KC LEGAL UPDATE

Summer 2020

In this issue...

KEATING CHAMBERS

WELCOME

to the Summer 2020 Edition of KC LEGAL UPDATE

Much has changed since the last edition of KC Legal Update (Winter 2019/20). We have adapted to remote hearings, home working, virtual meetings and live webinars. The speed of the transformation is something that none of us could have imagined just a few months ago.

Keating Chambers, in common with all organisations in the UK and internationally, had to respond rapidly to the changes required back in March of this year. The impact was being felt even before then, particularly through the work and clients we have around the world and as we tried to respond responsibly.

In March, our chambers moved all staff to working from home in line with government guidance. We sent a letter to our clients explaining our move to working on a fully remote basis and how we could all stay in touch and continue to operate. Unprecedented times.

As our families adapted to home schooling, no travel unless essential and one daily outing for exercise; on the work front Technology and Construction Court hearings and arbitrations turned into remote hearings and applications, with new rules, protocols and guidance being rapidly drawn up by the courts and institutional bodies. We got to grips with Teams, Zoom, BlueJeans, Skype and Starleaf (amongst others).

A need for social connection has remained. A Keating Strava running group was set up which incorporated several of our children when we were restricted to exercising once a day. We have had virtual chambers drinks and 'lunch'. An internal social networking site was set up. We have walked 10,000 Steps for Justice (separately this year) for the London Legal Support Trust and ran 2.6km each to make up the 26 miles of the cancelled London Marathon for 'Kids Out' and Oxfam.

Many of our barristers have now done live webinars from their homes with audiences in the hundreds, some have sat as Deputy High Court Judges, arbitrators and mediators from their studies. We have fully embraced digital marketing and learnt to hold virtual catch ups with our clients so we can stay in touch. We are adapting our building for those who need to work in it to respond to in person hearings as physical courts continue to re-open.

We have produced this Summer edition of KC Legal Update in very different circumstances to the last edition.

We hope you and your families are well and safe and have been able to adapt as we will keep doing.

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"IT'S COMPLICATED": DECIPHERING THE ENGLISH GOVERNMENT'S RESPONSE TO SARS-COV-2 AND ITS IMPACT ON CONTRACTS[1]

By Sean Wilken QC

The English[2] Government's response to SARS-CoV-2 is legally and factually complicated. In this article I try to unpack the elements of it and then attempt to see how those elements may impact on the contracts that people may have.

In so doing, there are (currently) four elements:

- The Coronavirus Act 2020 ("the Act");
- Various regulations;
- Numerous items of guidance; and
- Political statements.

Together, I call this the "quadripartite approach" or "the puzzle". In this article I focus solely on the contractual aspects, I do not seek to address in detail any public law arguments as to the overall validity of the puzzle.

The Pieces of the Puzzle

Before the Coronavirus Act ("the Act") came into force, the Government's response to SARS-CoV-2 was set out in The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129). The Act in the main came into force on 25 March 2020[3] which is, of course, after the "lockdown" had been announced as a matter of policy.

The Act[4] revoked SI 2020/129. In so doing and despite that revocation, the Act grandfathered the previous declaration made in and by those regulations (SI 2020/129) as if it were made under the Act.[5] So far, this is perfectly orthodox and consistent with the Government's response to SARS-CoV-2 being within the four walls of the Act.

Yet, on the same day as the Act came into force revoking those regulations (SI 2020/129), the Government introduced the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) ("the Regulations"). The Regulations were not, however, introduced under the Act but under sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984.

1 This article has benefitted from discussions with Tom de la Mare QC at Blackstone Chambers. Any mistakes are obviously my own.

2 Reaction to the coronavirus is a health question devolved to the Welsh; Scottish and Northern Irish administrations – a fact which has become increasingly important. For ease, where I refer to the Government in this article, I mean the English Government.

3 Section 87(1).

4 Schedule 21 para 24(1).

5 See Sch 21 para 24(2).

"Trying to advise parties to a contract, one has the immediate problem, that the law is not clearly accessible"

Throughout this period the Government was also releasing various items of guidance as well as stating its policy position – as it altered – in relation to SARS-CoV-2. The only legislation in play, however, remained the Regulations.

That remained the position until 7 May 2020. Then, the Government issued further guidance: *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency.*[6]

Then on 10 May 2020, the position changed again. Via a speech not given to Parliament and not in guidance or regulation or legislation, a new approach was announced. This speech was the new foundation of the Government's position – indeed if on 11 May 2020 one accessed the Government portal on SARS-CoV-2 one was told that the current position was as set out in the speech.

On the back of that, four new pieces of guidance emerged: the "Our Plan to Rebuild";[7] the "Staying Alert";[8] the "Staying Safe";[9] and the "FAQs".[10] There is no attempt to link these pieces of guidance back to either the Act or the Regulations. Further, the speech and *Our Plan to Rebuild* referred to further additional guidance – Covid-Secure guidance which would apply to various work-places.

Then, after the new pieces of Guidance were issued, a speech was given (this time to Parliament) which may or may not be a source of new alleged obligations.

On 11 May 2020, the Government issued eight items of Covid-Secure guidance for particular sectors[11] including the construction industry.[12] These pieces of guidance emphasise two things. First, that the reaction to SARS-CoV-2 is to be one of employers making their own assessments of risk. Two, based on that assessment, there are no hard actions, other than the assessment, that *must* be taken. There are instead a series of possible actions that might be considered or "might be needed".

On 12 May 2020, the Government amended the Regulations using emergency powers to permit people to leave the house indefinitely for exercise, to visit parks, outdoor sports areas and garden centres.

At the same time as the Government was introducing and amending the Regulations, the devolved administrations were also introducing and amending their regulations – in rather different ways. Thus, in Scotland, construction sites were "locked down" from the outset but not in England. As time has progressed, however, the differences between Scotland, Wales and Northern Ireland and England have become more stark. As at time of writing, Scotland, Wales and Northern Ireland maintain the position as it had been in England before 10 May 2020 and their regulations therefore significantly diverge from those applicable in England.[13]

6 Currently at this locale but that may obviously change:vhttps://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf.

7 https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy.

8 https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing.

9 https://www.gov.uk/government/publications/staying-safe-outside-your-home/staying-safe-outside-your-home.

10 https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do.

11 All eight can be found here - https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19.

12 https://assets.publishing.service.gov.uk/media/5eb961bfe90e070834b6675f/working-safely-during-covid-19-construction-outdoors-110520.pdf.

13 For the extent of the divergence – see https://gov.wales/sites/default/files/publications/2020-05/the-health-protection-coronavirus-restrictions-wales-regulations-2020-as-amended.pdf.

The Puzzle

Trying to advise parties to a contract, one has the immediate problem, that the law is not clearly accessible – there is no one document, one can point to and say "do or do not do that which is said here". In England alone,[14] there are now the thirteen items of guidance referred to above ("the Guidance").

As and when one locates the various elements of the Guidance, one cannot then actually say which has precedence. No item of guidance is said to be more important than the others. This is important as the Guidance is not consistent.[15]

Then one has on top of that the Regulations and the Act. There is no obvious interplay between the Guidance and the Regulations. *The FAQs*[16] and *Staying Alert* make reference to the Regulations, the other two items of guidance do not. In *Staying Alert*, the Regulations are both to be amended[17] and apparently to have effect as is.[18]

If one then turns to the Regulations themselves, three points arise.

First, as others have pointed out,[19] there is some doubt as to whether those sections of the Public Health (Control of Disease) Act grant the requisite *vires* for the Regulations.

Second, the Government has chosen, notwithstanding the vires issue, not to use the obvious mechanisms in the Act (which it could have done having brought into place the appropriate mechanisms on that day) but to use the more obscure Public Health (Control of Disease) Act 1984.[20] The rationale for so doing is unknown.

Third, the Regulations have been amended twice. Both times using emergency powers. Given the most recent amendment was a relaxation of their requirements, it is difficult to see how the use of emergency powers was justified. If that is correct, then this would constitute a further ground for challenging the validity of the Regulations.

Impact of the Puzzle

As things currently stand, we are firmly in the realm of guidance. Nothing has been done under the Act and the Regulations have not been amended to reflect the Guidance in any detail.

It is trite law that guidance, whilst relevant to the exercise of public law powers by public bodies, may have little or no effect on the purely private law of rights, obligations and liability. Guidance does not, for example and absent particular wording, give one private party to a contract an ability to sue the private other party.[21] Under the Act, however, regard must be had to the Guidance.[22]

Therefore, not locating the Guidance under the Act – irrespective of the terms of the Guidance itself – creates uncertainty.

If one then turns to the wording of the Guidance itself, the extensive debate over the exercise of police powers under the Regulations and Guidance, has shown that the previous iteration of the Guidance was unclear.[23] That lack of clarity, at least in terms of criminal liability, falls outwith the scope of this article. This article instead focuses on the impact of the puzzle on commercial and construction law.

As far as commercial law is concerned, the obvious issues arise in relation to frustration; *force majeure*; the operation of contract terms and variation by necessity. Common to all of them is what is the legal effect of the quadripartite response?

Here, the distinctions between the Regulations and the Guidance become important.[24] The Regulations, to the extent they are clear and lawful, would obviously have legal force. Thus, a contract under which people agreed to leave the house without possessing a reasonable excuse would be contrary to Reg 6(1). It would therefore be an illegal contract – if entered into after the Regulations came into effect – and would otherwise be frustrated (and/or if it contained a force majeure provision potentially caught by force majeure). So far, so clear. There is, however, a critical distinction between the Regulations and all versions of the Guidance. There is nothing in the Regulations which imposes either obligations or penalties in relation to social distancing.[25] Yet that suggestion[26] was a feature of all previous versions of the Guidance up and until 10 May 2020.

Thus, the question becomes what is the status of the Guidance?

Taking the guidance specifically issued by Public Health England, this is issued under section 2A(2)(f) of the National Health Service Act 2006 which imposes a statutory duty on the Secretary of State to issue advice on public health issues. By virtue of the Framework Agreement which underpins Public Health England, the Secretary of State has delegated these functions to Public Health England.[27] Thus the Public Health for England Guidance is statutory.[28] On that basis, a public authority would have to have regard to it as a matter of general public law and by operation of section 2B of the National Health Service Act and also by Schedule 21 para 21 of the Act. Thus, a public authority would have to have regard to the need for social distancing. Can a private body, however, also rely on that need as against another private body? If it could, then there would be the concomitant potential to claim relief from contractual obligations by relying on, as appropriate, frustration, force majeure, contractual change of law provisions or even variation by necessity.

The orthodox view is that a private body could not rely on the Guidance to alter contractual relations as the Guidance is merely that – advice which the private body can take or not take. Thus, if a private body chose to follow the Guidance and as a result make either its performance of its obligations more onerous or, perhaps, impossible, that would be a choice for the private body to make and the consequences of that choice would be that private body's risk. On this orthodox approach, the Guidance is archetypal soft law – there to advise as opposed to determine obligations and penalty.

