KC LEGAL UPDATE

Summer 2019

In this issue...

KEATING CHAMBERS

WELCOME

to the Summer 2019 Edition of KC LEGAL UPDATE

Jane Lemon QC

Jane Lemon QC studied human sciences at Jesus College, Oxford from 1988 to 1991. She was called to the Bar in 1993 and, on successful completion of her pupillage, joined Keating Chambers.

Jane was very much a Chambers person. In addition to building a successful practice she was, for example, an active and enthusiastic participant both in the pupillage and tenancy committees and in Friday night drinking on Essex Street. She was also hugely popular within and outside Chambers. With Jane, laughter was never far away.

In 2015, she took silk and began to harness a very successful international practice, with particular interest in the Middle East. As time went on, different parts of the world were fortunate to encounter her unfailing professionalism and enthusiasm for the work.

Directories rightly described her as a *"fine advocate"* with *"a famed intellectual prowess"*. Who's Who Legal wrote: *"a real star of the Bar"* who combined *"tenacity with charm"*. A very recent opponent of hers said that *"as always, she was a joy to work against - a formidable fair and friendly advocate"*.

In addition to working on the Wembley Stadium dispute, Jane also acted on a $300 million LCIA arbitration concerning the manufacture, transport and installation of one of the world's largest offshore windfarms. Internationally, a typical case involved the design and construction of a 127km section of road in Africa. In court, Jane was involved in a number of reported cases including Amec Capital Projects v Whitefriars City Estates [2005] BLR 1, CA on breach of natural justice.

Academically, Jane was a contributor to various editions of *Keating on Construction Contracts*, *Keating on Offshore Construction and Marine Engineering Contracts* and, with Coulson LJ, a joint author of the chapter for *Architects, Engineers and Quantity Surveyors for Professional Negligence and Liability LLP*, 2000, which will now be dedicated in her name.

Jane became a significant influence for up and coming women in the law and was shortly due to speak at an event to promote that particular cause. It was said of her by the organiser that: *"Jane really was an inspiration: you can be formidable and serious in your work but feminine, career and family oriented at the same time, fiercely clever with a great intellect but without arrogance, affectation or ego."*

Indeed, Jane often, and with considerable ease, blurred the professional and personal lines. Solicitors and experts became good friends. After lengthy conferences with clients, duly despatched, champagne, poolside bars and shoe purchasing would soon follow.

On hearing news of her untimely passing, tributes in huge numbers were received from both here and all over the world. Coulson LJ wrote:

> *"She was always aware of how much she owed to those who had blazed the trail. She never took any of it for granted. And then, so it seemed from the outside, in recent years she herself became a huge contributor to the feeling and spirit of Keating.*
>
> *We laughed a lot. And at the same time, I saw her become - really very quickly - a quietly assured barrister with a clear eye and a methodical outlook, and I watched many other members of Chambers, some of them much more senior to her, beat a path to her door to ask her advice.*
>
> *Jane was an extraordinarily warm and empathetic person, with no side or hidden agenda. Sadly, I think she is irreplaceable."*

She will indeed be deeply missed by all who were lucky enough to have worked with her.

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THE PREVENTION PRINCIPLE: ONSHORE v OFFSHORE AND THE PROBLEM OF TIME AT LARGE

By Adam Constable QC and Thomas Lazur

The Prevention Principle

The prevention principle is a general principle of the construction of contracts governed by English law, broadly derived from the well-established proposition that a party cannot, in the absence of clear terms, take advantage of his own wrong. The principle has been discussed in many cases, but the generally accepted formulation of the principle is taken from the speech of Lord Diplock in Cheall v A.P.E.X.[1]:

> *"...except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed...."*

Further clarity on the principle was provided by Patten LJ in BDW Trading Limited v JM Rowe (Investments) Limited[2]:

> *"Although there has been a certain amount of academic discussion as to whether the principle has the status of a rule of law which is imposed upon the parties to a contract almost regardless of what they have agreed, it is now clear as a matter of authority that the application of the principle can be excluded or modified by the terms of the contract and that its scope in any particular case will depend upon the construction of the relevant agreement."*

This article considers how that principle has been applied when it is engaged, how the approach differs in the land-based and offshore construction contracts, and what steps might be necessary to narrow the differences.

Application of the Principle

A useful summary of the way in which the general principle has been applied in the context of a land-based construction contract can be found in the following passage from Lord Denning MR's judgment in the Court of Appeal in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board[3]:

> *"It is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*

That passage was one of a number of authorities referred to by Jackson J (as he then was) in Multiplex Ltd v Honeywell Ltd (No 2),[4] following which he set out three propositions which define the modern understanding of the application of the prevention principle to land-based construction contracts in English Law:

(1) actions by the employer, which are perfectly legitimate under a construction contract, may still be characterised as prevention if those actions cause delay beyond the contractual completion date;

(2) acts of prevention by an employer do not set time at large if the contract provides for extension of time in respect of those events;

(3) in so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

More recently, in North Midland Building Ltd v Cyden Homes Ltd[5], Coulson LJ clarified that the principle operated as an implied term and summarised the impact of the engagement of the principle as follows:

> *"If the parties do not stipulate that a particular act of prevention triggers an entitlement to an extension of time, then there will be no implied term to assist the employer and the application of the prevention principle would mean that, on the happening of that event, time was set at large."*

Contracting Out of the Prevention Principle

What emerges from the authorities above is a very strong presumption that, unless clear words are used, the parties did not intend the contractor to bear the risk for an act of prevention by the employer. That approach is consistent with the principle that parties should not be too easily presumed to be abandoning rights under the general law (see Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd[6] and Stocznia Gdynia v Gearbulk[7]).

In theory, therefore, there must be a *"clear contractual intention to be gathered from the express provisions of the contract"* if the prevention principle is to be disapplied, Richco International v Alfred C. Toepfer International[8]. In that context, we can consider the differing approaches taken in the drafting and interpretation of land-based and offshore construction contracts.

Land-Based Construction Contracts

Land-based construction contracts have positively engaged with the prevention principle to avoid its impact. Extension of time provisions typically incorporate all potential acts of prevention so as to maintain the contractual machinery for completion and liquidated damages:

(1) NEC: 19 compensation events including:

> *"A breach of contract or act of prevention on the part of the Employer (except to the extent caused or contributed to by the Contractor or any Subcontractor or any person for whom those parties are responsible) which is not one of the other compensation events in this contract."*

(2) JCT: 14 Relevant Events including:

> *"Any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons."*

In this way the land-based construction industry has sought to include comprehensive extension of time mechanisms to avoid the potential application of the principle and the risk of time being set "at large". That approach has led to an assumption within the industry that a contract could only incorporate provisions that were consistent with the prevention principle and not directly contradict it.

That assumption in turn has led to a number of challenges to any effort made by the express terms to limit a contractor's right to rely on acts of prevention of an extension of time. However, that thinking is inconsistent with the authorities noted above, which permit the parties to allocate risk under their contract as they see fit.

It should therefore come as no surprise that more recent authorities on the principle have upheld the express terms of the contract when invited to set them aside on the grounds of the application of the prevention principle. For example, the principle is not engaged when the parties have agreed to:

(1) Make notice a condition precedent:

> *"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."* (Jackson J in Multiplex Construction v Honeywell Control Systems)[9]

(2) Remove a right to extensions of time where there is concurrent delay:

> *"Clause 2.25.1.3(b) was an agreed term. There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle: indeed, the contrary is plain. Salmon LJ's judgment in Peak v McKinney ... expressly envisaged that, although it had not happened in that case, the parties could have drafted an extension of time provision which would operate in the employer's favour, notwithstanding that the employer was to blame for the delay."* (Coulson LJ in North Midland Building Ltd v Cyden Homes Ltd)[10]

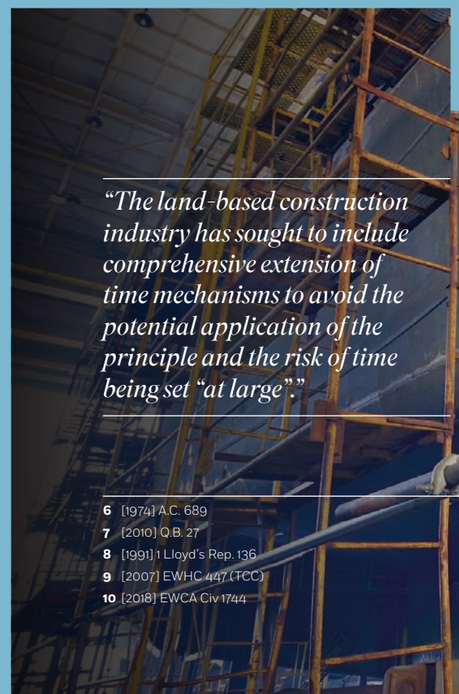
A picture therefore emerges of an industry that has appreciated the potential impact of the prevention principle, has dealt with it in the drafting of its standard forms, and is becoming more confident as time goes on in its efforts to adjust the balance of risk between the parties where that can be agreed.

"There remains considerable debate within the shipbuilding industry as to whether the prevention principle should have any application in a shipbuilding contract."

Offshore Construction Contracts

In contrast, there remains considerable debate within the shipbuilding industry as to whether the prevention principle should have any application in a shipbuilding contract. As was the case in the land-based construction industry, there is a fear of the consequences of time being set "at large" and the effective disposal of the machinery for delay, liquidated damages and termination. However, the offshore construction industry has not responded to this challenge in the same way.

