KC LEGAL UPDATE

Summer 2018

In this issue...

KEATING CHAMBERS

WELCOME

to the Summer 2018 Edition of KC LEGAL UPDATE

Readers will be aware, or such readers as are interested in the topic, that 1 May 2018 was the 20th anniversary of the Housing Grants Construction and Regeneration Act 1996 coming into force.

It is fitting that this significant anniversary should coincide with both the well-deserved promotion of Lord Justice Coulson (formerly of these chambers) to the Court of Appeal, and also that same judge's seminal decision earlier this year in *Grove Developments Ltd v S&T(UK) Ltd*. Surely no judge has made a greater contribution to this area of the law, both from the bench and as author of the leading text on the subject. It will be of enormous value to those involved in construction dispute resolution within this jurisdiction, whether as a party or potential party to a dispute or as a representative, that someone of such immense specialist experience should continue his judicial career in this role.

The Act appears to have been a success, at least in terms of providing a cost effective method of resolving disputes, i.e. compulsory contractual provision for adjudication.

Whilst I seem to be in a minority in expressing this view, I am generally impressed with the quality of adjudicators' decisions, particularly when one takes into account the necessary limitations of the exercise that they are asked to perform. Such decisions of course include account valuations and claims for time adjudicated by construction professionals, but also technical points of law or contract construction often decided by highly experienced barristers or solicitors.

Cases where the same dispute is decided by an adjudicator and then a second time in final proceedings are relatively rare: itself a measure of the success of adjudication in resolving the dispute, notwithstanding its temporary effect. I have had one dispute decided in turn by an adjudicator (an eminent QC), an arbitrator (a different QC), and then a High Court judge by way of a section 69 appeal. In that case the decision of the adjudicator was in my view the most carefully reasoned, no doubt (it will be said against me) because of the outcome. But frequently an adjudicator's assessment of disputes of fact, without live evidence and without disclosure, will often correspond more or less precisely with the determination of the final tribunal after a more costly process. I cannot think of any better illustration of this last point than Fraser J's judgments in *ICI v MMT* [2017] EWHC 1763 (TCC) and [2018] EWHC 1577 (TCC): in a £20 million final account and defects dispute the parties were left much where they had been following the earlier adjudications, albeit having incurred the greater cost of litigation.

The payment provisions of the Act have without doubt caused considerable problems, as demonstrated by the perceived need for significant amendments with effect from 2011, and the conflicting TCC decisions on how the amended payment provisions are intended to operate in relation to interim payments, starting with *ISG v Seevic* [2014] EWHC 4007 (TCC) in 2014.

No doubt there will be some further amendments to the Act, once the current points of controversy have all been resolved in the Court of Appeal.

Justin Mort QC

CONTENTS

SMART CONTRACTS *in* TRUSTLESS NETWORKS

Peter Brogden considers the functions of blockchain technology, and how the establishment of trustless networks could impact the legal sector.

Introduction

Humans are a trusting species. We trust friends not to lie to us. We trust chefs not to poison us. We trust banks to keep our money safe and secure. Trust is often built on consequences and consistency: the bank has always kept my money safe, and the chef knows I can sue him.

Trust of institutions runs deep within society. We trust that the credit card network has not been compromised. We assume that the bank has its security protocols up to date.

Trust underpins the financial decisions we make. When was the last time you invested directly in an Argentinian winemaker? An Indian start-up? What about the Filipino engineer who needs to patent his idea? These might all be great investments, but most people avoid them because they do not know or trust the participants, and the costs of enforcing on a bad deal are disproportionate. You are no expert in Argentine law, so who knows if you will recover your investment. The people who do make these investments tend to do so through layers of banks, investment companies and consultants – each taking their cut along the way.

Blockchain technology claims that it can change all of this by creating a secure trustless world network running "smart contracts". The claims are bold: whereas Uber made everyone a taxi driver, eBay made everyone an auctioneer, and AirBnb made everyone a hotelier ... blockchain technology lets anyone build a legal system. This paper explores how the blockchain works, and what it means for lawyers.

The Origins of the Blockchain

Understanding the blockchain requires a look back in time, to the heady early days of the internet. In 1999, bored college students discovered that they could compress the music on their CDs and share it (illegally) with others over the internet. By uploading files to a central depository (Napster was the largest), they could send them on to anyone who asked. The weakness is obvious in hindsight: Napster was the single point of failure and soon enough, the lawyers came knocking.

But the lawyers did not come soon enough. At its peak, Napster had over 80 million users, now disgruntled and looking for an alternative. By 2002, Bram Cohen at Buffalo University had invented BitTorrent: a decentralised file-sharing system with no single point of failure. Whilst the early versions still required a central tracker (not to store the files, but to say who had them), it was soon followed by Distributed Hash Table (DHT) technology which sent that look-up information to hundreds of peers across the network, removing any single point of failure from the network. It worked: today BitTorrent has over 250 million users and accounts for about a quarter of all internet traffic.

> *"Whereas Uber made everyone a taxi driver, eBay made everyone an auctioneer, and AirBnb made everyone a hotelier ... blockchain technology lets anyone build a legal system."*

Decentralisation gave people ideas. Napster's servers worked like banks, who store everyone's money and keep track of who owns what. The 2008 crash taught us that banks are not impregnable. What if we could decentralise the money system?

In January 2009, an anonymous software engineer using the pseudonym Satoshi Nakamoto released the first build of a new product called Bitcoin Core. Bitcoin brought together decentralised technology with cryptographic techniques that had already been developed elsewhere.

Cryptography in the Blockchain

Cryptography has been around for thousands of years, but until recently suffered from a singular problem: the sender and the receiver had to agree on a secret key before any messages could be sent. This required a meeting, or at the very least some form of unsecure communication before secure communication could begin. That was a problem.

The solution came in the 1970s. Public-key cryptography uses *pairs* of keys – a public and a private one – to encrypt and decrypt messages. A public key can be widely promulgated. Anyone with your public key can run it through a special one-way algorithm to produce an encrypted message that can only be decrypted with the corresponding private key (which the recipient keeps secret). For the first time, two people could exchange encrypted messages from the start, without intermediaries or non-secure communication.

Around the same time, cryptographers needed a way to check that a message had not been corrupted or tampered with during transmission. Various cryptographic 'hash functions' were invented to map a set of data of arbitrary size (the input) to a string of fixed size (the hash). The best hash functions would radically alter the hash, giving very minor variations in the input.

Given the message and the hash, it was possible to verify whether the message received was exactly the same as the message sent.

The blocks were beginning to fall into place. It was possible to send encrypted messages to anyone along a coordinated but decentralised network.

HOW A HASH FUNCTION WORKS

A hash function maps a set of data of arbitrary size (the key) to a string of fixed size (the hash). Changing the key slightly should comprehensively alter the hash. An example using the MD5 hashing algorithm:

The fox jumps over the dog	MD5 HASH →	01d83900271f3120f48b9848c372a063
The foxes jump over the dogs	MD5 HASH →	d79281ca91a8b35480794caf6294241b

What is the Blockchain?

Bitcoin is one implementation of blockchain technology, and a good example. It works like this:

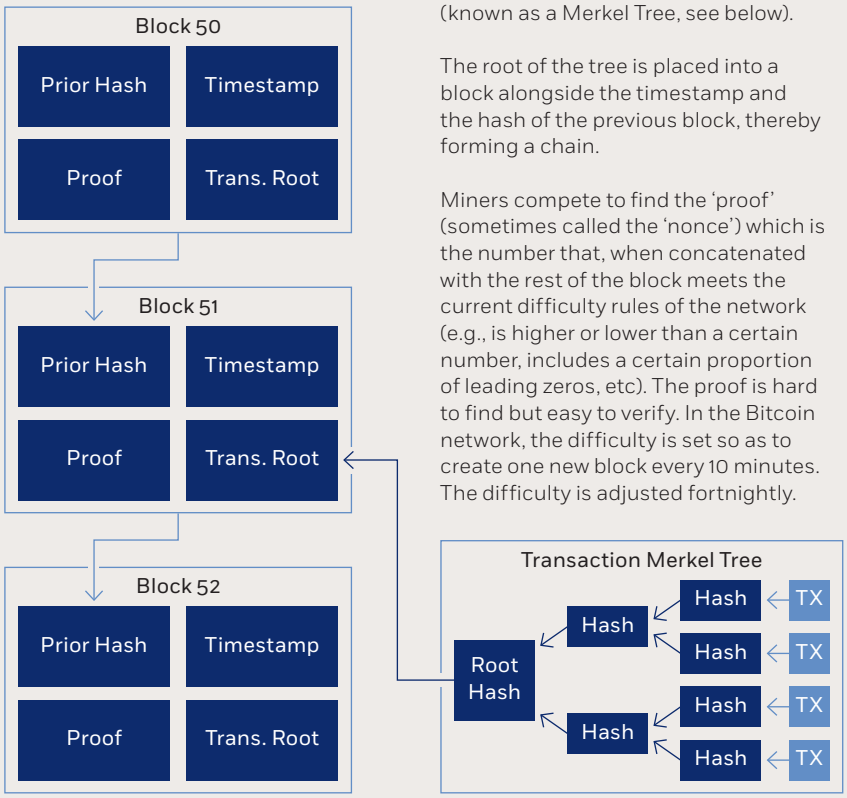
- Anyone can join the Bitcoin network by creating themselves a public/private key pair and connecting to local nodes through a Bitcoin client. Let's assume Alice has done this, and she has 5 Bitcoins. She wants to send one to Bob. Alice broadcasts a message to the decentralised network, with Bob's public key and the amount she wants to send. She hashes the message and signs it with her private key so every knows that it's her making the broadcast. The nodes around her check a global ledger to make sure that she's got enough Bitcoins, and they check her signature is valid. When enough nodes validate the transaction, the ledger is amended to reduce Alice's account to 4 Bitcoins, and increase Bob's account by 1. The ledger is public, and everyone holds a copy.

- Every 10 minutes, certain participants in the network (called 'miners') collect all validated transactions into a block. In order for a block to be accepted into the network, the miner must create proof-of-work. Proof-of-work regulates the supply of Bitcoins, which is essential to preserve value in any money system. Proof-of-work is achieved by solving a complex cryptographic problem, designed to be hard to find but easy to verify. The proof-of-work requires miners to find a number called the 'proof' (or 'nonce'), such that when the block content is hashed along with the proof, the result is numerically smaller than the network's current difficulty target. Every couple of weeks, the difficulty target is automatically adjusted to keep the mining time to about 10 minutes. Miners compete to solve each block, and the winning miner is rewarded with 12.5 Bitcoins (currently about £72,000).

- A solved Bitcoin block contains four things: a timestamp, a hash representing all transactions in that block, the proof found by the miner and – importantly – the hash of the *previous* block, thereby forming a chain.