The Guidance is not, however, standard guidance, not least because it is backed by the Regulations which impose criminal sanction. To take one example, under Reg 7: *"no person may participate in a gathering in a public place of more than two people except… (b) where the gathering is essential for work purposes"*. Under Reg 8(1): *"A relevant person[29] may take such action as is necessary to enforce any requirement imposed by regulation 4, 5 or 7"*. Under Reg 8(9):

Where a relevant person considers that three or more people are gathered together in contravention of regulation 7, the relevant person may—

(a) direct the gathering to disperse;

(b) direct any person in the gathering to return to the place where they are living;

(c) remove any person in the gathering to the place where they are living.

Under Reg 8(10), the relevant person may use force to support the exercise of the Reg 8(9) powers. Under Reg 8(11), the relevant person may also issue instructions. Finally, a breach of regulation constitutes an offence under Reg 9(1) – there also being corporate liability under Reg 9(5).

There are oddities in this wording – the use of "gathering" rather than assembly; the fact that the gathering is "essential for work purposes" as opposed to be for "essential work purposes" both of which render compliance with the provision more complicated. Further, that there is an exemption based on "essential for work purposes" suggests that one can gather to work. If that was not the case, there would be no need for exemption. Thus, any enterprise with two or more people in one place would be caught.

This then moves to the next level of the problem. What is the relationship between these provisions and the Guidance? It is possible that the Guidance is entirely irrelevant to the analysis of the Regulations. Thus, if one is "gathered", there is potential criminality irrespective of social distancing as per the Guidance. That, however, would be contrary to the aim of the Guidance – which is to allow working provided that people can still work at home or at a work site if there is social distancing "where practicable". Therefore, it would follow that the Guidance is relevant to the operation of the Regulation. If that is right, the Guidance would be operable in two ways – offensively (you have not instituted social distancing at work and therefore there is a potential offence) or defensively (I have instituted social distancing at work and therefore there is no potential offence). By either route, however, the Guidance is operating not as guidance but as an indicator of criminality. That means the Guidance is operating as hard rather than soft law.

A similar conclusion can be reached via the Health and Safety at Work Act 1974. It is well established under section 3 that an employer owes various obligations to employees as to a safe system of work. If the Health and Safety Executive were to prosecute a failure to adopt the Guidance (as the HSE has indicated that it will),[30] that can only mean that the Guidance has operation as a hard principle of law relevant to section 3.[31] If, as per traditional thinking, the Guidance is purely advisory, failure to comply could not found any enforcement.

Thus, one gets to the position that the Guidance is by appearance soft law but by operation (and not straightforwardly) hard law. Therefore, the application of the Guidance could well have private law consequences – in the realm of frustration, *force majeure*, contractual provisions and variation by necessity.

The above would be difficult enough if the Guidance now issued were consistent. It is not. Thus, paragraph 1 of "Staying Safe" states:

Public Health England recommends trying to keep two metres away from people as a precaution. However, this is not a rule and the science is complex. The key thing is to not be too close to people for more than a short period of time, as much as you can.

Further, as indicated above, the Covid-secure guidance is very weakly worded. Thus, it is, from one perspective, difficult to see how any form of obligation is imposed by it. Yet, the Government's stance is that it will be checking whether the Guidance is being complied with and action will be taken against those who are not complying.

14 Again the position is different in Scotland, Wales and Northern Ireland. I am not sure if anyone has yet to consider how these different regimes can be operated where there are cross border commercial activities.

15 For example, Cabinet Office does not, necessarily, accept the Public Health for England 2m rule – see para 1 of "Staying Safe".

16 See para 1.2.

17 See the preamble.

18 See paras 2 and 5.

19 See https://ukhumanrightsblog.com/2020/04/20/is-the-lockdown-lawful-an-overview-of-the-debate/ for a review of the conflicting views as to the legality of the Regulations themselves.

20 There is also the oddity that the government did not rely on the already existing Civil Contingencies Act 1984 which would have enabled all and each of the steps the government has taken but with a much more oversight and control of the breadth of governmental power.

21 If a party to the contract was a public body and possessed a discretion between a range of options, there would be an obvious argument guidance would at least inform the exercise of that discretion – under the implied term that the discretion would not be exercised arbitrarily; irrationally or capriciously (as to the implied term see *Abu Dhabi National Tanker Co v Product Star Shipping Ltd ("the Product Star")* [1993] 1 Lloyd's LR 397; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287; *Socimer International Bank v Standard Bank London* [2008] EWCA Civ 116; *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34). Query, however, whether the guidance would be relevant if there was no contractual discretion but a black and white choice to be made under the contract – see *Mid-Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 at [89 – 95].

22 See Schedule 21 para 21.

23 The College of Policing sought to redress this ambiguity by issuing a series of briefings – these are now at: https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Pages/default.aspx.

24 In this discussion, I draw the familiar distinction between hard/bright light law and soft law. The former is a principle or rule with distinct legal consequences eg criminality. The latter is a guiding principle from which subjects may or may not depart.

25 Compare the position in Wales, where social distancing is in the Regulations and therefore is a legal obligation backed by penalties – see https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Documents/Health-Protection-Regulations-Amendments-England-changes-130520.pdf.

26 Social distancing was to be observed wherever practicable under the previous Guidance.

27 See https://www.gov.uk/government/publications/framework-agreement-between-the-department-of-health-and-public-health-england.

28 The basis of the other Guidance issued, for example, by Cabinet Office is less clear.

29 A police constable, police support officer or someone designated by the Secretary of State or local authority

30 See https://www.tuc.org.uk/news/employers-staying-open-must-guarantee-safe-working-conditions-including-social-distancing-say.

31 See https://www.hse.gov.uk/pubns/hse41.pdf for the unsurprising policy statement that one can only prosecute where a law has been broken.

The immediate practical issue is against what benchmark is compliance with what appear to be suggestions to be tested? Further, absent a benchmark, does this impose any form of legal obligation? At least as far as the health and safety and employment law perspective, it apparently does.[32] Further, if the Government is going to be checking compliance and penalising non-compliance there must be some form of obligation being imposed here.

The above then leads to two questions: what does it mean for commercial dealing and in each of the realms of frustration, *force majeure*, contractual provisions and variation by necessity?

One could, of course, refer to *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*.[33] Yet, this is once again guidance and in its own terms is non-binding.[34] If the Government were to interpolate a whole series of terms into contracts, one would expect that to be done by primary legislation. Further, as tangible contractual rights are choses in action, they would be possessions within Article 1, First Protocol of the European Convention on Human Rights. Wholesale intervention into contractual arrangements would therefore inevitably attract a human rights based scrutiny. Therefore, this guidance, I would suggest, takes one no further forward.

The Government's approach of having Guidance which is not guidance but is some form of chimera inevitably creates commercial uncertainty: parties do not know whether there is a private law obligation to socially distance and, if so, what role that plays in their arrangements.

Thus, parties do not know whether to comply with the Guidance or their contract. This in turn creates uncertainty as to where the risks and liabilities ultimately lie. Where there are multiple parties in the contractual chain and/or layered transactions (e.g. a supply of goods chain backed by finance and insurance obligations or a large scale project with multiple parties also backed by finance and insurance obligations), there will be concerns as to whom is the ultimate payor and whether that entity has assets to cover the eventual liability. These basic risks are then compounded by the fact that the Guidance wording varies and contains caveats such as practicability or essential. These add additional uncertainty. Finally, as the risks cannot lie with Government (this is guidance supposedly advisory only), intentionally or not, all risk has been transferred to the private sector.

Thus, the effect of the puzzle is not only to transfer risk away from Government but also to do so in a doubly uncertain fashion – namely, uncertainty as to what the risk is and whose risk is it? This is, in commercial and legal terms, unfortunate. Not only is there no legal certainty (which is of importance in commercial law and the absence of which generates litigation) but also parties cannot hedge against risk.

With those general comments in mind, I turn to the possible relevance of the quadripartite approach to each of frustration, force majeure, contractual terms and variation by necessity. In my approach to each of the areas, I assume, however, that legal uncertainty is not a factor and one can assume that the Guidance has some legal effect.[35] I also approach the application to each issue as a matter of legal and not factual analysis – that is I do not consider the potential issues raised by the ambiguous wording of the quadripartite wording as they may or may not arise on the facts. What I am looking at is the ways in which this new, private sector risk may manifest or be managed.[36]

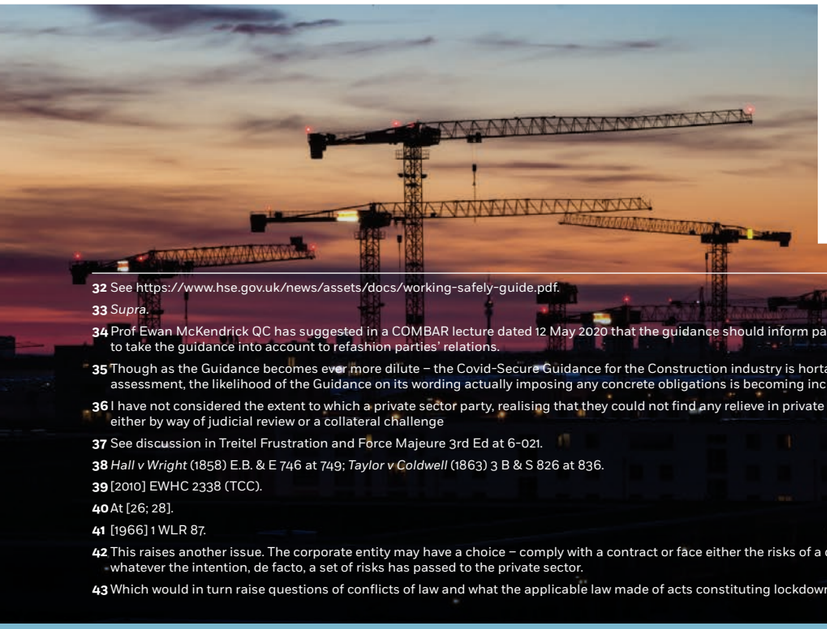
Frustration

For frustration to occur, the contract must be incapable of performance. The fact that performance has suddenly become more onerous or impracticable for one party does not suffice.[37]

If one has a contract for personal service, the illness of the person may amount to frustration.[38] Further, although the contract may not be frustrated, the affected party may be discharged from future performance. In *Atwal v Rochester*[39] a builder who had become ill was discharged from future performance due to the relationship of trust the builder had with the client.[40] Similarly, in *Condor v The Barron Knights*[41] the claimant was discharged from further performance of the contract due to a fear of further mental illness.

