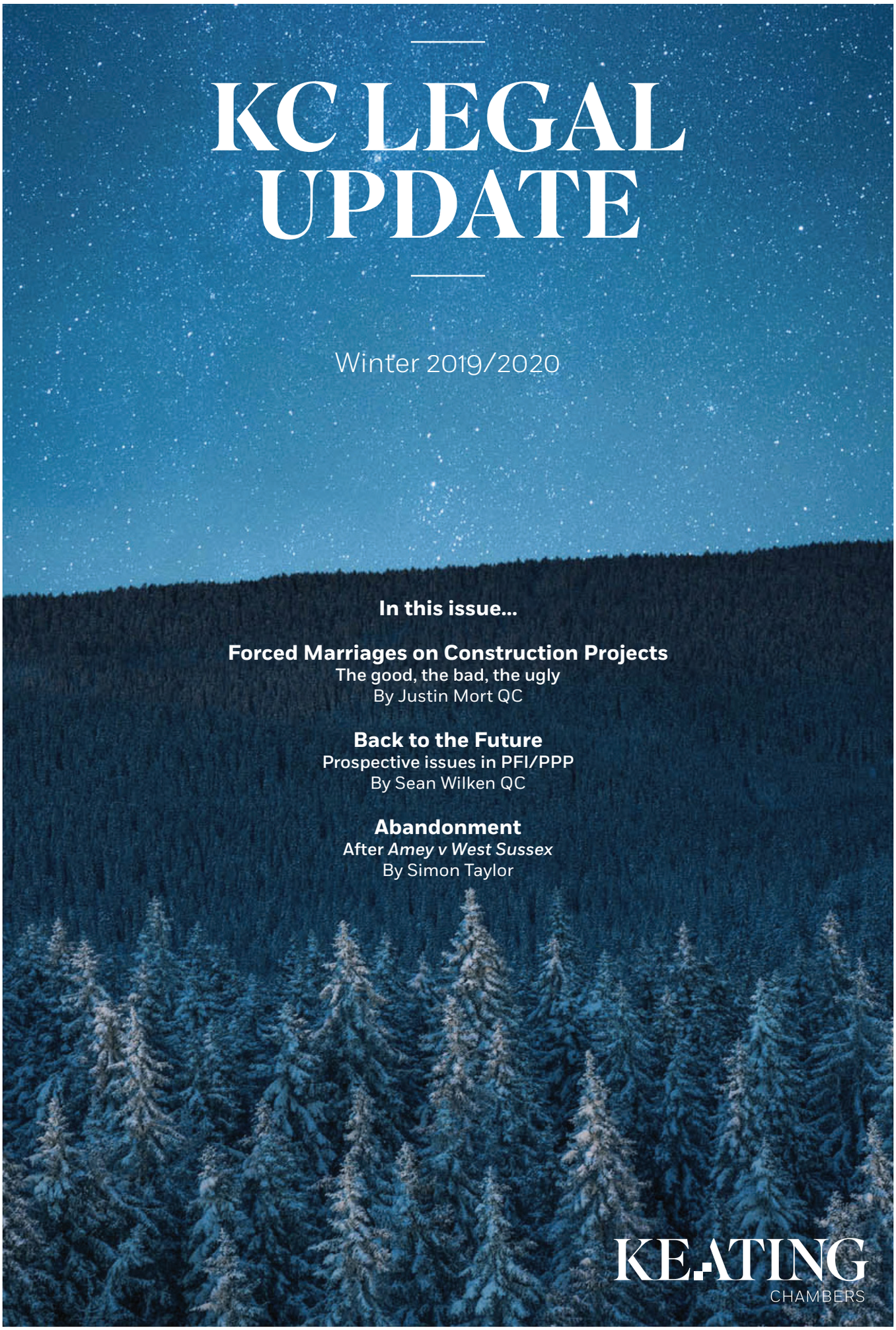

KC LEGAL UPDATE

Winter 2019/2020

In this issue...

KEATING
CHAMBERS

WELCOME

to the Winter 2019/2020 Edition of KC LEGAL UPDATE

In 2018 the rapper, Jay-Z, had a brush with the arbitration community in New York. It turned out that there were only three African-American arbitrators on the roster maintained by the American Arbitration Association ("the AAA") - and one of these had already been retained by the opposing side as counsel. Jay-Z's lawyers secured an injunction which temporarily restrained further proceedings in the arbitration on the footing that the AAA's procedures arguably deprived him of equal protection under the law and equal access to justice.

The case serves to remind us of diversity problems closer to home, where women and Black, Asian and Minority Ethnic ("BAME") students are at a disadvantage. In that context, we at Keating Chambers claim to have made some progress. With our international members, we can boast members who have a genuine understanding of cultures from the Caribbean to Ireland, Scotland, Nigeria, South Africa, the Middle East, the Far East, Malaysia and Australia. Moreover, we have a strong tradition of successful women. Our alumni include Mrs Justice O'Farrell and Mrs Justice Jefford. Currently, we have a flexible working culture that has enabled several women (and men) to enjoy both their families and professional life.

But there is more work to do. In the event, Jay-Z achieved speedy redress to his grievances. For the arbitration in question, the AAA appears to have agreed to put aside its roster. It seems eventually to have put forward some 18 African-American arbitrators for consideration. And it seems to have agreed to take various steps to improve the diversity of its roster for use in future arbitrations. In our case, since it is essentially one of recruitment, we cannot hope to match such speed. Rather, we must settle in for a longer campaign.

To that end, we are engaged in a number of initiatives. Our recruitment procedure now includes a contextualised scoring system that identifies outperformers, irrespective of whether they went to state of independent schools. Members of Chambers participate in the Bar Placement Scheme that pairs talented sixth form students, from non-traditional backgrounds for the Bar, with practising barristers. Krista and Abdul are founding members of the TECBAR BAME Network, whose objectives include enhancing BAME inclusion, participation and progression at the Technology and Construction Bar, judiciary and arbitral practice and in the wider Commercial Bar and to provide support and mentoring for aspiring barristers.

In all this, our objective is clear. We hope that, with initiatives such as the formation of the BAME Network and with an enlightened approach, exemplified by the introduction of contextualised assessment, we will eventually become truly inclusive.

By John Marrin QC and Krista Lee

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FORCED MARRIAGES ON CONSTRUCTION PROJECTS:

THE GOOD, THE BAD AND THE UGLY

By Justin Mort QC

This paper was prepared by Justin Mort QC in advance of a panel discussion at the IBA in Korea of the same title. It is concerned with "marriages" forced on construction projects: where a specific subcontractor, consultant or supplier is imposed upon a contractor by the employer. In particular, this paper is concerned with the divorce stage: the relationship has failed and the parties are in formal dispute. Are there any particular challenges or hazards arising out of such a relationship?

Introduction

In the interests of simplicity the parties are referred to respectively as *"the employer"* (the party imposing the relationship on to its main contractor), *"the contractor"* (i.e. the main contractor: the party forced to enter into the relationship) and *"the subcontractor"*. The underlying assumption when using this terminology is that the employer/project owner has engaged a main contractor and has in some way compelled the contractor in turn to engage with a specific subcontractor (or as it may be a designer or other consultant or supplier or manufacturer).

The party being imposed upon the contractor may be a nominated subcontractor, whether in the formal sense of that phrase (e.g. as it is used in FIDIC contracts) or something less than that. It might be simply a named subcontractor or there might be a limited list of acceptable subcontractors, with the contractor permitted to choose the specific entity. This paper also anticipates a designer or other consultant imposed upon the contractor. A yet further scenario is where the employer imposes not an entity as such but a specified proprietary system or product (for example: a proprietary paint system, or a specific item of plant made by a named manufacturer) which in practice requires the contractor to contract either directly with the named manufacturer or with the manufacturer's sole authorised representative.

In practice there are also many cases where the main contractor imposes an arrangement on its subcontractor requiring the subcontractor to engage with some subordinate subsubcontractor or supplier. By using the terms as defined above (employer, contractor, subcontractor) it is not intended to exclude consideration of such cases (i.e. contractor, subcontractor, subsubcontractor) and the terms should be understood accordingly.

A defining characteristic of the *"forced marriage"* (as referred to in the title) is that the contractor is denied the freedom to choose its subcontractor, consultant or supplier. If the marriage is *"forced"* it must follow that, all things being equal, the nominated or named subcontractor or supplier would not have been the contractor's first choice.

The fact that the contractor is obliged to engage with a particular party that, but for that obligation, it would not otherwise have done may give rise to problems, that is to say: problems related to the party itself (e,g, as to its performance, or its solvency).

But the nature of the relationship (one imposed upon the contractor) may also have implications for the terms upon which these marriage-partners deal. In particular: the nominated or named subcontractor may have a particularly strong bargaining position if the contractor has been denied the freedom to engage an alternative. It may be able to name its terms generally, or to impose exclusions of responsibility or liability. Particular difficulties may arise in the case where the named subcontractor is imposed upon the contractor during the project i.e. post-contract, by way of a variation.

A further defining characteristic of the forced marriage, or rather the same point expressed slightly differently, is that the employer necessarily involves itself in a subordinate contractual layer, whilst (in theory at least) seeking to make an intermediate party (the contractor) contractually responsible for performance. That may mean, but does not necessarily require, a direct relationship of some sort as between employer and subcontractor. That may have implications for the contractor as discussed below, for example if the employer's long-term relationship with the subcontractor is more important to the employer than its relationship with the contractor. Of course, some main contractor provisions make specific allowances for the fact that the employer has restricted the contractor's choices in this way.

Forced marriages for the good and for other reasons

The reference in the title of this paper to *"the Good, the Bad and the Ugly"* alludes to the fact that there are a range of possible scenarios or types of scenario where a subcontract, consultant or supplier is imposed upon a contractor, and that some types of scenario may work out better than others. Similarly, the employer's motivation for imposing a particular subcontractor or consultant upon a contractor may vary.

Whilst it is not strictly necessary to allocate particular types of project scenario to any of the three characters in Sergio Leone's film of that title, nonetheless one can readily think of three contrasting *"forced marriage"* situations for the purposes of discussion.

The good

In this first category the employer wants nothing but the best for its project. It therefore imposes its choice of high-quality products or a reputable subcontractor(s) on the contractor for the critical elements of the project.

For example: the employer requires high quality manufactured by an internationally recognised company to be incorporated into its facility. In such a case it may be that:

(1) the plant or other product is known to be reliable and/or known to meet the employer's performance requirements;

(2) the employer has a successful past history of using this manufacturer or subcontractor and/or enjoys a good relationship with it as a result (and enjoys corresponding leverage on price);

(3) the employer invariably uses this product or system on all of its projects and wants consistency;

(4) the manufacturer or subcontractor provides effective and reliable post-project customer support;

(5) the subcontractor's size and financial standing is such that the end customer (in this case the employer) can confidently rely upon collateral warranties in the event of any problems.

The contractor is therefore obliged to engage (in this example) that named manufacturer, subcontractor or supplier. The marriage is *"forced"* in the sense that but for the employer's requirements the contractor would or might have used a less reputable but cheaper alternative.

In those circumstances the downside for the contractor is that it may be denied the opportunity to make as much profit as it would have done had it been permitted to choose its own supplier simply on grounds of price.

On the positive side the contractor is effectively compelled to provide a quality project and one that corresponds with what the employer wants, and on the basis that the employer is by implication content to pay for this high standard. In addition: in this scenario the employer is more likely to have effective remedies directly against the nominated or named supplier in the event of defects or non-performance. Indeed, the possibility of an effective direct remedy against the nominated subcontractor may have been a consideration in the employer's original decision making. In theory that might reduce the employer's need to pursue the contractor in relation to the same matters.