To some extent the different approach is explained by the fact that the contractual machinery that has developed in the shipbuilding industry has followed a sale-of-goods mentality. In shipbuilding contracts the purchaser orders a well-specified vessel for delivery by a particular date. If the vessel is not delivered on time, the purchaser can simply cancel the order and get their money back.



"The land-based construction industry has sought to include comprehensive extension of time mechanisms to avoid the potential application of the principle and the risk of time being set "at large"."

1 [1983] 2 AC 180 at p. 188
2 [2011] EWCA Civ. 548
3 [1973] 1 W.L.R. 601 at 607
4 [2007] Bus LR Digest
5 [2018] EWCA Civ 1744
6 [1974] A.C. 689
7 [2010] Q.B. 27
8 [1991] 1 Lloyd's Rep. 136
9 [2007] EWHC 447 (TCC)
10 [2018] EWCA Civ 1744

In that context, the commonly held belief is that the builder cannot be prevented from delivering the vessel on time by virtue of instructions because it has the power to refuse to make changes to the design and can ignore defects or punches issued by the purchaser as long as the builder obtains the approval of class.

There was therefore some surprise expressed when Hamblen J concluded that the prevention principle applied to shipbuilding contracts generally in Adyard Abu Dhabi v SD Marine Services[11]:

> *"(1) In a basic shipbuilding contract, which simply provides for a Builder to complete the construction of a vessel and to reach certain milestones within specific periods of time, the Builder is entitled to the whole of that period of time to complete the contract work.*
>
> *(2) In the event that the Buyer interferes with the work so as to delay its completion in accordance with the agreed timetable, this amounts to an act of prevention and the Builder is no longer bound by the strict requirements of the contract as to time.*
>
> *(3) The instruction of variations to the work can amount to an act of prevention."*

Significantly, however, Hamblen J did not need to apply the prevention principle in Adyard. In that case the builder argued that the extension of time mechanism broke down where the parties were unable to agree to reasonable adjustments to the delivery date arising from changes to the vessel. In those circumstances it was alleged that the prevention principle would apply, rendering time at large (and defeating the termination). Hamblen J rejected that analysis on the basis that there was an alternative mechanism through which a claim for an extension of time could be made.

Thus, a trend began where judges and tribunals avoided implementing the principle by seeking to find that the contract provided an adequate and complete regime for the allocation of risk between the parties.

The key case after Adyard was Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc[12]. In that case, Leggatt J considered an amended SAJ form of contract and, after a lengthy analysis of the various terms dealing with time which were distributed in different places throughout the contract, concluded that there were three categories of delay defined by the express terms:

(1) *"permissible delay"* being delays for which the builder could obtain an extension of time;

(2) *"non-permissible delays"* being delays for which the builder could not obtain an extension to time; and

(3) various other types of delay which the judge called "excluded" delays as they were, under a separate term of the contract, effectively permissible delays.

At 34-35 he held:

> *"There is accordingly a tripartite classification of delays to the delivery of the vessel.*
> ...
> *I think it plain that these three categories of delay are intended to cover the whole field. It is natural to expect, and the wording of the definition in article VIII.4 makes clear, that – once excluded delays are taken out of the picture and deemed not to be delays at all – any delay which is not a "permissible" delay is a "non-permissible" delay, and vice-versa."*

As a consequence, the judge found that any breach of contract that is not a caught by the definition of permissible or excluded delay must be a non-permissible delay for which there is no relief.

Dealing with the prevention principle specifically in the context of delays allegedly caused by the conduct of the buyers' supervisors he held at 46:

> *"I of course recognise the force of the general presumption on which the Yard relies. When considering what reasonable parties would be likely to have intended, however, it is necessary to descend from generality and look closely at the specific consequences which would ensue if a particular interpretation is adopted. When the implications of a breach by the buyer of article IV are examined, I do not think it safe to assume that reasonable commercial parties would have intended that such a breach could permit the Yard to postpone the delivery of the vessel.*
>
> *Notably, while article IV.3 of the contracts (quoted at para 7 above) requires the buyer's supervisor to give prompt notice to the Yard of any construction or workmanship which does not or will not conform to the requirements of the contract, the Yard is only obliged to correct such nonconformity if it agrees with the buyer. To make the position even clearer, the clause continues:*
>
> *"In any circumstances, the BUILDER shall be entitled to proceed with the construction of the VESSEL even if there exists discrepancy in the opinion between the BUYER and the BUILDER, without prejudice to the BUYER's right to submit the issue for determination by the CLASSIFICATION SOCIETY or arbitration in accordance with the provisions hereof.*
>
> *It is therefore plain that the buyer's supervisor has no power to delay the construction of the vessel. ..."*

It is important to note that this judgment was given in the context of an appeal of an arbitrator's award on a matter of law. The judge did not therefore have to determine the facts and whilst it is not clear whether a different approach would have been taken had there been a determination that an act of prevention by the employer had caused critical delay to the delivery of the vessel, there is no indication from the analysis itself that would suggest that it would have been.

"The willingness to avoid the impact of the prevention principle has driven an approach to interpretation that assumes that the contracting parties intended to provide a complete code for the allocation of the risks of delay."

In any event, the approach taken by Leggatt J in Zhoushan appears to suggest an opposing approach to that taken in the land-based cases above. The willingness to avoid the impact of the prevention principle has driven an approach to interpretation that assumes that the contracting parties intended to provide a complete code for the allocation of the risks of delay. Therefore, if the contractor is delayed by anything that is not a permissible delay, it is a contractor's risk. That approach has been followed in a number of partially reported shipbuilding arbitrations[13].

We are therefore in an awkward position in the jurisprudence where:

(1) it is accepted that the prevention principle applies in theory; but

(2) there is no appetite to apply it, and contracts are construed to contain a complete code.

As a result, there has been no force driving a re-think of the standard forms of contract as there was in the land-based construction industry, even though it obviously would not be difficult to add to the basic shipbuilding contract (usually based on the SAJ) a catch all provision which ensures the contractual mechanisms apply to all types of acts of prevention by the owner.

"There is no reasonable justification for the prevention principle to be applied in different ways in different contracts."

Time At Large

At present it is difficult to see how the differing approaches between land-based and offshore construction contracts will be resolved. One possibility is that it is determined that (as some commentators have argued) the prevention principle should not apply to shipbuilding contracts, although we suggest that would be an unsatisfactory outcome. There is no reasonable justification for the prevention principle to be applied in different ways in different contracts.

Our view is that it is the approach in land-based construction that should be preferred because of the strength of the underlying principle that a party to a contract should not be able to rely on its own wrong to the detriment of the other contracting party. As it was put in *Keating on Offshore Construction and Marine Engineering Contracts*[14]:

> *"...the inability – absent clear words to the contrary – of party A to hold a party B to a stipulation if party A itself has prevented party B from complying with that stipulation is a basic presumption compatible with ordinary rules of construction. It is "obvious". It is no different to the rebuttable presumption when construing a contract, for example, that absent clear words a party will not give up their common law rights. The suggestion that the modern shipbuilding world is so different from other commercial and construction spheres that such an obvious starting point from which to construe a contract might be excluded is, it is suggested, wrong."*

The path to an alignment of approaches might be possible if there was a challenge to the current assumption that the effect of the application of the prevention principle was to set aside the whole of the machinery of the contract relating to time, liquidated damages, and termination for delay by setting time "at large".

The foreword to *Keating on Offshore Construction and Marine Engineering Contracts*[15], by Hamblen LJ and Sir Vivian Ramsey, indicates that there may be some judicial appetite for such a move:

> *"...There is also a very interesting analysis of the principle of prevention and time at large, which has been developed from nineteenth century decisions. It raises for consideration whether the principle is correct. The proposition that an act of prevention by the employer can, in the absence of an extension of time provision for that eventuality, lead to the replacement of the agreed time for completion by a reasonable time is startling. In Chapter 7, the authors question whether that proposition is consistent with existing case law...."*

To understand how such an approach might be possible it is appropriate to look first at the development of the orthodox

11 [2011] EWHC] 848 (Comm) at paragraph 242

12 [2015] 1 Lloyd's Rep. 283

13 (see for example London Arbitration 15/18 (22 Jun 2018), London Arbitration 2/19 (17 Jan 2019), and London Arbitration 9/19 (14 Mar 2019) in the Lloyd's Maritime Law Newsletter)

14 2nd Edition at para 7-110

15 2nd Edition

approach before considering some of the shortcomings of that approach noted in other authorities.

The Orthodox Approach

The first mention of the concept of time being "at large" as a consequence of an act of prevention appears to come from Holme v Guppy[16] in which Parke B in the Court of Exchequer held:

> *"Then it appears that they were disabled from by the act of the defendants from the performance of that contract. There are clear authorities that if the party be prevented by the refusal of the other contracting party from completing the contract within the time limited he is not liable in law for the default … It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large. Consequently they are not to forfeit anything for the delay."*

This was developed in Dodd v Churton[17] by Lord Esher MR in the Court of Appeal who held:

> *"If the building owner has ordered extra work beyond that specified by the original contract which has necessarily the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the Contractor."*

In Multiplex v Honeywell Control Systems[18], Jackson J (as he then was) concluded:

> *"In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor."*

He reached that conclusion relying, in part, on Peak Construction (Liverpool) Limited v McKinney Foundations Limited[19] from which he quoted the following passage:

> *"The employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach […] Edmund Davies and Phillimore LLJ expressed similar views in their concurring judgments".*

Finally, Coulson LJ reached the conclusion in North Midland, already set out above, that "*the application of the prevention principle would mean that, on the happening of that event, time was set at large*" relying on the authorities above and the speeches given in the House of Lords in Trollope & Colls Limited v North West Metropolitan Regional Hospital Board[20].

