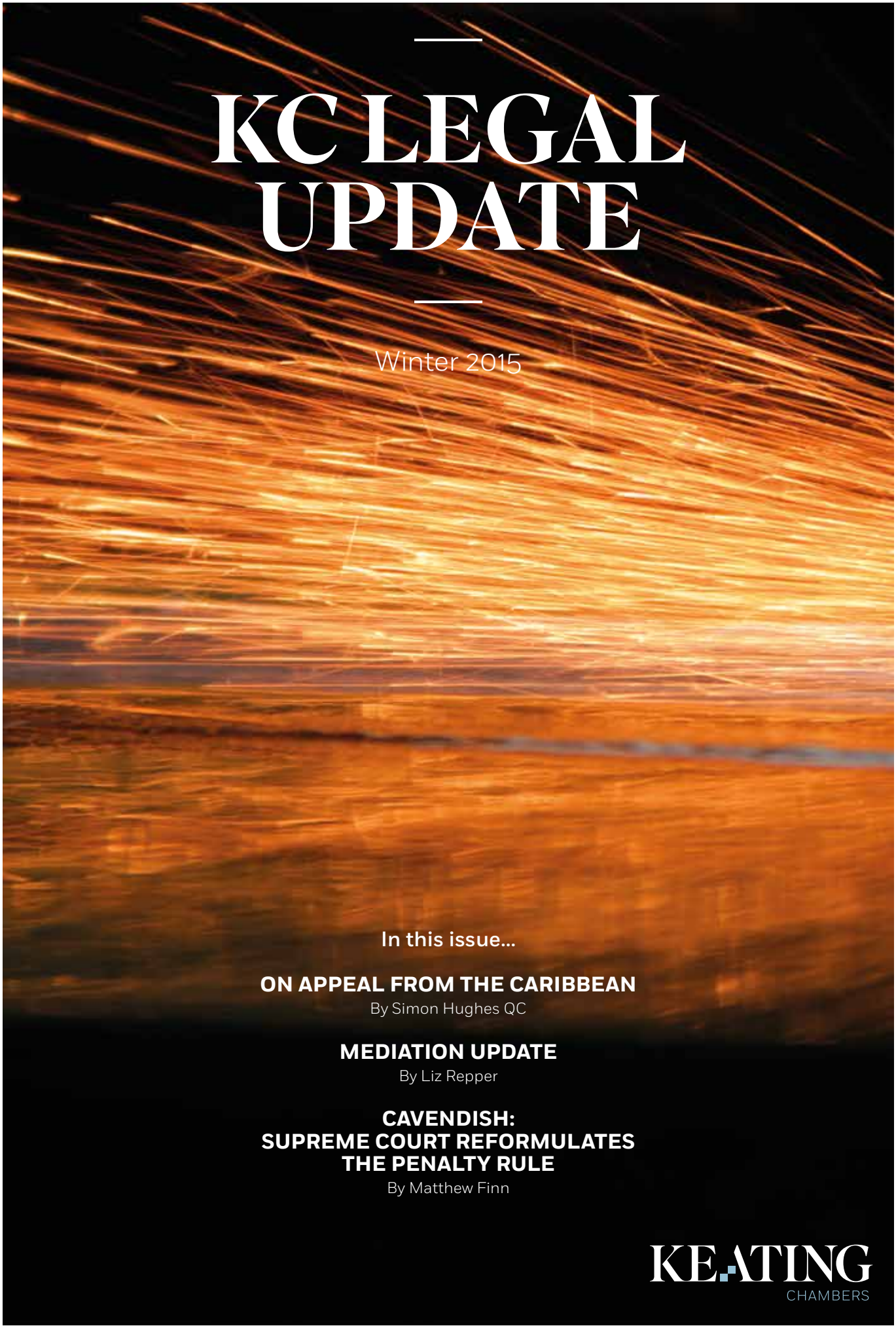

KC LEGAL UPDATE

Winter 2015

In this issue...

KEATING CHAMBERS

WELCOME

TO THE WINTER 2015 EDITION OF KC LEGAL UPDATE

The last issue of KC Legal Update in 2015 is also the start of the fourth year of its publication. There are other highly-significant beginnings at Keating Chambers to report.

Our last issue recorded, and paid tribute to, the term of office of the outgoing Head of Chambers, Paul Darling QC OBE. In other circumstance, it might be expected that the new Head of Chambers would be 'introduced' here. However, such is the profile of Marcus Taverner QC that an introduction to most of our readers is quite superfluous. All wish him well at the start of this new chapter in Chambers' long history.

Also a part of that new chapter is Director of Business Development, Holly Gavaghan. Holly's experience embraces life as a solicitor, both in private practice and in-house at a major contractor, leading clerks' teams at specialist chambers and heading business development at a major City firm. A profile of Holly is included in this Issue and Chambers' welcome to her extends also to Marketing and Events Manager, Marie Sparkes, another recent arrival.

Members of Keating Chambers undertake work related to, and sometimes in, the world's most glamourous locations, from the Far East to the West Indies. On this page, Robert Gaitskell QC gives us a flavor of the extraordinary island nation of Singapore and its cutting edge contributions to dispute resolution. His report of Singapore's brokerage of a PRC-Taiwan summit Is a good news story at the end of a year which has desperately needed them.

Elsewhere in this issue, Simon Hughes QC, who appeared earlier in the year in National Stadium (Grenada) v NH International, considers this and other recent examples of Privy Council decisions from the Caribbean on construction law. The Commonwealth nations and British Overseas Territories which are loosely called 'the Caribbean' are the last major global region to send cases to be heard by the Judicial Committee of the Privy Council, once said to be "the final court of appeal for more than a quarter of the world". Simon emphasises the value of consideration of construction law issues, including interpretation of FIDIC contract provisions, by the most senior members of our judiciary, when few such cases ever reach the Supreme Court.

A case which did, of course, reach the Supreme Court was that of Cavendish Square Holding v Makdess; and the conjoined appeal of Parking Eye v Beavis. There is a sort of fitness, which has been much remarked on, in celebrating the centenary of Dunlop Pneumatic Tyre Co v New Garage by a root and branch consideration of the law on penalties. Matthew Finn examines what he sees as a reformulation of the penalty rule and his analysis will be read with great interest by all in construction who are concerned about the relationship between liquidated damages and penalties – surely all of us – to say nothing of long-suffering motorists – almost as many of us.

The title of this publication gives some indication of its Continuing Professional Development function, which is an important part of its mission. As well as the regular Keating case notes feature, there is an ADR Update from mediation specialist Liz Repper, of which a major and familiar theme is failure to engage in ADR and the consequences. Finally, there is a note on the piloting of 'Shorter and Flexible Trials' in the Technology and Construction Court (and other courts) which began on October 1st of this year. With strict limits on the length of pleadings, tight time limits and summary assessment of costs, the construction industry and the professions which serve it will definitely categorise this experiment as a 'watch this space' development.