What is common to all these cases is the concept of particular, individual service. Thus, at that level, individual circumstances would discharge any further obligation to perform. In terms of a company, however, unless as per Atwal the company can only perform the contract via a particular employee, the company will not be discharged, it can always perform via another employee (assuming employees are available).[42]

Further, It is possible that a contract could in theory be frustrated by lockdowns resulting from SARS-CoV-2 – for example a contract to travel to an area under total lockdown would be incapable of performance as would a contract for the supply of goods from an area where all the factories had been closed. Neither of those factual scenarios would apply within England as there is no such lockdown, therefore this possibility would arise in relation to international contracts.[43]



32 See https://www.hse.gov.uk/news/assets/docs/working-safely-guide.pdf.

33 *Supra*.

34 Prof Ewan McKendrick QC has suggested in a COMBAR lecture dated 12 May 2020 that the guidance should inform parties' relations but accepted that a court would not be able to take the guidance into account to refashion parties' relations.

35 Though as the Guidance becomes ever more dilute – the Covid-Secure Guidance for the Construction industry is hortatory at best and really only requires a work place assessment, the likelihood of the Guidance on its wording actually imposing any concrete obligations is becoming increasingly remote.

36 I have not considered the extent to which a private sector party, realising that they could not find any relieve in private law, might simply challenge the quadripartite structure either by way of judicial review or a collateral challenge

37 See discussion in Treitel Frustration and Force Majeure 3rd Ed at 6-021.

38 *Hall v Wright* (1858) E.B. & E 746 at 749; *Taylor v Coldwell* (1863) 3 B & S 826 at 836.

39 [2010] EWHC 2338 (TCC).

40 At [26; 28].

41 [1966] 1 WLR 87.

42 This raises another issue. The corporate entity may have a choice – comply with a contract or face either the risks of a dispute or the risks of infecting employees. Once again, whatever the intention, de facto, a set of risks has passed to the private sector.

43 Which would in turn raise questions of conflicts of law and what the applicable law made of acts constituting lockdown in terms of frustrating events.

It will be a very rare case, however, where the Guidance will form grounds for frustration: performance of the contract with social distancing is highly likely to be a possibility. Further, although performance will be more onerous and more costly, neither of those constitute frustration.

Force majeure

There is no independent doctrine of *force majeure* in English law.[44] Force majeure can therefore only be invoked where there is the appropriate clause and all will turn on the provisions of the particular clause.[45]

I focus here on what the parties may do in relation to the risk that the puzzle has placed onto the private sector.

Looking at some of the standardised wording:

- A simple reference to force majeure would require reference to the general caselaw. That, unsurprisingly, does suggest that a pandemic would be *force majeure*. It is more difficult to suggest, however, that social distancing constitutes *force majeure* – this may be relevant to causation as discussed below.

- One could see that a lockdown could permit a party to rely on a *"restraint of princes"* wording by analogy with the blockade cases.[46]

- Obviously, any clause which included "epidemic" as *force majeure* would be of simple application.

- "Act of God" – given that an Act of God is described as *"events which involved no human agency and which it was not realistically possible for a human to guard against: an accident which the defendant can show was due to natural causes, directly and exclusively without human intervention"*[47]. The pandemic would be an Act of God. The Guidance, however, would not be.

- More difficulty would be had if the clause referred to plague.[48] At first blush, it could be thought that this would refer solely to the result of *Yersinia pestis* (the bacterium that causes bubonic plague) but dictionaries and case law say differently. Thus, the OED has plague defined as: *Any infectious disease which spreads rapidly and has a high mortality rate; an epidemic of such a disease*. Further, if one were to look at the original plague cases – for example *Plague in London & Westminster*[49] or *Anonymous*[50] – one would see that "plague" was not used in the sense of a specific bacillus but of some general disease – a fact which is hardly surprising given the state of medical knowledge at the time. Thus, perhaps it may well be that recourse to seventeenth century learning may assist a twenty first century commercial entity to resolve its SARS-CoV-2 issues created by the quadripartite scheme.

Assuming, however, that an individual case can fall within the wording, there still remains the test of causation. As the court emphasised in *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*,[51] the alleged event must be the sole cause of the failure to perform. Whilst it is easy to see how a full lockdown could amount to the sole cause of the failure to perform, proving maintaining social distancing, a far more nebulous concept, is the sole cause of the failure to perform will be far more difficult.

Contractual Terms

The other area which private sector parties will be forced to examine is whether their contracts contain change in law provisions. This are common in finance contracts, PFI contracts and in the JCT model for building contracts.

Common to all of them is a requirement that there be a change in the hard law provisions relevant to the contract. As I have discussed above, the quadripartite arrangement straddles the hard/soft law divide. An orthodox analysis would say there is no change in law – but the quadripartite approach might suggest otherwise. Whilst again, care must now be taken with the wording of the latest Guidance, in theory it is arguable that because the Guidance is being treated as having force of law, then there could be a change of law.

Variation by Necessity

Again, one has recourse to some very old law.

In Lawrence v Twentiman, the Court said:[52]

> *"If a man covenant to build a house before such a day, and then the plague is there before the day and continues there till after the day, this excuses him from the breach of the covenant for not doing it before the day; for the law does not wish to compel him to venture his life for this, but he must do it afterwards"*

Or one has recourse to some very complicated law. There are a series of very complicated cases relating to Mississippi soya bean cargoes afloat from 1973. These were described by the courts at the time as an 'unattractive piece of forensic history'[53] with those involved being the 'cognoscenti in this recondite field'.[54]

The two combined above can enable private sector parties to have recourse to the idea of variation by necessity – namely that the obligation to perform may, in extreme circumstances, be varied by events beyond the parties' control. In *Lawrence*, being permitted to suspect performance, and in the soya bean cargo cases, to supply amounts others than those stipulated by the contract without being in breach.[55]

Conclusions

There are undoubtedly legal mechanisms which would theoretically assist private sector entities affected by SARS-CoV-2. In each case, however, there is considerable uncertainty as to whether those mechanisms will in fact assist private sector parties. While it is possible to see that a particular set of facts – the collapse of a supply chain or a significant and irreplaceable portion of the workforce falling ill – might well trigger all or any of the above mechanisms, it is very difficult to see how either the Guidance per se or the fact that commercial life is more difficult, more complicated and more expensive will aid private sector parties in relieving themselves from such burdens.

44 *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 .

45 For a useful general summary – see https://www.fountaincourt.co.uk/wp-content/uploads/Force-Majeure-and-Frustration-April-2020.pdf. There is further a lecture by Prof Ewan McKendrick QC given 12 May 2020 which should be soon uploaded to the COMBAR website.

46 *Geipel v Smith* (1872) LR 7 QB 404. The lockdown would have to be actual not anticipated – see *Watts, Watts & Co v Mitsui & Co* [1917] AC 227.

47 *Transco v Stockport MBC* [2003] 3 WLR 1467 at [59]

48 The plague reference also occurs in some Business Interruption Insurance policies as well as the charters of schools and universities.

49 (1665) 82 ER 1103.

50 (1562) 73 ER 498.

51 [2019] 1 All ER (Comm) 34.

52 1 Rolle's Abridgement Condition G. pl. 10 (p.450).

53 *Andre & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254 at 258 cols 1–2 per Kerr L.J.

54 *Tradax Export SA v Cook Industries Inc* [1982] 1 Lloyd's Rep 385 at 387 col 2 per Kerr L.J.

55 See most recently Sean Wilken QC *"Contractual Performance in times of Peril"* to be found at https://www.keatingchambers.com/contractual-performance-in-times-of-peril-2/. See also the original text as modified for the article – Wilken & Ghaly The Law of Waiver, Variation and Estoppel 3rd Ed OUP Ch 2 *passim*.

A CRITICAL LOOK AT *BROSELEY LONDON v PRIME ASSET*:

WOULD PERMITTING A FINAL ACCOUNT ADJUDICATION HAVE BEEN A "REMARKABLE INTRUSION"

By Harry Smith

Harry Smith examines the recent judgment in *Broseley London Ltd v Prime Asset Management Ltd (Trustee of the Mashel Family Trust)*[1], in which the TCC declined to stay the execution of a judgment enforcing an adjudicator's decision in order to allow a "true value" adjudication to take place in respect of the final account.

How did the question of a "true value" adjudication arise?

On 11 July 2019, Broseley issued a payment application ("Valuation 19") for £485,216.17 plus VAT. Prime Asset failed to give a payment notice or pay less notice, and refused to pay the sum due. Broseley therefore sought, and on 12 September 2019 obtained, an adjudicator's decision to the effect that it was entitled to be paid the sum set out in Valuation 19. Two further adjudications took place thereafter in September and November 2019 respectively, the latter of which resulted in a declaration that Broseley had lawfully terminated the contract on 29 September 2019.

In early 2020 Broseley applied to enforce the decision in the first adjudication. Prime Asset accepted that Broseley was entitled to summary judgment but argued that it was entitled to a stay on the basis of the well-known principles set out in *Wimbledon v Vago*[2]. Prime Asset's case was not that the stay should continue indefinitely, but that it should be limited to about two months to allow a further adjudication to take place to determine the true value of the final account post-termination.

What did the court decide?

It was common ground that the effect of the decision of the Court of Appeal in *S&T v Grove*[3] was to preclude Prime Asset from commencing a "true value" adjudication as to Valuation 19 prior to paying the sum found to be due in the first adjudication. The parties disagreed, however, as to whether Prime Asset was, by extension, precluded from adjudicating the true value of the post-termination final account.

Mr Roger ter Haar QC, sitting as a Deputy High Court Judge, decided that Prime Asset was so precluded. He said:

> *"Whilst the S & T decision does not expressly concern the present situation, where what is suggested as the possible subject of an as yet unstarted adjudication is the determination of a notional final account where the amount of that final account would be dependant on the validity of Decision No. 1, the ability to mount such an adjudication following upon Decision No. 3 attacking the validity of that Decision without prior payment of the amount awarded in Decision No. 1 would be a remarkable intrusion into the principle established in S & T: it would permit the adjudication system to trump the prompt payment regime, which is exactly what the Court of Appeal said in paragraph [107] of that case would not be permitted to happen."*

He went on to find that no stay should be granted on the grounds that (a) Prime Asset had failed to take any steps to challenge the first adjudicator's decision in the period since 12 September 2019; (b) it could not be said to be probable that Broseley would be unable to repay the judgment sum if ordered to do so; and (c) neither could there be said to be a real risk of Broseley dissipating or disposing of the judgment sum.

Was the court right to say that permitting a final account adjudication would have been a "remarkable intrusion" into the principle established in *S&T v Grove*?