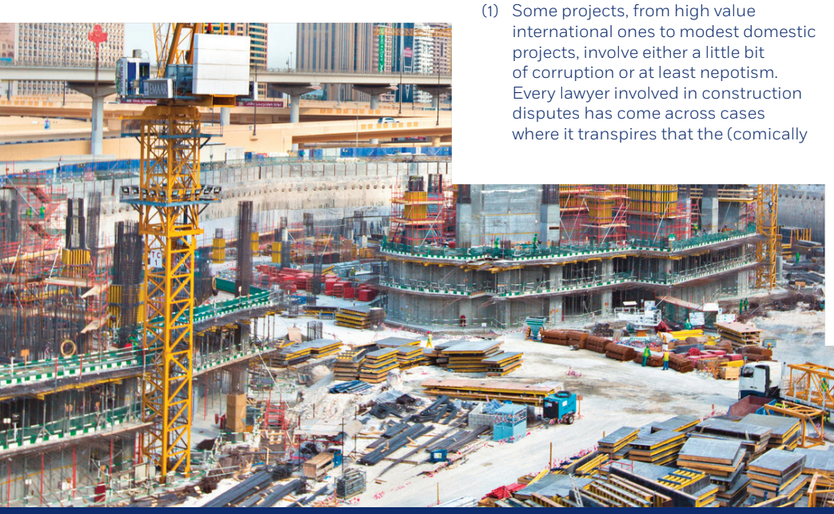
These points are likely to be in the contractor's interest.

A similar scenario is where the employer requires the contractor to engage a well-recognised engineering practice or other design consultant, again with an eye to either (1) ensuring a project of good quality, and/or (2) procuring effective and enforceable warranties to be provided by the consultant (albeit a consultant engaged by the contractor) directly to the employer for the purposes of any issues that might arise after completion of the project.

The bad

At the opposite extreme the marriage is imposed upon the contractor for reasons that have nothing to do with ensuring a high-quality project but for other considerations.

The most obvious reason might be that the employer is concerned to keep costs down. It has identified a subcontractor, manufacturer or supplier who the employer believes meets its requirements (just about) but more importantly fits the budget.



But there are myriad other reasons why the employer might require the contractor to engage with identified or nominated subcontractors who fall short in terms of quality.

A recurring theme of many international projects is a requirement to engage labour and/or businesses local to the project site. From a moral, economic and/or commercial perspective it is entirely right that a significant enterprise (such as an engineering project or the construction of a manufacturing facility) will benefit the local economy and the individuals living in the surrounding environment and affected by it. No one could seriously suggest otherwise.

Conversely the idea that global businesses should make vast profits from the natural resources of say a developing country whilst effectively preventing the region from sharing in the benefit is surely abhorrent to anyone with any sense of fairness.

One way for the employer to satisfy that moral imperative at little personal cost is to require the contractor to engage subcontractors local to the project. The employer can thereby advertise its commitment to the use of local businesses for its lucrative projects (what might be referred to as virtue signalling). The actual interface with the local businesses, and any problems arising (for example: because the local subcontractor has no experience of this kind of project), are the responsibility of the contractor and the contractor's problem.

In addition to this slightly cynical scenario there may be other practical and/or legislative requirements that compel the engagement of either a specified local subcontractor, or local subcontractors or labour generally.

By way of example:

(1) Some projects, from high value international ones to modest domestic projects, involve either a little bit of corruption or at least nepotism. Every lawyer involved in construction disputes has come across cases where it transpires that the (comically unsuited) subcontractor imposed upon the contractor by the employer is owned by a connection of the employer.

(2) Local legislation (for example: legislation governing the licencing and/or authorisation of contractors or legislation governing health and safety matters) may mean that the contractor has to engage a local subcontractor, or simply require that a minimum number of local people are employed on the project. In remote regions and/or in the case of highly specialist trades that may mean that the contractor has an effective choice of only one or two subcontractors.

(3) The authority responsible for permitting the works may require the engagement of local subcontractors for specified tasks and/or local labour as a condition of the works proceeding.

In all of these situations, in contrast to the first category, the common theme is that the subcontractor imposed upon the contractor has not been selected because of its established credentials but for some reason unrelated to the quality or anticipated quality of its output. In such scenarios, because of its position in the contractual chain (that is to say: in the middle), the contractor is then expected to make good any shortfall in quality.

The ugly, aka: the "design and dump"

Since there are three main characters referred to in the title of the film there needs to a third scenario (*il brutto*). This would be the *"design and dump"* form of contract.

> *"The intention behind the "design and dump", that is to say: the employer's intention, is that if there is anything wrong with or difficult/impossible about the design such matters will be the contractor's responsibility and liability."*

In this type of scenario the employer puts together its chosen team of designers, some high level or outline drawings and some similarly high level performance based specifications. Everything is driven entirely by price.

The employer then engages the contractor on a design and build basis, requiring it to take over the entirety of the design team (pursuant to a complicated novation arrangement or some equivalent process), together with such design as has been prepared to date by the design team for the employer. Thereafter the contractor is required to develop the rudimentary outline specification into a detailed design and then to proceed to build out the project.

One sometimes encounters this strategy in the context of disputes arising out of hotel, residential or other building projects in the UK and the Middle East. The developer employer wants to build say a hotel of five-star quality but expending only the cost of a budget hotel. The design and dump contractor has been brought in to the project in order to solve this arithmetical conundrum.

The intention behind the *"design and dump"*, that is to say: the employer's intention, is that if there is anything wrong with or difficult/impossible about the design such matters will be the contractor's responsibility and liability.

Invariably the different elements of the design, being only preliminary at contract stage, will have not been co-ordinated with one another at the time that the design and dump contract is signed. The sort of problem that seems to arise in every such case is that (for example) there is a hopelessly inadequate amount of space allowed in the architect's preliminary layout drawings of the building(s) available to accommodate the ambitious quantity of lifts, plant and other services referred to in the M&E consultant's specification.

As indicated under the design and dump contract the idea is that upon contract execution all such problems (together with the entire design team responsible) are passed over to the contractor's side of the bargain. Whether in practice the terms of the contract do achieve that outcome (i.e. whether the contract terms successfully render the contractor liable for problems in the employer's design prepared before the contractor was engaged) may be a different matter.

In practice the contractor is unlikely to have had more than a limited opportunity to review, analyse and assess the employer's design at the time of tendering for or entering into the contract. Apart from any other consideration the contractor is unlikely to have retained its own full complement of engineers, architects, building services engineers etc in circumstances where the intention is that the contractor will take over and pay for the employer's entire team.

As a result at bid stage the design and dump contractor has to rely somewhat blindly upon the employer's design team having done a competent job to date, i.e. competent having regard to what the contractor now has to do (as opposed to: competent for the employer's rather more limited purpose, which was to hook and reel in the design and dump contractor).

In the event of the inevitable disaster in theory the contractor then has a complicated claim against the relevant consultant(s). That is to say: a claim in relation to services provided to a different client (i.e. the employer), for a different purpose, at a time when the contractor was not a participant in the project (i.e. pre-contract) and therefore in circumstances and/or upon the basis of instructions about which the contractor may know comparatively little.

In the design and dump the *"marriage"* or marriages are *"forced"* in that the contractor will necessarily have had no input into selection of the design team upon whom it is now wholly dependent: the bride and groom(s) will have never met before.

But not only that: crucially the contractor takes on not just someone else's design team but (depending upon the effectiveness of the *"dump"* provisions in the contract) also a large amount of design work carried out before it had any involvement.

To be clear: there is no standard form of design and dump contract. The employer typically uses either its own tried and tested form for this method of procurement or more likely a magnificently amended standard form of design and build contract. Extensive amendments to the standard form are necessary in this context because published forms of design and build contract do not ordinarily purport to make the contractor liable for inadequacies in design work carried out long before it had anything to do with the project.

The divorce, and problems at the dispute stage

Having identified some different *"forced marriage"* scenarios the purpose of this paper is to consider what if any issues might arise at the disputes stage.

There are a number of potential risks faced by any main contractor, sitting in the middle of a contractual chain i.e. irrespective of any element of *"forced marriage"*. For example:

(1) a failure and/or an inability at the procurement stage to align the subcontractor's or supplier's obligations and liabilities with the contractor's responsibilities to its customer;

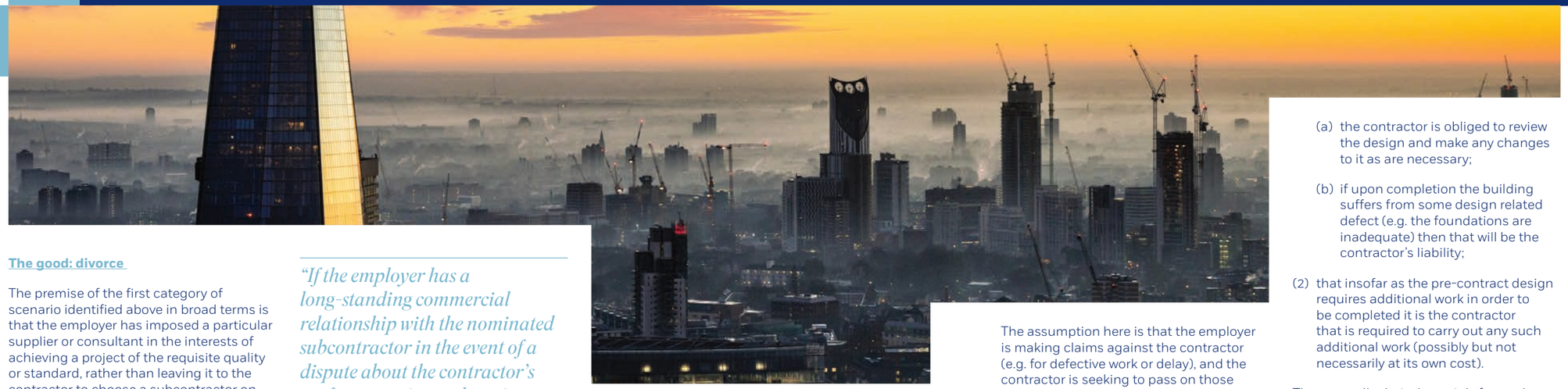
(2) the risk that formal proceedings upstream and downstream are required to be conducted

  (a) in different forums (e.g. court and arbitration)

  (b) before different tribunals

with a consequent risk of inconsistent findings (so that for example the contractor is found to be liable to the employer for say defective work but fails to establish the same defects as against the subcontractor).

To what extent, if at all, are those risks any different in the case of the forced marriage and/or in the different categories of forced marriage identified above?



The good: divorce

The premise of the first category of scenario identified above in broad terms is that the employer has imposed a particular supplier or consultant in the interests of achieving a project of the requisite quality or standard, rather than leaving it to the contractor to choose a subcontractor on the basis of cost and/or how much profit it can make from the project.

In that relatively happy scenario many such risks may well be significantly reduced. The employer's requirement for quality itself means that it is more likely to be content with the project outcome.

Moreover: the likelihood in this scenario is that the main contract specification will have been drawn up by the employer either with extensive input from the named supplier or subcontractor or at the very least with their proposed products or outputs specifically in mind. In those circumstances the possibility that there is some unfortunate disconnect as between the employer's requirements imposed upon the contractor and the terms of the relevant subcontract ought to be reduced. At the very least the employer can have less scope for complaint about (its) choice of product. Under English law at least, absent effective express terms to the contrary, the employer would struggle to bring a claim for fitness for purpose in relation to a product or system that it had itself chosen (*IBA v EMI & BICC Construction*[1]). It may nonetheless be entitled to bring a claim in relation to quality i.e. notwithstanding the fact that the product complained of was chosen by the employer.

Having said all of that there may be additional problems specific to this type of scenario in the event of a major dispute.