Coulson LJ noted that, when the case was in the Court of Appeal, Lord Denning MR held:

> *"…. It is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*

And went on to state that, "*In the House of Lords, Lord Pearson agreed with that section of Lord Denning's judgment (see 607 E-H). Lord Guest, Lord Diplock and Lord Cross agreed with the speech of Lord Pearson.*"

The orthodox approach rests on the jurisprudential foundation above. However, a deeper dive into the case law demonstrates that there is some dissent from other authorities and even some uncertainty within the examples relied on above as the basis of the orthodox approach.

Shortcomings of the Orthodox Approach

Some criticism of the impact of the orthodox approach can be found in Leggatt J's observations in Zhoushan and the introduction to *Keating on Offshore Construction Contracts*[21] provided by Hamblen LJ and Sir Vivian Ramsey. In fact, Sir Vivian Ramsey's discomfort with the orthodox position can be traced back to his comments in Bluewater Energy Services v Mercon[22]:

> *"The principle is of some antiquity and has a surprising effect of the contractual obligations as to the time of completion"*

Stronger criticism can be found in Coleman J's judgment in Balfour Beatty v Chestermount:

> *"The remarkable consequences of the application of this principle could therefore be as if…the contractor fell well behind the clock and overshot the completion date…if the architect then gave an instruction for the most trivial variation, representing perhaps only a day's extra work, the employer would thereby lose all right to liquidated damages for the culpable delay…what might be a trivial variation instruction would destroy the whole liquidated damages regime…"*

It can also be seen that the cases relied on in the development of the orthodox approach are not as clear-cut as they have been presented. For example, Peak v McKinney[23] was relied on by the judge in Multiplex, Jackson J commenting that Phillimore LLJ expressed a view that was consistent with the orthodox approach. However, Phillimore LLJ in fact said:

> *"I was somewhat startled when Mr. Gardam said in the course of his argument that the moment any part of the delay which has occurred can be attributed to the employer, then any agreement as to liquidated damages disappears. Mr. Rankin conceded that the summary of the effect of the cases… was correct save only in regard to subparagraph (d), which he suggested went too far. I think his concession was right".*

Also, although Coulson LJ's judgment in North Midland clearly supports the orthodox approach, his conclusion that Lord Pearson agreed with Lord Denning's judgment in the Court of Appeal in Trollope merits further analysis. Lord Pearson in fact held as follows:

> *"On the other hand, the majority of the Court of Appeal, Lord Denning M.R. and Phillimore L..J., decided in favour of the respondents. Lord Denning M.R. decided first on a point of construction or perhaps on a rule of law which he derived from Dodd v Churton25. I will set out a passage from the judgment of Lord Denning, inserting "(1)" and "(2)" to divide it into two parts:*
>
> *"(1) It is well settled that in building contracts — and in other contracts too — when there is a stipulation for work to be done in a limited time, if one party by his conduct — it may be quite legitimate conduct, such as ordering extra work — renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*
>
> *"(2) The time becomes at large. The work must be done within a reasonable time — that is, as a rule, the stipulated time plus a reasonable extension for the delay caused by his conduct."*

Then he said:

> *"That was established by Dodd v Churton."*
>
> *"Now Dodd v Churton does establish the first part of that passage, which I have marked "(1)", but does not establish, or afford any support to, the second part of the passage which I have marked "(2)"."*

There is therefore some doubt cast in the highest authority on the application of the prevention principle that time should be set at large with the effect that the contractual completion date is replaced by an obligation to complete within a reasonable time.

Conclusion

Given that it has now been confirmed that the prevention principle is an implied term in North Midland, a possible route forward would be for the implied term to have a less draconian effect.

As the judicial criticism noted above makes clear, it is not obvious or necessary that an act of prevention should dissolve the parties' agreed extension of time and liquidated damages regimes which, after all, were agreed for the benefit of both parties.

Instead the implied term could simply permit an extension of time to the extent that critical delay was caused by an act of prevention not otherwise covered by the express terms of the contract.

Such an approach would take the sting out of the prevention principle, as perceived by the offshore construction industry, and encourage the differences between the approach taken for on and offshore construction projects to be reconciled.

16 (1838) 3 M&W 387
17 [1897] 1 QB 566
18 [2007] EWHC 447 TCC
19 [1970] 1 BLR 111
20 [1973] 1 WLR 601

21 2nd Edition
22 [2014] EWHC 2132 (TCC)
23 [1970] 1 BLR 11

A BRIDGE TOO FAR:
A BUILDER'S LIABILITY FOR ECONOMIC LOSS IN TORT

"What the decision in Thomas v Taylor Wimpey does highlight is the difficulty in articulating a principled basis for exceptions or qualifications in this area."

Tom Coulson appeared for Taylor Wimpey Developments Ltd, instructed by Gowling WLG (UK) LLP.

Introduction

As every law student knows, following the double volte-face which took place in our higher courts in the 20 years preceding the decision in Murphy v Brentwood[1] in 1991, a builder is liable in tort only for damage caused to persons or property by defects in its work but not for the purely economic loss of remedying the defect. However, in Murphy, having set out those general principles, Lord Bridge suggested a possible exception to them in the following terms:

> *"The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties."*

That suggested exception is not infrequently relied upon by parties and is the subject of conflicting first instance decisions. However, in Thomas v Taylor Wimpey[2], HHJ Keyser QC ('the Judge') has decided that Lord Bridge's dictum does not represent the law.

Thomas v Taylor Wimpey

The issue arose on the trial of a series of preliminary issues arising in proceedings between the claimants, who were owners of two adjacent properties, in which they claimed damages from the homebuilder ('the Builder') in respect of what were said to be defective log retaining walls at the rear of the back gardens of the properties. Any cause of action in contract having become statute-barred, the claim was advanced *inter alia* as a claim in the tort of negligence.

In response to the Builder's contention that the claim was one for pure economic loss, the claimants averred that the defects in the walls amounted to a potential source of injury to persons or property on neighbouring land. In other words, they sought to rely on Lord Bridge's exception as founding a claim where there would not otherwise have been one. The Court ordered various preliminary issues to be determined, including an issue as to whether, on the assumption that the facts pleaded by the claimants were true, the Builder owed the claimants a duty of care not to cause them the loss and damage claimed.

The Previous First Instance Authorities

The Judge reviewed the previous authorities at first instance in which the exception suggested by Lord Bridge had been considered.

In Morse v Barratt[3], a case from 1993 in which a wall adjacent to a highway had to be rebuilt after it was found to represent a danger to the public, HHJ O'Donoghue had taken Lord Bridge's suggested exception and applied it as correctly stating the law. However, as the Judge observed, the reasoning in Morse was somewhat unsatisfactory: no legal basis for the exception was identified and the suggestion of one member of the Appellate Committee, on a point that did not arise for decision by the House of Lords in that case, was simply applied as representing the law.

The only other previous decision in which the point had arisen was George Fischer Holding Ltd v Multi Design Consultants Ltd[4], in which Morse had not been followed. In that case, HHJ Hicks QC had concluded (albeit obiter) that Lord Bridge's dictum was properly to be regarded as a minority obiter dictum which was contrary to the ratio of the decision of the House in Murphy. In HHJ Hicks' view, the decision in Murphy was premised on the rejection of the reasoning in the older cases (Dutton v Bognor Regis[5] and Anns v Merton[6]) that it was anomalous to award damages for a realised injury but not for the cost of averting it. In his view, it was difficult to see why the exception suggested by Lord Bridge should *"linger on where the danger averted is that of liability to a neighbour or passer-by rather than of injury to the plaintiff himself"*.

The Judge's Reasoning in Thomas v Taylor Wimpey

The Judge decided that Lord Bridge's suggested exception to the rule that loss suffered as a result of the need to remedy a defect was irrecoverable in tort did not represent the law. Interestingly, although his ultimate conclusion was the same as that of HHJ Hicks QC in George Fischer Holding, his reasoning was rather different.

The Judge disagreed with the suggestion that Lord Bridge's qualification was itself inconsistent with the ratio of the House of Lord's decision in Murphy. As the Judge observed, it would be *"surprising indeed"* if Lord Bridge had said something inconsistent with the *ratio* of a decision in which he had himself expressed his full agreement with the leading speech of Lord Keith, a speech with which a majority of the Committee also agreed. In the Judge's view, the point was simply not one that had arisen to be decided in Murphy.

The Judge also differed from Judge Hicks in suggesting that there was a real distinction between the possibility of causing injury to those on neighbouring land, on the one hand, and the possibility of causing injury to a claimant or his visitors on his own land. If the condition of a property amounts to a danger to those on it, the owner of that property is in a position to obviate that danger by taking necessary precautions, including, ultimately vacating it altogether. By contrast, the Judge reasoned, the owner of the defective property has no right to control the use of the adjacent land and thereby obviate the risk to those upon it; all he can do is remedy the defect.