Everyone at Keating Chambers send best wishes to readers of KC Legal Update for the festive season and for 2016.

Professor Anthony Lavers
Director of Research & Professional Development

The Singapore skyline never sleeps. For the past few days I have been mediating in Maxwell Chambers in the heart of Singapore. This wonderfully restored colonial building captures the essence of the modern city-state. The building itself is the old Custom House, with beautifully evocative period architecture. The careful restoration has transformed it into a state-of-the-art dispute resolution centre. The result is a cutting -edge facility that has preserved the stability of an illustrious history.

In similar fashion the whole city has embraced the latest technology while never losing touch with its historical foundations. The various bodies within Singapore that promote dispute resolution, including arbitration and mediation, are flourishing, encouraged in their work by the internationally renowned Chief Justice, Sundaresh Menon. When it became known that I was about to visit Maxwell Chambers to mediate I was promptly contacted by Eunice Chua, the dynamic head of the Singapore International Mediation Centre, and the result was that my trip ended with two speaking engagements, one to lawyers and one to professional engineers, making the case for mediation as an important procedure for resolving construction and engineering disputes. On each occasion Eunice and a friend joined me in presenting a mock mediation within 30 minutes. The feedback was overwhelmingly positive.

Now back in London, and with the Christmas break looming, I and the team who produce the Keating Construction Dispute Resolution Handbook, will be busy drafting the third edition, which will appear in mid-2016. In my chapter on international dispute resolution I shall be building in the lessons gleaned from my recent trip. In particular, I shall take account of Singapore's latest triumph in setting up a meeting there at the highest level between the governments of the PRC and Taiwan. Not only was this a major diplomatic success, boding well for the future stability of the region, but it demonstrated clearly precisely what mediation has to offer: the ability to bring together two parties, with different agendas, and to enable them to find common ground and a way forward founded on compromise and cooperation. Well done, Singapore!

Dr Robert Gaitskell QC

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On Appeal from the Caribbean

By Simon Hughes QC

2015 has seen a number of construction and construction-related cases coming from the Caribbean for decision by the Privy Council, with the Caribbean now accounting for the large majority of appeals to the Judicial Committee. Very few construction and engineering cases reached the House of Lords, certainly in the last few decades, and even fewer have come before the Supreme Court. It is of considerable interest, therefore, when construction and engineering contracts come before the most senior judges in the United Kingdom.

Construction cases from the Caribbean: tendering procedure

In *Central Tenders Board v White* [2015] UKPC 39, an appeal from the Court of Appeal of the Eastern Caribbean, the Judicial Committee of the Privy Council had to consider issues which are constantly before the modern English courts, namely fairness and due observance of procedure in the award of contracts in the public sector. When counsel for the Board, part of the Ministry of Finance Economic Development and Trade of the Government of Montserrat, cited the judgment of Lord Reed in the *Supreme Court in Healthcare at Home v The Common Services Agency* [2014] UKSC 49, Lord Toulson remarked that, although that case concerned European law requirements regarding procedures for awarding public works contracts, there could be no dispute as to *"a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment"*.

The case arose from the construction of a new multi-purpose hall for Lookout School in Montserrat, the successful tender price being just over EC$2.2 million. The tender had been submitted by the respondent, White Construction Services (White), and was the lowest price. Although the tender indicated that the work would be completed in 275 days, White had not filled in the blank space for the number of working weeks. White received notification that its bid had been accepted. One of the unsuccessful tenderers objected that this made the White tender non-compliant. The instructions to tenderers stated that failure to comply strictly with the requirements of the form "is liable to cause your tender to be rejected". The Board wrote to White stating that the tender had been found to be non-compliant and so the award of the contract had been withdrawn.

White commenced litigation against the Board and Montserrat's Attorney-General seeking judicial review. The High Court, in a decision upheld by the Eastern Caribbean Court of Appeal, held that the Board was in breach of its contractual obligation to White and that White should be awarded damages (to be assessed separately). The Board appealed to the Judicial Committee, its counsel stating that the Montserrat government was pursuing the appeal *"in order to obtain guidance about how it should proceed when confronted with issues about non-compliance with public law requirements in the area of awarding contracts, in particular, the requirement of equal treatment of tenderers"*.

The Board argued that, although it had the statutory power to award contracts for the procurement of goods and services, it had no power to accept a non-compliant tender; to do so would have been an ultra vires act.

The Privy Council did not accept the argument. First, the tender documentation had not stated that non-compliance with the instructions to tenderers would result in automatic rejection of the tender. Whereas bribery would *"result in instant rejection of the tender concerned"*, non-compliance with instructions was stated to be *"liable to cause [the] tender to be rejected"*. The former was mandatory, the latter not so. The Board was avoiding committing itself to automatic rejection, depending on the circumstances of the case. Here the non-compliance could be treated as of little significance because the omitted information could be obtained elsewhere within White's construction programme. Relying on the Canadian authority of *Society Promoting Environmental Conservation v Canada* (2003) 2328 DLR 4th 693, Lord Toulson thought that *"the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of authority"*.

> ***...if, in future, the Board made an error in enforcing its own procedure, it should focus on compensation (if loss could be proved) of an unsuccessful tenderer, not on depriving the successful tenderer of its entitlement.***

Since the Board sought guidance as to how it could have proceeded, the Privy Council addressed the rhetorical question *"what if something goes wrong in the process of awarding a contract by tender, giving rise to legitimate grievance on the part of an unsuccessful bidder that if he had been fairly treated, he would have secured the contract, or have had a good chance of doing so?"*.

Lord Toulson offered the *"possible remedy"* of the tender contract, following the *"instructive"* Court of Appeal decision of *Blackpool and Flyde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195, in which it was held that a contractual relationship was formed between the tendering authority and every party submitting a compliant tender.

In the present case, *"there would be no difficulty"* in finding that the Board *"owed an implied contractual duty to the under-bidder and to every other invitee that they would be treated fairly and equally. If a breach of that duty caused a tenderer to suffer a loss of a chance of a contract, the tenderer would be entitled to damages"*.

So, in dismissing the appeal, the Privy Council had shown that if, in future, the Board made an error in enforcing its own procedure, it should focus on compensation (if loss could be proved) of an unsuccessful tenderer, not on depriving the successful tenderer of its entitlement.

Construction cases from the Caribbean: frozen funds and Grenada's National Stadium

National Stadium Project (Grenada) Corporation v NH International (Caribbean) Ltd [2015] UKPC 6 came to the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago. The National Stadium of Grenada is an international sports venue which, amongst other major events, hosted matches in the 2007 ICC Cricket World Cup. This appeal concerned earlier construction work and, specifically, the use to be made of funds deposited in an account after the termination of the construction contract. The appellants, National Stadium Project (Grenada) Corporation (NS), had been set up to implement and manage the construction project by consultants ICS and the CLICO Investment Bank (CIB). The respondents, NH International (Caribbean) (NH), entered into a construction contract with ICS to carry out a major part of the work for approximately US$16 million. When ICS terminated the construction contract with NH, NH commenced proceedings in the court, claiming entitlement to monies due from CIB under its facility agreement with NS, and they obtained an injunction against CIB to prevent it otherwise utilising the money. NH's claim related to monies allegedly owing under the construction contract. Some US$2.68 million was thus 'frozen' when the project was eventually completed and the monies advanced under the facility agreement were repaid by the Government of

"...where parties choose to resolve theirdisputes through the medium of arbitration, it has long been well established that the courts should respect their choice and properly recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable".