Firstly: this *"good"* scenario is assumed to arise out of the employer's devotion to the nominated or named subcontractor, its products or outputs. That is likely to have given the nominated subcontractor a particular advantage at the negotiating stage. In terms of price: since any price is likely to be passed on to the employer in theory that should not give rise to any issue for the employer. The issues are more likely to relate to the terms upon which the nominated subcontractor was engaged, which may be more difficult to pass up to the employer.

"If the employer has a long-standing commercial relationship with the nominated subcontractor in the event of a dispute about the contractor's performance it may have interest in seeking to maintain and/or further that relationship at the contractor's expense."

Crucially subcontractors in a strong negotiating position of that sort are typically inclined to limit or exclude their liabilities in the event of delay or defective work on their part. In addition, the subcontractor in a strong negotiating position may have been able to limit the standard of performance required so that, for example, it is obliged to exercise only reasonable skill and care in circumstances where the contractor is under a fitness for purpose warranty. Obviously these sorts of issues are likely to become relevant once the employer seeks to make claims against the contractor.

In addition, if the employer has a long-standing commercial relationship with the nominated subcontractor in the event of a dispute about the contractor's performance it may have interest in seeking to maintain and/or further that relationship at the contractor's expense.

Such a strategy could manifest itself in a number of ways:

(1) by the employer seeking to frame any claim against the contractor in a such a way as to make it difficult for the contractor to pass on those complaints to the subcontractor with the benefit of the special relationship with the employer;

(2) by the employer and the subcontractor sharing confidential information with one another relating to the contractor's disputes with each party.

The bad: divorce

However at least in the first type of scenario the subcontractor has been chosen because of its perceived competence, reputation or resources i.e. for reasons that are essentially good in terms of the likely success of the project. Different sorts of problem arise in the second scenario where the subcontractor has been imposed upon the contractor for reasons that have nothing to do with quality of work product and/or at the expense of quality.

If a subcontractor has been imposed simply on grounds of cost rather than quality or reliability that may give rise to problems.

But some specific problems may arise where the contractor has been compelled to engage with a local subcontractor:

(1) local standards to which the subcontractor is prepared to work may differ from or be irreconcilable with the international standards that the contractor has signed up to;

(2) the local subcontractor may only be prepared to work on the basis of a subcontract subject to local law (and expressed in the local language), and/or enforceable in the courts local to the project.

Businesses trading internationally are sometimes prejudiced against or at least nervous of the courts of other jurisdictions, and the fairness of a dispute resolution process where they are the foreigner and the other party is local. That is hardly surprising in the case where the relevant business in fact has limited or no experience of the local court, quite aside from difficulties arising from the enforcement of foreign court judgments as contrasted with arbitration awards.

But quite aside from such nervousness there are potentially severe practical disadvantages in conducting litigation under a foreign legal system and in a foreign language. The contractor will have to engage a local law firm (or a locally qualified branch of its regular lawyers, in any event: different people).

1 (1980) 14 BLR 1

The assumption here is that the employer is making claims against the contractor (e.g. for defective work or delay), and the contractor is seeking to pass on those claims to the subcontractor. There is obviously an immediate risk of inconsistent outcomes if the two sets of proceedings are to be conducted in different forums (i.e. the contractor found liable to the employer but unable to establish liability, in relation to precisely the same matters, as against the subcontractor). But that risk is likely to be magnified considerably in the case where the two sets of proceedings are to be determined by reference to different legal principles, contractual obligations expressed in different languages, and where the proceedings are to be conducted by different lawyers.

The ugly divorce

As for the design and dump contractor: it faces a number of possible disputes arising from the nature of its contract.

The issue that typically arises as between the contractor and the employer is whether the employer, by its contract terms, has successfully made the contractor responsible for any design issues created before the contractor had any involvement and which were therefore imposed upon it.

The employer's first difficulty is that its intention under the contract (to make the contractor responsible for past errors) is in a sense at odds with the factual history. Of course, in principle contracting parties are limited, in terms of what they may agree to be the position, only by their imagination. Nonetheless a contractual provision that purports to mean that a contractor is responsible (for all purposes) for a design that was self-evidently not the contractor's design but the employer's has to be robustly worded.

A related difficulty is that any reference to *"responsibility"* for design, or any equivalent phrase, is typically capable of a number of meanings. It can mean:

(1) that if the pre-contract design were negligently prepared and/or is not fit for purpose then the contractor is responsible; in practice that means that

   (a) the contractor is obliged to review the design and make any changes to it as are necessary;

   (b) if upon completion the building suffers from some design related defect (e.g. the foundations are inadequate) then that will be the contractor's liability;

(2) that insofar as the pre-contract design requires additional work in order to be completed it is the contractor that is required to carry out any such additional work (possibly but not necessarily at its own cost).

These are all relatively straightforward matters and in practice are unlikely to give rise to vast disputes.

But what the design and dump employer typically wants is that, in the event that the design cannot in fact be achieved (e.g. because it is literally physically impossible, for example: as per the example given earlier there is insufficient physical space for the specified services), the cost of any delay and/or additional building work arising out of a substantial re-design will be met by the contractor.

In practice that can be a difficult obligation to impose upon a contractor. The underlying presumption, absent some clear words to the contrary, is likely to be that the contractor is not responsible for additional costs arising from the fact that a design prepared by the employer is literally impossible. In practice it is relatively rare to see a contract that says in terms that not only are deficiencies in the employer's design to be addressed by the contractor but that additional cost arising from the corrections of such deficiencies (in terms of additional construction work) will be entirely borne by the contractor.

There is nonetheless plenty of scope for the contractor to face claims from the employer, as the full horror of its obligations become manifest during the course of the project. That then raises the possibility of the contractor seeking to pass on such claims to the novated design team, i.e. a group of consultants working for the employer at the time that the alleged crimes were committed. In addition, contractors sometimes have claims where either (1) the project has been over-designed, so that the quantity of structural work imposed by the design is unnecessarily great, or (2) under-designed, with the result that the contractor has bid too low.

Such claims have all the problems of any professional negligence claim of that type, i.e. ignoring for the moment the "forced marriage" element:

(1) there are bound to be difficult issues of causation and quantum where the complaint is that the contractor's tender sum was in the wrong amount;

(2) net contribution clauses are commonplace, and in any case where there are other potential candidates for blame make proceedings pointless, particularly if any of the claims is required to be conducted in arbitration (i.e. in isolation).

But in addition, claims by a design and build contractor against a member or members of the novated design team (i.e. a team originally engaged by the employer but transferred to the contractor) are particularly perilous for the reasons intimated earlier in this paper.

It is assumed for present purposes that the relevant design work of which complaint is now made will have been prepared not for the contractor (i.e. post-contract) but for the benefit of the employer, for the purposes of letting the project. The notorious Scottish case of *Blythe & Blythe v Carillion*[2], whether or not correctly decided, illustrates the sorts of problems that can arise where a contractor seeks to pursue a consultant that has been foisted upon it in relation to services provided to the original client (the employer).

Conclusions

Since the title of the paper assumes a range of different scenarios to some extent it is difficult to identify common themes.

But a common feature or by-product of any imposed marriage is likely to be the partial or wholesale imposition of subcontractor terms that the main contractor will have some difficulty rejecting, in circumstances where it is denied freedom to contract with whom it chooses. In practice that is likely to have a range of different implications for the contractor, from how disputes are to be resolved to the exclusion of liabilities by the subcontractor or other commercial matters.

A further common feature of any imposed marriage is likely to be a lack of familiarity or prior relationship between the main contractor and the imposed marriage-partner. In general construction projects will be successful because of good commercial and/or cultural relationships and attitudes between the project participants, more than anything that the lawyers contribute, or so one assumes.

2 (2001) 79 Con LR 142

BACK TO THE FUTURE? PROSPECTIVE ISSUES IN PFI/PPP[1]

By Sean Wilken QC

It may seem hard to believe for some but on 12 November 2019, PFI turned 27 years old.[2] Quite apart from amounting to depressing evidence for those of us who have been in practice almost throughout that time as to the time that has passed, this anniversary is important for another reason. It means that the time is approaching for many of the assets created under the first generation of PFI projects to be handed back, as Sean Wilken QC discusses in this article.

For most of us involved in disputes, our caseload over the years has involved the issues arising in procuring the project, obstacles to the asset being created (in the case of the Birmingham North Relief Road or the M6 Toll Road as it is now known, dealing with planning and protestors) and then defects in either the construction or operation of the asset. The idea that there might be a valuable asset to be handed at the end of the Concession Period has rarely crossed our minds. This is the case even though the whole point of the PFI/PPP system was to generate a valuable asset for future use at the private sector's risk.

As handback approaches, however, there will undoubtedly be disputes. The purpose of this article is to discuss what type of disputes they might be and how we as litigators can best assist in the effective resolution of those disputes.

Obviously the provisions for handback will depend on whether this is a Project or Concession Agreement,[3] the asset, the scale and length of the Concession and the respective bargaining positions of the parties at the original tender. One result of that is that handback and the issues associated with it can take a myriad of forms. That means, of course, it is difficult to draw out general principles and much will turn on the terms of the particular Concession.

This article does not therefore address any specific case or agreement wording. Nor does it offer an answer to a particular problem. The article instead addresses the range of issues that may arise breaking them down, for present purposes, into the following: what will be handed back; to whom and with what short/long term issues.

What will be handed back

Where the asset is a discrete building without tenants or leaseholders and where the Concessionaire holds the freehold free and clear, then, perhaps, it could be said that it is easy to identify what is being handed back.

1 This article has its origin in a roundtable kindly hosted by DLA Piper; Affinitext and the Partnership Bulletin. The views and errors are my own and no one else's.

2 PFI was announced in the then Chancellor of the Exchequer's Autumn Statement – see - https://publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1146/1146.pdf

3 I use the term Concession for the rest of this article as this represents the more extreme case.

Yet, even here, issues may arise:

1. What will happen about the fixtures and fittings?
2. How will provision be made for the transfer of staff under TUPE/the ARD? What is the undertaking being transferred?
3. What happens to the know-how acquired over the life of the Concession?
4. What provision has been made for any goodwill associated with the asset?
5. What will happen to the data associated with the Concession?

Often, of course, the asset will not be a discrete building, the asset can include:

1. Multiple structures on different sites which may have different forms of land tenure;
2. Structures where, for example, the Concessionaire holds the freehold but there are numerous long term leases which will outlast the life of the Concession;
3. Structures where the Concession owns the freehold but the asset is actually a leasehold asset;
4. Assets on fragmented sites or sites with complex and fragmented title.

In each case, thought will have to be given to unbundling and then rebundling the asset – in fact and law – valuing that asset if there is an end of Concession payment to be made; and then seeing what, if any, market value the asset has.

None of the above are necessarily straightforward and it is easy to see how, without adequate preparation, there could be pitfalls.

To whom will the asset be handed back?

As to what will in fact happen much depends on the political complexion of the country at the time of handback and, of course, the state of the government's finances.

That said, there are three options:

1. A return to State ownership;
2. A further concession period;
3. Variants of outright sale, some form of sale and leaseback and so on.

"There are pragmatic difficulties in simply returning the asset to State ownership."

All things being politically equal, a return to State ownership will may well entail a capital cost on the part of Government and the only way to avoid that would be some form of renationalisation legislation. Here, depending on the compensation paid (or not paid) there may obviously be issues over valuation and, ultimately, if there is a State deprivation of property disputes under Article 1, Protocol 1 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998.

Such complications aside, there are pragmatic difficulties in simply returning the asset to State ownership. In circumstances where the state has divested itself of the staff – both in terms of the staff associated with the asset but also in terms of monitoring, oversight, know-how and long term planning – how the returning asset will be cost effectively managed must be open to question.

The second will in theory attract the various forms of procurement regulations.[4] Further, if there is any doubt over the asset being transferred, the state in which it is being transferred and the life cycle, that will complicate the tender process – both in terms of scope and price. Further still, provision would again have to be made for know-how, data and so on.