- The chain is important because it prevents attacks on the network, and attacks must be expected on any money system. If an attacker controlled enough nodes, they could authorise a fraudulent transaction and publish it to the ledger. There would then be two ledgers: one with the fraudulent transaction, and another created by honest users who invalidated the fraudulent transaction because it didn't follow the rules. For the fraudster's ledger to be accepted, he would need to solve the block faster than the honest users, so would need to control more than half of the computing power in the whole network for at least 10 minutes. Even if he managed that, he would need to keep solving blocks faster than anyone else, every 10 minutes, to keep ahead of all the other nodes that contradict his blockchain history. To historically alter the blockchain is even harder – the attacker would need to fork the blockchain by solving each and every cryptographic challenge in the network for as far back as he wanted to go – requiring orders of magnitude more computing power than the rest of the network put together. There comes a point where controlling that much computing power stops being worth the reward.

HOW BLOCKCHAINS WORK



Transactions are transmitted to the network, where they are collated and hashed together into a tree of hashes (known as a Merkel Tree, see below).

The root of the tree is placed into a block alongside the timestamp and the hash of the previous block, thereby forming a chain.

Miners compete to find the 'proof' (sometimes called the 'nonce') which is the number that, when concatenated with the rest of the block meets the current difficulty rules of the network (e.g., is higher or lower than a certain number, includes a certain proportion of leading zeros, etc). The proof is hard to find but easy to verify. In the Bitcoin network, the difficulty is set so as to create one new block every 10 minutes. The difficulty is adjusted fortnightly.

Bitcoin has been wildly successful. It is accepted by many online retailers as it offers zero transaction fees when compared to the 2-3% levied by credit card companies. It is increasingly popular in China and other jurisdictions that strictly control their national currencies. At the time of writing, the value of the world Bitcoin supply is about £100 billion.

Ethereum

Whilst Bitcoin is important, it is the underlying blockchain technology that is the real prize. Just as decentralisation got people thinking about blockchains, so blockchains have people thinking about other kinds of trustless networks. Contracts are the obvious candidate.

The state creates money to support commerce. It imposes two rules on using money, which may be so obvious that we do not even recognise them as rules. They are: (1) you cannot spend more than you have; and (2) you do not still have the money that you have spent.

The Bitcoin network applies these rules programmatically when it validates a transaction.

But what if we extended the platform to execute *any* rules we wanted?

When two or more people write down private rules for their conduct, we call that a contract. We put our trust in contracts because we know that the court system can step in when contracts are broken. But courts can be slow, expensive and occasionally unpredictable. They might work well nationally, but nobody starts an international arbitration over a £50 debt. Smart contracts provide the answer.

Smart contracts are a way to reduce obligations to executable code and have it executed by a cryptographically secure worldwide network. Let us imagine that a bank enters into a smart contract car loan. Whilst the loan is outstanding, the borrower can drive the car but the bank retains the right to stop the borrower selling it whilst the loan is outstanding. If the borrower defaults, the contract rescinds access to the car and grants control back to the bank. If the loan is repaid, the bank's rights to the car are deleted and the borrower assumes complete control.

The ability to reduce contracts to code has existed for decades, but has never gained traction because we have never before had a secure trustless network, outside the control of either contracting party, which we know will execute the contract in accordance with its terms.

In July 2015, a young Russian programmer named Vitalik Buterin designed a blockchain-based system called the Ethereum Virtual Machine (EVM). It has generated an enormous level of excitement in the technology industry, and its currency, 'Ether', is already second in value to Bitcoin worldwide. The EVM is a Turing-complete computer capable of executing scripts on an international network of public nodes. It is similar to Bitcoin but extended to run any kind of contract, effectively as a cryptographically-secure "world computer".

How does it do this? The Bitcoin network and the EVM network both have a ledger that records which Accounts hold currency (Bitcoins on the Bitcoin network; Ether on the EVM). In addition to Accounts, however, the Ethereum network also holds Contracts (as compiled code) and records the machine state of each Contract on the network. Users pay tiny amounts of money (called 'Gas') to have the network run cycles of their contract and move money around the network. The amounts really are tiny, especially when compared to the 2-3% fees charged by credit cards: the average transaction today costs about half a penny, irrespective of value.

The big advantage of Ethereum – and smart contracts – is that they are automatically executable. If you have a stock option that is not honoured, you have to go to court, secure an injunction and call the bailiffs. With Ethereum, that option automatically executes on the network when its conditions are met, moving money between accounts without user input.

Ethereum and Real-Life Law

Does this mean the end of lawyers? In short, no. Law is flexible; it requires interpretation and judgement but is corruptible and sometimes uncertain. Machine code is rigid, inflexible and absolute. There are roles for both solutions.

Forming the junction between life and code does not necessarily require human judgement, but often it will. In the car loan example above, the question of whether a loan has been paid is a binary one, capable of being rationalised by a machine. By contrast, a relatively simple contract to paint a house might require the subjective evaluation of a human where the quality of the workmanship is in dispute.

Smart contracts might deal with subjectivity by incorporating call-out functions. If the painter is not paid, the owner might be required to raise and specify the dispute within a certain time, failing which the painter is paid automatically. Once the dispute is raised, the smart contract code might then define its parameters ('Is this workmanship adequate?') and transmit that question to a third-party arbitrator. The jurisdiction and scope of the dispute is pre-defined, reducing the potential for satellite litigation. A bid/offer system might allow the owner to offer less than the contract value, putting pressure on the painter to accept something less than the price in an effort to avoid the cost of an arbitrator's intervention (similar to CPR Part 36 in England). By making the losing party liable for the arbitrator's costs, we can disincentivise the raising of unmeritorious disputes.

"Low-cost, high-trust transacting unlocks the economic potential of new markets and new parts of old ones."

Ultimately, the subjectivity call-out functions could themselves be contracted out to the network. Let us say an aggrieved party submits evidence of their grievance to 100 human 'judges' across the network, who vote on the outcome. The 'judges' can themselves gain trust and respect from the network by consistently voting in line with (what transpires to be) the consensus, such that vote weight can be adjusted in favour of those who have demonstrated competence and impartiality in the past.

Of course, not everything can be reduced to written evidence and there will always be a role for inspection, cross-examination and advocacy. Smart contracts are, and probably only ever will be, a way to reduce basic and binary disputes to a simpler, cheaper and more certain means of dispute resolution.

What's the Point?

Smart contracts reduce transaction costs and improve trust in those transactions. By implementing what would, in effect, be a global legal system for private law, Ethereum allows individuals to cut out the middleman and invest directly in places they might otherwise ignore.

To return to my opening examples, why wouldn't you invest in that Filipino engineer if you knew (with cryptographic certainty) that you would recover your investment if his patent was rejected? Why not buy equity in that winemaker if you could be sure that you would automatically receive a share of his profit? Low-cost, high-trust transacting unlocks the economic potential of new markets and new parts of old ones.

Decentralisation also has social utility. A decentralised information network cannot easily be censored. A decentralised money system takes control away from governments (see, e.g., Bitcoin's current popularity in China). Right now, a decentralised microblogging platform called Eth-Tweet prevents anyone but the original poster removing their post.

Whilst this talk of cryptography and blockchains might sound very abstract, there are already real-world blockchain applications. New start-up Slock.it creates Wi-Fi connected locks for bikes, lockers and apartments – designed to interface directly with smart contracts. WeiFund is an Ethereum-based crowdfunding platform, which creates individual smart contracts between backers and pitchers. KYC-Chain is positioning itself as a trusted gatekeeper for consensus-based, and KYC regulation compliant, digital identities.

Blockchain technology has yet to reveal its full potential. Right now, it is in its ascendency. The next few years will be an interesting time for lawyers and inventors.

‘Man is Born Free
(and can therefore agree to live in chains)’

The Supreme Court decision in MWB v Rock Advertising goes against two Court of Appeal authorities and makes clear that NOM clauses are effective. In this article, ***Charlie Thompson*** *sets out a brief survey of the cases and seeks to highlight some practical implications of the Supreme Court’s decision.*

Introduction

The recent case of *MWB v Rock Advertising* [1] raises the question of what freedom of contract actually means in a commercial context. If commercial parties are free (subject to arguments over duress and undue influence etc) to bind themselves as they see fit, including agreeing specific formality requirements for any change to their contractual relationship, does freedom of contract permit the parties to subsequently ignore such a formality requirement in amending their contractual relationship? In other words, is freedom of contract served better by: (a) allowing parties to agree enforceable restrictions on the effect of their future conduct, or (b) allowing parties to ignore a previously agreed restriction on the effect of their future conduct?

The contention that freedom of contract is undermined if the parties are able to agree limits on their future conduct is redolent of recent debates over parliamentary sovereignty. As the conundrum goes, Parliament cannot be sovereign if it is subject to the laws of the EU, although, if Parliament chose to be bound by the laws of the EU does it not remain sovereign despite being bound by the laws of the EU?

Non-oral modification (“NOM”) clauses are found in many construction contracts; they provide that a variation to the contract shall be of no effect unless it is made in writing.[2] Such clauses are clearly designed to provide commercial certainty: setting out a clear process to be followed for any variation and thereby permitting parties to accurately track what changes have been agreed during the life of the contract. In the modern world, such certainty is all the more important given the possibility that a change to a contract might be agreed by an ever-increasing number of informal methods of instantaneous communication.

Nevertheless, and despite the clear commercial purpose of such clauses, until very recently, it had been thought that they did not operate to prevent a subsequent oral modification of a contract (although the legal analysis behind their ineffectiveness and therefore precisely what was required to circumvent the clause was not entirely clear). That position has now changed following the Supreme Court decision in *MWB v Rock Advertising* which goes against two Court of Appeal authorities and makes clear that NOM clauses are effective. This article sets out a brief survey of the cases and seeks to highlight some practical implications of the Supreme Court’s decision.

1 [2016] EWCA Civ 553

2 See, for example, NEC4 Core Clause 12.3, JCT SBC/Q 2016 clause 3.12 and FIDIC Red Book 2017 GC1.2(c)

Globe Motors

The first in the run of NOM clause cases is *Globe Motors v TRW LucasVarity Electric Steering Ltd*.[3] This was an appeal from a decision of the Commercial Court that TRW had acted in breach of an exclusive supply agreement with Globe. Globe was a designer and manufacturer of electric motors: important components in electric power-assisted steering systems, which TRW produced. TRW entered into an agreement with Globe that it would exclusively purchase electric motors from Globe. Despite this, in about 2005 TRW began purchasing "second-generation" motors from Emerson. Globe argued that this was a breach of the exclusive supply agreement.