> *"The Judge decided that Lord Bridge's suggested exception to the rule that loss suffered as a result of the need to remedy a defect was irrecoverable in tort did not represent the law."*

Having conducted a careful review of the authorities and the academic discussion of the point, the Judge summarised his own reasoning for concluding that Lord Bridge's exception did not represent the law in a series of six propositions as follows:

- First, it was propounded in a single obiter dictum in Murphy.
- Second, it was unsupported by authority, other than Morse in which there was no persuasive analysis.
- Third, it is not supported by the *ratio* or reasoning in Murphy; indeed, it is not supported by any specific reasoning on the part of Lord Bridge.
- Fourth, it is contrary to the analysis of the Court of Appeal in Robinson v PE Jones, which concluded that the only basis for tortious liability for economic loss was on grounds of assumption of responsibility.
- Fifth, were the exception correct, it would suggest, logically, that a claimant ought to be able to recover the cost of moving out of his own home if forced to do so because of a dangerous defect, whereas such recovery was not permitted on the current state of the law.
- Sixth, builders have a potential liability by virtue of the Defective Premises Act 1972 and in respect of injury to persons or property under the common law. In those circumstances, there was no compelling policy justification for recognising the existence of Lord Bridge's qualification.

Conclusion

It might be said, albeit perhaps uncharitably, that this is not the first time that Lord Bridge has been found culpable of mooting possible exceptions or explanations in the field of tortious liability for pure economic loss which have not withstood subsequent analysis: see Exhibit A – the 'complex structure theory'. What the decision in Thomas v Taylor Wimpey does highlight is the difficulty in articulating a principled basis for exceptions or qualifications in this area, just as the contortions which were introduced into the law following the decision in Anns v Merton over 40 years ago.

For practical purposes, however, the key point is that it is now going to be very difficult for claimants to seek to recover in tort on the basis of Lord Bridge's exception. Whilst definitive resolution of the point perhaps awaits a decision of the Court of Appeal or the Supreme Court, there is no doubt where the weight of first instance decisions now lies.

1 Murphy v Brentwood [1991] 1 AC 398
2 Thomas v Taylor Wimpey [2019] EWHC 1134 (TCC)
3 Morse v Barratt [1993] 9 Const LJ 158
4 George Fischer Holding Ltd v Multi Design Consultants Ltd [1998] 61 Con LR 85
5 Dutton v Bognor Regis [1978] 1 QB 373
6 Anns v Merton [1978] AC 728

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Cannon Corporate v Primus Build [2019] EWCA Civ 27

This was a conjoined appeal alongside Bresco v Lonsdale. Cannon Corporate appealed against a summary judgment in favour of Primus and against the refusal to grant a stay of execution in spite of the fact that Primus was in a Company Voluntary Arrangement (CVA). The appeal settled, but given the importance of the issue the court gave a judgment. Lord Justice Coulson gave the leading judgment.

It would defeat the purpose of the statutory framework for adjudication if a responding party could reserve its position on jurisdiction in general terms at the start of an adjudication. Any challenge to jurisdiction had to be made appropriately and clearly. If the position was not reserved effectively, it would be deemed to have waived any jurisdictional objection. It would be better for a party to reserve its position based on a specific objection so that an adjudication could decide whether to proceed, and the referring party could decide whether the objection had merit.

A general reservation of position on jurisdiction may be effective. However, a general reservation would be likely to be deemed ineffective if the objector had deliberately chosen not to articulate specific objections, or the court concluded that it was worded simply to keep all options open.

Lord Justice Coulson found that the claimant had sought to raise a specific jurisdictional point for the first time on appeal, and could not be permitted to rely on their original vague general reservation of position. The judge had been correct to distinguish Westshield and grant summary judgment.

Further, a court was permitted to exercise its discretion to stay if it concluded that the party seeking the stay was *'substantially responsible'* for the claimant's financial difficulties. This was the conclusion reached.

Adrian Williamson QC represented the respondent.

Zagora Management Ltd v Zurich Insurance Plc [2019] EWHC 140 (TCC)

The claimants were the freeholder and the long-leasehold owners of 30 flats. They complained that the flats had serious defects which rendered them unsafe. They brought a claim against Zurich under its new home warranties, and another claim against Zurich Building Control (ZBC) who had signed off the flats as compliant with building regulations.

The freeholder asserted that there had been an earlier agreement in which Zurich had agreed to fund works to resolve certain agreed defects. The claimants also sought damages from ZBC for the diminution in value of their respective interests in the development on the basis that ZBC had fraudulently issued building regulations completion certificates to induce them to purchase their properties.

HHJ Davies dismissed the freeholder's claim that there was any 'agreement to rectify'. The agreement reached between the freeholder and Zurich had been insufficiently certain to be enforceable. Accordingly, the freeholder was not insured. However, the judge found that the building was seriously defective and required major repairs so that claims could be pursued by the leaseholders against Zurich under the warranties but, due to a limitation clause in the warranties, the leaseholders' claims were limited to the total of the purchase prices of their flats.

HHJ Davies went on to find that ZBC had fraudulently issued the Completion Certificates. He found that the relevant building inspector had intended all the leaseholders (but not the freeholder) to rely on the representations contained within the certificates but that the leaseholders had not relied upon them. The claims in deceit therefore failed.

This case produced two further judgments in respect of interest and costs.

Jonathan Selby QC and Charlie Thompson represented the claimants.

Skymist Holdings v Grandlane Developments [2019] EWHC 747 (TCC)

Skymist was an offshore company. It purchased a property, and appointed Grandlane Services to manage its development. Skymist subsequently terminated the appointment. Grandlane claimed unpaid fees, including the fees of its architect (PTP), of around £480,000. Nine months later, they made a revised claim of £1.6million.

Skymist was concerned that Grandlane had colluded with PTP to present an inflated claim for fees. Grandlane referred the claim to adjudication, and the adjudicator made a decision in Grandlane's favour. Skymist successfully applied for pre-action disclosure. On the basis of the documents disclosed, they took the view that Grandlane colluded with the architects. Grandlane applied for summary judgment to enforce the adjudicator's award. Skymist opposed the application on the basis that the adjudicator's decision was tainted by fraud.

Mrs. Justice Jefford granted Grandlane's application for summary judgment. The disclosed documents explained why PTP's fees increased dramatically in nine months. Given that Grandlane did not have the funds to discharge their liability, they agreed with PTP to mitigate their exposure by taking the claim to Skymist. There was nothing in the documents to infer that Grandlane was seeking to inflate the claim. There was no clear and unambiguous evidence of fraud. In any event, fraud could and should have been raised in the adjudication.

In the alternative, Skymist submitted that the enforcement hearing should be adjourned because they had a *'continuing suspicion'* that there was clear evidence of fraud. They relied on the failure to disclose any agreement with PTP about payment to Grandlane. This was dismissed. There was no dishonest attempt to keep from Skymist any agreement as to the payment of costs of the adjudication.

Jonathan Selby QC represented the defendant.

Swansea Stadium Management Company Ltd v Swansea City Council and Interserve [2019] EWHC 989 (TCC)

The claimant (management company, and tenant of D1) sued D1 (local council landlord) and D2 (contractor, engaged by D1) in respect of defects in the flooring and paintwork of the Liberty Stadium in Swansea.

The claim against the council was for breach of the lease, and breach of a separate agreement under which the council was to take all reasonable steps at its own expense to enforce its rights arising under the council's building contract with the contractor. The claim against the contractor was for breach of a collateral warranty, for defects not identified and remedied during the defects liability period.

Pepperall J dismissed the claims. The council was not in breach of the lease or its obligations to enforce the building contract. Whilst there were defects not identified and remedied in the defects liability period, the contractor was not liable under the warranty. The effect of the notice of completion of making good defects was to deem all defects to have been made good on the date of the notice, such that any claim for defects not remedied in the defects liability period had to be brought pursuant to the *'core obligations'* in the building contract and within 12 years of practical completion.

Justin Mort QC and Tom Owen represented the claimant.

PBS Energo AS v Bester Generacion UK Ltd [2019] EWHC 996 (TCC)

Bester engaged PBS to design and build a biomass power plant in Wrexham. Following termination, PBS sought monetary relief in adjudication. PBS represented to the adjudicator that bespoke equipment had been manufactured for the project, that it was held in the Czech Republic to Bester's order, that it would be released to Bester upon payment, and credit given for any sale or disposition of the equipment.

The adjudicator ordered Bester to pay PBS £1.7M plus interest. On the understanding of PBS's representations, the adjudicator did not give any credit on the sum he considered to be due to PBS for the bespoke equipment held to Bester's order.

Shortly before the adjudication decision, in underlying TCC proceedings, PBS disclosed 57,000 documents. They demonstrated that the equipment was not actually in the Czech Republic. Some had been sold and installed in another power plant in Poland, or deconstructed for use elsewhere. Some PBS had not paid for, nor obtained title, nor held it to Bester's order, and for some PBS had achieved credits in its favour.

Pepperall J held Bester had an arguable case that the decision was procured by fraud and dismissed the application for summary judgment. Bester could not reasonably have been expected to allege fraud before the adjudicator.

Tom Owen represented the defendant.

Thomas v Taylor Wimpey Developments [2019] EWHC 1134

The claimants were freehold owners of adjacent properties which they purchased with the benefit of NHBC Buildmark cover. Damages were claimed on the basis of purportedly defective log retaining walls at the rear of the back gardens. The claim was dismissed.

The court found that the builder did not owe a duty of care to the home owners in tort in respect of pure economic loss. There was no exception where a building stood so close to a boundary that it represented a danger to persons or property on neighbouring land. Lord Bridge's dictum in Murphy v Brentwood to that effect did not represent the law.

Any misrepresentation claim against the builder was barred by limitation. The claimant sought to rely on the special time-limit for claims of negligence. However, the claimants had not advanced a claim of negligent misrepresentation.

The claimants alleged that defects in the walls were within the scope of cover provided by the NHBC warranty. The critical question concerned whether the walls were necessary for the building's structural stability. On the basis of the expert evidence, the court concluded that they did not.

