KC LEGAL UPDATE

Spring 2018

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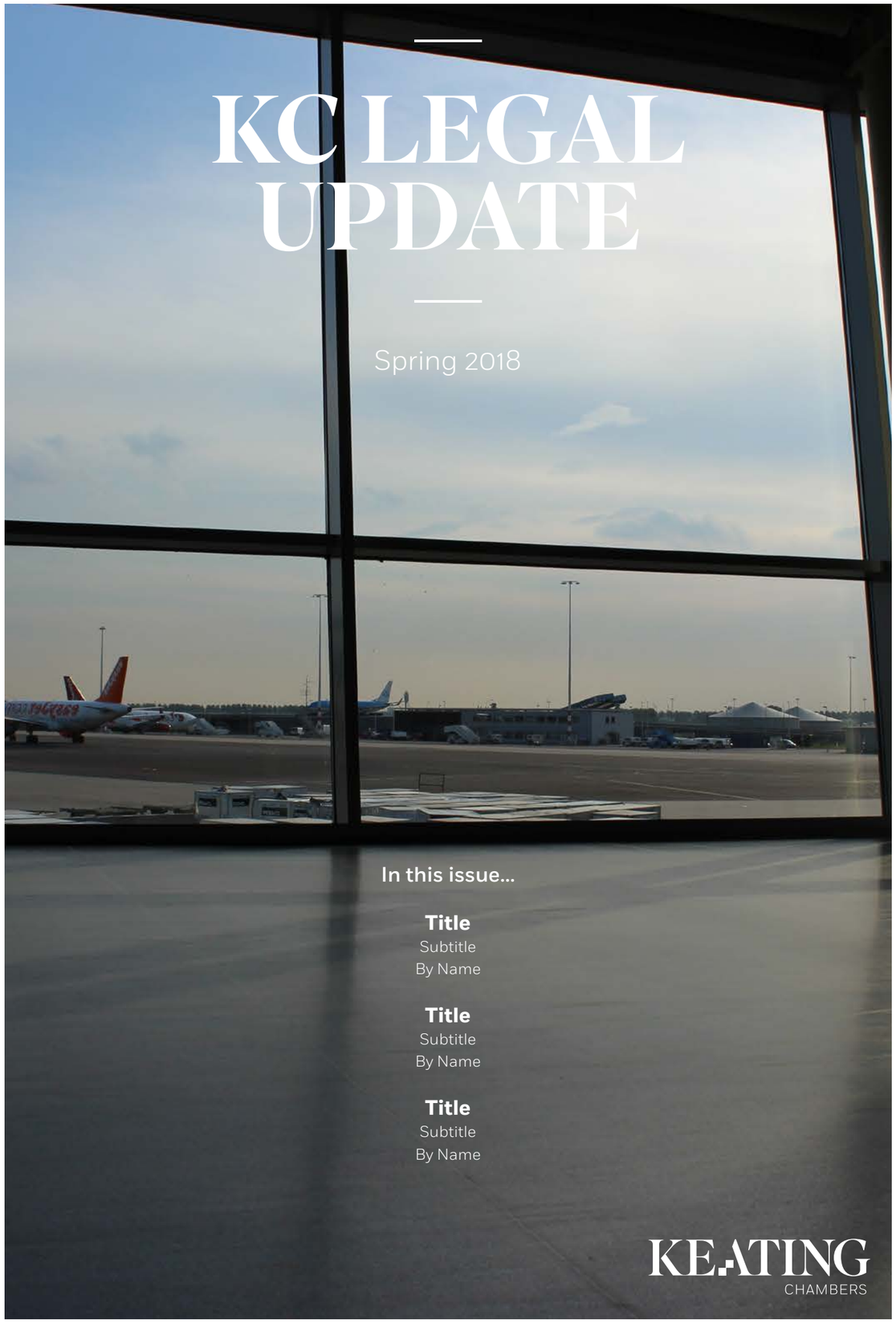

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Title
Subtitle
By Name

Title
Subtitle
By Name

Title
Subtitle
By Name

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WELCOME

TO THE SPRING 2018 EDITION OF KC LEGAL UPDATE

Equality and diversity are on everyone's agendas nowadays. Recently in the quiet moments of a mediation I wandered the corridors of a law firm where the walls displayed photographs of the firm's women.

The caption for each portrait began by celebrating the person (parent to 2 boys, cyclist, skier, singer, single Mother of 3, etc) and ended by describing their role within the firm (partner, receptionist, senior associate) and I was struck by the definition of these women as mothers first, lawyers second. The same day, 15 of our client law firms appeared in Stonewall's Top 100 LGBT-friendly employers list.

Reflecting on the changes I have seen in my career, there has been a massive improvement in gender equality in the construction dispute business, although other aspects of diversity lag behind. In 1981 I started my pupillage at a Construction Bar comprising male silks and juniors, clerked by men and appearing in front of male judges. With the appointment of Lucy Garrett to silk, we will have 8 female juniors and 6 female QCs. It would have been 8 QCs, but for the elevation of Nerys Jefford and Finola O'Farrell to the High Court Bench, achieving gender parity in the TCC.

The all-male clerks room is a thing of the past. There is a long way to go before the gender split reflects anything like the split in entrants to the profession but this is a huge improvement.

Female solicitors have always been well-represented in my mediations but increasingly the decision-makers are now women. Female Managing Directors, Chief Executives and Senior in-house Counsel are no longer the exception. By contrast, however, female expert witnesses remain few and far between and very few of the projects ending in mediation seem to have involved female architects, engineers or quantity surveyors.

The verdict – much progress made, much still to be done. And perhaps we are ready for exhibitions celebrating male lawyers as parents and carer-givers too?

Rosemary Jackson QC

CONTENTS

A MAGIC BULLET *or* A BOTCHED SHOT?

Using Part 8 to Resist Adjudication Enforcement Proceedings

by Brenna Conroy

In this article, Brenna Conroy considers the use of Part 8 proceedings and adjudication in light of the recent criticisms from the TCC, and the guidance to be followed when seeking a final determination of an issue arising out of the underlying dispute by way of declaratory relief.

Introduction

The use of Part 8 in relation to adjudication enforcement proceedings has become increasingly popular over the past few years as parties try to avoid the pitfalls of having to pay now and argue later by seeking a final determination of *"a short, self contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing"*[1] on an expedited timetable.

> *"...in a number of recent decisions the TCC has set down a clear warning to parties attempting to use the procedure to avoid the consequences of an adjudicator's decision."*

The problem that has been identified in recent authorities is that there are very few cases which have a point suitable for determination using Part 8 proceedings, and in a number of recent decisions the TCC has set down a clear warning to parties attempting to use the procedure to avoid the consequences of an adjudicator's decision.

Issuing a Part 8 claim in inappropriate circumstances is seen as an abuse of process, with the consequence that a defendant who unsuccessfully raises this sort of challenge on enforcement *"will almost certainly have to pay the claimant's costs of the entire action on an indemnity basis."*[2] Therefore, parties are advised to consider carefully the merits and propriety of the proposed Part 8 claim before issuing proceedings.

Part 8 and Adjudication

Paragraph 9.1.2 of the TCC Guide recognises that in addition to enforcement applications, declaratory relief by way of a Part 8 Claim can be sought in the TCC at the outset of or during an adjudication in respect of matters relating to the jurisdiction of the adjudicator or the validity of the adjudication. Paragraph 9.4.1 of the Guide lists three such examples: disputes over the jurisdiction of the adjudicator, whether there is a construction contract within the meaning of the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 (as amended) and disputes over the permissible scope of the adjudication.

In relation to claims for declaratory relief properly considered as 'Other Proceedings Arising Out of Adjudication', paragraph 9.4.2 of the TCC Guide contemplates abridged directions akin to those given in adjudication enforcement cases, see *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC) at [18], where Jefford J stated "[t]he point here is that the Court will act quickly where there is an issue that goes directly to the proper constitution of the adjudication at its commencement."