At first instance, HHJ Mackie QC held that the purchase of second generation motors from Emerson was a breach of the exclusive supply agreement. Furthermore, the judge found that there had been an implied novation or variation of the agreement so that a Portuguese subsidiary of Globe, Porto, was a party to the exclusive supply agreement and therefore also had a cause of action. This variation was said to take effect notwithstanding the fact that that agreement had a NOM clause, in the following terms:

> *"6.3 Entire Agreement; Amendment: This Agreement, which includes the Appendices hereto, is the only agreement between the Parties relating to the subject matter hereof. It can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties."*

The Court of Appeal overturned HHJ Mackie QC's decision, finding that he had been wrong to conclude that the exclusive supply agreement did not apply to second-generation motors, such that there had been no breach. This finding was sufficient to dispose of the appeal. However, the Court of Appeal went on to express its view on the NOM issue in *obiter* comments. In this context, the Court of Appeal agreed with the first instance judge's decision that the agreement could be varied orally. Beatson LJ, giving the lead judgment of the Court, held that freedom of contract meant that the parties were free to agree a later contract which had the effect of varying the original agreement:

> *"Absent statutory or common law restrictions, the general principle of the English law of contract is [freedom of contract]. The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties' contract contains a clause such as Article 6.3 does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct."*

Moore-Bick LJ concurred, suggesting that an analogy might be drawn with parliamentary sovereignty and the principle that Parliament cannot bind its successor. Underhill LJ was more cautious. He had considerable doubts about refusing to enforce the intentions of the parties but could not find a conceptually satisfactory way to give effect to a NOM clause. The appeal was therefore allowed.

MWB v Rock Advertising

The same question came before the Court of Appeal in *MWB v Rock Advertising*. The case concerned a licence agreement under which Rock Advertising was to occupy premises in central London. Rock Advertising was unable to keep up payments of the licence fees and fell into arrears. Subsequently, a new payment plan was orally agreed with the credit controller of MWB, Miss Evans, to help Rock Advertising to clear the licence fee arears; in fact, this agreement had been made over the phone while Miss Evans was on a bus on Oxford Street. When Miss Evans told her manager about the agreement, he refused to ratify it and instead excluded Rock Advertising from the building.

MWB therefore issued proceedings for the arrears in licence fees and Rock Advertising counterclaimed for wrongful exclusion. At trial, MWB relied on clause 7.6 of the licence agreement which stated that:

> *"This licence sets out all of the terms as agreed between MWB and the licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."*

At first instance, the judge held that there had been an oral agreement but that it was ineffective because of clause 7.6. MWB successfully appealed to the Court of Appeal who followed *Globe Motors* and allowed the appeal. Even though the discussion of NOM clauses in *Globe Motors* had been *obiter*, the Court of Appeal in *MWB* felt bound to follow it given the detailed consideration the issue had been given in *Globe Motors*.

Supreme Court

MWB then appealed to the Supreme Court.[4] Lord Sumption gave the leading judgment and, overturning the Court of Appeal, determined that NOM clauses should be enforced in accordance with their terms.

> ***"The presence of a NOM clause does not prevent the parties from agreeing a subsequent variation to their agreement: it merely requires certain formalities to be met."***

In Lord Sumption's view, the only reasons advanced for disregarding NOM clauses were entirely conceptual but these conceptual reasons did not withstand scrutiny. For example, whilst entire agreement clauses regulated the position in the past, and NOM clauses regulated future conduct, the purpose behind both was the same, namely, to avoid uncertainty over the terms of an agreement or the existence of collateral agreements. Given their shared purpose, in Lord Sumption's view it was inconsistent for English Law to uphold entire agreement clauses but refuse to enforce NOM clauses in accordance with their terms. Ultimately, there was no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation. Further, Lord Sumption identified that there appeared to be no principled reason for why statute could demand formality requirements to be observed but the courts would refuse to uphold any such formality requirement agreed by the parties.

3 [2016] EWCA Civ 396.

4 [2018] UKSC 24

Ultimately, Lord Sumption's view of what freedom of contract required was to uphold the parties' intentions as at the date of contract:

> *"The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties' intentions. They cannot validly bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they express their intention to do so…Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows…The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed."*

It is respectfully suggested that this view is right. The presence of a NOM clause does not prevent the parties from agreeing a subsequent variation to their agreement: it merely requires certain formalities to be met. The advantage of Lord Sumption's view is that it does not encroach on the parties' freedom of contract, in that it enforces what the parties have agreed, whilst upholding the commercial purpose of NOM clauses (see paragraph 12 of his judgment) and still permits those parties to vary their agreement in accordance with the limitations they have agreed to be subject to.

Further, at paragraph 15, Lord Sumption dealt with the argument that, in agreeing an informal oral variation, it was clear that the parties intended to dispense with the NOM clause:

> *"What the parties to [a NOM] clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause…The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with eyes open."*

However, in his dissenting opinion Lord Briggs approached the matter differently. Lord Briggs' view was that freedom of contract and party autonomy was protected best by having a position in which:

> *"The NOM clause will remain in force until they both (or all) agree to do away with it. In particular it will deprive any oral terms for a variation of the substance of their obligations of any immediately binding force, unless and until they are reduced to writing, or the NOM clause is itself removed or suspended by agreement."* *(paragraph 25)(emphasis added)*

Lord Briggs' position reflects the celebrated dictum of Cardozo J in *Beatty v Guggenheim*[5] that was cited in the Court of Appeal by Kitchin LJ and Lord Sumption in the Supreme Court at paragraph 7:

> *"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived…What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again…"*

What Lord Briggs made clear, however, was that in his view, in order for such an oral variation to the parties' contract to be effective where there is a NOM clause, the parties must have turned their minds to removing or suspending the NOM clause itself. Whilst the idea of 'suspending' a NOM clause may seem uncertain, the advantage of Lord Briggs' view is that it provides some doctrinal clarity on the position adopted in the Court of Appeal in *Globe* and *MWB v Rock Advertising*, which left open the question of precisely how it was that a NOM clause could be disapplied (i.e. whether it was always ineffective or whether it was effective but could be waived).

In Lord Briggs' view: (a) the NOM clause is effective and so cannot be ignored by the parties to the contract, but (b) it can be waived or removed/suspended by agreement. Nevertheless, it is respectfully suggested that there are still some problems with Lord Briggs approach.

First, his position was that, whilst statute did require formality requirements for some contracts, it should only be statute that imposes such requirements. However, Lord Briggs did not identify a principled reason why this should be the case. Moreover, this approach would actually lead to the conclusion that NOM clauses should be wholly ineffective, contrary to his position that they are effective but can be done away with by direct agreement.

Second, it has a tendency to undermine the certainty for which the parties had originally contracted in agreeing the NOM clause. To that extent, it arguably does undermine freedom of contract in that whilst parties are free to change their contract by turning their minds to the specific clause in question according to Lord Briggs, the parties will have considerably less ability to police internal rules restricting authority to agree variations to the contract and will not, in practice, be able to trust the effect of a NOM clause.

Third, Lord Briggs' analogy with negotiations declared to be 'subject to contract' (see paragraph 29) may not be entirely direct. Whilst parties can agree to dispense with the 'subject to contract' label, or an agreement reached during such negotiations may by necessary implication indicate that the label has been dispensed with, the question of whether parties have reached an enforceable agreement that does away with the subject to contract label in the first place is surely different from one of whether the parties have agreed to dispense with a formality requirement in their pre-existing contract. The subject to contract scenario is not so much a question of whether the parties have agreed to dispense with a formality requirement (as it would be for NOM clauses on Lord Briggs' view) as a question of whether, as a matter of construction of the putative agreement, there is a binding contract despite the subject to contract label (i.e. an agreement for which a formal contract is not a condition precedent).

What Room for Estoppel?

The majority view in the Supreme Court does leave some questions open, however. For example, in what circumstances would the law permit the parties to circumvent the effect of a NOM clause?

> ***"…it is arguable that estoppel by convention offends against the very purpose of certainty at which NOM clauses aim."***

Even if it is consistent with principle to uphold the certainty of the parties' bargain, there must still be some means for the law to protect a party against the potential injustice of acting to its detriment on the

5 [225 NY 380, 387-388]

understanding that the NOM clause was no longer effective. Whilst Lord Sumption stated that *MWB v Rock* was not the place to explore the circumstances in which an estoppel could operate to defeat a NOM clause, he did say that:

> *"I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself..." (paragraph 16)*

The position therefore appears to be as follows:

a. An estoppel by representation may well be capable of defeating a NOM clause, in circumstances where:

   i. the parties have reached an informal agreement (including a variation) that would be enforceable but for the NOM clause;

   ii. one party has represented to the other that the agreement or variation will be valid despite the terms of the NOM clause; and

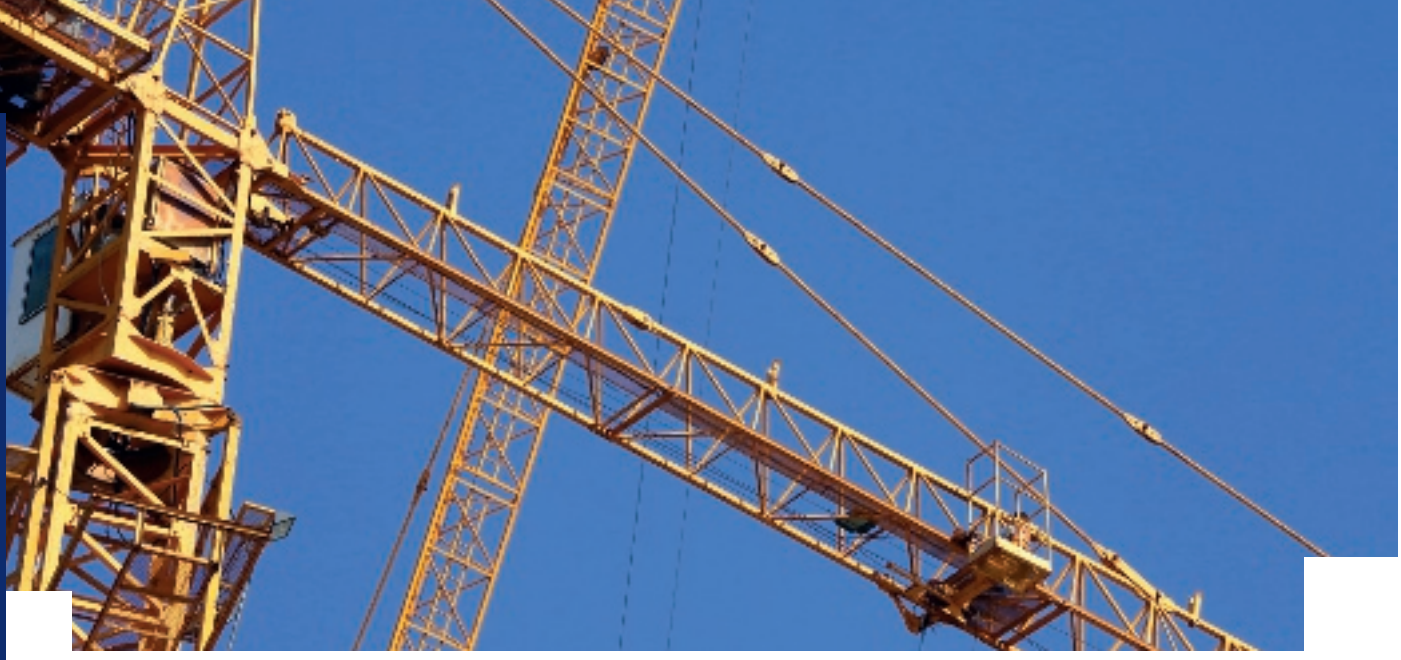
   iii. the other party has acted in reliance on that representation in some way that is external to the informal agreement or variation itself (i.e. additional to the promises made in the informal agreement).

b. There is no room for an estoppel by convention to circumvent the effect of a NOM clause as, if the parties could simply act in contravention of the NOM clause and still enforce their informal agreements, this would undermine the very purpose of the NOM clause and, if the parties were aware, be an instance of the parties *"courting invalidity with their eyes open"* (see paragraph 15 of Lord Sumption's judgment).