Grenada, the 'frozen fund' was deposited by CIB in an escrow-type account.

NH commenced further action for a declaration that CIB held the frozen fund on trust for the sole purpose of paying contractors and other suppliers of goods and services, so that NH would have a claim on it. NS counterclaimed for a declaration that the fund belonged to NS. The first instance judge granted the declaration in favour of NH and ordered that the fund be paid to NH with interest. An appeal by NS to the Court of Appeal of Trinidad and Tobago was dismissed and NS appealed to the Privy Council.

NS's case was that it had been forced to complete the National Stadium project work at significant cost to itself, so that a considerable debt was owed to it. The first action had resulted in the freezing of funding which NS needed to use and had been obliged to obtain elsewhere. The first instance judge had held that the funds were subject to a 'Quistclose' trust (following *Barclays Bank v Quistclose Investments* [1970] AC 567) and that the funds were not needed for payment to the lenders, who had been repaid in full. The 'primary purpose' of the trust, namely to pay the contractors and suppliers for construction, could "yet be carried out".

NH, in the Court of Appeal proceedings, had stated that NS had failed to assert any facts which gave it any interest in the frozen fund. The fact that it had incurred loss in building out the project did not give it rights over the funds. Absent that, they submitted, there was no basis for a full appeal hearing.

The Court of Appeal, in a short oral judgment, reflected its conclusion that NS had not shown how it had acquired entitlement to the monies, by holding that the appeal could not be entertained, whatever its substantive merits might be.

It was this decision, to dismiss the appeal without hearing its substantive grounds, which was the subject of the further appeal to the Privy Council.

It was argued for NS that the Court of Appeal had ignored well-established principles applying to applications to strike out a notice of appeal without hearing it. The exercise of such a power should be reserved for *"clear and obvious cases"* which did not require *"extensive inquiry into the facts"*. Had there been a proper analysis of the underlying contract documents, which the court had not undertaken, it would have been apparent that title in the frozen funds vested in NS when the outstanding loans were repaid.

Lord Carnwath observed that, in dealing with first appeals to a local court of appeal, the court *"should be particularly careful not to shut out an apparently serious appeal unless it can be satisfied, without unduly detailed inquiry, that it is not realistically arguable"*. If it could not justify the necessary detailed inquiry, *"that is likely to be a good reason for not attempting to reach a decision without full argument"*. His Lordship concluded that it will rarely be appropriate to strike out an appeal on the ground of a gap in the pleading if that could be corrected by amendment.

The Privy Council, which, ironically perhaps, had had the benefit of a more detailed analysis of the underlying agreements than the Court of Appeal had allowed itself, took the view that it was at least *"arguable, to put it no higher"* that, once the project was completed, it was to NS (as the entity responsible for raising the finance for the development) that any residual monies should revert. The grounds presented in this appeal turned on interpretation of the contract documents, and there was no attempt to adduce new evidence or new arguments.

In the result, the Privy Council allowed the appeal, so that the decision of the Court of Appeal of Trinidad and Tobago to dismiss NS's appeal would be set aside and the case would be remitted to it for a full hearing of the grounds of appeal.

Construction cases from the Caribbean: termination under a FIDIC contract

The contractor *NH was also a party in the case of NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd* [2015] UKPC 37.

NH had been retained as contractor by Employer National Insurance Property Development Company Ltd (NIPDEC) for the construction of the new Scarborough Hospital under the 1999 edition of the FIDIC General Conditions of Contract for Construction (the "Red Book"). Following disagreements between the parties, NH suspended work and subsequently, a year later, purported to exercise its right to determine the contract. An arbitrator [Dr. Robert Gaitskell QC] was appointed to decide a range of disputes between the parties and issued five awards. Two issues arising from these awards were the subject of challenge and subsequently appeal. The first was the decision that NH was entitled to terminate the contract and the second related to financial claims.

There are long-standing concerns about the meaning of Clause 2.4 of the Red Book (Employer's Financial Arrangements), which requires the production of *"reasonable evidence that financial arrangements have bee made which will enable the Employer to pay the Contract Price (as estimated at that time)"*. The concerns are basically as to what "reasonable evidence" would be sufficient to fulfil this requirement and also as to the linkage of this provision with the suspension/ termination provisions, principally Clause 16.2.

NIPDEC had provided to NH for these purposes a letter from the Ministry of Health of the Government of Trinidad and Tobago stating that the Cabinet had approved US$59 million of additional funding for the project. In response to NIPDEC's point that the estimated final cost was US$287 million, a Permanent Secretary of the Ministry confirmed in writing that *"funds are available"* and *"moneys certified or found due to NHIC ... will be paid by the Government"*.

NH asked NIPDEC whether the Cabinet had approved these funds and a week later served a termination notice under Clause 16.2. NIPDEC did not accept that this was a valid termination and only agreed to proceed without prejudice to its contention that the termination was invalid because the Contractor had received the necessary "reasonable evidence".

The appointed arbitrator decided that the overall effect of the correspondence between the parties did not amount to "reasonable evidence" that the "financial arrangements" had been made and maintained. This was challenged by NIPDEC. The first instance judge upheld the arbitrator's finding but the Trinidad and Tobago Court of Appeal allowed NIPDEC's appeal. They found that the arbitrator was, in effect, demanding assurance of the "highest standard" rather than "reasonable evidence" and that the latter had been satisfied on the facts.

The Privy Council started its hearing of NH's appeal on this point from the position that *"where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that the courts should respect their choice and properly recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable"*.

The Court of Appeal had taken the view that the interpretation of Clause 2.4 was purely a matter of law. The Privy Council, by contrast, remarked that the arbitrator had reached its conclusion in the light of evidence which justified that conclusion.

The Court of Appeal had adopted an approach which *"involved an impermissible substitution of the court's judgment for that of the arbitrator, in circumstances where the parties had mutually agreed to have the issue determined by the Arbitrator"*. The arbitrator had been entitled to find that it was not sufficient to satisfy Clause 2.4 that an employer is wealthy, however relevant that might be. The appeal by NH was therefore successful on this issue.

The Privy Council was also called upon to decide an issue on Clause 2.5 (Employer's Claims), specifically the question whether the absence of a valid Clause 2.5 notice by the Employer would prevent it from relying on an ordinary right of set-off. In doing so, the court provided welcome clarification, and indeed support, for the FIDIC drafting.