The type of dispute expressly referred to in the TCC Guide is in keeping with the general rule that, ordinarily, the fact that one of the parties thinks that the adjudicator's decision was wrong is irrelevant to any enforcement decision.[3] However, this general rule has two narrow but important exceptions, as identified by Coulson J in *Hutton Construction Ltd v Wilson Properties (London) Ltd:*

> *"The first, exemplified by Geoffrey Osborne Ltd v Atkins Rail Ltd [2010] BLR 363 , involves an admitted error... The second exception concerns the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice, and could be said to date from Caledonian Modular Ltd v Mar City Developments Ltd (2015) 160 Con LR 42."*[4]

As to the second exception, in the case of *Caledonian v Mar City*, the defendant had raised one simple issue in defence of enforcement proceedings, which was that a small group of documents could not have constituted a valid payment application; if that was right it was agreed that the claimant was not entitled to summary judgment. Coulson J stated at paragraph 12 that:

> *"If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration."*

Therefore, it is possible to use Part 8 proceedings to seek a final determination of an issue arising out of the underlying dispute, so long as it satisfies the relevant criteria.

Procedural Requirements

In *Caledonian v Mar City*, Coulson J stated that paragraph 9.4.3 of the TCC Guide envisaged that separate Part 8 proceedings will not always be required in order for such an issue to be decided at the enforcement hearing (i.e. it could be pleaded in a defence and counterclaim). However, in *Hutton v Wilson*, Coulson J made clear that a *"prompt Part 8 claim is the best option"* and expressly stated that paragraph 9.4.3 of the Guide must be taken to have been superseded by the guidance in the judgment.[5]
In *Hutton*, Coulson J stated that if there is a dispute between the parties as to whether or not the defendant is entitled to resist enforcement on the basis of its Part 8 claim, the Defendant must be able to demonstrate that:

> *"(a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest; (b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement; (c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore."*[6]

1 Caledonian Modular Ltd v Mar City Developments Ltd (2015) 160 Con LR 42 at [12].

2 Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [21]-[22].

3 Macob Civil Engineering Ltd v Morrission Construction Ltd (1999) 64 Con LR 1. [1999] BLR 93 at pp.98-99.

4 Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [4] to [5].

5 Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [11]–[12] and [15]–[16].

6 Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [17].

At paragraph 18, Coulson J continued,

> *"What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in the Macob Civil Engineering Ltd case 64 Con LR 1."*

Additionally, due to the inevitable time restraints associated with enforcement hearings, Coulson J considered it *"axiomatic that such an issue could still only be considered by the court on enforcement if the consequences of the issue raised by the defendant were clear-cut."*[7]

"...the real benefit of Part 8 proceedings issued before or at the outset of an adjudication is that they provide parties with certainty as to matters which could otherwise derail a decision on enforcement."

The cases of *Hutton v Wilson* and *Merit Holdings v Lonsdale* also provide clear guidance on the way in which the Part 8 claim should be framed. In *Hutton*, the defendant's failure to seek specific declarations in the Part 8 claim and its attempt to re-run the entirety of the issues in the adjudication were two of the reasons given as to why the Part 8 claim would not be considered at the enforcement hearing.[8] In *Merit Holdings v Lonsdale*, Jefford J stated that it was *"implied in the rules that the question [to be determined] should be framed with some degree of precision and/or be capable of a precise answer."*[9]

Suitability to Part 8 Proceedings

In the case of *Caledonian v Mar City* itself, Coulson J emphasises that the procedure would rarely be used *"because it is very uncommon for the point at issue to be capable of being so confined"*.[10] In Merit Holdings, Jefford J identified the risk of *"the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions."*[11]

In the past six months there have been two further cases that have considered the use of Part 8 in relation to adjudication enforcement proceedings. In *Actavo UK Ltd v Doosan Babcock Ltd* [2017] EWHC 2849 (TCC), Doosan sought, *inter alia*, a declaration that Actavo was not entitled to interest under the Late Payment Act. O'Farrell J considered that it was not appropriate for the court to determine the point by way of Part 8 as Doosan had raised a course of dealing argument that would require further oral and/or written evidence before it could finally be settled.

In *Victory House General Partner Ltd v RGB P&C Ltd* [2018] EWHC 102 (TCC), Joanna Smith QC determined that the matters raised in the Part 8 Claim, which included matters of disputed fact, were not suitable for resolution under the Part 8 procedure. The Judge did not accept that the Part 8 claim could be determined on the basis of assumed facts which could later be challenged as *"in the event of a subsequent challenge to such a decision, there will be no saving of cost and resources and no advantage in permitting determination of the issues to be expedited."*[12]

An Expedited Timetable?

Following Merit Holdings v Lonsdale, it also remains unclear as to whether a Caledonian v Mar City point properly constitutes 'Other Proceedings Arising Out of Adjudication' so as to justify an expedited timetable. The issue is that the Caledonian v Mar City exception relates to a point arising out of the underlying dispute rather than a matter that goes to the proper constitution of the adjudication. At paragraph 20 of the Judgment, Jefford J stated *"It should not be assumed that some relationship to an adjudication and an adjudication label means that it is automatically appropriate for a case to be dealt with in this way."*

The simple answer may be that if the defendant meets the Hutton criteria set out above, this warrants the imposition of an abridged timetable to allow the Part 8 claim to be heard at the enforcement hearing. However, in circumstances where Part 8 proceedings are issued pre-emptively (i.e. before a threatened adjudication) or during the adjudication itself, it remains to be seen whether the Courts will adopt an expedited timetable for disputes based on other factors such as the avoidance of unnecessary cost and expense as referred to in *Merit Holdings v Lonsdale*.[13]

Concluding Remarks

Where there are issues in dispute which go to the proper constitution of the adjudication, the real benefit of Part 8 proceedings issued before or at the outset of an adjudication is that they provide parties with certainty as to matters which could otherwise derail a decision on enforcement. The use of Part 8 in these circumstances is expressly endorsed by the TCC Guide, and parties should give serious consideration to the proceedings knowing that *"the Court will act quickly where there is an issue that goes directly to the proper constitution of the adjudication at its commencement."*[14]

As to Part 8 proceedings relating to the underlying dispute, the type of case envisaged by Coulson J in *Caledonian v Mar City* as suitable for such determination is colloquially known as a *"smash and grab"* dispute, where the outcome will usually depend upon the Court construing a series of documents to determine whether there has been a valid payment application and/or pay less notice. Whilst the recent decision in *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC) has clearly diluted the potency of a 'smash and grab' adjudication, the case itself makes clear that the paying party will still be expected to pay the sums due in a payee's notice. Faced with that situation, a well-considered Part 8 claim may still be an appropriate tactical choice to determine the validity of a payment application/pay less notice, particularly if a party is not ready to adjudicate the actual value of the interim application.

As to issues relating to the underlying dispute more generally, parties are well advised to ensure that any declaration sought by way of Part 8 proceedings can properly be determined without the need for oral evidence and the relief sought is *"framed with some degree of precision"* and *"capable of a precise answer."*[15] An application for an expedited timetable pursuant to paragraph 9.4 of the TCC Guide should also identify why the expedited procedure is sought, particularly if the point raised does not go to the constitution of the adjudication itself.

7 Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [19].

8 Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [32]–[34].

9 Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) at [21].

10 Caledonian Modular Ltd v Mar City Developments Ltd (2015) 160 Con LR 42 at [13].

11 Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) at [22].

12 Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 102 (TCC) at [6].

13 Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) at [20].

14 Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) at [18].

15 Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) at [21].