Though Lord Sumption did not expressly deal with estoppel by convention, in the section of his speech that did deal with estoppel, his only reference was to estoppel by representation. Further, as set out above, it is arguable that estoppel by convention offends against the very purpose of certainty at which NOM clauses aim: which purpose the Supreme Court upheld in *MWB v Rock Advertising*.

However, if or to the extent that Lord Sumption was not saying that it was impossible for an estoppel by convention to defeat a NOM clause (which he did not, of course, expressly state), it seems clear that he did intend for there to be limits on the application of such an estoppel. On this basis, what would such restrictions look like? It may well be that (a) the parties would have to operate on the shared assumption that (i) the NOM clause was no longer effective, and (ii) that their subsequent agreement was valid, and; (b) it would have to be unconscionable to go back on the shared assumption due to some detriment suffered by one party that was additional or external to any action taken on the basis of the agreement itself. In other words, the limit is provided by the parties essentially turning their minds to the effect of the NOM clause and by a detriment being suffered that is more than merely performing the terms of the otherwise invalid agreement.

When the ingredients of any such estoppel by convention are considered, it seems very much like the sort of agreement that Lord Briggs considered to be capable of varying the NOM clause itself (see paragraph 31). Assuming that Lord Sumption did not intend to deny the possible impact of estoppel by convention altogether (which is not at all clear), the major difference between his approach and that



of Lord Briggs is essentially one of legal classification: whether it is better to deal with such scenarios by way of estoppel or as an enforceable agreement (see Lord Briggs' comments at paragraph 31 *"...where estoppel and release of the NOM clause by necessary implications are likely to go hand in hand"*).

A further difference may well be that an estoppel by convention requires a longer-term course of conduct but, in theory, such an estoppel could operate in relation to one variation alone in respect of which the parties had acted in accordance with the shared assumption for a sufficient period of time.

"Whilst the idea that parties should essentially be free to make or unmake their contracts is appealing, it is also the case that a bilateral contract necessarily entails the agreement of some limits to one's freedom to act in the future."

What is difficult to envisage, though, is how often estoppel by representation or estoppel by convention will actually operate to ground a contractor's claim for unpaid sums pursuant to an orally agreed variation where there is a NOM clause. On one view, this would be an attempt to use such an estoppel as a sword and not a shield. Accordingly, claimants will need to be careful how they frame such a claim therefore (see, for example *Mears Ltd v Shoreline Housing Partnership Ltd*).[6]

Practical Implications

It is clear that parties to construction contracts will now have to be careful to record variations in writing. This will have a significant impact on the often informal and site-based agreement of variations that is commonplace on construction projects. However, there may still be some room for manoeuvre.

At paragraph 15 of his speech, Lord Sumption explained that the natural inference of parties agreeing an oral variation was not that they had agreed to dispense with a NOM clause; this was on the basis that NOM clauses merely made oral variations invalid but did not forbid them. Accordingly, the position may be different where a NOM clause forbids oral variations and the parties subsequently reach an oral agreement as, in that case, the agreement is a direct contravention of the NOM clause and it is arguable, therefore, that by necessary implication the parties should be taken to have dispensed with or suspended it.[7] Parties should therefore be astute to check the wording of any NOM clauses in their contracts: although agreeing a variation in writing is always the safest bet.

Further, Lord Sumption's speech indicates that collateral contracts may well still be able to operate despite the presence of a NOM clause and depending on its wording (see paragraph 14). In framing claims for informal or orally agreed variations, parties may choose to advance them on the basis that these agreements constitute collateral agreements not varying the contract itself but being additional thereto.

Finally, as set out above, parties may still rely on estoppel to protect them albeit the ambit of this protection is not quite clear. What is obvious however, is that in seeking to demonstrate detriment, the relevant party will have to show some reliance additional to the informal or oral agreement itself.

Conclusion

Whilst the idea that parties should essentially be free to make or unmake their contracts is appealing, it is also the case that a bilateral contract necessarily entails the agreement of some limits to one's freedom to act in the future. If such limits are in the nature of a contract, then it seems that giving effect to NOM clauses would tend to promote freedom of contract.

Further, that parties are free, in principle, to agree whatever limitations on their future conduct they might wish, also serves freedom of contract. It seems wrong (and somewhat contradictory) that the concept of freedom of contract could be invoked to render ineffective a clause that has been agreed between two commercial parties with the sensible aim of promoting certainty. Of course, even if such a clause is effective, the parties remain free to alter their bargain in accordance with the terms of that bargain. In that sense, it is difficult to see what threat to freedom of contract NOM clauses pose.

The Supreme Court has now spoken (almost decisively) about the effect of NOM clauses: which take effect according to their terms. However, in doing so the court has left open the related and important issue of the extent to which the various doctrines of estoppel will be able to protect a party relying on an oral agreement made in spite of a NOM clause. No doubt this is the next battle-ground for the TCC in dealing with orally agreed variations.

6 [2015] EWHC 1396 (TCC)

7 Such an approach would, however, come very close to Lord Briggs' approach to matters.

MULTI-PARTY DISPUTES *and* CO-MEDIATION

***Rosemary Jackson QC** and **Elizabeth Repper**, full-time mediators at Keating Chambers who regularly co-mediate, discuss why and how parties are using co-mediation.*

Mediation and Multi-Party Disputes

For all the well-known reasons, parties to any dispute will want to consider mediation.

Where there are multiple parties, such as businesses who have contributed design, work or materials to the same project or homeowners all affected by the same event, the desire to settle is obvious. A greater number of parties will bring greater risk: each party's legal costs are likely to be increased by the fact that they are fighting on multiple fronts. At trial, one party may ultimately be ordered to pay everyone's costs.

Often no-one dares attempt unilateral settlement for fear of being brought back into the party by way of contribution proceedings by the remaining parties. Drafting a watertight Calderbank offer is challenging. The parties therefore all go forward in the litigation together.

Traditional mediation may seem impossible, with the risk that the mediator starts off by visiting each of the six, eight or ten parties in their rooms and isn't ready to convene a plenary session until noon. If each party then makes a presentation at the plenary session it may be mid-afternoon before any real work is done.

Such issues are fuelling a desire for multi-party disputes to be mediated and case-managed by co-mediators. Being a party to such a co-mediation, however, requires parties to think differently.

The Basics

The sheer number of people involved in a multi-party mediation gives rise to a number of practical issues. In some cases, fifty or more people may want to attend the mediation day. Hard though it can be, finding a date when all parties can attend with their chosen representatives, insurers and experts is often the easy part. A venue large enough to offer each party their own room, as well as a further room large enough for all attendees to gather, must be found. There are also the logistics of getting everyone to agree to the mediators' terms and the wording of a suitable mediation agreement. These matters, which are surprisingly time-consuming, are often best handled by one party, but may need a hand from the mediators.

Sometimes, simply because of the issues in play, the parties will need more than one day. It can be helpful for the mediation days to be separated by a week to enable parties to re-group and ponder the developments of Day One.

Case Management by Co-Mediators

In the days and weeks leading up to a multi-party mediation, parties are likely to need assistance with case management. There may be ten or more sets of pleadings, expert reports and disclosure from which numerous issues arise.

Often, by the co-mediators talking to the parties in advance, such issues can be identified and the ground laid for fruitful discussions. It may be that a timetable is needed for the exchange of documents. It may be sensible if certain parties or groups of individuals meet or talk on the phone. Pre-meetings of groups with common or linked interests (for example all of the claimant parties, or all of the defendant parties) may be needed to agree an approach. It may also be helpful to have had a discussion about the level (and direction of payment) of a first offer before the mediation day so that all arrive with realistic expectations. Without this, there is a risk that it will take all day and into the evening to get the paying parties sufficiently aligned to put a first offer.

The Work of the Co-Mediators on the Mediation Day

Managing time and people will always be a big challenge at a multi-party mediation. Co-mediators are likely to arrive on the day with a common starting plan which, as with all mediations, will evolve.

To make the best of use of the agreed time, co-mediators are likely to need to work together as well as apart, meeting up at appropriate moments to pool ideas and strategise. If one mediator has trouble getting a message across to or obtaining a decision from one of the parties, there may be a benefit in the other mediator stepping in to speak to that party with a fresh approach to see if the blockage can be overcome.

At any point in the day, the co-mediators may be chairing different meetings, talking with certain groups or trying to help start a negotiation. This allows several strands of conversation or negotiation to develop concurrently.

Mediating with more than two parties can also add a layer of confidentiality to the process that must be of paramount importance to all. Some parties may require their discussions with certain other parties to remain confidential between them and the co-mediators. Some may require the same confidentiality to apply to their offers.

The Future of Co-Mediation

Awareness of the availability and benefits of co-mediation is growing in the construction, property and energy sectors and beyond. We have found that co-mediation allows us to combine our collective experience and offer a specific service to parties caught in multi-party disputes.

KEATING CASES

A SELECTION OF RECENT REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Dacy Building Services Ltd v IDM Properties LLP [2018] EWHC 178 (TCC)
This was the hearing of a preliminary issue following the dismissal of the claimant's application to enforce an adjudicator's decision summarily.

The hearing with oral evidence over the course of a single day was ordered to determine whether a construction contract had been concluded orally so that the adjudicator had jurisdiction.

At the outset, Fraser J made a number of observations that the ordering of a preliminary issue in an enforcement case was only to happen in exceptional cases such as this. In the body of the Judgment the Judge also reviewed the case-law on the weighing up of oral and documentary evidence as to the creation of commercial contracts.

The issue was whether an oral construction contract had come into being between the parties, being a sub-contractor and developer respectively, at a short meeting at a bus station or whether the contract was between Dacy and the impecunious main contractor, HOC.

Fraser J preferred Dacy's factual witnesses to those of IDM, and found that the surrounding circumstances and documents also supported Dacy's case.

He, therefore, held that an oral contract had been concluded between Dacy and IDM and that consequently the adjudicator had jurisdiction.

Samuel Townend represented the defendant.

Tees Esk & Wear Valleys NHS Foundation Trust v (1) Three Valleys Healthcare Ltd; (2) Bank of Scotland Plc [2018] EWHC 1659 (TCC)
On 12 December 2007 the Trust entered into an agreement with TVHL for the design and construction of a hospital, and provision of operational services, in Middlesbrough.