In *S&T v Grove*, the Court of Appeal upheld the decision of Coulson J at first instance that S&T was not entitled to adjudicate the true value of an interim payment due to Grove until it had paid the notified sum. The principal justification for that conclusion was expressed by Sir Rupert Jackson as follows:

> *"Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation."*

This passage, which was technically *obiter*, has proved controversial. The kernel of the controversy is the judge's use of the phrase "embarking upon" in the final sentence. A rule that an employer cannot refer a "true value" dispute to adjudication without first paying the notified sum is difficult to reconcile with the wording of s. 108(2)(a) of the Housing Grants, Construction and Regeneration Act 1996:

> *"The contract shall include provision in writing so as to – (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication". (Emphasis supplied)*

The meaning of the words "at any time" might be thought to need no elucidation, but for the avoidance of any doubt the Court of Appeal confirmed in 2005 that the phrase "means exactly what it says"[4]. The court also noted that it was apparent from Hansard that Parliament had considered the time for referring a dispute to adjudication and had "decided not to provide any time limit".

1 [2020] EWHC 1057 (TCC)
2 [2005] EWHC 1086 (TCC)
3 [2018] EWCA Civ 2448
4 *Connex SE v Building Services Group* [2005] 1 WLR 3323 at [38]

In *Davenport v Greer*[5], both a "smash and grab" adjudication and a "true value" adjudication had already taken place by the time of the enforcement hearing. The defendant argued that it was entitled to rely on the "true value" decision to resist enforcement of the "smash and grab" decision. In a carefully reasoned judgment, Stuart-Smith J considered *S&T v Grove*, and concluded:

> *"it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment."*

He went on to say this:

> *"The decisions of Coulson J and the Court of Appeal in Grove are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can commence a 'true value' adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation: see the decision of the Court of Appeal in Harding. It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so." (Emphasis supplied)*

These passages are important because they make clear that, notwithstanding *S&T v Grove*, the court has a discretion to permit employers to commence and progress "true value" adjudications without paying the notified sum in particular circumstances. The "prohibition" on such adjudications laid down, obiter, by S&T v Grove is not, therefore, absolute; and so cannot be a matter of jurisdiction. It can convincingly be argued that this analysis must be right in view of the clear wording of s. 108(2)(a) and Connex SE v Building Services Group, quoted above.

With this background in mind, the view of the judge in *Broseley v Prime Asset* that permitting the commencement of a post-termination final account adjudication would represent a "remarkable intrusion" into the principle laid down by *S&T v Grove* was, arguably, an overstatement, for several reasons:

(1) As the judge acknowledged, the facts of *S&T v Grove* were different to the facts of Broseley v Prime Asset. In *S&T v Grove*, the proposed adjudication concerned the true value of an interim payment for which no valid payment notice or pay less notice had been given. In *Broseley v Prime Asset*, the proposed adjudication concerned the true value of the final account following the termination of the contract.

(2) Further, as *Davenport v Greer* made clear, the court has a discretion to permit "true value" adjudications without payment of the notified sum to proceed.

(3) In principle, it is not obvious why merely allowing a "true value" adjudication to proceed should in itself, as the judge put it in *Broseley v Prime Asset*, "permit the adjudication system to trump the prompt payment regime", given that it is clear from both *S&T v Grove* and *Davenport v Greer* that an employer will not, in any event, be permitted to "rely upon" the result of a "true value" adjudication to avoid payment of the notified sum.

What is the impact of this judgment likely to be in practice?

On the face of it, the judgment in *Broseley v Prime* Asset supports the proposition that *S&T v Grove* lays down an absolute prohibition on the commencement of a "true value" adjudication by an employer absent payment of the notified sum; and suggests that that prohibition extends not only to attempts to adjudicate the true value of the particular payment concerned, but to adjudications which might cut across the employer's liability to pay the notified sum more generally. It is likely to be cited by parties seeking an injunction to restrain the progress or continuation of an adjudication on analogous facts.

"Insofar as there is a tension between Broseley v Prime Asset and Davenport v Greer, the latter is surely to be preferred for the depth and quality of its reasoning"

The weight which future courts place upon this aspect of the judgment may, however, prove to be limited, for a number of reasons:

(1) It is not clear whether the judge was referred to *Davenport v Greer*. At all events, the judgment does not acknowledge, or grapple with, the extent of the court's discretion to permit a "true value" adjudication to proceed prior to payment of the notified sum.

(2) The judge's reasoning has to be understood in the context of the slightly unusual way in which the issue arose, namely as part of an application for a stay of execution. The theoretical availability or non-availability of a "true value" adjudication as a route by which to contest the decision in the first adjudication could only ever have been a factor of incidental relevance to the merits of this application[6]. Moreover, the judge may well, in suggesting that permitting the proposed adjudication to proceed would "permit the adjudication system to trump the prompt payment regime", have had in mind the practical reality that, on the facts, granting a stay would have deprived Broseley of its right to prompt payment of the notified sum; rather than any broader point about the relationship between adjudication and payment.

(3) Insofar as there is a tension between *Broseley v Prime Asset* and *Davenport v Greer*, the latter is surely to be preferred for the depth and quality of its reasoning, and in particular for its recognition of the availability of a discretion on the part of the court to permit a "true value" adjudication to proceed before payment of the notified sum in certain circumstances. Unless and until *S&T v Grove* is revisited by an appellate court, the existence of such a discretion is, it is submitted, necessary in order to enable the courts to recognise and give effect to employers' statutory right to adjudicate "at any time".

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5 [2019] EWHC 318 (TCC)

6 The principally relevant factors being those set out in Wimbledon v Vago [2005] EWHC 1086 (TCC).

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Ryhurst Ltd v Whittington Health NHS Trust [2020] EWHC 448

The Claimant had been awarded a contract under a procurement exercise which was later abandoned by the Defendant NHS Trust. The Claimant contended that the Trust was in breach of its duties under the Public Contract Regulations as it had, in the Claimant's contention, abandoned the exercise due to public pressure it was facing over the Claimant's connection to a company that had been responsible for supply and installation of cladding at Grenfell Tower. It sought compensation for its losses relating to the abandonment.

HHJ Stephen Davies dismissed the Claimant's claim, holding that it was not open to a claimant in a public procurement case to argue that a decision was subject to challenge simply because a legally irrelevant and hence impermissible consideration had been taken into account by the decision-maker.

The Trust had not been obliged to put out of its mind the fact that there was a lack of stakeholder support simply because one of the reasons, or even the principal reason, was the Grenfell connection, *R. (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41 applied. The need for approval from NHS Improvements had also been a genuine and a proper and rational reason.

He also held that the Trust's decision to abandon the procurement had not breached its obligations of equal treatment, proportionality or avoiding manifest error. There had been no breach of the transparency obligation in respect of the reasons for the decision, and there had been no change of real significance before the decision to abandon the procurement of which the claimant ought to have been notified.

Sarah Hannaford QC and Tom Coulson represented the Claimant.

Yuanda (UK) Company Ltd v (1) Multiplex Construction Europe Ltd (formerly known as Brookfield Multiplex Construction Europe Ltd), & (2) Australia and New Zealand Banking Group Ltd [2020] EWHC 468 (TCC)

The case decided a new point on the wording of an ABI-type performance guarantee – in particular what was meant by "established and ascertained" and the need to take into account "sums due or to become due" to the Sub-Contractor.

Yuanda had sought an injunction against Multiplex and ANZ restraining a call on the guarantee contending that no call on the guarantee could be made until the Final Account and all issues relating to the Final Account had been resolved – including all and any adjudication, arbitration and litigation relating to that Final Account.

Multiplex contended that the guarantee should respond when Multiplex operated the indemnity provisions under the Contract between it and Yuanda alternatively if, as and when Multiplex obtained an adjudication decision in its favour.

The judge rejected the first argument on the terms of the particular contract as there was no certification procedure under the contract. The judge therefore appeared to believe that the guarantee might well respond if there were a certification procedure. The judge went on to hold, however, that the guarantee would respond if, as and when Multiplex obtained an Adjudication decision in Multiplex's favour.

Sean Wilken QC represented the First Respondent.

Resistant Building Products Ltd v National House Building Council [2020] NICh 6

This case concerned an application by the Plaintiff manufacturer for an interim injunction to restrain NHBC from refusing to cover new-build homes which incorporated the Plaintiff's Magnesium Oxide (MgO) boards.

The application related to a claim of malicious falsehood made by the Plaintiff against NHBC – which issued 10 year warranties and guarantees covering newly built dwellings in the UK – after it had proposed to issue guidance to the effect of precluding the use of MgO boards in construction. This proposed guidance and some subsequent correspondence is what the Plaintiff contended constituted a malicious falsehood, its argument being that the only inference or innuendo that can reasonably be drawn from it is that RPB's boards are unfit for purpose in the building trade.

In his decision, the Recorder of Belfast, HHJ McFarland sitting as High Court Judge, reviewed the case-law in this unusual area of law, identifying that to grant an interim injunction for this tort (which has analogies with defamation) the test was an extremely high one: the court has to be satisfied that no tribunal of fact (be it judge or jury) could reasonably conclude that the statements, or any of the innuendos reasonably drawn from the statements, were and are true.

He was not of such a view: there was clearly a problem with MgO boards in the industry; much would depend on the quality of a product and there was no approved standard for such quality; ongoing research indicated that there were no problems with the Plaintiff's boards, but that research was not yet finished; the decision of whether or not to award a guarantee was a commercial one based on evidence; that evidence included the unfinished research, but also evidence of actual detrimental performance of the product within a building. The cause of action was a blunt and, potentially, inapplicable instrument for the aim which the Plaintiffs had.

The application for interim relief was therefore dismissed.

Samuel Townend represented the Defendant.

PBS Energo AS v Bester Generacion UK Ltd [2020] EWCA Civ 404 (TCC)

The Appellant sub-contractor appealed against a refusal to grant summary judgment to enforce an adjudicator's decision.

The Respondent had been contracted to design and build an energy plant and had engaged the Appellant as a subcontractor. The main contract had been terminated and there were adjudication proceedings under the sub-contract. An adjudicator decided that the Appellant had validly terminated the sub-contract and a second adjudicator found that amount owed by the Respondent to the Appellant was £1.7 million. The Appellant applied for summary judgment to enforce the second decision.

At the hearing of this application in the TCC, the Respondent contended that the adjudicator's decision should not be enforced as there was a reasonably arguable case of fraud as the adjudicator had proceeded on the basis that large items of plant manufactured by the Appellant for the project would be available to the Respondent. However, documents disclosed in separate TCC proceedings involving the parties indicated that the items had been sold or otherwise disposed of. Pepperall J found that there was thus a reasonably arguable case of fraud and summary judgment should not be granted.

Here, the Appellant argued that the judge should have found that allegations of fraud were not open to the Respondent because it had not included such allegations in its defence; and that the judge should have granted summary judgment, but then stayed some or all of that judgment.

Coulson LJ, with whom Rose LJ and Sir Timothy Lloyd agreed, dismissed the appeal. Coulson LJ drew a distinction between an adjudication where allegations of fraud had been considered, and an adjudication where the decision had been procured by fraud. He felt the latter applied here and such allegations were a proper ground for resisting enforcement.