The particulars of claim made no express reference to a breach of the building regulations. Therefore, the claimants could not assert that they pleaded a breach of the regulations. The building regulations did not apply to the log retaining walls. The walls were not part of the houses, but separate structures. Their construction did not constitute building work.

Tom Coulson represented the first defendant.

Samuel Townend represented the second defendant.

Indigo Projects Ltd v Razin [2019] EWHC 1205 (TCC)

Mrs and Mrs Razin engaged Indigo to construct a new house. Indigo issued an interim payment notice, to which no pay less notice was issued in response. Indigo referred the dispute to adjudication. The adjudicator determined that the Razins were obliged to pay the payment notice sum less an amount that had previously been paid on account.

Indigo issued an application for summary judgment to enforce the adjudicator's decision. The Razins discovered that Indigo had sent a CVA proposal to its creditors after they issued the application. The CVA was approved and came into effect two days later. Subsequently, the Razins opposed enforcement of the adjudicator's decision and made an application for a stay of execution of the judgment in the alternative.

Indigo's application for summary judgment was dismissed. Sir Anthony Edwards-Stuart first noted that there were two points that distinguished this case from previous authorities. Firstly, the CVA was entered into after the adjudicator's decision. Secondly, the adjudicator's decision was not one which determined the value of Indigo's claims. It was merely an order for an interim payment.

The reasoning behind the decision was twofold. The Razins had arguable counterclaims against Indigo that had not been determined. To order the Razins to pay the sums due pursuant to the adjudicator's decision would distort the CVA accounting process because the money would be distributed among all Indigo's creditors. If the CVA supervisors ultimately determined that sums were due to the Razins, they would have little or no prospect of recovering the amounts paid in full. This distortion would always operate in a way to the detriment of the Razins, so it would be wrong in principle to enforce the decision.

It was further determined that, had the decision been enforced, a stay of execution would have been ordered due to the probable inability of Indigo to repay the judgment sum. Indigo had accepted that it would be unable to repay the sums to the Razins if it was eventually ordered to do so.

Emma Healiss represented the defendant.

CHALLENGING ARBITRATORS IN INTERNATIONAL ARBITRATION:
HOW ARE CHALLENGES MADE AND WHAT IS THE LIKELY OUTCOME?

James Thompson examines how challenges to arbitrators in international arbitration are made and dealt with, some of the statistics relating to challenges and looks at practical considerations in making or responding to these challenges.

Introduction

Practitioners involved in international arbitration may have perceived, over recent years, an increased willingness of parties to raise a challenge to an arbitrator in their proceedings. The aim of this article is to attempt to answer some of the important questions relating to challenges such as: how do such challenges work, on what grounds can they be justifiable, and are they likely to succeed? What considerations are relevant to the decision whether to make a challenge, and how should the other party respond to a challenge?

How Challenges Are Made and Dealt With in International Arbitrations

Due to space limitations, a comprehensive review of how challenges are made and dealt with by all of the major institutions is not possible. This section therefore focusses on the position under the ICC Rules, but reference is made to other major institutional rules by way of comparison.

Challenges to arbitrators in ICC arbitrations are made pursuant to Article 14 of the 2017 Rules. Those provide that challenges must be made by submitting a written statement to the ICC Secretariat *"specifying the facts and circumstances on which the challenge is based"*[1].

"The requirement to make challenges in writing gives rise to the question of whether a party will be entitled, or allowed, to make oral submissions either in support of, or against, a challenge."

The ICC Secretariat notes that the requirement to specify the facts and circumstances in writing *"is an initial but important barrier to frivolous challenges as it forces the challenging party to explain itself"*[2]. The Secretariat also gives helpful guidance as to the form and content of the challenge, noting that the submission should be *"concise and measured"*[3]. It notes that attachments such as supporting evidence and even witness statements can be provided but cautions the use of restraint in this regard. In particular, the provision of articles and extracts from text books is unlikely to be helpful to the Court in deciding the challenge, although extracts of relevant caselaw and other authority relevant to the legal standards of impartiality at the place of the arbitration may well be.

The requirement to make challenges in writing gives rise to the question of whether a party will be entitled, or allowed, to make oral submissions either in support of, or against, a challenge. There is no provision in the Rules for such oral submissions, and the Secretariat notes that, although parties have occasionally sought permission to do so, such requests have consistently been refused[4].

The requirement for a challenge to be made in writing is common across the different institutional rules, and for good reason. The LCIA Rules require a challenge to be made in writing[5]. The UNCITRAL Rules similarly require a notice of challenge to be sent to all other parties and the arbitrators, which shall state the reasons for the challenge[6]. The DIAC Rules also require the challenging party to send a written statement of the reasons for the challenge to all other parties and the tribunal members[7].

The grounds on which such a challenge may be made are *"an alleged lack of impartiality or independence, or otherwise"*[8]. This is plainly a very broad statement of the potential basis for challenge and challenges are in practice brought on a wide range of grounds. The most common ground for challenge is an alleged lack of independence, usually based on alleged relationships between the arbitrator and a party or counsel to one of the parties. In practice, the alleged offending relationship is likely to be between the arbitrator's law firm rather than himself or herself as an individual.

However, it is clear that challenges are not limited to considerations of independence and can also be brought on the basis of perceived unfairness in the way that a party has been treated giving rise to alleged impartiality. Such challenges are, however, unlikely to be successful. Furthermore, what is meant by the words *"or otherwise"* is open to interpretation. They are surely wide enough to include a challenge brought on the basis of an alleged lack of ability to conduct the proceedings or the failure

1 Article 14(1)
2 Paragraph 3-559 of the Secretariat's Guide to ICC Arbitration (commenting on the 2012 Rules)
3 Ibid, paragraph 3-560
4 Ibid, paragraph 3-561
5 Article 10.1 of the 2014 Rules refers to a "written challenge" and Article 10.3 requires the submission of a written statement of the reasons for the challenge.
6 Article 13(1) and (2) of the UNCITRAL Rules
7 Article 13.4 of the DIAC Rules 2007
8 Article 14(1)

> *"If the challenge is made on the basis of perceived lack of independence, objecting to it may well strengthen that impression."*

to possess a necessary skillset, but such challenges are unlikely to be successful unless the parties have agreed that the arbitrator(s) should have such skills. An example might be the inability of the arbitrator to conduct the proceedings in the required language, but it would seem unlikely that an arbitrator who was clearly unable to do so would have been appointed in the first place.

Challenges in ICC arbitrations can be made at any time but must be submitted either within 30 days from receipt by the party making the challenge of notification of the appointment or confirmation of the arbitrator, or within 30 days *"from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification"*[9]. Failure to comply with these time limits will render any challenge inadmissible. Given this draconian consequence, it is likely that the party not making the challenge will wish to examine the facts on which the challenge is based carefully in order to see whether an argument can be made that they were known to the other party more than 30 days before the challenge was submitted.

Other arbitral institutions set down an even stricter time limit for raising a challenge. Both the UNCITRAL Rules and the DIAC Rules require such challenges to be made within 15 days[10] and the LCIA Rules require challenges to be raised within 14 days[11].

The question arises as to whether the various rules require actual knowledge on the party bringing the challenge or whether constructive knowledge is sufficient. The wording of Article 14(2) of the ICC Rules would suggest the former ("was informed"), but the Secretariat notes that in practice the Court will often conduct an assessment of the factual circumstances to determine whether the challenging party should have known of particular facts and matters at an earlier time[12]. The position is likely to be the same under other institutional rules.

When a challenge is made, the Secretariat will seek comments from the challenged arbitrator as well as the other members of the tribunal, and the other party[13]. The Secretariat will then produce a written report to the Court on the challenge, but this will not include any recommendation regarding the outcome[14]. The decision on the admissibility and the merits of the challenge will then be made by the ICC Court at its monthly plenary session. However, the practice of the ICC in recent years is to deal with straightforward challenges at a weekly committee session of the Court to deal with such challenges as quickly as possible[15]. The Secretariat notes that, as at 2012, it had never been the case that a challenge referred to the weekly committee session for decision was subsequently referred to the Court on the basis that sufficient doubt existed not to reject the challenge.

As will be readily apparent, all of this takes time and it is usually the case that a challenge will cause (potentially substantial) delay to the proceedings. There is no fixed period in which a decision on a challenge will be made and communicated to the parties, and the ICC will not provide guidance to the parties on an ad hoc basis as to when a particular challenge is likely to be resolved. However, if a challenge is made which is sufficiently arguable to require a decision of the Court at its monthly plenary session, as well as potentially extensive submissions from the arbitrators and the parties themselves, it is reasonable to expect that the process could take some 2-3 months overall to be resolved, and quite possibly longer.

Statistics Relating to Challenges

The ICC Secretariat published challenge statistics for the decade between 2001 and 2011[16]. During that period, some 397 challenges were filed, and the proportion of challenges as a percentage of the total number of arbitrators appointed or confirmed in that period was 3.3%. The proportion in each year ranged from 1.8% (2002) to 4.4% (2009) but there is no discernible trend over the period (either increasing or decreasing).

Of the 397 challenges made in that ten-year period, only 30 were accepted by the ICC Court (some 7.6%). There was a broader range of success in each year, from 2.3% (2008, when only one challenge out of 44 was accepted by the Court) to 29.4% (2002, when 5 challenges out of 17 were accepted). However, given the relatively small numbers it is difficult to attribute any statistical significance to these figures, and there is again no discernible trend in terms of success over the period.