Interpretation of PFI contracts: the long and winding road

By Tom Coulson

Do long-term contracts need to be construed in a particular way? Do contracts that require the parties to work together and cooperate over a period of many years have their own special rules? Do they demand special treatment when it comes to questions of contractual interpretation?

Those are some of the questions raised by the judgment in *Amey Birmingham Highways Ltd v Birmingham City Council*, in which the Court of Appeal had to grapple with the complexities and inconsistencies of a PFI contract.[1]

Amey Birmingham Highways Ltd v Birmingham City Council

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

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

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

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

Subsequent conduct of the parties

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

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

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

Text and context

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

> *"Since Arnold v Britton, many have felt that the courts have been less willing to depart from the apparent meaning of the words used in favour of an interpretation more consistent with commercial common sense"*

Since *Arnold v Britton*, many have felt that the courts have been less willing to depart from the apparent meaning of the words used in favour of an interpretation more consistent with commercial common sense. Although in *Wood v Capita Insurance Services Ltd*[5] the Supreme Court itself sought to denounce those sorts of easy generalisations in favour of a more nuanced understanding of the relative importance of text and context in different circumstances, it does sometimes feel that the broad direction of travel in the last few years has been to reassert the primary importance of the words used over the commercial purpose of the contract.[6]

1 [2018] EWCA Civ 264

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

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

4 [2015] A.C. 1619.

5 [2017] A.C. 1173

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

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

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

Relational contracts?

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

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

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

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

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

This article was first published by the Thomson Reuters Practical Law Construction Blog on 27 February 2018.

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

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

Be Careful and Honest in What You Say: Fraud in Arbitration

by Vincent Moran QC

Vincent Moran QC acted for the successful Claimant in *Celtic v Knowles*, the first reported decision under the 1996 Arbitration Act ("the Act") in the construction field setting aside or remitting an award in arbitration because it was obtained by fraud. In this article he lays out the background to the case and the implications of the TCC's decision.

Introduction

The Claimant ("Celtic") and the Defendant ("Knowles") had been involved in a long running arbitration arising out of a fee claim by Knowles ("the Arbitration") for services provided to Celtic in relation to various adjudication claims made against a third party, Devon County Council ("DCC"). The Arbitration was conducted pursuant to an "ad hoc Arbitration Agreement" between the parties and, in light of a Partial Award in the Arbitration, the fee claim (put at £1.2m) was capped in a maximum potential sum of £178k and was in any event, Celtic contended, subject to a complete defence of set off that will negate any potential recovery.

Celtic's application was to set aside a part of a further Interim Award, dated 6 September 2016, arising out of an interim application by Knowles pursuant to s39/47 of the Act for certain declarations relating to Knowles' conduct with DCC. Celtic's application was made pursuant to s68(2)(g) of the Act, on the basis that Knowles deliberately (or recklessly) misled the Arbitrator when making the s39/47 application by adducing false evidence as to its behaviour in connection with claiming its outstanding fees from DCC, instead of from Celtic.

Celtic's Case

Celtic's case was as follows:

a. Knowles made its s39/47 application to the Arbitrator for a number of declarations, including ones to the effect that, in accordance with the terms of the ad hoc Arbitration Agreement, (i) it had withdrawn/extinguished certain historic invoices previously served by Knowles on DCC in respect of part of its alleged fee/payment entitlement against Celtic, (ii) it had provided a Deed of Indemnity and Waiver, and (iii) it was no longer pursuing DCC for the previously invoiced sums.

b. In support of its application, Mr Rainsberry and Knowles made representations and adduced evidence to the effect that Knowles (i) had withdrawn/extinguished its historic invoices served on DCC, (ii) had not issued further invoices for the relevant sums, (iii) considered itself bound by the Deed of Indemnity and Waiver, and (iv) was no longer pursuing DCC for these sums.

c. These representations were misleading in light of the content of recent prior correspondence ("the March 2016 Correspondence") – which, to the contrary, showed that Mr Rainsberry/Knowles (i) had not withdrawn/extinguished the invoices, (ii) had re-claimed (and effectively re-invoiced) the sums previously the subject matter of the 'withdrawn' invoices, (iii) did not consider itself bound by the Deed of Indemnity and Waiver, and (iv) were still claiming these sums direct against DCC.

d. The Court could conclude that it was likely that Knowles deliberately misled the Arbitrator in the above respects having regard to (i) the immediate background leading up to the s39/47 application, (ii) the content of the March 2016 Correspondence, (iii) the failure of Mr Rainsberry/Knowles to bring this correspondence to the Arbitrator's attention, (iv) the incredible explanation provided by Mr Rainsberry for his conduct and (v) the absence of any other evidence to support Mr Rainsberry's 'explanation'.

e. Even if Mr Rainsberry's explanation for the March 2016 Correspondence was accepted, it is clear that he deliberately misled the Arbitrator in respect of the matters referred to above (or was at least reckless).

The Law

Section 68 of the Arbitration Act 1996 provides that:

> *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:*
> *...*
>
> *(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;"*

An award may therefore be set aside if either (i) it was obtained by fraud or (ii) the award, or the way it was procured, is contrary to public policy – although the Courts have interpreted these limbs consistently.[1] Where the allegation is fraud in the production of evidence, an applicant must make good the allegation by the production of cogent evidence of fraud by a party to the arbitration that was not available at the time of the award and would have had an important influence on the result.[2]

Section 68(2)(g) of the Act is not concerned with an innocent failure to provide accurate evidence or proper disclosure, but with extreme cases in which there is "*dishonest, reprehensible or unconscionable conduct*"[3]. Fraud must be established to the heightened burden of proof as discussed in *Hornal v Neuberger Products Ltd* [1954] 1 QB 247, *Re H Minors* [1996] AC 563 and *The Kriti Palm* per Rix LJ at paragraphs 256-259.

Background

The Arbitration was concerned with fee claims arising under three separate fee agreements made between the parties regarding the adjudication of certain disputes with DCC (referred to as Adjudications 6, 7 and 8). At the start of their relationship, the parties entered into a Deed of Assignment which, Celtic contended, made Knowles' entitlement to payment of fees contingent upon receipt by Celtic of the proceeds of the Adjudications against DCC.

Knowles interpreted the Deed of Assignment as giving it a right to make claims for its alleged outstanding fees to third parties that owed Celtic money and first made direct claims for payment of such sums from DCC after the decision in Adjudication 6. This led DCC to seek an injunction and declarations in relation to the anticipated claim by Knowles/Celtic for the said Adjudication 6 sum – and, on 14 February 2014, the TCC made an Order declaring, amongst other matters, that the Adjudicator did not have jurisdiction to order the payment of sums to Knowles.

After the further decision in Adjudication 8, to the effect that DCC pay Celtic a sum of money (on 3 and 7 February 2014), Knowles again served invoices on DCC claiming an entitlement to be paid directly by DCC in relation to its outstanding fees – and in spite of the TCC decision dated 17 January 2014. DCC refused to pay these sums and Knowles thereafter commenced the Arbitration on 19 March 2014 seeking payment of some of its alleged Adjudication 8 fee entitlement. The Arbitration was by the ad hoc Arbitration Agreement subsequently expanded to include the disputes connected with Knowles' fee entitlements in respect of Adjudications 6 and 7 as well.

Knowles' interim application, which was the subject matter of the s68 application, included a request for declarations in respect of the fulfilment of certain conditions of the ad hoc Arbitration Agreement.

Declaration 1 was sought in the following terms:

> *"A declaration that Knowles has complied with paragraph 3 of the Arbitration Agreement as it has withdrawn its invoices served on Devon County Council."*

Paragraph 3 of the ad hoc Arbitration Agreement stated:

> *"That Knowles will withdraw* ***and extinguish*** *its invoices served on Devon County Council" (my emphasis).*

The Arbitrator's determination on this matter on 6 September 2016 found that Knowles had withdrawn and extinguished those invoices which it had previously issued against DCC by the issue of the credit notes referred to above.