On the issue of whether the Respondent should have pleaded fraud in its defence, Coulson LJ applied CPR Rule 24.4(2) and held that whilst pleading allegations of fraud may be advised, it was not required. The Appellant had also not been prejudiced as the allegations had been clearly made in the Respondent's evidence and skeleton argument.

Because of these findings, the question of a stay did not arise.

Tom Owen represented the Respondent.

Broseley London Ltd v Prime Asset Management Ltd [2020] EWHC 944 (TCC)

This was an application for a stay of execution of summary judgment in relation to a "cash flow" adjudication decision, the novel element being an extension of reasoning of the Court of Appeal in *S&T v Grove*.

It arose from a dispute between the parties in relation to refurbishment works at a grade II listed building which the Defendant had contracted with the Claimant construction company for it to carry out. The dispute centred on a payment application made by the Claimant to the Defendant which stated the sum it considered due as £482,216.17 plus VAT and which had not been paid.

On 9 August 2019, the Claimant commenced an adjudication to obtain a decision confirming that the sum should have been, and should be, paid to it. The adjudicator confirmed that the Defendant should have paid the Claimant the sum plus VAT by and awarded contractual interest.

The Claimant applied for summary judgment to enforce the Adjudicator's decision. The Defendant did not oppose this application, but sought a stay of execution for the entire judgment sum as the Claimant had served a notice of adjudication shortly prior to the hearing mounting a post-termination final account "true value" adjudication. The Defendant's case was that the judgment should be stayed pending the conclusion of this adjudication. At the hearing the Claimant notified that it was withdrawing the further adjudication reference, "pulling the rug" from under the Defendant's case. The Defendant, therefore, argued that it would immediately commence its own final account true value adjudication and sought a stay of execution on that basis.

Mr Roger Ter Haar QC sitting as a High Court Judge decided that approach was not possible, and that the Defendant could not mount a true value final account adjudication because it had not paid the sum awarded in the first adjudication. He went on to apply the principles laid down by HHJ Coulson QC (as he then was) in *Wimbledon Construction Co Ltd v Vago* [2005] BLR 374, as supplemented by his later decision in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695, and concluded that the Defendant's application for stay should not be awarded.

Samuel Townend represented the Defendant.

J&B Hopkins Ltd v Trant Engineering Ltd [2020] EWHC 1305 (TCC)

The Defendant had engaged the Claimant sub-contractor to carry out mechanical and electrical works at a recycling plant. The sub-contract provided for interim payments. A dispute arose in relation to interim Application No. 26, in the sum of £812,484.94, which was referred to adjudication. The Adjudicator held that because the Defendant had not served a valid payment notice or pay less notice, the sum was due and payable together with interest and that the Defendant should pay the Adjudicator's fees and expenses.

When the Defendant failed to pay, the Claimant applied for summary judgment to enforce the adjudicator's decision. The Defendant resisted enforcement, contending that the Claimant's entitlement to the sum stated in Application No. 26 had been superseded by subsequent payment cycles which had corrected the sum payable under the sub-contract. The Defendant applied for a stay of execution of the Adjudicator's decision.

Fraser J granted the Claimant's application, applying the principle that the Court will enforce an adjudicator's decision, whether it was right or wrong, unless they had made the decision without jurisdiction or there had been a breach of natural justice. *Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC) and PBS Energo AS v Bester Generacion UK Ltd [2018] EWHC 1127 (TCC)* applied. The Defendant had not raised any arguments relating to jurisdiction or natural justice. The Defendant was also incorrect to say that awarding summary judgment would undermine the principle that an amount stated in an interim application which had fallen due as a result of a party's failure to issue the required notice could be corrected on a later payment cycle.

Fraser J then rejected the Defendant's application for a stay of execution as it had failed to show that a stay was necessary to prevent manifest injustice.

Tom Owen represented the Claimant.

GROUP LOYALTY – A COMPANY V X AND OTHERS

By Jennie Wild

"The distinguishing obligation of a fiduciary is the obligation of loyalty" [1]

"The circumstances in which an expert witness is retained could give rise to a relationship of trust and confidence, such that the obligation of loyalty arose".

It is well-known that barristers and solicitors owe fiduciary duties to their clients (the core duty being that of loyalty) such that they must not act for a second client if that would put them in conflict with the interests of the first. But what about expert witnesses? And what about multi-national groups of expert witness companies, who offer expertise in a variety of specialisms? Are such companies different to barristers' chambers whose members routinely act for opposing sides?

The TCC has recently grappled with these issues in *A Company v X and Others*[2], granting an injunction to restrain a group of expert witness companies from providing both delay and quantum expert services, despite setting up different teams, in different countries and putting in place measures to protect confidentiality. It is a case of some significance.

Fiduciary Duties (short form)

Consideration of when and, if so, what fiduciary duties arise fills entire textbooks. There is not time for great analysis here. In short:

1. A company or individual may owe fiduciary duties where:

   a. a relationship falls under a previously accepted category (eg a solicitor and client); or

   b. there is an inherent relationship of trust and confidence between the parties (described by the Law Commission as a test of "*discretion, power to act and vulnerability*"[3]).

2. The core fiduciary duty is that of loyalty[4]. "Loyalty" encompasses a number of obligations, including that a fiduciary must not put themselves in a position where their duty towards one client conflicts with a duty they owe to another[5]. A client may consent to conflicts of interest, but the consent must be fully informed (as to which, read on).

A Company v X and Others: The Facts

This was an application by the Claimant, for a continuation of an injunction restraining the Defendants (a group of related companies) from acting as experts for a third party ('the Third Party') in arbitration proceedings against the Claimant ('the EPCM Arbitration'), in circumstances where the Defendants were also acting for the Claimant in another, related, arbitration ('the Works Package Arbitration')

The Claimant was the developer of a petrochemical plant ('the Project') and entered into agreements in respect of the Project including:

(i) two agreements with the Third Party for engineering, procurement and construction management services ('EPCM Contracts');

(ii) two agreements with a contractor ('the Contractor') for the construction of facilities.

Two ICC arbitrations ensued.

First, the Works Package Arbitration was brought by the Contractor against the Claimant, seeking additional costs due to delays to the Project, including the late release of drawings produced by the Third Party pursuant to the EPCM Contracts. The Claimant engaged the First Defendant (in particular "K" of the First Defendant) to provide delay expert services.

The Claimant contended that it would pass on any additional costs it was required to pay due to late release of the drawings, to the Third Party.

Second, the EPCM Arbitration was brought by the Third Party against the Claimant, seeking sums due and owing under the EPCM Contracts. The Claimant brought counterclaims in respect of delay and disruption and passing on any additional sums payable by the Claimant to the Contractor caused by the Third Party's failures under the EPCM Contracts. The Third Party engaged the Defendants (in particular "M") to provide quantum expert services.

The Claimant contended that the provision of services by the Defendants to the Third Party in connection with the EPCM Arbitration was a breach of the Defendants' fiduciary duty of loyalty to the Claimant. The Defendants contended they didn't owe any fiduciary duties – such a duty was excluded by the expert's overriding duty to the tribunal – and there was no conflict of interest.

A Company v X and Others: Judgment

Does an expert witness owe a fiduciary obligation of loyalty?

The Defendants contended that an expert witness does not owe a fiduciary obligation of loyalty because such a duty would be inconsistent with the independent role of the expert.

The Court considered the cited authorities established no more than:

1. there is no property in an expert witness (*Harmony Shipping Co SA v Davis*[6]);

2. where no fiduciary duty arises, the obligation to preserve privileged and confidential information (pursuant to the "Bolkiah" test) does not prevent an expert witness from acting or giving evidence for another party (*Meat Corporation of Nambia Ltd v Dawn Meats (UK) Ltd*[7]).

3. an expert has a paramount duty to the Court (much like a barrister), which may require the expert to act in a way which does not advance their client's case (*Jones v Kaney*[8]),

but none of these rules were determinative as to whether fiduciary duties were owed.

Therefore, the Court concluded, as a matter of principle, the circumstances in which an expert witness is retained (as to which, read on) could give rise to a relationship of trust and confidence, such that the obligation of loyalty arose.

Did the First Defendant owe a fiduciary obligation of loyalty?

The Court held that a clear relationship of trust and confidence had arisen (imparting a fiduciary duty of loyalty), because the First Defendant:

1. was engaged to provide expert services for the Claimant in connection with the Works Package Arbitration;

2. had been instructed to provide an independent report and to comply with the duties set out in the CIArb Expert Witness Protocol; and

3. had been engaged to provide extensive advice and support for the Claimant throughout the arbitration proceedings.

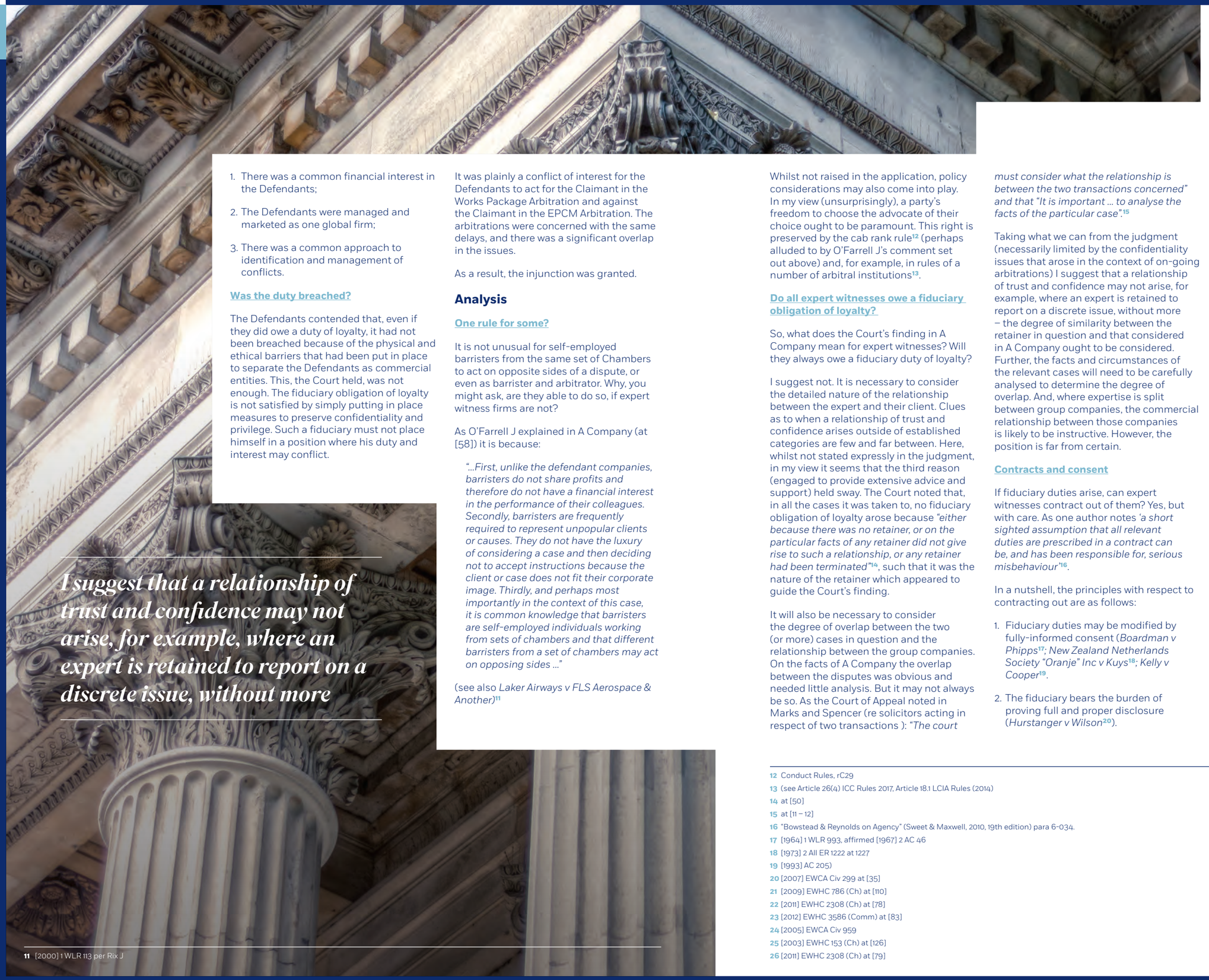
I discuss what parties might make of this finding, below.

