Part 8 proceedings seeking declarations that: (1) its pay less notice dated 18 April 2017 had been valid; and (2) in any event, it was entitled to commence a fourth adjudication as to the true value of interim application 22. It succeeded both at first instance before Coulson J (as he then was) and on S&T's appeal to the Court of Appeal, which was dismissed.

This article is concerned with the second declaration sought by Grove, and the consequential legal issues arising from the Court of Appeal's decision in respect of that request for declaratory relief.

The Right to Challenge the Notified Sum

In arguing that it was entitled to refer a dispute as to the true value of interim application 22 to adjudication, Grove expressly invited the court to depart from the decision in *ISG v Seevic*,[2] in which Edwards-Stuart J had held that:

> "*… if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the value of the work carried out by the contractor for the purposes of the interim application in question.*"

At first instance,[3] Coulson J accepted Grove's invitation, embarking on a comprehensive rejection of the reasoning in *ISG v Seevic*, both by reference to first principles and by reference to authority. He summarised his conclusions as to principle in the following way:

> "*…in my view, there is no contractual basis for treating interim and final applications/payments in different ways. The contract treats them in the same way. So too should the parties, the adjudicators and the courts. On that basis, therefore, whether what is in dispute is an interim payment or a final payment, the employer has the right in principle to refer to adjudication the dispute about the 'true' valuation.*
>
> *Accordingly, … it seems to me to be clear that an employer in the position of Grove must pay the sum stated as due, and is then entitled to commence a separate adjudication addressing the 'true' value of the interim application.*"

> *"The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due."*

The Court of Appeal adopted this reasoning at paragraph 99.

As the above passage makes clear, Coulson J's analysis was predicated on the notion that the employer would have to pay the notified sum before commencing a second 'true value' adjudication. He developed this point later in his judgment in the following way:

> "*There is also the suggestion that, if this analysis is right, the notice regime under the 1996 Act and/or this form of contract will be undermined, because every employer who misses the relevant deadline for the pay less notice will simply start a second adjudication as to the true value. But why would they? In most cases, such a course would be inefficient and costly: **the employer will still have to pay the sum stated as due in the interim application**. If the employer can then resolve the alleged over-valuation point in the next interim payment round, no second adjudication would be necessary.*
>
> *Even if we assume that the relationship between the employer and the contractor is poor, so that there is a second adjudication in any event, **the adjudications will still be dealt with, by the adjudicators and by the courts, in strict sequence.** The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due. I have made that crystal clear.*" (emphasis added)

Coulson J's analysis of this point was upheld and developed in the Court of Appeal. Jackson LJ said:

> "*As a matter of statutory construction… the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. … The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. **Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking on an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.**"* (emphasis added)

> *"The Court of Appeal judgment in Grove amounts to a radical departure from the words used in the statute."*

There is much to be commended in that analysis:

i) The problem thrown into focus by *Grove* is one which might be said to be inherent in the drafting of the 1996 Act: s.108(1) provides for a right to adjudicate 'at any time'; s.111(1) provides that the employer 'shall pay the notified sum…on or before the final date for payment'. The former is a right of an absolute character; the latter is an absolute obligation. If they conflict, the answer must be that one or the other has to give way.

ii) It is trite that the principal purpose of Part II of the Act is to maintain contractors' cash-flow. That being the case, on the working hypothesis that s.108(1) and s.111(1) conflict, it can convincingly be argued that it is the right to adjudicate 'at any time', and not the right to payment under s.111, that ought properly to be 'read down'.

iii) This was, in effect, the solution which Edwards-Stuart J adopted in *ISG v Seevic*: the employer was deemed, in the absence of a valid pay less notice, to have agreed to the amount set out in the contractor's application, such that no 'true value' dispute could arise or be referred to adjudication. The problem with this analysis was that it was thoroughly artificial, as Coulson J convincingly demonstrated in his first instance judgment (see paragraphs 114-121).

iv) The judgments in *Grove* resolve the conflict by giving the contractor's right to payment under s.111 precedence in time over the employer's right to enforce the parties' underlying contractual rights. This recognises the fundamental point that, if s.111 is to be complied with at all, the employer must, logically, discharge its s.111 liability before any adjustment to account for the parties' underlying contractual rights can be made. It can therefore be said to be inherent in the statutory scheme that the contractor's right to payment under s.111 ought to be given temporal precedence over the employer's right to adjudicate.