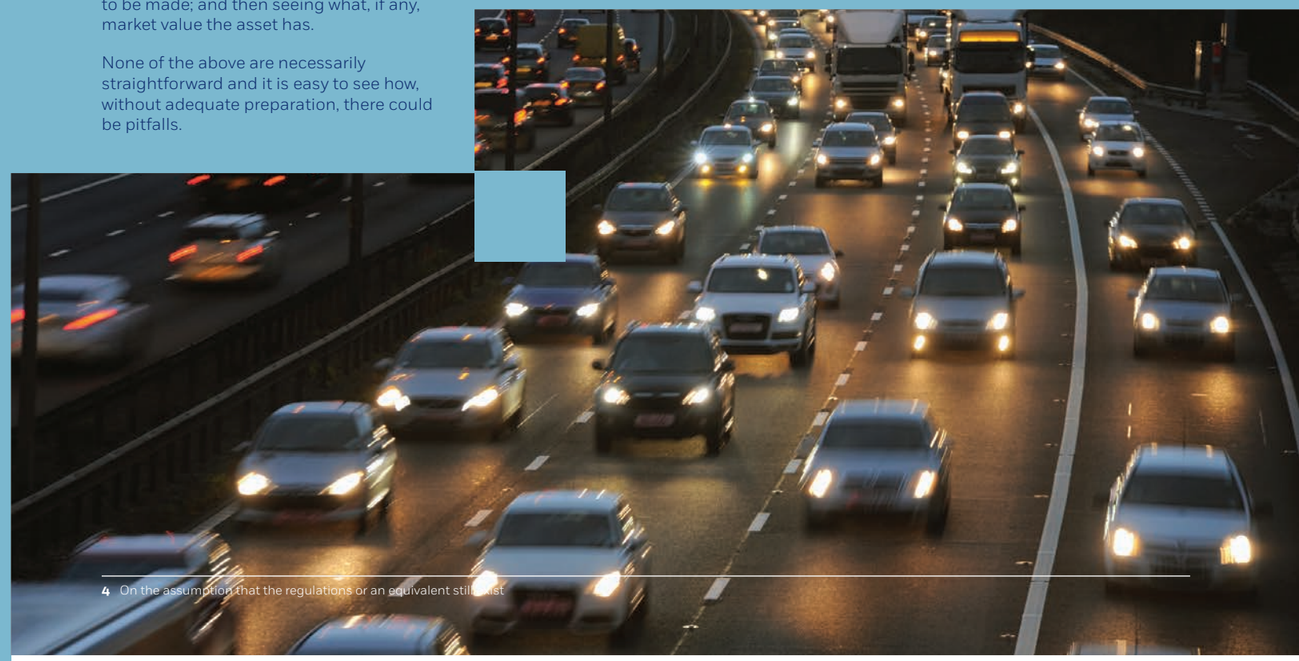
The third is a straighforward asset sale. It has the virtue of simplicity but could leave many questions unanswered – as to the nature of the rights retained and leased back; the costs and the long term future of the project..

Short and long tail liabilities

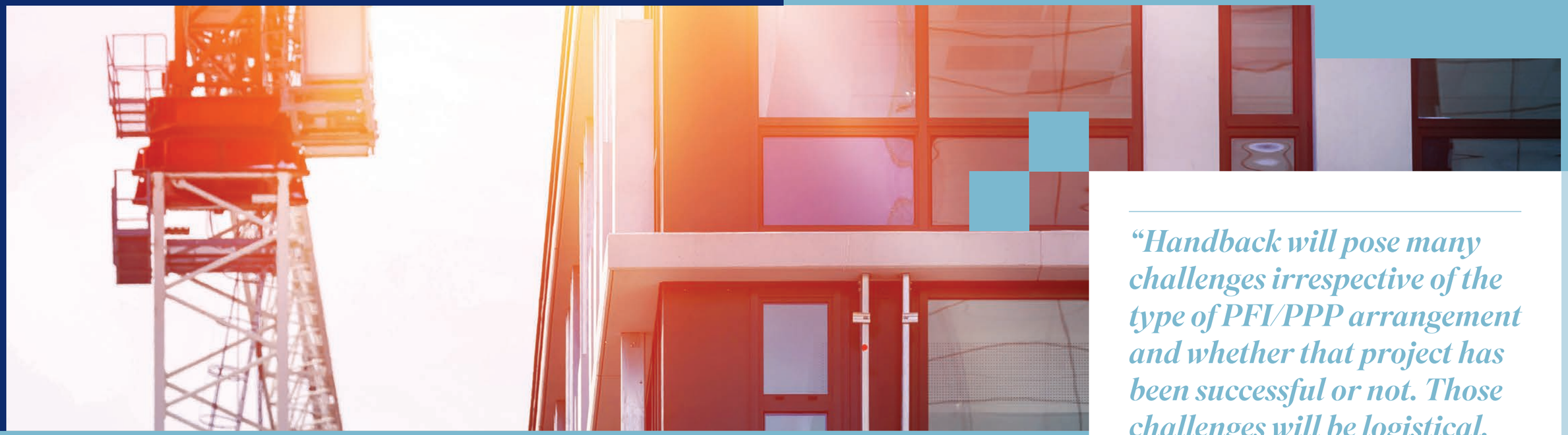
State and value of the asset(s)

With a short term single asset, the issue will be one of survey. Where there are multiple assets, this problem will be more logistically complicated.

Perhaps two of the thorniest problems will be surveys of a complicated estate of assets where there are differing assets in differing conditions.



4 On the assumption that the regulations or an equivalent still exist



Not only will there be the logistical issue of simply having the time and capability to carry out surveys (which will require forward planning) but there will also be two potential points of principle.

First, does the estate have a value greater than the sum of its parts? If so, how is that to be calculated? What is to happen if the estate has been viewed as a whole whilst within the PFI/PPP Scheme but government has different plans for it? The value to the State may be less if the government is to fragment it or to use it differently. The value invested by the PFI/PPP remains, however, the same.

The second problem is the operation of the compensation provisions (if any) or retention fund (if any).

As far as the compensation provisions are concerned, here one can see issues of principle – do the provisions allow for unbundling? What allowance does the formulation allow for intangibles associated with the assets (good will etc)? What provisions are made for the whole being greater than the sum of its parts? What account is taken of the possible difference between the value to the State and the accrued cost/value to the PFI/PPP entity?

As far as the retention fund is concerned, the size and allocation of the fund will depend on the surveys and whatever view is taken of the lifecycle of the asset or estate. Again there will be scope for differing views.

The final and most difficult problem will be how does one value those projects that have been historically "problematic" or poorly performing?

Here there are two scenarios – where the project has turned the corner and the problems have been resolved and where the project has not.

In the first, there is obviously the question of has the project in fact turned the corner. The more complicated issue is how does one value a historically difficult or damaged project? There will be a series of imponderables here – was the project problematic due to financial issues – cashflow; loss of profit; the need for additional equity? Or was it due to defects in the structures – latent or otherwise? Or were there problems with the service provided? In each case, there will be differential impacts on the value of the project.

In the second, an obvious issue is whether the fact that a less than perfect asset or estate is being returned to the State at the end of the life of the project was ever envisaged by the parties. After all the whole intent of concessions was that the State would receive something valuable at the end of life. Thus the parties may never have addressed the question of how an asset which has some but not the envisaged value will arise.

Lifecycle/Longevity

There will be two main issues here.

First, what to do with an asset whose planned lifecycle is close to that of the Concession Agreement itself. Where the planned and actual lifecycle are the same, then there should be no issue. The Concession was for the life of the agreement and is being handed back on that basis. Where, however, the actual lifestyle is longer than the planned lifestyle (due to, for example, advances in technology or effective maintenance and upgrading during the concession), the parties may well not have intended that the Concessionaire would receive compensation. If that is clearly expressed in the wording, then the Concessionaire will simply have to absorb that fact. If it is not clearly expressed, however, there will be debates over how the compensation provisions are to be operated.

Second, inherent within PFI financial models are assumptions as to the spend over the life of the project – including what, if anything, will be spent on the repair, upgrading or replacement of assets under the Concession Agreement. In terms of the actual repair, upgrading and replacement, there will obviously be room for the exercise of commercial judgment – both in terms of that which is in fact necessary and, as the Concession draws to a close, that which the Concessionaire is willing to spend thereby reducing profit on an asset which is in any event transferring back.

These are all issues on which there is room for disagreement between the State and the Concessionaire. A Concessionaire may have acted perfectly legitimately but the State has unrealistic expectations as to what will be handed back. Alternatively, the State may legitimately suspect that there has been insufficient spend in the final years of the project. There is then the third possibility of a legitimate spend but with latent defects or problems which impact on the future lifecycle of the asset.

"Handback will pose many challenges irrespective of the type of PFI/PPP arrangement and whether that project has been successful or not. Those challenges will be logistical, financial and legal – if not an interplay of all three"

Disputes and dispute resolution

As can be seen, handback could give rise to questions of principle, of process and of quantification. With sufficient advance planning, it is to be hoped that the parties will allow sufficient time to work out their differences well in advance so that there can be a smooth and non-contentious handover.

"It is worth remembering that the Dispute Resolution Procedures in the Concession Agreement can often be the start rather than the end of the means to resolve a debate."

That does, however, require sufficient advance planning. That planning must also take account of the possibilities that the parties may, perfectly legitimately, not agree. In that process, the parties may need both to realise that they harmoniously can agree to disagree and use the Dispute Resolution Procedures in the Agreement to resolve the points of difference in the most cost effective and efficient fashion possible.

In that process, it is worth remembering that the Dispute Resolution Procedures in the Concession Agreement can often be the start rather than the end of the means to resolve a debate. The Dispute Resolution Procedures may provide, for example, for an Expert Determination.

This could be a snap, contentious determination or one where the parties had agreed what should be decided and how. On top of that, the parties might decide to put that Determination within an overall mediation or negotiation structure to resolve all the issues between them.

The important points for the parties to realise are that a) there are a number of means of resolving these difficult issues which can be tailored to the Concession Agreement, the project and the issues and which will avoid cost and time; and b) the resolution of disputes need not be antagonistic or contrary to a solid ongoing relationship between the parties. Indeed, the more parties realise that there are genuine differences of opinion between them which can be usefully resolved (as opposed to some zero sum game), the more efficient the process of resolving those disputes will be.

Conclusion

Handback will pose many challenges irrespective of the type of PFI/PPP arrangement and whether that project has been successful or not. Those challenges will be logistical, financial and legal – if not an interplay of all three. Given these challenges and the amounts at stake and even the possibility that some decisions will be very political, it is reasonable to expect at least one party will have unilateral recourse to dispute resolution procedures. That may turn what should be an agreed declaratory process into an unnecessarily contentious process.

The upshot of the above is that those involved in handback need to plan significantly in advance to identify the issues that may arise and the best means of resolving them. This may well require all involved – funders, stakeholders and advisors – on both sides – working together to identify the criitical issues and the best means of resolving them. In that process, it must be borne in mind that an efficient and cooperative use of lawyers and the various means of resolving a dispute may prove, in the long term and to the surprise of some, to be both cost effective and non-contentious.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Marine Specialised Technology Ltd v Secretary of State for Defence [2019] EWHC 2727 (TCC)

An existing supplier to the MoD discovered that its confidential information had been published by the MoD over an extended period in breach of contract and in breach of procurement obligations. A new procurement was underway and the breaches were relevant to that competition.

The Court held that the claimant's experts were entitled to inspect the relevant website data to establish whether the information had been accessed and if so by whom. Costs were awarded against the Secretary of State for Defence, on a standard basis at 82% of the costs schedule.