Did all the Defendants owe a fiduciary obligation of loyalty?

The Court noted that where a duty of loyalty arises, it is not limited to the individual concerned, but extends to the firm or company they are employed by (*Bolkiah; Marks & Spencer Group Plc v Freshfields Bruckhaus Deringer*[9]*; Georgian American Alloys Inc v White & Case LLP*[10]).

Yet here, the duty extended further – to the group of defendant companies. This was because:

1 Per Lord Millet in Bristol and *West Building Society v Mothew* [1998] Ch 1 at 18A
2 [2020] EWHC 809 (TCC)
3 (1992) Consultation Paper No 124 para 2.4.6; (2013) Consultation Paper No 215 para 5.7
4 Mothew at 18
5 Mothew at 18-19
6 [1979] 3 All ER 177 at 180-181 and 183 per Lord Denning
7 [2011] EWHC 474 (Ch)
8 (2011) 135 ConLR 1
9 [2004] EWCA Civ 741
10 [2014] EWHC 94 (Comm)



1. There was a common financial interest in the Defendants;

2. The Defendants were managed and marketed as one global firm;

3. There was a common approach to identification and management of conflicts.

Was the duty breached?

The Defendants contended that, even if they did owe a duty of loyalty, it had not been breached because of the physical and ethical barriers that had been put in place to separate the Defendants as commercial entities. This, the Court held, was not enough. The fiduciary obligation of loyalty is not satisfied by simply putting in place measures to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and interest may conflict.

It was plainly a conflict of interest for the Defendants to act for the Claimant in the Works Package Arbitration and against the Claimant in the EPCM Arbitration. The arbitrations were concerned with the same delays, and there was a significant overlap in the issues.

As a result, the injunction was granted.

Analysis

One rule for some?

It is not unusual for self-employed barristers from the same set of Chambers to act on opposite sides of a dispute, or even as barrister and arbitrator. Why, you might ask, are they able to do so, if expert witness firms are not?

As O'Farrell J explained in A Company (at [58]) it is because:

> *"...First, unlike the defendant companies, barristers do not share profits and therefore do not have a financial interest in the performance of their colleagues. Secondly, barristers are frequently required to represent unpopular clients or causes. They do not have the luxury of considering a case and then deciding not to accept instructions because the client or case does not fit their corporate image. Thirdly, and perhaps most importantly in the context of this case, it is common knowledge that barristers are self-employed individuals working from sets of chambers and that different barristers from a set of chambers may act on opposing sides ..."*

(see also *Laker Airways v FLS Aerospace & Another*)[11]

I suggest that a relationship of trust and confidence may not arise, for example, where an expert is retained to report on a discrete issue, without more

11 [2000] 1 WLR 113 per Rix J

Whilst not raised in the application, policy considerations may also come into play. In my view (unsurprisingly), a party's freedom to choose the advocate of their choice ought to be paramount. This right is preserved by the cab rank rule[12] (perhaps alluded to by O'Farrell J's comment set out above) and, for example, in rules of a number of arbitral institutions[13].

Do all expert witnesses owe a fiduciary obligation of loyalty?

So, what does the Court's finding in A Company mean for expert witnesses? Will they always owe a fiduciary duty of loyalty?

I suggest not. It is necessary to consider the detailed nature of the relationship between the expert and their client. Clues as to when a relationship of trust and confidence arises outside of established categories are few and far between. Here, whilst not stated expressly in the judgment, in my view it seems that the third reason (engaged to provide extensive advice and support) held sway. The Court noted that, in all the cases it was taken to, no fiduciary obligation of loyalty arose because *"either because there was no retainer, or on the particular facts of any retainer did not give rise to such a relationship, or any retainer had been terminated"*[14], such that it was the nature of the retainer which appeared to guide the Court's finding.

It will also be necessary to consider the degree of overlap between the two (or more) cases in question and the relationship between the group companies. On the facts of A Company the overlap between the disputes was obvious and needed little analysis. But it may not always be so. As the Court of Appeal noted in Marks and Spencer (re solicitors acting in respect of two transactions): *"The court must consider what the relationship is between the two transactions concerned"* and that *"It is important ... to analyse the facts of the particular case"*.[15]

Taking what we can from the judgment (necessarily limited by the confidentiality issues that arose in the context of on-going arbitrations) I suggest that a relationship of trust and confidence may not arise, for example, where an expert is retained to report on a discrete issue, without more – the degree of similarity between the retainer in question and that considered in A Company ought to be considered. Further, the facts and circumstances of the relevant cases will need to be carefully analysed to determine the degree of overlap. And, where expertise is split between group companies, the commercial relationship between those companies is likely to be instructive. However, the position is far from certain.

Contracts and consent

If fiduciary duties arise, can expert witnesses contract out of them? Yes, but with care. As one author notes *'a short sighted assumption that all relevant duties are prescribed in a contract can be, and has been responsible for, serious misbehaviour'*[16].

In a nutshell, the principles with respect to contracting out are as follows:

1. Fiduciary duties may be modified by fully-informed consent (*Boardman v Phipps*[17]; *New Zealand Netherlands Society "Oranje" Inc v Kuys*[18]; *Kelly v Cooper*[19].

2. The fiduciary bears the burden of proving full and proper disclosure (*Hurstanger v Wilson*[20]).

3. In recognition of the vulnerability inherent in a relationship that gives rise to fiduciary duties, the Courts impose a high test. For example, it is not enough to:

   a. merely disclose that the fiduciary has an interest (*Cobbetts LLP v Hodge*[21]; *FHR European Ventures LLP v Mankarious*[22]),

   b. or to say something that ought to cause the principal to make enquiries (Novoship (UK) Ltd v Mikhaylyuk[23]),

   c. or to establish that if permission had been asked for it would have been given (*Murad v al-Saraj*[24]; *Gidman v Barron*[25]; *FHR European Ventures LLP v Mankarious*[26]).

Therefore, a boiler-plate clause added to a retainer before the second case is taken on may not be sufficient. More fundamentally, I question whether a client who is owed a duty of loyalty and who is fully informed of the nature of the second case and services the expert wishes to provide would consent – it seemingly not being in their interests to agree to anything that assists an opponent. More safely, expert witness firms may wish to consider company policy with respect to acting for two opposing clients.

This article first appeared on the PLC Construction Blog in June 2020. Jennie will be discussing this topic on Thursday, 9 July 2020 as part of our webinar programme. Please contact **marketing@keatingchambers.com** for further information.

12 Conduct Rules, rC29
13 (see Article 26(4) ICC Rules 2017, Article 18.1 LCIA Rules (2014)
14 at [50]
15 at [11 – 12]
16 "Bowstead & Reynolds on Agency" (Sweet & Maxwell, 2010, 19th edition) para 6-034.
17 [1964] 1 WLR 993, affirmed [1967] 2 AC 46
18 [1973] 2 All ER 1222 at 1227
19 [1993] AC 205)
20 [2007] EWCA Civ 299 at [35]
21 [2009] EWHC 786 (Ch) at [110]
22 [2011] EWHC 2308 (Ch) at [78]
23 [2012] EWHC 3586 (Comm) at [83]
24 [2005] EWCA Civ 959
25 [2003] EWHC 153 (Ch) at [126]
26 [2011] EWHC 2308 (Ch) at [79]

CORONAVIRUS, ADJUDICATION AND INJUNCTIONS

By James Frampton

Coronavirus, or Covid-19, has impacted and continues to impact all parts of our lives. The focus in the construction industry has rightly been on the safety of workers still attending sites. No doubt the future will see litigation on whether the coronavirus gives rise to extensions of time, force majeure, frustration or other legal rights or remedies. At present, the main impact on construction litigation has been the procedural impact of the Coronavirus.

By the middle of April 2020, within 1 month of the start of lockdown, there were already 15 High Court judgments referring to Coronavirus. These included judgments on procedural issues, such as the refusal of an application to adjourn a 5-week trial in a £250 million claim in the Insolvency and Companies List of the Business and Property due to start in June 2020. The TCC has since published a template remote hearing order and hearings by Zoom, Skype or similar video conferencing software have quickly become the norm.

In litigation and arbitration, it has, therefore, been all change. What about the impact of the Coronavirus on adjudication?

Millchris Developments Ltd v Waters

The question of adjudication and Coronavirus was always likely to arise given the short-timescales in adjudication and the complications and delays caused by remote working and the furloughing of employees at many contractors during the lockdown. The surprise is how quickly it did so.

On 2 April 2020, Jefford J heard an application by Millchris Developments ("MD"), a building contractor, for an interim injunction to prohibit a home owner ("W") for whom it had carried out building works in 2017 from continuing with an adjudication.

It is a sign of the difficulties of remote working, that the transcript of the judgment only became available two months later on 1 June 2020.

The Facts

MD had carried out building works to W's property. The works commenced in December 2017, albeit the contract, in the form of the JCT Homeowner Contract, was only executed on 2 March 2018. The contract contained a provision for adjudication and required a decision to be made within 21 days.

It appears that the works were completed in 2019 and there was a final account meeting on 19 August 2019.

In November 2019, MD ceased trading (although it remains an active company on Companies House) as a result of its poor financial state.