1 [2018] EWCA Civ 2448
2 [2014] EWHC 4007 (TCC)
3 [2018] EWHC 123 (TCC)

However, as is instantly clear, the Court of Appeal's decision that an employer is prevented from "*embarking on*" a 'true value' adjudication until it has paid the notified sum is flatly inconsistent with s.108(2)(a), which permits a party to a construction contract to give notice "*at any time of his intention to refer a dispute to adjudication*" (emphasis added). In that regard, the Court of Appeal judgment in *Grove* amounts to a radical departure from the words used in the statute and, further, runs counter to prior Court of Appeal authority in which it has been held that the phrase "*at any time*" means exactly what it says: see e.g. *Connex South Eastern Ltd v MJ Building Services Group Plc*,[4] [38] per Dyson LJ (as he then was).

In our view, there was – strictly speaking - no need for the Court of Appeal to treat ss.108(1) and 111(1) as being in conflict with one another in order to hold an employer to its payment obligations. Instead of prohibiting an employer from commencing a 'true value' adjudication prior to payment of its s.111(1) liability, the court could simply have held that the courts would *enforce* 'notified sum' adjudications and 'true value' adjudications sequentially, in that order. Such an approach would have avoided doing violence to the language of s.108(1) of the Act, whilst ensuring that if an employer failed to pay the notified sum and immediately referred a 'true value' dispute to adjudication, the contractor would be free to commence a separate s.111 adjudication – or to seek a Part 8 declaration as to the employer's s.111 liability – safe in the knowledge that its right to payment under s.111 would be upheld and enforced before any question of enforcement of the parties' underlying contractual rights could arise.

The Employer's Right to Recover an Overpayment

The consequential issue which arose in *Grove* concerned the legal nature of the employer's right to recover any overpayment made by reference to a 'notified sum'. Coulson J held at first instance that the employer's right to repayment arose pursuant to an implied term or alternatively in restitution. This adopted the findings of the Supreme Court in *Aspect Contracts (Asbestos) Limited v Higgins Construction plc*,[5] which concerned the slightly different context of an overpayment found to have been made as a result of an adjudicator's decision subsequently shown to have been wrong.

Jackson LJ departed from this analysis, stating:

> "*If an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from the adjudicator's re-evaluation… Having determined the true value of the works at an interim stage, the adjudicator (whose powers are co-extensive with the powers of the court in matters such as this) must be able to give effect to the financial consequences of his decision.*"

"…there is now an unwelcome tension in the jurisprudence between the basis of the employer's right to recover overpayments flowing from an adjudicator's decision."

With respect, this reasoning is circular and unsatisfactory. It is circular because it does not follow from the fact that an employer has the right to refer a 'true value' dispute to adjudication that there "*must*" exist a legal basis for a claim to recover any overpayment found to have been made. It is unsatisfactory for that reason and also because there is now an unwelcome tension in the jurisprudence between the basis of the employer's right to recover overpayments flowing from an adjudicator's decision (i.e. an implied term or restitutionary right: *Aspect v Higgins*) and overpayments made pursuant to the interim payment mechanism, respectively. There is no good reason for similar rights of this kind to have different legal foundations.

Future disputes will have to grapple with this difficult passage in the Court of Appeal's decision in *Grove*. One possibility is that the courts will reject it as inconsistent with *Aspect v Higgins* and/or as being wrong in principle. Another possibility is that Jackson LJ's judgment represents the first step towards the recognition by the courts of some kind of alternative freestanding statutory right to repayment of sums overpaid flowing from or necessarily implied by the provisions of the 1996 Act itself. However, if such a freestanding right is to be recognised, a stronger forensic justification for it will be required than that articulated in *Grove*.

4 [2005] 1 WLR 3323

5 [2015] UKSC 38

BRIEF *Encounters*

Calum Lamont considers the attributes and work of the modern barrister and the advice that has influenced his career.

You were recently awarded International Arbitration Junior of the Year at the Chambers UK Bar Awards, what do you think clients are looking for in a modern barrister?

I was obviously really proud to win the award. I was extremely lucky to have been introduced to international work at a relatively early stage of my career by more senior members of chambers and I took to it. Sometimes it has been difficult being away for long periods of time – there was a stage when I was abroad for the best part of 3 years, and I very nearly didn't come back! The experience, however, was invaluable, as were the connections that I was able to make during those travels. I firmly believe that if one is willing to travel, show willing, and of course do good work, then there is an international practice for everyone.