Declaration 2 was sought in the following terms:

> *"A declaration that Knowles has complied with paragraph 4 of the Arbitration Agreement in that it has provided an indemnity in favour of DCC indemnifying the latter against Knowles pursuing sums owed by DCC to CBE under an assignment in favour of Knowles dated 19.11.10."*

Clause 4 of the Ad Hoc Arbitration Agreement (which Knowles' Declaration 2 is seeking to cover) states):

> *"THAT Knowles will provide an indemnity in favour of Devon County Council in the matter of the Celtic BioEnergy Ltd assignment in favour of Knowles* ***and that it will not pursue Devon County Council for such sums as are owed by Devon County Council****" (my emphasis).*

The Arbitrator's determination on this matter on 6 September 2016[4] found that Knowles had complied with the terms of paragraph 4 of the ad hoc Arbitration Agreement in that (i) it had provided a form of indemnity and waiver in favour of DCC in a form which was agreed with Celtic, and (ii) Knowles did not retract its agreement to the Deed of Indemnity in the letter dated 27 November 2014.

Developments after the Interim Award

Celtic obtained information in the March 2016 Correspondence to the effect that Knowles had misled the Arbitrator in relation to Declarations 1 and 2 set out above. In particular, it was clear from Knowles' letter to DCC of 16 March 2016 that Knowles were continuing to seek payment from DCC at that time, on the premise that they were entitled to do so pursuant to the Deed of Assignment.

However, the position and submissions taken by Knowles before the Arbitrator were to exactly the opposite effect i.e. that it had withdrawn and extinguished its invoices to DCC, had not issued a further invoice, was not still pursuing such a claim and had provided (and not retracted) a valid DOIW to and in favour of DCC which it was still content to abide by. No indication was provided on the part of Knowles in the March 2016 Correspondence that it was withdrawing or changing this stance as to its existing entitlement to and demand for payment as previously communicated in the earlier correspondence.

Celtic's case was that Knowles and Mr Rainsberry had therefore misled the Arbitrator by asserting:

a. In relation to Declaration 1, that they (i) had *withdrawn <u>and</u> extinguished* its invoices, thereby removing its alleged claim/entitlement to be paid direct by DCC and the associated bar to payment of proceeds by DCC into the stakeholder account, and (ii) had not re-issued or reclaimed or pursued the same from DCC - at a time when the Knowles claim had been re-asserted, re-invoiced and not finally withdrawn by virtue the March 2016 Correspondence.
b. In relation to Declaration 2, that the Defendant had (i) provided the required Deed of Indemnity, (ii) not revoked the same, and (iii) not pursued DCC direct for the relevant sums.

Knowles denied that there had been any possible deceitful misrepresentations on its part.

Importantly, however, Knowles did not suggest that it had simply forgot to mention the March 2016 Correspondence during its s39/57 application – by an oversight or carelessness – and did not deny that the March 2016 Correspondence, on its face, completely contradicted the position it had taken previously on Declarations 1 and 2 before the Arbitrator. Initially, Mr Rainsberry's only explanation offered was that (i) Knowles had been intending to elicit an acknowledgment from DCC that it would rely upon the Deed of Indemnity (because the Celtic had previously argued that an impediment to any settlement between it and DCC was the objections raised by DCC to the Deed of Waiver and Indemnity dated 18 July 2014), and (ii) in any event the correspondence was irrelevant.

Celtic's primary case was that the evidence established, to the required standard, that Mr Rainsberry/Knowles deliberately misled the Arbitrator by presenting false evidence to the effect that (i) the relevant invoices had been withdrawn and extinguished, (ii) Knowles had not issued further claims/invoices, (iii) Knowles considered the Deed of Indemnity as still binding on it and the parties generally, and (iv) Knowles was no longer pursuing DCC direct for payment.

Alternatively, even if Mr Rainsberry's explanation of his real motive for writing the March 2016 Correspondence is accepted, nevertheless the evidence shows that he deliberately misled the Arbitrator. In fact, on analysis, the issue of Mr Rainsberry's subjective intention in respect of the March 2016 Correspondence does not exculpate him or Knowles for providing inconsistent evidence to the Arbitrator and/or failing to disclose the March 2016 Correspondence or its content.

Objectively construed, Celtic contended that it was abundantly clear (and would have been clear, or should have been clear, to Mr Rainsberry) from the March 2016 Correspondence that Knowles, as matter of fact, made (and were still making) a further positive claim to be entitled, by alleged reason of the Deed of Assignment, to payment directly from DCC of the Adjudication 8 Sum. Mr Rainsberry/Knowles therefore must have known that it was untrue to suggest the contrary to the Arbitrator as part of its s39/47 application – whether or not there was some ancillary or hidden purpose in acting in this way toward DCC in March 2016.

Alternatively, whether guilty of deliberate deception or recklessness, this conduct amounted to dishonest, reprehensible and unconscionable conduct within the meaning of s68(2)(g) of the 1996 Arbitration Act.

The Court's Decision

The Court found that:

a. The threshold for any challenge under s.68 was high.

b. It was not sufficient to show that one party had inadvertently misled the other, however carelessly. There had to be some form of dishonest, reprehensible or unconscionable conduct that had contributed in a substantial way to obtaining the award.

c. There might be cases in which recklessness as to whether a statement was true or false might amount to fraud within the meaning of s.68(2)(g).

d. To establish that there had been a substantial injustice, the applicant had to show that the true position, or the absence of the fraud, would probably have affected the outcome of the arbitration in a significant way[5].

e. Mr Rainsberry had deliberately misled the Arbitrator as alleged by Celtic and that the Interim Award should therefore be remitted back to the Arbitrator for further consideration.

f. This conclusion would have been reached whether or not Mr Rainsberry's explanation had been accepted.

g. The parts of the award challenged were to be remitted to the Arbitrator for reconsideration[6].

Specifically in relation to Declaration 1, Jefford J held:

> *"50. It seems to me clear that extinguishing an invoice must mean that the claim on which the invoice was based is extinguished...*
>
> *52. Although that correspondence initially made no references to the invoices themselves, the sums claimed were those invoiced. At the conclusion of Knowles's exchanges with DCC, the claims had not been withdrawn and were still extant...*
>
> *53. The omission of any reference to the March correspondence by Knowles was, therefore, utterly misleading. It created the impression that by issuing the credit notes in 2014, the claims had been extinguished when Knowles had, just months earlier in 2016, been making the same claims."*

Her Ladyship remarked after quoting from the cross-examination of Mr Rainsberry:

> *"95. This evidence or argument had not been mentioned in Mr Rainsberry's witness statement. It evaded the issue and had all the hallmarks of having been concocted to advance a case that a letter that claimed money and threatened legal proceedings if that money was not paid was not, in fact, a claim, because Mr Rainsberry knew full well, and knew at the time of the application to the arbitrator, that a letter that made a claim against DCC was inconsistent with Knowles having extinguished its claims against DCC and inconsistent with its not pursuing DCC for payment, and ought to have featured in the arbitration.....*

1 see Russell on *Arbitration* (24th edn) at paragraphs 8-112; Merkin *Arbitration Act 1996* (5th edn) at pages 315-317)

2 (see Russell on *Arbitration* (24th edn) at paragraphs 8-112 to 8-118; *Double K Oil Products v Nestle Oil Oyj* [2009] EWHC 3380, per Blair J at paragraphs 33-35)

3 see *Chantiers De L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 per Flaux J at paragraphs 55-61; *Profilati Italia SrL v Paine Webber* [2001] 1 All ER 1065; *Gater Assets Ltd v Nak Naftogaz Ukrainy* [2008] EWHC 237 at [39]-[40]

4 at 1/26/221-224

5 see paras 65-70, 104 of Judgment.