9 Article 14(2)
10 Article 13(1) and Article 13.4 respectively
11 Article 10.3 of the 2014 Rules
12 Ibid, paragraph 3-581
13 Article 14(3)
14 Ibid, paragraph 3-589
15 Ibid, paragraph 3-590
16 Ibid, paragraph 3-573 Table 20

More recent figures do not suggest a marked departure from the picture painted by these figures. For example, the number of challenges filed in ICC arbitrations in 2017, whether based on an alleged lack of impartiality, independence or otherwise, amounted to 48, out of which 6 were accepted by the Court (an acceptance rate of 12.5%)[17]. In light of these statistics, it would appear that any perception that challenges are on the rise, and/or more likely to be accepted, does not reflect the reality.

Statistics relating to other arbitral institutions paint a similar picture. For example, some 50 challenges were raised in LCIA arbitrations in the period between 2007 and 2012, with just 5 being upheld (a success rate of 10%)[18].

However, taking the figures for accepted challenges by the Court does not give the whole picture. This is because it is of course possible for an arbitrator to resign in response to a challenge, and thereby avoid the need for the Court to rule upon it. For example, in the course of 2017 some 29 arbitrators resigned in ICC arbitrations[19]. If only half of these were in response to a challenge, when combined with the 6 cases in which the Court accepted a challenge that year it would mean that the "success rate" (in terms of achieving the result intended, namely the removal of the arbitrator in question) would be far higher than 12%.

> *"A challenge which fails may be perceived as an attempt to delay the proceedings, and that may be taken into account when the tribunal comes to make a decision as to costs."*

Furthermore, the acceptance rate does not take into account a further way in which an arbitrator might be replaced as the result of a challenge, namely upon the agreement of the parties pursuant to Article 15(1) of the ICC Rules. As will be explored later, the party not making the challenge may decide that it would rather that a new arbitrator is appointed in place of the challenged arbitrator, particularly where the proceedings have not reached the latter stages and there have been no substantive hearings. In such a case it would be open to the parties to simply agree that the arbitrator should be replaced, again removing the need for the Court to rule upon the challenge. It is therefore very likely that the statistics for acceptance of challenges alone underestimate (and possibly by some margin) the true picture in terms of how many challenges ultimately result in the replacement of an arbitrator.

Practical Considerations in Making and Responding to Challenges

In light of the statistics set out above, it is clear that very few challenges are likely to be accepted by the ICC Court or other decision-making body in the case of different arbitral institutions. The question then arises: what practical considerations should a party bear in mind when deciding whether to raise a challenge?

Firstly, and most obviously, a party should consider very carefully whether the facts do amount to convincing grounds for a challenge. In that regard, the *IBA Guidelines on Conflicts of Interest in International Arbitration* are likely to be useful. Many arbitral institutions will rely on the Guidelines when considering challenges, and it is clear that the ICC Secretariat will often do so when briefing the Court[20]. For example, a common basis for challenge is an alleged lack of independence arising out of the activities of an arbitrator's law firm. In that regard, General Standard 6 deals with the relationship of an arbitrator to his or her law firm. The explanation provides that *"the growing size of law firms should be taken into account as part of today's reality in international arbitration"* and makes clear that *"the activities of the arbitrator's firm should not automatically create a conflict of interest"*[21]. A party considering a challenge on this basis should therefore be aware that a more detailed and careful consideration of the relevance of the activities of the law firm will be required, and the decision will turn on the facts of the particular case.

Secondly, a party considering a challenge should be aware of the possible ramifications of a challenge which fails (especially given that many do). An arbitrator who has been the subject of a failed challenge will, of course, be expected to put it out of his or her mind when considering the merits of the case. But a challenge which fails may be perceived as an attempt to delay the proceedings, and that may be taken into account when the tribunal comes to make a decision as to costs. The ICC Rules expressly empower the tribunal to take into account *"the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner"*[22] (and a challenge designed simply to delay is obviously the opposite of such required behaviour).

Turning now to the position of the party not making the challenge. What should that party do in response? Should it object, if it considers that the challenge has no merit? Or should it keep out of the arena and politely decline to offer a response if and when requested? Plainly, if the other party considers that the challenge has been made out of time, then making submissions to that effect are unlikely to do much harm. However, where the merits of a challenge are involved, the position is more difficult. In particular, if the challenge is made on the basis of perceived lack of independence, objecting to it may well strengthen that impression. In such circumstances, it may well be advisable to say little or nothing.

However, it is entirely possible that the party not making the challenge may feel that there are arguable grounds for it, but for obvious reasons does not wish to expressly support the challenge. In such circumstances there may be a risk that the Court will nevertheless not accept the challenge and the arbitration will proceed to an award which could later be impugned by the challenging party at enforcement stage. Equally, the other party may wish to cut short the potentially lengthy process of formally determining the challenge, regardless of its merits, for the sake of getting on with the arbitration. Is there an alternative route out in such a case? In such a scenario, the other party may simply agree that the arbitrator should be replaced, regardless of the merit of the challenge itself, in order to avoid the need to determine the challenge. In an ICC arbitration, such agreement would be reached in line with Article 15(1) of the Rules, pursuant to which the Court may accept a request from all the parties to replace the arbitrator.

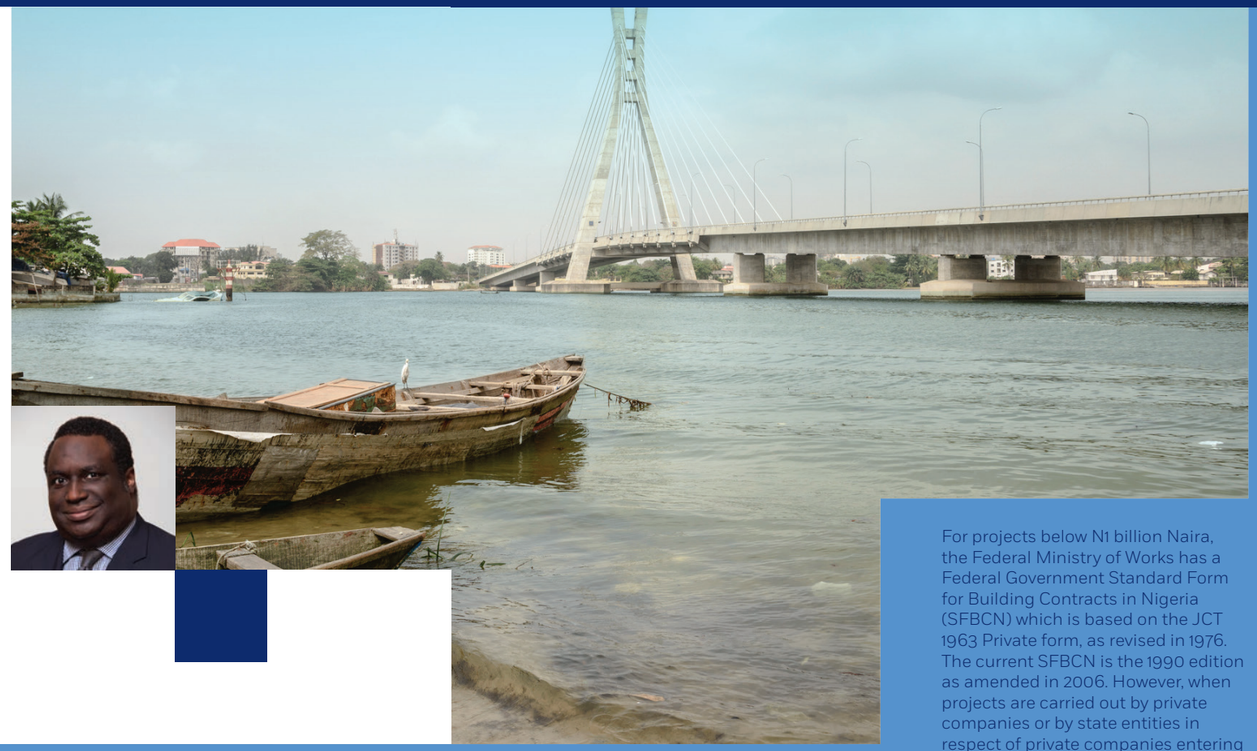
Practical Guidance

To conclude, parties should be cautious both in making a challenge and responding to a challenge. The numbers of challenges which are accepted remain low, and that is likely to be only in the clearest of cases. A failed challenge raises the question of whether it was genuinely made, or whether it was simply a tactical attempt to disrupt the proceedings. Parties considering a challenge should do so carefully in the knowledge that a rejected challenge could form the basis for a submission in due course that the challenging party's behaviour should be penalised in any subsequent costs award.

17 ICC Dispute Resolution Bulletin Number 2 (2018)
18 M Baker & L Greenwood, "Are Challenges Overused in International Arbitration?" Journal of International Arbitration 30, no.2 (2013), 110
19 ICC Dispute Resolution Bulletin Number 2 (2018)
20 M Baker & L Greenwood, "Are Challenges Overused in International Arbitration?" Journal of International Arbitration 30, no.2 (2013), 107-108
21 Explanation to General Standard 6
22 Article 38(5)

THE SOCIETY OF CONSTRUCTION LAW NIGERIA

Abdul Jinadu highlights the purpose and goals of the newly founded SCL Nigeria, of which he is one of the founding management committee members.



The global constellation of Societies of Construction Law is well known. From its origins in the UK in 1983 with the founding of the original Society of Construction Law, the "SCL" is now a global franchise with associated societies in many common law, quasi common law and indeed entirely civil law jurisdictions.