The Trust also entered into a funder's direct agreement (FDA) with the Bank of Scotland. Disputes arose between the Trust and TVHL and the Trust obtained adjudication awards in its favour in 2016. The effect of these adjudication awards was that the Trust was entitled to terminate under clause 44.3(c) of the Project Agreement. The FDA required the Trust to give two notices to the bank before terminating. On 1 June 2017 the Trust served the first notice stating that it had grounds to terminate the Project Agreement. On 29 June 2017 the Trust served the second notice, the "Paragraph 3.2.2 Notice", the validity of which was in dispute.

Paragraph 3.2.2 of the FDA required the Trust to give notice to the bank setting out "details of any amount owed by Project Co to the Trust, and any other liabilities or obligations of Project Co of which the Trust is aware (having made proper enquiry) which are: (a) accrued and outstanding at the time of the Termination Notice; and/or (b) which will fall due on or prior to the end of the Required Period, under the Project Agreement."

The judge rejected an argument that the qualification "of which the Trust is aware" attached only to "other liabilities or obligations". O'Farrell J held that on reading the contract as a whole it was clear that the obligation also attached to "any amount owed". This conclusion was strengthened by the fact that there was express provision elsewhere in the contract for amounts of which the Trust was not aware.

The judge also held that there was no obligation on the Trust to provide evidence of the enquiries that it had carried out. Turning to the notice that had in fact been given, O'Farrell J held that it complied with the contractual requirements. Although the descriptions were brief, it set out clearly and unambiguously the information required by the contract.

Adrian Williamson QC represented the claimant.

BAE Systems Pension Funds Trustees Ltd v Bowmer & Kirkland Ltd & Others [2018] EWHC 1222 (TCC)

In this case BAE discontinued its action against Geofirma, the second defendant. CPR Part 38.6 provides that a claimant who discontinues must pay the costs of the defendant unless the court orders otherwise. BAE sought an order from the court that Bowmer & Kirkland, the first defendant, should pay Geofirma's costs.

The project concerned the design and construction of a warehouse in Cheshire called Unit 2. BAE was the freehold owner of the land. Bowmer & Kirkland was the contractor. Goefirma was engaged as subcontractor and specialised in soil stabilisation. There were alleged to be defects in the floor slabs causing settlement and cracking.

The defendants gave warranties to BAE which were executed as deeds on 27th September 2004 with limitation expiring in September 2016. In August 2016, with the end of the limitation period approaching, BAE commenced proceedings against all possible defendants. Once proceedings had been issued a standstill agreement was entered into to allow the pre-action protocol to be complied with.

In their pre-action letter, BAE alleged that the slab construction was defective because there was insufficient lime in the filling. BAE also pointed out that they did not have a copy of the sub-contract and requested a copy. In reply, Geofirma provided a copy of the subcontract order but said that the executed version was likely to be in Bowmer & Kirkland's possession. Geofirma stated that it was clear from the scope of works that they had not been instructed to do work on Unit 2 and that the claim against them was therefore inappropriate.

Bowmer & Kirkland stated that they could not find a signed copy of the subcontract but that the work was carried out by vibro compaction, not by the addition of lime. BAE replied asking Bowmer & Kirkland to set out exactly what works Geofirma did carry out in relation to Unit 2. There was no response to that request. Following a CMC, by letter dated 13th October 2017, Bowmer & Kirkland confirmed that they would not be seeking contribution against Geofirma. In this application BAE complained generally about Bowmer & Kirkland's failure to engage with its request for the subcontract and argued that on that basis it should be Bowmer & Kirkland who pay Geofirma's costs.

Jefford J refused the application. The judge held that BAE's Particulars of Claim, which included a positive averment that Geofirma's works included lime stabilisation to Unit 2, showed that BAE took the risk that the allegation turned out to be wrong. This repeated the risk that they had already run

by commencing proceedings against all possible defendants before they were in a position to ascertain the true position under the contract. Asking Bowmer & Kirkland to formally confirm the position could not have the effect of transferring the risk to them.

Jefford J held that while the court has a wide jurisdiction under Part 38.6, it would only be in an unusual case that one defendant would be ordered to pay the costs of another. The judge further held that the cases in relation to Sanderson orders could provide some guidance as to how the court should approach a case such as this.

Calum Lamont represented the claimant.

–

CVU v Transport for London [2018] EWHC 831 (TCC)

In 2013 TfL entered into framework agreements for the maintenance of roads with four different contractors, including CVU. The Framework Agreement with CVU was entered into on 15 April 2013 and provided for conditions, rates, and prices for the carrying out of various highway works across London. This agreement was to govern call off contracts for works between CVU and various possible employers. On 15 April 2013 CVU and TfL entered into the Call Off Contract for works to the highway network for which TfL is responsible.

Where works will restrict the width of a carriageway, permission is required from the relevant highways authority. In this case, a scheme had been set up by TfL known as the London Permit Scheme (LoPS) to deal with requests for permission. It is a criminal offence for a works promoter to carry out works to the highways without a permit and conditions may be imposed on the grant of any given permit. Different procedures must be complied with depending on whether the works might result in a significant and adverse impact on the Transport for London Road Network (TLRN).

In this case CVU sought a declaration that, in a case where conditions were imposed by LoPS, they were not restricted to pricing the works under the Schedule of Rates in the Framework Agreement. CVU argued that they were entitled to submit a quotation outside of the Schedule of Rates to take account of the extra costs that would be incurred as a result of the restriction. This was resisted by TfL who argued that the Schedule of Rates was deemed to include the value of compliance with restrictions imposed by LoPS.

O'Farrell J refused to grant the declaration sought by CVU. The judge accepted TfL's argument that the rates were deemed to include the cost of any restrictions imposed. The judge held that TfL's interpretation was in accordance with the natural and plain meaning of the words and made commercial sense. In particular the judge held that any risk that contractors would include a premium to take account of the uncertainties inherent in the permit scheme was offset by the competitive tendering process which had been held.

Adrian Williamson QC represented the defendant.

–

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (Quantum) [2018] EWHC 1577 (TCC)

This case arose out of a contract for the installation of pipes at a paint manufacturing plant in the North of England. MMT was the contractor and ICI the employer. The original value of the works was £1.9m but MMT was eventually paid £20.9m following a Project Management Instruction to significantly increase the scope of the works.

Fraser J had previously decided the issue of liability largely in MMT's favour in an earlier judgment. In this case Fraser J had to decide, firstly, whether ICI could make out a case that they had overpaid MMT by approximately £10.9m during the course of the project and, secondly, the value of MMT's counterclaim for wrongful repudiation.

The judge accepted MMT's argument that the sums, rates, and measures agreed between the ICI team and the MMT team during the course of the project constituted unanswerable evidence of the true value of the works. What little evidence there was to support ICI's assertions that MMT should have been paid less did not even begin to meet the weight of contemporaneous evidence in MMT's favour.

The judge also accepted the argument that agreements reached with the Project Manager and ICI constituted legally binding relations as to the final value of each individual item of work. Therefore it was not open to ICI to revisit the sums that had been agreed at a commercial meeting.

In any event, Fraser J agreed with MMT that the burden of proof fell on ICI to recover an alleged overpayment. Approaching the matter from first principles he held that given ICI had pleaded a case of unjust enrichment, it was for them to make out such a claim. They were unable to do so and the claim for overpayment was dismissed.

Turning to MMT's counterclaim, Fraser J awarded most of the sums claimed by MMT. In the earlier liability trial, Fraser J held that a commercial decision had been taken by AkzoNobel, the company that acquired ICI, to force MMT into insolvency by refusing to pay them sums due. This strategy eventually led ICI to wrongfully terminate the contract. The counterclaim was for damages flowing from that repudiation.

The judge awarded 12.5% of the contract sum to represent lost profits; the sums spent on professional advice to consider the company's position following the repudiation; and £1.3m because of a reduced payment that MMT were forced to accept on another project due to the precarious financial position that ICI had forced them into.

Justin Mort QC represented the defendant.

–

Ian White v The Coal Authority [2018] UKUT 134 (LC)

This was a claim brought by Mr White against the Coal Authority under the Coal Mining Subsidence Act 1991. The respondent had admitted liability and so only quantum was in issue.

The claim concerned Tidbury Castle Farm in Coventry. Between September and December 2010 there was mining taking place in the vicinity of the farm, 770m underground. Between April 2011 and April 2013 the claimant was living elsewhere because of the breakdown of his marriage. When he returned to the farm he discovered substantial cracking to the floors and walls as well as significant tilting. This was a result of subsidence caused by the mining. The tribunal observed notable slopes across some of the floors and window frames during a site visit.

It was agreed that the only way to safely rectify the tilting was to demolish the house and rebuild it. Under the statute, the Coal Authority is liable to do repairs, or pay the cost of repairs, provided that those repairs are "reasonably practicable". The Upper Tribunal accepted the claimant's argument that it was "reasonably practicable" under the statute to demolish and rebuild the house.

Furthermore, it was irrelevant that the claimant intended to rebuild a different house once the defective one had been demolished. The statute made clear that he was still entitled to be compensated in such circumstances.

At the close of evidence, the respondent sought to put a new case before the tribunal. The tribunal held that this had been brought too late and was, in any event, a bad point. The respondent argued that the claimant should have given notice of his election to have the respondent pay for the repairs under s.8(4) rather than s.8(3). The respondent's argument was inconsistent with the statutory scheme and would have bizarre practical consequences. It was therefore rejected.

The tribunal ordered that the respondent pay £859,827.83 in damages plus any applicable VAT. The tribunal also considered whether it would be appropriate to award indemnity costs against the respondent, but held that the high bar for an indemnity costs award had not been met.

Gaynor Chambers represented the claimant.

–

40 UNDER 40:
International Arbitration

Keating Chambers are delighted to support the recent publication of *40 Under 40: International Arbitration*. The brainchild of Carlos González-Bueno, Partner at González-Bueno SLP in Madrid, and distributed by Spanish publisher Dykinson, *40 Under 40* is a collaboration between 40 legal practitioners all under 40 years of age. The co-authors of this book, of which almost half are women, come from all corners of the globe and, according to Alexis Mourre (President of ICC International Court of Arbitration), reflect the "*almost perfect image of the arbitration world of tomorrow*."

Each chapter is authored by a different rising star in arbitration, and topics cover the essentials of arbitration, including duties of good faith (by Keating Chambers' Jennie Wild), confidentiality and transparency (Emily Hay – Hanotiau & Van den Berg), early dismissal of unmeritorious claims and defences (Nicolás Costábile – WilmerHale), and court assistance in acquiring evidence (Rahul Donde – Lévy Kaufmann-Kohler). Other topics provide basic guides to fast-track arbitration (Rute Alves – PLMJ Advogados), consider the impact of cognitive biases on arbitrators (José M. Figaredo – González-Bueno SLP) and raise important questions on the transparency and diversity in arbitrator election (Elisa Vicente Maravall - Garrigues).