After MD has finished the works, W had engaged a second surveyor who advised her that she had been substantially overcharged.

On 23 March 2020, W commenced a true value adjudication contending that she had overpaid MD by £45,000 and that there were defects in its works. That evening the Government announced the "lockdown" measures.

An adjudicator was appointed who initially proposed a timetable for submissions to be completed by 3 April 2020. This timetable was rather condensed but was necessary in order to meet the 21 day timescale in the contract (as opposed to the standard 28 days under the Scheme).

On 26 March 2020, MD wrote to the adjudicator stating that it would not be able to comply with this timetable and also suggesting that the case was not suitable for adjudication given its nature and complexity. MD concluded by stating that W should withdraw the adjudication as it would inevitably lead to a breach of natural justice.

The adjudicator rightly ignored the suggestion that a £45,000 final account claim was not suitable for adjudication. However, on timetable, he recognised the difficulties caused by the Coronavirus and proposed a 2 week extension.

W agreed to this extension. However, MD was still dissatisfied and applied to the court for an interim injunction to stop the adjudication until the Coronavirus crisis, and the lockdown measures imposed by the Government as a result, were over.

Injunction: Principles and Argument

The principles applied by the court on an interim injunction are well established. Following *American Cyanamid*[1], the questions to be asked are:

1. Is there is a serious issue to be tried?
2. Would damages be an adequate remedy?
3. Where does the balance of convenience lie?

1 [1975] AC 396

The adjudication specific guidance from *Lonsdale v Bresco*[2] in applying this three stage test is that the court will only grant an injunction in respect of an ongoing adjudication *"very rarely and in very clear cut cases"*. (The Court of Appeal, in affirming the first instance decision which is of wider significance for insolvency and adjudication, did not comment on this part of the judgment. The appeal to the Supreme Court in *Bresco* was heard in April 2020, with the judgment expected later this year.)

On the first limb, MD's argument was that there was a serious issue to be tried because the adjudication, if pursued, would be in breach of the principles of natural justice and thus unenforceable.

Decision

Unsurprisingly, Jefford J made short shrift of this argument in declining to grant an injunction on the first stage of the test.

As a matter of principle, the court did not completely shut the door on the argument that an adjudication could be injuncted on grounds of an unavoidable breach of natural justice. However, it made it clear that such an argument would only succeed in exceptional circumstances, the example given by Jefford J being where an adjudicator indicated that he would only consider submissions from one party.

On the facts, Jefford J rightfully does not appear to have had much sympathy for MD's explanations as to why it could not participate. Plainly, allowances need to be made for remote working, but it should have been possible for MD to obtain documents and provide submissions in the adjudication. As the Court noted, MD had been able to prepare for the injunction hearing.

Analysis

Overall, the clear indication from the court is that natural justice challenges based on the Coronavirus to ongoing adjudications or adjudicator's decisions are very unlikely to succeed.

This decision is unsurprising and to be welcomed. In fact, far from being discouraged or unfair, adjudication is eminently suited to resolving disputes during the current remote working environment:

1. Adjudication is typically conducted on paper without live evidence.
2. Procedural issues are typically dealt with by email rather than hearings.
3. Adjudicators and the parties can adopt a flexible and bespoke timetable or approach.
4. Any adjudicator's decision is interim.

Points 1 to 3 mean that in many adjudications, minimal if any changes are required because of the Coronavirus to the typical procedure and approach, save for the likely absence of hardcopy bundles.

Point 4 means that even if a party feels aggrieved by a decision, it still has the opportunity to contest the adjudicator's decision in court or arbitration once we have returned to normal. The possible prejudice faced by a party having a remote electronic trial in court because of the lockdown is arguably greater than the prejudice to a party in an adjudication. The latter retains the ability to bring new proceedings once the Coronavirus and lockdown measures have ended (or at least ceased having such a significant impact on our lives), the former does not.

Overall, adjudication can and should continue to play a vital role in allowing those in the construction industry to resolve disputes and secure cashflow, particularly important during this difficult period. So long as parties and adjudicators are flexible and reasonable in making allowances for the unique working environment, and any particular difficulties it may pose, there is no reason why adjudication should be restrained.

Site Visit

However, one aspect of the court's reasoning could merit criticism. The court's response to MD's argument that it could not be present at the site visit was to the state that:

(a) Parties do not have an absolute right to be present at a site visit, so an adjudicator could conduct it alone.

(b) While W would likely be present as it was her home, the visit could be recorded or MD could provide a list of points for the adjudicator to consider in advance.

This reasoning is open for question.

First, as a matter of public and personal safety, a site visit during the height of the lockdown period in April 2020 arguably should have been discouraged, particularly a visit to someone's home in a claim only valued at £45,000.

Second, the risk of unfairness, even if unintended, from an adjudicator and one party being alone together, particularly at the location relevant to the substantive dispute, is significant. While not giving rise to an unavoidable breach of natural justice, this situation should be avoided, particularly where the absence of one party is enforced.

In other cases, where the site is not to one of the parties' home, site visits no doubt can and should proceed where necessary. The best solutions for such visits, to avoid the risk of unfairness or challenges on that ground, would be for the adjudicator to attend alone and show both parties his or her visit by a live video on Zoom, Skype or similar, or for a non-party representative to provide a video tour under the direction of the adjudicator. If sensible and fair measures cannot be adopted, then it is important to remember that the timing of an adjudication is a matter for the Referring Party. If a claim is brought where a site visit or meeting to examine witnesses is not possible or reasonable, despite a visit or oral evidence being essential to the determination of the claim, then fairness might dictate that the claim should fail for want of proof.

Overall, the clear indication from the court is that natural justice challenges based on the Coronavirus to ongoing adjudications or adjudicator's decisions are very unlikely to succeed.

2 [2018] EWHC 2043 (TCC)

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WHOSE RISK IS IT ANYWAY? PERFORMANCE SECURITY REVISITED

By Sean Wilken QC

Mention financial security to most contentious projects and infrastructure lawyers and the chances are that they will roll their eyes. Mention performance bonds and with the eye roll there will be an additional muttering about "obscure wording", "gibberish", "who really ever relies on them". Mention letters of credit or the UCP 600 (Uniform Customs and Practice for Documentary Credits) or the URDG (Uniform Rules for Demand Guarantees) and the reaction may be even more derogatory. The reaction to the question of whose risk it is has been, being crude and argumentative, therefore, no-one's.

Yet, as the global financial system moves into a time of considerable stress and uncertainty, when so many major projects are on foot, it is worthwhile revisiting the basic principle which underlies these securities and some recent cases on point. After all, if the global financial system has been based on various assumptions as to risk and liability, and if those assumptions are being tested to breaking point, the allocation of risk is worth consideration.

Ultimately, financial security (if one is not talking about charges, debentures and the like) comes in two forms: equivalent to cash and not equivalent to cash. Equivalent to cash: letters of credit (standby and others) and on demand bonds. They are equivalent to cash because they are negotiable as cash and the banks are required to respond to them as if they were cash (subject to fraud). Not equivalent to cash: all forms of guarantee. These are not negotiable and require a process of claim and proof as per their conditions. Put crudely, which type of financial security is provided by the instrument is a matter of contractual construction applying the standard applicable tools.[1]

That said, it is worthwhile recalling what these securities have in common – which stems from the principle that all these securities are autonomous instruments.

As Donaldson MR put it in *Bolivinter Oil SA v Chase Manhattan Bank NA*[2]:

> *"The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."*[3]

This is often stated a as truism – but there are three important consequences which are often ignored.

As the instrument is autonomous, anyone seeking to restrain the Bank/Guarantor[4] will need both to have an independent cause of action and grounds for impugning payment under the instrument as against the Bank/Guarantor. This is usually expressed as a fraud exception.[5] Yet, even with the fraud exception, where the Bank/Guarantor is not the obligor's own bank,[6] it is difficult to see what the cause of action the Beneficiary has against the Bank/Guarantor is.[7] Allied to that is a further principle, however, which perhaps is even less appreciated. At least where one is dealing with an on-demand bond or letter of credit, absent fraud or potentially a demand in breach of the underlying contract,[8] there can be no injunction to restrain the Beneficiary from calling on the instrument – for that would violate the principle of autonomy.[9]

Thus, the risk of failure lies with the banks.

Yet, whilst it is true that that instrument is legally autonomous, it is rarely commercially autonomous as the Bank/Guarantor will almost inevitably have underlying security ultimately biting against the Obligor's assets. That underlying security will, in all likelihood, immediately bite as soon as there is any call on the instrument. This is, of course, why Obligors seek to block payments on the instrument. Thus, and unsurprisingly, what is packaged, legally, as the Bank/Guarantor's risk of payment is in fact the Obligor's risk of the underlying security being called.

Thus, the risk of failure lies with the Obligor.

It is as a result of that risk, that Obligors seek to undermine the autonomy principle. That can only be done, absent fraud, if: a) as set out above, the demand is presented in contradiction to the underlying arrangements; or b) the instrument explicitly makes reference to those underlying instruments.

The most obvious example of the latter is the ABI Performance Guarantee wording which requires (at clause 1) the amounts to be paid under the instrument to be "established and ascertained" as per the underlying contract. This expressly therefore requires reference to the underlying contract.

What this entails was recently considered in *Yuanda v Multiplex Europe & ANZ ("Yuanda")*[10]. Here, Yuanda (the Obligor) sought to injunct Multiplex (the Beneficiary) and ANZ (the Bank/Guarantor) from paying out on a modified ABI-type Performance Guarantee. Yuanda had two arguments: the Beneficiary had called on the Guarantee as if it were an on-demand guarantee and that the Performance Guarantee would only ever respond after there had been a resolved Final Account including any adjudication, arbitration or litigation. Yuanda succeeded, as a matter of fact, on the first and failed on the second.

The underlying contract in *Yuanda* was a JCT Design and Build (2011). Under this contract, the employer/main contractor – rather than some third party – issues notices as to what payments are due and when. The Judge rejected an argument that those notices were sufficient to sums being established and ascertained[11] – leaving open whether, where the contract did have a third party certifier, such certifications would suffice.

The Judge did, however, find that an adjudication would serve to ascertain and establish loss[12]– pointing out that given an adjudication could found an application for summary judgment, it would be strange if the instrument did not respond.[13] This sufficed for Multiplex's purposes, having had an adjudication in train.

That then, however, led to a discussion about what would happen should the Adjudication be delayed. This was relevant because the instrument had an expiry date of 4 April 2020; the hearings were on 20; 27 January and 19 February with judgment (the court accelerating its processes to permit such) on 28 February. The Adjudicator was due to provide a decision on 6 March 2020. Slippage could therefore take completion of the process of a decision, failure to pay and the making of a claim past 4 April 2020. This discussion centred on clause 4 of the instrument.