Rights of set-off in most common law countries like Trinidad and Tobago are seen as important rights which cannot be lost without clear words of exclusion.

Clause 2.5 contains (inter alia) the requirement that if the Employer *"... considers itself to be entitled to any payment under any clause of these Conditions or otherwise..."*, the Employer should *"give notice and particulars to the Contractor"*, the applicable time-frame being *"as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim"*.

Rights of set-off in most common law countries like Trinidad and Tobago are seen as important rights which cannot be lost without clear words of exclusion. NIPDEC claimed that it could enjoy these rights under its financial counter-claim because there were no such clear words, and this was the view taken by the Court of Appeal of Trinidad and Tobago.

Lord Neuberger, however, stated the Privy Council's "different view": *"it is hard to see how the words of Clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been given 'as soon as practicable'"*.

On this point, too, the Privy Council found in favour of NH in allowing appeal from the Court of Appeal of Trinidad and Tobago.

Conclusion
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These decisions of some of the UK's most senior judges should be of great interest to practitioners. Although there is routinely an enormous amount of detail in construction and engineering cases, these decisions illustrate the point that there will often be interesting and important points of principle just below the surface of the detail. On those points of principle, it is invaluable to have the incisive and experienced views of the most senior judiciary in these decisions.

Profile

Holly Gavaghan joined Chambers in October 2015 as Business Development Director.

Holly qualified as a construction solicitor at Eversheds in 1996. After spending several years as an in house lawyer with Carillion plc, she took the opportunity to change direction, becoming Joint Senior Clerk at 39 Essex in 2003. She joined Freshfield Bruckhaus Deringer as Head of Business Development for Dispute Resolution in London in 2010 and returned to working with the bar in 2012 as Chambers Director at Landmark Chambers.

Email: hgavaghan@keatingchambers.com

Q.

What prompted you to join Keating Chambers?

Over the last 24 years I have been lucky enough to have worked for a variety of organizations within legal services in a variety of roles: solicitor, in-house lawyer, clerk, Head of Business Development and Chambers Director. From the very beginning as a trainee solicitor, the aspect of those roles I have found most interesting is what makes a client choose a particular lawyer for a piece of work and how client relationships are built up. I was a construction lawyer whilst practicing, so a client-focused business development role in a high quality set with an expertise in construction work was very attractive to me. I like the additional opportunities presented by other practice areas including energy, shipbuilding and offshore, professional negligence, property damage and nuisance, procurement and international arbitration. Chambers' joint focus on UK and international work is another attraction for me.

Q.

What are your priorities for the next 12 months?

Any role should be about working out how you add value to your organization and focusing on adding that value: for me that's primarily around clients. I'm still talking to barristers at Keating and clients of chambers about what they see as priorities and that will help shape the next 12 months. Based on my first six weeks my priorities will be to:

- Implement the relevant parts of the newly agreed Chambers Strategy;
- Create a marketing plan for 2016/17 with the newly formed Marketing Committee;
- Finish off the re-brand, in particular the launch of the new website and build on the Keating brand;
- Create a client programme to ensure we are providing what clients require; and
- Work on a CRM system that produces the information needed to support strategic decisions.

Q.

What is your perception of Keating Chambers since your arrival?

Before joining Keating my perception was that it was a top set specializing in construction related work. However, that is only a small part of the story and part of my role will be to work with Marie Sparkes, who joined chambers as Marketing and Events Manager in September, on reflecting through chambers' activities the full extent of the work our barristers do across arbitration, mediation and litigation.

Q.

How do you fit in with the clerks' room at Keating Chambers?

Seven years after qualifying as a solicitor I took the fairly unusual step of becoming Joint Senior Clerk at 39 Essex. It matched my desire to do something broader and non-fee earning, while they wanted a joint senior clerk from a different background. My time there not only enabled me to learn the business of running a barristers' chambers; it was also the perfect place to get a grounding in building client relationships. I'm enjoying being back in a clerks' room and working with Declan Redmond, our CEO/ Director of Clerking, and the practice managers on developing work and clients.

Q.

How have your first 2 months been?

Busy! My start coincided with the Annual IBA conference in Vienna and the SCL conference in Hong Kong. These events, along with meetings, seminars and events in London have given me opportunities to meet with over 25 client firms, including clients based in South Africa, Dubai, Mauritius and Hong Kong. I'm looking forward to going to Bristol and Dublin in the next few weeks. My aim is to continue to meet with as many of Chambers' clients as possible.

I have also managed to fit in a week at home with my 8 year old daughter and 10 year old son over October half term which was lovely.

TCC Pilot Schemes

Practice Direction 51N introduces 'Shorter and Flexible Trials in Pilot Schemes' ('the Pilot Schemes') and these Pilots – which will operate in all of the Rolls Building courts including the TCC – will run from 1st October 2015 for two years to 30 September 2017. The full terms of the Practice Direction are to be found at: www.justice.gov.uk

For practitioners and parties using the TCC, the Pilot Schemes are a welcome and thoughtful response to concerns over the ever-increasing cost and resources required to have disputes dealt with in Court.

Where STS not Suitable

The Shorter Trials Scheme ("STS") will not normally be suitable for cases described in paragraph 2.3 of the Practice Direction. This includes:

- Cases including an allegation of fraud or dishonesty.
- Cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence.
- Cases involving multiple issues and multiple parties, save for Part 20 counterclaims for revocation of an intellectual property right.
- Public procurement cases.

Allocation

Trials under the STS will be no more than 4 days including time (see paragraph 2.4) and all STS claims will be allocated to a designated judge "*...at the time of the first case management conference (CMC) or earlier if necessary...*"

In the TCC context, it is will of great interest to practitioners and parties alike to see how the criteria in paragraph 2.3 are interpreted and, in particular, what degree of complexity, disclosure and evidence will be regarded as too much for the STS. It is expected that the TCC will take a robust approach where parties, at the first CMC, emphasise the need for extensive disclosure and witness evidence in cases where a more efficient approach is likely to be appropriate.

Commencing and Transferring Proceedings

Guidance is provided on these topics in paragraphs 2.8 to 2.15 of the Practice Direction.

Proceedings under the STS – Some Points to Note

The detailed provisions of the Practice Direction give excellent guidance as to how the STS will be operated in practice.

- The pre-action protocols do not apply but a letter of claim should be sent and responded to within 14 days. This requirement will apply in most cases.
- Cost budgeting will not apply unless the parties agree to it. Costs are dealt with on a summary assessment basis at the end of the proceeding.
- Pleadings should be no longer than 20 pages and core documents should be attached.
- The CMC will take place 12 weeks after the acknowledgement of service.
- Standard disclosure will not apply.
- Documents provided by the parties – with pleadings – should be limited to those relied upon by either party.
- Trial date will be fixed no more than eight months after the CMC. As explained above, the trial will be no more than 4 days and this will include reading time.
- Evidence is to be limited and given in writing. Any oral evidence that is deemed necessary will be limited to identified issues.
- Timetables will be strictly adhered to but the parties can agree a 14-day extension for the defence and a seven-day extension for any other deadline.