Keating Chambers, together with Ashurst, were proud to celebrate the publication of this book by welcoming 13 of the 40 co-authors from countries including Switzerland, Spain, France and even the USA, to a launch event in London in May 2018. Co-ordinated by Jennie Wild (Keating Chambers) and Emma Martin (Ashurst), the event comprised an introduction from Editor Carlos González-Bueno, and brief overviews from 11 co-authors on their chapters.

In support of the diversity reflected by the co-authors of *40 Under 40*, the launch event also promoted the Equal Representation in Arbitration Pledge, which seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators. The goal of the Pledge is to achieve a fairrepresentation as soon as practically possible, with the ultimate goal of full parity. The values of the Pledge to endorse more equal representation in the arbitration community are echoed by the very essence of the diverse contributors to *40 Under 40*. This collaboration of a broad range of domestic and international practitioners, and the discussions presented in this pioneering publication, could be an insightful glimpse into the future of arbitration.

***Jennie Wild** joined Keating Chambers in 2014 and has a broad practice covering the spectrum of commercial disputes that fall to be resolved by way of litigation, adjudication, international arbitration and ADR, including energy, construction, engineering, professional negligence and associated insurance disputes. Jennie has experience of heavy, complex and high value claims in international arbitration and the Technology and Construction Court. In addition to her work as counsel, Jennie is a contributing editor of the Construction Law Reports, Keating on Construction Contracts, Keating on JCT, Keating on Offshore Construction and Marine Engineering Contracts and Halsbury's Laws.*

Foreword

Alexis Mourre

President, ICC International Court of Arbitration
Independent Arbitrator

The importance of this book can hardly be overstated. 40 bright and experienced practitioners, below 40 years of age, coming from all continents, almost half of them women, is an almost perfect image of the arbitration world of tomorrow. Achieving greater gender, generational and regional diversity is a fundamental condition for maintaining trust in arbitration as a global system of justice and as a fair and legitimate means of resolving international business disputes. With globalization and the rise of emerging markets, in particular in Asia and Africa, arbitral institutions need to reach out to a much broader population of arbitrators of diverse origins and experiences if it wants to meet the needs of the users of arbitration in the decades to come.

Tomorrow's arbitration will also see many more women at the forefront. The ICC has endorsed the Equal Representation in Arbitration pledge, a landmark initiative that has put the promotion of women in international arbitration as a top priority for institutions and law firms. The current situation is however still far from being satisfactory, and we need decisive action to increase significantly the proportion of women amongst counsel, arbitrators, and of course in the governing bodies of arbitral institutions. This book, by featuring an almost equal number of women and men amongst its authors, is a great contribution to this objective.

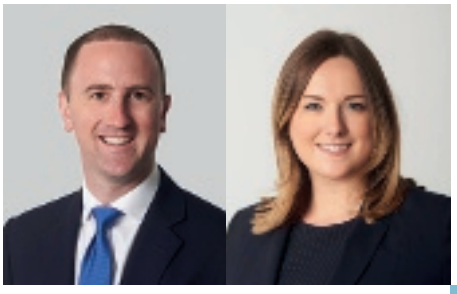
Allowing young practitioners to be appointed as arbitrators is of paramount importance. The role of institutions is in this respect primordial. Many young practitioners get their first appointment from institutions rather than from the parties, an ideal opportunity to show their professional skills and to then make their way as arbitrators. Institutions are of course conscious of the fact that their primary duty is to select the best profile in any given case, and the promotion of young arbitrators should not be at the expense of the experience that is in certain instances required. However, even if many young have less years of practice behind them, they often have accumulated very significant experience in acting as counsel or arbitral secretary, and are able to conduct an arbitration with no less skills than their elders. I am always amazed to see the very high quality of awards produced by arbitrators who are still in their late thirties or in their forties. Young practitioners deserve the trust of the parties and of institutions.

It is also incumbent upon institutions to invest in training, and I am proud that the ICC, in particular through the ICC Institute of World Business Law, is displaying very significant efforts in organizing programs such as the now famous PIDAs, the Arbitration Masterclasses, the Arbitration Academy, and more recently its training programs for arbitral secretaries. The ICC Young Arbitrators Forum (YAF) is also a fantastic vehicle for moulding the next generation of leading international arbitrators and experts.

This book brings together forty authors who are among the most promising rising stars in international arbitration. The topics elected by the authors go to the fundamentals of arbitration, such as due process, independence and impartiality, the role of good faith, and human rights. The book also addresses in a talented and often innovative way novel questions such as the role of psychology in arbitration, cognitive biases, third-party funding or the way in which technology will transform our profession in the years to come. My only wish is to see further editions of this remarkable book, and to see more authors from Africa and Asia amongst its future authors. I have no doubt that Carlos González-Bueno will heed this call. We should all be grateful to him for this remarkable initiative, which will greatly contribute to open the door to the new generation of arbitrators.

Transfer Of Proceedings Within England And Wales: Is It Time To Take A Fresh Look At Jurisdiction Clauses?

Jonathan Selby QC and Emma Healiss explore the benefits and challenges of regional transfer of proceedings, and consider how jurisdiction clauses may provide a solution.



Introduction

The introduction of the Business and Property Courts is intended to promote a stronger culture of a more unified court network – not just between the different specialist lists, but also between the courts in London and the regions.

There are many established specialist Technology and Construction Courts outside London, in Birmingham, Bristol, Cardiff, Exeter, Leeds, Liverpool, Newcastle, Nottingham and Manchester, all of which serve the important functions of dispensing justice in their local areas and of supporting the many firms in the regions that conduct specialist work.

> *"Neither of us has ever seen a jurisdiction clause in a contract which provides for court disputes to be resolved in a particular city."*

But what if you are a national company, headquartered in (say) Manchester, carrying out work, acting for clients and engaging sub-contractors all around the UK? In that scenario, it is very likely that you may be a defendant to proceedings which are commenced far away from your headquarters and perhaps also far away from where your preferred legal and expert advisers are based.

Those proceedings can therefore be very inconvenient for you, particularly if they go to trial. Not only will you have to incur travel and accommodation costs, which may not otherwise be incurred, but you may be exposed to a greater risk that important witnesses are reluctant to cooperate because (as can happen) they no longer work for your company and will not (or cannot) take the time off work to travel to a distant court to give evidence.

Contracts frequently contain arbitration clauses providing for the seat of arbitration to be in a particular city. It is also common for contracts to contain exclusive jurisdiction clauses providing for disputes to be resolved in the courts of England and Wales. However, neither of us has ever seen a jurisdiction clause in a contract which provides for court disputes to be resolved in a particular city.

We consider that such clauses may need to be considered by parties in the future. As we will explain below, the law governing the transfer of proceedings from one court to another generally favours the claimant. Therefore, if you want control over the location of the court where your disputes are resolved, provision ought to be made for this in your contracts.

The Law on Transfer

A party wishing to make an application for transfer must do so to the court in which the claim is proceeding (CPR 30.2(6)). The criteria that the court will apply in considering such an application are found at CPR 30.3. They include (a) the financial value of the claim and the amount in dispute, (b) whether it would be more convenient and fair for hearings (including the trial) to be held in some other court, (c) the availability of a judge specialising in the type of claim in question and in particular the availability of a specialist judge sitting in an appropriate regional specialist court, (d) the importance of the outcome of the claim to the public in general and (e) the facilities available to the court at which the claim is being dealt.

Further criteria are specified in the Business and Property Courts Advisory Note, including (a) whether there are significant links between the claim and the circuit in question, (b) whether court resources, deployment constraints or fairness require that the hearings (including the trial) be held in some other court than the court it was issued into, (c) the wishes of the parties, which bear special weight in the decision but may not be determinative, (d) the international nature of the case, with the understanding that international cases may be more suitable for trial in centres with international transport links and (e) the availability of a judge specialising in the type of claim in question to sit in the court to which the claim is being transferred.

There are two cases that are often cited on applications for the transfer of proceedings made in the TCC.

The first is *Neath Port Talbot v Currie & Brown Project Management Limited*[1] in which the defendants applied to the TCC in London for proceedings to be transferred from the Bristol District Registry. The court agreed to deal with the application even though it ought to have been made in Bristol in accordance with CPR 30.2(6). The defendants argued that an order for transfer was appropriate because they could not afford the cost of a hearing in Bristol in circumstances where the legal team and experts were based in or around London and would incur additional cost in having to travel to Bristol. Ramsay J refused the application on the basis that the defendants had provided no evidence in support of their position and they had so far managed to fund the litigation using London solicitors and counsel. The judge also set out the following general principles:

- In relation to TCC cases, the central factor will generally be whether it would be more convenient or fair for hearings (including the trial) to be held in London rather than in the regional centre;
- Generally, where there is a TCC judge at a regional centre which is convenient to the parties or which, on the balance of convenience, is the appropriate place for management and trial of the case to take place, the case should remain at that centre rather than being transferred to London. In those circumstances, cases issued at a regional centre will be case managed and tried by the full time or principal TCC judge or another TCC judge sitting at that centre; and
- When a TCC case at a regional centre merits case management or trial by a High Court judge it will generally be more appropriate for a High Court judge to case manage or try that case at a regional centre rather than for a case to be transferred to London.

1 [2008] EWHC 1508 (TCC)

"The TCC has a preference for retaining cases in the court at which the claimant issued the proceedings unless there is good evidence that the balance of convenience lies in favour of ordering the transfer."

The second is *Tai Ping Carpets UK Limited v Arora Heathrow T5 Limited* [2] in which proceedings had been commenced in the Birmingham District Registry. The defendant in this case also applied for an order for transfer to the London TCC on the ground that the balance of convenience favoured the transfer to London. It relied upon a number of points in support of that proposition including that (a) the defendant company was based just outside London, (b) the subject matter of the contract was at Heathrow, (c) the defendant's witnesses, solicitors and counsel were based in or around London and (d) any question of increased costs could be offset by the discount which the defendant company (a hotel chain) was prepared to offer to the claimant's advisers and witnesses if they stayed in their hotels in London. The claimant conversely argued that the balance of convenience favoured a trial in Birmingham, relying on the fact that (a) the claimant was a small company based very close to Birmingham, (b) its witnesses and solicitors were based in or around Birmingham and (c) it would be more expensive and more inconvenient to transfer the case to London.

In dismissing the application, Coulson J determined that the factors raised by each party effectively cancelled each other out and stated that, in the absence of any significant factors favouring the transfer to London, the case should remain in Birmingham because that is what the claimant had requested. It was the claimant who had gone to the trouble and expense of starting the proceedings, and it was the claimant who ran the costs risk, to the extent that its claim may ultimately have been unsuccessful. The judge further stated that it was inevitable that proceedings in London would be more expensive and, given the relatively modest sums in dispute (£600,000), it was appropriate to ensure that costs were kept down.