Clause 4 (as the Judge found) was not a standard ABI wording.[14] As a result, Yuanda's argument based on the standard ABI wording and the commentary to that wording could not succeed.[15] The Judge went onto find that the wording of this instrument was, in essence, there to allow the mechanical process of a claim to be gone through – bearing in mind the international nature of the underlying securities.[16] It goes without saying that this is a narrower approach to the expiry of ABI instruments than had previously been suspected to be the correct one. The approach did, however, turn on the wording of this instrument. It remains to be seen whether a narrower approach would also be adopted to the ABI wording.

Yuanda dealt with one further issue. The nature of the financial security provided

1 See eg *Trafalgar House Constructions (Regions) Ltd v GSGC Ltd* [1996] 1 AC 199

2 [1984] 1 WLR 392

3 See also *Tetronics (International) Ltd v HSBC Bank Plc* [2018] EWHC 201 (TCC) at [26]

4 In the following discussion, I refer to the party that issued the instrument and will pay against it as the Bank/Guarantor; the party making the claim as the Beneficiary and the party in default triggering the claim against the instrument as the Obligor.

5 Recently reiterated in *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31 at [56 ff] but a long standing principle in English law.

6 Where the Obligor can rely on the bank mandate between it and the Bank/Guarantor.

7 As the Court of Appeal recognised in United Trading Corp v Allied Arab Bank [1985] 2 Lloyd's Rep 554 at 561

8 Sirius International Insurance Co v. FAI General Insurance Ltd [2003] EWCA (Civ) 470 at [26 – 7]; MW High Tech Projects UK Ltd v Biffa Waste Services Ltd [2015] EWHC 949 (TCC) at [28 – 34]

9 Group Josi Re v Wallbrook [1996] 1 Lloyd's Rep 35 casting significant doubt on Themehelp Ltd v West [1996] QB 84

10 [2020] EWHC 468 (TCC)

11 At [70 – 1]

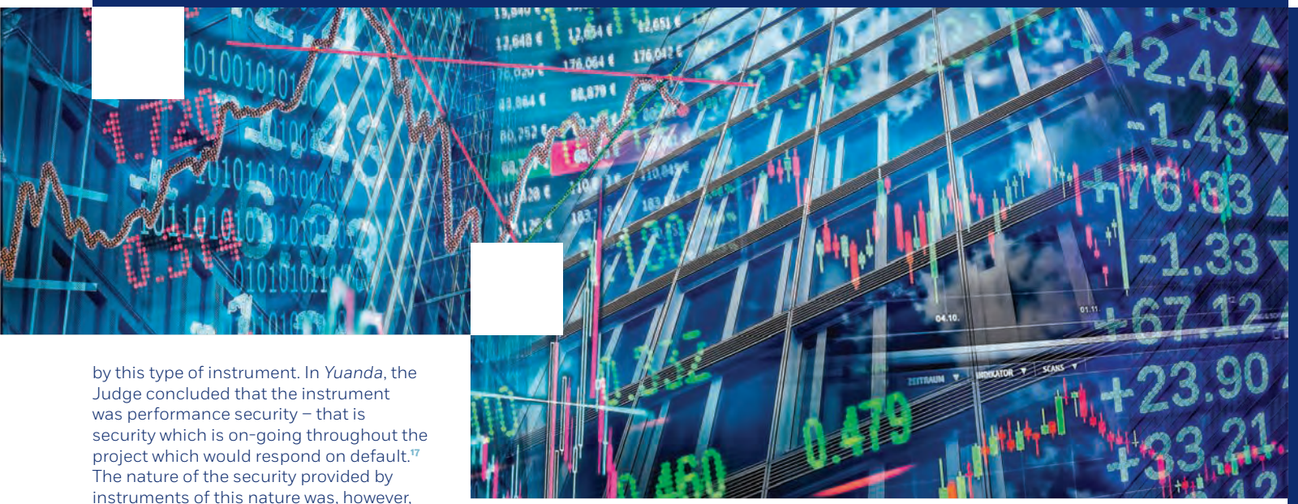
12 At [83 ff]

13 At [91]

14 At [96]. In fact, it was closer to the URDG wording.

15 At [97]. Leaving open, of course, whether the argument was correct on the standard ABI wording.

16 At [101]



by this type of instrument. In *Yuanda*, the Judge concluded that the instrument was performance security – that is security which is on-going throughout the project which would respond on default.[17] The nature of the security provided by instruments of this nature was, however, specifically considered in another case featuring Multiplex – *Multiplex v R&F One (UK) Ltd ("Multiplex").*[18]

Here, Multiplex was entitled, under its contract with the developer to financial security to cover the developer's payment obligations to Multiplex. The developer defaulted on numerous occasions both in payment and provision of the security. As a result, a CPR24 application was made. To settle that, the developer offered once again to provide security, in default of which Multiplex could suspend works on the Nine Elms development. The developer defaulted again in provision of the security but paid sums into court. Multiplex argued that it could still suspend, but the developer argued that doing so would be repudiatory breach due to the monies in court providing sufficient security.

Thus, the argument turned on what type of security was created by what might be termed a traditional financial security as opposed to payment into court.

The developer argued that, relying on *Halvanon Insurance Co Ltd*[19] and *Re Peak Hotels & Resorts Ltd (In Liquidation); Crumpler & Another v Candey Ltd*[20] ("Re Peak") that money paid into court gave the Beneficiary a "security interest" – as the Court of Appeal in *Re Peak Hotels* had recognised.[21] The question was what sort of security interest.

Whether a payment into court was the same as the financial security provided by the financial instruments being discussed here was considered in *Liberty Mercian No 3*[22] ("*Liberty Mercian*"). In this case it was

"Now, it appears, there is beginning to emerge a proper law and practice as to what autonomous financial security means and what it can achieve".

accepted that no bond could be provided but there were funds in court. Thus, the Court considered whether those monies in court could be used. The Court considered – but did not set out the scheme – that the monies in court could be so used but only if they were subject to some court devised scheme.[23] Thus, the Court in *Liberty Mercian* tacitly accepted that funds into court were not equivalent to a bond.

In *Multiplex*, the Court was more explicit as to the position: Multiplex would be a secured creditor in respect of the funds in the event of insolvency, the payment into court being equivalent to an equitable charge.[24] The Court also referred to the payment into court as a procedural security. The former – insolvency security with a secured creditor ranking – will be familiar to many. The latter - a procedural security – is absolutely consistent with the Court's abilities to control its own procedures and, for example, to require payment in to govern against default or as a precondition to continuing to have access to the court process.[25]

The Court was also clear that a payment into court was not the same security proffered by the instruments being discussed here. As the Court said:[26]

> *Therefore, it [payment into court] does not provide the same payment security as would a bank guarantee or bond, pursuant to which the claimant would have access by way of an appropriate demand to immediate payment of cash funds.*

This is clear statement as to how autonomous financial securities operate in building and infrastructure projects. In the law of international trade, letters of credit are a one shot security for payment obligations against proof documents. In financial transactions, letters of credit are ultimate recourse documents. In infrastructure and projects, the usual pattern has been for law and practice to follow these precedents. Now, it appears, there is beginning to emerge a proper law and practice as to what autonomous financial security means and what it can achieve.

Returning to the first or second theme of this piece – risk. These cases return ultimate risk to the defaulting party. That is undoubtedly correct. Yet, in these times, another question arises – who is the risk taker, or funder, of ultimate default?

17 At [92]
18 [2019] EWHC 3464 (TCC)
19 [1988] 1 WLR 1122
20 [2018] EWCA Civ 2256
21 [2014] EWHC 3584. At [82]
22 At [56 ff]
23 As yet no court has attempted the thought experiment to create the same
24 At [24]
25 For example, an order that a Defendant have permission to proceed with its defence, conditional on the payment into court.
26 At [24]

BRIEF *Encounters*

John McMillan discusses his move to Keating Chambers and the highlights of his legal career so far.

John McMillan joined Keating in February 2020 following five years in the international arbitration group at WilmerHale. He specialises in high-value, complex arbitration and litigation, with a particular focus on the construction, engineering, energy, and technology sectors. He has advised on or acted in arbitrations under the ICC, LCIA, SIAC, UNCITRAL, SCC, NAI and ICSID rules, involving common-law, civil-law and international-law issues.

"Understanding the successes and disasters that can occur at each stage [of a dispute's lifespan] is important."

How have you found your first few months at Keating?

It's been a strange time to start a new job. I knew a few people at Keating before joining and had a month in chambers before the lockdown came into force. Since then, Chambers has been good at keeping the social side of things ticking over. There is a Chambers social network so we can post photos and messages and a Chambers Strava group so people can race each other. Chambers also remains busy and it is relatively straightforward for barristers to work at home. We are all very aware that others in the profession (and outside it) are having a far more difficult time.

What have you particularly enjoyed since joining Keating?

I've been working on a couple of disputes relating to big infrastructure projects as part of a Keating team, as well as working on some commercial disputes and smaller construction disputes on my own. I wouldn't be without any of them, but it's the smaller things that I've particularly enjoyed. There is often a very short distance between providing advice and that advice being put into action, which is satisfying, and the stakes for small and medium-sized businesses involved in litigation are often very high.

What do you think you have learnt from the law firm environment that will be of benefit to clients?

At a law firm you get a lot of exposure to clients' decision-making processes. It can be uncomfortable for a lawyer to see a beautiful 30-page opinion reduced to a few slides to be shown at a board meeting, but it focuses you on the client's priorities. There is always a tension between providing advice that is cautious enough to be accurate, but clear enough to be useful. Getting that balance right is part of giving good advice, whether you are at a law firm or the bar.

I was also able to see disputes throughout their lifespan, from building the case to bringing the claim to enforcing a judgment or award if the client is successful. Sometimes a case turns on a crucial cross-examination (and it's fun when that happens), but sometimes it turns on whether the client finds the right documents to support its case, instructs the right experts, or makes the right procedural applications. Understanding the successes and disasters that can occur at each stage is important when you are considering the best way to pursue or defend a claim.

You studied Chinese at University; how has this helped in your practice?

Having a good grounding in Chinese can save clients time and money in a dispute for or against a Chinese company. I have acted on cases where large volumes of documents had to be translated before they could be reviewed by the legal team and it's not ideal to say the least. On one occasion, a client was gearing up to accuse a Chinese counterparty of fraud based, in part, on a mistranslation. Being able to read the original document avoided a potentially serious misunderstanding.

What has been the highlight of your career so far?

Perhaps the first time I cross-examined a witness. It was in an arbitration about an oil concession off West Africa and I was cross-examining an expert witness. I told myself that he was more afraid of me than I was of him. Anyway, it went well and I got a couple of concessions. A lot of legal life is slaving away behind a desk, but hearings and cross-examination are always exciting and throw up surprises. As Mike Tyson said about disputes, everyone has a plan until they get punched in the mouth.

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