As to what clients are looking for, I think 90% of the job is about hard work and if you are prepared to be diligent, but at the same time produce high quality output, clients will, generally speaking, be happy.

I think to make a name for yourself in the international work that we are exposed to here in chambers, you have to be prepared to work flexibly. The cases can be enormous, have often taken a life of their own, and frequently none of them make sense at first. There is no substitute for sitting down with the client and the experts and asking questions until you think you have understood it, and then ask further questions. I have found that solicitors are looking for a safe pair of hands and will happily hand over parts of the case to you if they can see that you are making progress, particularly with clients who are often wholly perplexed by the process.

What sort of disputes are you currently working on?

I always seem to be doing disputes about cracked concrete structures. Floor slabs are a particular favourite, not least because all parties involved point the finger of blame at each other. I am also dealing with a couple of car parks, precast concrete bridges, and tunnels. The technical aspects of our work are always the most interesting, not least when there are multiple technical experts who never seem to be able to reach consensus. My practice tends to be about 50% domestic work, and 50% international (predominantly the Gulf).

What else have you been doing recently?

I have co-authored a book, together with two other members of chambers (Adam Constable and Lucy Garrett), which was launched in early December 2018. It's called *Litigation in the TCC*, and we were really pleased that Coulson LJ and Fraser J were able to both read it and provide some kind words in their forewords. I get teased in chambers for saying so, but it is not a law book; rather, it is intended to be a book of ideas. The genesis of the book was from various late-night discussions whilst working on cases where we all thought that there must have been a better way to run particular aspects of the litigation or arbitration in question. We put our heads together and (several years later), hey presto! Happily, it has generated interest, and even some debate, which was why we wanted to put pen to paper in the first place. We don't pretend to have all of the answers, but you should definitely go and buy a copy.

Aside from that, Demolition (the Keating band) has been on tour and we are now proud winners of Law Rocks! for two years in a row.

In your role as a pupil supervisor you support aspiring barristers in the early stages of their career. What is the best professional advice that you have been given?

There are two pieces of advice which have stuck with me. The first was from my history tutor, Jonathan Scott, back in Cambridge, who taught me about relevance. His theory was that any properly formulated question should only ever seek to elicit an answer covering some 10% of a particular subject area. The skill in answering it, he said, was to apply 100% of your answer to the 10% of the subject area requested, rather than responding generally. His theory was that the recipient would then assume that the candidate was familiar with the remaining 90% of the subject area, by virtue of the comprehensive and fully relevant response to a focussed question. That would then be rewarded with good marks. To me, that advice has proved invaluable, and it has been fully transferable into practice. For example, when pleading, one should be as concise as possible and only plead out what is truly required. When responding to a tribunal's question, generalised assertions which seek to divert attention to perhaps more meritorious areas of the case are not helpful; tribunals want to get to the right answer, and as advocates we should be able to help them reach that by providing direct, relevant, answers.

The second was from an unnamed member of chambers. He said, "don't overtrade". It is always important to be busy, but I like to think that what sets us apart at Keating is the quality of the work which we produce and that, of course, takes time.

Calum Lamont is a pre-eminent junior in global construction and engineering litigation and in international arbitrations involving construction and infrastructure disputes, particularly in Korea, Hong Kong and the Gulf. Calum won International Arbitration Junior of the Year at the Chambers UK Bar Awards 2018.

Deleted Terms in Construction Contracts: Friend or Foe?

***Brenna Conroy** considers conflicting precedents in relation to deleted terms in construction contracts and the possible implications that they may have in practice.*

Introduction

In construction contracts it is very common to see standard form provisions deleted and replaced with bespoke terms, either on the face of the document itself, or in the schedules to the document. Often not considered are the implications, if any, of terms which appear in the contract, but which have been struck out. Is the contract to be treated as never containing the deleted words, or can the deleted words be used either as an aid to construction or to negate the implication of words in the same form?