Fionnuala McCredie QC represented the claimant.

The Lessees and Management Company of Herons Court v NHBC Building Court Services Ltd [2019] EWCA Civ 1423

Herons Court is a block of flats located in Radlett, Hertfordshire. The respondent, an Approved Inspector under Part II of the Building Act 1984, certified that the flats materially complied with the Building Regulations on their completion in 2012. The appellants, the lessees of the flats, alleged that the flats did not comply with the Building Regulations, and that as a result the respondent was in a breach of a duty owed to them under s. 1 of the Defective Premises Act 1972. The respondent applied to strike out the claim on the basis that no duty was owed under that provision.

The Court of Appeal upheld the decision of Waksman J at first instance that Approved Inspectors do not owe a duty under Section 1 of the Defective Premises Act 1972 in the exercise of their Building Control functions. It is a decision of immediate practical relevance not just to Approved Inspectors, but also to local authorities exercising Building Control functions and to property owners seeking recourse in respect of defects in their home.

Samuel Townend and Harry Smith represented the respondent.

Surgo Construction Limited v Planet Biogastechnik GmbH [2019] EWHC 2310 (TCC)

This judgment concerned an application for summary judgment made by the claimant. Between July 2013 and October 2015, the claimant engaged the defendant under separate contracts to complete works relating to the supply and installation of anaerobic digestor power plants. During the course of these works, the defendant mistakenly charged £1,177,478.12 in VAT to the claimant which the claimant paid. The mistake was discovered in 2016, and it was agreed between the parties that the defendant had no right to charge VAT to the claimant.

VAT was correctly due on the relevant supplies, but the sum should have been paid by the claimant directly to HMRC. The defendant, having wrongly received the VAT, accounted for it to HMRC and thus became entitled to reclaim it. They recovered £1,226,014.21 and agreed that this should result in a repayment of £77,029.47 to the claimant. However, it sought to retain the remainder on the basis that it was owed to it by the claimant.

On, 26 February 2019, the claimant issued a claim for repayment of the VAT it paid in the sum of £1,100,448.65, giving credit for the sum already paid. On 9 May 2019, the claimant issued an application for summary judgment.

The defendant alleged that it was owed £859,457.60 by the claimant, and identified the claim to retain the benefit of the VAT monies paid as arising under an equitable set-off or a statutory (or legal) set-off.

Following a hearing on 12 July 2019, HHJ Bird QC gave judgment, partially granting the claimant's application for summary judgment in the sum of £563,053.42 but refusing it for the balance of £537,395.23. The Judge rejected the defendant's entitlement to an equitable set-off but accepted that it had reasonable prospects of success based on a legal set-off in respect of some of its counterclaims.

The equitable set-off failed because the defendant's claims were not so closely connected to the claimant's claim for repayment of the VAT so as to raise "manifest injustice" sufficient to prevent the repayment of the sums paid as VAT.

The legal set off succeeded in that the defendant had reasonable prospects of establishing at trial that the sums held by the claimant as retention were capable of being set off against the sum claimed. These debts were sufficiently liquidated and, when compared with those for wrongly paid VAT, were mutual debts between the same parties. There was thus a reasonable prospect of the Court finding that the sums were due and payable. The Judge was also satisfied that the cost of servicing the bond, £34,364.33, was a liquidated sum, that there was mutuality, and that there was a reasonable prospect at trial of the court finding that the sum was due.

However, the Judge was not satisfied that the defendant's other counterclaims (for the principal value of the bond and the cost of certain additional works) had reasonable prospects of success at trial. The Judge rejected the claimant's argument that, because the original payments had been allocated to payment of VAT, the rules of appropriation prevented the defendant subsequently allocating them to other debts. He therefore gave partial judgment for the claimant.

William Webb represented the claimant.

Gideon Scott Holland represented the defendant.

C Spencer Limited v MW High Tech Projects UK Limited [2019] EWHC 2547 (TCC)

By a subcontract dated 20 November 2015, CSL was engaged by MW to design and construct the civil, structural and architectural works for completion of a power plant, capable of processing refuse derived fuel produced by commercial and industrial waste and municipal solid waste. MW had, in turn, been engaged as main contractor in respect of the project by Energy Works (Hull) Ltd.

This TCC judgment arose out of a Part 8 trial between CSL and MW. That Part 8 trial concerned the validity of MW's alleged payment notice 35, issued in response to CSL's interim payment application 32.

On the primary issue before the court, CSL argued that MW's payment notice was invalid. CSL contended that: (a) the subcontract was a hybrid contract; (b) s. 104(5) stipulated that the payment provisions contained within Part II of the HGCRA applied only so far as the subcontract related to construction operations; (c) accordingly, in order to be valid, it was necessary for both CSL's payment application and MW's payment notice to stipulate the sum which the notifying party considered to be due in respect of construction operations, independently of other matters also falling under the subcontract; (d) CSL's payment application had separately identified the sum which CSL considered to be due in respect of construction operations, whereas MW's payment notice had not; (e) in the premises, MW's payment notice was invalid and CSL was entitled to the sum applied for in its payment application, namely £2,683,617.09 plus VAT.

By contrast, MW argued that its payment notice was valid. It contended that: (a) the express payment regime agreed between the parties did not mandate the separate identification of those sums considered to be due in respect of construction operations, but nevertheless complied with the requirements of the HGCRA; (b) since MW's payment notice complied with the express payment regime agreed between the parties, it was a valid payment notice.

Mrs Justice O'Farrell DBE held in favour of MW and dismissed CSL's claim. She held that MW's payment notice was valid because: (a) the express payment regime agreed between the parties mirrored the payment notice requirements ordinarily applicable to a non-hybrid contract; (b) it was open to the parties to agree a payment regime of that type, and the payment regime in question therefore complied with the requirements of the HGCRA; (c) ss. 110A and 111 did not stipulate that the sum considered to be due in respect of construction operations must be specified independently of the sum considered to be due in respect of other matters; (d) s. 111 of the HGCRA could be implemented without difficulty even where the same payment provisions governed both construction operations and other matters; (e) the Court's approach to the proper interpretation of the subcontract did not undermine the purpose of the statutory payment provisions and could be described as *"a pragmatic solution to the illogical and uncommercial impact of section 104(5) of the Act"*.

Notwithstanding her conclusion, Mrs Justice O'Farrell granted CSL permission to appeal to the Court of Appeal.

Alexander Nissen QC and Matthew Finn represented claimant.

Manchikalapati & others v Zurich Insurance PLC [2019] EWCA Civ 2163

This Court of Appeal judgment was handed down following appeals against the decision of HHJ Stephen Davies in *Zagora Management Ltd v Zurich Insurance Plc* [2019] EWHC 140 (TCC). The case concerns a block of flats in Manchester, known as New Lawrence House. The development contains 104 flats in total but the claimants between them own only 30. At trial, HHJ Davies found that a number of defects exists in the development. Those defects include major fire safety defects and a roof that needs replacement.

Save in one important respect, this judgment essentially upheld the decision of HHJ Davies at first instance concerning the proper interpretation of the Zurich Standard 10 New Home Structural Defects Insurance Policy (the Policy). Where the Court of Appeal differed from HHJ Davies was in relation to the interpretation of the Policy's maximum liability clause (MLC).

The MLC provides that Zurich's maximum liability under the Policy is as follows: *"for a New Home which is part of a Continuous Structure, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £25 million."* HHJ Davies found that the MLC limited each of the claimants' claims to the purchase price of their individual flats (which totalled £3.6 million). The Court of Appeal disagreed. Sir Rupert Jackson (with whom Coulson and McCombe LJJ agreed) found that the MLC is ambiguous but construing it in light of the surrounding provisions of the Policy and the Policy's obvious commercial purpose it limits the claimants' claims to the total purchase price of all flats in the development, which is £10.8 million.

Zurich advanced a number of grounds of appeal relating to the proper interpretation of the Policy, all of which were rejected by Coulson LJ.

The decisions of HHJ Davies and the Court of Appeal provide a tour de force regarding the proper interpretation of the Policy.

Jonathan Selby QC and Charlie Thompson represented the claimants.

Multiplex Construction Europe Ltd v R & F One Ltd [2019] EWHC 3464 (TCC)

Multiplex sought a declaration permitting it to suspend works at One Nine Elms on the basis that the Developer, R&F, had failed to provide the requisite payment security – a bond. R&F's argument was that it had paid a sum equivalent to the amount of the bond .;into court and that could stand as security. Multiplex's argument was that a payment into court at best provided security against insolvency and did not equate to the security provided by a bond.

The Court held: 1) payment into court did not comply with R&F's obligations to provide a payment security and 2) payment into court could not be regarded as the same as or equivalent to the security provided by a bond. Multiplex was therefore entitled to suspend. The case therefore emphasises the important role that proper payment security i.e. a bond plays in preserving a contractor's cashflow.

Sean Wilken QC represented the claimant.

VVB v Optilan [2020] EWHC 4 (TCC)

This judgment, arising out of a part of the Crossrail project, provides an interesting start to 2020. In summary a subcontractor and a subsubcontractor (the defendant) agreed that £1m odd worth of specialist materials would become the property of the subcontractor / Network Rail provided that the subcontractor "included" agreed values against the vested materials in the next payment to be made to the subsubcontractor. The subcontractor did this but, and this is the bit that seems to have given rise to a dispute, at the same time modified the values attributed to other items in the account with the result that overall nothing was "due". Then the subcontractor went into administration. Proceedings were brought by the subcontractor's assignee, claiming injunctive relief and an order for delivery up of the materials.

Justin Mort QC represented the claimant.

ABANDONMENT AFTER AMEY V WEST SUSSEX

By Simon Taylor

An issue which arises frequently when advising defendants in procurement cases is whether to abandon the procurement and start again. This can be tempting when faced with a legal challenge given the cost and uncertainty of litigation, particularly where there are doubts over the merits of any defence. It may not however always be the best course, as the judgment of Mr Justice Stuart-Smith in *Amey v West Sussex*[1] illustrates. This article by Simon Taylor discusses the case, the questions that it raises and the guidance it provides for contracting authorities considering abandoning a procedure that has gone wrong.

The EU caselaw is fairly clear that abandonment is permitted provided it entails no breach of EU principles of equal treatment and transparency. There is broad discretion as to whether to abandon and exceptional circumstances are not required. For example, abandonment may be appropriate if an authority discovers that it is unable to award the contract to the most economically advantageous tenderer because of errors committed in the assessment of bids[2].

The Public Contracts Regulations 2015 ("the Regulations") even envisage abandonment. They provide at Regulation 55 that contracting authorities are to inform bidders as soon as possible after they decide not to award a contract for which there has been a call for competition or to recommence a procurement.

The Facts

In March 2018, Amey Highways Ltd ("Amey") challenged a highway services tender run by West Sussex County Council ("the Council"), claiming breaches of the Regulations in the assessment of bids which deprived it of the contract and seeking damages of about £28m. The margin between the scores of the winner (Ringway) and Amey was wafer thin. This was the first claim.

The Council recognised that there were legal risks but secured consent to the lifting of the suspension and sought to strike out the Amey claim. It failed and then concluded, after taking advice, that the risks in entering into the contract with Ringway and defending the litigation were too great. It considered and dismissed rewinding the procurement and decided that abandonment was the best option in order to bring the litigation to an end. The announcement of the abandonment to bidders of 2 August 2018 ("the Abandonment Decision") referred to the expensive, protracted and uncertain nature of litigation. It did not acknowledge any breaches, errors or flaws in the procurement process. A re-tender process was to be pursued using a different service model.

Amey brought a second claim challenging the Abandonment Decision and argued that the Council took the decision to abandon in the mistaken belief that it would bring the litigation to an end. The two claims were consolidated and a trial was held as to the second claim and the effect of the Abandonment Decision on the first claim.