There are SCLs in many jurisdictions which have strong historical ties to the United Kingdom and to the common law, such as Australia, New Zealand and Hong Kong. However, the global footprint of UK trained or affiliated lawyers and construction professionals has also seen the SCL spread to jurisdictions such as the Gulf and North America. In Europe, the umbrella European Society of Construction Law includes individual societies in 18 countries covering most of Western Europe but now with members as far East as the Ukraine.

The pioneer society on the African continent was SCL Egypt. This was followed by the formation of SCL Africa in 2013. SCL Africa is a South Africa based organisation which is focused on South Africa and neighbouring countries.

SCL Nigeria was incorporated in 2016 with the purpose of bringing Nigeria into the constellation of global SCLs by forming a society which is specifically tailored to address the challenges and opportunities of the Nigerian construction and engineering market.

Nigeria is the largest economy in Africa with a GDP of $411 billion. Like much of the continent, it has substantial infrastructure deficits across the board in everything from roads to power to communications to health care and education. It has a rapidly growing population which is estimated to be between 180 and 200 million and this population is young. Coupled with this is a rapidly growing middle class fuelling a demand for consumer goods and retail outlets.

All of this has translated into substantial growth in the construction industry. The large oil and gas industry, which contributes about 9% to the GDP, has resulted in a very well-established engineering sector.

Aims of the Society of Construction Law Nigeria

The aims of SCL Nigeria are:

(i) To promote for the public benefit, education, study and research (and publication of the useful results of such research) in the field of construction and engineering law and related subjects in Nigeria.

(ii) To encourage the development of knowledge within the legal, construction and engineering professions and the application of all aspects of construction and engineering law in Nigeria.

(iii) To seek the enactment of appropriate Federal and State laws and the proper application of the same.

SCL Nigeria was constituted with a board of trustees which included the then President of the Society of Engineers, the Past President of the Nigerian Society of Architects, the Past Director of the Bureau of Public Enterprises, the then President of the Nigerian Society of Quantity Surveyors and the Chairman of the only indigenous Nigerian company to have delivered and operated a major infrastructure project on a Build, Operate and Transfer ("BOT") basis.

The founding motivational principle driving the management committee of SCL Nigeria was to provide a forum in which professionals engaged in the construction and engineering industries can meet to learn, co-operate and exchange ideas.

Immediate Goals

SCL Nigeria was formed not just to provide a "talking shop" but to deliver a mechanism by which the immediate challenges facing the Nigerian construction and engineering industry can be addressed. To this end, the proposal for SCL Nigeria is that it should set itself three immediate and achievable goals:

(i) Standard Form Contracts

As the Nigerian economy grows and becomes more sophisticated there will be an increasing focus on projects which are funded privately or by state entities through capital raised from sources other than the governmental or quasi-governmental multilateral lenders or donors. This means more projects will be funded from banks and capital markets which will bring greater scrutiny of contractual arrangements. In addition, as the Nigerian economy develops it will be necessary to know more about what is going on in the construction industry and in particular on what basis people are contracting.

At present, where projects are funded by the World Bank either directly or through the IFC, or by the African Development Bank or other international multilateral institutions, such projects are usually carried out using the FIDIC family of contracts with amendments to suit the particular lending or donor institution. The World Bank standard form is used for World Bank assisted projects and the ADB standard form is used for ADB assisted projects. Both are derivatives of the FIDIC form.

Where projects are commissioned by state entities, the Bureau of Public Procurement (BPP) - which is the regulatory body responsible for monitoring, regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria - publishes a standard form used for government contracts that are above N1 billion Naira (approximately US$4m). The BPP standard form is an adaptation of the World Bank standard form. It was first formulated in 2010, revised in 2011 and revised again in 2013.

For projects below N1 billion Naira, the Federal Ministry of Works has a Federal Government Standard Form for Building Contracts in Nigeria (SFBCN) which is based on the JCT 1963 Private form, as revised in 1976. The current SFBCN is the 1990 edition as amended in 2006. However, when projects are carried out by private companies or by state entities in respect of private companies entering into agreements, the most popular standard form is the FIDIC family of contracts.

The absence of up to date, state of the art contracts which are specifically drafted for the Nigerian market is one of the gaps in knowledge and skill which SCL Nigeria hopes to help to fill. One of the principal aims of SCL Nigeria will be to bring together professionals in the construction and engineering industry with lawyers with the relevant local expertise to draft a family of standard form contracts, which will be drafted with the particular conditions of the Nigerian market at their core.

(ii) Adjudication and Prompt Payment

A common issue in all construction and engineering markets around the world is the issue of cash flow. The problems created by the failure of employers to pay main contractors and main contractors to pay sub-contractors retard the growth of this sector of the economy. The UK Government identified this as a problem in the mid-1990s in the Latham Report and this led to the present adjudication and prompt payment regimes which are encoded in the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts.

Other Commonwealth jurisdictions have copied the UK's example and introduced legislation which make provision for adjudication and prompt payment.

Issues regarding prompt payment are perhaps more acute in Nigeria than in most other markets because of a range of factors, including fluctuations in currency values, inflation and frankly a sometimes-cavalier attitude to compliance with contract provisions. Therefore, another area in which SCL Nigeria hopes to make immediate impact is to provide recommendations to state and the Federal Government regarding legislation making provision for adjudication and regulations for prompt payment. It would be useful for a study to be carried out by SCL Nigeria into the feasibility, desirability and impact of the introduction of similar laws in Nigeria.

(iii) Building Regulations

There is a persistent problem of building collapses in Nigeria. A recent collapse in Lagos led to the loss of 20 lives. A government committee set up to investigate that and other recent collapses stated that the collapses were the result of *"non-adherence to the building construction process, inappropriate/poor designs, hasty construction work, non-supervision of the construction work by professionals, and non-monitoring by the development control authorities."*

The weakness of the regulatory and supervisory regimes is responsible for these failings. SCL Nigeria is unique in that it will be the only space in which all of the professions engaged in the construction industry can interact together and with lawyers. Therefore, SCL Nigeria can function as a platform for the professional bodies to make use of the skills and experience of fellow professionals and of the legal practitioners to develop recommendations for the improvement of the relevant regulatory regimes and how to train their members in the sue of and compliance with these regulations.

Conclusion

SCL Nigeria has been long in gestation but it is now ready to be launched. Membership is available through the website at https://www.scl-nigeria.org/ and is open to local and foreign practitioners, professionals and firms. The benefits of membership are explained on the website, the most important of which is access to and membership of the only forum in which all of the professional disciplines engaged in the Nigerian construction and engineering industries can meet to exchange ideas and to fashion solutions to the very real and specific challenges of the Nigerian market.

An inaugural conference is to take place in Lagos in September/October 2019, the details of which will be published on the website in due course.

GENERAL RESERVATIONS OF RIGHTS IN ADJUDICATION AFTER BRESCO ELECTRICAL SERVICES V MICHAEL J LONSDALE

Gaynor Chambers considers general reservations of rights in the context of adjudications by reference to various cases, including *Bresco Electrical Services Limited (in liquidation) and Michael Lonsdale (Electrical) Limited*[1].

Introduction

I have dealt with various challenges to my jurisdiction following appointment as an adjudicator. Some are simple, others relatively complex, particularly those arising out of power generation projects and the exemption within section 105(2) of the Housing Grants, Construction and Regeneration Act 1996.

Even if no specific challenge is made, it is common practice for respondents to include a general reservation of rights within their adjudication submissions. The wording used is often very wide, stating that the responding party's position in respect of the reference is fully reserved, and that it further reserves all rights in respect of jurisdictional or other issues in the adjudication or any other proceedings (or words to that effect).

Challenges in Practice

This practice appears to have its roots in cases such as Allied P & L Limited v Paradigm Housing Group Limited[2], in which the responding party took various points on jurisdiction during the course of the adjudication, each of which failed. Although the responding party discovered a much better argument after the adjudicator had reached a decision, it was not allowed to rely on its to resist enforcement as the responding party had not previously referred to it or reserved its position in respect of it. However, Akenhead J left open the issue as to whether a general reservation without any hint or suggestion as to what the grounds are could be effective.

> *"Many respondents appear to view a general reservation of rights as offering a more effective means of protecting their position."*

Ramsey J then considered the issue further in GPS Marine Limited v Ringway Limited[3], concluding by analogy with authorities in the context of arbitration prior to the provisions of section 73 of the Arbitration Act 1996 that if the words of a reservation were sufficiently clear they could prevent a party's subsequent participation in an adjudication from amounting to a waiver or ad hoc submission.

Therefore, many respondents appear to view a general reservation of rights as offering a more effective means of protecting their position in due course than a specific challenge, particularly in situations where the commencement of the adjudication has been a surprise and so the responding party does not want to risk missing a point and being subsequently precluded from relying on it. Others take specific points but also add a general reservation of rights as a fall back position, hoping to then be able to bring up other issues on enforcement.

Whilst it is understandable that a responding party would want to use a general rather than specific approach in order to try to keep all options open, this approach raises difficulties for both the adjudicator and the referring party. The adjudicator cannot investigate the grounds for resisting jurisdiction as none are identified and cannot therefore decide whether or not to proceed. Similarly, the referring party cannot decide whether the responding party has made a good point and take steps to remedy the situation by, for example, starting a new adjudication.

Bresco Electrical v Michael J Lonsdale

The Court of Appeal recently tackled this vexed topic head on in Bresco Electrical Services Limited (in liquidation) and Michael J Lonsdale (Electrical) Limited.