These cases demonstrate that the TCC has a preference for retaining cases in the court at which the claimant issued the proceedings unless there is good evidence that the balance of convenience lies in favour of ordering the transfer. It seems that a defendant applying for an order for transfer will have to provide evidence that the burden to it of continuing the proceedings in the existing court outweighs that to the claimant of the transfer. A defendant is also unlikely to be able to rely on factors such as the need for a High Court judge to hear the case, for example due to the financial value or complexity of the proceedings, as TCC High Court judges are now available to hear cases in the regional centres.

2 [2009] EWHC 2305 (TCC)

"If you do want greater control over the location of the court in which your disputes are resolved, you should seek to provide for this in your contracts."

Would a clause providing for the resolution of Court disputes in a particular city or District Registry be enforceable?

"Exclusive jurisdiction" clauses are commonplace in commercial contracts, often specifying that the courts of England and Wales have exclusive jurisdiction to determine any dispute or claim arising out of or in connection with a contract. These clauses are usually valid and enforceable. However, the meaning of "jurisdiction" in the context of such clauses is that of the courts of England and Wales collectively rather than that of an individual court within England and Wales.

Parties to a contract may wish to agree a clause specifying, for example, that the London TCC has exclusive jurisdiction or that any claims must be commenced in the London TCC. However, there does not presently appear to be any authority considering whether such a provision is enforceable.

The arguments in support of such a clause being enforceable include (a) that the clause reflects the parties' agreement and should be enforced as would any other term of their contract and (b) that it would allow the parties a degree of certainty about where any proceedings are to be conducted.

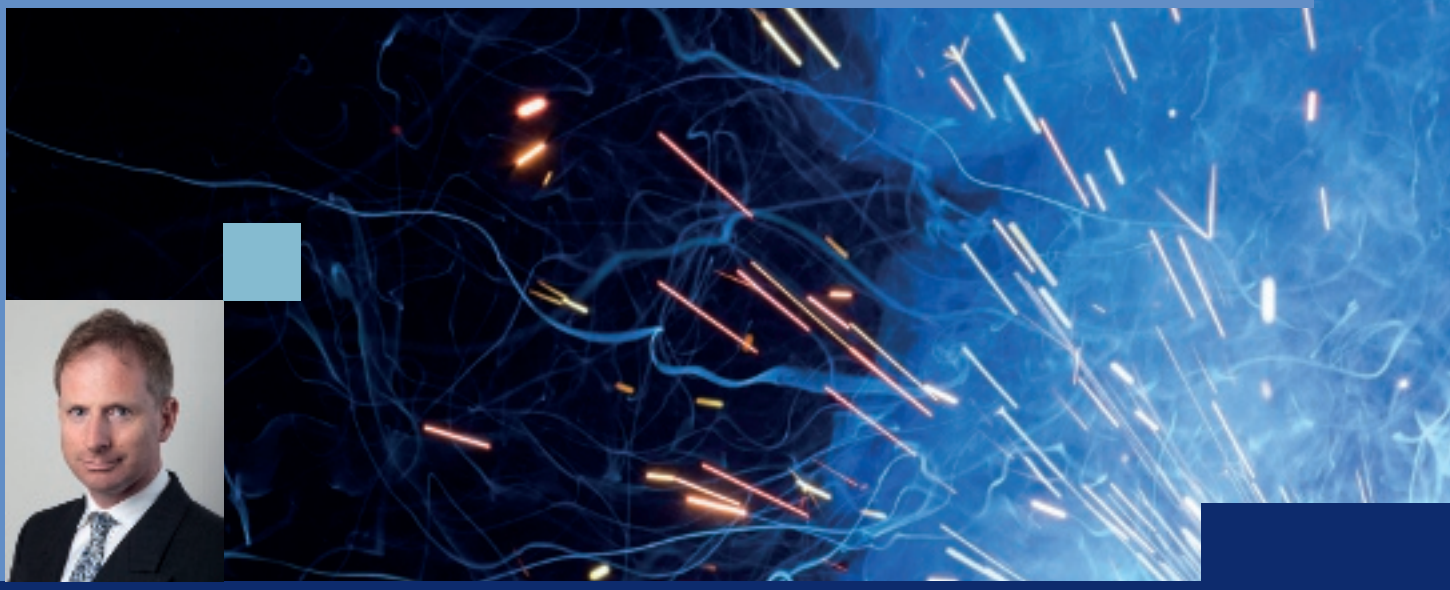
On the other hand, there are certain practical difficulties that could arise if such a clause were enforceable. For example, if a simple dispute of a low financial value arose between the parties to the relevant contract, the London TCC would likely be considered an inappropriate forum for those proceedings and may decline to deal with them. Further, it may be the case that the court named in the clause does not, for whatever reason, have the resources available at the time to deal with the dispute. There is also potentially a public policy argument against the enforceability of such a clause as it would curtail the courts' case management abilities.

But even if a clause of this nature were unenforceable, it may still be of assistance to a party making an application for an order for transfer of proceedings. As stated above, the Business and Property Courts Advisory Note provides that "special weight" is to be given to the parties' wishes. Such a clause ought to provide clear and strong evidence of the parties' collective wishes. It may particularly be of assistance in circumstances where the question of convenience is finely balanced.

Conclusion

It can be seen that a local court does not require much of a link to that court for proceedings commenced there to remain there. Conversely, it will require a clear case to justify the transfer of proceedings from one court to another, particularly now that the Business and Property Courts throughout England and Wales are all "one Court". Therefore, if you do want greater control over the location of the court in which your disputes are resolved, you should seek to provide for this in your contracts. Whether such a clause would be directly enforceable is not yet clear, but it is arguable that it should at least provide clear evidence of the parties' intentions and wishes and ought therefore to be a relevant consideration on an application for transfer.

CASE ANALYSIS:
Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd



***Justin Mort QC** analyses the key points arising from the judgment on quantum issues in ICI v MMT, and considers the role of expert evidence at trial.*

Mr Justice Fraser has now handed down judgment on quantum issues arising in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*.[1]

In late 2012, ICI appointed MMT to supply and install some steelwork at its new state of the art paint factory in Northumberland. The parties' contract incorporated an amended version of the NEC3 form of contract. It therefore provided for mandatory adjudication (clause W2), and compensation events including project manager instructions (PMIs).

From an early stage of the project, ICI substantially expanded MMT's scope of work, starting with PMI 3, so as to include the supply and installation of mechanical services (i.e. pipework, and the welding of pipework both off site and in situ). This meant that whilst the initial contract value was approximately £1.9 million, the total value of MMT's project by the time that MMT came to leave site was substantially greater.

The project as a whole, and in particular MMT's part of it, ran over budget. ICI's response was to dismiss MMT from the site summarily in February 2015.

From about that time the parties participated in four adjudications, three in 2015 and a late one in 2016, some time into the litigation, shortly before liability issues were due to be determined in the TCC.

The project has also given rise to five sets of court proceedings and a number of TCC judgments, in relation to *inter alia* the enforcement of two of the adjudication decisions (in October 2015 and October 2016), disclosure (July 2016), an application to adjourn the trial on liability (October 2016), the liability trial itself (July 2017) and now quantum (June 2018). Many members of the specialist TCC bench, and a number of members of the specialist construction bar, have had some input into the case.

The main event in the recent quantum trial was ICI's attack on the valuation of MMT's account, and ICI's claim for repayment of what it maintained was a significant overpayment.

By the time of the quantum trial, ICI had paid £21,749,659 to MMT. Much of that payment arose from ICI's failure to serve the requisite payment notice or pay less notice, in relation to two payment applications, rather than as a result of an assessment or valuation by the project manager: adjudications 1 and 4.

Because ICI had repudiated the contract in February 2015, it had deprived itself of the opportunity to correct the payment assessment in a subsequent payment notice, and recover overpayment by that route, as is expressly allowed for in the NEC3 form of contract (clause 50.5 and 51.1). Similarly, because ICI had decided not to operate the termination provisions of the NEC3 form, it had deprived itself of the termination assessment process and mechanism for payment / re-payment set out in clause 90.4.

1 [2018] EWHC 1577 (TCC).

In the liability trial heard in 2017, the judge determined that, notwithstanding ICI's repudiation of the contract, and notwithstanding the decision in *ISG Construction Ltd v Seevic College*,[2] ICI was nonetheless entitled to challenge the notified sum and recover any overpayment: [2017] EWHC 1763 (TCC). That decision has been subsequently approved and followed in *Grove Developments Ltd v S&T (UK) Ltd*.[3]

In the quantum trial, ICI contended that the proper value of MMT's account was £11,886,101.13, and that in those circumstances it was entitled to repayment by MMT of some £10 million.

Even ICI's valuation of the account was considerably greater, by a factor of six, than the original contract sum. It was therefore not in dispute but that MMT's scope of work had changed dramatically over the course of the project. In addition, it could not be disputed but that those changes in scope had been instructed on behalf of ICI in a somewhat piecemeal and chaotic fashion, in circumstances where design of the facility was developed in parallel with work on site.

In those circumstances, MMT's account was made up of a large number of conventional variations (i.e. additional work or modifications to work already executed), but also claim type items, such as:

(1) additional preliminaries arising from the prolongation of the project, additional work and the manner in which additional work had been instructed;

(2) disruption or unproductive working at MMT's fabrication shop arising from repeated changes in design;

(3) loss of productive working time, for a period whilst welding work was suspended but labour resources were nonetheless maintained on site.

Whilst the NEC3 form does not refer to generic "*claims*" in this way, it was accepted by both parties that, to some extent, it was necessary to bundle issues together (e.g. a global claim for further prolongations), rather than trying to apply the compensation event regime religiously. Hence there was, for example, a general preliminaries item rather than an attempt to identify the impact of individual compensation events on preliminaries.

A distinctive feature of the case was that ICI did not have available to it at the trial in 2018 any of the quantity surveying resources or commercial management that had been involved in the detail of the project at the time, that is to say in 2013 and 2014. The precise reason for this was not revealed, but it is to be inferred that there had been some sort of falling out between ICI and its professional team, and/or between ICI and some of its former employees responsible for the project.

2 [2015] 2 All ER Comm 545
3 [2018] EWHC 123 (TCC) at [130]

ICI was able to call a Henk Boerboom, a project manager appointed to the project by ICI's parent company (Akzo Nobel) a few months before ICI's repudiation of MMT's contract. However: Mr Boerboom only arrived at the end of the project; he was not involved in the detail of the disputed account; and in any event, for numerous other reasons, the judge found him to be an unsatisfactory witness.[4]

"There are relatively few final account type disputes which reach the High Court, let alone cases under the NEC3 form."

That particular set of facts as summarised above gave rise to a number of points of potentially general interest.

Firstly, an issue arose as to which party has the burden of proof, in circumstances where the employer claims to have overpaid as a result of the payment notice provisions of the contract.

Ordinarily, the burden of proof is not particularly important since both parties will adduce positive evidence on a given issue and the tribunal will decide the point by reference to the evidence it finds most persuasive. Determination of a given issue in those circumstances is likely to be the same whichever party has the burden of proof. Here, ICI was seeking a significant repayment, but in circumstances where a lot of detail from the project was no longer available.