6 paras 90-91, 98, 105-1.

"Celtic's primary case was that the evidence established, to the required standard, that Mr Rainsberry/Knowles deliberately misled the Arbitrator by presenting false evidence..."

98. *Against this background I have no hesitation in concluding that the failure to draw this correspondence to the attention of the arbitrator was deliberate. I cannot accept that Mr Rainsberry did not recognise that it was relevant to the issues of whether the claims had been extinguished or whether Knowles had not pursued DCC for payment. Nor can I accept that Mr Rainsberry did not know that these were relevant issues. The failure to disclose the March correspondence created a wholly misleading impression...*

99. *I have already said that I do not find his explanation for the March correspondence credible but, even if I had accepted it, I would still have been unable to accept that Mr Rainsberry thought the correspondence irrelevant."*

And, in relation to Declaration 2, Jefford J *held:*

"57. In coming to his conclusion as to whether Knowles had given a waiver as required under paragraph 4, the arbitrator considered that he had to take into account whether Knowles had retracted its agreement to the waiver. He did so and concluded that they had not and that, therefore, the condition in paragraph 4 had been complied with.

58. *In fact, Knowles' demand for payment from DCC was completely inconsistent with acceptance that the first Deed of Waiver was valid and, on its face, only consistent with Knowles adopting a position that it was for some reason not valid (as DCC had feared)...*

60. *It is therefore hardly surprising that CBL's case on this application is that the failure to tell the arbitrator about this correspondence was completely misleading and amounted to fraud. CBL's primary case was that Knowles' misled the arbitrator deliberately; its alternative position was that Knowles did so recklessly...*

74. *The letter dated 16 March 2016 claimed payment of the same sums as had been invoiced, together with a further sum, with the threat of legal proceedings if the sums were not paid. Thus Knowles had pursued DCC for payment after the date of the first Deed of Waiver and, even if the claim and the threat were not pursued, they were never withdrawn. It is no answer to say that the letter did not say what it said because Mr Rainsberry did not really mean what he said...*

79. *The March correspondence on its face started with an aggressive demand for payment that flew in the face of the first Deed of Waiver...*

94. *Mr Moran QC posed the same question in relation to paragraph 4 of the arbitration agreement (which provided that Knowles would not pursue DCC):*

"Q: If it were a letter of claim, it would be a breach, wouldn't it?
A: No
Q: Well, can you just explain that? If [it] were claiming the adjudication 8 sums and pursuing DCC direct, how would that not be a breach of paragraph 4 of the ad hoc arbitration agreement?
A: This letter is not a letter of claim. If a different letter existed which was a letter of claim, that could be a breach of 4. But a different letter doesn't exist."

As to the requirement under s68(2)(g) to show substantial injustice before an award will be remitted:

"109. It seems to me that where the key issue is one that would potentially be affected by the material not put before the arbitrator it must follow that CBL have suffered a substantial injustice – namely the wrong result. In any event, the arbitrator made a costs order against CBL which must have been affected by the outcome of the application...

115. I will, therefore, remit the parts of the award that are challenged to the arbitrator so that he can consider his award in possession of the full facts."

Although it was not necessary to consider Celtic's alternative case in recklessness, Jefford J concluded:

"101. ...Neither party was able to identify any case in which a court had decided one way or the other whether recklessness as to the truth of a statement could amount to fraud within the meaning of s.68(2)(g). High Court Approved Judgment: Celtic -v- Knowles 31.

102. Mr Moran QC's position was simple. In the civil context, fraud can be equated with or could require no more than the tort of deceit. The elements of the tort of deceit are (a) a representation which is (b) false and (c) dishonestly made and (d) intended to be relied upon and in fact relied upon. As Rix LJ put it in The Kriti Palm [2006] EWCA Civ 1601 at [256]:

"As for the element of dishonesty, the leading cases are replete with statements of its vital importance and of warnings against watering down this ingredient into something akin to negligence, however gross. The standard direction is still that of Lord Herschell in Derry v Peek (1889) 14 App Case 337 at 374: "First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proven when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless of whether it be true or false."

103. Accordingly, a false statement recklessly made would be a dishonest statement in the civil context (if not the criminal). As a matter of legal analysis, there is considerable force in that submission. It does not, however, sit entirely easily with the references in the authorities to "reprehensible and unconscionable" conduct. As I said above the authorities are unclear as to whether dishonest conduct and reprehensible or unconscionable conduct are to be regarded as distinct types of conduct or whether they are synonymous. If they are synonymous, that tends to suggest that "dishonesty" in this particular context involves something more than recklessness.

104. These comments – and they are no more than that – are more consistent with what I have called the synonymous reading of the different types of conduct. It seems to me, without deciding the point, because it is unnecessary for me to do so, that there may be cases in which recklessness as to whether a statement was true or false might amount to fraud within the meaning of s.68(2)(g) if there is some other element of unconscionable conduct..."

Implications of the Decision

On one level, given the fact sensitive nature of s68 applications, the wider significance of this decision is difficult to predict.

However, it is suggested that the case emphasises the following:

a. The willingness of the Court in clear cases to interfere with arbitral proceedings;

b. The need to be careful when making representations to and adducing evidence before arbitral tribunals;

c. The possible need to produce, or at least take account of, relevant correspondence or documentation even if no specific order for disclosure has been made in relation to the specific application or hearing.

Perhaps the most startling feature of the case is that it represents an unusual willingness of a Court to make a finding of fraud in a civil context. This may encourage other parties on other cases to more frequently allege that tribunals have been 'deliberately misled'.

Further, there was an interesting question of law raised in the case – namely whether 'recklessness' as to whether representations are true or not was sufficient to establish 'fraud' for the purposes of s68(2)(g0 of the AA 1996. Although, given the finding on deliberate dishonesty, it was not necessary for the Court to consider this aspect of Celtic's case the Court did appear to give support to that proposition; albeit with the caveat of "*if there is some other element of unconscionable conduct...*".

It is respectfully suggested that this may have been too restrictive an analysis. It is not entirely clear why an application under s68(2)(g) of the Act, based merely upon recklessness, should require some other element of unconscionable conduct.

The authorities appear to have interpreted the required element of 'fraud' to include "*dishonest, reprehensible or unconscionable conduct*". Knowingly making a representation without caring whether it be true or not is a form of dishonesty (in the law of deceit) or, it is suggested, should be considered by itself as amounting, at the very least, to a form of 'unconscionable conduct'.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Reported Case Summaries

Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)

The parties entered into a JCT contract for the design and construction of a new hotel at Heathrow. In response to an interim payment application by S&T, Grove issued a payment notice which contained sufficient information to enable S&T to know the basis of the valuation, but it was issued out of time. Grove then issued a pay less notice in time but did not re-attach the detail of the calculation. Instead, it sought to expressly incorporate by reference the detail of the sum to be paid as set out in the earlier payment notice. S&T persuaded an adjudicator that this was insufficient to stand as a valid pay less notice. On a Part 8 application, Coulson J decided that Grove had complied with the requirement to "specify the basis of the calculation". The pay less notice was in that respect compliant.

Grove also sought a declaration that, in any event, it was entitled to adjudicate the "true value" of the payment application even if both its notices had been invalid. This required it to persuade the Court that the first instance decisions in ISG v Seevic, Galliford Try v Estura and Kersfield v Bray and Slaughter should not be followed. Coulson J agreed that the reasoning in those cases was erroneous and incomplete. He therefore declared that upon payment, an employer was entitled to commence an adjudication to establish the true sum due and make a claim for any consequential financial adjustment that arose as a result.

In respect of delay, Grove was required to serve notice of an intention to deduct liquidated damages and, then, a subsequent notice actually making the deduction. S&T complained that serving both notices within the space of one minute, as Grove had done, was insufficient to enable it to consider the warning. Coulson J held that it was sufficient that the two notices had been sent and received in the correct sequence and that there was no minimum period required between the two.