Two Schools of Thought

Historically there has been conflicting authority on whether it is permissible to look at deletions in construing a contract and, if it is permissible, for what purpose. One school of thought is that deletions should not be taken account of at all; deletions are to be treated as if they had not formed part of the concluded contract (having been taken out of the agreement between the parties) and should not therefore be used to construe added words.[1] In contrast, there is also a line of authorities in support of the position that the deleted parts can be considered as part of the surrounding circumstances in construing what the parties have chosen to leave in and that the court is entitled to look at deleted words to see if any assistance can be derived from them in solving ambiguity in words retained.[2]

Mopani Copper Mines Plc v Millennium Underwriting Ltd

In *Mopani Copper Mines Plc v Millennium Underwriting Ltd*,[3] Christopher Clarke J considered the conflicting authorities on the question of whether it is permissible to have regard to deleted words in construing a contract. Whilst the judge did not consider it necessary to refer to or rely on the deleted words to find for the claimant on the preliminary issues determined, he suggested, *obiter*, that some general principles could be drawn from the cases.[4] Whilst the general rule is that deleted words cannot be used as an aid to construction, there were two exceptions, namely:

1. Deleted words in a printed form may resolve the ambiguity of neighbouring paragraphs; and

2. Deletion of words in a contractual document may be taken into account if the fact of the deletion shows what it is that the parties did not agree and there is ambiguity in the words that remain.

Clarke J also cited with approval the following passage from 'Keating on Construction Contracts' (8th Edition):

> *"In this confusion the second school is generally to be preferred. Where parties have made a contract in a document that contains deletions, to look at the deletions does not offend the principle discussed above which prevents reference to preliminary negotiations. The deletion is physically contained in the concluded contract. It is submitted that the court should first construe the retained words. If they are unambiguous, reference to the deletions is unnecessary. If they are ambiguous reference to deletions from printed documents should be permitted to see whether objectively they throw light on the meaning of the retained words."*[5]

Nevertheless, the judge expressed that care must be taken as to what inferences, if any, could properly be drawn from the deleted words as the parties may have deleted the words because they thought they added nothing to, or were inconsistent with, what was already contained in the document, or because the words that were left were the only common denominator of agreement, or by mistake.

Narandas-Girdhar v Bradstock

In *Narandas-Girdhar v Bradstock*,[6] the Court of Appeal had to consider whether deleted words in an IVA could be taken into account in resolving an ambiguity in the words that remained. In that case, a debtor had entered into an IVA, and the documentation as originally drafted stated that the IVA would be conditional upon the acceptance of his wife's simultaneous IVA proposal. As a result of a modification, this condition was deleted and subsequently his wife's IVA proposal was not approved.

> *"Deleted provisions are only relevant to construction where express terms are ambiguous."*

After being made bankrupt due to the failure of the IVA, the debtor applied to set aside the IVA on the basis, *inter alia*, that on its true construction, his modified proposal had been conditional upon the acceptance of a simultaneous IVA proposal for his wife which, in the event, had been rejected by her creditors.

The Court of Appeal approved Clarke J's comments[7] and held that, in that particular case, the relevant principle was that if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction, albeit one that must be used with care.[8]

The Court of Appeal upheld the judge's decision at first instance and found that the wording of the debtor's modified proposal was ambiguous such that it was legitimate to have regard to what the modification had deleted from the original proposal, and that, construing the proposal in this way, it had not been made conditional on the acceptance of the debtor's wife's proposal.[9]

Bou-Simon v BGC Brokers LP

In the recent case of *Bou-Simon v BGC Brokers LP*,[10] the Court of Appeal had to determine whether the judge at first instance was right to imply a term into a loan agreement that the monies advanced to the appellant by the respondent had to be repaid where the appellant had failed to remain in the respondent's employment for four years. The appellant alleged that deletions contained in a previous draft of the loan agreement were relevant to the process of the implication of terms.

The appellant had been employed by the respondent as a broker and it had been intended that he would become a partner. The loan agreement provided that the appellant would *"repay the Loan from the net partnership distributions"* and that if the appellant ceased to be a partner any unpaid amounts would only be written off if he had served at least four years. A previous draft of the agreement had contained terms about repayment that had been deleted during the negotiations, and in particular wording which contemplated repayment from sources other than partnership distributions.

The appellant resigned within four years and the respondent claimed repayment of the loan amount. There was no express provision in the loan agreement to this effect and the respondent sought to rely on an implied term that *"the Loan [£336,000] would become repayable in full where the Maker [the Appellant] failed to serve the full term of the Initial Period (the Implied Term)."* The appellant alleged that the deletions contemplating repayment from sources other than partnership distributions were relevant to the process of the implication of terms.

At first instance, the judge determined that the loan agreement contained an implied term that the monies be repaid on the basis that a reasonable person would have regarded the contract as an agreement for the making of a repayable loan which would be forgiven only on completion of the full four years of the initial term of engagement, but which, if the initial period was not completed in the circumstances which actually occurred, was repayable in full.