That case was primarily concerned with the interplay between adjudication and the insolvency regime[4], but Lord Justice Coulson also took the opportunity to set out his views on jurisdictional matters, stating that *"arguments about waiver and general reservations of position arise much more often in adjudication cases than they should"*[5].

1 [2019] EWCA Civ 27
2 [2009] EWHC 2890 (TCC)
3 [2010] EWHC 283 (TCC)
4 See also the subsequent case of Indigo v Razin [2019] EWHC 1205 (TCC): https://www.keatingchambers.com/case-report/indigo-v-razin/
5 Paragraph 82

As Coulson LJ pointed out, the difficulty with a general reservation of jurisdiction is that it means that a party can participate in an adjudication, decide it isn't keen on the result, and then *"comb through the documents in the hope that new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour"*[6].

Cannon, the responding party in Bresco Electrical, had emailed the adjudicator on 17th March 2018, noting the agreed timetable for the adjudication and then stating *"... the Responding Party (Cannon) reserves its right to raise any jurisdictional and/or other issues, in due course, whether previously raised or not and whether within the forum of adjudication or other proceedings"*[7].

Cannon subsequently emailed the adjudicator again repeating the general reservation of rights but also raising two specific challenges to the adjudicator's jurisdiction, firstly that the responding party had cherry picked parts of the account in their claim and second that there was no crystallised dispute. These two points were rejected by the adjudicator and subsequently by Judge Waksman QC.

In its application for permission to appeal, Cannon sought to raise an argument that the adjudicator did not have jurisdiction because the referring party Primus was the subject of a Company Voluntary Agreement (CVA) for the first time.

Coulson LJ was firmly against Cannon on this point, stating that any proper jurisdictional objection was limited to the two points which the adjudicator decided against Cannon, and that either the general reservation was *"too vague to be effective"* or ought to be regarded as having been superseded by the two specific arguments which had been raised and failed.

The judge differed from Ramsey J in GPS Marine by finding that the reasoning in cases dealing with general waivers in the context of arbitrations were not of direct application, and that this informed the starting point when considering the applicable principles on waiver and general reservations in an adjudication context. His analysis of those principles at paragraph 92 of the judgment makes interesting reading:

"i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so 'appropriately and clearly'. If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (Allied P&L).

ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decided not to proceed, and the referring party cannot decide for itself whether the objection has merit (GPS Marine).

(iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement) then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (GPS Marine).

(iv) A general reservation of position on jurisdiction is undesirable but may be effective (GPS Marine; Aedifice). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:

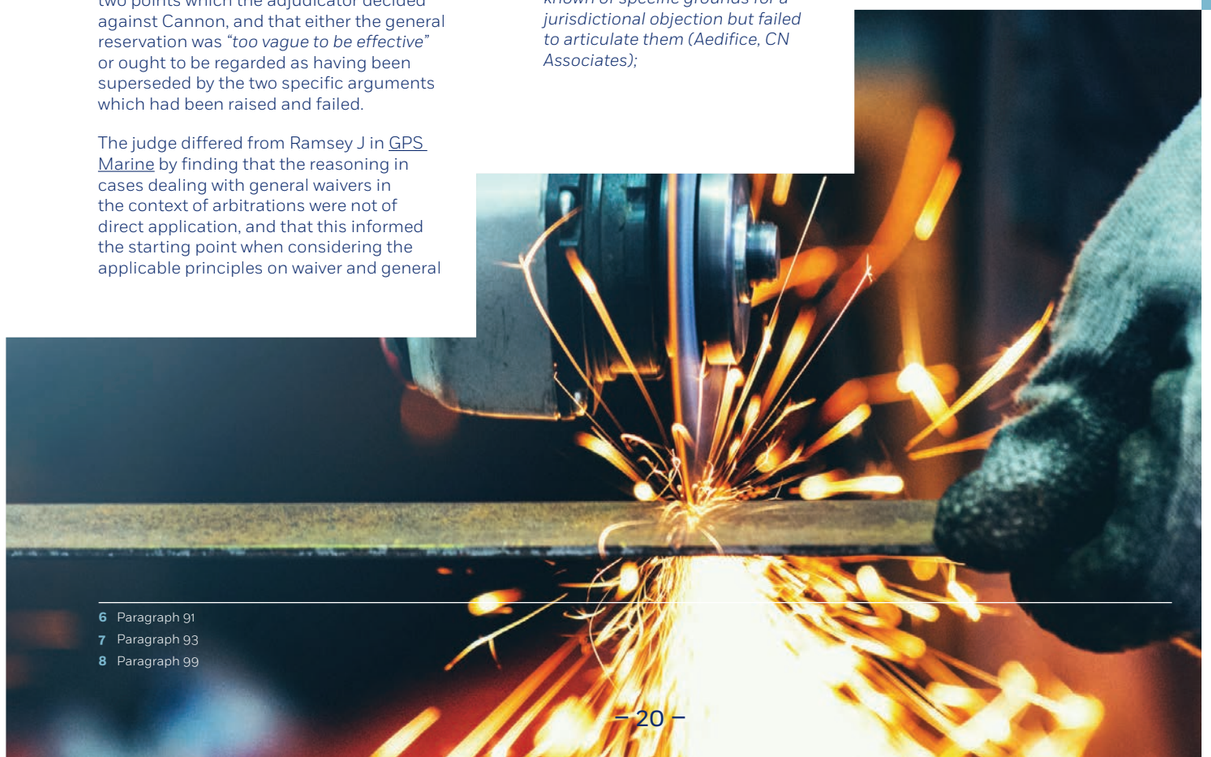
i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (Aedifice, CN Associates);

ii) The court concludes that the general reservation was worded in the way that simply to try and ensure that all options (including ones not even thought of) could be kept open (Equitix)".

Conclusion

So, what does this mean in practice? Whilst the judgment does not entirely preclude general reservations of rights from being effective, it means that the prospects of successfully relying on any such general reservation are greatly reduced. Any such reservations could almost invariably be construed on enforcement as being attempts to try to ensure that all options are being kept open, falling foul of the principle at paragraph 92(iv)ii).

It also means that responding parties and those representing them need to take care to consider specific grounds rather than simply relying on a carefully worded general reservation, as even careful wording will not assist if the argument being raised on enforcement is one which ought to have been known about and raised before the adjudicator. The issue of what a responding party should have known may therefore prove to be a key issue in future enforcement applications in the light of Coulson LJ's analysis.



6 Paragraph 91
7 Paragraph 93
8 Paragraph 99

BRIEF
Encounters

James Frampton reflects on his career thus far as a junior tenant at Keating Chambers.

What made you choose Keating?

I was on the GDL looking for pupillage at a commercial set. At one of the pupillage fairs I attended (and would recommend to all budding barristers), two of the three speakers at the "Life at the Commercial Bar" talk were construction barristers, including one member of Keating Chambers. Before then I was not aware that there was a distinct "Construction Bar". However, I was struck by the passion with which the "brickies" on the panel described their jobs and immediately shared their interest. Put simply, it is far more enjoyable and stimulating arguing about, and having to understand, something which is physically there! For example, I have already have had to master how an iron ore mine and a nuclear power plant are built and function. Once I had settled on the Construction Bar, Keating was the obvious choice.

What has been the highlight of your career so far?

I was lucky enough to be led in my first big case, just three months into tenancy, by Simon Hughes QC. At the beginning of last year, I spent over two months in Singapore for a five week arbitration concerning a mine in Australia. Not only was it incredibly exciting to be acting in one of the biggest disputes in Asia, but I also had a ring-side seat watching Simon, the distinguished arbitrators, and counsel for the other side in action. It was an unparalleled learning experience in cross-examination, submissions and general court/tribunal advocacy. I was even able to spend two weeks travelling around south-east Asia once the hearing finished. At the other end of the spectrum, I more recently had my own two-day arbitration in Taunton! While less glamorous, it was equally enjoyable as I could put all I had learned into practice.

"I was struck by the passion with which the "brickies" on the panel described their jobs and immediately shared their interest."

What is the balance of your practice between international and UK work?

International construction cases can be enormous and my domestic cases are typically smaller, so the balance of my practice can vary at any given time. For example, last year I was involved in two international arbitration hearings which both lasted over four weeks. Overall, I would say that the balance of my practice is roughly 50% international work and 50% domestic work. One of the best things about being a barrister at Keating Chambers is the diversity of the work. You can go from being a second or third junior on a multi-billion pound arbitration one day, to acting as sole counsel in a £20k dispute on the next day. Both are equally challenging and rewarding!

What aspects do you think are important for building a career as a modern barrister?

I think it is increasingly essential for modern barristers to be able to work as part as a team. Within chambers generally as well as in the counsel or wider legal team in each case, it is vital that you are able to build personal relationships with people and fulfil your role in the team. Solicitors and leaders are looking for junior barristers they can both rely on during a hearing and share a beer with after. Plus this team spirit will keep you going through even the most difficult cases! Similarly, marketing – whether it is writing articles, giving talks or attending dinners – is a crucial part of a barrister's practice. Luckily, at Keating Chambers we are assisted by our brilliant marketing team – Marie and Maddy!

James Frampton became a tenant at Keating Chambers in 2017 after the successful completion of his pupillage. James is developing a busy practice across the range of Chambers' specialisms both domestically (led and unled) and internationally. He has appeared as a sole advocate in the County Court and the High Court, as well as acting in several large-value arbitrations concerning high-profile international projects. James is an Honorary Lecturer in the Bartlett School of Construction and Project Management at UCL, teaching a MsC module on contractual claims and dispute resolution.

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