The case has wide-ranging ramifications for the construction industry and grapples with key questions that have concerned the TCC for some time.

Alexander Nissen QC represented the claimant.

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Equitix ESI CHP (Wrexham) Limited v Bester Generacion UK Limited [2018] EWHC 177 (TCC)

The Employer (Equitix) engaged the Contractor (Bester) to design and build the Wrexham Biomass Fired Energy Generating Plant. Equitix terminated Bester. Equitix commenced two adjudications against Bester, first, in respect of entitlement to EOT (none found by the Adjudicator) and, second, as to the validity and monetary entitlement from Equitix's termination (valid termination found by the Adjudicator and entitlement to c.£10m).

After written and oral submissions, the Court ordered a substantial partial stay of execution (£4.5m) on enforcement of the adjudicator's decision.

Tom Owen represented the defendant.

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Clin v Walter Lilly [2018] EWCA Civ 490

The Appellant succeeded in establishing, compared to the findings at first instance, a more limited scope of contractual responsibility on the part of an Employer under a Standard Form JCT Building Contract for obtaining necessary planning and conservation area consents for a residential development in Kensington.

The Court of Appeal rejected the Respondent's argument that there should be a strict implied term to the effect that any requirements of the local authority, whether legally justified or not, should be satisfied by the Employer and/or were necessarily at the Employer's risk under the contract.

Instead it was found that an Employer is only under an obligation to use 'due diligence' to obtain any required planning consents.

In doing so, the Court of Appeal rejected the Respondent's case that, as a matter of principle and contract, all risks associated with obtaining planning consent (including delays on the part of the planning department in dealing with the same and any unlawful or capricious steps taken by the local authority that may delay a project) were carried by the Employer.

Vincent Moran QC and Tom Coulson represented the appellant

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Systems Pipework Ltd v Rotary Building Services Ltd [2017] EWHC 3235 (TCC)

In these Part 8 proceedings the claimant sub-contractor sought a declaration that, contrary to the decision of an adjudicator, it was not deemed for all time to have agreed the contractor's assessment of the value of its works. Clause 28.6 of the parties' contract provided that the contractor could notify the "proper amount due for payment in respect of the Sub-Contractor's Final Account", and that the notified figure would become binding if not dissented from in writing within 14 days. The issue was whether a document provided by the contractor on 2 September was the notification envisaged by clause 28.6. A secondary factual issue was whether any notification had in fact been dissented from.

Coulson J held that the document provided on 2 September was not the notification required by clause 28.6 as a matter of form or substance, and would not have been considered to be so by the reasonable recipient. The contract drew a distinction between the gross valuation and the sum due for payment, which were manifestly not the same thing. The 2 September document was not notification of the sum due for payment for a number of reasons. First, the notification did not say on its face that it was the notification of an amount due. Second, it did not identify any amount as being due for payment; it was a gross valuation only. Third, there was no reference to it being a notification under clause 28.6. Fourth, the contractor's own evidence was that the document was a final account assessment only. Coulson J held that under a clause that provides for a deemed agreement of a sum due that binds the parties unequivocally then a notice given under that clause must clearly identify the relevant clause and the sum due. The fact that the recipient might have been able to work out the sum due from other documents was not sufficient; in order to be notification of a figure, the figure had to apparent without further calculation.

As to the secondary factual issue, Coulson J held that the sub-contractor had in any event dissented from the contractor's notification by the service of an adjudication notice within the 14 days required by the contract.

Ben Sareen appeared for the claimant.

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Multiplex Construction Europe Ltd v Gordon Alan Dunne [2017] EWHC 3073 (TCC)

This was an application for summary judgment under two personal guarantees. Multiplex had engaged DBCE as a sub-contractor on a number of different projects. In order to help DBCE with cash flow, Multiplex entered into an agreement to lend £4m as advance payments for future works guaranteed by Mr Dunne personally. Multiplex argued that these were indemnities. Mr Dunne argued that they were guarantees containing only secondary obligations.

Fraser J rejected the argument that the agreements should be construed strictly in Mr Dunne's favour. First, Mr Dunne clearly had a commercial interest in ensuring that his company kept going and so did not provide the guarantee gratuitously. Secondly, the contra proferentem rule exists, if at all, in only a very skeletal form. These were commercial parties of equal bargaining power and so the contra proferentem rule had no part to play. The task of interpretation was to be approached in the normal way.

Construing the first trigger, Fraser J held that it was an indemnity. The contract said that Mr Dunne would be "immediately" liable in the event of DBCE's insolvency. The trigger would make no commercial sense if it was secondary to DBCE's primary obligation. By definition they would be insolvent and so unable to repay the debt.

The second trigger occurred if DBCE was unable to immediately repay on receipt of a written demand. Even if this did show a secondary obligation, it did not matter because there was no reason why each trigger had to be interpreted in the same way. Multiplex was therefore entitled to rely solely on the insolvency trigger and Fraser J granted the application for summary judgment for £4m.

Paul Buckingham appeared for the claimant.

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HSM Offshore BV v Aker Offshore Partner Limited [2017] EWHC 2979 (TCC)

This claim concerned a dispute between the claimant, HSM, and the defendant, Aker arising out of a contract to carry out the fabrication, load-out and sea fastening of two process modules for use on the Clyde Platform in the North Sea. Aker had engaged HSM to carry out the works pursuant to a contract incorporating LOGIC sub-contract terms. During the project it had become apparent that the process modules would not achieve the agreed Ready for Sail Away (RfSA) date of 10 May 2015. The parties therefore entered into a Memorandum of Understanding (MOU) and Sail Away subsequently occurred on 10 August 2015. In the proceedings before the Court, HSM sought to recover sums that they alleged were due under the sub-contract or the MOU. Aker counter-claimed for liquidated damages and damages in respect of defects.

The first issue for the Court to determine was whether the execution of the MOU had altered the sub-contract such that the failure to meet the agreed RfSA date entitled Aker to levy liquidated damages. Coulson J held that the original RfSA date under the sub-contract was no longer operative because both parties knew that it could not be met. Further, the MOU had altered the sub-contract to change from a contract to complete by a certain date to a contract for HSM to use its "fullest endeavours" to achieve Mechanical Completion by 1 July 2015. On the basis that the contract had been altered to one of "fullest endeavours", Coulson J found that HSM had complied with such an obligation and therefore no issue of liquidated damages could arise in the circumstances.

The next issue for Coulson J to determine was whether any sums approved and paid by Aker could be clawed back as part of the final account process or whether an estoppel by convention had arisen which prevented Aker from doing so. Coulson J held that an estoppel by convention did not arise for several reasons, including the terms of the contract, the approval of the invoices having been "without prejudice" and the evidence of HSM's witnesses.

Coulson J also examined a number of individual items that HSM claimed they were entitled to as a matter of construction. Coulson J rejected each of these claims. HSM could not point to any individual term in either the MOU or the sub-contract that would entitle them to the items under normal principles of construction.

Simon Hughes QC represented the claimant. Adrian Williamson QC and Calum Lamont represented the defendant.

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Civil and Allied Technical Constructions Pty Ltd v A1 Quality Concrete Tanks Pty Ltd [2018] VSCA 12

The applicant applied for a stay of execution in the Supreme Court of Victoria Court of Appeal in Melbourne, Australia following a money judgment against them. In Victoria this requires 'special' or 'exceptional' circumstances to be shown. In this case, the special or exceptional circumstance was that the plaintiff had obtained litigation funding and charged the proceeds of the litigation to the funder. The Court accepted Robert Fenwick Elliott's argument that this justified granting a stay because the judgment sum, if paid, would immediately be dissipated and effectively be beyond the recall of the court, rendering an appeal nugatory.