Conclusion
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The Pilot Schemes, and the STS in particular, ought to be welcomed and embraced by those using the TCC. With a background and training in adjudication, expert determination and short-form arbitration procedures, construction & engineering professionals and lay clients are well placed to use the STS to substantially reduce the overall cost and burden of litigation in their field. The Pilot Schemes will of course represent a challenge, both for users of the TCC and its Judges. It is a challenge which the TCC's users and its dedicated team of expert Judges are well capable of meeting. Exciting and interesting times ahead.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Reported case summaries

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030

Wilson & Sharp (W&S) were employers under JCT Contracts. They failed to pay 4 interim certificates or to serve pay less notices. The Contractor (HVD) threatened to wind W&S up. W&S sought an injunction to restrain the petition on grounds that they disputed the valuations in the interim certificates and had claims for damages for repudiatory breach. HVD resisted the application on the grounds that W&S had historically admitted the sums were due and their cross claims were raised too late and were a "put up job" to avoid liquidation. At first instance the Judge agreed with HVD. Shortly after, HVD went into liquidation. W&S appealed.

The Court of Appeal allowed the appeal. The Court of Appeal found that, although the interim payments had been due and payable, W&S' cross claims, supported by a quantity surveyor, were sufficient to grant the injunction. W&S' failure to issue pay less notices did not prevent them from now challenging the valuations. Furthermore, HVD was in liquidation. Thus, under the JCT contract, W&S *"need not pay any sum that has already become due"*. The JCT clause applied notwithstanding that the contracts had been terminated 7 months prior to HVD's insolvency, for reasons unrelated to HVD's insolvency. This is the first case on s111(10) of the HGCRA 1996.

Krista Lee represented the appellants

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Northrop Grumman Missions Systems Europe Ltd v BAE (Al Diriyah C41) Ltd [2015] EWCA Civ. 844

The Court of Appeal had to consider the entitlement of a purchaser under a one-off commercial agreement for deployment licences and associated software on a defence system for the Ministry of Defence of the Kingdom of Saudi Arabia.

The claimant, Northrop Grumman Missions Systems (NGM), had sought a declaration that the defendant, BAE, was not entitled to terminate the agreement for convenience.

The Technology and Construction Court held that, on the correct interpretation of the agreement, BAE was entitled to terminate it for convenience on 20 calendar days' notice. This judgment, reported at [2014] EWHC 1955 TCC, was noted in our Winter 2014 Issue. NGM appealed from the decision of Ramsey J. The Court of Appeal treated the appeal as a case *"purely about contractual interpretation"*. It involved considering the less well known but *"authoritative dicta about the incorporation of provisions into a contract by reference to another contract"*. The appellants argued that the termination provision sought to be incorporated by the Respondent was not the parties' intention because the subject matter of the contract was *"inherently unsuitable for early termination at will or convenience"*. Rejecting reliance upon NGM's stance in pre-contract negotiations to support this contention, the Court of Appeal held that there was no objection to inclusion of early termination provisions in one agreement not found in the other. The question was whether that was what had been agreed and, on interpretation of the termination provisions, it had been so agreed. The appeal was dismissed.

Marcus Taverner QC and Richard Coplin represented the respondents

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The Dorchester Group Ltd v Kier Construction Ltd [2015] EWHC 3051 (TCC)

The Dorchester Group (Dorchester), the claimants, sought declarations and other relief in respect of discounts obtained by the defendant contractors, Kier, from their mechanical and electrical sub-contractors, Mitie. Dorchester's case was that these discounts were undisclosed, which constituted a breach of their contract with Kier.

Dorchester sought judgment on an admission and specific disclosure of documents not included in Kier's disclosure. Kier had made an open offer to pay the sum of £686,575, which was the sum decided to be the quantum of the discounts by an adjudicator. The offer did not include costs, was not accepted and was withdrawn. Dorchester argued that Kier had thereby admitted liability. The court held that Kier had not by its offer admitted liability, merely accepting the proposition of liability for the purposes of the offer. To obtain judgment, an admission would have to be clear and unequivocal, which was not the case.

On the disclosure application, the defendants argued that their expenditure, which greatly exceeded the amount for that element of the costs budget, should not be extended further. The judge rejected this, on the ground that the cost incurred was at least partly because of the disclosure method. Applying the test of proportionality, the judge extended standard disclosure to specified categories of documents sought by the claimants, though other categories were excluded. The tests of proportionality and relevance were applicable throughout.

Jonathan Selby represented the claimant
Adrian Williamson QC represented the defendant

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GBM Minerals Engineering Consultants Ltd v GBM Minerals Holdings Ltd [2015] EWHC 2954 (TCC) and [2015] EWHC 3081 (TCC)

The claimant engineering consultants claimed some £595,000 from the defendant, a Canadian mining company, said to be due for consultancy services carried out on a project in Guinea-Bissau. The defendants counterclaimed for over £4 million alleged overpayment and professional negligence on the part of the claimant. The defendant had succeeded in an application for permission to bring contempt proceedings against the claimant's principal based on allegations relating to the claimant's statement of truth in the Reply (*GB Holdings Ltd v Michael Short* [2015] 1387 (TCC)). The claimant sought to amend its pleadings in the light of the difficulties disclosed. Specifically, the claimant sought to remove its reliance on variation orders, the validity of which had been doubted. The defendant also sought to amend its pleadings in the light of information revealed during the disclosure process which they say gave rise to a case of secret payments/ bribery of their then chief executive.

In the result, the claimant's application to amend was granted. Any lack of particularisation would not be fatal to permission to amend, though the claimant would have to provide further information. Because of the unusual circumstances, the defendant, though applying late, would also be allowed to amend its pleadings.

In the costs hearing, both parties sought costs on the grounds that they had been successful in their respective applications to amend. In what he described as *"the unique circumstances of this case"* and because he regarded both parties' conduct negatively, the judge ruled that there would be no order as to costs for this hearing.

Samuel Townend represented the claimant

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Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2015] EWHC 2915 (TCC)

ICI applied for a court order to enforce an adjudicator's decision as to its contractual right to delivery by MMT of certain documents. The adjudicator had upheld ICI's entitlement to the documents, but refused to order delivery, on the grounds that the 7 days specified for delivery in the referral was inadequate and lack of jurisdiction to substitute a longer period. ICI drew an analogy with an adjudicator establishing that money was owed but not directing payment of it, also arguing that the shortness of the 7 days specified was no longer relevant because of the passage of time since the adjudication.

The TCC is rarely asked to enforce an adjudicator's decision by an injunction or court order and it has refused to do so where the claim is for payment of money. Here, the application to order delivery up was rejected as going further than the adjudicator was prepared to go; the court would not substitute its own decision for that of the adjudicator. The court also had to decide whether the adjudicator's decision was valid at all, on the ground that there was an apparent conflict in the contract between the NEC 3 Clause 2 procedure specifying the CIArb as nominating body and an appendix specifying the TecSA Rules and the RICS as nominating body.