On the evidence, there were no drivers leading to the abandonment other than the litigation. The Court also found that the Council was aware that the Abandonment Decision was not bound to end the litigation with Amey.

The Ruling

The Court's findings were as follows:

Firstly, all the constituent elements of an accrued cause of action were in place before the abandonment, subject to Amey making good on the factual basis of its claim. There was no reason to cast doubt on the proposition that, if Amey had scored more than Ringway, the Council would not have abandoned and would have awarded the contract to Amey. For example, there was no evidence that, if the decision were reversed, Ringway would be able to identify errors in the scoring of its bid.

Secondly, the Court rejected the Council's submission that it is a necessary pre-condition to a claim for breach of the Regulations that there is an ongoing procurement. While procurement claims engage public law duties, they do not fall away when the public decision is withdrawn because they are based on breach of statutory duty and give rise to the private law remedy of damages (subject to satisfying the *Francovich*[3] condition that the breach is 'sufficiently serious'). The Court could "*see no reason in principle why the Abandonment Decision should have any impact upon an accrued cause of action*".

The authorities reviewed included *Apcoa Parking (UK) Ltd v City of Westminster*[4]. That case related to a claim challenging the abandonment of a tender procedure on the basis that unpublished criteria were being applied and a proper decision could not be arrived at without reference to these unpublished criteria. An application was made for an injunction preventing the authority entering into contracts in the second procedure. The court concluded in Apcoa that the defendant was entitled to abandon and therefore no injunction should be awarded. While damages do not appear to have been claimed, the court left open the possibility that a damages award could be made to remedy any actionable breaches.

Thirdly, the Court was not satisfied that the Abandonment Decision was itself irrational as it was an attempt to preserve public funds having regard to various factors, particularly the costs and uncertainty of litigation and avoiding the "double bind" of contracting with Ringway and litigating with Amey. It was said that Amey had not shown that there was any better approach for the Council to take than abandoning and starting again. Nor was it a breach of equal treatment or transparency as all bidders were equally placed in accepting the risk of a rational abandonment. The Court noted that Amey did not pursue the remedy of setting aside the Abandonment Decision.

The only relief given was an order that Amey's claim for damages may be pursued.

Analysis

Amey v West Sussex was under appeal but has settled so the Court of Appeal will not have the opportunity to adopt a different approach and the ruling stands. The case has certainly caused a stir amongst procurement practitioners. It raises a number of questions:

- What should an authority do when faced with a meritorious challenge from an unsuccessful bidder – should it reverse the award decision or abandon?

1 [2019] EWHC 1291 (TCC)
2 (see *Embassy Limousine* T-203/96 [1999] 1 CMLR 667, *Metalmeccanica* [2000] CMLR 1150, *Kauppatalo* [2003] ECRI-12139).
3 *See Nuclear Decommissioning Authority v EnergySolutions EU Ltd* [2017] UKSC 34, *Francovich v Italian Republic* [1995] I.C.R.722
4 [2010] EWHC 943 (QB)

- Does that choice depend on whether the claimant would have won had it been scored properly and how does the authority work that out without going to trial?
- Is the court right to find that the lawfulness of the abandonment can be assessed independently from that of the accrued action in damages?
- Should the Court in *Amey v West Sussex* have set aside (or left open the possibility of setting aside) the Abandonment Decision on the basis that the abandonment ultimately caused the loss?
- Could the Court if the breaches were established make a declaration that the Council was entitled to reverse the award decision or even an order requiring the Council to contract with the challenger?
- When a challenge is made, what should the successful bidder do? Does the successful bidder need to scrutinise its own scores in case they are unfairly low and then intervene in the litigation?

Lawfulness of Abandonment

On the first issue, it seems surprising that Amey apparently did not seek the reversal of the decision in its favour. Possibly, it preferred the damages claim.

"There is a tension in finding on the one hand that the Abandonment Decision was not contrary to the Regulations, and on the other, that an accrued cause of action in damages survives in the Claimant's favour for breaches of the Regulations."

In my view, the proper course of action for a responsible authority which realises that it has awarded the contract to the wrong bidder is generally to reverse the decision and award it to the right bidder - not to abandon the tender and start again. It can establish how far it has gone wrong through a rescoring exercise, possibly involving a new evaluation team to avoid confirmation bias.

Clearly, if it realises the claim has merit but is unable to say who should have won, that is different. In those circumstances, abandonment may well be the best option (see below).

Furthermore, there is a tension in finding on the one hand that the Abandonment Decision was not contrary to the Regulations, and on the other, that an accrued cause of action in damages survives in the Claimant's favour for breaches of the Regulations. This is because the cause of action is only complete if it results in, or is likely to result in, loss and it is the abandonment which ultimately causes the loss.

Clearly, there would be no loss to Amey if the decision had been reversed. It is also clear that contracting with Ringway would cause loss if Amey was the rightful winner. Equally, abandonment causes loss to Amey if it has been wrongly deprived of the contract, though that loss may be mitigated if Amey wins the re-tender.[5]

It seems to follow that, in circumstances where Amey was the rightful winner, abandonment must be a breach of the equal treatment principle, just as an award to Ringway would be.

It may be that ultimately the court would favour a remedy in damages over set aside and might, as in Apcoa, deny interim relief. However, it is difficult to see how the abandonment can be lawful when the scoring breaches reverse the bidder order because these are steps in the same causal chain.

Loss of a Chance

Even more difficult is the question of whether there can be a complete cause of action on abandonment where it is clear that the process is flawed but unclear who the rightful winner should be. At paragraph 46 of the Judgment, the Court stated that Amey's alternative claim, of a loss of a chance of winning the contract, is also capable of completing the cause of action:

> *"The loss of a significant chance of winning the contract is also capable of constituting loss and damage for the purposes of completing the cause of action asserted by Amey, the loss being suffered at the latest when the contract would have been concluded if Amey's chance had come to fruition."*

The loss of a chance in procurement cases was recently explained by the Court of Appeal in *Ocean Outdoor UK Ltd v LB Hammersmith & Fulham*[6] in the judgment of Lord Justice Coulson at paragraph 91:

> *"So in public procurement cases, the loss of a chance principle is most likely to arise where there is a close comparison between the unsuccessful and the successful bids, and where it can be shown that the illegality in the tender process may have contributed to the rejection of the losing bid. The principle can be applicable because of the uncertainties caused by the number of hypothetical variables in play. But it will not apply where, even taking into account all those uncertainties, it is plain that the claimant's bid would have been rejected in any event".*

In other words, loss of chance damages may be available for a breach where the claimant cannot show that it would have won the contract (had it been scored properly) but can show that there was a breach and that it might have won, subject to variables. In the classic scenario of the authority contracting with the so-called successful bidder following a defective tender from which no winner could be said to emerge fairly, the claimant is entitled to a proportion of the loss of profit on the contract.

It is more problematic to apply the same analysis where the authority has effectively done the right thing by abandoning a tender which it could not lawfully complete.

The problem with the court's statement in *West Sussex* is that if the tender is abandoned the court would not be able to bring the lost chance to fruition – all it could do is assess what the effect of correct scoring against the award criteria would have been if the breach had not been committed.

If it finds that the claimant would have won, the accrued cause of action would crystallise in full loss of profit damages. But less easy to understand is the notion that if, due to variables such as ambiguous criteria which make the tender unworkable, the authority is unable to determine who should have won, the claimant would be entitled to loss of chance damages.

Surely the better view is that, in those circumstances, abandonment was the proper course of action and the loss of opportunity in the first procedure (suffered by all bidders who were potential winners) is neutralised by the opportunity to participate in the second. Again, it is difficult to divorce the accrued cause of action from the lawfulness of the abandonment decision. If the latter is the right course, the former should fall away.

Alternative Remedies

The court will not order an authority to enter into a contract save in exceptional circumstances. In Woods, the claimant established the scoring breaches and it was held following trial that, all other things being equal, the claimant should have scored higher than the successful bidder. However, the court was not prepared to order the authority to contract with the claimant, partly because that relief was not sought and also due to the flawed nature of the procurement and held that the claimant was entitled to damages.

A similar conclusion was reached in *MLS (Overseas) Ltd v Secretary of State for Defence*[7], but in that case Mrs Justice O'Farrell decided that the appropriate remedy in the circumstances was a declaration that it would be lawful for the Ministry of Defence to enter into a contract with the claimant.

In Amey, the Court could have similarly held that if the alleged breaches were established to such an extent that Amey was the rightful winner, the abandonment would be unlawful and the Court would then consider the appropriate remedy.

That could be damages or it could be a declaration that it would be lawful for the Council to reverse its award decision and contract with Amey.

Position of the Successful Bidder

Finally, what can the successful bidder do to mitigate the risk that an authority could abandon or even reverse its award decision following a meritorious challenge?

The first point is that the successful bidder will need to establish whether there is merit in the challenge and will want to review the pleadings and establish interested party status in the proceedings. It will also scrutinise carefully any abandonment decision and may well want to challenge an abandonment resulting from an unmeritorious challenge or one that does not acknowledge any flaws in the procurement.

But it should also consider its own scores. That may be prudent given the risk that the authority and ultimately the court may be undertaking a rescore of the challenger's bid.

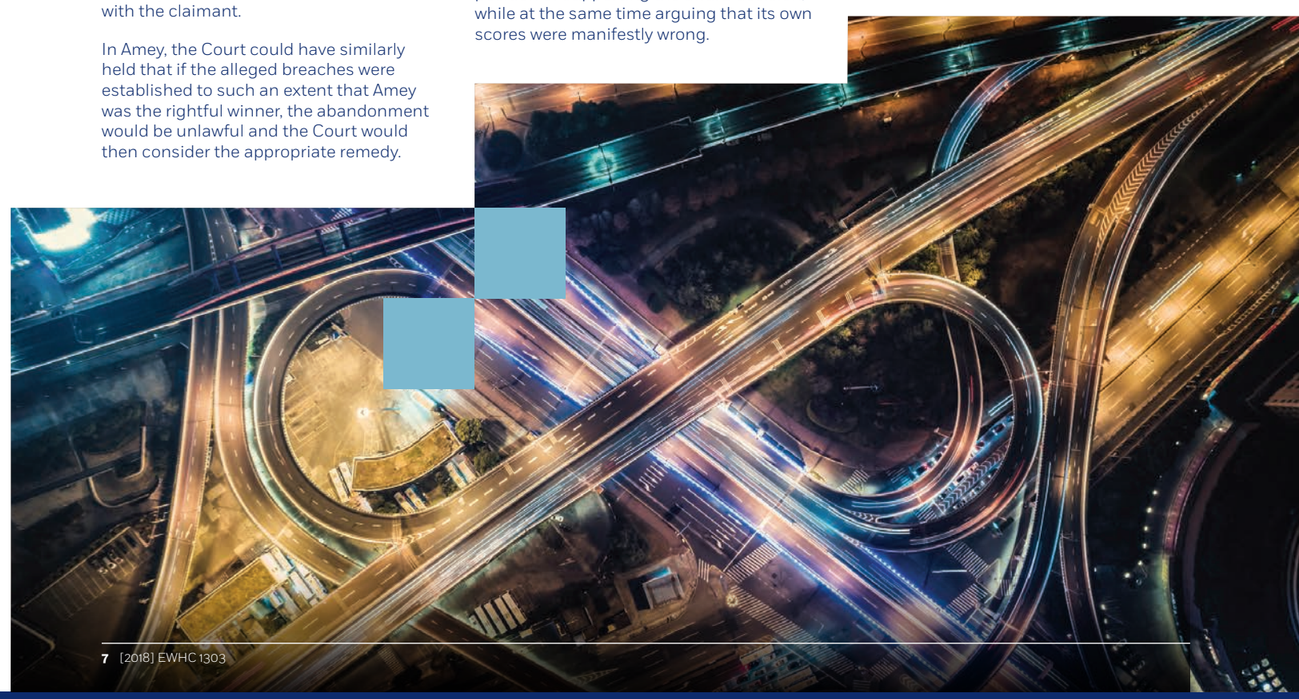
If the challenge has merit but the successful bidder was also underscored, it may need to put its arguments before the court. The authority could choose to make the same arguments itself but may be reluctant to acknowledge further flaws in its procurement process. This could place the successful bidder in the awkward position of supporting the award decision, while at the same time arguing that its own scores were manifestly wrong.