The Court of Appeal allowed the appeal on the basis that the judge at first instance had

1 Inglis v Buttery (1878) 3 App. Cas. 552, HL; Ambatielos v Jurgens [1923] A.C. 175 at 185, HL; M.A. Sassoon & Sons v International Banking Corp [1927] A.C. 711 at 712, PC; see also, City & Westminster Properties (1934) Ltd v Mudd [1959] Ch. 129; Prenn v Simmonds [1971] 1 W.L.R. 1381, HL. Compania Naviera Termar v Tradax Export [1965] 1 Lloyd's Rep. 198 at 204; Ben Shipping v An-Board Bainne [1986] 2 Lloyd's Rep. 285 at 291; Wates Construction v Franthom Property (1991) 53 B.L.R. 23, CA

2 Lord Cross, stating the majority view in Mottram Consultants Ltd v Bernard Sunley & Sons [1975] 2 Lloyd's Rep. 197 at 209, HL

3 [2008] EWHC 1331 (Comm)

4 See paragraphs 120-122 of the judgment

5 Paragraphs 121 of the judgment

6 [2016] EWCA Civ 88; [2016] 1 W.L.R. 2366

7 See paragraph 19 of the judgment

8 Paragraph 20 of the judgment

9 See paragraphs 20 to 23 of the judgment

10 [2018] EWCA Civ 1525; [2018] 7 WLUK 85

"If the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction."

succumbed to the temptation of implying a term in order to reflect the merits of the situation as they now appeared and it was not appropriate to apply hindsight and to seek to imply a term in a commercial contract merely because it appeared to be fair. The Court of Appeal went on to determine that the loan agreement did not lack commercial or practical coherence without the Implied Term and a limited recourse loan was not absurd or uncommercial. Equally, the agreement would have required considerable re-drafting to require repayment in the circumstances that arose. This was a good indication that the Implied Term was not necessary to give business efficacy and was not obvious.

"The consideration of deleted words may negative the implication of a term in the form of deleted words."

Given that finding, the Court of Appeal considered that it was unnecessary to consider the deletions; however, for "*clarity's sake*", Asplin LJ and Singh LJ also chose to make a number of *obiter* comments on the deleted provisions in earlier drafts. Asplin LJ noted that deleted provisions are only relevant to construction where express terms are ambiguous and that there was a different process for the construction of contracts and the implication of terms.

In relation to the latter, "*even if the deleted clauses had been on all fours with the Implied Term and there were evidence that they had been omitted by common design, it would only have been appropriate to have taken them into account in the implication process if they could be characterised as part of the relevant surrounding circumstances and not merely part of the course of negotiations*".

Asplin LJ considered that deletions were unlikely to be relevant to the process of implication given it was necessary to consider the express terms of the contract in question from the viewpoint of the reasonable reader and not the parties themselves (unless the deletions were relevant to the process of interpretation in the first place) and a term should only be implied as a matter of strict necessity.

Singh LJ also noted the potential "*wider importance*" of the admissibility of deletions from previous drafts of a concluded contract. He commented that he saw force in the suggestion made in Lewison, 'The Interpretation of Contracts',[11] that "*the consideration of deleted words may negative the implication of a term in the form of deleted words*" even though the fact that the same words had been deleted could not be used as an aid to construe the express terms of the contract. He also stated that he did not necessarily accept that, in the context of implied terms, there is a threshold requirement that there must be an ambiguity in the contract before deleted words could be admissible, despite there being such a requirement when the court was engaged in the exercise of construction of a contract. However, ultimately he left this open to an appropriate future case.

Conclusion and Practice Points

Given that recent authorities have determined that deleted terms may, in limited circumstances, be relevant to the construction of a contract, and have suggested the relevance to the implication of terms, careful thought should be given to the potential consequences of striking through provisions in standard form construction contracts.

From a practical point of view, it may be preferable to delete the relevant words in their entirety; if deleted text remains visible in the contract, it may be taken into account if a dispute arises. Certainly, the authorities have been keen to express the dangers of drawing inferences (if any) from deleted words given that there are a number of reasons why words are deleted in any particular case.

If deleted provisions are retained in the contract itself, there are a number of points to remember:

- Deleted words will only be relevant to the construction of a contract if the remaining words are ambiguous.
- The deletion of words in a contractual document may be taken into account if the fact of the deletion shows what it is that the parties did not agree.
- Caution must be taken as to what inferences can be drawn from deleted words.

11 (6th ed.,) at p.96

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