Finola O'Farrell QC represented the claimant
Justin Mort QC represented the defendant

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William Clark Partnership v Dock St PCT Ltd [2015] EWHC 2923 (TCC)

The claimant professional services firm claimed £174,500 for professional fees arising from the construction of a new-build primary health care centre in Lancashire. The defendant employer counterclaimed on the ground of alleged professional negligence in permitting a substantial overspend (some £730,000 above the contract sum) on the project. The court had to consider whether the doctrine of abatement could apply to the fees claimed by the firm on the basis of the alleged deficiencies of performance.

It was held that a distinction is still drawn in law between professionals and non-professionals for these purposes, so that professionals are still entitled to their fees where their obligations have been substantially performed, and these are not subject to abatement on the ground of professional negligence. The claimant was still entitled, in principle, to recover its fees. However, the defendant succeeded in establishing that there had been unnecessary variations, for which the claimant was responsible.

It was also established that the claimant had failed to provide monthly cost reports stating the actual and projected final cost of the development: *"a wholesale and serious failure of a basic obligation which one would have expected any professional quantity surveyor to provide"*. There was also a breach of duty in failing to provide any detailed analysis of the final account claim, which impeded the prospect of negotiating a settlement. The damages awarded in respect of these breaches were set against the claimant's fee entitlement.

Justin Mort QC represented the respondents

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Cavendish: Supreme Court reformulates the penalty rule

Matthew Finn considers the implications of the Supreme Court's recent ruling on the penalty rule in *Cavendish*.

The penalty rule: the background

Rather than leaving the common law to dictate the level of damages payable for breach of contract, contracting parties often choose to make express provision for payment of a specified sum by the guilty party. When faced with such a provision, a court may well be tasked with determining whether it ought to be enforced, as a liquidated damages clause, or held unenforceable, as a penalty clause. In the latter case, i.e. where the 'penalty rule' is invoked, the innocent party is left to prove its entitlement to damages at common law.[1]

One might expect there to be a clear and long-understood principle underlying the court's power to interfere with contracting parties' freedom of contract, by invoking the penalty rule. That, however, is not the case. Historically, a succession of judges have tried and failed to elucidate the juridical basis for the penalty rule.[2]

No doubt because the principle underlying the penalty rule has for so long been unclear, the test for what constitutes a penalty clause has shifted somewhat over time. The classic common law distinction between a liquidated damages clause and a penalty clause cast:

(a) A liquidated damages clause as a clause providing for payment of a genuine pre-estimate of the damage that may conceivably flow from the breach in question; and

(b) A penalty clause as a clause providing for payment of a sum held in terrorem over a guilty party, in the sense that it was extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have flowed from the breach in question.[3]

In recent years, the penalty rule has changed, not just in linguistic terms[4], but also in substance. Of particular importance, the courts have suggested that a clause may be enforceable even if it does not constitute a genuine pre-estimate of loss, provided that the sum stated therein is *"commercially justifiable"*[5].

As will become evident, the Supreme Court has - in recently considering the rule - not only accepted the notion that commercial justifiability has some part to play in the relevant test, but replaced much of the traditional common law penalty rule with a reformulated test that marks a significant retreat from judicial interference in parties' freedom of contract.

Supreme Court guidance

In July 2015, seven Justices of the Supreme Court heard two appeals together, both of which raised issues surrounding the penalty rule. The principal difference between the two was that the first appeal, *Cavendish Square Holding BV v Talal El Makdessi*, concerned a commercial contract, whilst the second appeal, *ParkingEye Ltd v Beavis*, concerned a consumer contract.

Judgment in relation to those appeals was handed down in November 2015[6]. The first judgment was given by Lord Neuberger and Lord Sumption, with whom Lord Carnwath agreed in full and Lord Clarke agreed in very large part[7]. The judgments of Lord Hodge (with whom Lord Clarke and Lord Toulson agreed almost universally[8]) and Lord Mance were also strongly supportive of the new test proposed by the first judgment, albeit with slight differences in formulation.

Presaging a reformulation of the penalty rule test, the first judgment began by describing the penalty rule as *"an ancient, haphazardly constructed edifice which has not weathered well"*[9]. As that first judgment then made clear:

(a) The penalty rule has its roots in the equitable jurisdiction to relieve from defeasible bonds, which jurisdiction was invoked, not on public policy grounds, but on the basis that the party seeking to rely on the bond only ever intended the bond to be security for its right to claim a debt or damages, such that it should be restrained from claiming under the bond and instead prove its claim in debt or damages[10]; and

(b) It was only when the common law altered the penalty rule, as born in equity, that the penalty rule started being invoked on what were essentially public policy grounds, and that from the outset the test laid down by the common law was one that essentially drew a binary distinction between genuine pre-estimates of loss on the one hand, and sums extravagant and unconscionable in comparison with conceivable losses on the other[11].

In summarising the hangover from that traditional, binary distinction in the modern law, Lord Neuberger and Lord Sumption noted that in their view *"the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent"*[12]. Lord Carnwath and Lord Clarke[13] shared that view. Lord Hodge, in a very similar vein, noted that the law risked being placed in a straightjacket *"by an over-rigorous emphasis on a dichotomy between a genuine pre-estimate of damages on the one hand and a penalty on the other"*[14].

In proposing a new test, Lord Neuberger and Lord Sumption noted that the four principles set out by Lord Dunedin in *Dunlop* would usually be adequate to determine the validity of a given clause[15]. Lord Carnwath agreed with that proposition, as did Lord Clarke[16]. Those principles are:

(a) That a provision will be penal if *"the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach"*;

(b) That a provision will be penal if the breach consists only in the non-payment of money and it provides for the payment of a larger sum;

"The Supreme Court has not only accepted the notion that commercial justifiability has some part to play in the relevant test, but replaced much of the traditional common law penalty rule with a reformulated test that marks a significant retreat from judicial interference in parties' freedom of contract."

1 Commissioner of Public Works v Hills [1906] AC 368.

2 Astley v Weldon (1801) 2 Bos & Pul 346, 350; Wallis v Smith (1882) 21 Ch D 243, 256; Robophone Facilities Ltd v Blank [1966] 1 WLR 1428, 1446.

3 Astley v Weldon (1801) 2 Bos & Pul 346; Kemble v Farren (1829) 6 Bing 141; Betts v Burch (1859) 4 H & N 506, 500; Dunlop Pneumatic Tyre Company v New Garage and Motor Company [1915] AC 79, 86; Clydebank Engineering v Don Jose Ramos [1905] AC 6, 19; Commissioner of Public Works v Hills [1906] UKPC 35, 6. Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The "Scaptrade") [1983] 2 AC 694, 702.

4 The phrase *"in terrorem"* has, for instance, been held to be archaic: Campbell Discount Co Ltd v Bridge [1962] AC 600, 622, *per* Lord Radcliffe.