Conclusion

Abandonment remains an option for a contracting authority after *Amey v West Sussex*, but it will not necessarily put an end to litigation as it carries the risk that a damages claim may already have crystallised. That risk is particularly acute if the evidence indicates that the claim has merit and would, if established, result in the claimant having the highest score.

According to the Court in *Amey*, the abandonment decision may in those circumstances be lawful but the cost in damages could be high. In the circumstances, the authority may be well advised to avoid the damages risk by reversing its award decision, even if that course may risk an unmeritorious claim from the bidder who was wrongly found to be the winner the first-time round.

More tricky is where the authority recognises that the process was flawed but is unable to say who should have won because, for example, the criteria mean different things to different people. If settlement is not available, abandonment is likely to be the best option in these circumstances even if there is a risk, based on paragraph 46 of *Amey v West Sussex* (see above), that a loss of a chance damages claim may survive the abandonment. That issue may yet need to be clarified by the courts.



5 See Woods v Milton Keynes [2015] EWHC 2172)

6 [2019] EWCA Civ 1642

7 [2018] EWHC 1303

THE ENEMY OF MY ENEMY IS MY FRIEND: *RES JUDICATA* AND COMMON INTEREST PRIVILEGE IN MULTI-PARTY LITIGATION[1]

By Callum Monro Morrison

The complexity of modern construction projects often means that a raft of specialist sub-contractors, managers, administrators and certifiers are engaged, each bringing their own expertise to bear on the works. However, when things go awry, the result is often a similarly complex and fragmentary multi-party dispute. Several such disputes have found their way to the Technology and Construction Court in recent years – for example, the litigation between Amey LG Ltd, Amey Birmingham Highways Ltd and Birmingham City Council, which Mr Justice Fraser characterised as "*tortuous*".[2]

In circumstances where the same defendant is being sued by a number of different claimants in respect of the same or related matters, but in separate sets of proceedings, the following two questions commonly arise:

(1) To what extent is that defendant bound by determinations, both factual and legal, made in other proceedings against different claimants? This question really concerns issue estoppel – a species of '*res judicata*' (i.e. matters adjudicated upon) which Lord Sumption has described as "*the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties*".[3] We are not here concerned with cause of action estoppel or the principle in *Henderson v Henderson*,[4] which are separate but related doctrines.

(2) Will communications with the defendant(s) in those other proceedings be privileged? This question concerns common interest privilege – the idea that where a communication is produced by one party for the purpose of obtaining legal advice or to assist in the conduct of litigation, then a second party who has a common interest in the subject matter of the communication or in the litigation can assert a right of privilege over that communication as against a third party.[5]

To illustrate these questions, let us imagine that a main contractor, 'B', having been sued by its employer, 'A', is now suing one of its sub-contractors, 'C', in respect of the same project. Despite the causes of action being different, there are issues common to both sets of proceedings. Expressing question (1) in those terms, to what extent will determinations of factual or legal issues in the litigation against A be binding upon B when it comes to the litigation against C? Expressing question (2) in the same terms, will B's communications with its co-defendants in the litigation against A be subject to legal professional privilege in the litigation against C?

Issue estoppel and common interest privilege are now principles of some antiquity and have been well ventilated in the senior courts. As a result, large bodies of relevant case law have accumulated. In order to be of maximum utility, this article does not quote from authority at length, but rather attempts to summarise the emergent principles as succinctly as possible. Full citation is provided in the footnotes to allow the reader to investigate pertinent aspects of the discussion in greater detail.

Answering question (1) – Issue Estoppel and Privity of Interest

The answer to the first question depends on two preliminary questions: (a) were the determinations in the previous proceedings *in personam* or *in rem*?; and (b) if they were *in personam*, can the claimant in the instant proceedings, who was not a party to the former proceedings, nonetheless be considered 'privy' to those former proceedings?

Determinations *in personam* or *in rem*?

Determinations *in rem* will bind non-parties. In order for a judgment to have *in rem* effect, the determination must be a determination regarding the status or disposition of property which is to be valid as against the whole world. Examples include a declaration on the ownership of shares,[6] or the revocation of a patent.[7] The mere fact that a judicial determination relates to property rights between parties does not make it a decision in *rem*.[8] However, it should be noted that an order may operate partly *in personam*, partly *in rem*.

> *"Someone who is not a party cannot take advantage of a decision made in proceedings when they were not there."*

Determinations *in personam* can usually only bind the parties to that litigation and their 'privies'. It is unquestionably not a rule of law that a judgment obtained by A against B is conclusive in an action between B and C; on the contrary, a judgment *inter partes* is conclusive only between the parties and those claiming under them.[9] Similarly, where B has lost against A on an issue in one case, it is irrelevant to B's legal obligations and rights in relation to A if C subsequently defeats A on the very same issue.[10] This is the doctrine of 'mutuality': someone who is not a party cannot take advantage of a decision made in proceedings when they were not there.[11] However, there is an important exception to this rule in circumstances of 'privity' between parties A and C.

Was the claimant 'privy' to the other proceedings?

Mindful of the reasoning above, let us suppose that an unfavourable determination *in personam* has been made against B in litigation with A – a finding that a contractual termination notice was invalid, for example. C then seeks to hold B to this finding in subsequent litigation. Can C rely on the court's determination in A v B? The answer is: only if there is sufficient privity between C and A.

Before a person can be privy to another, there must be a community or privity of interest between them.[12] This is a necessary but not a sufficient condition, since a privy must also claim under, through or on behalf of the party bound.[13] The bar here is high. Privity is not established by mere curiosity or concern (commercial or otherwise) about the litigation – there must be a sufficient degree of identification between the two parties to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party.[14] The requirements of privity may be stricter in the context

1 First published by Practical Law.
2 Amey LG Ltd v Amey Birmingham Highways Ltd [2019] EWHC 234 (TCC), at [3].
3 Per Lord Sumption in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, at [17].
4 (1843) 3 Hare 100.
5 Per Aikens J in Winterthur Swiss Insurance Company & Anor v AG (Manchester) Ltd & Ors [2006] EWHC 839 (Comm), at [78].
6 E.g. Ali v Pattni [2007] 2 AC 85, PC.
7 E.g. Resolution Chemicals Ltd v H. Lundbeck A/S [2013] EWCA Civ 924.
8 Per Lord Mance in Ali v Pattni, at 98.
9 Per Mellish LJ in Gray v Lewis (1873) 8 Ch App 1035, at 1059-1060.
10 Per Lord Neuberger in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, at [46]-[47].
11 Per Longmore LJ in Sun Life Assurance Company of Canada v The Lincoln National Life Insurance Co [2004] EWCA Civ 1660, at [77].
12 Per Lord Guest in Carl-Zeiss (No.2) [1967] 1 AC 853, HL, at 936.
13 *Spencer Bower and Handley on Res Judicata*, 4th Ed., §9.45.
14 Per Sir Robert Megarry V-C in Gleeson v J Wippell & Co [1977] 1 WLR 510 (Ch), at 515-6.

of issue estoppel than *Henderson v Henderson* abuse of process, where the courts take a broad merits-based approach.[15] Yet both approaches will often lead to the same conclusion.[16]

Issue estoppel may operate between defendants too, where: (i) there is a conflict of interest between the defendants; (ii) it is necessary to decide that conflict to determine the claimant's entitlement to the relief sought; and (iii) the question between the defendants has been judicially determined in other proceedings.[17] A defendant prejudiced by a judgment for or against a co-defendant on liability or quantum can appeal from it.[18] Any third party joined to the proceedings (e.g. under CPR Part 20) becomes a party to the proceedings between the prior parties and will be bound by issue estoppels created by a judgment or judgments between them.[19]

Finally, it should be noted that issue estoppel applies only to judicial determinations which are fundamental to the decision reached, rather than collateral to it.[20] As to legal issues, the issue determined must have been necessarily involved in the decision, as part of its legal foundation or justification; nothing but what is legally indispensable to the conclusion reached is thus finally precluded. As to factual issues, the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action.[21]

Answering question (2) – Common Interest Privilege

First, common interest privilege is not a freestanding form of privilege. It merely provides a means by which pre-existing privilege in a document or communication may be preserved in transmittal to a third party who has the requisite 'common interest'. Accordingly, the answer to whether privilege is lost by sending privileged information to another defendant will depend on whether that party has sufficient common interest in the information and/or in the litigation generally.

Older cases suggested that common interest privilege arose where the parties concerned could have instructed the same solicitor.[22] More recent authority, however, indicates a less restrictive approach which acknowledges that the relationship between parties with a common interest may not (and need not) always be harmonious.[23] The relationships where common interest privilege has been held to apply include: co-defendants;[24] insured and insurer;[25] reinsurer and reinsured;[26] companies in the same group, including parent companies and subsidiaries;[27] agent and principal;[28] and any parties who do or might use the same solicitor.

It has been suggested that common interest privilege can be used as a 'sword' (to obtain disclosure) as well as a 'shield' (to prevent disclosure).[29] However, this development may in fact be an outgrowth of joint interest privilege (requiring that the joint interest in the document existed at the time of its creation) rather than common interest privilege (which requires only that the parties have a common interest in the confidentiality of the document at the time of its disclosure).[30]

In practice, it may be prudent for parties to delineate the extent of their common interest before sharing privileged material, since for privilege to attach, disclosure must be given in recognition that the parties share a common interest.

15 Per Thomas LJ in Aldi Stores Limited v WSP Group Plc and others [2007] EWCA Civ 1260, at [10].
16 Per Floyd LJ in Resolution Chemicals v Lundbeck, at [33-35] and [50-52]. See also the learned judge's summary of the three-stage test to be applied by courts assessing privity, at [32].
17 Per Sir George Lowndes in Munni Bibi v Tirloki Nath (1931) 58 LR Ind App 158, PC, at 165-166. Board included Lord Tomlin.
18 Per Lord Carswell in Moy v Pettman Smith [2005] 1 WLR 581 HL, 602-604.
19 Per Scrutton LJ in Barclays Bank v Tom [1923] 1 KB 221 CA, 223-224.
20 Per Lord Holt CJ in Blackham's Case (1709) 1 Salk 290; per Mance LJ (as he then was) in Sun Life Assurance, at [41].
21 Per Dixon J in Blair v Curran (1939) 1 CLR 464, at 531-533 (an Australian case which was cited with approval by Mance LJ in Sun Life Assurance).
22 E.g. Buttes Gas and Oil Co v Hammer (No 3) [1981] QB 223.
23 E.g. Svenska Handelsbanken v Sun Alliance and London Insurance plc (No 1) [1995] 2 Lloyd's Rep 84.
24 Buttes Gas and Oil.
25 Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027.
26 Sun Alliance.
27 USP Strategies plc v London General Holdings Ltd [2004] EWHC 373 (Ch).
28 The World Era (No 2) [1993] 1 Lloyd's Rep 363.
29 Per Aikens J in Winterthur Swiss Insurance, at [78] *et seq*.
30 *Thanki on Privilege*, 3rd Ed., §6.21, 6.59.