Robert Fenwick Elliott successfully acted for the applicant.

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BRIEF ENCOUNTERS

Harry Smith gives his thoughts on life as a junior tenant and the opportunities and challenges at the modern commercial Bar.

What kind of work have you been exposed to in Chambers?

I am involved in a large number of international arbitrations with seats variously in the Middle East, Switzerland, Singapore, and London, together with a number of domestic arbitrations; I often advise and appear for parties in UK adjudications; and I appear regularly in the County Court and High Court (TCC and Commercial Court). In terms of subject-matter, I have been involved in a diverse range of commercial work: whilst the bulk of my caseload has been construction, energy, and insurance disputes, I am presently instructed in an auditor's negligence case about overpaid tax in the Commercial Court; last year I appeared for residential leaseholders in a complex service charge dispute in the First-Tier Tribunal; and in 2016 I appeared in the Divisional Court in the Legal Aid Agency procurement litigation.

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

My favourite part of the job is the oral advocacy, which I invariably enjoy, and my highlight so far has been my appearance for the claimant in *Jonjohnstone Construction Limited v Eagle Building Services Limited* [2017] EWHC 2225 (TCC). Having said that, I have just spent five weeks working on a very interesting case in Singapore (with time for a quick weekend trip to Bali in the middle), so that ranks pretty high on the list too!

What attracted you to a career at the commercial Bar?

I never seriously considered any career other than the Bar, though I didn't decide that it was to be the commercial Bar until I was at university. There were two key attractions for me at that stage, namely (1) the opportunities for oral advocacy, and (2) the constant variety which one finds in disputes about commercial law. Three years into tenancy, I would add a third attraction, which is the high level of personal autonomy and responsibility for one's own work which one has even at a very junior level at the commercial Bar.

What is the best professional advice you've been given?

The best piece of advice I have received is to always assume the worst when preparing a case. Doing this forces you to take your opponent's best points into account right from the start of your analysis, and to structure your case in a way which anticipates (and hopefully undermines or subverts) their lines of attack. It also helps you to filter out points run by your own side which will not withstand close scrutiny as early as possible.

What do you think are the biggest challenges facing the commercial Bar?

At present the commercial Bar is in excellent health. However, looking ahead, it seems inevitable that the fast pace of technological developments will bring changes to the way barristers work and, in due course, to the nature of the work they do and the role that they play. Legal research has become very much quicker and easier over the last two decades as a result of the development of online databases and that trend is likely to continue. Computers do not yet play any very significant role in the process of legal analysis itself, but that too seems likely to change with time. How best to respond to this development, as and when it arrives, may prove to be the defining challenge of the next few decades for the commercial Bar and, for that matter, the legal profession more broadly.

Are there any aspects of your job that you didn't expect?

I have been pleasantly surprised by two things since joining Chambers: first, the amount and quality of court work available to baby juniors, which compares favourably with what is available at many other commercial sets; and second, the variety and interest of Chambers' marketing events which have included, amongst many other things, annual trips to the Varsity rugby match and visits to Escape Rooms, Ping Pong and Flight Club.

What advice would you give to aspiring barristers?

Anyone considering the Bar should, first, have a realistic look at what the job involves. As a barrister, you work very long hours, often under considerable pressure, and almost always in circumstances where you (and only you) are answerable for the work you produce. You owe a heavy duty to your client, who may suffer serious and irremediable injustice if you fail to do your job properly. You are also self-employed, with no guaranteed income and in direct competition with your colleagues at the Bar in and out of Chambers. Notwithstanding all of that, it is an absolutely brilliant job and I would encourage anyone who is really determined to be a barrister to just go for it.

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Harry Smith was called to the Bar in 2014 and became a tenant at Keating Chambers on the successful completion of his pupillage in 2015. Harry has a broad and busy commercial practice in line with Chambers' profile, including construction & engineering, procurement, professional negligence, utilities, and insurance matters.

Grove Developments Ltd – v – S&T(UK) Ltd [2018] EWHC 123 (TCC)

Alexander Nissen QC discusses the key points and implications arising from Grove Developments Ltd v S&T (UK) Ltd, in which he successfully acted for the claimant.

The case of *Grove* raises three points of general interest to the construction industry, but this commentary focusses on two related points concerning payment notices and adjudication. It was the last substantive judgment from Coulson J before his well-deserved elevation to the Court of Appeal.

Grove Developments Ltd was engaged in the business of hotel developments. The building contractor was S&T UK Ltd. This was a project for the development of a Premier Inn hotel at Heathrow Airport. The contract was a JCT D&B 2011. Practical completion had been achieved. S&T issued an interim payment application for £14m. In response, Grove valued the work at £1.4m, providing full particularity as to the basis of that valuation. In doing so it used the spreadsheet which S&T had itself issued when making the application, dropping in its own lower values within the same document. So far so good, but, regrettably, its Payment Notice came too late. The effect of missing the date was that it became liable to pay the sum stated as due in the application unless it had served a valid Pay Less Notice. Grove did rather better with the timing of the Pay Less Notice. But the sender did not re-attach the spreadsheet with that notice. Instead he referred back to its content as sent with the Payment Notice. S&T contended that this was not a valid Pay Less Notice because it failed to "specify" the basis on which the sum had been calculated, that word coming from the contract and the HGCRA. S&T's argument was that the word "specify", on its true construction, imported the requirement for attachment of the detail within the Pay Less Notice itself. It was not enough to refer to a breakdown contained in some other document which was not itself attached. It said the contractor should not be left struggling through the project files to work out the basis of the calculation. By contrast, Grove said it was sufficient if the recipient of the Notice would know which document was being referred to. Applying that test, the reasonable recipient would have known that it was a reference to the detailed spreadsheet sent only a few days before with the Payment Notice.

The Payment Notice

Narrowly, the principle arising in this part of the case is that the word "specify" does not mean that the detail must be attached. It is a question of fact and degree whether a notice specifies the basis of the calculation in compliance with the contract and the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA").

Of broader interest is the shift in the Court's approach to the way in which notices will now be considered. Judges have previously tended to address the question of validity differently depending on whether it is a payment application on the one hand or a pay less notice on the other: contrast *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] BLR 694 with *Windglass Windows Ltd v Skyline* [2009] EWHC 2022. As Coulson J himself says in *Grove*, there is a hint in some of the cases that a pay less notice may be construed "more generously" than would be the application for payment, because of the draconian consequences which would flow from non-compliance with the requirements of a pay less notice. But the words used in the contract are the same and so, it could be said, there is no real justification for any difference of approach. For that reason, Coulson J confirms the test should be the same.

It may be that how a pay less notice will be construed is not a question which can be wholly divorced from the legal consequences of an adverse conclusion as to its validity. As a matter of policy, a tribunal is more likely to find a pay less notice invalid if it knows that the only consequence of that conclusion is a temporary deprivation of cash flow until the matter can be corrected in a second adjudication. When the law was thought to be as suggested in *ISG v Seevic*, one can understand a more liberal approach being adopted to the construction of pay less notices.

Even though the Judge reached very firm conclusions on this issue, he gave permission to appeal in respect of it because, he said, it was of importance to the construction industry and he therefore thought that there was a compelling reason that it be dealt with definitively.

Adjudication over the true value

The headline grabbing point in the case concerns the question of whether *ISG v Seevic* [2015] 2 All ER Comm. 545 was correctly decided. One of the fascinating things about the law and lawyers is their endless appetite for testing the boundaries. No sooner has one principle become established than questions are raised about how that new principle is to be applied.

The significance of *Grove* obviously lies in its decision that, in principle, an employer (or in the case of a subcontract, a main contractor) can adjudicate over the true value of an application if he fails to issue his notices in time. But, in the legal profession, that is already yesterday's news.