5 Lordsvale Finance v Bank of Zambia [1996] QB 752, 763-764; Cine Bes v United International Pictures [2004] 1 CLC 401, [15]; Murray v Leisureplay Plc [2005] EWCA Civ 963, [54]; c.f. [108].

6 Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis [2015] UKSC 67.

7 [291].

8 [291], [292].

9 [3].

10 [4]-[5].

11 [6]-[8].

12 [31].

13 [291].

14 [225].

15 [21].

16 [291].

(c) That there is *"a presumption (but no more)"* that a provision will be penal if it is payable in a number of events of varying gravity; and

(d) That a provision will not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss[17].

However, Lord Neuberger and Lord Sumption also noted that, for over a century, there had been reference in the case-law to a broader and more nuanced set of criteria for drawing a line between liquidated damages clauses and penalty clauses, which emphasised that:

(a) Liquidated damages clauses may be set at a relatively high level with a view to deterring breaches of contract that would prejudice the innocent party's trade holistically[18], even if the breaches in question would not give rise to a direct, immediate and measurable monetary loss;

(c) Viewed from that perspective, liquidated damages clauses are not always concerned with the recovery of compensation for losses flowing directly and measurably from the specific breach with which they are concerned; and

(d) For that reason, recent authorities were correct to ask whether the innocent party's interest in protecting its trade holistically gave rise to a *"commercial justification"* for the sum stipulated[19].

In effect, summarising the import of those references in the earlier case-law, Lord Neuberger and Lord Sumption held that:

> "...a damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach. This must depend on whether the innocent party has a legitimate interest in performance extending beyond the prospect of pecuniary compensation flowing directly from the breach in question." [20]

That opinion was shared by Lord Carnwath and Lord Clarke[21] and shared in terms by Lord Mance[22], Lord Hodge[23] and Lord Toulson[24].

On that basis, Lord Neuberger and Lord Sumption held that the new test for whether a clause is a liquidated damages clause or a penalty clause should be:

> "...whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation." [25]

That sentiment was supported by Lord Carnwath and Lord Clarke[26], thus making that formulation of the test the formulation supported by the majority of the Court.

That notwithstanding, it is noteworthy that Lord Hodge formulated essentially the same test in a similarly succinct manner (which was expressly highlighted and endorsed by Lord Toulson[27] and supported by Lord Clarke[28]) when he said that a sum would be a penalty if it was:

> "...exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract."[29]

In light of the foregoing, and the degree of concord between the judgments cited above, it is to be expected that, in determining what constitutes a penalty in the future, Lord Dunedin's four principles of longstanding import will be used in conjunction with the 'legitimate interest' test put forward in subtly different ways by Lords Neuberger, Sumption and Hodge.

The newly reformulated test for penalty clauses differs from its early common law predecessor in the following fundamental ways:

(a) There is no longer any need to consider whether the sum stipulated is a "genuine pre-estimate of loss", or a sum held *"in terrorem"* over a guilty party[30];

(b) In determining whether a sum is exorbitant or unconscionable, regard must now be had to the innocent party's legitimate interest in the performance of the contract on a broad basis, not just to the level of damages that the innocent party could have expected to flow directly and measurably from the breach[31];

(c) The fact that a clause is a deterrent against breach no longer necessarily means (at least of itself) that it will be unenforceable;[32] not least because the prospect of liability in common law damages can itself readily be described as a spur to performance[33]; and

(d) It is only when a clause makes provision for a sum that is out of all proportion to (i.e. unconscionably high or exorbitant by reference to) the innocent party's legitimate interest in the performance of the contract (and/or intended to punish the guilty party) that it will be struck down[34].

Consequences

Liquidated damages provisions are commonly found in standard form and bespoke contracts in the construction, engineering and energy sectors, where they are most often intended to provide an employer with a contractual right to a liquidated sum from a contractor in respect of contractor-culpable delay to the contract works. The consequences of the Supreme Court decision in *Cavendish* are likely to be significant in those sectors, especially where the parties concerned are properly advised and of comparable bargaining power[35].

In light of the Supreme Court decision in *Cavendish*:

(a) Employers can expect to be given greater scope to contend that their interest in performance of the contract, in the wider commercial context to the contract, serves to justify the sums stipulated therein by way of liquidated damages;

(b) By contrast, contractors can expect to face greater difficulties than ever before in seeking to persuade courts, arbitrators and adjudicators that a damages clause constitutes a penalty that should be struck down in favour of a common law damages assessment.

17 [2015] UKSC 67, [21]

18 Or to use Lord Atkinson's terminology, *'in globo'*: [2015] UKSC 67, [23].

19 [20]-[30].

20 [28].

21 [291].

22 [137]-[138], [143], [152]-[153].

23 [246]-[249], [254].

24 [293].

25 [32].

26 [291].

27 [293].

28 [291].

29 [255].

30 [31], [225], [291].

31 [28], [137]-[138], [143], [152]-[153], [246]-[249], [254], [291], [293].

32 [28], [248], [291].

33 [248].

34 [31], [32], [148], [243]-[244], [255], [291].

35 [35], [291].

MEDIATION UPDATE

By Liz Repper

Recent months have brought many changes that affect parties to construction contracts. To name a few, creditors saw the bankruptcy creditor petition level rise from £750 to £5,000, the CDM Regulations 2015[1] came into force, consumers gained new statutory remedies under the Consumer Rights Act 2015 in the case of non-conformance with a contract and, in an important decision for the law on liquidated damages, the Supreme Court ruled in *ParkingEye Ltd v Beavis* [2015] UKSC 67 that an £85 parking charge for overstaying 56 minutes was not a penalty.

In the world of ADR, for "traders" not already subject to mandatory ADR, on 1 October 2015 those trading with "consumers" who had exhausted their internal complaints procedure became obliged under the ADR Regulations 2015[2] to tell consumers the name of an "ADR entity" approved by the Regulations that could deal with their complaint and say whether they were prepared to submit to such an ADR procedure.

Whilst these Regulations did receive some publicity over the summer, knowledge of them and what they really mean remains limited. What goes without saying however is that where ADR was not already mandatory, these Regulations have not made it so. The requirement on traders is only to give information and they retain the power to say no to ADR under these Regulations. Whether traders (such as contractors) will agree to such ADR remains to be seen. That the consumer's complaint can only be dealt with by ADR entities approved under the Regulations may deter some; others may be put off by the fact that it seems as if only the complaint can be considered and not any counterclaim or wider issues (perhaps involving others in the chain). What must be right however is, if a trader complies with its obligations under these Regulations and rejects ADR at this stage, it has completed its obligations and can later suggest ADR outside these Regulations. Also, since these Regulations specifically allow traders to refuse such ADR, any Halsey[3] type arguments made later about unreasonable refusal to engage in ADR at this stage will surely fail.