NIGERIA IN THE PIPELINE TO PAY US$9BN DAMAGES AS ABORTED PROCESSING PLANT RUNS OUT OF GAS

On 16 August 2019, the High Court handed down its judgment in the case of *P&I Developments v Nigeria*[1] enforcing a US$6.6bn arbitral award (US$9bn with interest) against the Federal Republic of Nigeria ("the FRN") over a failed gas project. Both the size of the judgment and the fact that it was awarded for a project that never began construction have attracted a considerable degree of controversy, with Nigerian officials calling the decision of the High Court *"completely wrong and obviously unjustifiable."*[2] Nevertheless, the judgment confirms the English court's robust approach to the enforcement of arbitration awards and Butcher J's pro-arbitration comments will be seen by the international arbitration community as further proof of London's commitment to its reputation as the leading seat for arbitration.

By David Thomas QC and Brenna Conroy

Background

The dispute between the FRN and P&I Developments Limited ("P&ID"), a British Virgin Islands entity, arose out of a Gas Supply and Processing Agreement ("the GSPA") entered into between the parties on 11 January 2010. Under the GSPA, the FRN agreed to supply natural gas ("Wet Gas"), at no cost to P&ID, and P&ID agreed to construct and operate the facility necessary to process the Wet Gas by removing the natural gas liquids ("NGLs") contained within it. Pursuant to the terms of the GSPA, the lean gas was to be returned at no cost to the FRN, for use in power generation or other purposes, and P&ID was entitled to the NGLs stripped from the Wet Gas. The agreement was to run for 20 years, and P&ID expected this arrangement to generate US$5-6 billion in profits over that period.

The GSPA contained an arbitration clause that allowed either party to serve a notice of arbitration where a dispute arose. Clause 20 stated:

> *"The Agreement shall be governed by, and construed in accordance with the laws of the Federal Republic of Nigeria.*
>
> *The Parties agree that if any difference or dispute arises between them concerning the interpretation or performance of this Agreement and if they fail to settle such difference or dispute amicably, then a Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement....*
>
> *The venue of the arbitration shall be London, England or otherwise as agreed by the Parties. The arbitration proceedings and record shall be in the English language."*

By 2012, a dispute had arisen in relation to the GSPA with P&ID contending that the FRN had failed to build the necessary pipelines to supply the Wet Gas to the production facility, which amounted to a repudiatory breach of the GSPA that was accepted by P&ID. P&ID thereafter commenced an arbitration against the FRN for damages in the sum of US$5,960,226,233 plus interest.

Arbitral Tribunal

The arbitral tribunal (chaired by Lord Hoffmann) ruled that: (1) FRN had repudiated the GSPA by failing to perform its obligations thereunder; (2) P&ID was entitled to damages; and (3) (by majority) those damages were assessed as being US$6.6bn, representing the loss of profits over the 20 year period minus a discount to account for the immediate payment of sums that would otherwise have accrued over the entire operational period, plus interest calculated at 7% per annum. By the time of the High Court judgment, this sum amounted to approximately US$9 billion. The tribunal's decision was reached on the basis that there was no evidence, contrary to arguments made by the FRN, that the P&ID was unable or did not intend to fulfil its obligations under the agreement. The tribunal also determined that, contrary to the FRN's assertion, there was no actual evidence that militancy in the Niger Delta had any impact on gas production or transport around the site earmarked by P&ID. As there was no meaningful challenge from the FRN, the tribunal agreed with P&ID on the measure and calculation of damages, including the 20-year period of lost profits. The interest rate set reflected what P&ID would have had to pay to borrow the money or could have earned by investing in Nigeria.

Following the issue of the tribunal's award on liability, but before the Final Award was published establishing the quantum of P&ID's claims, FRN commenced proceedings in the English Commercial Court to set aside the liability award on the ground of serious irregularity. After its application was rejected on paper, FRN initiated similar proceedings in the Federal High Court of Nigeria disputing, for the first time in the arbitration, that London was the seat chosen under the GSPA. FRN's primary argument was that the word "venue" in the arbitration clause represented a choice of geographical location for the arbitration hearings, rather than a choice of juridical seat, which it submitted was Nigeria. FRN obtained an injunction in the same proceedings restraining the parties from taking any further step in the arbitration.

Despite the injunction issued by the Nigerian courts, the tribunal considered itself empowered to make a ruling on the seat of the arbitration and, under Procedural Order No. 12, determined

1 [2019] EWHC 2241 (Comm).

2 https://www.premiumtimesng.com/news/headlines/347423-interview-how-british-courts-9-billion-ruling-against-nigeria-could-affect-our-economy-cbn-governor.html

that the seat was England. FRN chose to continue participating in the arbitration whilst "maintaining its position on the award on liability" and the Final Award was issued by the tribunal on 31 January 2017.

High Court

P&ID applied to the High Court to enforce the Final Award pursuant to section 66 of the Arbitration Act 1996 ("the 1996 Act"). FRN opposed enforcement, arguing that the tribunal had not been entitled to rule in Procedural Order No. 12 on the seat of the arbitration, that FRN had not been given the opportunity to present its case before the tribunal's ruling on the seat, and in any case that the arbitration was seated in Nigeria on the basis that the issue of the seat was to be determined in accordance with the law governing the arbitration clause of the GSPA (i.e. Nigerian Law, and that as a matter of Nigerian law the seat of the arbitration was Nigeria). It further argued that even if the arbitration was seated in London, and not Nigeria, the award was manifestly excessive, punitive and against English public policy.

Butcher J first considered P&ID's primary argument that the tribunal had been entitled to determine the seat of the arbitration and FRN was now bound by that determination. Despite FRN's complaints of procedural unfairness, Butcher J considered that the seat of the arbitration was not a matter that FRN could now ask the court to revisit on the basis that FRN had failed to pursue any of the remedies available to it either before the tribunal, before the English courts or before the Nigerian courts, noting that FRN had allowed its action challenging Procedural Order No. 12 in the Nigerian courts to be struck out. This determination was bolstered by a finding that Procedural Order No. 12 had created an issue estoppel as to the seat of the arbitration in line with *Good Challenger Navegante S.A. v Metalexportimport S.A. (The 'Good Challenger')*[3] that precluded any such argument being raised on the application before the High Court.

Although not strictly necessary given his determination that FRN was bound by Procedural Order No. 12, Butcher J also determined whether the decision of the tribunal as to the seat of the arbitration had been correct. It was undisputed between the parties that Nigerian principles of construction should be taken to be the same as those of English law. Applying the approach to construction of English law, at paragraph 85 of the judgment Butcher J concluded that "*while there are significant arguments the other way, the GSPA provides for the seat of the arbitration to be in England*" for the following principal reasons:

1. It was significant that Clause 20 referred to the venue "*of the arbitration*" as being London, which would continue up to and including the Final Award. This provision "*represented an anchoring of the entire arbitration to London rather than providing that the hearings should take place there.*"

2. Clause 20 provided that the venue of the arbitration "*shall be*" London "*or otherwise as agreed between the parties.*" If the reference to venue was simply to where the hearings should take place, this was an inconvenient provision and one which the parties were unlikely to have intended. It would have meant that hearings had to take place in London, however inconvenient that might be for a particular hearing, unless the parties agreed otherwise. The question of where hearings should be conveniently held is, however, one which arbitrators ordinarily have the power to decide (as envisaged in section 16(2) of the Nigerian Arbitration Act ("ACA")).

3. The reference in Clause 20 to the provision of the rules of the ACA was not inconsistent with the choice of England as the seat of the arbitration; the non-mandatory provisions of the 1996 Act were replaced by that provision, but the mandatory provisions applied.

4. The authority of *Zenith Global Merchant Ltd v Zhongfu International Investment FZE* [2017] All FWLR 1837 was decided long after the conclusion of the GSPA and therefore could not be used to support any argument that at the time of conclusion of the agreement, the word "venue" was being used in the sense in which it was used in that case.

The FRN also argued that even if the seat of arbitration was England and the Final Award was a "domestic" award, the High Court should refuse leave to enforce it on the basis that it would offend public policy to enforce an award for damages which were "*not compensatory, but hugely inflated and penal in nature.*" To support its contention that the damages were not compensatory, the FRN relied on three particular points, namely: (1) that the tribunal had applied an incorrect and unduly low discount rate to the assessment of future cash flows from the project; (2) that the tribunal had ignored the fact that the GSPA required P&ID to grant the FRN a 10% carried interest in the project; and (3) the majority of the tribunal did not make any deduction on grounds of a failure to mitigate.

The High Court accepted that if enforcement of an award would be contrary to public policy, that would be a ground for refusal of enforcement under the 1996 Act as it would constitute a matter which fell to be considered by the Court in exercising its discretion. However, at paragraph 95 of the Judgment, Butcher J held that

"Looking at the Final Award itself, there can be no doubt that the Tribunal was intending to award only compensatory damages… In paragraph 20 it stated that: "the damage suffered by P&ID is the loss of net income it would have received if it had been supplied with wet gas in accordance with the contract and had been able to extract and sell the natural gas liquids." *The Tribunal went on to consider and reject an argument that P&ID would not have performed the contract, and to hold that losses of the kind referred to in paragraph 40 were not too remote… and were quantified at US$6,597,000,000…"*

In response the public policy arguments Butcher J found, at paragraph 102, that:

> *"I am clearly of the view that there is no public policy which requires the refusal of enforcement to an arbitral award which states and is intended to award compensatory damages, and where, even if the damages awarded are higher than this Court would consider correct (as to which I express no view), that arises only as a result of an error of fact or law on the part of the arbitrators. The enforcement of such an award would not be "clearly injurious to the public good" or "wholly offensive to the ordinary reasonable and fully informed member of the public". Furthermore, the public policy in favour of enforcing arbitral awards is a strong one, and, if a balancing exercise is required at all, outweighs any public policy in refusing enforcement of an award of excessive compensation. The labelling of such excessive compensation as "punitive" or "penal", as the FRN seeks to do in this case does not alter this conclusion."*

Discussion

The initial High Court decision drew controversy due to the fact it upheld an arbitration award that was argued by the FRN to be "manifestly excessive." The Final Award itself represents around 20% of the government's foreign reserves, one third of its fiscal budget, and 2.5% of its GDP. Some have seen this decision as sending a very 'pro-arbitration' message, particularly given the court's argument that public policy favours arbitration awards being enforced even where the award is large or the respondent is a state. Butcher J also concluded that the circumstances that justify arbitration awards being set aside on public policy grounds should be narrowly circumscribed.

Given that the seat is a key factor in any arbitration, the decision is also a reminder of how important it is to give the issue careful consideration at the outset and take care when drafting the arbitration agreement. In this particular case, a reference to a 'venue' was taken to mean the arbitral seat, rather than the physical location of the arbitration, which does not have the same significance.

What next?

Following the High Court decision enforcing the award, Nigeria was granted a stay of execution pending its appeal against the decision which was conditional on Nigeria paying US$200 million into court.[4]

P&ID had offered an undertaking that any monies obtained by way of execution would be held in a client account of its solicitors pending the outcome of the appeal. But the FRN argued there was a real risk that the assets would be not returned if the appeal was successful on the basis that P&ID was a BVI company and: (i) it had no operations there; (ii) there was no information regarding its assets or balance sheet; the instant claim might be its only asset; and further, it had an opaque ownership structure.

The application for stay was granted as there was held to be a real risk that the assets obtained by P&ID pending an appeal would be irrecoverable by the FRN in the event of a successful appeal and even with the undertaking, there were reasons to consider that there might be immediate and potentially severe damage to the FRN without a stay. Granting the stay was therefore considered to be the best solution, and one which accorded with the interests of justice for both parties.

"Some have seen this decision as sending a very 'pro-arbitration' message, particularly given the court's argument that public policy favours arbitration awards being enforced even where the award is large or the respondent is a state."

3 2004 1 Lloyd's Rep 67.

4 *P&I Developments v Nigeria* [2019] EWHC 2541 (Comm).

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