"It was never the purpose of the Act to enable contractors to retain, on an indefinite basis, a sum greater than that which was actually due to them in accordance with the valuation bargain."

Everyone tells me they always knew *Seevic* was wrong – even people with whom I remember debating that very question – and now the legal argument moves on: how quickly can I start the second adjudication? This was not a question which arose directly in *Grove* – it simply needed to establish the principle that it could re-adjudicate if it wanted to.

The principle established in *Seevic* (and *Galliford Try v Estura* which followed it) was that an employer who failed to issue both a payment notice and a pay less notice was to be taken as having *agreed* that the true value of the work was that which was stated in the application.

The effect of this was that the penalty for not serving notices was not merely the liability to pay the sum claimed but also to deprive the employer of the right to reclaim any windfall element which exceeded the true value of the work.

It was said that this was in accordance with the statutory scheme and that affording a right to adjudicate the true value would drive a coach and horses through the purpose of the amendments introduced in 2009.

As the Judge held, there are real difficulties with this analysis. I will focus on four.

(1) The wording

The words of the contract, which mirror exactly the words in the Act, specifically draw a distinction between "the sum due" (the valuation bargain) and the "sum stated as due" (the payment bargain). The sum due is the sum which is actually due, calculated in accordance with the valuation bargain. That is the agreement reached in clause 4.7.2. By contrast, the bargain struck in the notice regime (or, more accurately, the deal imposed by statute) is that the sum which is stated as due becomes payable if no timely notices are served. The sum stated as due may, coincidentally, be the sum due but it is likely not to be.

On the common and ordinary meaning of the provisions, there is therefore no warrant for creating a deemed agreement that the sum stated as due is the same as the sum due. As Coulson J said, there is no basis in fact for the agreement and it flies in the face of reality, which is that there is usually a plethora of disagreements over the sum due.

Coulson J said that the concept of a deemed agreement which lies at the root of *Seevic* and of *Galliford Try* was "not only unjustified, but it is also an unnecessary complication".

To use the language of adjudication, a dispute about payment of the sum stated as due is not the same as a dispute about the true value of the sum due.

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(2) Inconsistency with the final payment

The second difficulty with *Seevic* relates to the situation at the final account stage, when the final payment comes to be made. The Courts quickly realised that the *Seevic* principle creates an anomaly at this point. If applied in that context it would mean an employer who did not get his notices in on time in relation to the final account payment could find himself forever deprived of the opportunity to prove the true value of the final account.

So, the Judges said: well of course this does not apply at the final account stage. Edwards-Stuart J decided that at first instance in *Harding v Paice* and the Court of Appeal agreed. That was the occasion on which it could also have chosen to overrule *Seevic* but it chose not to do so in terms, hinting only that it may be wrong. The Court simply decided that, whatever may be the position at the interim stage, the final account payment could always be the subject of investigation as to the true value of the sum due irrespective of the absence of notices. O'Farrell J followed that approach in *Kilker Projects Ltd v Purton* [2016] EWHC 2616.

But the difficulty with that approach, not addressed by any Court, is that the wording in relation to the final account provisions and the effect of not serving notices in respect thereof is materially exactly the same as it is at the interim stage. It is also exactly the same in the Act.

So, it is completely anomalous to say that the same contractual and statutory wording has one effect at the interim stage and another at the final stage. In Grove, Coulson J recognised this.

(3) Equal treatment

The approach which I successfully advanced in *Grove* applies equally to the contractor and the employer. The employer who does the right thing and gets his notices in on time is only liable to pay the sum "stated as due" in his own notices.

Everyone (rightly) acknowledges that a contractor who is aggrieved by the employer's approach to valuation in a valid payment notice could adjudicate over the true value so as to get an increased valuation from an adjudicator. Indeed, the Act plainly envisaged that a contractor can ask for more: see Section 111(8) and (9). If the contractor is entitled to claim payment of more money because the sum stated as due does not reflect the sum truly due in accordance with the valuation bargain why should the employer not be able to do make the mirror image claim?

Coulson J said that giving the right to adjudicate over the true value was simply a matter of equality and fairness and that there was nothing in the Act which suggested a one-sided arrangement.

(4) The policy point

Edwards-Stuart J was impressed by the submission that permitting an employer to adjudicate over the true value would render the Act ineffective. Not so, as the Act still serves the function of rendering the employer liable to pay the sum stated as due if he does not serve proper notices.

It was never the purpose of the Act to enable contractors to retain, on an indefinite basis, a sum greater than that which was actually due to them in accordance with the valuation bargain. In cashflow terms, they could (or should) never have needed to be funded by that element which constitutes the excess windfall.

There is another point too. The NEC form of contract expressly enables the monthly payments to go in either direction. At the end of each month, a sum may be due to the employer or to the contractor, depending on the balance of the account as it then stands. So, the failure by an employer to issue his notices in time can immediately be rectified the following month by claiming an overpayment. There is nothing wrong with that and those provisions are statutorily compliant. So, if there is nothing wrong with allowing parties by their contract to rectify the consequences of not serving timely notices, why is it contrary to the Act to allow them to achieve the same result by adjudication?

The question which has most excited the industry is how soon the employer can start his adjudication.

So, I turn to the future implications which arise as a result of *Grove*[1]. The question which has most excited the industry is how soon the employer can start his adjudication. I have no doubt that there is already a case waiting in the wings to test that question – it did not arise directly in Grove, which simply sought to establish the principle.

There must, of course, be a crystallised dispute. So, on any view, an employer who has not served any form of notice or statement containing a valuation cannot begin his adjudication because he will not even have crystallised a dispute as to the true value.

But let us assume the conventional case in which the issue over valuation has, one way or another, been expressed. In my view the Courts should require the employer to have made payment before he can even start his own adjudication.

I say that for three reasons:

(1) First, there are several references within *Grove*, in which Coulson J emphasises the need to make payment of the sum stated as due before adjudicating over the true value. For example, Coulson J said:

> *"the adjudications will still be dealt with, by the adjudicators and by the courts, in strict sequence. The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due. I have made that crystal clear."*

(2) Second, the underlying reasoning in the judgment depends on prior payment by the employer having been made. An employer cannot easily crystallise a dispute that he is entitled to repayment until he has made the payment in the first place. In legal terms, there can be no cause of action based on over-payment until a payment has, first, been made. This is not a fetter on his right to refer a dispute at any time: it is based on a conclusion that a premature reference of such a dispute should fail in law.

(3) Third, this produces a proportionate outcome, commensurate with the policy of the Act. The provision of timely notices provides certainty and clarity. The penalty for non-compliance should be the obligation to pay. Once and if you have paid, you can reclaim any over-payment. It is also a neat outcome because it avoids the parties getting involved in tactical races between the payment adjudication and the repayment adjudication. Parties will be reluctant to extend time in the first adjudication (in circumstances where it would otherwise have been sensible for them to do so) for fear of narrowing the gap before the conclusion of the second adjudication. It stops or, at the very least, minimises the Courts having to determine tactical skirmishes about listing of the enforcement hearings, stays of execution and all the rest. In respect of the current approach to sequential adjudications, see Jackson J in *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 741 at [43] and *HS Works v Enterprise Managed Services* [2009] BLR 378 at [39-40]. In the latter, Akenhead J took a similar approach to Jackson J though he did suggest that "things might be different if there were effectively simultaneous adjudications and decisions": see [64].

S&T was also granted permission to appeal in respect of this issue on the grounds that it was an important point with industry wide ramifications. Pending that appeal, it is submitted that High Court Judges (and adjudicators) should follow *Grove*: see the approach in *Willers v Joyce* at [9], which requires Judges faced with conflicting first-instance decisions to follow the last of the decisions, absent cogent reasons to the contrary.

[1] Of course, I reserve the right to argue or decide differently from the views expressed should the need arise.

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