> *The requirement on traders is only to give information and they retain the power to say no to ADR under these Regulations. Whether traders (such as contractors) will agree to such ADR remains to be seen.*

Turning to unreasonable refusal to engage in ADR, in late 2014 *Ramsey J held in Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd* [2014] EWHC 2955 (TCC) (a Part 8 claim about the construction of a contract) that BAE had unreasonably refused to mediate (although due to other factors imposed no costs penalty). In doing so, the court reviewed each of the (non-exhaustive) Halsey factors individually and held overall that "*Where a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable.*"

Importantly, when considering the question of whether mediation would have had a reasonable prospect of success, Ramsey J said the court would not "*merely look at the position taken by the parties*" because that would ignore "*the ability of the mediator to find middle ground by analysing with each party its expressed position and making it reflect on that and the other parties' position.*"

Outside the TCC, Turner J in *Laporte v Commissioner of Police of the Metropolis* [2014] EWHC 3574 awarded the defendant only two thirds of his costs to be assessed on the standard basis because of his failure to fully and adequately engage in the ADR process, whilst the Court of Appeal, in the rent arrears case *NJ Rickard Ltd v Holloway* (3.11.2015), applied the rule in *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288 (silence towards an invitation to engage in ADR is itself unreasonable) and stated no dispute was too intractable for mediation. Costs penalties are, however, now not the only potential consequence of a failure to mediate as demonstrated in Gresport Finance Limited v Battaglia [2015] EWHC 2709 (Ch), which concerned a defendant's application for security for costs.

> *"even absent any other factors...the defendant's misconduct in failing to honour his agreement to attend a mediation would be sufficient to entitle the court to dismiss the application."*

Previously, the defendant had agreed to mediate, but failed to attend the mediation or give any explanation why. This "serious misconduct" was something, the court said, it was entitled to take into account. Security was refused as it was highly likely the defendant would be ordered to pay a substantial sum to the claimant. However, even if that was wrong, all the factors together (including the failure to attend the agreed mediation) made it unjust to order security and, moreover, "*even absent any other factors...the defendant's misconduct in failing to honour his agreement to attend a mediation would be sufficient to entitle the court to dismiss the application.*"

The courts have also shown support for ADR for wider reasons. In *Gilks v Hodgson* [2015] EWCA Civ 5, a boundary dispute where costs approached £500,000 in the context of an award of damages of £3,500, the disparity between costs and damages led Stanley Burnton LJ to describe the case as a "*depressingly unfortunate dispute*" that "*could and should have been compromised on terms that both parties could live with*". Time, and the potential for a quicker resolution, is also frequently mentioned (see, for example, Bradford v James [2008] EWCA Civ 837 where the Mummery LJ spoke of mediation being attempted at the beginning of the dispute).

> *Despite proportionality being over two years old as a concept, there is yet to be any definitive step-by-step guidance about what it translates into in terms of likely potential recovery.*

In terms of timing, the use of early mediation (perhaps as early as final account stage) continues to grow. Some have been pondering whether the March 2015 sharp increases in court fees would cause more parties to mediate pre-issue and rises such as £1,515 to £10,000 for a claim between £200,000 and £250,000 have certainly encouraged some to do so. Proportionality has also driven some to consider using ADR early on. However, despite proportionality being over two years old as a concept, there is yet to be any definitive step-by-step guidance about what it translates into in terms of likely potential recovery. Instead it is being approached on a case by case basis.

In terms of proportionality, in the TCC Akenhead J in *Savoye and Savoye Ltd v Spicers Ltd* [2015] EWHC 33 (TCC) reduced costs from £201,790 to £94,465 and gave guidance on what the court should have regard to when assessing proportionality and reasonableness of costs, whilst Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC) (in relation to a claim of approximately £18 million) limited the claimant's costs to a maximum of £4.28 million, even though the claimant had already spent about that sum and said it had a further £5 million to spend. Stuart-Smith J in *GSK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 said that most costs budgeting reviews should be carried out in the TCC by the application of a "fairly broad brush" and reduced the claimant's costs budget of £824,000 (in relation to a claim for £805,000 plus interest) to £425,000.

Away from the TCC, Master O'Hare in the medical negligence case *Hobbs v Guy's and St Thomas' NHS Foundation Trust* [2015] EWHC B20 highlighted the lack of authoritative guidance on how the new test of proportionality should be applied. There the parties agreed a settlement payment to the claimant of £3,500 plus costs. The claimant then submitted a bill of around £32,000 which the court reduced to (about) £10,000 on the basis

1 The Construction (Design and Management) Regulations 2015
2 Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended by the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015)
3 Halsey v Milton Keynes General [2004] EWCA Civ 576

that the costs were unreasonable and disproportionate. When considering proportionality, the court preferred to target particular items that were disproportionate in the circumstances of the case, rather than chop off a slice of the reasonable costs and said *"although it was reasonable for the Claimant's solicitors to incur these costs it is unfair to expect the Defendant to pay for these items."*

In terms of what the future may hold for costs recoverability, in the rent arrears case of *N J Rickard v Holloway* (3.11.2015) the landlord was awarded £16,000 in arrears and interest and the tenant £7,000 in damages but no order for costs was made. There, the Court of Appeal said the fact that the landlord and tenant had incurred £85,000 and £100,000 in costs respectively made as strong a case as possible that there should be some form of limitation on the costs recoverable in these cases. It remains the case however that ADR is not mandatory. No "bold" judge has acceded to Sir Alan Ward's invitation in *Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234 to rule on questions raised about Halsey so the Court of Appeal can revisit it. In boundary or right of way cases however, post *Bradley v Heslin* [2014] EWHC 3267 (Ch), whatever parties say about their willingness to engage in the process, they should expect directions imposing a two month stay for mediation that say they must take all reasonable steps to conduct that mediation. Whether the Court of Appeal says anything about this approach when it hears the appeal of this case in early 2016 remains to be seen.

Liz Repper has acted as mediator over 60 times, including in construction, property, insolvency and professional negligence disputes, and takes appointments under the Keating Chambers' Fixed Fee Mediation Packages.

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KEATING CHAMBERS' ANNUAL ENERGY SEMINAR 2016

Keating Chambers will be holding its Annual Energy Seminar at the Royal College of Surgeons on Wednesday, 27 January 2016.

Led by experts in the field, sessions will cover key issues related to oil & gas, termination, and nuclear energy. The seminar will conclude with a panel discussion around the leading case of *Transocean Drilling UK Ltd v Providence Resources plc.*

Speakers include:
Paul Darling QC, Veronique Buehrlen QC, Adam Constable QC, Simon Hughes QC, Gaynor Chambers, Lucy Garrett and Thomas Lazur.

Date:
Wednesday 27 January 2016

Timings:
17:30 Registration
18:00 Seminar Commences
19:30 Drinks Reception

Venue:
The Royal College of Surgeons
35-42 Lincoln's Inn Fields
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This seminar is free to attend. Places will be filled on a first come, first served basis, so please respond promptly to avoid disappointment.

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