The judge held at [84] that the burden of proof was on ICI.

Secondly, the case is possibly of interest simply because there are relatively few final account type disputes which reach the High Court, let alone cases under the NEC3 form.

In fact, once the judge had determined that ICI had little or no evidential basis for its attack on MMT's account, it was more or less inevitable that each and every individual item of dispute, and there were many, would be decided in MMT's favour.

In the event, the court found that the correct value of MMT's account was £22,018,084, so that MMT had in fact been *under*paid by £268,425. Therefore ICI's hard won right to challenge the notified sum did not quite have the consequence it had hoped for.

An interesting hypothetical point to consider is whether an adjudicator (for example a QS adjudicator), expected to take the initiative in ascertaining the facts, would have reached the same conclusions.

Expert Evidence

It is the judge's comments about ICI's expert witnesses that are of most interest.

ICI's experts in both the liability trial and the quantum trial (that is to say: four experts in total), in each case made a number of elementary errors, with catastrophic results for the evidence of that expert and in turn for ICI's case.

These errors prompted strong criticism in the judgment. The judge also referred to similar criticisms of the experts made by Coulson J, as he then was, in *Bank of Ireland v Watts Group plc*,[5] and raised the hope that these apparently partisan experts were not part of "*a worrying trend.*"

I refer to just two examples taken from the quantum judgment in *ICI v MMT.*

In his written report, ICI's QS expert expressed the opinion that, under the contract, some compensation events (but not all) should be valued by reference to the actual cost of labour incurred by MMT, rather than by reference to the parties' agreed labour rates (which he accepted should be used for assessing the other compensation events). That opinion as expert evidence was misguided:

(1) in circumstances where the same contractual regime applied to all compensation events, there was no conceivable quantity surveying or other reason to value some (high value) compensation events in a way that was more favourable to ICI;

(2) in any event, the meaning of the contract was a matter for the judge, and/or a matter for legal submission;

(3) at the time of expressing this view in his report, the expert did not have a clear understanding of what documents were incorporated into the contract (in circumstances where the invitation to tender, which was a contract document, made clear what was intended); further:

(a) the expert nonetheless expressed a strong view, albeit as a quantity surveyor, as to how the contract should be applied;

(b) during his oral evidence (but, it would seem, not at any earlier stage) he sought clarification of what documents were incorporated into the contract, yet his written report did not refer to any such limitation in his understanding: in short, he had expressed a firm view as to how the contract should be understood, without first ascertaining what documents the contract consisted of;

(4) the ICI expert compounded these errors by asserting that MMT would enjoy a "*windfall*" if it were paid by reference to the agreed contractual rates rather than actual cost, i.e. a pejorative and unnecessary comment.[6]

"Any advocate or litigator dealing with an expert will use the internet to see their track record: to see whether they have given evidence before, and if so how they fared."

The second example I refer to is in relation to ICI's accountancy expert, who addressed MMT's counterclaim.

The ICI accountancy expert reported that his opposite number, that is to say MMT's accountancy expert, had agreed with him that she did not have information from MMT necessary for her to be able to discharge her function as an expert.[7]

4 See the judgment at [103]

5 [2017] EWHC 1668 (TCC)

6 See the judgment at [183] to [186].

7 See the judgment at [223] and [224].

In circumstances where MMT's expert had been instructed for nearly a year, that was a potentially damning statement, if correct: it implied that she was incompetent, that she had failed to alert her client to the need for more information from an early stage, and that MMT had failed to provide the information that its own expert now agreed was essential for her task.

In fact the statement was incorrect, and indeed MMT's expert had refused to agree that she lacked the necessary information when that statement had been proposed to her by ICI's expert. ICI's expert had therefore seriously misrepresented the position.

There were various other examples, and yet more examples in the liability trial in 2017.

In each case these ICI experts gave evidence that was in some way unfair upon the other party (MMT). The judge concluded, at [236]

> *"It is a matter of concern that in a TCC case, with the sums at stake exceeding 10 million, there should be such a preponderance of partisan experts, all called by the same party."*

Judgments of the High Court are all reported, in the sense that they inevitably appear on Westlaw, Bailii, Lexis, and Lawtel. Judgments in the TCC, on any topic of substance, are also likely to be reported in the BLR and Con LR, as well as being the subject of articles on the internet and general industry discussion. Any advocate or litigator dealing with an expert will use the internet to see their track record: to see whether they have given evidence before, and if so how they fared.

In short, judicial criticism of this kind is highly visible to the world.

It is now being suggested that certain categories of expert witness (e.g. some quantity surveyors), are increasingly reluctant to appear in the TCC, against the possibility of attracting judicial criticism of this kind. Obviously there is no equivalent risk for an expert who gives evidence exclusively in adjudication and/or arbitration.

To a lawyer this reluctance seems bizarre, for two reasons:

(1) giving evidence in the High Court is surely an opportunity for an expert to perform a good job in a relatively public environment, just as it is for an advocate or other litigator; an expert witness who has impressed a High Court judge in the face of cross examination on issues within their field of expertise has genuine credibility;

(2) surely the way for a competent expert to avoid judicial criticism is to ensure that they discharge their duties properly and in accordance with the spirit and letter of the CPR, rather than refusing to accept any instructions that involve giving evidence in court.

It is not clear how these expert evidence disasters come about: whether pressure is put on the expert by their client at the report drafting stage, or whether the expert is simply keen to make comments that they think might assist the client (but which in practice then have precisely the opposite effect). A possible implication is that in some cases an expert quantity surveyor will not be instructed unless he or she is prepared to act as *de facto* advocate for their client's cause.

It is essential that, when drafting their report, an expert asks him or herself: is this the evidence I would be giving if I were instructed by the other side, and would I be presenting it in this language, assuming the same information were available?

If the answer to that question is *"possibly not"* then *prima facie* something has gone wrong with the process.

BRIEF *Encounters*

Lucy Garrett QC provides an insight into her motivations for a sabbatical in Sierra Leone.

So Lucy, what is your big news?

I am going on sabbatical to do a very exciting job working for a not-for-profit organisation, the Tony Blair Institute for Global Change (https://institute.global) in Sierra Leone. I will be working for the Governance part of TBI, which works with governments and leaders of fragile, developing and emerging states to enhance their effectiveness, in order to help them actually deliver reforms or projects that help the people of the country. I'll be based in Freetown, working for the elected Mayor – the inspirational Yvonne Aki-Sawyerr, OBE.

TBI provides embedded teams of professionals who work "shoulder to shoulder" with governments. This means that in practice I am effectively seconded to the Mayor's office and will work side by side with her and her team at Freetown City Council. My new office is pictured above – it's quite similar to the old, pre-refurbishment Keating Chambers, but of course bears no resemblance to the new shiny version.

The TBI teams' dedication and courage can't be understated. For example, TBI stayed in Sierra Leone, Guinea and Libera during the Ebola crisis in 2014 – 2016 and helped the governments of those countries to organise a systematic response.

TBI's work is government-led, ie. I am there to help implement the policies which the mayor was elected to deliver. I find this very appealing as I believe that Sierra Leoneans are best placed to know what Sierra Leone needs and wants.

It doesn't sound like it involves law at all.

It doesn't. I'm really a civil servant. My formal title is Governance Advisor. I'm going to lead the Mayor's private office team.

What has made you do this now, when you have just taken silk?

The taking silk part is a coincidence. I actually applied for and in principle got a job with TBI in January 2017, before I even applied for silk. It was a combination of waiting for a suitable role to come up and finishing a big case which meant that I have taken silk just before leaving. But I've been thinking about doing something like this for a long time.

I've always been interested in and involved in charity-type work. At university I was nicknamed Banners Garrett because I was always campaigning about something or other (I expect members of chambers are rolling their eyes in recognition at this point). After university, when I was travelling, I worked on two charity projects for a couple of months, one in a leprosy rehabilitation centre in India and one building a health centre in northern Kenya, near Lake Turkana (the location was near where they filmed those desert scenes in The Constant Gardener). It was the second of these projects which taught me that any help you want to give, must, to be useful, be what the local people want: it turned out on that project that what Nairobi Kenyans who had organised it thought was required wasn't what the tribal Kenyans who actually lived there thought at all.

After I got tenancy, I pretty much fell in love with the Bar – the work is so interesting, and so much fun. I did continue to do some charity work but my contribution was mostly financial for a long time. I'm sure a lot of people reading are familiar with the feeling that giving money doesn't really seem to change anything (although please keep giving everyone: there's nothing like a month in Freetown to convince you that money is desperately needed), and of course it's not usually possible to see the specific concrete effect of what you've given. Because of this, in 2016 I gave my spare room to an Eritrean refugee for 6 months, and I spent a lot of the second half of 2017 organising a fundraising dinner with Ben Keenan of Brookfield Multiplex – as many of you will know, we raised over £130,000 for the Refugee Council and (equally important) had a really great night.

Over the same kind of period, since about 2015, I started actively looking for an opportunity to work in development. I obviously hugely admire people who work in crisis response, but I don't have any skills to offer in that area, and those reading will readily appreciate that expertise in litigation and a deep familiarity with Scott Schedules is not particularly useful to charities such as Amnesty International or Medicins sans Frontiers. I was however very keen to find something which allowed me to use some of my barrister skills, and eventually I discovered TBI, which actively recruits from the private sector as well as those with a development background. I particularly like the idea that I'll be able to contribute in a small way to implementing structures and systems which make crises less likely, or enable countries to recover faster from those that do occur.

I also wanted to have an adventure. I think Africa will certainly fulfil that objective!

What's it like in Sierra Leone?

The country is very beautiful – smothered in rainforest and palm trees and with stunning white sand beaches (I have already been to two). There is very serious poverty, and Freetown has many slum communities, but I can already see that the Western impression of Sierra Leone consisting of war, blood diamonds and Ebola is completely wrong. Everyone said before I left that Sierra Leoneans were incredibly friendly and welcoming, and this has turned out to be absolutely true.

I have an enormous flat with a veranda and the weather is still amazing even though the rainy season should have already fully started.

Are you coming back?!

I have to say I'm not missing delay analysis *yet*. But yes indeed. I am hoping to do at least a year here, but I will certainly come back. Apart from anything else, I need to take up the challenge of practice in silk – and I already bought the gown.

Lucy Garrett QC was called to the Bar in 2001 and has practised at Keating Chambers since 2004. She has an impressive specialist practice in construction, engineering, energy and shipbuilding and particularly enjoys disputes involving complex technical issues. Lucy won Chambers and Partners' Construction Junior of the Year in 2013 and was nominated again in 2015. She was made Queen's Counsel in 2018.

Keating Chambers
15 Essex Street
London WC2R 3AA
DX: LDE 1045

Tel: +44 (0)20 7544 2600
Fax: +44 (0)20 7544 2700
Email: clerks@keatingchambers.com
Web: keatingchambers.com
Follow us: @keatingchambers

Providing dispute resolution services to the construction, engineering, shipbuilding, energy, procurement and technology sectors worldwide.